

ALAI BRUSSELS 2014

Moral rights in the 21st century

The changing role of the moral rights in an era of information overload

QUESTIONNAIRE

REPORT THE NETHERLANDS

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1. Origin, objectives and underlying philosophy of the moral rights in the Netherlands.

This part will be split in a paragraph concerning the origin (A) and a short comment on the objectives and underlying philosophy (B).

In paragraph (a), Origin of the moral right in the Netherlands, first a general characteristic will be sketched which attempts to summarize the 'spirit' of the Dutch doctrine on moral rights in a few key words (i). Under the second heading, 'legislative history', the legislative evolution will be dealt with. This allows to highlight the long term evolution of the moral right in the Netherlands. Apart from that, in the earlier era of development of the moral right the legislator sometimes took a synthetic approach of several aspects of the moral right at the same time. It is therefore more practical to deal with those issues in a general chapter.

When dealing with Question 2 of the Questionnaire, concerning the individual categories of moral rights, the development of the individual rights is commented in the light of case law and academic doctrine. In this way, the answers to Question 1 and 2 form an integrated whole.

a. The origin

(i) General features of the Dutch moral right.

Moral rights in the system of the Copyright Act

In the system of the Dutch Copyright Act of 1912, the moral rights of Article 25 – the rights of paternity and the integrity - are treated as exceptions to the exploitation right.

Moderately dualistic approach

Discussions about the monist or dualist nature of copyright have hardly been played a role. The prevailing opinion seems to be that the Dutch system should be characterized as moderately dualistic. It is however no point of discussion that moral rights can be used in order to defend commercial interests.

Between droit d'auteur and Copyright

The spirit of the Copyright Act 1912 predominantly was of a *droit d'auteur* nature. In some regards the system tends towards solutions based on a common law/copyright approach. This notably is the case where, according to Article 7 Copyright Act, the employer is considered to be the maker of works created by an employee in the execution of his duties. This issue also concerns the moral right, as part of the jurisprudence infers from the fact that the employer is qualified as maker, that the moral rights must also be vested in the employer. However, there is far from unanimity on this topic – although literature sometimes suggests otherwise – and in the more than a century old history of the copyright Act, the Dutch Supreme Court has never been called to decide on the issue. Otherwise, the moral rights by their nature mainly are a *droit d'auteur* issue. It nevertheless strikes that the Netherlands put strong emphasis on the practicability and reasonability of the results of the exercise of the moral rights. This applies to the legislative level as well as to the application by the judiciary.

Reasonableness

Concerned about the needs of practice and apprehensive of fundamentalist excrescences of the moral right, the Dutch put great emphasis on the need that the exercise of the moral right must remain within the limits of reasonableness. The legislator submits the exercise to a test of reasonableness, either directly or via the additional requirement that a violation of the right must be prejudicial to the honour or reputation of the maker. The jurisprudence follows the same direction. However, it would not be correct to state that as a consequence of this, the moral right is reduced over its full width. If, in certain cases, the courts find a violation of the moral right for which there exists no sufficient justification, the right may 'show its teeth' and will be enforced, even where this may have drastic social or financial consequences.

The role of jurisprudence and doctrine in the field of moral rights

The influence of judge-made law on the exercise of moral rights today seems the most important factor in the development of moral rights in the Netherlands. Although the Copyright Act of 1912 recognized moral rights and even the Act of 1881 contained features of them from the start, it was not until half a century later that gradually, a body of jurisprudence began to develop. As from the eighties, the volume of case law in the field of moral rights grew sharply. At an academic level, the attention given to moral rights was not always exuberant. In some cases this may have been inspired by the tacit conviction that the whole institution of moral rights was an outdated, somewhat sentimental curiosity, the role of which should as much as possible be reduced under a modern copyright doctrine. As a result, to a great extent the doctrine of the moral right might be characterized as genuinely judge-made. If good or even influential academic comments have been written, their guiding role may have been modest in comparison to other parts of copyright.

The number of decisions of the Dutch Supreme Court (Hoge Raad) dealing with moral rights in the strict sense presently is limited to only four,¹ to which should however be added some

¹ Dutch Supreme Court 29 May 1987, *Struycken and Unger v. Riet*, about the integrity right; Dutch Supreme Court 6 February 2004, *Jelles v. Zwolle* ('destruction of the *Wavin*-building'), LJN AN7830; *AMI* 2004, p. 140-152, note Seignette; *IER* 2004, nr 19, p 102-119, note Grosheide.

highly relevant decisions that deal with the moral rights issue from the angle of general private law (see below). However, there is a considerable body of decisions of lower courts.

Supplementary role of general private law

A striking feature is that from the earliest beginning of moral rights jurisprudence, moral rights protection by copyright has constantly been supplemented by private law solutions, found in particular in the law of obligations and in the general doctrine on unlawful acts. Frequently general private law even provides protection for interests copyright hesitates to underwrite. In certain experimental cases, where the courts might be in doubt as to the frontal application of the official doctrine of the 'absolute' moral right, they are willing to apply general private law without a shade of hesitation – essentially to the same result as would have been reached under the heading of the authors' moral rights. This refutes ingrained prejudices that the moral right would be some singularity for which no support could be found in the 'real' legal world outside copyright.

Continuing importance of the doctrine of general private law

Although the evolution of copyright has brought the moral right provisions to full life, the dialogue between general private law and moral rights doctrine is far from being closed, as can and will be buttressed hereunder by many examples. In the mid-eighties, when the development of an independent moral rights jurisprudence and doctrine was already in full swing, C.J.H. Brunner, the authoritative commentator on the law of obligations in the leading journal *Nederlandse Jurisprudentie (NJ)*, wrote in a note² that 'the description of the moral rights in Article 25 Copyright Act [had] no other significance than that of a closer specification of the respect which is owed to the maker of the work by virtue of the requirements of reasonableness and fairness (and – as far as third parties were concerned – by virtue of the standards of due care which must be observed in society).'

A moral 'right to exposure' developing under private law?

A more experimental doctrine developed in private law confirms that under circumstances, an author may have a (moral) interest in that his or her work is realized and communicated to the public. One could link this to another, meanwhile firmly established feature in the Dutch moral rights doctrine: the economic function of the right of paternity. The interest that the name of the author is known with the public is not so far from the interest that his work is known to the public. Perhaps we are witness to the gradual recognition of an '*interest in "exposure" of the work*'. Support for this could be found in some rather interesting case law of the Dutch Supreme Court of the last decades.

Literature

Various overviews in the English language on the moral right in the Netherlands and its evolution are available.³

² C.J.H. Brunner in *NJ* 1986, 692.

³ Herman Cohen Jehoram, Jan Kabel, Jeroen Arnolds, in: Jan Corbet, Fabienne Brison, Hendrik Vanhees, Guido Peeters (eds), *Le droit moral de l'auteur*, Congrès d'Anvers, ALAI 1993/*The moral right of the author*, Congress of Antwerp, ALAI 1993, respectively p. 179-185, 385-395, 455-459; Herman Cohen Jehoram and Mireille van Eechoud, Netherlands, §7, Moral Right, in: Paul Edward Geller (ed.), *International Copyright Law and Practice*; Eltjo J.H. Schrage, 'The Payer Determines, or Does He?', in: B. Demarsin, E.J.H. Schrage, B. Tilleman & A. Verbeke (eds), *Art & Law*, Brugge: Die Keure 2008, p. 200-229; F.W. Grosheide, 'The Netherlands', in: Gillian Davies, Kevin

(ii) **The legislative history: tracing the sources of the moral rights provisions**⁴

The origin of the moral rights in the modern sense in Dutch law lies no doubt in the Copyright Act of 1912. However, the Act of 1881 contained some precursors of the moral right which are interesting enough to mention.

Copyright Act of 1881: obligation to mention the source, immunity of copyright for seizure

The Act of 1881⁵ did not provide moral rights; even in countries much ahead of the Netherlands, the concept of the moral right was still *in statu nascendi*. Nevertheless, two interesting observations can be made.

Obligation to mention the source

“Provided that the source is mentioned”, Article 7(2) of the same Act of 1881 allowed to further publish by print news and articles from daily and weekly papers unless the copyright was expressly reserved in the head of the article and the work was duly registered. Is it a first precursor of the right of paternity introduced in 1912? As Henri Louis de Beaufort argued in 1909, this right could not be explained as a corollary of the (commercial) copyright. Indeed, the obligation to mention the source applied in the case in which the reservation of the copyright and/or the registration with the Ministry of Justice had been neglected and therefore, no commercial copyright in the work was granted.⁶

Immunity for seizure and right of divulgation

More importantly, Article 9, par. 3 of the Dutch Copyright Act 1881 declared that copyright was not eligible for seizure. In his influential thesis of 1909, Henri Louis de Beaufort fleshed out the question whether there was a relation between the rule of immunity for seizure and the concept of the right of divulgation.⁷ As in the Netherlands, the right of divulgation (and certainly the relation between that right and the immunity for seizure) has not always received great attention, this will be elaborated on somewhat more.

De Beaufort considers that only as far as it concerns works as not yet exploited (divulged) by the author, the right of divulgation is at stake, for the new publication will have consequences the reputation as a scholar or an artist for which he will have to bear the full responsibility. However, in case the author has already exploited the work or has given the

Garnett (eds), *Moral Rights*, London: Sweet & Maxwell, Thomson Reuters, p. 481-504, at 482; Jan J.C. Kabel and Antoon A. Quaedvlieg, *Moral Rights*, in: Bernt Hugenholtz, Antoon Quaedvlieg, Dirk Visser, *A Century of Dutch Copyright Law. Auteurswet 1912-2012*, Amsterdam: deLex 2012, p. 308-358.

⁴ This part on the legislative history is in large part based on the contribution of Jan J.C. Kabel in: Bernt Hugenholtz, Antoon Quaedvlieg, Dirk Visser, *A Century of Dutch Copyright Law. Auteurswet 1912-2012*, Amsterdam: deLex 2012, p. 309-319

⁵ M. Reinsma, *Auteurswet 1881. Parlementaire geschiedenis wet 1881 – ontwerp 1884*, Walburg Pers: Zutphen 2006, p. 86; J.J.C. Kabel in: J.J.C. Kabel and A.A. Quaedvlieg, *Moral Rights*, in: Bernt Hugenholtz, Antoon Quaedvlieg, Dirk Visser, *A Century of Dutch Copyright Law. Auteurswet 1912-2012.*, Amsterdam: deLex 2012, p. 308-358, at p. 312

⁶ H.L. de Beaufort, *Het Auteursrecht in het Nederlandsche en internationale recht*, thesis at the Faculty of Law of the University of Utrecht, P. den Boer Utrecht 1909, republished in facsimile in 1993 on commission of BUMA by WC den Ouden in Amsterdam, with a preface by F.W. Grosheide

⁷ P. 281 ff.

work free for publication⁸ there is no reason why the creditors would be prevented to seek recovery on the copyright. Let alone, De Beaufort added, if the copyright would have been assigned by the author, and would form a part of the assets of, for example, a publisher. He nevertheless carves out that seizure will only be possible for the ways of publication for which the author has given consent.

For these reasons, De Beaufort considered that Article 9(3) of the Act of 1881, forbidding the seizure of copyright altogether, went too far. Neither was there any indication, De Beaufort added, that it owed its existence to an early manifestation of the divulgation right. The Minister had simply declared that he shared the feeling of most of the Members, that a seizure of copyright was 'undesirable'. In the Explanatory Memorandum of a later bill for the protection of works of visual arts, the Government had remarked that allowing the seizure of copyright would lead to 'all kinds of difficulties'. However, De Beaufort sustained, those difficulties could hardly be insurmountable. De Beaufort nevertheless submits some pages later⁹ that the exploitation of an intellectual creation can not be placed on one level with other property rights. Showing sophisticated legal intuition as well as practical insight, he supposes that the execution of a copyright would create a considerable risk that it would end in the hands of a party with little respect for the personality rights of an author, whereas the author, in dire financial circumstances, would probably refrain from starting an expensive legal action with an uncertain result. Although De Beaufort himself found that these problems should be resolved by a special regime in the Code of civil procedure, it is by no means impossible that objections of this kind moved the Dutch legislator, in 1912, to partially maintain the general ban on seizure of copyright, as we will see.

The Copyright Act of 1912

The Copyright Act of 1912¹⁰ introduced a modified regulation of the immunity for seizure in Article 2(3). Its Article 25 recognized rights of integrity and paternity. Later additions in a special regulation for filmworks likewise contained provisions relevant for the protection of the moral rights.

1912: immunity for seizure based on the moral right

The immunity for seizure, which already figured in the law of 1881 (see above), was laid down in Article 2(3), though in a modified version:

Article 2.

[...]

3. The copyright that rests with the maker of a work and, after his death, the copyright in any of his unpublished works transmitted to his heir or legatee, is not liable to seizure.

The legislator, following the remarks made by De Beaufort, restricted the general eligibility for seizure to unpublished works. However, to the degree that the copyright still rested with the maker, the immunity for seizure was also upheld.

⁸ With a reference to the regulation for works of visual art in Article 9 of the Belgian Copyright Act

⁹ De Beaufort 1909, p. 286-287

¹⁰ The legislative history has been published in : *De Vries, Parlementaire geschiedenis van de Auteurswet 1912*, 's Gravenhage : SDU 1992

In reaction to a debate in the senate, the Minister clearly linked Article 2(3) to the moral right: "Quite rightly it was understood, that the ideal side of copyright forbids an unrestricted power of a creditor to seize this right."¹¹

1912: rights of integrity and paternity

It was not before 1912 however that the Dutch legislator introduced, in article 25 of the Act of 1912, the 'classic' moral rights such as the right of integrity and the paternity right. Even then, the wording of the moral rights article was to go a long way before it reached its present form. It was to be modified in 1931, 1972 and 1989. By 1989, Article 25 had become quite an extensive provision. In view of its central importance it is nevertheless quoted here in full. It reads in the present form:¹²

Article 25

- 1. Even after assignment of his copyright, the maker of a work has the following rights:**
 - a. the right to oppose the making public of the work without mention of his name or other indication as maker, unless such opposition would be unreasonable;**
 - b. the right to oppose the making public of the work under a name other than his own, as well as any alteration in the name of the work or the indication of the maker, in so far as these appear on or in the work or have been made public in connection with the work;**
 - c. the right to oppose any other alteration made to the work, unless the nature of the alteration is such that opposition would be unreasonable;**
 - d. the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the reputation or name of the maker or to his dignity as maker.**
- 2. After the death of the maker and until the copyright expires, the rights meant in the first paragraph rest with the person that the maker has designated by testamentary disposition.**
- 3. The right referred to in the first paragraph sub a, may be waived. The rights referred to sub b and c may be waived in so far as alterations to the work or its title are concerned.**
- 4. If the maker of the work has assigned his copyright, he remains entitled to make such alterations to the work as he may make in good faith in accordance with social custom. As long as copyright subsists, the same right shall belong to the person that the maker has designated by testamentary disposition, if it may reasonably be assumed that the maker would have approved such alterations.**

Article 25a

For the purposes of this section, 'relatives' means the parents, spouse or registered partner and the children. The rights of the relatives may be exercised by each of them individually. In the event of a dispute the Court may render a decision, which shall be binding on them.

We now turn to the historical development of these provisions, starting in 1912.

The moral right in 1912: alterations in the work and the name; reasonableness

The *Copyright Act of 1912* introduced moral rights in Article 25,¹³ reading as follows:

"Article 25. No alteration may be made in any work, mentioned in Article 10, 1° until 9°, with the exception of architectural works, without the permission of him, to whom belongs

¹¹ Memorandum of Reply of the Minister of Justice and the Minister of Colonies, Eerste Kamer (Senat) 1911-1912, nr 227, p. 592

¹² taken from the English translation by Mireille van Eechoud *in*: Bernt Hugenholtz, Antoon Quaedvlieg, Dirk Visser, *A Century of Dutch Copyright Law. Auteurswet 1912-2012.*, Amsterdam: deLex 2012, p. 505-546

¹³ Numbered, in the initial bill, as Article 23

the copyright in that work. If the maker has assigned his copyright, then during his life his permission is nevertheless also required.

The same applies with regard to the name of the work and the indication of the maker, as far as these appear on or in the work. However, if a work has not been made public under the true name of the maker, then he, to whom accrues the copyright therein has, after the decease of the author, the right to mention the true name of the maker on or in the work, if this one has authorized him to do so.

The provision in the first paragraph does not apply with regard to alterations of such a nature, that the maker or his successors in title could not in good faith refuse their permission. Also, the maker will keep, even if he has assigned his copyright, the right to make such modifications in the work as are permissible in good faith according to generally accepted standards.”

The ratio of the moral right in the Explanatory Memorandum of 1912

The Explanatory Memorandum¹⁴ is remarkably short as to the ratio of the moral right. It says:

“In close connection to the copyright stays the right to protect the work against alterations, which the owner (of the work, *ed.*) or others, in order to increase the sale value or for whatever other reason, would like to make therein. Without the permission of him, to whom accrues the copyright, this ought not to be done, as indeed the scope, the value, of the copyright is determined by the shape, which the maker has assigned to the work. Here, the legislator touches upon a highly ideal side of copyright, to such a degree that the right to oppose alterations must stay with the maker even when he has assigned the copyright to someone else; for despite the assignment, the tight ideal bond between the maker and the work continues to exist, only to come to an end with life.”

