Universiteit
Leiden
The Netherlands

Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen

Elferink, M.H.

Citation
Elferink, M. H. (1998, December 10). *Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen*. *Meijers-reeks*. Kluwer, Deventer. Retrieved from https://hdl.handle.net/1887/43081

Version: Not Applicable (or Unknown)
License:
Downloaded from: https://hdl.handle.net/1887/43081

Note: To cite this publication please use the final published version (if applicable).

Cover Page

Universiteit Leiden

The handle http://hdl.handle.net/1887/43081 holds various files of this Leiden University dissertation.

Author: Elferink, M.H.
Title: Verwijzingen in wetgeving. Over de publiekrechtelijke en auteursrechtelijke status van normalisatienormen
Issue Date: 1998-12-10

Summary, conclusions and recommendations

1 AIM AND OUTLINE OF THE STUDY

The first chapter of this book describes the background to standardisation and its economic relevance. Standardisation implies that agreements about the requirements to be fulfilled by the products, and about the processes and the measuring and inspection methods are made on a voluntary basis by the parties concerned. They are laid down in so-called technical standards. Examples of standardisation are the 'A' series of paper formats, sizes of light-bulb sockets, sizes of miniature films, means and methods of measurement, engine fuel and bar codes.

The subject of this study is the technical standards issued by the Dutch Standardisation Institute (NNI). They are designated by the abbreviation NEN (Dutch technical standard). When drafting generally binding regulations the legislator uses the NNI technical standards by *referring* to them in the legislation. The practice of referring to technical standards is closely linked to the European standardisation policy and modern trends towards deregulation. An important advantage of this approach is that the formal legislative process can be simplified and expedited. On the assumption that the use of technical standards in regulations produces greater public acceptance of its aims (self-regulation), the Dutch authorities hope to promote the effectiveness of legislation.

The form of standardisation by which technical standards are referred to in regulations is not only a form of self-regulation. Standardisation of this kind, which is central to the subject of this study, also establishes a link between self-regulation and legislation; in other words, between private and public law.

The literature in the Netherlands has hitherto paid little attention to the effects of the practice of referring to technical standards in regulations. This is why this study first of all examines at some length the public law status of these technical standards referred to in legislation, with a view to determining their validity under the constitutional rules for publication. *Chapter 3* deals with this subject after the standardisation process has been described in *chapter 2*.

Chapter 6 deals no less extensively with the copyright status of the technical standards concerned under section 11 of the Dutch Copyright Act, which excludes among other things statutes and regulations from copyright. The question is whether these technical standards too are covered. This question is interesting because NNI claims the copyright in the NEN standards, which have hitherto been relatively expensive (from NLG 32.50 to NLG 400 for each separate NEN standard). Another subject examined in *chapter 6* is whether section 15b of the Copyright Act (in principle, no copyright in government publications) is applicable to publications related to NEN standards. This discussion is preceded by a description of the practice of referral on the basis of a detailed example in *chapter 4* and by a comparative survey of German law in *chapter 5*. This issue has been the subject of debate in German literature for some time and has led to interesting decisions by the *Bundesgerichtshof*.

Chapters 7 and 8 are much shorter and deal with the potential significance of competition legislation under public law and the Government Information (Public Access) Act.

2 Realisation of NEN technical standards: the standardisation process

The Dutch standardisation institute NNI, which is a private law body, together with the closely related NEC (Dutch Electrotechnical Committee), is a recognised standardisation institution in the Netherlands. As such it is engaged in coordinating standardisation in the Netherlands. The NNI has policy committees that determine standardisation policy for specific fields and arrange their funding. These policy committees can institute committees for technical standards which are in charge of the actual drafting of NEN standards. Interested parties can take part in the work of a technical standards committee. If they do so, they are required to contribute to the costs of drafting the NEN standards in question. After a period in which the draft standards are open to public scrutiny and criticism, they can be adopted and published. The NEN standards are obtainable from the NNI only in exchange for payment.

The Dutch government provides project-tied subsidies to the NNI for the benefit of various legislative standardisation projects and is thus one of the NNI's largest clients. The aim is that the costs of this arrangement should be recovered as far as possible from the proceeds of the sale of the standards.

