Openbaar maken: Communication to the public

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1. Introduction

This chapter deals with the right of communication to the public, the right of distribution, the right of public performance and the right of making available to the public. These rights are all covered by the right relating to 'openbaar maken' (literally: 'to make public') in the Dutch Copyright Act.

So-called 'secondary' communication to the public, notably cable redistribution, is dealt with separately and more extensively in Chapter 10 by Madeleine de Cock Buning. The concept of exhaustion, the most important limitation to the distribution right, is covered in detail in Chapter 11 by Feer Verkade. Openbaar maken is one of the two main categories of exclusive economic rights of the copyright owner in the Dutch Copyright Act. The other main category of restricted acts is 'verveelvoudigen', which includes both the right of reproduction and the right to make adaptations. Verveelvoudigen is analysed by Jaap Spoor in Chapter 8.

It is important to note that in Dutch copyright law there is no concept of indirect copyright infringement. However, many acts which in other jurisdictions are covered by indirect copyright infringement or by vicarious or secondary liability are in the Netherlands considered to be an 'onrechtmatige daad', an 'unlawful act' or tort within the general civil law tort provision, currently in Article 162 of Book 6 of the Dutch Civil Code and previously developed in case law based on Article 1401 of the old Civil Code: 'An unlawful act shall be taken to mean an act or omission, violating a right or a statutory duty or violating either the good morals or the standard of due care, which must be observed in society with respect to a person or the person's property (…)'.[1] Within the context of this chapter it is important to realize that assisting in, facilitating, advertising or making a profit

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1 Supreme Court of the Netherlands, 31 January 1919, *NJ* 1919, 161 (Lindenbaum v. Cohen).

from copyright infringements can often amount to an 'unfair act'. These 'unlawful acts' connected to copyright infringements through communication to the public will be discussed in this chapter together with the form of communication with which they are connected. Otherwise, an incomplete picture would be given of this field of copyright law.

2. Communication to the public

Communication to the public and the other acts covered by the right relating to 'openbaarmaking' give rise to the same questions in all copyright systems. What kind of communication is involved? What constitutes 'a public'? Which parties are liable for a particular kind of act of communication?

2.1 Terminology

In this chapter the Dutch words 'openbaar maken', 'openbaarmaking' and 'openbaarmakingsrecht' are not translated, because there is no English word or phrase that includes all different acts covered by the openbaarmakingsrecht. The phrase 'communication to the public' is mainly used to indicate those forms of communication which are covered by Article 3 of the Information Society Directive, especially broadcasting and making available online. However, sometimes the phrase is used to also include the public performance right and the distribution right. The word 'distribution' is used to indicate the acts covered by Article 4 of the Information Society Directive: the right relating to the dissemination of physical copies, that is 'fixed copies that can be put into circulation as tangible objects'.[2] The term 'public performance' is employed to designate acts of communication where the audience is present at the time and place where the performance takes place, including public recitation, public showing and public viewing. 'Broadcasting' is used to indicate the act of sending signals from point to multi-point, either through the air, through cable or by satellite. 'Transmission' is used to indicate the act of sending signals from point-to-point, sometimes described as 'narrowcasting'. Finally, 'making available (to the public)' is used to indicate the act of making works available to the public 'in such a way that members of the public may access them from a place and at a time individually chosen by them', as described in Article 3 of the Information Society Directive.

2 Agreed statements concerning Articles 6 and 7 of the 1996 WIPO Copyright Treaty: 'As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects'.

2.2 Distribution

The distribution of physical copies of a work is the oldest form of communication covered by copyright. In some copyright systems the right of distribution is closely linked to the right of reproduction: permission to make copies usually includes or implies the right to distribute those copies. The interests of owners of physical copies and those of commerce and trade do require some kind of exhaustion doctrine. The sale of second-hand copies should not be controlled by the author or the publisher. Exhaustion can also be limited territorially (nationally or regionally) and specific acts such as lending and rental can be excluded from its effect. The public lending or rental of copies is considered to be relevant under copyright and is usually covered by a separate exclusive right, as far as rental is concerned, or a right to an equitable remuneration, as far as lending is concerned. A central question with regard to exhaustion is when it commences: with the very first transfer of ownership from the manufacturer to a trader or with the first sale to a member of the public? Connected to this question is the question who is liable for the distribution of a copy? The manufacturer, the trader, the retailer or even a member of the public selling an illegal copy? And there is the question regarding 'the public'. What constitutes a public to which the distribution takes place? Does the sending of one copy to a friend constitute distribution to the public?

2.3 Performance

Another even older form of communication is recitation or performance. The first question is whether there is a *public* performance. How large does the public have to be? Does there need to be an admission fee for a performance to be considered public? Is it enough if the performance is open to the public, without an actual audience present? Does the nature or aim of the performance play a role? Does the music played at a private funeral, to which only some family, friends and neighbours are invited, constitute a public performance? Who is liable for the public performance? Is it (only) the performer himself? Or is it the organizer of the performance? Or maybe the owner of the venue where the performance takes place too?

2.4 Broadcasting

New forms of communication create new questions regarding the right of communication to the public. Broadcasting was quickly recognized as a new form of communication to the public in all copyright systems, because it typically

reaches a larger audience which does constitute a public. But who is liable for the broadcast? Is it the organization that creates the programme or is it the entity that actually causes the programme to go on air? Or are they both liable? And what constitutes a separate broadcast? Does every rebroadcast that takes place later in time count? Or is simultaneous rebroadcasting also covered? Satellite broadcasting and encrypted signals introduced new questions. Is the satellite uplink a communication to the public? Or is the satellite downlink in every separate country a separate communication to the public? Is the broadcasting of an encrypted signal a communication to the public? Or is the making available of decryption tools (information, apparatus or both) an act relevant under copyright?

2.5 Making available online

The making available of works over the Internet is probably the most far-reaching communication to the public. But which acts exactly give rise to liability under copyright? Is uploading an act relevant under copyright? Does the making available and/or maintenance of a bulletin board, online discussion forum, online marketplace, or dedicated search engine amount to a communication to the public? What about hyperlinking and embedding?

3. Communication to the public in the Dutch Copyright Act

3.1 Legislative history

The previous Dutch Copyright Act of 1881 contained a right of public performance only in relation to plays and musical-dramatic works.[3] In the 1912 Act, the rights relating to public performance (including public recitation) and other kinds of communication to the public in Articles 11(1) and (3), 13 and 14 of the 1908 version of the Berne Convention were to be enacted. The openbaarmakingsrecht would apply to all kinds of works then protected: literary works, musical works, plays, dramatico-musical works, films, but also 'tableaux vivants' of paintings, 'living statues' (people taking poses representing statues), and projections with 'magic lanterns' of images of works of art. The Dutch legislator chose in 1912 to bring all these kinds of exploitation of a work directed at 'a public' under a very broad concept of openbaar maken. There is no indication that the Dutch legislator at the time had the specific 'grand design' of anticipating any future

3 See M. Reinsma, *Auteurswet 1881*, Walburg: Pers Zutphen 2006, p. 16-17.

kinds of communication to the public. Apparently, it just so happened that the legislator chose to bring distribution *to the public* and *public* performance under the umbrella of one concept called 'making public' (openbaar maken).

3.2 The Act of 1912 and subsequent amendments

Broadly speaking, openbaar maken includes the right of first publication, the right to communicate to the public, the right of public performance and the right of distribution. In the Dutch Copyright Act, the right relating to openbaar maken is codified in Article 1 and Article 12. Article 1 has never been changed and has retained its exact same wording since 1912:

> Auteursrecht [copyright] is the exclusive right of the maker of a literary, scientific or artistic work or his successors in title to 'openbaar maken' [make the work public] and to 'verveelvoudigen' [reproduce/adapt it], subject to the limitations laid down by law.

Article 12 remained unchanged from 1912 to 1972. From 1983 to 2011 it was amended more than ten times. The original 1912 version of Article 12 (then numbered 11) reads as follows:[4]

> The communication to the public of a literary, scientific or artistic work also includes:
> (i) the openbaarmaking of a verveelvoudiging [reproduction or adaptation] of all or part of the work;
> (ii) the distribution of all or part of a work or of a reproduction thereof, so long as such work has not appeared in print;
> (iii) the public recitation, performance or presentation of all or part of a work or of a reproduction thereof.
>
> A recitation, performance or presentation in a private circle shall be deemed to be a public recitation if there is a charge for admission in any form, including payment of a subscription fee or any kind of membership fee. This provision shall apply also to an exhibition.