It is interesting that the Explanatory memorandum does not only recognize the ideal bond between the maker and the work as ground of the moral right, but also points at the fact, very concretely, that the shape assigned by the maker to the work determines the *value* of the work. It is as if the legislator connects the highly idealistic notion that it is the authentic expression of the author which determines the intrinsic value of the work, with an objective, down to earth statement that, given that the shape determines the value of the material object, the author keeps a right in it. It almost makes the impression that the legislator follows the reasoning, that the greater value of the author’s contribution being mixed with the lesser value of the material object would grant him a (moral) “property acquired by accession.”

Works excluded from the moral right in 1912

The first paragraph of Article 25 excludes two categories of works from the protection of the moral right: not only architectural works which are mentioned explicitly, but also, more implicitly, works of applied art. In fact, the Act mentioned these in Article 10, under 10°, whereas Article 25 was to apply only to the categories of Article 10, 1° until 9°.

The paternity right was not yet strongly articulated in 1912

The Act of 1912 tried to catch the whole bundle of moral rights under a comprehensive right to oppose *alterations* of the work. In the wording of Article 25 version 1912, the Act protects against alterations in either the work itself, its name or in the indication of the maker. That formulation could give rise to doubt whether the *general* right of the author to have his or her name mentioned was meant to be included. As we will see hereunder, in 1931 the

¹⁴ Tweede Kamer (Parliament) 1911-1912, nr. 227, nr.3, p. 12-13 (Article 23)

Minister would strongly sustain that this was the case;¹⁵ jurisprudence however developed in a sense which was not entirely unequivocal. Ultimately, the question became rather controversial in 1989 when the legislator finally wished to implement the full recognition of the paternity right, but economic stake holders argued this would be impracticable.

The test of reasonableness and the right to repent in 1912

Attention is further drawn to the final (third) paragraph of the article which contains a test of reasonableness: "The provision in the first paragraph does not apply with regard to alterations of such a nature, that the maker or his successors in title could not in good faith refuse their permission." The provision is the result from a remarkable amendment introduced by Drucker.¹⁶ Drucker opposed the text of the (old) third paragraph as proposed in the bill, and which read:

"The provision in the first paragraph does not apply with regard to alterations, which are the necessary consequence of changes in the destination or the use of the work or of any good, of which the work is a part."

Drucker argued that this provision allowed modifications which under circumstances could violate the moral right of the author. Even more interesting, he added that on the other hand, the proposed paragraph was too restrictive, because even after the assignment of copyright, the author should in certain cases keep the right to review his work, for example in order to adapt a new edition of a book in view of progress made in learning and science. The amendment was approved. Consequently, the right to repent was introduced in 1912 as a kind of corrective corollary to the integrity right.

Amendments in 1931. Architectural works.

*Scope of the moral right in 1931: extended to **architectural works***

Drucker's amendment even played a further role when in 1931, the exception made for architectural works was removed, so that the integrity right henceforth was to extend to those works as well. The change proposed in the bill¹⁷ met with the resistance of some members of Parliament. The Minister replied that the modified wording of Article 6bis of the Berne Convention¹⁸ made it impossible to maintain the old wording of Article 25. He could add, however, that in view of the amendment of Drucker, a prohibition to alter an architectural work would not be possible with regard to changes of such a nature, that the maker (or his successors in title) could not in good faith refuse their permission.

*Explanatory Memorandum 1931: the Copyright Act already recognizes the **paternity right***

The Explanatory Memorandum extensively argued that the Copyright Act in force already complied with Article 6bis of the Berne Convention which was a result from the Rome Conference of 1928, with the exception of a small modification to be applied to Article 25. The articles 25, 27 and 34 of the existing Copyright Act complied with the new Article 6bis. In particular, Article 25, par. 2, forbidding modifications in the name of the work or the indication of the maker, recognised the *droit de revendiquer la paternité de l'oeuvre*, for the author could demand that the public would find the correct name of the author mentioned when it made acquaintance with the work. Article 27 entitled the author to start an action

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¹⁶ Hendrik Lodewijk Drucker (1857-1917), in 1882 appointed as professor at the Faculty of Law in Groningen, and a member of parliament between 1894 and 1913.

¹⁷ TK 1930-1931, nr. 254

¹⁸ As a consequence of the Rome Act of the BC of 1928

for damages in case of infringement, even after the assignment of the copyright; the legislator linked this to the fact that the *droit à la paternité* stayed with author. Article 34 contained sanctions of criminal law.

In 1964, it turned out that the judiciary did not necessarily share this opinion. In the case *Niermeyer v. Nijhoff*,¹⁹ the District Court of the Hague held that, “in the absence of a mandatory legal provision” it was no infringement of the moral right to make no mention, in a scholarly publication, of the name of a contributor who had provided two important chapters for the book. E.D. Hirsch Ballin, who commented the decision, said this showed an urgent need for an addition to the law. It would nevertheless take almost 25 further years, that is, until 1989, before the Dutch Copyright Act finally adopted a full explicit recognition of the paternity right.

As from 1931,²⁰ the first paragraph of article 25 read:

“No alteration may be made in any work, mentioned in Article 10, 1° until 9°, without the permission of him, to whom belongs the copyright in that work.

Otherwise, the text of 1912 was maintained unchanged.

The moral right in 1972. Waiver, assignees, heirs.

The moral right revised in 1972

In 1964 a bill was introduced to finally implement the Brussels revision of 1948,²¹ which of course was long overdue. It took no less than eight years of consideration and intensive debate²² before the law was finally passed on 27 October 1972.²³ The legislator seized the opportunity to undertake a thorough revision of Article 25; the considerations in the legislative history are more elaborate than at earlier occasions.

Terminology: hesitation to adopt the term ‘moral right’

For example, the issue of the terminology is raised. The Minister states that a literal translation of the ‘often used’ term of ‘droit moral’ in Dutch, ‘zedelijk recht’ – the term was actually used by MP Drucker in 1912 - could lead to the misunderstanding, that the right concerned no more than a moral obligation, as opposed to a binding provision. Therefore, a wording had been chosen in which a translation of the term ‘droit moral’ was superfluous. However, starting with H.L. de Beaufort in 1909, the majority of Dutch courts as well as authors generally use the term of ‘persoonlijkheidsrechten’ (personality rights, or more officially: copyright personality rights), although ‘morele rechten’ (moral rights) continues to be popular as an alternative choice.

Amendments in the law of 1972

The legislator proposed changes concerning:

- the wording of the paternity right
- the regulation of the integrity right

¹⁹ District Court of The Hague 25 January 1965, *Niermeyer v. Nijhoff* (“Welvaart in wording”), NJ 1965, 76; *Ars Aequi* XIV, 1964-1965, p. 186 note E.D. Hirsch Ballin

²⁰ Act of 9 July 1931, *Staatsblad* 1931, 264

²¹ Nr. 7877

²² The reasons of the delay were not connected to the issue of the moral rights : see H. Cohen Jehoram, *De Auteurswet gewijzigd*, NJB 1973, p. 525-543

²³ Law of 27 October 1972, *Staatsblad* 1972, 579. Entry into force on 7 January 1973, see *Staatsblad* 1972, 722.

- the deletion of assignees of the maker as holders of moral rights
- the extension of the duration of the moral right from the date of the death of the author until the expiration of the exploitation right, 50 years *post mortem auctoris*
- the extension of the moral rights to henceforth apply to works of applied art as well, following the Berne Convention

Three of these changes will here be elaborated on somewhat more.

*The regulation of the integrity right. Limitation of the possibility of **waiver** of moral rights.*

As far as the integrity right is concerned, the bill introduced, apart from the right of the author to oppose – subject to the test of reasonableness – modifications of the work, an explicit right to oppose deformation, mutilation and other derogatory action ('atteinte')²⁴ in relation to the work, which could cause prejudice to the name or honour of the author or his dignity as a maker. The specific characteristic of an atteinte/aantasting of the work lied in the fact that the work as such did not need to have been changed; for example, a work could have been published in an unbecoming context.

It was further provided that – different from the right to oppose modifications - the right to oppose deformation, mutilation and other derogatory action could not be waived. As to this topic of waiver, the legislator made a careful weighing of interests. It was considered that a entire exclusion of every possibility of waiver would hamper legal transactions with regard to works eligible for copyright, so that in the end it would not be advantageous even for the authors themselves. On the other hand, creating a possibility of a comprehensive waiver of the moral rights would certainly lead to the use, in practice, of standard clauses which would make the whole regulation meaningless. The legislator then put forward that the bill meant to create a waiver of only certain parts of the integrity right, and more in particular of those parts "in which the interest of exploitation relatively weighed the most heavy and the honour and reputation of the author relatively had the least weight." This were the (simple) modifications in the work and its name. Not every waiver would be valid: it would not be if it were contrary to the public order or public morals or would lack a valid legal basis. The Minister ended by strongly asserting that as far as deformations, mutilations and other derogatory 'atteintes' of the work were concerned, or modifications in the indication of the maker, under no circumstances a permission in advance could be granted.

Assignees of the maker do not have moral rights. Modifications vs. the right of adaptation.

As we saw, the 1912 version of Article 25 seemed to designate the author as a holder of the moral right beside the copyright holder to which he had assigned the right. It provided:

"No alteration may be made in any work, mentioned in Article 10, 1° until 9°, with the exception of architectural works, without the permission of him, to whom belongs the copyright in that work. If the maker has assigned his copyright, then during his life his permission is nevertheless also required (emphasis added).

In 1972, the legislator considered this henceforth improper; he rightfully held that the successor in title of the exploitation right was not entitled to any role in the enforcement of the moral rights. It does not necessarily mean though that in 1912, the legislator made a naïve mistake against the nature of the personality right. It is not impossible that at that time, he made no distinction between the exploitation right in its form of the right of adaptation, and the moral right in its form of the right to oppose modifications. He started from the idea that actually, the author would keep his right to forbid adaptations; the only

²⁴ The Dutch term is 'aantasting'; the legislator refers to the French term of 'atteinte'

aspect of 'droit moral' was that the author did not lose this part of his exploitation right when he assigned the rest of his (commercial) 'copyright', but would stay empowered to exercise it. That means that the legislator was willing to grant, in 1912, a right of integrity of an extremely generous scope (!), and illustrates at the same time how lucid and justified the intervention was by which Drucker at that time subjected the exercise of that right to a test of reasonableness. It is also clear, however, that by 1972, the legal evolution made it inevitable to make a neat distinction between the right of adaptation and the moral right to oppose modifications.

The droit moral after death

By far the most vivid reactions to the bill of 1972 would however be stirred by the proposal to extend the duration of the moral right, in compliance with the Berne Convention, until 50 years after the death of the author, thereby creating what professor Dirk Visser would later call 'mortal rights'.²⁵ In the end, this led to the adoption of several amendments. As a consequence, Dutch law now restricts the exercise of moral rights to persons especially appointed by the last will. This Dutch 'shoot the widow'²⁶ mind set was to create embarrassing iniquities vis-à-vis surviving relatives. Jurisprudence managed in some cases to save foreign widows by manipulating international private law in ways which as such might have appeared questionable, but Dutch relatives continue to stay ignorant victims of the regulation of 1972.

After these changes in **1972**, Article 25 read as follows:

"Article 25

1. Even after assignment of his copyright, the maker of a work has the following rights:

- a. the right to oppose the making public of the work with mention of a name other than his own, as well as any alteration in the title of the work or the indication of the maker, in so far as these appear on or in the work or have been made public in connection with the work;**
- b. the right to oppose any other alteration made to the work, unless the nature of the alteration is such that opposition would be unreasonable;**
- c. the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the reputation or name of the maker or to his dignity as maker.**

After the death of the maker and until the copyright expires, the rights mentioned under a, b and c rest with the person that the maker has designated by testamentary disposition or by codicil.

The rights under a and b may be waived in so far as alterations to the work or its title are concerned.

If the maker of the work has assigned his copyright, he remains entitled to make such alterations to the work as he may make in good faith in accordance with social custom. As long as copyright subsists, the same right shall belong to the person that the maker has designated by testamentary disposition or by codicil, if it may reasonably be assumed that also the maker would have approved such alterations."

The moral right in 1985: applied to filmworks

Statutory waiver of the 'lower' moral rights and express safeguard of the core of moral right

²⁵ DJG Visser, *Mortal rights. Persoonlijkheidsrechten van degenen die hebben nagelaten na te laten*, Informatierecht AMI 1993, p. 169-171

²⁶ H. Cohen Jehoram, *Shoot the widow*, AMI 1998, p. 62-63

In 1985, an Act was passed in order to bring the Dutch Copyright Act in accordance with the Paris version of the Berne Convention of 24 July 1971.²⁷ An important part of this operation consisted in introducing a new and – according to Dutch standards – elaborate regulation of film works. The new regulation covered several important aspects of the moral right. The central element in this new regulation is Article 45*d*: a (rebuttable) presumption of transfer of the copyright to the producer once the film is ready for showing. The regulation of the moral rights revolves around that presumption of transfer. On the one hand it strives at securing that the aim pursued by the presumption of transfer, an unhampered circulation of filmworks, is not frustrated by the exercise of moral rights; on the other hand, it wishes to offer a safeguard that the core of the moral right is maintained. In order to secure the aim pursued by the presumption of transfer the law contains a rebuttable statutory waiver of most of the moral rights which could, without important reasons, hinder the commercial exploitation of the film work. To prevent that the regulation would overshoot the mark, Article 45*f* provides that the maker is assumed to have waived (only) the right to oppose *alterations* to his contribution; consequently, the right to oppose mutilations and impairments stays with the makers.

For a good understanding, one must know that according to Dutch law, the makers of a film work are taken to be [all] the natural persons who have made a contribution of a creative nature directed at the making of the film work.²⁸ It is not so that only a more or less select company of more important contributors is considered as makers of the filmwork.

The right of divulgation in film works (1985)

Articles 45*b* and 45*c* and *d* seem to start from the assumption that according to Dutch law, authors can exercise a divulgation right in their creations before they consider it as completed – and thereby gives considerable support to this thesis. This property of the divulgation right is put aside by a statutory presumption. The producer has the right to use uncompleted *contributions* to the film work (45*b*), although it is held out in the Explanatory Memorandum²⁹ that if this leads to a moral rights infringement as serious as a deformation or mutilation of the work, the maker can invoke the protection granted by Article 25, paragraph 1(c) – see, to that effect, Articles 45*e* and *f*. Furthermore, the producer alone decides when the *film work* itself can be considered as completed (45*c*). This is also a reduction of the right of divulgation, although it must be supposed that in a reasonable interpretation of the latter, only the most important contributors to the film, such as the director, would probably be able to successfully invoke that right. It is with regard to the director that the Explanatory Memorandum³⁰ foresees that parties might agree otherwise in writing. This is allowed with regard to both provisions.

Article 45b

Where one of the makers is unwilling or unable to complete his contribution to the film work, he cannot prevent the producer from using the contribution as created for the

²⁷ Act of 30 May 1985, Staatsblad 1985, 307

²⁸ Article 45*a*, par. 2

²⁹ Explanatory Memorandum of 10 April 1981, TK (Parliament) 1980-1981, 16 740, p. 12

³⁰ Explanatory Memorandum of 10 April 1981, TK (Parliament) 1980-1981, 16 740, p. 12

purposes of completing the film work, unless otherwise agreed in writing. With respect to the contribution he created, he is deemed to be its maker as meant in Article 45a.

Article 45c

The film work is deemed completed once it is ready for showing. Unless otherwise agreed in writing, the producer decides when the film work is ready for showing.

Article 45d

Unless the makers and the producer have agreed otherwise in writing, the makers are deemed to have assigned to the producer, as from the time meant in Article 45c, the right to make the work public, to reproduce it within the meaning of Article 14, to subtitle it and to dub the dialogue. [etc.]

The rights of paternity and integrity in film works (1985)

The exercise of moral rights *after* the completion of the film work, apart from the right to oppose alterations, which is subject to a statutory waiver to the benefit of the producer, these largely remains unaffected.

The *paternity* right even receives an extensive regulation in Article 45e. The Explanatory Memorandum³¹ considers the rights mentioned under a. and b. as customary and generally recognised, but, meaningfully, it adds: “whether Article 25 already encompasses these rights, is not certain.” This potential gap will not be stopped until 4 years later in 1989.

Article 45e

With respect to the film work, in addition to the rights meant in Article 25, first paragraph, sub b, c and d, each maker has the right to:

- a. have his name mentioned on the film work in the usual manner, with mention of his capacity or the nature of his contribution to the film work;
- b. claim that the part of the film meant sub b is also shown;
- c. oppose the mentioning of his name on the film work, unless such opposition would be unreasonable.

