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A century of Dutch Copyright Law

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

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Preface

On September 23, 1912, the Dutch Copyright Act – *Auteurswet* – was enacted. A century after its enactment the Dutch law is one of the world's oldest 'living' acts of the author's rights tradition. While the Act has seen many small and large amendments since its adoption in 1912, it has never been thoroughly revised, so its conception and basic structure have remained essentially intact.

This book celebrates the hundredth anniversary of the Dutch Act. It traces and assesses, for an international readership, the development of Dutch copyright law since its codification in 1912 until today. The book focuses on the interesting or even unique features of Dutch copyright law, with a view to the on-going harmonization of copyright law in the European Union, and possible future unification. What can Europe or the world at large learn from a century of Dutch copyright law, jurisprudence and doctrine? What solutions might inspire the European legislature or law makers elsewhere in the world? What mistakes are better to be avoided?

This book is divided into sixteen chapters, written by sixteen distinguished scholars in the field. Its order roughly corresponds with the structure of the Act: subject matter – ownership – economic rights – moral rights – limitations.

In Chapter 1 Willem Grosheide places the 'making of' the Dutch Act in a historical cultural and economic context. As Grosheide explains, the mainly economically motivated resistance against protection of foreign copyrights that had kept the Netherlands out of the Berne Union much longer than other European states, gradually evaporated in the course of the late 19th and early 20th Century, as the Dutch creative community came to realize that there was more to gain than to lose from international copyright protection.

In Chapter 2 Bernt Hugenholtz treats 'works of literature, science and art', the Dutch term of art for works of authorship. As Hugenholtz rather despondently concludes, the influence of Dutch legal doctrine in shaping the law relating to works of authorship has been very limited. Courts in the Netherlands "seem to be guided more by intuitive feelings of justice and fairness [...] than by legal doctrine."

In Chapter 3 Annemarie Beunen critically examines one of the most salient and controversial features of the Dutch Act: *geschriftenbescherming*, i.e. the protection of non-original writings – a remnant of case law decided by the Dutch Supreme Court prior to 1912 that was carried over into the present Act. As the author observes, following the European Court of Justice's *Football Dataco* judgment

the survival of this primordial copyright regime has become questionable.

In Chapter 4 Anselm Kamperman Sanders focuses on the interface between copyright protection for works of applied art and special design protection, which has been uniform in the Benelux countries since 1975. As the author explains, the cumulative exercise of design right and copyright has been a perennial problem ever since.

Chapter 5 by Jacqueline Seignette discusses issues of authorship and ownership, focussing in particular on Dutch copyright law's unique rule on works made under employment, which vests both copyright ownership and authorship in the employer, and on the law's rather muddled rule on commissioned works.

In Chapter 6 Mireille van Eechoud looks at the treatment of government works under the Dutch Act. While generally applauding the Dutch opt-in copyright protection regime, the author laments the lack of harmonization of government works at the EU level, and criticizes the EU Public Sector Information Directive that has left national government copyrights intact.

Chapter 7 deals with copyright contracts, a field left largely uncharted by the Dutch Act – in marked contrast to neighbouring countries Belgium, France and Germany. Bart Lenselink discusses the few rules on author's contracts that Dutch law does provide for, and speculates on a future bill that might fill this void.

Chapters 8 and 9, by Jaap Spoor and Dirk Visser respectively, treat the two main prerogatives that Dutch law grants to copyright holders: the exclusive rights of *verveelvoudiging* and *openbaarmaking*. Both concepts have, by legal design, a much broader meaning than in ordinary language. *Verveelvoudiging* ('reproduction') comprises not only acts of reproduction, but also of translation, arrangement and adaptation. *Openbaarmaking* ('communication to the public') encompasses an infinite variety of acts of making works available to the public, both on physical media (distribution) and in immaterial form (performance, broadcasting, making available online). As both authors demonstrate, the technology-neutral and flexible definitions of both rights by the 1912 Dutch legislature has made these concepts withstand the test of time, despite the strong influence of European harmonization.

In Chapter 10 Madeleine de Cock Buning focuses on cable retransmission and other secondary uses – a vexing issue that has led to several decisions by the Dutch Supreme Court in the 1980's, and remains controversial until this day. Here too, the influence of European harmonization and case law of the European Court of Justice can hardly be ignored.

Remarkably, the original Act of 1912 was silent on exhaustion ('first sale') – a doctrine gradually developed in a string of landmark decisions by the Dutch

Supreme Court, which Feer Verkade describes in Chapter 11. Here again, European case law and subsequent harmonization have had a major impact on Dutch law.

In Chapter 12 Jan Kabel and Antoon Quaadvlieg paint a rich and detailed portrait of Dutch law on moral rights. Absent harmonization the law on moral rights has developed ‘in the wild’. As the authors demonstrate, Dutch case law on moral rights has been at once pragmatic and creative. On occasion it has grown in unexpected directions – untamed by European directives.

In Chapter 13 Martin Senfleben takes on the daunting topic of copyright limitations, in particular those permitting quotation and parody. Senfleben juxtaposes the rigidity of the Dutch structure of circumscribed exceptions against the more flexible fair use doctrine of the United States. As the author concludes, limitations and exceptions in Dutch law have over time gradually been broadened in order ‘to counterbalance exclusive rights that have constantly been expanded during the last 100 years’.

A separate chapter 14, written by Dirk Visser, is devoted to private copying. According to Visser, ‘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.’ Of course, much of this debate is about levies – yet another issue increasingly affected by European harmonization.

In Chapter 15 Lucie Guibault focuses on the press exception in the Dutch Act, a provision that has suffered from ‘technological turbulence’ perhaps more than any other article of the Dutch Act. As the newspaper clipping controversies that the author describes illustrate, it is not easy to reconcile the competing goals that the provision allegedly serves: protecting the interests of the media industry and freedom of expression.

The last chapter of this book deals with yet another unique feature of Dutch copyright law: the legal monopoly that *Buma*, the Dutch music performing rights society, enjoys since 1932. As Kamiel Koelman explains, the monopoly’s main aim was to exclude foreign competition, especially from Sacem, the French society. But the days of the Buma monopoly are numbered. While the EU has made competition between national collectives inevitable, smaller players like Buma are left behind.

Finally, the Dutch *Auteurswet* takes centre stage itself in the form of a completely new English translation by Mireille van Eechoud, which is appended. Although unofficial, surely this is to become the standard translation of the Act for many years to come.

A century after the enactment of the Dutch *Auteurswet* national copyright law

is increasingly giving way to European norms. A growing swell of cases decided by the Court of Justice suggests that the main features of the law of copyright in the EU have now been fully harmonized, even for areas not covered by directives. In this rapidly changing legal environment it is easy to lose sight of the law and legal doctrines that have developed at the national level in the course of the past century. The editors of this book sincerely hope that its contents will help scholars, practitioners, judges and legislators keep their heads cool and feet on the ground – as Dutch culture and legal tradition require.

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Bernt Hugenholtz
Antoon Quaadvlieg
Dirk Visser