Copyright in Non-Original Writings Past – Present – Future?

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Introduction

Although my father has been active in different fields of the intellectual property law science, copyright always stayed closest to his heart. It is probably for that reason that he has written so passionately against one single word in the Dutch Copyright Act.[1] He even qualified this subject as one of the essential issues of copyright law.[2] He wrote on the subject, lectured about it and debated over it. That one word, however, is still part of the Dutch Copyright Act. But how long will it resist the pressure of international treaties, EC directives and new national legislation?

The Past

The Creation

Article 10 of the Dutch Copyright Act of 1912 contains a lengthy catalogue of works that are protected under that Act. Paragraph 1 starts (under 1) with 'books, brochures, newspapers, magazines and *all other writings* ...'. This list differs from the catalogue as contained in Article 2 of the Berne Convention, which mentions 'books, brochures and other writings'. The difference is the word 'all'. It is quite clear that at the time (1912), the government drafted Article 10[3] of the Copyright Act in this way with the intention to extend copyright protection not only to works which would meet the originality standard of the Berne Convention, but also to writings which would lack any and all originality. Even though it was clear that the Dutch Act would create protection for works that fall outside the scope of the Berne Convention, the government felt that many printed matters should be protected against copying, as was the

1 H. Cohen Jehoram, 'Schrap één onzalig woordje uit de Auteurswet 1912', *NJB* 1992, pp. 1542–1543 and many of his publications mentioned below.

2 H. Cohen Jehoram, *Kernpunten van auteursrecht*, Nijmegen 1993, pp. 109–111.

3 At that time, still Article 9.

case under the preceding Act of 1881. Mentioned were such examples as lists of sermons, lists of festivities, and theatre programmes. This protection for non-original writings was a remnant of an eighteenth-century printer's right. The introduction of this right in the modern Act was already at that time heavily criticized.[4] The protection in non-original writings was nevertheless maintained in view of the political wish to protect substantial investments made by printers and publishers.[5]

Although the copyright in non-original writings was implemented, it remained under constant attack from the side of copyright scholars,[6] as a copyright in non-original writings of course remained a strange phenomenon. Not only is it contrary to the very essence of copyright, it has also had undesirable practical effects. Where there is a general notion throughout the world that facts in themselves cannot be protected,[7] a copyright in non-original writings in practice (often) leads to that situation, in particular where exhaustive lists of data are involved.

SITUATION ABROAD

Although the Dutch copyright in non-original writings is in itself unique, similar results have been obtained in Denmark, Finland and Sweden (through catalogue protection), and in the United Kingdom and Ireland (through the 'sweat of the brow' doctrine). This 'sweat of the brow' doctrine was often applied in the United States too, until the United States Supreme Court made it clear that for copyright protection a minimal degree of originality is necessary.[8] This decision made some of us in the Netherlands feel somewhat uneasy. Where we always felt that we and our continental copyright system were way ahead of the United States – which joined the Berne Convention only in 1989 – we were now faced with the fact that the Dutch Copyright

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4 P. Scholten, *Verzamelde Geschriften III*, pp. 531–533; F.W.J.G. Snijder van Wissenkerke, *Het auteursrecht in Nederland*, Gouda 1913, p. 162.

5 Memorie van Toelichting and Memorie van Antwoord on (then) Article 9 Auteurswet 1912, *Parlementaire Geschiedenis van de Auteurswet 1912*, Den Haag 1989, pp. 10.5–10.6 and J.H. Spoor/D.W.F. Verkade, *Auteursrecht*, Deventer 1993, No. 51.

6 Besides H. Cohen Jehoram (*see* note 1), also: H.L. de Beaufort, *Auteursrecht*, Zwolle 1932, pp. 72—78; L.J. Hijmans van den Berg in his notes under Supreme Court 17 April 1953, *AA* III (1953–1954), p. 128, Supreme Court 27 January 1961, *NJ* 1962, 355 and Supreme Court 25 June 1965, *NJ* 1966, 116; E.D. Hirsch Ballin in his notes under Supreme Court 27 January 1961, *AA* 1961, p. 159 and Supreme Court 25 June 1965, *AA* 1966, p. 345, and in: 'De Herziening der Auteurswet', *WPNR* 1953 (4299), pp. 277–281, 'Pseudo-auteursrechtelijke programmabescherming', *NJB* 1966, p. 710; S. Gerbrandy, *Kort commentaar op de Auteurswet 1912*, Arnhem 1992, pp 45–47. *See* also the footnotes in Th.C.J.A. van Engelen, 'De geschriftenbescherming in de Auteurswet en de bescherming van daarmee op één lijn te stellen prestaties', *BIE* 1987, pp 243–253.