4 This original 1912 version of Article 12 is still in force in the Auteurswet (BES) of 2010, the regulation of copyright for the Dutch Caribbean islands Bonaire, Saint-Eustace and Saint-Martin which administratively became part of the kingdom in Europe in 2010, when the larger islands became independent states within the Kingdom of the Netherlands.

The 1912 definition of public performance was based on the definition of the same in Article 1(2) of the 1881 Act, which read as follows:

> A public performance shall include any performance which is accessible once or several times, against payment, even if there also is a ballot to gain access.

A proposal to add the phrase 'unless the performance takes place within the private home circle' was rejected as unnecessary, because the present definition already excluded such performance from the concept of public performance.

In 1972 the definition of the private circle was amended to its present form (see below) and two new subparagraphs were added. One new subparagraph implemented Article 11bis of the Berne Convention relating to simultaneous rebroadcasting by the same organism. The new subparagraph on simultaneous rebroadcasting by the same organism lead to much parliamentary debate in 1972 on the position of Central Antenna Systems, the predecessor of current cable redistribution.

The other new subparagraph introduced in 1972 excluded from the openbaarmakingsrecht public recitations and performances which are part of non-profit public education. The definition of this kind of non-profit public education was changed slightly several times during the following years.

In 1995 the lending and the rental right were added on the basis of the Rental Right Directive (Staatsblad 1995, 653). In 1996, the Satellite and Cable Directive was implemented by the addition of Article 12(1)(5) and Article 12(7) (Staatsblad 1996, 364).

In 2004 the Information Society Directive was implemented by introducing for the first time a specific clause on exhaustion in the form of Article 12b (Staatsblad 2004, 336). Interestingly, 'the making available' right of Article 3(1) of the Directive was not implemented by any amendment of the Copyright Act, because the legislator felt that it was clear that this kind of communication to the public was already covered by the existing broad right relating to openbaarmaking.

3.3 Structure of Article 12

Openbaar maken is mentioned in Article 1 and the main subcategories of openbaar maken are described in Article 12.

> What is meant primarily by 'openbaar maken', which is one of the essential prerogatives of copyright, does not have to be determined in the law. For every kind of literary, scientific or artistic work the word clearly has its natural meaning. For

> literary and scientific works, which consist of writings, it means: to make appear in print and make available to the public, to publish. The same applies to musical works. With paintings and sculptures it means: to send in to an exhibition, to make available to the public. With works of applied art it means: to put on the market. But apart from this primary meaning, the codification of copyright requires that another meaning [of openbaar maken] be specified, which is not so self-evident that is does not require explanation in the law. (Explanatory Memorandum of 1912)

Therefore, some meanings of openbaar maken are not mentioned in Article 12. In the first sentence of Article 12 it is stated that openbaar maken 'also includes' the categories listed in Article 12. The main meaning of openbaar maken must be derived from the 'natural meaning' per category of works and from the fact that openbaar maken is mentioned in Article 1.

> It is apparent from the legislative history of the Copyright Act 1912 that the concept 'openbaarmaking' in article 12, does indeed have a very broad meaning, but that in any case, also in the derivative meanings of the concept, the work must become available to the public in one way or another.[5]

What is meant by '(the) public' is one of the key issues of openbaar maken. However, what is meant exactly by 'public' is not necessarily the same for all categories of openbaar maken. Therefore the question of what is 'public' within the meaning of the different kinds of openbaarmaking will be discussed separately for each kind of openbaarmaking.

The first part of Article 12 probably, at least initially, had to be understood as a scope rule, not so much referring to a particular kind of openbaar maken, but referring to the scope of protection of the exploitation right.

> Openbaar maken of a literary, scientific or artistic work also includes:
> 1°.openbaar maken of a verveelvoudiging of the whole or part of a work;
>
> Here verveelvoudiging also has the meaning of adaptation.
>
> On the one hand, one cannot deny that the openbaar maken in the form of a somewhat different imitation [adaptation] of a sculptural work, - a photograph of, for instance, a marble sculpture -, is not openbaar maken of the work [itself] in the literal sense. But on the other hand, it must be admitted that the maker of the work has just as much

5 Supreme Court of the Netherlands, 27 January 1995, *NJ* 1995, 669 (Bigott v. Doucal).

> right to decide on the publication of verveelvoudigingen [here: copies in adapted form] of his creation as of the work itself; that by publication of reproductions of his work without his permission, his rights are violated. (Explanatory Memorandum of 1912)

One distinction that is sometimes made between two different categories of openbaar maken, is between 'material' and 'immaterial' openbaar maken. 'Material' openbaar maken is the distribution of hard copies, hence the word material. 'Immaterial' openbaar maken is communication to a public not involving the distribution of hard copies.

The different categories of openbaar maken will be discussed here in the following order:

- The right to make the work (available to the) public for the first time (first publication);
- The 'verbreidingsrecht': the right to make a few copies of the work available to a small number of people before the work appears in print;
- 'Material' openbaar maken: the distribution right;
- 'Immaterial' openbaar maken: the right to communicate to the public, including the right of public performance, the broadcasting right and the right of making available.

3.4 The right to make the work (available to the) public for the first time

Within the system of the 1912 Act, the right to make the work (available to the) public for the first time, is classified as an exploitation right. It is comparable to the 'Veröffenlichungsrecht' and the 'droit de divulgation' and the 'droit the publication', in Germany and France respectively, which are moral rights.

This meaning of openbaar maken does not refer to a specific act such as distribution of copies, public performance or any other kind of communication to the public. It just refers to the fact that the work is made available to the public for the first time, regardless through which kind of communication.

This right gives the maker or his successor in title the right to determine whether and when his work is made available to the public for the first time. It is considered an essential prerogative of an author to have the right and the freedom to determine whether or not he wants to make his work available to the public at all, and if so, when he wants to do that. It concerns the transformation from the *phase intime* of the author to the *phase public*.

Works that have not (yet) been made available to the public for the first time

enjoy special protection. For instance, they cannot be the subject of a seizure by creditors[6] and several statutory limitations, such as the quotation right[7] and the right to educational copying,[8] do not apply.

What is meant by 'public' with regard to this particular kind of openbaar maken is not very clear. In a case regarding a particular document of the Church of Scientology, the district court[9] considered this document, of which copies had been made available to 2500 followers of the Church of Scientology, to have been made available to the public and therefore ruled that the quotation rights did apply. The Court of Appeal[10] ruled that the work had not been made available to the public, because it was made available to those 2500 people under a confidentiality clause. The fact that this confidentiality clause had been violated was irrelevant in this respect. Therefore, the Court of Appeal ruled that the statutory quotation right did not apply, but also that quotation was allowed on the basis of the freedom of information as a fundamental right.

3.5 The 'verbreidingsrecht' (distribution in a small circle)

The 'verbreidingsrecht' is the right relating to 'the distribution of the whole or part of a work or of a reproduction thereof, as long as the work has not appeared in print' (Article 12(1)(2)).

This is in fact the right to make a few copies of the work available to a small number of people before the work appears in print, without making it available to the public at large, and therefore without giving it the status of a work made available to the public (at large) for the first time.

The very limited meaning of the 'public' within this category of openbaar maken, follows from the word 'verbreiding' and the Explanatory Memorandum of 1912. According to the Explanatory Memorandum, the author must have the right 'to give or make available his work to a certain [limited] number of people not large enough to be considered synonymous to openbaar maken'.

This kind of openbaar maken is therefore a bit of a contradiction in terms: it is openbaar maken which does not amount to openbaar maken. What is meant is that the author has the right to make a very limited number copies available to a very limited number of people, for instance for the purpose of pre-publication criticism or peer review, before the work is made available to the (real) public by

6 Article 2(3).
7 Article 15a.
8 Article 16.
9 District Court of The Hague, 9 June 1999 (Scientology).
10 Court of Appeal of The Hague, 4 September 2003 (Scientology).

making it appear in print. Obviously, in 1912 there was a clear distinction between distributing a few handwritten or typed copies to a few people and distributing printed copies to the public at large. In 2012, the criterion 'as long as the work has not appeared in print' is an anachronism.[11]

What the 'verbreidingsrecht' does make clear however, is that not every distribution of a small number of copies or small scale performance amounts to the work being made available for the first time within the meaning described above. And this does remain very relevant in today's world: some kinds of communication to a very limited 'public' can and should remain confidential.