Article 45f

Unless otherwise agreed in writing, the maker is assumed to have waived the right to oppose alterations to his contribution as meant in Article 25, first paragraph, sub c, to the benefit of the producer.

The moral right in 1989. Full implementation of the right to the paternity of the work.

³¹ Explanatory Memorandum of 10 April 1981, TK (Parliament) 1980-1981, 16 740, p. 13

Photopiracy provided the incentive to table again the issue of the paternity right in 1989, in the frame of a bill aiming at combatting copyright piracy.³² The assertions of the Minister in 1931 proved not to impress the commercial counterparts of the photographers, who put forward, in essence, that the introduction of a paternity right would lead to unworkable complications in particular as far as the market for photographic works was concerned. Even Dutch ALAI uttered objections, but it also came up with a solution, in the form of the introduction of a reasonableness clause as already existed in Article 25. The Minister followed that advice and extended the reasonableness clause to the right of paternity.

MP Kosto brought up the issue of the moral right *post mortem*, asking the Minister with some apparent amazement whether it was true that, in the absence of a testamentary disposition, the moral rights could not be exercised by the next of kin. The Minister answered that in this respect, the already existing legislation was to apply to the right of paternity; and that 'in his view', the requirement of a testamentary disposition had been introduced in order to avoid conflicts as to the person entitled to exercise the moral rights post mortem. Still, the question of the application of this rule to the right of paternity might perhaps have deserved some further consideration. In many cases, and especially in cases where the author has not entered into special agreements concerning the mentioning of the name during his life, the exercise of the right of paternity by his heirs might often be justified and mostly rather uncontroversial. Was the danger of conflicts as realistic in the case of the paternity right as it had been held in the case of the integrity right?

The Act was passed on 3 July 1989³³ and entered into force on the first of October of that year.³⁴ The text of Article 25 took its present form, as cited here above in the beginning.

b. The objectives and the underlying philosophy of the moral rights in the Netherlands

Practical approach

The Netherlands do not exactly have a tradition of grandiloquence concerning the moral right. Shortly before the introduction of the copyright law in 1912, the first Dutch author to deal with moral rights in some depth was H.L. de Beaufort. His observations are practice oriented and reasonable. He does not seek a deeper philosophical foundation of the moral right, but refrains himself to the simple statement that when a work appears under the name of the author, he exposes his reputation and bears the responsibility for the work.

The majority of authors agrees that the basis of the moral right is the bond between the maker and the work.³⁵ Consequently, the right of integrity protects neither the work as such nor the

³² Bill nr 19 921 of 26 March 1987

³³ Act of 3 July 1989, Staatsblad 1989, 282

³⁴ Decree of 17 July 1989, Staatsblad 1989, 316

³⁵ S. Gerbrandy, *Kort Commentaar op de Auteurswet 1912. Commentaire de la loi Néerlandaise sur le droit d'auteur*, Arnhem: Gouda Quint 1988, at p.287; J.H. Spoor, D.W.F. Verkade, D.J.G. Visser, *Auteursrecht*, 3rd edition, Deventer: Kluwer 2005, p. 352; Du Bois, 'Over enkele aspecten van het morele recht van de auteur', *Auteursrecht AMR* 1984, p. 56; Kuypers, 'droit moral: grondslag en uitwerking', *AMI* 1988, p. 9, at 10; Quaedvlieg, *Auteur en aantasting, werk en waardigheid*, inaugural lecture Nijmegen 2002, p. 17.

reputation of the author as such, independently of the work. This issue might seem academic, but as will be shown, it is not without importance for the dogmatic construction of the power of the courts to mitigate the application of the moral rights in the frame of a weighing of interests.

2. What do the moral rights consist of in your country:

- right of disclosure (divulgation)
- right to claim authorship (paternity right)
- right to respect and integrity
- right to repent or to withdraw
- the capricious 'interest in exposure'
- the right of the painter to make similar paintings: a moral right?

2.1 The right of divulgation under Dutch law

The right of divulgation or of first publication is not mentioned as such in the law. Moreover, as was already remarked by De Beaufort in 1909, in most cases it 'hides' behind the more visible and concrete exploitation rights. That makes that it is often deemed hard to identify cases proving its existence. Some commentators doubt about that existence. Nevertheless, the Copyright Act contains some manifestations of the right of divulgation:

2.1.1 Traces of the right of divulgation in the Copyright Act

Immunity for seizure

Article 2(3) Copyright Act excepts from seizure the copyright which belongs to the maker and, after his death, the copyright in works which have not been published and belong to persons who have acquired them as heir or legatee.³⁶

Prohibition to quote from a non published work

Article 15a, para. 1 requires for a lawful quotation that the work has legally been published.

Article 16, para 1 contains an exception allowing, under certain conditions, the use of parts of a literary, scientific or artistic work for the purpose of illustration for teaching. Like Article 15a, para. 1, it requires that the work from which the part is taken has been lawfully made public.

Many or most authors relate the criterion that the work has legally been published to the moral right.³⁷ It is however open to various interpretations. In a first interpretation, there only would be a legal publication when the work is made available in print to the general public. This would entail serious limitations for the freedom to quote and therefore for the freedom of expression. In a second interpretation, closer to the moral right spirit of the right of divulgation, the work would have to be considered as legally published as soon as it leaves, with the permission of the author, his intimate circle. This is far from requiring a publication aiming at the general public.

³⁶ Spoor/Verkade/Visser, *Auteursrecht*, p. 365; Grosheide, 'The Netherlands', at p. 496.

³⁷ Spoor/Verkade/Visser, *Auteursrecht*, p. 180-181; J. Kabel, Privacy of Auteursrecht? Enkele ongekamde gedachten over grondslagen van het recht van eerste openbaarmaking, in: *Privaatrecht en Gros*, 1999, 237-251.

These questions will be dealt with under Question 8, regarding conflicts between the freedom of expression and moral rights.

Prohibition to make a work 'circulate' before it has appeared in print

A particularly interesting provision is Article 12, paragraph 1(2), which forbids to 'circulate'³⁸ (even in a small circle) a work, as long as it has not appeared in print. This seems to be clearly linked to the protection of the 'phase intime' of the work and therefore to the divulgation right. Apart from that, it obviously is written with the book market in mind; not only with regard to music, film and other work categories, but even with regard to writings other than books meant to be published as such, the provision would need to be interpreted in accordance with the work category. It does not prevent that it forms a clear manifestation of the divulgation right.

Right of privacy and right of divulgation

A question more or less related to Article 12, paragraph 1(2), and which up to now largely remains unsolved under Dutch law, is in how far the interest protected by this provision – or by the right of divulgation - must be restricted to considerations concerning the aesthetic qualities of the work or whether it may also extend to its informational contents.

Let us start with the case decided by the District Court of Arnhem on 8 August 1990. It concerned the diary of a daughter, whose two parents were engaged in divorce proceedings. In these proceedings, the father accuses his wife of misconduct in order to reduce his obligation to pay maintenance. The father lives alone in the marital home after this has been left by the mother and the daughter. In the attic of this home, the father finds an old diary of the daughter. It contains passages he apparently considers ideal to support his accusations of misconduct towards his wife. He quotes these passages in the procedure. He also sends quotations to his brother-in-law as well as to his parents-in-law.

The daughter accuses the father of unlawful conduct – not of copyright infringement. This should not surprise: aspects of protection of privacy dominate the case, no (commercial) copyright interest is at stake, and some of the aspects of the conduct of the father are not actionable under copyright, whereas they are under the general doctrine of unlawful conduct. Indignantly, the President of the District Court judges that the conduct of the defendant is unlawful 'in all aspects', including the reading (!) of the diary without the permission of the daughter.

However, the question remains whether the daughter could have invoked copyright protection. From a grammatical point of view, it can hardly be doubted that Article 12, paragraph 1(2) applies – unless one would read in that article, that it only applies to work destined to appear in print, which obviously was not the case for this diary. But should it apply as to its spirit? Some will uphold that the diary case in essence concerns nothing else than pure privacy interests, so that the application of copyright would not be well founded. Others might feel different. If the basis for the moral right must be found in the bond between the maker and the work, than it is obvious that this bond can result not only from the wording, but also from the subject and content. Moreover, to the extent that the author feels personally involved in subject and

³⁸ In Dutch: 'verbreiden'. See Chapters 8 by Dirk Visser and 10 by Feer Verkade.

content, it is almost impossible that this would not considerably influence aspects of the expression like the choice of words and style, the selection and arrangement of the factual elements, the personal judgment and interpretation of the author. Whether this will decide the case in favour of the (possible) application of copyright protection is however uncertain.

Uncompleted works

One of the practical applications of the divulgation right would be that an author has the right to prohibit the use of a work as long as he does not consider it as completed. Although Dutch law does not openly endorse this right, traces of such recognition can nevertheless be found.

According to Article 45b, where one of the makers is unwilling or unable to complete his contribution to a film work, he cannot prevent the producer from using the contribution as created for the purposes of completing the film work, unless otherwise agreed in writing. This suggests that in absence of this special provision, the general rule would be that a producer would not be entitled to use a work as long as the author does not consider it as completed, or that at least, the danger might arise that the author would be entitled to do this in certain situations.

2.1.2 Traces of the right of divulgation in Dutch case law

Case law might contain more support for the exercise of a divulgation right than is commonly believed.

The exploitation only starts at a moment the work has become outdated

In a case which opposed illustrator Geesink and Terra Nostra,³⁹ Terra Nostra published certain drawings made by Geesink only 19 years after they were made available to Terra Nostra. In the meantime, the style in which those drawings had been made had become old-fashioned. Terra Nostra was ordered by the Court to make mention of the fact that the drawings dated from 19 years back. It is an indication that if the exploiter chooses a moment of first publication radically different from the one the author was entitled to expect, his moral right may be infringed.

A previously unpublished fragment of the diary of Anne Frank

Clear references to the right of divulgation were made by the Court of Appeal of Amsterdam when it prohibited the pre-publication, by the press, of newly disclosed fragments of the diary of Anne Frank of 8 February 1943, containing observations about her mother.⁴⁰ The exercise of the right of divulgation may in such cases come into conflict with interests protected by the human right of freedom of expression.

2.1.3 Divulgation and Distribution

³⁹ Court of Appeal of Amsterdam 14 May 1964, Geesink v. Terra Nostra, *NJ* 1964, 453.

⁴⁰ Court of Appeal of Amsterdam 8 July 1999, *Diary of Anne Frank II*, *AMI* 1999, p. 116-120, note Hugenholtz, *Mf* 1999, 252 note Visser. See also Martin Senftleben, 'Quotations, Parody and Fair Use', in : Bernt Hugenholtz, Antoon Quaevlieg, Dirk Visser, *A Century of Dutch Copyright Law. Auteurswet 1912-2012*, Amsterdam: deLex 2012, Chapter 12 p. 359-412, for a detailed discussion of this case.

Can the moral Right of Divulcation under circumstances thwart the exhaustion of the Distribution Right? This was the question in two intriguing cases in the Netherlands which both led to decisions of the Dutch Supreme Court..

Calendar illustrations sold as paintings: a transformation right preventing exhaustion

In 1979, the Dutch Supreme Court rendered an intriguing decision which in the past 35 years has not stopped to puzzle copyright lawyers. The *Poortvliet* case concerned the question whether the distribution on a different market was allowed of calendar illustrations which had been legally acquired. The artist Rien Poortvliet, highly popular in the Netherlands for his paintings of subjects like horses, dogs, wild animals, farmers and gnomes, had licensed the publisher Unieboek to use illustrations from his hand for calendars. A third party acquired the calendars, cut out the illustrations, put them on chipboard and sold them in this form. The calendars had been legally acquired; consequently the right of distribution was exhausted. Despite this, the Dutch Supreme Court prohibited the sale in the new form.⁴¹ Reactions on *Poortvliet* commented on the surprising fact that in this case, the contractual terms of the licence between Mr Poortvliet and his publisher Unieboek seemed to also have been considered binding for third parties.⁴² However, Verkade convincingly argues that the decisive reason why exhaustion was denied in the *Poortvliet v. Hovener* case was the physical transformation of the copies, calling it the birth, in the Netherlands, of the ‘exhaustion-preventing-transformation right’.⁴³

Transformed copies and new markets

It does not seem too far-fetched to assume that the relevant consequence of that physical transformation of the copies is that the ‘transforming’ party can open up a new market by offering those transformed copies.⁴⁴ Perhaps therefore, the rule of *Poortvliet* could be explained as a rule that the exhaustion of the distribution right in a copy lawfully put on the market does not entail that the author also loses the right to serve, with a transformed product ‘extracted’ from that physical copy, a *different* market. In the same spirit, the Court of Appeal of Den Bosch read, in the ‘canvas transfer’ case to deal with hereunder, in the *Poortvliet* judgment that the “new form given to the copy [leads to] a new opportunity of exploitation for the one who markets that new form of the copy originally brought into circulation.”⁴⁵

Posters transferred on canvas

⁴¹ Supreme Court of the Netherlands 19 January 1979, *Poortvliet*, *NJ* 1979, 412 note L. Wichers Hoeth; *AMR* 1979, p. 50 note J.H. Spoor; *Ars Aequi* 1980, p. 311 note H. Cohen Jehoram. Also see J.H. Spoor, ‘Zijn de kalenders rechtmatig in het koninkrijk gewijzigd?’, *BIE* 1985, p. 242-247, at p. 245; Gerbrandy, *Kort Commentaar op de Auteurswet 1912*, Art. 12 Aant. 5, Arnhem: Gouda Quint 1988, at p. 131-132.

⁴² H. Cohen Jehoram, note in *AA* 1980, p. 311; J.H. Spoor in *AMR* 1979, p. 50, also see *BIE* 1985, 242, at p. 245

⁴³ Verkade, ‘First-sale or Exhaustion Doctrine in the Netherlands, in : Bernt Hugenholtz, Antoon Quaedvlieg, Dirk Visser, *A Century of Dutch Copyright Law. Auteurswet 1912-2012*, Amsterdam: deLex 2012, Chapter 11 p. 291-305, in section 4.3.

⁴⁴ In the same sense : A-G Verkade in para. 4.42 of his Opinion of 3 May 2013, ECLI :NL :PHR :2013 :CA0265, with the Dutch Supreme Court of 12 July 2013, *NJ* 2013, 400 ; *IER* 2013, nr. 61 p. 477

⁴⁵ Court of Appeal of Den Bosch 3 January 2012, considerations quoted in the decision of the Dutch Supreme Court of 12 July 2013, ECLI :NL :HR :2013 :CA0265 ; *NJ* 2013, 400 ; *IER* 2013, nr. 61 p. 477, para. 3.3 at p. 478

A more or less comparable situation arose in the case of the ‘canvas transfers’, a case in which, by the time this is written, questions have been put by the Dutch Supreme Court (Hoge Raad) to the European Court of Justice.

The company Art & All Posters started to separate, by a chemical process, poster illustrations from the paper they were fixed on and transfer them to a new support of canvas. This is done in the following way. Allposters takes a poster on paper. It applies to the poster a synthetic coating – the laminate – and subsequently transfers the illustration on the paper, by the use of a chemical process, to a canvas cloth. The canvas is fitted on a wooden frame. The analogy with the case of Poortvliet is obvious: there is a physical transformation of the copies, opening a gate to a new market segment. Of course, opinions can differ as to the question whether the transformation is either or not more radical than in the case of Poortvliet.

The District Court of Roermond assumed these acts did not constitute a reproduction or adaptation.⁴⁶ The Court of Appeal of Den Bosch⁴⁷ found an infringement of the distribution right. Deciding the case in the light of the judgment in Poortvliet, it considered that the canvas transfers had a new form; and that this new form led to new opportunities of exploitation, as their price, considerably higher than the price for paper posters, and their new form targeted a new group of consumers.

Following the Opinion of Advocate-General Verkade, the Hoge Raad decided to put questions to the European Court of Justice concerning the distribution right. Although the Hoge Raad mentions that Pictoright had invoked its moral rights, neither the Court of Appeal, nor the A-G or the Hoge Raad give attention to this question. For the following reasons, considering the moral right – and more in particular, the right of divulgation - might nevertheless have been fruitful.

The commercial function of the moral right of divulgation

The right of divulgation plays a somewhat hidden, but irrefutably material role in Dutch copyright law. In principle, it leaves to the author the right to decide how, when and in what form the work will be published. The characteristic of both the case of Poortvliet and the canvas transfer posters is that the work will be published in a new *form*. It therefore would seem difficult to determine, in a case like these, the scope of the exploitation right without having regard to the *right of divulgation* as well. It should be recalled that as we said before, the Dutch system is not strictly dualist, so that an interaction between moral rights and the defense of commercial interests cannot constitute an objection against such operation. All the more, as especially the right of divulgation is in most of its aspects so intensely intertwined with, or rather absorbed by, the exploitation right, that it is considered to ‘hide behind’ this.

⁴⁶ President of the District Court of Roermond 22 September 2010, *AMI* 2011, nr 3, p. 25-31, note Annemarie Beunen.