7 *Cf.* already J. Kohler, *Das Autorrecht, Eine zivilistische Abhandlung*, Jena 1880. *See also* P.B. Hugenholtz, *Auteursrecht op informatie*, dissertation, Deventer 1989 and E.J. Dommering/P.B. Hugenholtz/J.C. Ginsburg/G.W.G. Karnell/T. Koopmans/M. Vivant (eds.), *Protecting works of fact*, Deventer 1991.

8 *Feist Publications Inc.* v. *Rural Telephone Service Company Inc.*, Supreme Court of the United States 27 March 1991, case 1282, with note H. Cohen Jehoram, *Informatierecht/AMI* 1991, p. 179.

Act still granted copyright to non-original writings, where the United States applied the Berne Conventions' originality criterion.

LIMITATIONS

It should be noted, however, that the scope of copyright protection in non-original writings has been limited through the jurisprudence of the Dutch Supreme Court. The most important limitations[9] are that protection is only granted against copying from the writing involved (which lays a heavy burden of proof on the plaintiff)[10] and that not all copyright provisions automatically apply to the protection of non-original writings.[11] Every provision of the Copyright Act should be considered separately, and in view of the background of that provision it should be determined whether or not it applies to the protection of non-original writings. In that respect I would for instance assume that there is no protection of moral rights for non-original writings, as an emotional bond between author and work usually does not exist in those cases and a change in data will not harm the reputation of the author as 'creator'. Also it is necessary that the writings are made public or are intended to be made public.[12] Because of these limitations, the copyright protection in non-original writings has also been called a 'pseudo-copyright'[13] or even 'a protection overdressed as a pseudo-copyright in non-original writings'.[14]

This pseudo-copyright in non-original writings is important to the Dutch public broadcasting associations. The allotment of broadcasting time among them is dependent on the strength of their respective memberships which, in turn, are based on subscriptions to the radio/television guide each broadcasting association publishes. The above-mentioned jurisprudence weakened the position of public broadcasters, as it was up to them to prove that a defendant had used their broadcasting data as the source for his competing publication. This judicial condition therefore effectively weakened the position of the entire broadcasting system.[15] In order to protect it, part of the pseudo-copyright was transferred to the Dutch Media Act.[16] This new provision in the Dutch Media Act placed the burden of proof of non-copying on the defendant, and in that sense broadened the pseudo-copyright.[17]

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9 For a complete list *see* J.H. Spoor/D.W.F. Verkade, *op. cit.*, No. 55.
10 Supreme Court 27 January 1961, *NJ* 1962, 355.
11 Supreme Court 25 June 1965, *NJ* 1966, 116.
12 *See* note 11.
13 *See* note 6 and H. Cohen Jehoram, note under ECHR 6 July 1976, *AA* 1979, p. 145.
14 H. Cohen Jehoram, 'Hybrids on the borderline between copyright and industrial property law', *RIDA* 153, 1992, pp. 74–145.
15 H. Cohen Jehoram, note under Supreme Court 4 January 1991 (*Grote Van Dale*), *AA* 1992, p. 31.
16 Article 22 Omroepwet, later Article 59 Mediawet.
17 For an overview of the history of broadcasting data protection in the Netherlands, *see* P.B. Hugenholtz, 'Het einde van het omroepbladenmonopolie nadert', *Mediaforum* 1995, pp. 82–87.