3.6 The distribution right

The distribution right can be surmised from the first subparagraph of Article 12:

> Openbaar maken of a literary, scientific or artistic work also includes:
> 1°.openbaar maken of a verveelvoudiging of the whole or part of a work

As verveelvoudiging also means (exact) reproduction or copy (as opposed to adaptation), this section of the law can be read as the right to openbaar maken [make public] a copy (or reproduction) of the whole or part of a work. As described above, this provision was included as a scope rule, rather than a rule pointing to the existence of a distribution right.

The distribution right however is probably one of the 'natural meanings' of openbaar maken which according to the legislator in 1912 did not require to be mentioned separately in Article 12, and follows from the word 'openbaar maken' itself as mentioned in Article 1 and in Article 12(1)(1).

Therefore, until quite recently, in fact until the implementation of the European Information Society Directive, the distribution right, including its most important limitation, namely exhaustion (in Dutch: 'uitputting'), was not dealt with separately in the Dutch Copyright Act at all. It all had to be surmised from the natural meaning of openbaar maken as mentioned in Article 1.

The distribution right as a distinct right, separate from the right to make available for the first time described above and separate from the verveelvoudigingsrecht, was recognized by the Supreme Court for the first time in 1953. In the *Polak v. De Muinck* case,[12] the Supreme Court ruled that the distribution of separate copies of

11 As is the old-fashioned spelling of this definition in Dutch 'zoolang het niet in druk verschenen is'. In modern Dutch 'zoolang' (as long as), is spelled with one 'o' ('zolang').

12 Supreme Court of the Netherlands, 18 December 1953, *NJ* 1954, 258 (Polak v. de Muinck).

a work requires the permission of the owner of the copyright. De Muinck was the owner of the copyright in some art reproductions. Polak came into possession of one of these reproductions (it is unclear how) and sold it. Polak argued that this was not *openbaar maken*, as De Muinck had already sold copies of the same work and that therefore the right was exhausted.

The Supreme Court dismissed this reasoning and ruled:

> that however the exclusive right to openbaarmaking of the work comprises not just, and therefore is not exhausted by, the openbaarmaking of one or more copies of that work, but, as is also apparent from Article 12 sub 1 of the Copyright Act – the copyright owner, and he alone, has the right openbaar te maken in respect to any verveelvoudiging [reproduction];
> that therefore the copies which have been brought into circulation without his permission shall be deemed to be openbaar gemaakt in violation of his copyright.

For the distribution right to apply, one or more copies of the work need to have been handed to or sent to a member of the public; someone outside a restricted circle. As long as distribution takes place intentionally within a restricted circle, the verbreidingsrecht does apply (see above), but there is no making available to the public for the first time, nor is there exhaustion. The intention of the rights owner probably does play a role: if he intended to make the work available to just a few friends or colleagues the verbreidingsrecht applies, but the distribution right does not.

In a case regarding the presence in transit of a shipment of closed containers with cigarettes in the harbour of Aruba[13] destined for sale in other parts of the world, the Supreme Court ruled that the distribution right did not apply:

> It is apparent from the legislative history of the Auteurswet 1912 that the concept 'openbaarmaking' in Article 12, does indeed have a very broad meaning, but that in any case, also in the derivative meanings of the concept, the work must become available to the public in one way or another.[14]

13 Aruba, as a separate entity within the Kingdom of the Netherlands (since 1986), has its separate Auteursverordening, which does include a right relating to openbaar maken, which is identical to the concept in the Dutch Copyright Act. The Supreme Court of the Netherlands is also the Supreme Court for Aruba. There is no doubt that this decision also applies in 'the Kingdom in Europe'.

14 Supreme Court of the Netherlands, 27 January 1995, *NJ* 1995, 669 (Bigott v. Doucal).

This however does not imply that in order for the distribution right to apply the product must have reached a public of end users. The distribution right applies, and is indeed exhausted, as soon as the copies in question have been sold, for instance to a wholesaler, in the territory where the Copyright Act applies.

Obviously, since the implementation of the Information Society Directive in 2004 the scope of the distribution right is determined by Article 4 of that directive. In 2004, the principle of exhaustion of the distribution right was codified for the first time in Article 12b. In 1952 and in 1987 the principle of exhaustion had been recognized and confirmed by the Supreme Court in the *Leesportfeuille*[15] and *Stemra v. Free Record Shop*[16] cases.

The concept of exhaustion and the history thereof is dealt with in much more detail in Chapter 11 by Feer Verkade. The relevant case law, including the important *Leesportfeuille*, *Stemra v. Free Record Shop* and *Poortvliet* cases, is also discussed by Verkade in his chapter dedicated to exhaustion.

3.7 Public performance

As mentioned above, 'immaterial' openbaar maken covers the right to communicate to the public, including the right of public performance. It covers the rights of public performance mentioned in Articles 11(1)(i), 11bis(1)(i) and 14(1)(ii) of the Berne Convention and of public recitation mentioned in Article 11ter(1)(i) of the Convention. It also covers any communication to the public (of performances or recitations) by loudspeaker or otherwise as mentioned in Articles 11(1)(ii), 11bis(1)(ii) and (iii), 11ter(1)(i) and (ii) and 14(1)(ii) of the Berne Convention.

Recitation, playing, performance or presentation in public is mentioned in Article 12(1)(4) DCA. This public performance part of openbaar maken also includes the so-called secondary public performance which takes place when a radio is played in a public place. The Dutch cause célèbre in this respect concerned the broadcast of a performance of The Czarevitch by Franz Léhar by the Dutch Broadcasting Organization, which was played by a Mr Vergeer to the customers of his café in Rotterdam on 11 September 1935. In its *Caféradio* decision of 1938,[17] the Supreme Court ruled that the playing of a radio in a café amounts to a separate openbaarmaking, notwithstanding the fact that the (*live*) performance in the radio studio or concert hall and the broadcasting also amount to an openbaarmaking.

15 Supreme Court of the Netherlands, 25 January 1952, *NJ* 1952, 95 (Leesportefeuille).
16 Supreme Court of the Netherlands, 20 November 1987, *NJ* 1988, 280 (Stemra v. Free Record Shop).
17 Supreme Court of the Netherlands, 6 May 1938, *NJ* 1938, 635 (Caféradio).

The definition of what is 'public' with respect to these kinds of openbaar maken is given somewhat indirectly in the current Article 12(4):

> The expression 'recitation, playing, performance or presentation in public' includes that in a closed circle, except where this is limited to relatives or friends or equivalent persons and no form of payment whatsoever is made for admission to the recitation, play, performance or presentation. The same applies to exhibitions.

Therefore, the definition of 'public' is any communication directed at an audience outside or larger than a circle of 'relatives or friends or equivalent persons'.

A circle of 'equivalent persons' was defined by the Supreme Court as 'a group of persons with personal ties almost as tight as family ties or ties of friendship'. The inhabitants of a retirement home, the Willem Dreeshuis, were not considered to form such a group, and the playing of music in the communal rooms of the retirement home was considered a public performance by the Supreme Court.[18] Likewise, the attendees of a funeral ceremony were not considered to form such a close-knit group and there the playing of music was also considered a public performance.[19] However, the Supreme Court also ruled that performing rights collecting society Buma was allowed not to collect for the playing of music during funeral ceremonies for policy reasons. Mr Hille, composer of the funeral favourite *Waarheen, waarvoor* (Whereto, wherefore), was not able to force Buma to collect at funerals on his behalf.

If music is being played in a place of business by the owner or employer, for the benefit of the employees or customers, this will usually amount to a public performance. If an employee plays music for his own pleasure only, this does not necessarily amount to a public performance. This was decided in a case regarding the playing of a radio by an employee of a laundry (*Wasserij De Zon* [Laundry The Sun]):[20]

> When someone plays music only for his own pleasure, the mere fact that other people can also hear the music can only amount to an *openbaarmaking* within the sense of the *Auteurswet 1912*, if he has a professional or business interest in the fact that others besides himself can listen to the music.

18 Supreme Court of the Netherlands, 9 March 1979, *NJ* 1979, 341 (Willem Dreeshuis).
19 Supreme Court of the Netherlands, 6 March 1998, *NJ* 1999, 113 (Hille v. Buma).
20 Supreme Court of the Netherlands, 1 June 1979, *NJ* 1979, 470 (Wasserij De Zon).