At the European level standardisation activities are carried out by a combination of the *Comité Européen de Normalisation* (CEN) and the Comité *Européen de Normalisation Electrotechnique* (CENELEC). All national standardisation institutes of the member states and EFTA countries are members of this European

standardisation institute. The national standardisation institutes are obliged to convert the European standards into national standards.

The NNI has undertaken in a private law contract to perform the obligations resulting from European Directive 83/189/EEC (directive on an information procedure for technical standards).

There are also international standardisation organisations, two of which are discussed in this book. These are the 'International Organisation for Standardisation' (ISO) and the 'International Electrotechnical Commission' (IEC). Adoption of standards drafted in an international context occurs on a voluntary basis.

3 THE PUBLIC LAW STATUS OF TECHNICAL STANDARDS

Various methods can be used when referring to technical standards in regulations under public law. The most important are:

- static reference (i.e. an exact reference specifying the date and number of the technical standards, e.g. *NEN 1740, 1st impression March 1983);*
- dynamic reference (technical standards indicated only by number, e.g. NEN 1507); and
- open reference (reference in the form of a general clause to all existing and future technical standards).

The NNI is a foundation established under private law. It follows that the technical standards laid down by the NNI are of a private law nature and do not therefore have generally binding effect. Their effect is based only on voluntary acceptance by the parties concerned. They do, however, appear able to obtain 'de facto validity' (in that competition in the labour market makes it necessary, for example, to comply with the standards) or 'sociological validity' (in that people tend to assume that the technical standard is compulsory). The character of NEN standards changes, however, when they are referred to in statutory regulations. If NEN standards are (correctly) referred to in regulations, this means that they must be observed and that they acquire a generally binding nature in the process. As a result of the reference the NEN standards become part of the generally binding rule concerned. It follows that they themselves then have the effect of a generally binding rule.

Although the formal character of NEN standards (the procedure of realisation and adoption) differs from that of 'normal' generally binding rules adopted on behalf of the State, their substantive character (content and scope) is the

same. Accordingly, the NEN standards should be covered by the Publication Act, which lays down how generally binding rules must be made public.

At present the NEN technical standards are made public by means of the so-called 'deposit-for-inspection' or 'footnote' method. This means that in the text of the statute there is merely a *reference* to the NNI as the institute where the NEN technical standards are made available to the public. This method is not in keeping with the publication procedure for generally binding rules as laid down in the Publication Act. Under this Act, the NEN standards should be published in their entirety in the Government Gazette *(Staatscourant)*, in an annex to the Government Gazette or in an official publication journal made available by the authorities.

Since NEN standards are not published in the correct way it follows that they do not come into force at all. This is a constitutional sanction for incorrect publication as regulated in articles 88 and 89 of the Dutch Constitution. Regulations that have not come into force are not binding. Anyone who has suffered damage as a consequence of non-binding regulations can recover the damage by an action in tort from the person causing the damage. In the present case it must be assumed that this is the legislative authorities, since it is they who refer to the non-binding NEN standards.

A further factor plays a role in the case of 'dynamic reference'. Such a reference confers on the NNI, in effect, the power to adopt generally binding rules (i.e. a form of hidden delegation). The NNI thus becomes an independent administrative authority. There are various objections to this from the constitutional point of view.

There is no need in practice to attach an equal degree of importance to all these objections to the system of dynamic reference to NEN standards. A distinction can be made in this connection between technical standards that relate directly to the composition and quality of products and processes and technical standards that provide methods for assessing or measuring this composition or quality. In the case of the former standards, there should be no uncertainty about whether and, if so, which standards are applicable. They do, after all, define the criteria (or further criteria) to be satisfied by products and processes. This is less of a problem, relatively speaking, in the case of technical standards of the latter kind. Such standards merely determine indirectly the required content and quality: the reference has no direct influence on the criteria drafted by the legislator concerning the quality of products and/or services, but simply indicates the method to be used in determining whether the criteria drafted by the legislator have been fulfilled.

