

## Dutch Copyright Act 1912 and EU Harmonization: The Economic and Moral Rights

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### The Dutch Approach

- 2 copyright rights:
  - *verveelvoudigingsrecht* (copying, adaptation)
  - *Openbaarmaking* (dissemination)
- General tort: Dutch Civil Code, 6: 162
- No 'grand design' (Visser, 214). But proved long-lived

### Advantages of the Dutch Approach: Flexibility

- *Flexibility*: Spoor, 186
- District Court of Rotterdam, 24 August 1995 (*Eindeloos Bridge*): Visser 241
- No implementation of Art 3 of ISD: Visser, 216, 241; De Cock Buning, 268
- But did not accommodate rental/lending: *De Spaarnestad v Favoriet* (1952); *Stemra v Free Record Shop* (1987)
- So needed amendment to implement RRD: Art 12(1)(3).

### Material/Immaterial Distinction

- *Might have anticipated* equivalence of material and immaterial : eg ECJ's recent decisions in
- Case C-128/11 *UsedSoft GmbH v Oracle* (3 July 2012), [47], [49], [58], [61] (rights in software exhausted where there is 'sale' irrespective of whether on CDROM or intangible); and
- Case C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland* (15 March 2012), [62]-[63] (communication to public includes making physical means –CDs and players – available to public). [But (?) isn't rental therefore communication?]

### Material/Immaterial

- But in fact the generality of "dissemination" breaks down in practice - Visser
- e.g. Art 12b exhaustion rule applies only to distribution of a "specimen", but not communication.
- So it is not obvious that Dutch law would have anticipated those ECJ decisions

### The Challenge: EU "maxima"

- International treaties – Berne, TRIPS, WCT, WPPT – create *minimum* standards
- EU law, in contrast, "harmonizes". That means it creates *upper* as well as lower limits. So eg harmonization of term means a MS state cannot have a shorter or longer term.
- Occasionally this is explicit: ISD, Recital 23, 24. "This right should not cover any other acts."
- Occasionally, there are only minima: Cab-Sat, Art 6(1).

## The Problem with Fixing *Maxima*

- Partial harmonization.
- So, even if particular harmonized rights are limited, acts falling outside those right may fall into un-harmonized rights (eg public performance).
- When will those “other acts” be a matter for national law, and when will national provisions be pre-empted?

### 3 Examples from Dutch Law (as described in the book)

- Public Exhibition
- Distribution of transformed version: *Poortvliet v Hovener*
- Deemed public rule

### Case C-456/06, *Peek and Cloppenburg KG v Kassina SpA* (17 April 2008)

- Was allowing customers to use chairs ‘distribution’? Was display of chairs ‘distribution’?
- CJEU: No. Distribution is limited to “acts which entail, and only acts which entail, a transfer of ownership of that object.” [36]
- (Note also Case C-5/11, *Donner* (21 June 2012), [26].)

## Considerations

- Would protection under a national right *undermine* harmonization of the right? Affect the IM? (Case C-61/05, *Commission v Portuguese Republic* (13 July 2006))
- Does the right fall within a right explicitly preserved: “confidentiality”/“unfair competition” (ISD, Art 9)?
- Is it a “moral right” and thus “outside the scope of this Directive” (ISD rec 19)?
- Does it fall within a field harmonized in vertical directives but not in ISD (and thus implicitly left to MS)? eg “adaptation” (CPD, Art 4(b), DBD Art 5(b)) “public performance” (DBD Art 5(d)) “secondary infringement” (CPD Art 7(c))

### 1. Public Exhibition

Art 12: The communication to the public of a literary, scientific or artistic work also includes:...

(iii) the public recitation, performance or presentation of all or part of a work or of a reproduction thereof.... **This provision shall apply also to an exhibition.**

Art 23: Unless otherwise agreed, **the owner**, possessor or holder of a drawn, painted, built or sculpted work or a work of applied art **shall be authorized to reproduce or publish that work so far as necessary for public exhibition or public sale of that work**, all subject to the exclusion of any other commercial use

### Verkade, 291, n 51

“...Article 23 of the Copyright Act establishes, within certain limits, the legal authority of owners .... of artworks or works of applied art... to exhibit these objects. **Because of the ‘certain limits’ (not to be discussed here), in the Netherlands a successful ‘Cassina v. P&C claim’ based upon the right of public exhibition or display, cannot be excluded.**”

Cf. Visser: “first sale ‘exhausts’ the exhibition right.”