Liability for public performance

In case of a live performance, the performers themselves are primarily liable under copyright for their public performance.[21] With mechanical music or film it is the person or legal entity which controls the playing or showing to take place who is liable for the openbaarmaking. The organizer of a live performance or the owner of the venue where a performance takes place is not considered to be liable for the public performance on the basis of copyright law.[22] They will however be liable on the basis of tort law. They will commit an 'unfair act' if they have not checked whether the relevant rights for the public performance have been cleared with the right owners.[23]

Public performance for educational purposes

According to Article 12(5) DCA 'recitation, playing, performance or presentation in public' does not include those that take place exclusively for the purposes of education provided on behalf of the public authorities or a non-profit-making legal person, in so far as such a recitation, playing, performance or presentation forms part of the school work plan or curriculum where applicable, or those that exclusively serve a scientific purpose. This clause, which is in fact a limitation internalized in the paragraph dealing with the exclusive right, has over time changed slightly in wording but not in substance. It clearly exempts all non-profit classroom use. It probably does not apply to distance learning or any kind of making available at a distance. Those kinds of educational use are covered by the limitation on copyright laid down in Article 16 of the DCA, which is subject to the payment of fair compensation.

3.8 Broadcasting

Broadcasting was not mentioned in the original 1912 version of the Auteurswet, because the technology did not exist at that time, at least not on a commercial scale, but there was never any doubt that broadcasting was covered by the broad openbaarmakingsrecht.[24] It includes the broadcasting and the rebroadcasting rights mentioned in Article 11bis(1)(i) and (ii) of the Berne Convention.

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21 Supreme Court of the Netherlands, 4 June 1920, *NJ* 1920, 720: singer and accompanying piano are jointly liable for the public performance on the basis of copyright.

22 Supreme Court of the Netherlands, 11 June 1920, *NJ* 1920, 718 (Buitensociëteit) and Supreme Court of the Netherlands, 11 February 1926, *NJ* 1920, 354 (Harmonie Phileutonia).

23 Supreme Court of the Netherlands, 8 March 1957, *NJ* 1957, 271 (Buma v. De Vries).

24 Possibly the earliest decision on broadcasting and copyright in the Netherlands: Sub-District Court Hilversum, 27 September 1927, *NJ* 1927, 1885.

In 1931 Article 17bis[25] was introduced creating the possibility to regulate by royal decree the right regarding the openbaarmaking by radio diffusion. This followed the introduction of Article 11bis in the Berne Convention at the Rome Revision of 1928. It was felt that broadcasting did not have to be mentioned in Article 12. In 1938 the Supreme Court confirmed that radio broadcasting was indeed a form of openbaarmaking.[26]

Article 12(1)(5) contains a reference to 'the broadcasting of a work incorporated in a radio or television programme, by satellite or other transmitter or a broadcasting network', followed by a reference to the most recent Telecommunications or Media Act (currently the Media Act 2008). This reference however has no effect on the applicability of the openbaarmakingsrecht to other possible forms of broadcasting.

(Cable) redistribution

In 1930, the Supreme Court ruled in its *Radiocentrale* decision[27] that redistribution of a radiobroadcast did not amount to a separate openbaarmaking, but in 1958 the Supreme Court decided in its *Draadomroep* decision[28] that a kind of cable redistribution of a radiobroadcast did amount to a separate openbaarmaking. This has also been laid down in Article 12(7). In the 1980s the Supreme Court rendered its famous Amstelveen cable decisions,[29] in which it ruled that secondary cable redistribution, also within the reception area of the original terrestrial broadcasting of the same programme, is a new openbaarmaking. These decisions and secondary (cable) redistribution in general are dealt with in much more detail in Chapter 10 by Madeleine de Cock Buning.

'Cable pirates'

There is one decision on 'involuntary' cable-casting which is important to note, because it could serve as a precedent for the liability of Internet intermediaries such as Internet service providers, hosting providers and others. In 1980 'cable pirates' used rather weak close-range transmitters, which were hard to detect, to transmit broadcasts of pirated movies directly into the reception system (the dish) of the Amsterdam cable distributor KTA. They did this after midnight, after the regular broadcasting hours of KTA. The signal transmitted by the 'pirates' was

25 This article was abolished in 1972.

26 Supreme Court of the Netherlands, 4 March 1938, *NJ* 1939, 948 (Buma v. Broadcasting organizations).

27 Supreme Court of the Netherlands, 3 April 1930, *NJ* 1931, p. 53 (Radiocentrale).

28 Supreme Court of the Netherlands, 27 June 1958, *NJ* 1958, 405 (Draadomroep).

29 Supreme Court of the Netherlands, 30 October 1981, *NJ* 1982, 435 and 25 May 1984, *NJ* 1984, 697 (Amstelveens Kabel I + II).

broadcast involuntarily by KTA to all its 300 000 subscribers, because the KTA cable network was not switched off. The courts, including the Dutch Supreme Court, ruled that KTA was liable for direct copyright infringement because its involvement, keeping its systems switched on during the night, was covered by the broad concept of the openbaarmakingsrecht.[30]

3.9 The concept of 'public' under pre-harmonized Dutch copyright law

Before looking into the influence of European copyright law, it might be useful to establish whether or not there was one concept of 'public' that applied in the same way to all kinds of openbaar maken under pre-harmonized Dutch copyright law. That is however not quite clear.

Before the advent of the digital networked environment, the issues relating to the distribution of physical copies, broadcasting and (re)broadcasting and public performance could be separated quite easily in practice and posed in fact mostly distinct problems.

As regards traditional distribution, the question what is public and what is not usually only arises in the context of exhaustion or cross-border trade. Small-scale distribution is usually covered by the 'verbeidingsrecht' and/or involves illegal copies, which can be challenged with the reproduction right. In a case on cross-border trade in the harbour of Aruba, the Dutch Supreme Court ruled that in general 'the work must become available to the public in one way or another'.[31] But it is questionable whether this is in fact a tenable position outside the particular case involved, if a public of end users is meant. Usually, the distribution right is exhausted long before the copies reach the end user. It is the first sale that triggers exhaustion, not the actual availability to the end user.[32]

In the case of broadcasting, the question often was whether some acts of rebroadcasting of signals received by central antenna or dish, by professional middlemen or by local government owners of apartment blocks amounted to a new communication to the public. These issues were often addressed on the basis of the 'autre organisme' concept in the Berne Convention. If that happens, the size or nature of 'the public' is often not taken into consideration as such. In relation to the small cable networks, the Dutch Supreme Court decided that with cable redistribution the same 'circle of family and friends'- criterion for 'public' should be applied as for public performance, because no other clear and acceptable criterion

30 Supreme Court of the Netherlands, 14 January 1984, *NJ* 1984, 696 ('Cable pirates').
31 Supreme Court of the Netherlands, 27 January 1995, *NJ* 1995, 669 (Bigott v. Doucal).
32 Compare: Court of Appeal of The Hague, 31 May 2011, *LJN* BQ6773, *IEF* 9740 (Hauck v. Stokke).

was available.[33] It is important to note that the Dutch Supreme Court ruled that with regard to cable redistribution there was no requirement of reaching a 'new public',[34] as is discussed in Chapter 10 by Madeleine de Cock Buning. The intervention of an 'autre organisme' sufficed. This is interesting, because the European Court of Justice seems to favour an approach based on a concept of a 'new public', which can indeed be reached through 'intervention by other operators'.

With public performance the question usually is whether a small-scale performance for a limited audience does or does not require a licence form the musical performance right collecting society. These issues were settled in the Netherlands in 1979 in the *Willem Dreeshuis*[35] and *Wasserij De Zon* (Laundry The Sun)[36] cases discussed above.

Whether or not this actually amounted to a general concept of 'public' in theory or in practice is debatable and was subject to different opinions. Some argued that there was not or should not be a general concept of 'public' in Dutch copyright,[37] while others argued that there was or should be.[38] The latter position was however already influenced by the advent of the digital networked environment.

4. European context and current global context

4.1 What is harmonized and what is not?

Many of the rights covered by the openbaarmakingsrecht are now harmonized by European law, but not all of them. European law must in turn be interpreted in line with the Berne Convention and the WIPO Copyright Treaty.