4 AN IMPORTANT APPLICATION: THE BUILDING ORDER

The Building Order, discussed in *chapter 4*, contains a large number of references to NEN standards. The basis for the references in or under the Building Order is contained in the Housing Act (section 2 in conjunction with section 3). In addition to the references to NEN standards in the Building Order, pursuant to the Housing Act, further rules governing the NEN standards may be laid down by ministerial order (sub-delegation provision – article 416 of the Building Order). The number of references to various NEN standards in the Building Order totalled 146 on 1 October 1997. These include both standards to which direct reference is made in the Building Order itself and standards to which reference is made in another standard applicable under the Building Order. The Building Order refers to NEN standards in three categories of case:

- where the criteria are very detailed;
- where terms are used in the Building Order whose meaning has been defined in NEN standards; and
- where a standard fixes a method of determination that is an integral part of the performance criteria specified in the Building Order.

This last category is by far the most common. The Building Order rules are based on functional descriptions. The basic premise is that the limit values of the performance criteria are included in the Building Order itself. This premise is not always fulfilled. It should be noted, incidentally, that the Building Order contains equivalence provisions, which allow the user to prove that he has complied with rules in a different way. Nonetheless, the NEN standards referred to in the Building Order are of a peremptory nature. This is also evident from the Explanatory Memorandum to the Building Order.

As the minister has indicated in the ministerial orders which version of the NEN standards designated in the Building Order is applicable, the references can be classified as static. Yet in so far as far as the minister also leaves it up to the NNI to designate *parts* of technical standards as being applicable, this practice can be questioned since it is comparable to sub-delegation. Whether direct or indirect, references to NEN standards in the Building Order therefore qualify as generally binding rules. As such they come within the scope of the Publication Act and should be published in the manner prescribed in this Act. This is not done in practice at present. The conclusions drawn in *chapter 3* therefore apply equally to the Building Order standards, i.e. that they have not come into force and cannot therefore be enforced against anyone.

5 COPYRIGHT STATUS: GERMANY

As Germany too makes frequent use of the technique of reference to technical standards in regulations and as the problem has already attracted much attention there, this study also examines German law in order to assess the copyright position. Strikingly, the debate in Germany has not been about the consequences under copyright law of references to DIN standards in *legislation*, but has instead focused on references to DIN standards in *internal government rules (Verwaltungsvorschriften)*. These are comparable to the Dutch concept of 'policy rules' *(beleidsregels)*. As regards references to DIN standards in legislation, it generally assumed (tacitly) that they are covered by § 5 of the German Copyright Act *(Urheberrechtsgesetz)*, and that there is therefore no longer any copyright in the DIN standards concerned.

It is, incidentally, assumed in Germany that DIN standards come under the concept of work, although this has never been explicitly confirmed in the case law. There is no clear answer to the question of who has the copyright in the DIN standards. However, the DIN institution does reserve the rights to commercial exploitation of the standards. In addition, participation in a standards committee entails an obligation to remit the *Nutzungsrechte* to the DIN.

DIN standards can be elevated to the status of *Amtliche Werke* either through incorporation (i.e. literal adoption in the text) or by reference. Such 'works' are free from copyright in compliance with § 5 of the German Copyright Act. For this purpose, the *sich-inhaltlich-zu-eigen-machen-criterium* formulated by the *Bundesgerichtshof*, namely that a public authority has wished to adopt the standards, has been fulfilled. This may be evident from an expression of will *(Willensäußerung)* of the public authority *(Amt)* concerned, or from the fact that the authority has adopted the DIN standards as the content of its rules *(hoheitlicher Erklärung)* The DIN standards must have a certain degree of external effect upon individuals: if the DIN standards merely have the status of recommendations, this is not sufficient to make § 5 of the German Copyright Act applicable.

6 COPYRIGHT STATUS: THE NETHERLANDS

Copyright subject issue (section 10 of the Dutch Copyright Act)

To obtain copyright protection a work must have a sufficiently *individual and original character*. The drafters of NEN standards are bound by very detailed conditions as to the form, layout and structure of the standards. Furthermore, NEN standards consist to a large extent of scientific (technical) theories and accepted technical symbols, which are in principle not susceptible of copyright

protection under section 1, in conjunction with section 10, of the Dutch Copyright Act.