⁴⁷ Court of Appeal of Den Bosch 3 January 2012, considerations quoted in the decision of the Dutch Supreme Court of 12 July 2013, ECLI :NL :HR :2013 :CA0265 ; NJ 2013, 400 ; IER 2013, nr. 61 p. 477

That this moral rights aspect has remained unexplored is all the more surprising as A-G Verkade, explicitly and repeatedly,⁴⁸ makes reference to the ‘moral right of the trade mark holder’ in Article 7 of the European Trademark Directive: the right of the trade mark holder to oppose further commercialization of the goods where there exist legitimate reasons for the proprietor, especially where the condition of the goods is changed or impaired after they have been put on the market. In that case, exhaustion shall not apply. It would not be so far-fetched to apply, in this copyright case, the copyright equivalent of that trade mark provision.

2.1.4 Divuligation right and framed or embedded links

The question rises whether the transmission of a work via a framed link or embedded link – or, for that matter, by means of a simple hyperlink – could, under circumstances, give rise to an action based on the violation of the right of divulgation.⁴⁹

2.2 The right to claim authorship (paternity right)

As was seen above, full recognition of the paternity right in the Netherlands only became a reality in 1989. Although it was held by many that the Copyright Act in fact recognized the principle of the paternity right as from 1912, its text was not unambiguous, and some pretended that full recognition of the paternity right would meet with practical objections. In some cases however, it was *certain* that the paternity right in the copyright law did not apply: this happened with regard to works of US authors, at a time when the UCC did not yet apply. The fairly archaic national standard regime of Article 47 Copyright Act, still in force today as a monument of the past, reserved protection exclusively to works made by Dutch citizens or first published in the Netherlands. The courts found a simple solution and held that omitting the mentioning of the name should be considered as an unlawful conduct, as the following case shows.

Integrity of the name of the author, the title and the contents of the work

On 30 November 1961, the District Court of Rotterdam had to decide about the publication in the Netherlands, without permission of the right holders, of the American novel *The Enemy General*. The American work was not protected in the Netherlands. Nevertheless, the District Court held that ‘apart from the existence of copyright as mentioned before, in principle every author is entitled to demand that if his work is published by someone else, this happens: a) with the mentioning of the name of the author; b) in an exact reproduction of the title and the contents, including in the event of publication in a foreign language.’

The paternity right and the function or rank of the author

⁴⁸ In para’s 4.16 and 4.43.3 of the Opinion

⁴⁹ <http://blog.iusmentis.com/2014/02/14/hyperlinks-zijn-geen-auteursrechtinbreuk-ook-niet-als-je-embedt-framet/comment-page-1/#comment-333077>

In one case, a District Court⁵⁰ held that the paternity right was infringed by the fact that the academic rank of the author had not correctly been mentioned on the work. Perhaps it is useful to note that the wrong mention had been made by the university for which the author worked and was accompanied by other forms of unlawful behaviour towards the author.

The moral right of paternity in employment relationships

Part of Dutch jurisprudence and doctrine is of the opinion that Article 7 Dutch Copyright Act entails a statutory allocation of the moral right to the employer. It is put forward that employers can have an interest in the exercise of the moral right. Others deny that these of the employers are interests of the kind which copyright envisages to protect, and that as far as they are legitimate, the law offers other instruments to protect them which are better suited for their purpose.

In recent jurisprudence, the resistance against granting the right of paternity to employers proves tough. A recent decision of the District Court of Amsterdam simply denies allocation with the employer by referring to the nature of the paternity right as a personality right.⁵¹ But a perhaps even stronger indication of the impetus of the paternity right is contained in a decision of the District Court of Utrecht,⁵² which, although it expressly recognized that the paternity right in a book about 'Key Management Models' was statutorily allocated to the employer, imperturbably granted the employees, who in the meantime had left the company, a right to have their name mentioned on the basis of 'post contractual good faith'. Recently, the District Court of The Hague ruled again in the same spirit.⁵³

Economic functions of the right of paternity

Dutch law is not opposed to the financial 'exploitation' of moral rights. They may be waived for financial remuneration. Nevertheless, the prevailing opinion might still be that the moral right primarily is based on and justified by moral considerations. The economic and pecuniary importance of the paternity right has only occasionally been pointed to. Jacqueline Seignette however explicitly dealt with it in her famous thesis:⁵⁴

'Creators may have a considerable interest in having their names mentioned in connection with their works. Authorship credit may give an unknown creator recognition and the prospect of future work, while a famous creator may be able to capitalize on the value of his name when negotiating a fee for the use of his work.'

⁵⁰ District Court of Arnhem 23 June 2004, X v. Wageningen University, LJN : AP4281, AMI 2004, p. 229

⁵¹ District Court of Amsterdam 13 July 2011, Smith v. Vrije Universiteit ('Christmas cards'), AMI 2011, p. 203; B9 9944; IEF 9959.

⁵² District Court of Utrecht (provisional measures) 24 December 2008, Ten Have & Stevens v. Berenschot, AMI 2009, p. 78-79.

⁵³ District Court of The Hague 25 April 2014, IEF 13789, Roadmaps Leonardo onderwijs

⁵⁴ J.M.B. Seignette, *Challenges to the Creator Doctrine. Authorship, copyright ownership and the exploitation of creative works in The Netherlands, Germany and The United States*, Kluwer Information Law Series 1994, p. 113. Also see, in the same sense, A. Quaadvlieg, 'Onderneming, werknemer en intellectuele eigendom', in: I.P. Asscher-Vonk, S.C.J.J. Kortmann, N.E.D. Faber, E. Loesberg (eds), *Onderneming en werknemer*, Deventer: Tjeenk Willink 2001, p. 329-414, at 386.

The awareness of this economic importance now gradually filters through in the jurisprudence. In a recent decision the District Court of The Hague recognizes the economic interest in the mentioning of the name of the author in view of making the name more widely known and acquiring new orders.⁵⁵ The District Court of Leeuwarden stressed in 1991 the interest of the plaintiff to acquire renown.⁵⁶

An indication that the right of paternity, rather than (only) being a passive *expression* of the bond between the maker and his work, primarily serves a *function* – the function of making the name of the author better known and of enhancing his reputation – is provided by the fact that if, in a given case, this function becomes superfluous because the author is generally known to the relevant public, the exercise of the right of paternity may lose its justification. The Court of Appeal of Arnhem⁵⁷ denied the authors of the design of banknotes the right to have their name mentioned in advertisements showing those banknotes or parts of them: ‘Indeed, by the daily and massive use which is made of banknotes, on which banknotes the name of the designer is mentioned, it is and it stays a fact of common knowledge that Oxenaar and Kruit are the authors.’

2.3 right to respect and integrity

2.3.1 The integrity right enforced via an action based on unlawful conduct

Mutilation and deformation as unlawful acts

The earliest manifestations of the protection of moral interest which I could find in the jurisprudence are based on general private law. As was already remarked above in relation to the paternity right, in some cases, the courts may have been compelled to turn to the general doctrine because copyright was not available. This happened with regard to works of US authors, at a time when the UCC did not yet apply. The fairly archaic national standard regime of Article 47 Copyright Act, still in force today as a monument of the past, reserved protection exclusively to works made by Dutch citizens or first published in the Netherlands. In 1958, the District Court of Amsterdam⁵⁸ decided in a case about the reproduction, in the Netherlands, of an article which had appeared in the Saturday Evening Post of 26 September 1953. As the plaintiffs had apparently foreseen that a claim based on copyright might be dismissed, they alternatively invoked the law on unlawful conduct. Although the court considered that it would be contrary to the law to provide, on the basis of the general law of unlawful conduct, a protection for specific copyright interests, it added that this did not exclude that ‘the way in which such a publication is reproduced can constitute an unlawful

⁵⁵ District Court of The Hague 13 July 2011, *Aerodata v. Mzoem*, *AMI* 2011, 200; B9 9949, IEF 9968. Also see Court of Appeal of Amsterdam 21 August 1997, *Technisch Handelsbureau Van Veenendaal v. Vos c.s.* (‘Lifty candlestick’), *Informatierecht AMI* 1999, p. 150-152, recognizing harm for having missed orders (at 152).

⁵⁶ District Court of Leeuwarden 14 September 1991, *Van der Ploeg v. Rhebergen*, *NJ* 1992, 332, *Informatierecht AMI* 1993, p. 56-57.

⁵⁷ Court of Appeal of Arnhem 2 March 1993, *OHRA v. Oxenaar en Kruit*, *AMI* 1995, p. 90 note F.W. Grosheide.

⁵⁸ District Court of Amsterdam 27 May 1958, *Ahmad Kamal v. Drukkerij De Spaarnestad*, *NJ* 1958, 636.

act against the author or other interested parties. Thus, the author who cannot oppose the reproduction of his work, will have the possibility to oppose mutilation or deformation of the same.’ Interestingly therefore, the exercise of the moral right – or at any rate, the protection of an interest identical with the one protected by the moral right – was explicitly granted in spite of the strong reciprocity rule that the judge applied with regard to the exploitation right.

Integrity of the name of the author, the title and the contents of the work

On 30 November 1961, the District Court of Rotterdam had to decide about the publication in the Netherlands, without permission of the right holders, of the American novel *The Enemy General*.⁵⁹ For the same reasons as in the previous case, the American work was not protected in the Netherlands. Nevertheless, the District Court held that ‘apart from the existence of copyright as mentioned before, in principle every author is entitled to demand that if his work is published by someone else, this happens: a) with the mentioning of the name of the author; b) in an exact reproduction of the title and the contents, including in the event of publication in a foreign language.’ As the title had been changed and the text had been shortened, the publication was forbidden.

Presentation of the work in a derogatory context

However, even in cases where protection by the Copyright Act was fully available, cases were decided on the basis of general private law. Doctor Smol in Rotterdam, who had written a book under the title *Man, woman, sexuality*, was shocked when he found out that his publisher advertised for this scientific work on a leaflet together with other works, among which were ‘works of dubious character’; the Court of Appeal of The Hague forbade the further distribution of the leaflets as an unlawful act.⁶⁰

Supreme Court decisions based on general private law

Like the lower courts, the Dutch Supreme Court reached decisions in cases concerning moral rights and their legal ‘periphery’ – some of which cases were groundbreaking – by relying on the general doctrine of tort and/or contract law. In the case of *Patrimonium v. Heirs of Reijers*,⁶¹ the Sculptor Reijers had contracted with Patrimonium to the effect that Reijers would make a sculpture named *The hands*, which was destined to be placed on the front of the 1st Lower Technical School in the Wibautstreet in Amsterdam. Later, Patrimonium pretended that for financial reasons, placing the sculpture there was not possible. It placed the sculpture on the front of another school it had not been made for and where it did not fit. The Court of Appeal considered that in view of its *specific nature*, the contract between Patrimonium and the sculptor obliged Patrimonium to place the sculpture on no other building than the 1st LTS, and to actually place it on the front of that building. The Supreme Court held that in finding so, the Court of Appeal had violated no legal rule and that the further interpretation of the contract belonged to the facts.

⁵⁹ District Court of Rotterdam 30 November 1961, Morheim and James v. Kerco c.s, *NJ* 1962, 169.

⁶⁰ Court of Appeal The Hague 27 April 1962, Smol v. Baruch (‘Man, vrouw, sexualiteit’), *NJ* 1963, 164.

⁶¹ Dutch Supreme Court 22 June 1973, *Patrimonium v. Heirs of Reijers*, (placing of the sculpture ‘The Hands’) *NJ* 1974, 61 note Bob Wachter.

Interestingly therefore, a contract with an author is held to be of a 'specific nature' as a consequence of which the (moral) interest of the author that – and how – a work is realized or published, must be taken account of. This criterion of the 'specific nature' precluded the findings of the Supreme Court in the important cases of *KRO v. Frenkel*⁶² and *Körmeling v. Vlaardingen*,⁶³ which will be dealt with below as the 'right to exposure'.

Destruction of works as abuse of power under general private law

The link between the moral rights and general private law was in a strange way confirmed in the 2004 decision in *Jelles v. Zwolle*. In that case the Hoge Raad rejected a moral right to oppose destruction, only to make it rise again under the (general private law) figure of tort. This private law phoenix showed qualities which are quite closely related to the 'interest to exposure.' It is as if at the fringes of the moral right, the courts are at once willing to recognize this interest but reluctant to assume the burden of an absolute moral right. Therefore, they prefer to deal with the said interest under general private law, which leaves the judge more free space to manoeuvre. This can be observed where matters are uncertain, as in the case of moral rights of employees or of the experimental moral right that the work be published, or where matters are hotly debated, as they were in the case of the possibility to oppose destruction of a work.

2.3.2 Alteration, mutilation or impairment of the work

Roughly spoken, there are four important categories of cases which the Dutch courts had to deal with in relation to the right of integrity: (a) alterations and mutilations of the material body of the work; (b) mutilation of a work by omitting it as a component of a work with which it has been combined; (c) impairments; (d) impairment of conceptual elements of the work.

The defenses against allegations of infringement will be dealt with under Question 3: waiver of moral rights. This may have the drawback that it breaks the casuistic coherence of the individual cases. However, a casuistic presentation would consume a disproportionate volume of pages; the form of the Questionnaire aims at an analytical overview.

(a) Alterations and mutilations of the physical body of the work

Only a minority of cases concerns the impairment of the material body of the work. Problems arise where, especially in the field of architecture, practical needs demand the adaptation or modernization of a work. Courts may attach importance to the fact that the intended alterations are urged by huge exploitation costs; it is also important for the defendant to show that no acceptable alternatives are available.

De Meerpaal 1988: priority given to urgent renovation

⁶² Dutch Supreme Court 1 July 1985, *Frenkel v. KRO* (TV-documentary 'dreams are alive'), *NJ* 1986, 692, note CJHB; *AMR* 1985, p. 111 note D.W.F. Verkade; *Ars Aequi* 1986, note H. Cohen Jehoram.

⁶³ Dutch Supreme Court 20 May 1994, *NJ* 1995, 691, *Körmeling v. Vlaardingen* ('De Negende van OMA').

A typical example of these cases is provided by President of the District Court Zwolle 2 March 1988.⁶⁴ The situation in the 'multifunctional community center' De Meerpaal, which dated from 1967 and combined a wide range of functions like cultural and sporting activities, had become unbearable. The staff was struggling with problems as cold, draught, noise and humidity; the exploitation deficit amounted to a staggering 1.5 million (Dutch guilders) a year; renovation was necessary for the preservation of the building. Although the President acknowledged that the intended alteration would deeply affect the architecture and the perception of the building, and took these arguments very seriously, he finally decided in favor of the renovation.

Tietjerksteradeel 1988. No cheap solutions allowed for a commissioner of a representative building (who deliberately ignores warnings by an architect)

It met with unanimous amazement – and criticism - when only a few months later, another municipality was defeated in court by the opposing architect, notwithstanding (seemingly) obvious functional deficiencies of the architectural design.⁶⁵ The architect had equipped the brand new town hall of that municipality with majestic black glass walls which however – in case of sunshine – made the temperature raise to degrees far above the level sustainable by the average civil servant. The (heated) authorities wished to bring these excessive temperatures back to normal levels by installing awnings, although these would destroy the majestic effect of the glass walls. Architect Bonnema however insisted on the installation of a system of air conditioning, even if the costs of a system of air conditioning were three times as high as those of the textile cloth solution the municipality preconized.

The President held that in view of the representative character of the building, the municipality had to resign itself to the air conditioning desired by the architect. At first, this was criticized. The case came to be viewed in a wholly different light when - only later - an important aspect came out which was not mentioned in the decision.⁶⁶ It turned out that the architect had, as from the beginning, included an airco system in his design. Despite his explicit warnings, the municipality had not realized this system for reasons of economy, one of the more consistently pursued virtues of the Dutch nation.

Police office Maastricht: alteration of the color of panels between the window

The police office of Maastricht was altered by an architect different from mr. Snelder, the one who had designed the building. Mr Snelder did not object against the alteration of the building. However, he opposed against the fact that apart from this, the initial colors of the exterior of the building had been altered, more in particular, by replacing the blue/green colors of the panels between the window sections and the green color of the sunblinds by lighter colors. The Court of Appeal of Den Bosch considered that the colors initially intended by the architect took an eminent place in the architectonic concept. There was no indication that functional requirements

⁶⁴ President of the District Court Zwolle 2 March 1988, Architect Van Klingereren v. Municipality of Dronten and De Meerpaal, *AMI* 1988, note H. Cohen Jehoram; *BIE* 1988, 200; *KG* 1988, 144.

⁶⁵ President of the District Court of Leeuwarden 12 July 1988, Bonnema v. Municipality of Tietjerksteradeel, *IER* 1988, 88 note L. Wichers Hoeth; *AMI* 1989, 17 note H. Cohen Jehoram; *BIE* 1990, 54 note Sonja Boekman.