The secondary cable distribution and satellite broadcasting rights are harmonized by the Satellite and Cable Directive and by Article 3 of the Information Society Directive. The right relating to communication to the public and making available to the public online is harmonized by Article 3 of the Information Society Directive. The distribution right is harmonized by Article 4 of the Information Society Directive. The rental and lending rights are harmonized by the Rental Right Directive. The right relating to public performance is not harmonized by any European directive, but it is covered by Articles 11, 11bis, 11ter and 14 of the Berne Convention.

33 Supreme Court of the Netherlands, 24 December 1993, *NJ* 1994, 641 (Small Cable Network), at 3.7.
34 Supreme Court of the Netherlands, 30 October 1981, *NJ* 1982, 435 and 25 May 1984, *NJ* 1984, 697 (Amstelveens Kabel I + II).
35 Supreme Court of the Netherlands, 9 March 1979, *NJ* 1979, 341 (Willem Dreeshuis).
36 Supreme Court of the Netherlands, 1 June 1979, *NJ* 1979, 470 (Wasserij De Zon).
37 P.B. Hugenholtz, *Auteursrecht en Information Retrieval*, Deventer 1982, p. 47.
38 D.J.G. Visser, *Auteursrecht op toegang*, Den Haag 1997, p. 132-135.

Articles 3 and 4 Information Society Directive are currently most important for the interpretation of the rights covered by the openbaarmakingsrecht and are therefore cited in full. Article 3(1) Information Society Directive, which is in turn based on Article 8 WCT,[39] reads as follows:

> Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Recital 23 of the Information Society Directive seems to limit this right of communication to the public to 'transmissions' where the public is not present at the place where the communication originates:

> This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

In its *Premier League* decision[40] the European Court of Justice stated:

> 201 In this regard, it is apparent from Common Position No 48/2000 that this recital follows from the proposal of the European Parliament, which wished to specify, in the recital, that communication to the public within the meaning of that directive does not cover 'direct representation or performance', a concept referring to that of 'public performance' which appears in Article 11(1) of the Berne Convention and encompasses interpretation of the works before the public that is in direct physical contact with the actor or performer of those works (see the Guide to the Berne Convention, an interpretative document drawn up by WIPO which, without being

39 Article 8 WCT Right of Communication to the Public:
'Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.
Agreed statements concerning Article 8: It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis (2).'

40 CJEU, 4 October 2011, C-403/08 and C-429/08 (Premier League).

> binding, nevertheless assists in interpreting that convention, as the Court observed in *SGAE*, paragraph 41).
>
> 202 Thus, in order to exclude such direct public representation and performance from the scope of the concept of communication to the public in the context of the Copyright Directive, recital 23 in its preamble explained that communication to the public covers all communication to the public not present at the place where the communication originates.
>
> 203 Such an element of direct physical contact is specifically absent in the case of transmission, in a place such as a public house, of a broadcast work via a television screen and speakers to the public which is present at the place of that transmission, but which is not present at the place where the communication originates within the meaning of recital 23 in the preamble to the Copyright Directive, that is to say, at the place of the representation or performance which is broadcast (see, to this effect, *SGAE*, paragraph 40).

The requirement of 'direct physical contact with the actor or performer of those works' might well suggest that the playing and viewing of a *recording* of a performance, for instance including the viewing of a movie, is also *not* excluded from the harmonized concept of communication to the public. This might mean that only the *live* performance is not covered by the harmonized concept of communication to the public. This view might be supported by the broad meaning of 'transmission' mentioned below.

The fact that *live* performance is not covered by the harmonized concept of communication to the public was confirmed by the European Court of Justice in its *Circul Globus Bucureşti* decision of 24 November 2011.[41]

What is meant by 'transmission'?

In the same *Premier League* decision the European Court of Justice also stated that

> 195 […], the proprietor of a public house intentionally gives the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers. Without his intervention the customers cannot enjoy the works broadcast, even though they are physically within the broadcast's catchment area. Thus, the circumstances of such an act prove comparable to those in *SGAE*.

41 CJEU, 24 November 2011, C-283/10 (Circul Globus Bucureşti).

> 196 Accordingly, it must be held that the proprietor of a public house effects a communication when he intentionally *transmits* broadcast works, via a television screen and speakers, to the customers present in that establishment [*emphasis added*].

Apparently, the act of giving 'the customers present in that establishment access to a broadcast containing protected works via a television screen and speakers' can also be qualified as 'transmission'.

Recital 25 of the Information Society Directive makes clear that 'the making available right' refers to 'interactive on-demand transmissions':

> It should be made clear that all right holders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

Article 4 Information Society Directive, which is in turn based on Article 6 WCT,[42] reads as follows:

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.
2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent.

42 Article 6 WCT Right of Distribution:
'(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.
Agreed statements concerning Articles 6 and 7: As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.'

4.2 What is 'the public'?

Communication to the public

In 2000 the European Court of Justice took the position that the concept of 'the public' is not harmonized by the Satellite and Cable Directive:

> The question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an 'act of communication to the public' or 'reception by the public' is not governed by [the Satellite and Cable Directive], and must consequently be decided in accordance with national law.[43]

In June 2005 the European Court of Justice ruled in *Mediakabel* on the definition of 'television broadcasting' in another European directive, which is not a directive relating to copyright but to regulatory aspects of television broadcasting services. The Court ruled:

> A service comes within the concept of 'television broadcasting' referred to in Article 1(a) of Directive 89/552, as amended by Directive 97/36, if it consists of the initial transmission of television programmes intended for reception by the public, that is, an indeterminate number of potential television viewers, to whom the same images are transmitted simultaneously. The manner in which the images are transmitted is not a determining element in that assessment.[44]

In this context the Court defined 'the public' as 'an indeterminate number of potential television viewers'. One month later, in July 2005, in *Lagardère* the European Court of Justice repeated this definition of 'the public' in a decision on the interpretation of the Satellite and Cable Directive:

> Finally, it must be observed that a limited circle of persons who can receive the signals from the satellite only if they use professional equipment cannot be regarded as part of the public, given that the latter must be made up of an indeterminate number of potential listeners (see, regarding the meaning of the term public, Case C-89/04 *Mediakabel* […], paragraph 30).[45]

43 ECJ, 3 February 2000, C-293/98 (Egeda v. Hoasa).
44 ECJ, 5 June 2005, C-89/04 (Mediakabel)
45 ECJ, 14 July 2055, C-192/04 (Lagardère), paragraph 30.

Here, the definition of 'the public' was no longer to be 'decided in accordance with national law' and was for the first time in the context of a copyright directive given as 'an indeterminate number of potential listeners'.

In December 2006 in *SGAE v. Rafael Hoteles* the European Court of Justice ruled that

> the distribution of a signal by means of television sets by a hotel to customers staying in its rooms, whatever technique is used to transmit the signal, constitutes communication to the public within the meaning of Article 3(1) of [the Information Society] directive.[46]

The Court stressed that 'the need for uniform application of Community law and the principle of equality require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, as is the case with [the Information Society Directive], they must normally be given an autonomous and uniform interpretation throughout the Community'. 'It follows that the Austrian Government cannot reasonably maintain that it is for the Member States to provide the definition of "public" to which [the Information Society Directive] refers but does not define'.[47]

The Court repeated that 'in the context of this concept, the term "public" refers to an indeterminate number of potential television viewers' and referred to its earlier *Mediakabel* and *Lagardère* decisions.[48] It seems however that the Court realized that the criterion of an 'indeterminate number of potential television viewers', which was developed in the context of satellite broadcasting, would not necessarily apply to a limited number of customers in hotel rooms. Therefore, the Court added:

> In a context such as that in the main proceedings, a general approach is required, making it necessary to take into account not only customers in hotel rooms, such customers alone being explicitly mentioned in the questions referred for a preliminary ruling, but also customers who are present in any other area of the hotel and able to make use of a television set installed there. It is also necessary to take into account the fact that, usually, hotel customers quickly succeed each other. As a general rule, a fairly large number of persons are involved, so that they may be considered to be a public, having regard to the principal objective of [the Information Society Directive]

46 ECJ, 7 December 2006, C-306/05 (SGAE v. Rafael Hoteles), operative part.
47 ECJ, 7 December 2006, C-306/05 (SGAE v. Rafael Hoteles), paragraph 31.
48 ECJ, 7 December 2006, C-306/05 (SGAE v. Rafael Hoteles), paragraph 37.

> [which is 'to establish a high level of protection of, inter alios, authors, allowing them to obtain an appropriate reward for the use of their works, in particular on the occasion of communication to the public'].[49]

Apparently, 'a fairly large number of persons' may also be considered to be a public.