The purpose and scope of NEN standards is largely functional and it would be virtually impossible for such standards to have an individual character given the intention of standardisation. Nonetheless, it could still be argued that copyright can be obtained in a NEN standard in its entirety. Although the drafters of standards have only limited freedom of choice they are still required to make certain choices, which may depend for example on the intended level of safety. An example is the standard on ventilation. What criterion has been applied – is it that of 'a normal healthy person' or that of 'a CNSLD patient'? In view of the decision by The Hague Court of Appeal in the case of *Van Dale v. Romme,* in which a minuscule degree of originality of this kind was judged sufficient to grant copyright protection for the *key word collection* of Van Dale's Dictionary, it could be argued that NEN standards too can be the subject of copyright. Since it is not certain whether this ruling of The Hague Court of Appeal is in keeping with the interpretation envisaged by the Supreme Court in a previous judgment, it remains dubious whether NEN standards can be classified as 'works' within the meaning of the Dutch Copyright Act. Indeed, the answer could possibly differ from standard to standard.

Protection of writings

In the absence of 'full' copyright protection the NNI could invoke 'protection of writings' *(geschriftenbescherming)*, which is a specific form of copyright protection under the Dutch Copyright Act.

Ownership of copyright

If it is assumed that NEN standards can be the subject of copyright or 'protection of writings', ownership is vested in the NNI under section 8 of the Dutch Copyright Act. This is because the NNI mentions only its own name on the technical documents which it publishes and marks them as 'lawful' (within the meaning of section 8 of the Dutch Copyright Act).

Databank Directive

In assessing the question of copyright the study discusses the Databank Directive, which has yet to be implemented. Although the Databank Directive contains hardly anything new on the subject of copyright, it does introduce a kind of right based on effort or investment: a *sui generis* right by which a producer can prohibit the retrieval and re-use of the contents of his database. A collection of NEN standards could be eligible for *sui generis* protection, but a single NEN standard would probably not be. If an individual NEN standard

that forms part of a collection can be classified as a *non-substantial* part it can be retrieved or re-used within the meaning of the Directive. As it is still not at all clear how the terms of the Databank Directive will be interpreted, any statements about them are bound to be of a speculative nature.

Section 11 of the Dutch Copyright Act

The question whether NEN standards to which reference has been made in legislation are covered by section 11 of the Dutch Copyright Act is one of the central questions dealt with in this study. Section 11 provides as follows:

> There is no copyright in laws, orders and regulations issued by public authorities nor in judicial rulings and administrative decisions.

The basis of section 11 of the Dutch Copyright Act is the legal fiction that *'Everyone is deemed to know the law.'* This legal fiction implies that once a law has been proclaimed it is deemed to be publicly known. This is why legislation must be published, as discussed in *chapter 3*. Asking compensation comparable to copyright would be at odds with the tenor and spirit of section 11. It is evident from the literal text that section 11 covers everyone (i.e. the State and above all private publishers): "there is no copyright in laws, orders and regulations."

Whether references are static or dynamic, NEN standards (and the standards to which they themselves refer) are covered by section 11 and are therefore not subject (or no longer subject) to copyright. It follows that anyone is free to reproduce these technical standards and distribute them among the public, whether or not after editing them. References to NEN standards in policy rules are also covered by section 11 of the Copyright Act. This is because policy rules have been adopted by order since 1 January 1998 pursuant to section 1:3 of the General Administrative Law Act. The NNI reserves the copyright in all its publications. This reservation does not apply to NEN standards that are covered by section 11 in keeping with the above.

Related NNI publications

The study also examines whether publications relating to NEN standards referred to in legislation are covered by section 15b of the Dutch Copyright Act. Section 15b deals with documents which are made public by or on behalf of a public authority and whose further publication or reproduction is not deemed to be an infringement of copyright unless a reservation has been made. Examples of 'related NNI publications' are practical and/or technical guidelines that serve to explain a NEN standard, draft NEN standards for public scrutiny and so-called pre-standards.

My conclusion is that, judging in any event by the spirit of section 15b of the Dutch Copyright Act, this section should be applicable to NNI publications relating to the NEN standards referred to in legislation. Like parliamentary documents relating to the legislative process of the central government, such publications play a part in the interpretation of NEN standards referred to in legislation. I have therefore argued that there is in principle no scope for reservation of copyright in these publications. It is in my view undesirable to use this instrument to have the user defray the expenses incurred from public funds.