⁶⁶ This was revealed in a letter of the lawyer of Bonnema, P. Tuinman, published in the newspaper *NRC Handelsblad* of 23 July 1999. See K.E. Verzijden, 'Morele rechten in de polder', *Informatierecht AMI* 2000, p. 37-44, on p. 38, in footnote 14; also see Du Bois, 'Een overspanning van de auteursrechtgedachte', *Informatierecht AMI* 2000, at p. 99.

regarding the alteration constrained to giving the panels another color. The Court of Appeal found an infringement of the integrity right.⁶⁷

Enforcement despite important consequences

Fortior had held out in a contract with the architect's office of Loxodrome, that the realization of a new architectural project would take place in 5 phases in that after each of these phases, Fortior could end the contract and seek a new architect. Furthermore, the parties had stipulated that "after the realization of the work", the architect would not oppose further alterations.

The District Court of Maastricht⁶⁸ inferred from this that that the waiver by the architect of the right to oppose alterations only took effect as from the realization of the building. Fortior, who apparently wished to make certain modifications even before the start of the new phase – possibly anticipating a new approach in that phase – was not allowed to do this before the work of the 3rd phase by Fortior had been realized. It is an exercise of the integrity right with some flavor of the right of divulgation. The Court accepts that its decision has severe consequences. Not only for the commissioner of the building, who is forbidden to make alterations at the present moment, although it is certain that these will be allowed after the realization of the building. However, then it will - obviously – only be possible to make alterations at a much higher cost. The consequences of the enforcement of the moral right extend further to third parties, as it is stated in the decision that the pupils of the school will have to stay longer in their present location. This does not prevent, according to the court, that those interests must be subordinated to the interests of the author which weigh heavier.

Breitman v. van Manderen: far reaching consequences of the exercise of the integrity right

The consequences of a decision of the Judge for Provisional Measures in Amsterdam in 2011⁶⁹ might have reached even further. The plaintiff was the architect of the Riva-project, including residential and commercial premises, social-cultural space and parking places, which at the time of the litigation had already been realized. But the project also included a mosque, which the defendant, a property developer, due to financing difficulties planned to realize at half the costs estimated by the architect. On the basis of the right of integrity, defendant was forbidden to execute these plans, despite the considerable consequences, either financial or social.

(b) mutilation of a work by omitting it as a component of a work with which it has been combined

Where two works are combined into one, the alteration or mutilation of one of those works can lead to the mutilation of the whole work and its two components. Struycken and Unger had collaborated to create a design for a Dutch stamp: Struycken designed the illustration, a portrait of the Queen, and Unger the indication of the value. The design of the stamp was subsequently

⁶⁷ Court of Appeal of Den Bosch 5 November 1997, *IER* 1998, p. 13 ; *AMI* 1998, p. 35-36 (summary), *Politie Regio Limburg Zuid et al. v. Snelder*.

⁶⁸ The District Court of Maastricht 29 July 2009, *ECLI:NL:RBMAA:2009:BJ4326*, *Loxodrome v. Fortior*.

⁶⁹ District Court (Provisional Measures) Amsterdam 14 July 2011, *Breitman v. Van Manderen (Westermoskee)*, *B9 9965*, *IEF* 9949, *AMI* 2011, 198.

brought on the market as a postcard, but the indication of the value of the stamp was replaced by another typeface, which was fatter and coarser. The publication of the postcard was held to infringe the moral right, not only of the designer of the illustration of the stamp, but also of the designer of the indication of the value, which had been replaced.⁷⁰

(c) Impairment of the work

Most jurisprudence concerns cases in which the physical body of the work as such is left intact, but in which it is considered to be impaired by environment in which it is placed, its presentation and its context. In general, such actions are comprised under the category of what Dutch law calls impairment ('aantasting') of the work or what the Berne Convention would qualify as '(other) derogatory actions in relation to the work'. Of course, in such situations there is much more room for discussion whether the act of the defendant is unlawful or not.

Staal v. Beurspassage 1992: mutilation or impairment?

In some cases, the dividing line between a mutilation and an impairment may be unclear. Architect Staal had designed the front of three adjoining buildings, known (together) as the Metropool building. The owner wanted to destroy the southern part of it, known as the building of IJzer, as the 25-year-old office building did not comply anymore with the modern standards. The President of the District Court Amsterdam dismissed the argument that the buildings had to be considered as one complex (or one may read: one work),⁷¹ but 9 months later, the Court of Appeal held that the Metropool building had to be considered as one architectural creation.⁷²

Beurspassage had put forward that the demolition of the building of IJzer was required on functional grounds; Staal disputed this. The Court of Appeal considered that in summary proceedings, these technical questions could not be decided. It found that it had insufficiently been shown that it was impossible to maintain the fronts and found, provisionally, in favor of the architect/plaintiff. However, the Court of Appeal added that if after all the contrary would be established and the destruction would prove to be inevitable for reasons of functionality, it would be unreasonable if the architect opposed the destruction. This finding was criticized by H. Cohen Jehoram in his note, who argued that whereas an author cannot oppose a modification when this is unreasonable, this clause does not apply in the more serious case of a mutilation. This is true, but as will be explained later, courts tend to reintroduce the test of reasonability in such cases via the question whether the mutilation is of such a kind as to be prejudicial for the reputation of the maker. If the mutilation is justified on sufficiently convincing functional grounds, that might not be the case.

The case finally ended with a settlement in which the architect allowed the demolition. This kind of settlements has sometimes given the moral right a bad reputation. It was felt that the integrity right for architects tended to turn into a (rather generous) regular 'bonus' for makers whose

⁷⁰ Dutch Supreme Court 29 May 1987, *Struycken and Unger v. Riet*, *NJ* 1987, 1003; *AMI* 1987, p. 105 note D.W.F. Verkade.

⁷¹ President of the District Court Amsterdam 17 October 1991, *Staal v. Beurspassage* ("Gebouw van IJzer") *IER* 1992, p. 20-21; *AMI* 1993, p. 186 (Gebouw van IJzer).

⁷² Court of Appeal of Amsterdam 11 June 1992, *AMI* 1993, p. 186, note H. Cohen Jehoram *Staal v. Beurspassage* ("Gebouw van IJzer").

creations had become obsolete, even though it was foreseeable that their works often have a limited life cycle, and even though architects use to be paid well for their creative input when compared to other categories of authors.

Abridged version of a book

In another case, Issidorides, author of the book *The Landscape of Love, an Atlas*, opposed with success the publication of an abridged version of the work by the publisher whom she had licensed to publish the work in the Netherlands.⁷³ Plaintiff characterized the abridged version as a 'vulgarized' one. Interestingly, the court considered that the author could oppose the use of the work in another *context* than she had given permission for.

Changes in the placing of the work

Normally, the changing of the placing of a work of art as such will – of course – not constitute an infringement of the moral right,⁷⁴ but in combination with other circumstances, such as contractual agreements about the placing,⁷⁵ or wrongly representing the actual placing in a design,⁷⁶ it can lead to an infringement of the moral right. An infringement of the integrity right was also accepted when the cultural centre De Meerpaal placed a large painting of 6x15 metres at a height of 2.20 metres, which was higher than initially intended, in order to allow an easy passage underneath it.⁷⁷

Changes in the surroundings or context of the work

An impairment may further result from the fact that the work is realized without elements which were intended to be added to its presentation. In the *Sun Fighter* case, the municipality of Haarlem and the sculptor Arthur Spronken had contractually agreed that the municipality would place the sculpture 'Sun Fighter' on the Great Market of Haarlem, in combination with a functioning fountain.⁷⁸ In the end however the municipality chose another place, where the sculpture was installed without the promised mountain. In court, the municipality declared that the artistic views within 'certain circles of the municipal authority' had changed and that moreover, the funds reserved for the initial execution were not available anymore. The Court of appeal considered that in view of article 25, a reliance on changed artistic views on the side of the municipality would have had to meet very high standards and that moreover, Spronken had

⁷³ District Court of Amsterdam (provisional measures) 3 February 2005, *AMI* 2005, p. 114, Issidorides v. Meteor Press ('Cartografie van de liefde').

⁷⁴ President District Court Maastricht 30 October 2008, Van Dijk v. Province of Limburg: moving a painting of a former governor of Limburg is not an impairment.

⁷⁵ Court of Appeal of Den Bosch 17 December 1990, Haarlem v. Spronken ('The Sun Fighter'), *NJ* 1991, 444; *AMI* 1992, 35: it is certain that both parties had agreed on the placing of the sculpture 'The Sun Fighter' on the market place of Haarlem in a fountain basin; the defence of the municipality that its artistic views have changed and that the placing in combination with a fountain is costly, does not take away its duty to comply with this obligation.

⁷⁶ Kantongerecht Maastricht 23 January 1985 and 15 May 1985, *AMI* 1986, p. 21, Beeldrecht v. Fraenkel ('Küeb va Heële').

⁷⁷ President of the District Court Zwolle 14 April 1989, Van Soest v. De Meerpaal, *AMI* 1989, p. 100 with a very critical note of J.H. Spoor.

⁷⁸ Court of Appeal of Den Bosch 17 December 1990, Haarlem v. Spronken ('The Sun Fighter'), *NJ* 1991, p. 444; *AMI* 1992, p. 35.

alleged that he had realized the sculpture in view of its placement on the Great Market. The municipality was ordered to place the sculpture at that place in a functioning fountain basin.

Ceiling paintings in a theatre, corresponding with the colour of the carpets

More controversial was the following case. The artist Irene Verbeek had realized (abstract, colorful) ceiling paintings in the municipal theater of the city of Groningen. She intended to form an artistic unity with the festive red carpets decorating the interior of the theater. In 2004 the municipal theater replaced those red carpets in several rooms by new ones in three shades of blue, while maintaining them in the theatre hall. Irene Verbeek objected to this, considering it an impairment of her ceiling paintings, which meant to form an artistic unity with a surrounding in unitary red carpets. The District Court of Groningen⁷⁹ found that the work of art owed its significance to a great extent to its surroundings, as it had especially been made for those surroundings and formed an artistic unity with them. When making the concept of the work, the artist had made herself lead by the surroundings and their color, of which defendant – the municipality – was aware. It could not be doubted that the colors of the surroundings had been of great importance, as the work owed its importance for an important part to the colors applied. The court ordered the city to remove the new blue carpets which had been laid to replace the previous red ones. Again, it is obvious that in certain cases, courts do not hesitate to enforce moral rights despite onerous and far-reaching consequences. In this case, the new blue carpets had already (almost) wholly been laid at the time of the decision.

In a note, Judica Krikke roasted the judgment under caustic criticism. However, it seems a given thing that Dutch courts take moral rights especially serious in case of works commissioned for ‘representative’ purposes, and even more when this is done by institutions called to have a special duty of respect towards the cultural heritage such as museums, theatres and universities.⁸⁰ In the case of a municipal theatre as symbol of an artistic environment, compliance with moral rights might therefore be of a greater weight than in the case of a private or commercial party.

Impairment by changing the purport of a work. Consequences for parodies?

Photographer Koen Wessing took a picture of two women in Nicaragua, crying after their father had been killed by troops of dictator Somoza. The newspaper the Telegraph published that photograph with the text, that “the civilian population [was] the victim of the fight between the Sandinists and their adversaries.” Wessing objected: the intention of the photograph was to accuse the dictator, whereas now, the accompanying text put the emphasis on the part of the Sandinistic liberation movement. In 1986, the Court of appeal of Amsterdam⁸¹ confirmed a decision from the District Court⁸² that Article 25 of the Copyright Act had been infringed.

⁷⁹ District Court of Groningen 10 September 2004, Irene Verbeek v. Groningen (‘Ceiling paintings municipal theatre Groningen’), *AMI* 2004, p. 225 note Judica I. Krikke.

⁸⁰ Cf. for example President of the District Court of Leeuwarden 12 July 1988, Bonnema v. Municipality of Tietjerksteradeel, *IER* 1988, 88 note L. Wichers Hoeth; *AMI* 1989, 17 note H. Cohen Jehoram; *BIE* 1990, 54 note Sonja Boekman, and Court of Appeal of Leeuwarden 29 December 1993, Van den Berg v. Rijksuniversiteit Groningen, *Informatierecht AMI* 1996, p. 13, with note H. Cohen Jehoram at 16.

⁸¹ Court of Appeal of Amsterdam 13 November 1986, *AMI* 1987, 37, Koen Wessing v. De Telegraaf

⁸² District Court of Amsterdam 19 December 1986, *AMI* 1987, 41, Koen Wessing v. De Telegraaf

In the light of that ruling, there might be some doubt whether a later decision of the Court of Appeal of Amsterdam can be upheld under all circumstances, that if a defense that a work is a parody is honoured, there can be no infringement of the moral right of the parodied work.⁸³ In yet another case, the Court of Appeal held that in the absence of an infringing adaptation or transformation, there could not be an infringement of the moral right.⁸⁴ Although as a general rule, these statements might be approved, they might in certain cases appear to be too absolute. One could imagine a parody that does not reproduce too many elements from the original but that, without explicitly saying so, suggests that the parodied work also expresses or symbolizes (racist, sexist, fascist⁸⁵) opinions or feelings which in fact it does not. It should not be excluded that this might constitute a sound ground for the author to object against the parody on the basis of his moral right.

Impairment by presenting a different work under the same title

It happens in the theatre world⁸⁶ that theatre directors present on stage representations of a play which has been modified to the point that little more than the title corresponds anymore to the original piece; still the representation is announced under that title and the public is induced to believe that what it sees has a certain connection to the original play. Supposing that in fact, the representation deviates so far from the original piece that it has become a new and independent work, the success of an action based on deformation or mutilation of the work would not be certain anymore. Nonetheless, prejudice the honour and reputation of the author of the play might very well still result from such actions. Wild 'interpretations' presented under the name of the original work cause confusion and can hardly fail to affect the reputation of the author. In such cases, it could be considered whether the original work is not 'impaired' by the strong association created by the use of the same title for a very different production.

(d) Impairment of conceptual elements of the work

Two cases are of interest because they concern (or at least, come close to) the question whether or not the presence of certain elements in the environment can interfere with *conceptual* elements of a work of art.

Spacial compositions

The first one opposed the artist Devens and the city of Eijsden. In 1984, the artist Devens creates a work consisting of 'eight spacial constructions' which is placed in front of the monumental

⁸³ Court of Appeal of Amsterdam 13 September 2011, *Bruna v. Mercis* (Miffy parody) *AMI* 2012, nr 3 p. 29 note D.J.G. Visser, *Mf* 2012, nr 2 Wolfgang Sakulin, see para. 4.16; of a different opinion (before the insertion of the new parody exception in the Copyright Act): RJQ Klomp, *Recht op Parodie*, in: J.M. van Buren-Dee (ed.), *Privaatrecht en Gros*, Antwerpen: Intersentia 1999, at p. 263

⁸⁴ Court of Appeal Amsterdam 6 August 1998, *AMI* 1998, p. 136 note Quaedvlieg, *Mf* 1998, p. 264 note Visser, *Newman v. Aartsbisdom Utrecht* ('Who's afraid of Red, Yellow and Blue').

⁸⁵ It came close to that in County Court Leeuwarden 23 September 1986, *Stichting Beeldrecht/Stichting Hispel*, *AMI* 1990, p. 16-17

⁸⁶ Dutch theatre directors tend to reserve a large measure of freedom for themselves: A.A. Quaedvlieg, 'Le théâtre-laboratoire au laboratoire du droit: la liberté du metteur en scène', *Les Cahiers de Propriété Intellectuelle* Vol. 21 nr 3, Octobre 2009, p. 673-693 ; A.A. Quaedvlieg, 'De vrijheid van de toneelregisseur en het kunstoordeel in het auteursrecht', *AMI* 2009, p. 129-135.

town hall of Eijsden.⁸⁷ The spacial constructions are composed of concrete blocks in the form of a cube and transparent screens of perforated metal sheets. Around 1992, the municipality of Eijsden wishes to (also) place a fountain in front of the town hall. Devens however considers his work as a spacial composition in which space cannot be ignored. If the space were broken by another object, the composition, and therefore the work, would be modified and mutilated.

The Court of Appeal⁸⁸ started out stating that the municipality could not object that as there was no alteration 'in' the body of the work, there could be no alteration in the sense of Article 25, paragraph 1(c). It endorsed expert opinions which had submitted that the artistic work comes to life when one moves in the direction of the town hall, whereby the monumental entry is a fixed point of orientation and a varying view is offered on the building by the perforated metal sheets which alternatingly allow an unhampered view on the entry or veil it. Finally, the placing of the fountain was considered contrary to Article 25, paragraph 1(d).