In 2009 the Supreme Court of the Netherlands ruled on the satellite transmission of encrypted signals containing television programmes to cable operators.[50] The Supreme Court mentioned the *Lagardère* and *Rafael Hoteles* decisions by the European Court of Justice and ruled that such transmissions are not intended for reception by an indeterminate number of potential television viewers and are therefore not covered by the right of communication to the public nor by the openbaarmakingsrecht. The Supreme Court even concluded:

> Openbaarmaking as meant in article 12 Auteurswet cannot apply to communications to (groups of) persons which do not belong to 'the public' as meant in the [Information Society Directive].

This statement probably is a bit too broad because some types of communication that are covered by the openbaarmakingsrecht, do not fall under Article 3 of the Information Society Directive, but under Article 4 of the same (distribution), and some are not harmonized at the European level at all (public performance).

In 2011 the European Court of Justice ruled in the *Premier League* case[51] that the customers present in a public house constitute a public.

> 198 When […] authors authorise a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. Where a broadcast work is transmitted, in a place accessible to the public, for an additional public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public (see, to this effect, *SGAE*, paragraph 41, and *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon*, paragraph 37).

49 ECJ, 7 December 2006, C-306/05 (SGAE v. Rafael Hoteles), paragraph 38.
50 Supreme Court of the Netherlands, 19 June 2009, LJN BH7602, *NJ* 2009, 290 (Buma v. Chellomedia)
51 CJEU, 4 October 2011, C-403/08 and C-429/08 (Premier League).

> 199 That is so when the works broadcast are transmitted by the proprietor of a public house to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorised the broadcasting of their works.

Operative part, sub 7:

> 'Communication to the public' within the meaning of Article 3(1) of [the Information Society Directive] must be interpreted as covering transmission of the broadcast works, via a television screen and speakers, to the customers present in a public house.

In 2011 the European Court of Justice also ruled in its *Airfield* decision that several kinds of direct and indirect satellite transmissions 'must be regarded as constituting a single communication to the public by satellite and thus as indivisible' within the meaning of the Satellite and Cable Directive.

> 76 Nevertheless, that finding does not preclude intervention by other operators in the course of a communication such as that referred to in the preceding paragraph with the result that they render the protected subject-matter accessible to a public wider than that targeted by the broadcasting organisation concerned, that is to say, a public which was not taken into account by the authors of those works when they authorised the use of the latter by the broadcasting organisation. In such a situation, the intervention of those operators is thus not covered by the authorisation granted to the broadcasting organisation.[52]

Again, as in *SGAE v. Rafael Hoteles* and in *Premier League*, the fact that a 'new public' of viewers is reached, 'that is to say, a public which was not taken into account by the authors of those works when they authorised the use of the latter by the broadcasting organisation' gives rise to an obligation to ask for additional permission from the right holders.

Meanwhile, it is clear that the definition of 'the public' as 'an indeterminate number of potential television viewers', developed in *Mediakabel* and *Lagardère*, was meant for (satellite) broadcasting. As mentioned above, the definition is harder to apply to small-scale 'rebroadcasting' by cable to a limited number of people in a hotel, because the number of potential viewers might then not be 'indeterminate'. That is why the European Court of Justice added that 'a fairly large number of persons' may be considered to be a public.

52 CJEU, 13 October 2011, C-431/09 and C-432/09 9 (Airfield v. Sabam).

It may be harder, rather impractical and/or undesirable to apply this criterion of 'an indeterminate number of potential television viewers' to making available, public performance and distribution. With public performance and making available to the public it will probably be inevitable to define some kind of closed group or minimum audience within which a performance or an act of making available is not considered to be public.

In respect to distribution the situation is even more complicated because of the concept of exhaustion.

Distribution to 'the public'

Article 4(1) Information Society Directive explicitly contains a reference to 'the public'. But Article 4(2) of the same directive states that the exhaustion effect takes place 'where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent'. It is clear that the first sale itself is subject to the distribution right.[53] More often than not however, the first sale of an object does not take place to a member of the public, but to a trader or wholesaler or to a retailer. Therefore, there can be no doubt that a sale or other transfer of ownership does not have to be effected to a member of the public to be covered by the distribution right of Article 4.

But what then does 'to the public' mean in Article 4 of the Information Society Directive?

In paragraph 31 of the *Peek & Cloppenburg v. Cassina* decision, the European Court of Justice stressed that the concept of distribution in Article 4(1) of that directive must be interpreted, as far as is possible, in the light of the definitions given in the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty.

The relevant definition is given in Article 6(1) of the WIPO Copyright Treaty: 'Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership'. It is remarkable that Article 6(1) of the WIPO Copyright Treaty speaks of 'making available to the public', a phrase now usually reserved for making available online.

The Court of Appeal of The Hague in a decision in 2011[54] suggested that this terminology probably is a remnant of the initial idea in the drafting process of the WIPO Copyright Treaty that Article 6 on distribution would also include making available online: the making available to the public of their works in

53 ECJ, 17 April 2008, C-456/06 (Peek & Cloppenburg v. Cassina).

54 Court of Appeal of The Hague, 31 May 2011, *LJN* BQ6773, *IEF* 9740 (Hauck v. Stokke).

such a way that members of the public may access them from a place and at a time individually chosen by them. In the end it was decided at the 1996 WIPO Conference that this kind of making available would be covered by the right of communication to the public in Article 8 of the WIPO Copyright Treaty and not by Article 6 of the same. This follows clearly from the Agreed Statements concerning Articles 6 and 7:

> As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

The Court of Appeal of The Hague argued that this was the only reason why Article 6 of the WIPO Copyright Treaty and Article 4 of the Information Society Directive contain a reference to 'the public' at all. The court went on to argue that in fact this reference to 'the public' only means that the objects in question must be meant to be distributed eventually to end users. The court thereby contradicted its own earlier statement in the same decision that 'the public' in Article 4 of the Information Society Directive must mean the same as 'the public' in Article 3(1) of the Directive.

But it seems clear that there must be a different meaning. In Article 3, at least as far as broadcasting is concerned, there must be a signal (containing protected works) that is aimed directly at 'an indeterminate number of potential television viewers'. The preceding transmissions to intermediaries such as cable operators are not relevant under copyright. It is only the end of the chain of communication that is actually directed at the end user which is relevant under the right of communication to the public. In respect to the distribution right it is exactly the opposite: it usually is the beginning of the chain of communication to the end user that is relevant. In Article 4 the distribution right also covers, and in fact mainly covers the first sale to any person or entity, which is usually not a member of the public but an intermediary. The actual sale to a member of the public is only affected by the distribution right if there has not been a preceding first sale by or with the consent of the right owner.

Another reason why the distribution right should not be limited to distribution to an end user/member of the public is that the industrial property rights regarding patents, trademarks and designs do not have that limitation either. It would be very impractical if the exhaustion rules for copyright and neighbouring rights were to differ from those in patent law, trademark law and design law.

4.3 Rental and lending right

No rental or lending right existed in the Netherlands before the implementation of the EU Rental Right Directive in 1995. In the *Stemra v. Free Record Shop* decision of 1987, the Supreme Court had confirmed that no rental right existed. Obviously, most aspects of the rental and lending right are governed by the Rental Right Directive. The rental and lending rights are defined in Article 12(1)(3), 12(2) and 12(3) DCA.

> Rental […] means making available for use for a limited period of time for direct or indirect economic or commercial advantage. (Article 12(2) DCA)

> Lending […] means making available for use by establishments which are accessible to the public, for a limited period of time and not for direct or indirect economic or commercial advantage. (Article 12(3) DCA)

The rental and lending rights do not apply to works of architecture and works of applied art.[55]

The rental right is an exclusive right which can be exercised as such. The lending right is transformed by Article 15c into a right to remuneration on the basis of Article 6 of the Rental Right Directive. It should be noted that in the Dutch Copyright Act the words 'billijke vergoeding' are used to describe both 'equitable remuneration' and 'fair compensation', which have different meanings in the European directives. Moreover, it should be noted that Article 6 of the Rental Right Directive only prescribes 'remuneration', whereas in the Dutch implementation the word 'billijk', meaning 'fair' or 'equitable', is added. In Article 5 of the Rental Right Directive an 'equitable remuneration' is prescribed, which is also implemented as 'billijke vergoeding'.