Since NEN technical standards have not come into force owing to the absence of proper publication *(chapter 3)* it could be argued that section 11 of the Dutch Copyright Act is not applicable either. This argument is specious for three reasons: first, the publication requirement relates only to the *entry into force* of generally binding rules and not to their adoption; second, a decision on matters of copyright is not dependent on issues of constitutional law; and, third, it follows from the adage *nemo turpitudinem suam allegans auditur* (no one alleging his own turpitude is to be heard) that the authorities cannot deny the applicability of section 11 of the Dutch Copyright Act on the grounds that the NEN standards have not come into force – this being something for which they themselves are to blame.

When the Databank Directive is implemented, a separate provision should be included to give further effect to the national statutory restrictions on copyright (sections 11 and 15b of the Dutch Copyright Act).

7 SOME ASPECTS OF COMPETITION LAW

Chapter 7 examines some related aspects of competition law. In fact, this discussion is superfluous as regards cases to which section 11 of the Dutch Copyright Act already applies, but it is nevertheless of importance in view of the implementation of the Databank Directive and for related publications not covered by section 11 of the Dutch Copyright Act.

Section 24 of the Competition Act prohibits companies from abusing a position of dominance in the market. The NNI (and NEC) is the sole (recognised) standardisation organisation in the Netherlands and therefore has a monopoly: its position of dominance is accordingly an established fact. The NNI claims to have the exclusive right to the standards published by the Institute itself and to related publications. The NNI is the sole source of standards in the Netherlands. The position of the NNI means that it can itself fix the prices and determine the terms of delivery. The costs of a single technical standard are between NLG 32.50 and NLG 400, whereas technical standards are – according

to a Dutch member of parliament (Van Zuijlen) – free or virtually free in other countries (in France for example). In addition, the NNI receives government subsidies.

Undertakings which have a function that is in the public interest can be exempted from the prohibition on abuse. It is necessary for this purpose that the function is derived from a statutory regulation, a decision of an administrative authority or a mixture of regulations, contracts and orders. As the central authority for standards and standardisation in the interests of health, safety and efficiency in the social sphere, the NNI could be eligible for an exemption if this could be inferred from the existence of the contract with the State under private law, the resulting mandates and the individual standardisation assignments in the context of legislation and the related project-linked subsidies that there is a mixture of regulations. In the case of dynamic reference the situation with regard to the exemption problem is clearer: the NNI is an independent administrative authority and has been invested with (substantive) powers under public law. In such a case it is necessary to determine whether this abuse is justified.

As the NNI wears two hats – as standardiser in the public interest and as publisher of its own technical standards drafted in the public interest – it is no simple matter to assess the scope for exemption referred to above. Nor is the position altered by the fact that the legislator wishes the standardisation costs to be recouped from the sale of the standards: the Competition Authority is in any event not automatically bound by this wish.

The question whether the NNI is justified in 'abusing' its dominant position has been examined in the light of article 86 of the EC Treaty and the Magill judgment. Under article 86 of the EC Treaty this article takes precedence over intellectual property rights in the case of abuse of a dominant position by monopolies or quasi-monopolies of copyright information. The exercise of such a position does not necessarily constitute abuse of power, which occurs only in special circumstances (Magill). The existence of a dominant position and the exercise of exclusive rights to the publications combined with the high charges could constitute an abuse of a dominant position in keeping with the Magill judgment. Support for this view can be found in the Intellectual Property Rights Notice of the European Commission.

8 Government Information (Public Access) Act

The question whether the Dutch Government Information (Public Access) Act (WOB) applies to a government minister who refers to NEN standards in legislation is discussed in *chapter 8*. The question has been answered in the affirm-

ative because a minister is deemed on the basis of the Government Information (Public Access) Act to be an administrative authority within the meaning of the Act. This means that a request for information about NEN standards to which reference is made in legislation can be submitted to the minister concerned. Before granting such a request the minister has to assess whether the requested NEN standards relate to an 'administrative matter', in other words to the policy of the minister (including the preparation and implementation of policy). This condition is naturally fulfilled in the case of NEN standards to which reference is made in legislation since they relate by definition to legislative policy.