The integrity of an imaginary connection with an empty space

Perhaps inspired by the success of her colleague Devens, the sculptor Christine Chiffrun tried to go one step further. In 1991, a sculpture by Chiffrun representing A. Winkler Prins, the author of the first Dutch encyclopaedia, was placed in front of the Winkler Prins building in Veendam. The triangular pedestal of the sculpture pointed as an arrow in the direction of the (empty) place 1 kilometre further where, before, had stood the presbytery where Winkler Prins wrote the encyclopaedia. In 1992, the Rotary Club of Veendam, on the occasion of its 60th anniversary, set out to offer the town as a gift 'of lasting value' an object commemorating Winkler Prins at that very empty place. Chiffrun objected and sustained that the virgin place where the former presbytery had stood formed a conceptual but essential part of her work, which was impaired by the placing of the object offered by the Rotary Club. The President rejects the claim based on infringement of the moral right because he is of the opinion that the conceptual element of the work basically consists of an idea or concept, which makes that it is not eligible for copyright at all. If discussion seems possible about this conclusion as such, it becomes perhaps more convincing in the light of what is stated further, in the frame of an action based on unlawful conduct, where the President basically states that Rotary (or other third parties) neither could nor ought to have been aware of the fact that the placing of the object would impair the work of Chiffrun.⁸⁹

2.4 right to repent or to withdraw

Article 25, para 4 provides:

⁸⁷ Court of Appeal of Den Bosch 24 February 1993, *Devens v. Eijsden*, *NJ* 1993, 440; *Informatierecht AMI* 1994, p. 116-117. The President of the District Court Maastricht 11 March 1992 had in first instance been of the same opinion: *Informatierecht AMI* 1992, 152-153.

⁸⁸ Which by the way was presided by the same Bob Wachter who wrote the lucid note in *NJ* on *Patrimonium v. Reijers* mentioned *supra*.

⁸⁹ President of the District Court of Groningen 20 October 1993, *Chiffrun v. Foundation Rotary Projects Veendam*, *Informatierecht AMI* 1994, p. 114-116.

4. If the maker of the work has assigned his copyright, he remains entitled to make such alterations to the work as he may make in good faith in accordance with social custom. As long as copyright subsists, the same right shall belong to the person that the maker has designated by testamentary disposition, if it may reasonably be assumed that the maker would have approved such alterations.

It has been contended that especially young authors – and performing artists – should be protected in their ‘right to make mistakes’ – the right to withdraw works which cause shame to the later, ripe artist – even though the risk exists that the passages which the artist regretted in his own later years will, a century later, come to be admired as the flash of a genius far ahead of his time.⁹⁰ This was the case with an adolescent master piece of the author Lodewijk van Deysse.

2.5 the capricious ‘interest in exposure’

The right to exposure as a defense against destruction or removal

We return now to the economic interests underlying the paternity right and identified by the 2011 judgment of the District Court of The Hague mentioned here above in 2.2: making the name of the author more widely known and acquiring new orders.⁹¹

The same interests are also mentioned in the seemingly totally different context of the integrity right, more particularly where authors oppose the destruction or the removal of a work. Could this indicate that there is a connection between these interests?

De Haas v. Ulrich: exposure as a means to acquire orders

In 1978, the District Court of Amsterdam⁹² found that a wall painting of Toon de Haas had been mutilated by the fact that the owner of the building had made it invisible by covering it with white paint. In 1969, the owner had commissioned the wall painting in order to decorate the entrance hall of his office building in Amstelveen. As to the harm caused, the District Court considered that as it had not been shown that the hall of the office was much frequented by the public, this harm was limited; in essence, the District Court held, a work had been obscured which could serve the author as a reference for acquiring new orders. What emerges here is what might be called a ‘right to exposure’. It primarily has the function of allowing the author to make the public aware of his work and his name in order to acquire new orders; this coincides with the economic function of the right of paternity which was identified above.

Non exposure as a cause of damage to the renown and the appeal of an artist

De Haas v. Ulrich is not an isolated case. In a judgment of 29 December 1993,⁹³ the Court of Appeal of Leeuwarden, forbade the University of Groningen to destroy a mural on a separation wall between two buildings of the University, which it wished to remove in order to create a

⁹⁰ A. Quaevlieg, *Adolescent et droit d'auteur*, In: *l'Adolescence en droit français et en droit néerlandais*, P.U.F. Paris 1995, p. 205-212.

⁹¹ District Court of The Hague 13 July 2011, *Aerodata v. Mzoem*, *AMI* 2011, 200; B9 9949, IEF 9968, quoted in note 60.

⁹² District Court of Amsterdam 15 November 1978, *De Haas v. Ulrich*, *Auteursrecht* 1979, p. 32.

⁹³ Court of Appeal of Leeuwarden 29 December 1993, *Van den Berg v. Rijksuniversiteit Groningen*, *Informatierecht AMI* 1996, p. 13, with note H. Cohen Jehoram at 16.

more efficient layout of the premises. Among other arguments, the Court of Appeal considered that the fact that the public would no longer be able to view the work could damage 'the appeal and the renown of Van den Berg.' There are still more cases in which the interest of the author to have his work exposed is, implicitly, recognized. In many of these cases however, *other* interests prevail which ultimately overcome the interests of the maker. The President of the District Court of The Hague gave this element a rather material twist in a case where he considered that maintaining in a mutilated state a giant sculpture placed in an industrial zone would not prevent the artist from acquiring new orders, as he had never come to visit the work with potential commissioning parties.⁹⁴

'Dreams are alive': the interest of the author to have his work reach the public

The heyday of the past century regarding the legal development of moral rights may have been the case of the TV documentary 'Dreams are alive'.⁹⁵

The Dutch broadcasting organization KRO had ordered Frenkel to make a documentary film about the dreamers of the Senoi. It concerned a people in Malaysia, to which an important dream cult was attributed. In the standard contract with the filmmaker, the KRO reserved the right not to broadcast the film. Mr Frenkel completed the film and delivered it to the KRO. At that time, the head of the department of Informative Programmes gave him the prospect that the film would be broadcasted. However, after a new head of department replaced the first one, the KRO changed its position. The film would not be broadcasted as it was considered confusing, because it was not in line with the scheme of the script and because 'broadcast time is scarce and one is forced to choose the best.'

Upon this, Frenkel demanded that the film be broadcasted before 1 January 1984.

The Dutch Hoge Raad finds that it must be assumed that the commissioning order to make a documentary film fit to be broadcast has, as to its nature, the goal that the film will, even if the broadcasting organization has not committed itself to broadcasting the film, actually be broadcasted after acceptance by the broadcasting organization. As a consequence, the freedom the broadcasting organization has reserved to decide whether the broadcasting will take place, does not stretch so far that it can, in taking that decision, ignore *the justified interests and the moral rights* of the author. The matter was referred to the Court of Appeal of The Hague to decide on this issue; the judges of the Court of Appeal eventually found in favour of Frenkel.⁹⁶ On 28 September 1986 the documentary on the dreamers of the Senoi was finally broadcasted.⁹⁷

The decision of the Hoge Raad, and more in particular its reference to the moral rights of the author was immediately recognized as important. Herman Cohen Jehoram characterized it as

⁹⁴ President District Court The Hague 15 September 2004, *Caris v. E.* On ('Polyhedron-net structure'), *IER* 2005, nr 4 p. 10 note J. Kabel; *AMI* 2005, p. 100-102, with note Jan Kabel at p. 99.

⁹⁵ Dutch Supreme Court 1 July 1985, *Frenkel v. KRO* ('Dreams are alive'), *NJ* 1986, 692 note CJHB; *AMR Auteursrecht* 1985, 111 note D.W.F. Verkade; *Ars Aequi* 1986, p. 125 note H. Cohen Jehoram.

⁹⁶ Court of Appeal of The Hague 4 June 1986, *Frenkel v. KRO*, *NJ* 1987, 472; *AMI* 1986, 139 note H. Cohen Jehoram.

⁹⁷ Note H. Cohen Jehoram on Court of Appeal of The Hague 4 June 1986, *Frenkel v. KRO*, *AMI* 1986, at p. 140.

internationally causing quite a stir,⁹⁸ adding that it was striking that the Hoge Raad had engaged into solving a matter it could easily have qualified as belonging to the facts. Above all, the judgment triggered a fierce discussion as to whether it entailed the recognition of a general moral right, as a consequence of which the categories of moral rights defined by the Copyright Act did not have to be understood anymore as a closed catalogue;⁹⁹ it was also debated whether the reference to the moral rights should be understood as to imply that the decision not to broadcast the documentary after the KRO had already committed itself to such broadcasting, constituted a 'derogatory act' in relation to the work which was prejudicial to the honour and reputation of its maker.

A quarter of a century later, it is felt that perhaps other aspects are as important. It is not really essential whether the broadcasting of the film is qualified as a right or an interest of the maker, or something in between; the 'right of the author to exposure' may present itself in the official robe of the moral right where it concerns the paternity right. It may take the appearance of the integrity right when a work is made invisible. And it may unexpectedly surface as the guerilla war force of a 'justified interest' where a broadcasting organization plays too arbitrarily with the right it has stipulated to broadcast or not a documentary.

How important the publication of the ordered work can be was eloquently expressed by Verkade in his note in *AMI* 1985, 113: the publication is often more important than the recompense; the refusal to broadcast can have a disastrous effect on the maker's reputation in professional circles and on his professional career.

The Supreme Court in Körmeling v. Vlaardingen: (only) an 'obvious interest' in realizing the work
A decade later, in a case also concerning the realization of a work of art, the Hoge Raad only spoke of 'an obvious interest' of the maker. There was no mention anymore of his moral rights. This destroyed some of the charms of *KRO v. Frenkel*.¹⁰⁰ However, the term 'obvious' interest¹⁰¹ still is a particularly strong one. That interest was defeated, in this second case, by even stronger interests of third parties; but that could also have happened with a 'real' moral right. It is telling that in 2004, the Dutch Supreme Court considered that the destruction of a work could under circumstances imply abuse of power by the owner. It needs a strong interest for the doctrine of abuse of power to be re-adjusted by the interests of the author. The 'interests of the author' in *Jelles v. Zwolle* are in essence no different from the 'obvious interests' in *Körmeling v. Vlaardingen* and the 'moral rights' in *KRO v. Frenkel*.

⁹⁸ 'internationaal opzienbarend', in *AMI* 1986, at p. 128.

⁹⁹ In favour of this interpretation: D.W.F. Verkade in his note in *AMI* 1985, p. 113, with references to De Beaufort (1932), p. 178; Van Isacker (1961), p. 41 and Pfeffer/Gerbrandy (1971), p. 200-201 and 205; not in favour of this interpretation: H. Cohen Jehoram in *Ars Aequi* 1986, 125-132, at 129 and C.J.H. Brunner in his note in *NJ* 1986, 692, agreeing with Cohen Jehoram and arguing that the decision only concerns the interpretation the Court of Appeal had given to the promise to broadcast the documentary in the light of the nature of the agreement; also see the Conclusion of Advocate General Hartkamp: weighty interests of artists to represent the work might in certain circumstances have to yield to a weighing of interests.

¹⁰⁰ Dutch Supreme Court 20 May 1994, *Körmeling v. Vlaardingen* ('De Negende van OMA'), *NJ* 1995, 691, note CJHB; *AA* 1998, 46-52 note H. Cohen Jehoram; *Informatierecht AMI* 1995, p. 13 note A.A. Quaadvlieg.

¹⁰¹ In Dutch: 'evident belang'.

An echo of *KRO v. Frenkel* can sometimes be found in later case law, as in District Court of Arnhem 23 July 2004.¹⁰² The plaintiff was a biologist. She worked as a free lancer and visiting lecturer for the University of Wageningen in the Netherlands. She had made contributions for the CD ROM “The Biology of Lower Plants” for academic education. According to the Dutch copyright system, free lancers keep their copyright; it only is different in case there is an employment contract. When the University planned to also issue a commercial version, she wanted a remuneration for the exploitation. Subsequently, the University deleted the photographs and drawings of plants from her hand from the CD ROM. The District Court found in 2004 in favour of the plaintiff, considering that the university had acted contrary to the expectations raised with the plaintiff that her photos and drawings would be maintained. The District Court added that the defendants generated income by the exploitation of the CD-rom of which a reasonable part could have been awarded to the copyright holders. By omitting this and instead deleting the photos and drawings of plaintiff she had failed in fulfilling her obligations towards the plaintiff.

Balancing interests and boundaries to the right of exposure

In the already mentioned case of 20 May 1994, *Körmeling v. Vlaardingen*, a conflict arose between the artist Körmeling and the municipality of Vlaardingen. Vlaardingen had commissioned a ‘spatial object’ from the artist. Körmeling designed, as part of the project, a neon text intended to decorate an old people’s home, consisting of the text ‘De negende van OMA’. Körmeling pretended that the text was meant to do homage to the Office of Metropolitan Architecture, but in common Dutch the word ‘OMA’ means granny, and the inhabitants of the old people’s home did not take it well. As emotions exploded and public commotion increased, the municipality, that initially had supported Körmeling, finally gave in to the protests. The Hoge Raad indicated that in interpreting the agreement in the light of the requirements of reasonableness and fairness, Article 3:12 of the Civil Code obliged to take into account the interests of third parties, and that consequently, the municipality – that had paid Körmeling the full sum due for his work – could not be compelled to cooperate in order to place the litigious text on the building. The Hoge Raad added that Körmeling had an obvious interest in having the neon text placed; however the Court of Appeal had found that the interests of the inhabitants weighed so much more, that the requirements of reasonableness and fairness did not allow that his interest be granted priority.

Already in 1989, the District Court of Arnhem had held that despite the interest of the author, sustained by the law of obligations and the Copyright Act, that a work designed for a certain environment be placed there, a crematorium could remove a tapestry that was perceived by the mourners as ‘too dominant and cheerful’.¹⁰³

It cannot amaze that the same fate struck the painting *Mais où est la merde* of Mirko Krabbé which – although the title ‘Mais où est la merde’ suggests that the work of art addressed a different public than children – covered a whole wall in the Emma Children’s Hospital, a part of the Amsterdam Medical Center AMC. The President of the District Court stated that the painting

¹⁰² District Court of Arnhem 23 June 2004, X v. Wageningen University, LJN : AP4281, AMI 2004, p. 229

¹⁰³ District Court of Arnhem 13 July 1989, Smeets v. Crematorium, *Informatierecht AMI* 1990, p. 33-35, note D.W.F. Verkade.

had an effect which caused a great disturbing impact on the staff, the young patients and their parents, and which was not desirable on a children's ward.¹⁰⁴ Articles in the press revealed that the painting inspired fear in the sick children. Krabbé did not give up, but his appeal was dismissed.¹⁰⁵

A temporal element in the balance of interests

The fact that the right to exposure is subject to a test of reasonableness makes that the factor of the period during which a work has already been exposed may play a role. The District Court of Arnhem¹⁰⁶ considered in 1992 that if on the one hand, the work to be destroyed was of a modest level of originality, on the other hand it was of a very recent date so that the honour and reputation of the author were still freshly and therefore sensitively attached to it. Frequently, the formula is used that the maker cannot claim the *permanent* exposure of the work.¹⁰⁷ The fact that a work of art had already been exposed for a long time was taken into account by the President of the District Court of The Hague¹⁰⁸ and by the Court of Appeal of Leeuwarden.¹⁰⁹ Above, it was already indicated that wear & tear, natural decay and high costs might cause a claim to restore the work to fail; the same applies of course to the right of exposure, which in fact in a way coincides with such claims.

Conclusion

Do we witness the emergence of a (limited) right to exposure? It could be, but it is also clear that it will never be able to take the monolithic force of its fellow moral rights. Too much depends on contractual provisions and other circumstances. It is nevertheless obvious that the 'interest to be exposed' in its two faculties: related to both the name and the work, can be of great support in order to reach fair conditions for authors.

2.6 The right to make similar paintings

Directly preceding the main provision on moral rights in Article 25 of the Dutch Copyright Act figures an almost forgotten Article 24 stating that the maker of a painting remains entitled to make similar paintings:

Article 24

Unless otherwise agreed, notwithstanding the assignment of copyright in a painting, its maker remains entitled to make similar paintings.

¹⁰⁴ President of the District Court Amsterdam 28 October 1993, *Mirko Krabbé v. AMC* ('Mais où est la merde'), *AMI* 1993, p. 103.

¹⁰⁵ Court of Appeal 19 June 1997, *AMI* 1998, p. 15.

¹⁰⁶ District Court of Arnhem 3 September 1992, *Vossen and Vermeulen v. Nijmegen*, *AMI* 1994, p. 59.

¹⁰⁷ President of the District Court Breda 29 April 1993 *Voogt v. Breda* (sculptures IJpelaar garden), *AMI* 1994, p. 55.

¹⁰⁸ President District Court The Hague 15 September 2004, *Caris v. E.On* ('Polyhedron-net structure'), *IER* 2005, nr 4 p. 10 note J. Kabel; *AMI* 2005, p. 100-102, with note Jan Kabel at p. 99.

¹⁰⁹ Court of Appeal of Leeuwarden 16 January 2008, *VOKO v. Loppersum*, LJN: BC2151.

Article 24 is not considered to provide a moral right; at least it is never mentioned as such. It nevertheless shares the typical characteristics of moral rights. It stays with the author even after the assignment of the copyright. It cannot be assigned itself, as it is bound to the maker. It expires with his life, even before other moral rights in Dutch law. That it can be waived by an express agreement, does not disqualify it as a moral right: the same applies to several moral rights mentioned in Article 25, such as the right to oppose alterations of the work. Finally, the legislative history reveals that Article 24 aimed in the first place at the defense of the intellectual freedom of the maker: visual artists should have the freedom to re-use elements of previous work which continue to fascinate them.