If the author assigns the producer his rental right in respect of a work fixed on a phonogram or of a film work, the author retains the right to fair compensation (or actually 'equitable remuneration' as prescribed by Article 5 of the Rental Right Directive) for the rental, which may not be waved.[56] In the Netherlands the right to an equitable remuneration for the rental is not exercised through a collecting society, and in practice no separate payment of an equitable remuneration takes place. The equitable remuneration for rental is usually deemed to be included in the lump sum payment to the author.

55 Article 12(1)3.

56 Article 12a and Article 45d, last sentence. See also Article 5 of the Rental Right Directive.

Public lending right

'Provided the person doing or causing the lending pays a fair compensation, it is not regarded as an infringement of the copyright, to lend […] the whole or part of the work or a copy which has been put into circulation by or with the consent of the right-holder'. (Article 15c(1) Dutch Copyright Act).

The remuneration for lending has to be paid to a collecting society, a foundation called 'Stichting Leenrecht' (Lending Right Foundation) which is designated by the government.[57] The remuneration is paid (mainly) by public libraries. Educational establishments and research institutes, the libraries attached to them, and the 'Koninklijke Bibliotheek' (National Library) are exempt from payment of a lending remuneration.[58]

The level of the remuneration for lending is set by another foundation designated by the government, called 'Stichting Onderhandelingen Leenvergoedingen' (StOL – Foundation Negotiations Lending Remunerations), in which the right holders and public libraries are represented evenly and which is presided over by an independent president.[59] The District Court of The Hague has exclusive jurisdiction over any disputes concerning the remuneration for lending.[60]

The public lending right does not apply to computer programs, unless the computer program 'is part of a data carrier that contains data and [the computer program] serves exclusively to make said data accessible'.[61]

The lending of computer programs as such, including business software and all other kinds of operational software without an information component, is therefore not permitted under the public lending scheme. However, the lending of multimedia products such as CD-ROMs is permitted, 'insofar as the interactive or game element in the software is subsidiary to the relevant information'.[62] Whether or not the lending right does apply has to be established on a case by case basis. Public libraries and right holders agreed to a practical solution whereby multimedia products with a so-called PEGI (Pan-European Game Information) code are not covered by the lending rights and cannot be lent out without permission of the right holder, whereas multimedia products without such a code are covered and can be lent out, unless the right holder expressly forbids the lending.

The renewal of the lending term for the same product to the same user does

57 Article 15f. See www.leenrecht.nl.
58 Article 15c(3).
59 Article 15d.
60 Article 15e.
61 Article 15c(1), last sentence.
62 District Court Amsterdam, 18 December 2002, *AMI* 2003, nr 10, p. 99 (lending of CD-ROMs).

not amount to a new *openbaarmaking* and therefore does not give rise to the payment of an additional remuneration for lending.[63]

4.4 Satellite broadcasting

'The broadcasting by satellite of a work incorporated in a radio or television programme means: the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth. Where the programme-carrying signals are encrypted, there is broadcasting by satellite of a work incorporated in a radio or television programme on condition that the means for decrypting the broadcast are provided to the public by or with the consent of the broadcasting organization' (Article 12(7) DCA).

Article 12(7) contains the implementation of Article 1(2) and Article 2 of the Satellite and Cable Directive. Article 47b contains the rule that the Dutch Copyright Act only applies to the 'up-link' mentioned in Article 12(7), if this up-link takes place in the Netherlands.

Before this directive, satellite broadcasting was also considered to be covered by the openbaarmakingsrecht, but was not the subject of any Dutch specific debate or litigation. The transmission by satellite of background music to professional users of such background music was also considered an openbaarmaking.[64]

In *Lagardère* the European Court of Justice decided that where a first transmission is not directed at the public, but at a terrestrial transmitter in another country, which in turn broadcasts to the public in the first country, the first transmission is not a communication to the public. The broadcast by the transmitter in the second country does amount to a communication to the public:

> In the case of a broadcast of the kind at issue in this case, [the Satellite and Cable Directive] does not preclude the fee for phonogram use being governed not only by the law of the Member State in whose territory the broadcasting company is established but also by the legislation of the Member State in which, for technical reasons, the terrestrial transmitter broadcasting to the first State is located.[65]

63 Court of Appeal The Hague, 28 June 2011, *LJN* BR 2527 (Public Libraries v. Stichting Leenrecht), appeal to the Supreme Court pending.

64 District Court Arnhem, 8 March 2001, *AMI* 2001 (Buma v. Digi Music).

65 ECJ, 14 July 2055, C-192/04 (Lagardère), paragraph 30.

As mentioned above, the European Court of Justice ruled in its *Airfield* decision that several kinds of direct and indirect satellite transmissions 'must be regarded as constituting a single communication to the public by satellite and thus as indivisible' within the meaning of the Satellite and Cable Directive, but that nevertheless additional permission was needed in this case because the protected subject matter had been made accessible to a public wider than that targeted by the broadcasting organization concerned, that is to say, a public which was not taken into account by the authors of those works when they authorized the use of the latter by the broadcasting organization. 'In such a situation, the intervention of those operators is thus not covered by the authorisation granted to the broadcasting organisation'.

Apparently, the effect of the Information Society Directive is such that the Satellite and Cable Directive is to a large extent replaced by this directive, insofar as its effect on the communication to the public right is concerned.

4.5 Public exhibition

It follows from the European Court of Justice's decision in the *Peek & Cloppenburg v. Cassina* case that exhibiting furniture protected by copyright is not covered by the distribution right:[66]

> The concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) of [the Information Society Directive], applies only where there is a transfer of the ownership of that object. As a result, neither granting to the public the right to use reproductions of a work protected by copyright nor exhibiting to the public those reproductions without actually granting a right to use them can constitute such a form of distribution.

It follows from the wording of Article 12(4) ('The same applies to exhibitions') that the openbaarmakingsrecht in the Dutch Copyright Act also covers public exhibition. This exhibition right is however severely limited by Article 23, which stipulates that '[u]nless otherwise agreed, whoever owns, possesses or holds a work of drawing, painting, sculpture or architecture, or a work of applied art, is permitted to reproduce and make public that work so far as necessary for the public exhibition or public sale of that work, all subject to the exclusion of any other commercial use.'

Therefore, the public exhibition right only applies to works owned by the author and the first sale 'exhausts' the exhibition right.

66 ECJ, 17 April 2008, C-456/06 (Peek & Cloppenburg v. Cassina).

Making available for viewing on site by an individual
Consensus exists on the premise that the openbaarmakingsrecht does not apply to the making available for on-site reference use in libraries of books and journals. However, the showing of an audiovisual work in a video cabin for individual viewing in a sex shop was considered an openbaarmaking.[67]

4.6 Making available online

Before the Information Society Directive and the WIPO Copyright Treaty of 1996, it was already clear that making available on the Internet was covered by the openbaarmakingsrecht.[68] The Dutch legislator did not consider it necessary to implement the so-called making available right mentioned in the Information Society Directive (the right relating to the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them), because there was no doubt that this activity was already covered by the existing openbaarmakingsrecht. Uploading content and the making available of one's own website certainly is covered by the openbaarmakingsrecht. In practice, enforcement of copyright against anonymous individual uploaders or website owners has proved very hard, if not impossible. Therefore, the focus has shifted to enforcement against all kinds of professional intermediaries on the Internet.

Telecom operators that only provide the cables and/or access to the Internet and Internet Service Providers that host thousands of websites are not considered to be liable for any direct copyright infringement through openbaarmaking in the Netherlands.[69]

Applicable global and European treaty and directive provisions
The openbaarmakingsrecht relating to making available online is not only influenced and harmonized by Article 3 of the Information Society Directive. As mentioned above, this Article 3 is an implementation of Article 8 of the WIPO Copyright Treaty. And although it only entered into force on 14 March 2010, the 'agreed statement' concerning Article 8 has been an important point of reference for quite some time:

67 Court of Appeal The Hague, 1 December 1994, *AMI* 1995, p. 51 (Güfa v. Sexshoppy Dinges).
68 District Court of Rotterdam, 24 August 1995, *AMI* 1996, p. 101 (Eindeloos Bridge).
69 District Court of The Hague, 9 June 1999, *AMI* 1999-7, p. 113 (Scientology v. XS4ALL).

> It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis (2).

The Dutch courts have referred to this statement in cases related to the involvement of all kinds of professional intermediaries in making available online. The Information Society Directive however also contains an important provision regarding the position of Internet intermediaries in Article 8(3):

> Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

This provision is repeated in Article 11 of the Enforcement Directive:

> […] Member States shall also ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.