The minister can comply with a request for information in various ways, for example by supplying a copy, by allowing the contents to be inspected, by providing an abstract or a summary of the contents or by giving information. It is assumed in this connection that the minister is not able to refuse to give information by referring to the NNI's publications. It is noted in passing that a considerable discrepancy appears to exist between the rates that the minister may charge under the Government Information (Public Access) Rates Order for providing NEN standards (or information about them) under the Government Information (Public Access) Act and the rates charged by the NNI for the NEN standards.

I have also examined whether a request for information under the Government Information (Public Access) Act can cover 'related NNI publications' concerning NEN standards, for example preparatory documents, future (legislative) NEN standards and informative documents such as practical guidelines. This does appear to be the case. However, if the minister is required under the Government Information (Public Access) Act to grant a request for related documents (or information about them), there may be a clash between this Act and the Copyright Act. Related publications do, after all, involve the copyright of third parties (for the time being of the NNI as 'third party') in documents containing (government) information. The government has taken the position in respect of such documents that a conflict arises only if the provision of information under the Government Information (Public Access) Act is deemed to be a copyright activity such as publication and reproduction. In its view this is only the case to a limited extent. The government now takes the view that the duty of publication under the Government Information (Public Access) Act is a limitation of copyright within the meaning of section 1 of the Copyright Act: the Government Information (Public Access) Act takes precedence over the Copyright Act.

Nonetheless, the minister must request the consent of the NNI, which has reserved copyright, before passing on information about related publications to an applicant.

I have also studied whether the Government Information (Public Access) Act is applicable to the NNI in its capacity of independent administrative authority (as is the case with dynamic reference).This proves not to be the case because the NNI has not been designated by order in council (section 1a (d) of the Government Information (Public Access) Act), which would be necessary if this Act were to be applicable. Since dynamic reference involves hidden delegation of legislative powers, it is desirable – and indeed necessary given the present state of the legislation – that the NNI should be designated by order in council as an administrative authority within the meaning of the Government Information (Public Access) Act in order that the regime under this Act is extended to the NNI itself.

9 RECOMMENDATIONS

The most important conclusion of the study of the public law and copyright status of the NEN standards to which reference is made in legislation is that they have thereby acquired the status of generally binding rules and come within the ambit of section 11 of the Dutch Copyright Act. It follows that they are free of copyright and that anyone may publish and reproduce them within the meaning of the Dutch Copyright Act. This conclusion brings about a number of consequences which have been discussed above. In this book I have also made a number of recommendations the most important of which are summarised below.

- *Recommendation 1*
  Publication of NEN standards in conformity with the Publication Act

As NEN standards have acquired the status of generally binding rules by reference to them in legislation, they are subject to the regime of the Publication Act. This means that they have to be published in conformity with that Act. Accordingly, they have to be reproduced in their entirety in the Government Gazette *(Staatscourant)* or in an appendix to the Government Gazette, or in a publication journal made officially available by the authorities.

The 'deposit-for-inspection' or 'footnote' method presently used for publication of NEN standards does not fulfil these requirements. Quite apart from the result – naturally unintentional – that the standards are invalid, this method means that there is much less awareness of NEN standards than should be the case for generally binding rules. NEN technical standards should therefore be published in conformity with the publication rules.

- *Recommendation 2*
  The availability of the NEN standards will have to be financed out of public funds and not by application of the user-pays principle

As, according to my findings, NEN standards referred to in legislation come under section 11 of the Copyright Act anyone is entitled to reproduce and publish them. Nor is this altered by the copyright reservation made by the NNI. Hitherto the view taken in practice – first and foremost by the NNI – has been different. The exclusive sale of the NEN standards – including those to which reference is made in legislation and for which prices are asked that are much higher than for other legislation – is very definitely a major source of income for the NNI.

I very much hope that the NNI and the Dutch authorities connected with the NNI in Delft regard my findings not as an attack on them but, on the contrary, as a recognition of the public importance of a form of self-regulation that deserves elevation to the status of statutory standard.