### But would that be compatible with EU law? 'Yes.'

- (i) The ECJ in *Peek* was only considering the interpretation of Article 4
- (ii) Might be unharmonized like 'public performance'? [Or harmonized 'communication to public' after *PPL v Ireland*?] And would be unaffected by exhaustion under Art 4: cp. Case C-200/96 *Metronome Music* [1998] ECR-I 1953
- (iii) If display is "offering for sale": unharmonized accessorial liability?

### But would that be compatible with EU law? 'No'

- (i) In *Peek*, AG indicated that this needed to be interpreted in the light of the Treaty. And the proposed restrictions would be contrary to Art 34 and not justified under Art 36.
- (ii) Moreover, RRD harmonizes acts short of transfer of ownership (involving transfer of possession).

## 2. Distribution of Transformed Versions

*Poortvliet v Hovener* (1979)

D took pictures by P from calendar and transferred to panels and sold.

Held: openbaar maken.



### Compatibility with ISD, art 4(2)?

- Criteria of Art 4(2): consent + marketing in EU are necessary for exhaustion but not sufficient in all cases?
- Verkade says consistent with Art7(2) TMD.
- But essential function/specific subject matter of trade marks is different – to guarantee origin and quality. So is that relevant?
- Case C-128/11 *UsedSoft* (3 July 2012), [63]: SSM is to control first sale so as to enable "the rightholder to obtain an appropriate remuneration" (and rights in copies exhausted even though updated etc)

### Other possibilities

- **Reproduction?** Requires *proliferation/duplication/copy* even if transient?
- **Adaptation?** Unharmonized. Does 'adaptation' require alteration of the work's internal qualities, rather than its context/framing?
- **Moral right of integrity**  
Here analogy with TMD, Art 7(2) makes more sense.

## 3. Deemed Public

Art 12 (now 12(4)):

"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."

### **CJEU Case-Law on Art 3 of ISD and Art 8 of RRD**

- Case C-306/05 *SGAE v Raphael Hotels* [2006] ECR I-11519
- Cases C-403/08 and C-429/08 *FAPL* (4 October 2011), [183] ff
- C-162/10 *Phonographic Performance (Ireland) Ltd v Ireland* (3<sup>rd</sup> Ch) (15 March 2012)
- Case C-135/10 *Societa Consortile Fonografica v Marco Del Corso* (3<sup>rd</sup> Ch) (15 March 2012)

### **Case C-135/10 *Societa Consortile Fonografica v Marco Del Corso* (3<sup>rd</sup> Ch) (15 March 2012)**

- “the situation of a specific user and of all the persons to whom he communicates the protected phonogram must be assessed. For the purpose of such an assessment, account must be taken of several complementary criteria, which are not autonomous and are interdependent. Consequently, they must be applied individually and in the light of their interaction with one another, given that in different specific situations, they may be met to varying degrees.”

#### **The Factors**

- (i) the indispensable role of the user in giving access
- (ii) “an indeterminate number of potential listeners”: not restricted to “a private group”
- (iii) “implies a fairly large number of persons”; “a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant.” (Sequential as well as simultaneous)
- (iv) it is not irrelevant that the communication is of a “profit-making nature” (targeted and not caught by chance)

#### **Conclusion that Art 12(4) needs to be ‘read down’**

- Deeming in Art 12(4) seems to go beyond EU law, which treats ‘profit-making’ as a factor
- In *SGAE*, [AG57] AG Sharpston wondered whether ‘economic benefit’ was always necessary for a communication to be ‘to the public’. She declined to decide.
- Here, no (obvious) justification can be offered for deviating from EU law

#### **Conclusion**

- What about Dutch flexibility?
- It looks as if developments at the ECJ mean that, in various respects, going forward that flexibility will be increasingly limited