But there are also the provisions in the e-Commerce Directive which limit the liability of Internet intermediaries. Articles 12 to 15 exclude from liability mere conduit, caching and hosting and prohibit the imposition of a 'general obligation' on Internet intermediaries 'to monitor the information which they transmit or store' and of 'a general obligation actively to seek facts or circumstances indicating illegal activity'. Those provisions, however, do 'not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement'.[70]

Hyperlinking and embedding

Mere hyperlinking is generally believed not to amount to an openbaarmaking.[71] But many distinctions can be made between different kinds of hyperlinking. A first distinction is whether or not hyperlinking takes place to sources on the Internet which are made available to the public by or with permission of the right holder (hereinafter: 'a legal source' as opposed to an 'illegal source'). Another

70 Articles 12(3), 13(2), 14(3) of the eCommerce Directive.

71 See for instance: District Court of The Hague 2 November 2011, *LJN* BU3223 (Real Networks v. X).

distinction is whether the Internet user can see that the hyperlink links to another source on the Internet, for instance by the opening of a new window or the appearance of another URL (hereinafter: 'a clear hyperlink' as opposed to a 'cloaked', 'framed' or 'embedded' hyperlink).

It is generally accepted that clear hyperlinking, including deep linking to a legal source does not amount to an openbaarmaking.[72] Hyperlinking to an illegal source is usually also not considered to amount to an openbaarmaking, but can be an 'unfair act' under general tort law if done knowingly or intentionally. The status of embedded hyperlinks to legal or illegal sources is (also) less clear. A framed hyperlink is sometimes considered to be a communication to the public, and so is an embedded hyperlink.[73]

Peer-to-peer file sharing

There is no doubt that peer-to-peer file sharing is covered by the openbaarmakingsrecht.[74] The countless, usually anonymous file sharers ('peers'), which make the music and film on their computers available for others to copy ('share'), certainly do make it available to the public. But enforcement against all those anonymous individual peers is practically impossible, if not undesirable. Therefore the question is what kind of enforcement is possible and against whom.

The most far-reaching solution would be legal action against the makers of the peer-to-peer software itself. In the *Buma v. KaZaA* case, the district court in Amsterdam ruled that the making available of peer-to-peer software by KaZaA, in its heyday the most popular peer-to-peer provider in the world, attracting between four and five million daily users in 2001,[75] amounted to an openbaarmaking, a direct copyright infringement, of all material being exchanged with the use of this software. The Court of Appeal of Amsterdam reversed this decision and ruled that the peer-to-peer software also had substantial non-infringing uses and could for instance be used for exchanging recipes and jokes. Therefore the court ruled that there was no openbaarmaking (direct copyright infringement) and that the makers of the software did not act unlawfully either (on the basis of tort law). The Dutch Supreme Court confirmed this decision, mainly because the demand by plaintiff for KaZaA to recall its software or apply some kind of filtering was not

72 Court of Appeal Arnhem, 4 July 2006, *IEF* 2288 (Zoekallehuizen.nl).

73 See for instance: Court of Appeal Den Bosch, 12 January 2010, *IEF* 8514 (C More v. MyP2P), Cantonal Court Haarlem, 5 September 2007, LJN BB 3144 and Cantonal Court Rotterdam, 2 September 2004, *AMI* 2005, p. 69 (Schlijper v. Nieuw Rechts) and President of the District Court Leeuwarden, 30 October 2003, *AMI* 2004, p. 32 (Vriend v. Batavus).

74 P.B. Hugenholtz, 'Napster: een *Bliksemonderzoek*', *Computerrecht* 2000/5, p. 228.

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

feasible, and also confirmed that there is no concept of contributory copyright infringement in Dutch law. The decision of the Dutch courts in this case must not be misunderstood as meaning that peer-to-peer file sharing as such does not infringe copyright law or that there is not a possibility of taking action against facilitating it on the basis of civil law liability on the grounds of an 'unlawful act' (tort).

Apart from software, file-sharing peers need to be able to find each other and the material they want to share. With peer-to-peer file sharing there is no central database where the files are stored, but usually there are central indexing services. Information on what material can be obtained where gets uploaded by individual users or collected through search engines. These indexing sites usually are almost entirely dedicated to copyright infringing material from the start, or become dedicated to this quickly. The courts in the Netherlands have been rejecting claims that heavy involvement in the making available of infringing material on the Internet amounts to a direct copyright infringement on the basis of openbaarmakingsrecht. It seems that only the actual 'physical' act of uploading files or making files available on one's own computer would fall under the openbaarmakingsrecht according to the Dutch courts. The structural and systematic facilitating of copyright infringements through communication to the public over the Internet either through peer-to-peer file sharing or other Internet facilities, by indexing sites, so-called Torrent-hosts and dedicated search engines, has however been considered to amount to an 'unlawful act' in all of the considerable number of cases brought to the courts, most of them brought by the Dutch anti-piracy organization BREIN.[76]

In early 2012, a Dutch court held that a hosting provider was obliged to block access for its subscribers to the peer-to-peer site The Pirate Bay situated in Sweden, on the basis of Article 26d DCA which is in turn based on Article 11 of the Enforcement Directive.[77]

76 Court of Appeal of Amsterdam, 15 June 2006, *LJN* AX7579 (Techno Design v. BREIN); President of the District Court of The Hague, 5 January 2007, *AMI* 2007/2, nr. 9, *LJN* AX5678 (BREIN v. KPN); President of the District Court of Amsterdam, 21 June 2007, *LJN* BA7810 (BREIN v. Leaseweb I); Court of Appeal of Amsterdam, 3 July 2008, LJN BD6223 (BREIN v. Leaseweb II); President of the District Court of 's-Hertogenbosch, 8 July 2008, *B9* 6425 (BREIN v. Euroacces); District Court of Utrecht, 26 August 2009, *LJN* BJ6008, *IEF* 8127 (BREIN v. Mininova); President of the District Court of Amsterdam, 22 October 2009, *B9* 8287 (BREIN v. The Pirate Bay); Court of Appeal of 's-Hertogenbosch, 12 January 2010, *B9* 8514 (C More Entertainment v. Myp2p); Court of Appeal of Amsterdam, 16 March 2010, B9 8678 (BREIN v. Shareconnector); Court of Appeal of The Hague, 15 November 2010, *LJN* BO398 (FTD v. Eyeworks); District Court of Haarlem, 9 February 2011, *LJN* BP3757 (BREIN v. FTD); President of the District Court of The Hague, 22 March 2011, *IEF* 9487 (KNVB v. MyP2P);

77 District Court of The Hague, 11 January 2012, *LJN* BV0549, *IEF* 10763 (BREIN v. Ziggo and XS4All).

5. Assessment and future developments

It has become clear that, according to the European Court of Justice, the concepts of communication to the public and distribution in Articles 3 and 4 of the Information Society Directive amount to an almost complete European harmonization of all possible modes of exploitation of copyrighted works.

For the time being, only live performance and public exhibition seem to be excluded from harmonization. These are however modes of exploitation of modest importance.

The European Court of Justice has reintroduced the criterion of 'new public', being a public not taken into account in an earlier permission. The 'intervention by other operators in the course of a communication', mentioned in paragraph 76 of the *Airfield* decision,[78] reminds us of the 'autre organisme' in the Berne Convention. But it might have an even broader application. It will have to be seen how the European Court of Justice will apply this criterion to several different modes of exploitation, especially over the Internet. It is inevitable that many more questions on the reach of the concept of communication to the public will be put before the European Court of Justice in the near future.[79]

6. Conclusion

The Dutch concept of *openbaar maken* has proven in the past to be sufficiently broad to cover most new technological developments. It seems that the European concepts of 'communication to the public' and 'distribution' can turn out to be equally broad or even broader.

Applying the concept of openbaar maken to the different actors in recent technologies such as hyperlinking, embedding, search engines and peer-to-peer systems has proven more difficult. The courts in the Netherlands have often resorted to applying the national general civil law concept of 'unfair act' to acts which might or might not in fact be communications to the public. This is unfortunate as far European harmonization is concerned.

78 CJEU, 13 October 2011, C-431/09 and C-432/09 9 (Airfield v. Sabam).

79 See f.i. the preliminary reference in the ITV/TVCatchup case (C-607/11).