The applicability of section 11 of the Copyright Act – after judicial confirmation if this is contested by the NNI – means that the NNI will sooner or later face competition from third parties. Such competition will bring the prices of the NEN standards in question down to the going market rate. Anyone who compares the prices of the Kluwer and Vermande collections of lecture notes with the prices charged for the entire collection of NEN standards referred to in legislation will understand what I mean. Another consequence will therefore be that the NNI loses its major source of income from sales of these standards.

Anyone who 'minds' about this or argues that it would 'jeopardise the very existence of the NNI' is, in my humble opinion, being very short-sighted. If one is in favour – as I am – of the system of standardisation and has no qualms about the system of statutory reference to NEN standards (provided that they are properly announced), one must also – other things being equal – acknowledge that the NNI requires another source of income to make up for the loss of income from sales of NEN standards referred to in legislation. Given the public interest factor to which I have just referred, the source of alternative revenue should naturally be public funds.

Public funding (in any event for the NEN standards referred to in legislation but also, for my part, for related publications) would tie in seamlessly with the system of section 11 of the Copyright Act and, in broad outline, also with section 15b of the Copyright Act, which deal with direct legislation and central government publications from 'The Hague'. (Although the latter system has been temporarily derailed as a result of the Kluwer-ADW contract discussed in *chapter 6*, I have not gone into this here.)

I should like to give the NNI the greatest possible support (albeit unrequested) in continuing its activities in the public interest and in demanding – rightly – a much simpler system of financing from public funds. In my view, the NNI is entitled to demand replacement of the present system of writing invoices and administering the transaction costs per NEN standard (which also involves rather strained attempts to guard its reading room and ensure that no one makes a photocopy).

Needless to say, such a convoluted and time-consuming arrangement can never have really been the wish of the NNI itself and was forced upon it by the central government (or part of it) in The Hague. The latter wished to have the benefits of the NNI regulations, but was not willing – unlike the situation with its own legislation – to bear the burdens. On the basis of the user-pays principle – a principle that is indefensible in the case of legislation – these burdens were then passed on to the user and the NNI was made the system's toll gatherer against its wishes.

No toll should be charged for generally binding regulations. Responsibility for the system error therefore rests in my view with the authorities in The Hague and not with the NNI. If my book results in the NNI being freed – and I stress once again that it has not asked for this – from its role of toll gatherer and being paid out of public funds instead, I hope that I will still be welcome to drop in for a cup of tea with the NNI officials.

The hybrid and contradictory situation – in which one part of the government machinery in The Hague has put the NNI into this unfortunate position while another part of the same machinery (the Ministry of the Interior with its Government Information (Public Access) Act) has stipulated access to the NEN standards referred to in legislation at a much lower rate – can then be swept away altogether.

At a rather different level, my last recommendation and wish is therefore that the copyright and databank aspects of this thesis do not necessitate litigation. I hope that the authorities in The Hague are as anxious as I am to avoid all the time and expense entailed by litigation and will simply arrange for the NNI to be able to release the NEN standards in question from copyright without getting into financial difficulties. The spirit of section 11 of the Copyright Act is quite clear, as the European Commission too has emphasised. And even if the letter of section 11 is not particularly clear, it would still be wrong to let the matter become the subject of a legal contest in court.

10 IN CONCLUSION

Even if the recommendations made in this book are adopted, thereby bringing about an improvement in the present situation and complying with the statutory rules, it is clear that the accessibility of the NEN standards – and of legislation in general – can still be improved. I am referring here to the fact that the availability of legislation often leaves much to be desired – a point of view which has given rise to much debate in recent years. I should therefore like to endorse the view of a former State Secretary for the Interior, Mr. J. Kohnstamm – which is still in the news in 1998 – who believes that legislation should be freely accessible for everyone on the Internet. I take this to mean *all* legislation *including NEN standards* to which reference is made in legislation. The authorities do, after all, have an (unwritten) substantive duty to ensure the availability of legislation. If they entrust this duty to private publishing houses – as is presently the case with, for example, the contracting out of the General Databank legislation and regulations – the authorities must either release the (consolidated) legislation from copyright or themselves ensure that the legislation and the relevant NEN standards are available.