Later on the copyright protection in non-original writings was (inevitably) limited by competition law. The Magill decision made clear that an abuse of a dominant position could occur when copyrights are (ab)used in order to protect such a position.[18] In this case the intellectual property owners with respect to broadcasting data tried to prevent the introduction of a new product on the TV-guide market (a TV guide containing the broadcasting data of different broadcasters) by refusing to provide those data under a licence. This was considered an infringement of Article 86 of the EC Treaty. The same doctrine has been applied in the Netherlands in the case of a telephone directory on CD-ROM.[19] Although pseudo-copyright protection for the list of names, addresses and telephone numbers was granted, the appellate court did consider the possibility that PTT Telecom was abusing its dominant position by refusing to grant Denda a licence under reasonable terms.

EXTENSION

Not only has the pseudo-copyright in non-original writings been limited, but the number of works protected under it has been greatly extended. Article 47 of the Dutch Copyright Act states that it has effect with respect to works that have been published in the Netherlands and to works the author of which has Dutch nationality or is domiciled in the Netherlands. This excluded direct applicability of the pseudo-copyright to foreigners or foreign works. Also, foreigners do not have the possibility to claim rights under the Berne Convention, as that Convention does not provide for a copyright in non-original writings. However, the fact that foreigners (as opposed to Dutch nationals) do not have a copyright in their non-original writings in the Netherlands contravenes Article 6 of the EC Treaty,[20] which forbids discrimination on the basis of nationality. This follows from the decision in the *Phil Collins* case.[21] Many remember who first recognised the true impact of this decision, which indeed turned out to have the effect of a landslide.[22] As a result, in the Netherlands pseudo-copyright protection should now be granted to the non-original writings of all nationals of EC member states.[23]

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18 ECJ 6 April 1995 joint cases C–241/91 and C–242/91 (*Magill*), *AA* 1995, p. 111 with note H. Cohen Jehoram and K.J.M. Mortelmans.

19 Court of Appeal Arnhem 15 April 1997 (*PTT/Denda*), *Mediaforum* 1997, p. B–72.

20 H. Cohen Jehoram in his note under Supreme Court 4 January 1991 (*Grote Van Dale*), *AA* 1992, p. 40.

21 ECJ 20 October 1993 joint cases C–92/92 and C–326/92, *Informatierecht/AMI* 1994, p. 91.

22 H. Cohen Jehoram, 'Het Phil Collins-arrest: een aardverschuiving in het (inter-)nationale auteursrecht', *Informatierecht/AMI* 1994, pp. 83–87.

23 H. Cohen Jehoram in *Nimmer-Geller* (1996), the Netherlands, § 9[1][b] and H. Cohen Jehoram, 'The EC copyright directives, economics and authors' rights', *IIC* 1994, p. 826; District Court Den Bosch, 11 March 1994, *NJ* 1995, 107 with note D.W.F. Verkade.

Another extension of pseudo-copyright protection in non-original writings lies in the fact that Dutch courts tend to grant that protection not only to physical writings, but also to compilations of electronic data.[24]

PSEUDO-COPYRIGHT IN PRACTICE

With all the limitations and extensions as indicated above, Dutch courts have granted pseudo-copyright protection to telephone directories,[25], broadcasting data,[26] hit parades,[27] lists of basic advertisements,[28] lists of stock prices,[29] catalogues,[30] game rules,[31] directions for use,[32] address lists,[33] theatre programmes[34] and word-puzzle dictionaries.[35]

The Present

The tide does, however, seem to have turned on the pseudo-copyright in non-original writings.

SOFTWARE DIRECTIVE

The first indications thereof can be found in the Software Directive.[36] This directive set an important precedent for exclusively originality-based copyright protection. Article 1 paragraph 2 of that directive states that the ideas and principles contained in computer programs and in interfaces are not protected. Furthermore a computer program will be copyright protected (par. 3) *only* if it is original in the sense that it constitutes the author's own intellectual creation. No other criteria may be applied to

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24 *Cf.* President District Court Haarlem 10 July 1996 (*PTT/Vuurwerk*), *Computerrecht* 1996, pp. 198–201; Court of Appeal Arnhem 15 April 1997 (*PTT/Denda*), *Mediaforum* 1997, p. B–72, and implicit: President District Court The Hague 20 March 1998 (*Vermande/Bojkovski*), *Informatierecht/AMI* 1998, p. 65.