In the present era, it could be more useful than in the past to secure such a freedom for artists. Generosity towards artists is no given thing anymore. There might even be reasons to consider whether it should up to some extent be broadened in scope as to cover not only other categories of works, but also – up to some extent – variations of an artist's own work of which reproductions would be offered to the market (as opposed to similar works in individual unique copies). A case could be imagined of an artist with a strongly individual style who makes a work for commissioner (A); subsequently, and in good faith, he accepts a similar commission from B. Both parties exploit the result on the market. A accuses B of infringement. The question arises then whether an artist must have the right to plagiarize elements of his own work without having to live under constant fear that this might create liabilities. This could actually hinder creative freedom.

3. Can the moral rights be transferred or waived in your country?

Moral rights are considered unassignable.

According to Article 25, para. 3 of the Copyright Act, the right referred to in the first paragraph sub a, may be waived. The rights referred to sub b and c may be waived in so far as alterations to the work or its title are concerned.

In order to mitigate the scope of the moral right, courts often have recourse to a construction of an implied waiver. This is dealt with under Question 6.

4. Which is the term of protection of the moral rights in your country?

Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?

4.1 Term of protection of the moral right

The duration of the moral right is governed by the same rules as the duration of the exploitation right, and will therefore not exceed the term of 70 years *p.m.a.* This not only follows from Article 25, para. 2 and 4, providing that “after the death of the maker and until the copyright expires,” the moral rights rest with the person that the maker has designated by testamentary disposition; it also follows from the system of Dutch copyright, in which moral rights are introduced as one of the *exceptions* to the exploitation right.

As it is, the moral rights will most often expire earlier, together with the life of the author. In order to be exercised *post mortem*, the author must, by testamentary disposition, designate a person who is to exercise the rights after his death. Most authors – and most notaries – are not aware of this rule. The consequences may be tragic.¹¹⁰ Until 1972, the moral right expired with the death of the author. The bill of 1972 saw that in the absence of a testamentary disposition, the heirs would be entitled to exercise the moral right, but Parliament objected and the law was amended. The new regulation, entered into force on 7 January 1973,¹¹¹ was immediately criticized by Sjoerd Gerbrandy in his handbook on copyright which appeared in 1973.¹¹² In 1998 however, Herman Cohen Jehoram, a great opponent of the *droit moral post mortem*, stated with satisfaction that in an international perspective, in relation to the moral rights after death the Netherlands “occupied an utmost minimalistic position.”¹¹³

The system of the Dutch Copyright Act has been criticized, also for its probable non-conformity with the Berne Convention.¹¹⁴ As far as foreign authors are concerned, the courts sometimes avoid the application of the Dutch system by applying the rule of *locus regit actum* as conflict rule for the whole regime of the succession. This was done by the District Court of Amsterdam in a case in which the widow of the German composer Carl Orff invoked moral rights against a house music adaptation of the work of her late husband.¹¹⁵

5. Other types of rights

¹¹⁰ FW Grosheide, The Netherlands, in: Gillian Davies, Kevin Garnett, (eds.), *Moral Rights*, London: Sweet & Maxwell, Thomson Reuters, p. 481-504, at p. 501

¹¹¹ Act of 27 october 1972, *Staatsblad* 1972, 579, entry into force 7 January 1973 (Royal Decree of 22 December 1972, *Staatsblad* 1972, 722

¹¹² H. Pfeffer, *Kort Commentaar op de Auteurswet 1912*, 2^e edrevised by S. Gerbrandy, Bohn: Haarlem 1973, p. 213

¹¹³ H. Cohen Jehoram, *Shoot the widow*, AMI 1998, p. 62-63

¹¹⁴ DJG Visser, Moral rights. Persoonlijkheidsrechten van degenen die hebben nagelaten na te laten, *Informatierecht* AMI 1993, p. 169-171

¹¹⁵ President of the District Court of Amsterdam 24 February 1992, *Musikverlag B. Schott's Söhne et Stemra c. Indisc (“Carmina Burana”)*, AMI 1992, p.112-114.

(such as “personality rights”, “civil rights”, “publicity rights”, “portrait rights” or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?

The Netherlands protect other types of rights like personality rights, publicity rights, portrait rights and others.

6. mitigating mechanisms for the abusive exercise of the moral rights

Three legal instruments form the main tools to mitigate the scope of moral rights and prevent abusive exercise. The most basic one is the test of reasonableness contained in several – but not all – provisions of Article 25. The right to oppose mutilation and impairment is not subject to a test of reasonableness, but the requirement that these must be prejudicial to the honour and reputation of the author is very commonly used as a correction in cases where it is found that demands of the author or his heirs are exaggerated.

Last but not least, circumstances pointing at the existence of an implied waiver may be used either as an argument to support that the claim to a moral right is unreasonable or that a certain action is not prejudicial for the reputation, or else be used by the courts as a direct argument in order to mitigate claims based on moral rights.

Apart from these instruments, the possibility always exists of a defense based on abuse of power. However, this is rarely seen in the field of moral rights, which might be explained by the existence of the other available possibilities, which prove reliable.

6.1 The test of reasonableness in the Copyright Act

According to Article 25, para. 1(a), the maker cannot oppose the making public of the work without mention of his name or other indication as maker, where such opposition would be unreasonable.

According to Article 25, para. 1(c), the maker cannot oppose an alteration made to the work, where the nature of the alteration is such that opposition would be unreasonable.

6.2 The requirement of prejudice to honour and reputation as a means to balance interests

According to Article 25, para. 1(d) of the Copyright Act, the maker of the work has the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the reputation or name of the maker or to his dignity as maker.

As will have transpired, Dutch courts have shown extreme care in trying to reach an equitable balance between the justified interests of authors on the one hand and owners and users of works on the other hand. It must be stressed that if the courts mitigate moral rights, it is not done at their own discretion but on the basis of the law. It is the Copyright Act itself which subjects the moral rights of integrity and paternity to a condition of reasonableness and the right to oppose mutilations and impairments to the requirement that these must be prejudicial to the honour and reputation of the author.

i. Practical circumstances which either reduce or increase the risk of prejudice to the reputation of the author

Moral rights may be mitigated on the ground of a number of circumstances. Often these might be interpreted as an implied waiver.

The nature of the work

The nature of the work is one of them. The work may be of a modest level of creativity,¹¹⁶ or made to serve a practical purpose¹¹⁷ or a purpose of light entertainment¹¹⁸ which may at a certain moment in time require its restoration and/or adaptation; the owner must be free to do so within reasonable limits.¹¹⁹ Or, authors who create advertising material for commercial parties must accept that the other party may require certain alterations. Thirdly, if a work is destined to be used in a trivial environment like business, trade or industry this might limit the right to oppose the placing of that work in a certain environment even if this is up to a certain extent derogatory as to its qualities as a design.¹²⁰ For example, it was considered that authors of the design of bank notes destined to fulfil the useful function of money cannot always oppose partial reproduction or use without the mention of their name, as in the case of use in advertising as a symbol of money.¹²¹ The District Court of The Hague was in 2002 of the opinion that a mutilation will less readily occur in the case of mass products than in the case of authentic objects of art of which only one or a few copies exist.¹²²

The law of obligations

The contractual relation between the maker and the owner is another one. For example, the author who consents to the making of a cinematographic adaptation will have to accept certain alterations.¹²³ In a conflict between the city of Haarlem and visual artist Klingers, who opposed

¹¹⁶ District Court of Arnhem 3 September 1992, *Vossen and Vermeulen v. Nijmegen*, *AMI* 1994, p. 59.

¹¹⁷ *Spoor/Verkade/Visser, Auteursrecht*, p. 352; P.G.F.A. Geerts, in: Ch. Gielen (ed.), *Kort begrip van het intellectuele eigendomsrecht*, Deventer: Kluwer 2011, p. 478.

¹¹⁸ Du Bois, 'Een overspanning van de auteursrechtgedachte', *Informatierecht AMI* 2000, at p. 98 reminds that it is perfectly accepted that hits of light music are abridged, arranged, or improvised on in all conceivable manners.

¹¹⁹ President of the District Court Rotterdam 27 July 1999, *Shell v. De la Haye*, *AMI* 1999, p. 149.

¹²⁰ Court of Appeal of The Hague 11 November 1999, *Shell v. De la Haye*, *AMI* 2000, p. 15, (critical) note *Quaedvlieg*.

¹²¹ Court of Appeal Arnhem 2 March 1993, *OHRA v. Oxenaar and Kruit*, *AMI* 1995, p. 90 note *Grosheide*.

¹²² District Court of The Hague 5 June 2002, *Stokke and Opsvik v. Thuiszorgwinkel*.

¹²³ President of the District Court Amsterdam 28 February 1985, *Auteursrecht AMR* 1985, 90, *Marga Minco v. Van Oostrom and Filmcompagnie (Film 'Het Bittere Kruid')*.

the removal from a playground of certain of his works, it was considered that the artist could have understood from the start that the works created by him for the playground would not stay there indefinitely.¹²⁴

Employment contracts. Moral rights with 'fictive authors'?

According to Article 7 of the Dutch Copyright Act, the employer is considered as 'the maker' of the work. It is still debated in the Netherlands whether the allocation with the employer on the basis of Article 7 Copyright Act also entails an allocation of the moral right with the employer. As yet, there exists no decision of the Supreme Court providing clarity on this issue.¹²⁵

The same applies as to Article 8, which provides that "a public institution, an association, a foundation or a company that makes a work public as its own, without naming any natural person as the maker, is taken to be the maker of that work, unless it is proved that in the circumstances the making public of the work was unlawful. » Here however, consistent case law at the level of the Courts of appeal rejects the allocating the moral right with the 'fictive maker'.¹²⁶

Even if it would be assumed that the moral rights stay with the employee, it remains that an employment contract will most often entail a renunciation, to a (very) large extent, of these moral rights. This follows from a number of circumstances. More often than not the work will be published without the name of the author – (tacitly) having waived this moral right, the author will find this circumstance in turn also affect the scope of his right of integrity, as it means that the bond between the work and the maker will be less strong and the reputation of the author will be less likely to be damaged. The personal bond between the author and the work might also be diluted by circumstances such as that under the employment contract, the author has to follow the instructions of the employer regarding the work, or cooperates with one or more other persons providing creative input, or primarily follows the prevailing trend and fashion.

Destination of the work

A third circumstance which might reduce the moral right may result from certain limitations ensuing from the public the work is destined for: if it turns out that a work destined for a home for the elderly,¹²⁷ a children's hospital¹²⁸ or a crematorium¹²⁹ shocks or profoundly disturbs the public it is destined to, the author must suffer that it is removed.

¹²⁴ President of the District Court of Haarlem 12 April 1996, *Klingers v. Haarlem*.

¹²⁵ Van Lingen, 'Morele rechten van fictieve makers', in: *Qui bene distinguit, bene docet*, Gerbrandy bundle Arnhem 1991, p. 198; Spoor/Verkade/Visser, *Auteursrecht*, p. 39; Quaedvlieg, 'Het belang van de werkgever', *AMI* 1993, p. 83-86 ; A.A. Quaedvlieg, *Aspecten van Intellectuele Eigendom*, in: C.J. Loonstra, W.A. Zondag (red.), *SDU Commentaar Arbeidsrecht*.

¹²⁶ Court of Appeal of Amsterdam 10 February 1970, *De Bezige Bij/Rijkspostspaarbank* ("Sparbankboekje op omslag "De Vervalsers"), *NJ* 1971, 130; Court of Appeal Amsterdam of 31 juli 2003, *Tariverdi/De Stadsomroep*, *IER* 2004, nr 43 p. 202, note EHH; *AMI* 2004, nr 2 p 25 note Seignette

¹²⁷ Dutch Supreme Court 20 May 1994, *NJ* 1995, 691, *Körmeling v. Vlaardingen* (The ninth of OMA/'De Negende van OMA').

¹²⁸ Court of Appeal of Amsterdam 19 June 1997, *AMI* 1998, 15 *Mirko Krabbé v. AMC* (painting *Mais où est la merde*).

¹²⁹ President of the District Court Arnhem 13 July 1989, *AMI* 1990, p. 33 note D.W.F. Verkade, *Smeets v. Crematorium* ('Tapestry in Crematorium').

Absence of mentioning of the name of the author: interaction with integrity right

If it seems certain that the mentioning of the name of the author in relation to a modified or mutilated work will add to the risk of prejudice to his reputation, this may entice into assuming that conversely, absence of any mention of the name could appreciably reduce this risk and therefore neutralize, at least partly, the infringement of the integrity right. This argument must however be handled with particular care, especially when it is used in connection with reproductions and adaptations by third parties. It is in no way excluded that the presence on the market of inferior imitations might very well affect the originality, freshness and status of the original work, as well as the reputation of its author.

Nonetheless, in a case in which it did find infringement of the exploitation right, the District Court of Arnhem¹³⁰ assumed that the integrity right was not at stake, because the imitation had not been marketed under the name of the author; that, therefore, the public would not associate the infringement with her; and that there consequently had been no prejudice to the reputation of the author. If the court meant to say that the absence of the mentioning of the name categorically excludes the possibility of an infringement of the right of integrity, this is certainly too absolute. Perhaps the President only meant to say that the judicial *sanctions* on the basis of the infringement of the exploitation right might suffice to also sanction the infringement of the moral right.

In addition (and as a side remark), it is obvious that in cases which do not concern identical reproduction, it would be strange to blame the defendant for (also) infringing the paternity right by omitting the name of the author. Such a claim was rightly rebutted by the District Court of Amsterdam.¹³¹

Wear & tear, costs, normative Kraft des Faktischen

When the state of the material copy of the work has deteriorated as a consequence of natural decay or wear, accidents or vandalism, this may put limits to the possibility to claim that it be restored to its initial state, especially when this entails high costs.¹³² Such circumstances may often appear in an alliance with what Kabel has characterized as the normative power of the factual:¹³³ infringers may often confront an author with a situation which is so difficult or costly to redress, that in the end, the judge nilly-willy accepts the *status quo* and the author is granted

¹³⁰ District Court of Arnhem 25 June 2009, Van der Leest v. D.P. Factory ('gehaakte langbeenknuffelbeesten'), *AMI* 2009, p. 213.

¹³¹ District Court Amsterdam 26 March 2008, LJM BF3727 *AMI* 2009, p. 76 (painting Chicken's chat 'Kippengekeuvel').

¹³² District Court of Amsterdam 16 June 1977, Koetsier v. Schiphol, *NJ* 1978, 218; Court of Appeal Den Bosch 17 December 1990, Lenartz v. Sittard, *NJ* 1991, 443; *AMI* 1992, 33; Court of Appeal Arnhem 24 January 1989, Marris v. Millingen, *AMI* 1989, 126, note J.H. Spoor; President District Court The Hague 15 September 2004, Caris v. E.On ('Polyhedron-net structure'), *IER* 2005, nr 4 p. 10 note J. Kabel; *AMI* 2005, p. 100-102, with note Jan Kabel at p. 99; District Court of Amsterdam 20 October 2004, Tuijnman v. WBA, *AMI* 2005, nr 7 p. 93-100, note J. Kabel (see para. 5(4)); District Court of Assen 17 November 1992, Abma v. Ruinen, *Informatierecht AMI* 1993, p. 191-192; Court of Appeal of Leeuwarden 16 January 2008, VOKO v. Loppersum, LJM: BC2151.

¹³³ J.J.C Kabel, 'Herstelvordering bij verminking: die normative Kraft des Faktischen?', note on President of the District Court The Hague 15 September 2004, *AMI* 2005, p. 99.

only inferior measures, such as the payment of damages and/or the obligation for the other party not to mention the name of the author in relation to the work.

Circumstances which facilitate invoking the moral right. Status of work and author.

On the other hand, within these same categories plenty of circumstances can be imagined which may form a counterbalance to these mitigations and enhance the possibility to successfully invoke the moral right. One can mention the high degree to which the name and reputation of the artist may be attached to the work, the important role and status of the work in the oeuvre of the author¹³⁴ or the high artistic status of the maker and/or the work.¹³⁵ For example, if a commissioning party explicitly orders a work of a certain artistic status, he will have to bear the responsibilities ensuing from that status as to its maintenance and preservation.¹³⁶

Extent and scale of alterations

Hardly surprisingly, the extent to which the form of a work is affected and the scale of the alterations inflicted on it play an important role;¹³⁷ in many of the cases where the maker successfully invoked the right of integrity, large scale alterations were at stake.¹³⁸

Destination of the work

Thirdly, the destination of the work can help to reinforce the integrity right – it is not unimaginable that the blue carpets which were considered incompatible with Irene Verbeek's ceiling paintings in the municipal theatre in Groningen, would have been seen with a more forgiving eye by the court if a less 'cultural' place and public were concerned.