25 President District Court Haarlem 10 July 1996 (*PTT/Vuurwerk*), *Computerrecht* 1996, pp. 198–201 with note P.B. Hugenholtz; Court of Appeal Arnhem 15 April 1997 (*PTT/Denda*), *Mediaforum* 1997, p. B-72.

26 Supreme Court 25 June 1965, *NJ* 1966, 116, with note L.J. Hijmans van den Berg.

27 President District Court Amsterdam 10 February 1977 (*Nederlandse Top 40*), *Auteursrecht* 1977, p. 66.

28 President District Court Zutphen 19 July 1984 (*Vraag en Aanbod*), *BIE* 1985, p. 148.

29 Court of Appeal Amsterdam 15 June 1917 (*Vereeniging voor de Effectenhandel*), *W* 10.163.

30 District Court Amsterdam 17 May 1989 (*Bureauklapper*), *Informatierecht/AMI* 1990, p. 51 with note H. Cohen Jehoram.

31 President District Court Assen 25 July 1978 (*Valkuil*), *BIE* 1979, p. 161.

32 District Court Amsterdam 3 June 1981 (*Dievenklauwen met montagevoorschriften*), *BIE* 1984, p. 325.

33 President District Court The Hague 21 May 1991 (*Nijgh/Samsom*), *BIE* 1993, 92.

34 Court of Appeal Amsterdam 4 February 1913, *NJ* 1913, p. 1107.

35 District Court Amsterdam, 15 June 1976 (*Super Groot Puzzelwoordenboek*), *BIE* 1978, p. 9.

36 91/25/EC of 14 May 1991, *OJ* L 122/42.

determine the eligibility of a computer program for this protection. This made it perfectly clear that copyright protection for non-original computer programs would not be allowed under the directive. In the Netherlands, this subject had led to a fiery dispute about a pseudo-copyright protection for computer programs.[37,38] With the implementation of the Software Directive, computer programs were excluded from pseudo-copyright in the Dutch Copyright Act, simply by stating that computer programs are not part of 'all other writings'.

DATABASE DIRECTIVE

During that time, the need for protection of databases became more urgent. After the Feist decision[39] it became clear to the negotiators working on the European Database Directive that copyright is not the proper tool with which to protect databases. The Database Directive[40] therefore contains a *sui generis* protection for those databases that are not original. This directive in a first draft only related to electronic databases, but now covers all collections of works, data or other independent elements that are organized systematically or methodically, and that can be accessed through electronic means or in any other way. This is an extremely broad definition of databases. Indeed it seems to cover all non-original writings to which pseudo-copyright has been granted in the Netherlands. If the obtaining, the checking or the presentation of the content of a database in respect of quality or quantity represents a substantial investment, then *sui generis* protection is granted. This seems to create a protection for all the non-original writings that have been considered worthy of protection under the pseudo-copyright. If no substantial investment was made, protection falls outside the quintessence of the copyright protection in non-original writings. Therefore, with the implementation of the Database Directive the need for such a pseudo-copyright protection seems to have disappeared.

Furthermore, the Database Directive again (indirectly) harmonises the originality test that should be applied under copyright law. Article 3 paragraph 1 states that a database shall be protected by copyright if it is original in the sense that it is a collection of works or materials which, by reason of their selection or their arrangement,

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37 On the one hand: H.R. Furstner/J.E.M. Galama/D.W.F. Verkade (reporter)/J.E. Vos, 'Report The Netherlands, Q 57, Protection of computer software', *AIPPI Annuaire* 1987/II, pp. 154–163, H. Cohen Jehoram, 'Computerprogramma's in de Auteurswet', *NJB* 1988, pp. 355-357; H. Cohen Jehoram, 'Herovering van koloniaal bezit', *NJB* 1988, pp. 784-787.

38 On the other hand: D.W.F. Verkade, 'Juridische bescherming van programmatuur', *BIE* 1983, pp. 298–303; D.W.F. Verkade, 'Computerprogramma's en geschriften: een onverstandige Nota van Wijziging', *BIE* 1988, pp. 46–52; D.W.F. Verkade, 'Computerprogramma's in de Auteurswet 1912: het vierde regime...', *Computerrecht* 1992, pp. 86–97; A. Patijn/F. Vellinga-Schootstra/P. van Dijken/D.W.F. Verkade, 'Gegevensbescherming, Preadviezen voor de Nederlandse Juristenvereniging', *Handelingen der Nederlandse Juristenvereniging*, deel I, Zwolle 1988.

39 *See* note 8 *supra*.

40 96/9/EC of 11 March 1996, regarding the protection of databases, *OJ* L 77/20.

constitutes the author's own intellectual creation. This originality test is, of course, the same as the originality test as prescribed in the Software Directive. But also the Database Directive does not leave it at that. It states (Article 3 paragraph 1) that no other criteria shall be applied to determine the eligibility of a database for this (copyright) protection. This clause therefore explicitly *forbids* copyright protection of databases that are not the author's own intellectual creation, these of course being non-original writings.[41] Also, in the explanatory notes to the directive (paragraph 3.2.6), the European Commission is quite clear in stating that non-original databases should not be able to profit from (pseudo-)copyright protection: 'It would be an unacceptable extension of copyright and an undesirably restrictive measure if simple exhaustive accumulations of works or materials, arranged according to commonly-used methods or principles could attract protection on the same basis as other literary works'. The notion that – according to the directive – certain databases (broadcasting data, telephone directories) should be excluded from pseudo-copyright protection in non-original works has been broadly accepted in the Netherlands.[42] But it goes further than that. Because the definition of databases is so broad (it even covers my Saturday shopping list), the pseudo-copyright becomes practically void: all those non-original writings that can and will be considered databases *may* not be protected under copyright law.

Although the Database Directive should have been implemented in the Netherlands by 1 January 1998, at the time of writing not even an official draft has been sent to the Dutch parliament.

COMPETITION LAW CONCERNS

Meanwhile political pressure on the public broadcasting system will probably lead to the abrogation of the broadened pseudo-copyright for broadcasting data in the Dutch Media Act.[43] This development should be seen in connection with the introduction of a new Competition Act in the Netherlands. Under the old Act, actions of newspapers trying to force the public broadcasting associations to provide their broadcasting data were unsuccessful because of the legal basis for that monopoly. The current changes are (also) clearly meant to make it possible for other market parties to obtain the broadcasting data.[44] Indeed, *De Telegraaf* newspaper has filed a complaint with the

41 H. Cohen Jehoram, 'Ontwerp EG-Richtlijn databanken', *IER* 1992, pp. 129–133.

42 H. Cohen Jehoram, 'Ontwerp EG-Richtlijn databanken', *IER* 1992, pp. 131–132; P.B. Hugenholtz, 'Het einde van het omroepbladenmonopolie nadert', *Mediaforum* 1995, p. 86. W.B.J. van Overbeek, 'De ontwerp EEG-richtlijn betreffende de rechtsbescherming van databanken', *Informatierecht/AMI* 1992, p. 123; H.M.H. Speyart, 'De databank-richtlijn en haar gevolgen voor Nederland', *Informatierecht/AMI* 1996, p. 178.

43 *Cf.* P.B. Hugenholtz, 'Het einde van het omroepbladenmonopolie nadert', *Mediaforum* 1995, p. 82; K.J.M. Mortelmans, 'Mediadingingswetgeving', *NJB* 1997, p. 581.

44 K.J.M. Mortelmans, 'Mediadingingswetgeving', *NJB* 1997, pp. 581–583.

newly created Dutch Competition Authority (Nederlandse Mededingingsautoriteit), which, in a provisional decision, concluded that the public broadcasting organizations were abusing their dominant position by refusing to provide those data.

Any Future?

Given all these developments, the question of course arises whether or not it is desirable to maintain the anomalous pseudo-copyright protection in non-original writings, or indeed if maintaining such a protection would still be allowed.

PSEUDO-COPYRIGHT DOES NOT FIT THE COPYRIGHT DOCTRINE

Already in 1912 the copyright in non-original writings was inconsistent with the Berne Convention and with international copyright traditions. In the draft for a new Book 9 of the Dutch Civil Code, E.M. Meijers had deleted the word 'all' from the first title thereof. Already then he proposed to formulate the definition of copyright protected works in such a way that it would be in agreement with the Berne Convention, the *communis opinio* of the legal science and the practice at it is anywhere else. Therefore, in his view, it would suffice to just follow the text of Article 2 of the Berne Convention.[45]

NO PRACTICAL INTEREST IN PSEUDO-COPYRIGHT

Also, there does not seem to be any practical interest in maintaining the pseudo-copyright in non-original writings any longer. The broadcasting data will at any rate be protected under a new Database Act. The same *sui generis* protection will be granted to any database (now: protected non-original writings) that has been collected or maintained through a substantial investment, so that no economic interest remains for the protection of non-original writings. As those writings are non-original, there also does not seem to be any moral justification for such protection.

PSEUDO-COPYRIGHT AND IMPLEMENTATION OF THE DATABASE DIRECTIVE

Given these circumstances, one would expect that with the implementation of the Database Directive the pseudo-copyright in non-original writings would disappear. However, it seems as though this will not be the case, at least if the current draft of the

45 Verslag der Commissie inzake Herziening van de Auteurswet (Commissie Alingh Prins), The Hague 1952 and footnote 13 in the work referred to in note 1 above.

Database Act is implemented.[46] According to this draft text, databases *that represent a substantial investment* would be excluded from pseudo-copyright protection in non-original writings (as had happened with computer software in the past), but the notion of a pseudo-copyright would (again) be maintained. According to the explanatory notes to the draft, this pseudo-copyright could still give protection for databases that have not been obtained or maintained through any substantial investment. However, not only is pseudo-copyright protection undesirable from a legalistic and a practical point of view, it is also contrary to the notion of the Software Directive, the provisions of the Database Directive and even the history of the copyright in non-original writings itself.

The Software Directive made it perfectly clear that it would not be permissable to grant any protection (thus also excluding copyright protection) to software that lacks originality.

The Database Directive explicitly excludes copyright protection for the wide range of non-original collections of data called databases, which basically covers all non-original writings protected under the pseudo-copyright in the past. The Database Directive does *not* leave room for (pseudo-)copyright protection in a non-original database, also not if the database does not represent a substantial investment (contrary to what the current draft proposes). Not only did these two directives *create* protection, they also clearly *limited* copyright protection for writings and (compilations of) data that do not show any originality. It would be contrary to this clear harmonization of the originality threshold for copyright protection to maintain the pseudo-copyright in non-original writings.

PSEUDO-COPYRIGHT AND ITS RATIONALE

Maintaining copyright protection for non-original writings would furthermore be contrary the rationale for implementing that protection in the first place. Although the legislator was heavily criticised for maintaining protection for non-original writings (which was outdated already in 1912), he did so because of the substantial investments that were protected in that way. Maintaining the pseudo-copyright in non-original writings (databases) that explicitly do *not* represent any substantial investment (as the current draft text suggests) would itself therefore (also) be contrary to the objective of that protection.

46 This draft is not an official document but was presented to the court dealing with the case: President District Court The Hague, 20 March 1998 (*Vermande/Bojkovski*), *Informatierecht/AMI* 1998, p. 65. On 20 July 1998, the bill for the Database Act was introduced in the Dutch Parliament (nr. 26 108).

Conclusion

Although a pseudo-copyright in non-original writings is undesirable, without practical merit and contrary to national and international legislation, the Dutch Copyright Act threatens to enter the twenty-first century without having been adapted to notions that have been common ground since the late nineteenth century.

Some things come too early (such as, for some: retirement), some things come too late (often: recognition), and some are long overdue. Quaedvlieg[47] wrote in 1987: 'The pseudo-copyright could just as well be an independent right of intellectual property, separate from copyright'. Now that even such a separate right *will* be created,[48] is it not high time to delete that one wretched word from the Dutch Copyright Act?

47 A.A. Quaedvlieg, *Auteursrecht op techniek*, dissertation, Zwolle 1987, p. 60.

48 Although implementation of the Database Directive is overdue, no 'database rights' can yet be claimed: President District Court The Hague 20 March 1998 (*Vermande/Bojkovski*), *Informatierecht/AMI* 1998, p. 65.