Nature of the work and degree of divulgation

The nature of the owner of the work may also play a role: public institutions, and more in particular cultural and academic ones, could be subject to a special duty of care and respect. Also, the degree of divulgation of the work is not unimportant. If a work still lingers half way

¹³⁴ For example District Court of Groningen 10 September 2004, Irene Verbeek v. Groningen ('Ceiling paintings municipal theatre Groningen'), LNJ AR1050; *AMI* 2005, p. 225 note Judica I. Krikke; *JIN* 2004, nr 37, p. 137; President of the District Court Rotterdam 27 July 1999, *AMI* 1999, p. 149.

¹³⁵ Court of Appeal of Arnhem 2 July 2002, Jelles v. Zwolle, *AMI* 2002, no. 19, p. 187-191, at para. 4(5); President of the District Court Rotterdam 10 September 1998, Struycken v. NAI, (under: para. 2.1, facts), *AMI* 1998, 178, *IER* 1999, p. 22-28, note Kabel; President of the District Court of Breda 1 and 18 March 1994, Van Mourik Vermeulen Architecten v. Dennenheuvel Vastgoed, *Informatierecht AMI* 1995, p. 34; Court of Appeal of Leeuwarden 29 December 1993, Van den Berg v. Rijksuniversiteit Groningen, *Informatierecht AMI* 1996, p. 13-14. See in particular Seignette, in her note on Supreme Court 6 February 2004, *AMI* 2004, p. 151, right column; Verzijden, 'Morele rechten in de polder', at p. 41; Quaedvlieg, note in *AMI* 1995, at p. 37.

¹³⁶ President of the District Court of Leeuwarden 12 July 1988, Bonnema v. Municipality of Tietjerksteradeel, *IER* 1988, 88 note L. Wichers Hoeth; *AMI* 1989, 17 note H. Cohen Jehoram; *BIE* 1990, 54 note Sonja Boekman.

¹³⁷ J.J.C. Kabel, *Privaatrechtelijk droit au respect bij vernietiging*, in: Inge van der Vlies et al., *Kunst, recht en beleid*, Den Haag: Boom Juridische Uitgevers 2009, p. 57-71.

¹³⁸ District Court of Maastricht 30 October 2008, Van Dijk v. Province of Limburg, *AMI* 2009, p. 122; President of the District Court of Leeuwarden 29 November 1995, Vegter v. Friesland Bank, *AMI* 1996, p. 14, note H. Cohen Jehoram; President of the District Court of Breda 1 and 18 March 1994, Van Mourik Vermeulen Architecten v. Dennenheuvel Vastgoed, *Informatierecht AMI* 1994, p. 34, note A.A. Quaedvlieg; President of the District Court Amsterdam 17 October 1991, *IER* 1992, p. 20-21; *AMI* 1993, p. 186, Gebouw van IJzer; President of the District Court of Leeuwarden 12 July 1988, Bonnema v. Municipality of Tietjerksteradeel, *IER* 1988, 88 note L. Wichers Hoeth; *AMI* 1989, 17 note H. Cohen Jehoram; *BIE* 1990, 54 note Sonja Boekman.

between a real divulgation and the 'phase intime', the moral right may be of another and more constraining nature than when it has moved far along the way of the 'phase du don'.¹³⁹

ii. The legal and doctrinal basis for creating a balance of interests

As early as in 1974, when case law about the integrity right had hardly started to emerge, Bob Wachter remarked in a visionary note in *Nederlandse Jurisprudentie* that 'it is clear that the situation in which the moral rights to an immaterial product of the mind and the rights in the material object itself are not united in one person, must lead to a weighing of interests'.¹⁴⁰ Indeed, the moral right would turn into a tyrannical instrument if the reasonable needs of legal owners and users of the work were not to be taken into account. This readiness to take into account the various interests involved is also favoured by the Dutch tradition of practical solutions, even more when these solutions help to facilitate trade. Also, a refusal to weigh the interests involved would hardly be conceivable in a system which, as from the introduction of the new Civil Code in 1992, has made of 'reasonableness and fairness' the leading principle of its whole law of obligations.¹⁴¹

Although the jurisprudence concerning moral rights naturally is casuistic, several decades of developing case law reveal with ever more clarity some general guidelines for the weighing of the interests of the parties concerned. This development shows that moral rights are not a vague, unpredictable and capricious element jeopardizing the commercial interests of exploiters, but that they can function as a stable and equitable component of the system of copyright protection as a whole.

The law: right to oppose alterations subjected to a condition of reasonableness

Against this background, Dutch authors generally show satisfaction with the reasonableness clause contained in Article 25, paragraph 1(c) of the Copyright Act with regard to the author's right to oppose alterations. However, a similar clause does *not* exist with regard to the right to oppose *mutilations* and other impairments. Some claim that as the text of the law does not repeat the condition of reasonableness in case the author opposes a mutilation, it clearly follows that in such cases a weighing of interests must be excluded. Kabel fears that the integrity right may be sapped if a balancing of interests is allowed even in the presence of a very serious impairment as 'mutilation'.¹⁴² Cohen Jehoram likewise is of the opinion that in case of mutilation, a weighing of interests is not allowed,¹⁴³ nevertheless, the same author argues that an author cannot oppose alterations necessary to keep an (architectural) work usable, even if these affected the representative character the architect intended to give to that building.¹⁴⁴ Occasionally, case law has followed the same approach, notably also the Court of Appeal of

¹³⁹ Term from the Doyen René Savatier, *Le droit de l'art et des lettres*, Paris 1953, p. 21.

¹⁴⁰ Bob Wachter, note on Dutch Supreme Court 22 June 1973, *Patrimonium v. Heirs of Reijers*, (placing of the sculpture 'The Hands') *NJ* 1974, 61.

¹⁴¹ Articles 3:12, 6:2 and 6:248 Civil Code.

¹⁴² J. Kabel, note on President of the District Court Rotterdam, 10 September 1998, *Struycken v. NAI*, *IER* 1999, no. 3 p. 22.

¹⁴³ Herman Cohen Jehoram, *AMI* 1988, p. 131.

¹⁴⁴ Herman Cohen Jehoram, note on President of the District Court Leeuwarden, 12 July 1988, *AMI* 1989, p. 17.

Leeuwarden on 17 March 1999 in the notorious case of *Bonnema v. SBB*.¹⁴⁵ In paragraph 9 of that judgment, the Court of Appeal found that Article 25, paragraph 1(d) did not allow for a weighing of interests as it protected the maker of a work whenever prejudice could be caused to his honour and reputation in that quality. However, subsequently the Court of Appeal considered that the question whether such prejudice was likely to be caused, depended on the question whether the third party could invoke a due cause for his acts with regard to the work. By thus interposing the requirement of a due cause, the Court of Appeal comes quite close to what seems to be a weighing of interests.

Still, other authors as Rob Du Bois, are of the opinion that an absolute right to oppose mutilation would lead to an 'overstraining of the idea of copyright'.¹⁴⁶

The courts: prejudice to the reputation as a test of reasonableness

The impression is that a majority of case law seeks a way out by verifying whether, in case of a mutilation or impairment of the work, these are of a nature as to cause prejudice to the honour or reputation of the author.¹⁴⁷

One could ponder whether this comes down, after all, to a simple weighing of interests or whether this 'setting' within the context of 'honour and reputation' to some extent protects authors against an all too laxist erosion of the integrity right into an interest like all others (and perhaps inferior to many others). Jan Kabel, who is sternly opposed to a simple weighing of interests, has taken an indulgent position vis-à-vis this test of prejudice to honour and reputation.¹⁴⁸

A test of prejudice to honour and reputation might indeed lead to slightly different results than a simple weighing of interests. Great financial losses for the exploiter might as such be of more importance in a general weighing of interests than in the specific context of the honour and

¹⁴⁵ Court of Appeal of Leeuwarden 17 March 1999, *Bonnema v. SBB*, *AMI* 1999, p. 158; also see President of the District Court Amsterdam 24 February 1992, *Carmina Burana v. O Fortuna*, *BIE* 1994, no. 83, p. 307; *IER* 1992, no. 38 p. 146-148, at p. 148, para. 14, considering that a weighing of interests is excluded except in cases where an extreme disproportionality between the interests is apparent.

¹⁴⁶ Formulated, in the elegant Dutch title of his article, as 'Een overspanning van de auteursrechtgedachte', for which formula he grants the credits to the great copyright scholar Sjoerd Gerbrandy: R.L. du Bois, *Informatierecht AMI* 2000, p. 98-101; also see A.A. Quaadvlieg, 'Vernietiging en ook nog aantasting', *IER* 2000, p. 13-15.

¹⁴⁷ See, *inter alia*, H.J.G.M. Mom, in: loose-leaf *Intellectuele Eigendom. Artikelsgewijs Commentaar* Au II Art. 25-29; P.G.F.A. Geerts, in: Ch. Gielen (ed.), *Kort begrip van het intellectuele eigendomsrecht*, Deventer: Kluwer 2011, p. 478; District Court of Arnhem 25 June 2009, *Van der Leest v. D.P. Factory* ('gehaakte langbeenknuffelbeesten'), *AMI* 2009, p. 213; District Court of Maastricht 30 October 2008, *Van Dijk v. Province of Limburg*, *AMI* 2009, p. 122; District Court of The Hague 15 September 2004, *Caris v. E.On*, *IER* 2005, nr 4 p. 10-13, note J. Kabel; *AMI* 2005, p. 100-102; Court of Appeal of Arnhem 2 July 2002, *Jelles v. Zwolle*, *AMI* 2002, no. 19, p. 187-191, note J.I. Krikke; Court of Appeal of Arnhem 2 March 1993, *OHRA v. Oxenaer and Kruit*, *AMI* 1995, p. 90-93 note Grosheide; Court of Appeal of Leeuwarden 13 April 1992, *Kuipers v. Groningen*, *AMI* 1993, p. 12. Also see C.J.H. Brunner in his note in *NJ* 1986, 692. Until 2004, the same applied to cases of destruction, see below.

¹⁴⁸ Note Jan Kabel on Court of Appeal Leeuwarden 17 March 1999, *AMI* 1999, p. 158, *Bonnema v. SBB*, at p. 159: the reputation test shows resemblance with a weighing of interests but should not be identified with it, as the examination whether there is a (due cause for destruction) is carried out in the frame of the requirement of prejudice to the reputation. 'Already on an earlier occasion, the Court of Appeal of Leeuwarden granted priority to the reputation test over a direct weighing of interests.'

reputation of the author. However, two remarks must be made. The first is that Dutch courts, in line with the sad reputation of the Dutch nation on this point, tend to take pecuniary interests very seriously – even if they fully endorse moral rights of authors. Secondly, the pecuniary element might (tacitly) be reintroduced in the honour and reputation approach. For example, one could imagine courts would consider that, *in view of the considerable investments to be made by the defendant*, the author should have observed special care in specifying the boundaries of the adaptation he allowed, in the absence of which even rather intensive adaptations must be held to be allowed.

Why the right to oppose mutilation is subject to a test of reasonableness

The question remains whether in view of the wording of the law, which does introduce a requirement of reasonableness in case the author opposes alterations but fails to subject cases of mutilation to that same test, a possibility exists for the introduction of a test of reasonableness via the ‘back door’ of the concept of honour and reputation. Here, such a possibility is sustained, in the light of the system of the law.

The cause of the dispute on this point may partly be due to the fact that the system of the law is not very clear in this case. In fact, if the work is *mutilated*, it must in principle be assumed that this constitutes a – drastic and defacing – alteration which the author can always oppose in all reasonableness. Consequently, this situation would already be covered by the basic right to oppose alterations, and the special provision on mutilations would be redundant. However, it is not.

The key to the special function of the right to oppose mutilation can be found in paragraph 3 of Article 25, from which it follows that the author can renounce the right to oppose alterations, but not the right to oppose mutilations. This results in a system of three stages of ‘alteration’: firstly, alterations of the work which the author cannot oppose at all, because such opposing would be unreasonable; secondly, (more serious) alterations of a nature he can oppose, unless he has – either tacitly or expressly – waived the right to oppose them; thirdly, alterations amounting to a mutilation of the work, which mutilation is of a nature as to be prejudicial to the honour and reputation of the artist; the right to oppose these *cannot* be waived.

Arguably, the first situation will most often occur in cases where the author has granted a simple right of reproduction, distribution and/or communication to the public. As in these situations, the author has allowed no more than a simple right to use, which right to use does not include a right of adaptation, he can oppose every alteration unless it concerns negligible alterations and opposing them would really be unreasonable. However, the author has the right to go further and allow more intrusive alterations, not only when these are more or less inevitable – which may occur in the case that the author of a novel grants permission for a cinematographic adaptation of that work – but also in other cases. However, the law contains this right within the ‘frontiers’ of a mutilation which is prejudicial to the honour and reputation of the author. Beyond those frontiers, his right to oppose changes with regard to the work remains intact.

This reveals the ambiguity of the situation the provision with regard to ‘mutilations’ has to deal with. It concerns cases in which, either expressly or implicitly, the author has *consented* to some degree of adaptation of the work. Moreover, the boundaries of this consent may be difficult to

identify. Therefore, the right of integrity retreats to its core value. It protects neither the work as such, nor the reputation of the artist as such, but the bond between them. Consequently, the integrity right will be at risk, not by the fact of the mutilation alone, but only if this mutilation also is likely to adversely affect the reputation of the author. It is felt that Article 25 paragraph 1(d) thus creates a reasonable compromise. In case an author has given his consent to an adaptation without clearly delimiting its boundaries, this will grant a rather large margin to exploiters. But if the adaptation goes very far and amounts to a mutilation, and if, moreover, none of the circumstances justify such mutilation so that the author has reason to fear that it will prejudice his reputation in the eyes of an (objective) user of the work, the integrity right will be activated, even if the consequences would be rather burdensome for the exploiter.

'Impairments'

Apart from mutilation, the Dutch term 'aantasting' (impairment) in Article 25, paragraph 1(d) also covers the case of, in the wording of the Berne Convention, 'any other derogatory action' in relation to the work. It is more or less generally accepted that this form of impairment concerns cases in which the work as such is left intact, but changes are brought to its context or environment, which might adversely affect its status and the honour and reputation of the author. Like in the case where the author has consented to an adaptation, the fact that the work as such is left untouched introduces a certain ambiguity in the situation. The integrity of the work as such is respected; therefore the arguments of the author to oppose the use must be particularly strong. For even if it is clear that it *may* be damaging to work and author when a work is presented in a morally or physically derogatory context, the integrity right should not grow into a general privilege to govern the environment of works of art; the rights of third parties should be carefully observed where the impairing element must be located outside the body of the work as such.

Prejudice to honour and reputation as an objectified legal concept

The impression is that in most cases, the test of prejudice to the honour and reputation of the author is applied in an objectified way. It thereby has acquired the nature of a legal concept rather than a factual criterion.¹⁴⁹ Indeed it is probably the best way to look at this concept.¹⁵⁰ A factual test as opposed to a legal criterion could make the right degenerate, as is illustrated by Court of Appeal of The Hague 11 November 1999, *Shell v. De la Haye*, AMI 2000, p. 15, in which opposition against an alleged impairment of the work was dismissed, *inter alia* because the court found that this action would not negatively influence the recognition the well-known designer already enjoyed with colleagues in design circles.¹⁵¹ The opinion is that this criterion can hardly lead to satisfying results. Not only colleagues, but also the public at large could maintain full confidence in an author's reputation even in case of quite revolting mutilations of certain works, so that the author could not oppose deformations he should be able to oppose. The other way round, a reputation could be damaged by actions which are nevertheless objectively necessary

¹⁴⁹ Different: J. Kabel, 'The Battle of the Arts', note on NAI v. Struycken, *IER* 1999, 25, pleading for a test of prejudice of a more empirical nature.

¹⁵⁰ As was earlier sustained in my note on Court of Appeal of Amsterdam 26 July 2001, *Röling v. Haarlem*, AMI 2001, p. 150-153, at 153.

¹⁵¹ Court of Appeal of The Hague 11 November 1999, *Shell v. De la Haye*, AMI 2000, p. 15; with illustrations in President of the District Court Rotterdam 27 July 1999, AMI 1999, p. 149.

and justified. Under the subjective and factual angle chosen by the Court of Appeal, there would be an infringement of the moral rights; whereas it seems a better solution to tolerate deformations of functional objects which are justified on objective ground – including, of course, the ground that there is no reasonable and less mutilating alternative.

Therefore, it is felt that the test whether a mutilation of impairment can be prejudicial to the honour and reputation of the maker must be of an objectified and normative nature. The author should not be obliged to prove actual damage to his reputation. It suffices if the work is mutilated or impaired in a way which objectively causes a reasonable risk of damage to his reputation.

Whether or not there is a due cause for behaviour which would otherwise constitute an infringement of the integrity right, may often coincide with what the parties may reasonably expect from each other on the basis of a contract they entered into. However contradictory and illogical from a legal point of view, in practice the rule is that actions which, by normal standards, would constitute a mutilation (the right to oppose which can consequently not be waived), can turn into a simple alteration *by* the mere fact that the author consciously waives his rights in respect of such actions! However, there are limits to this practice. There is a point beyond which the text of the law applies and waiver simply is excluded,¹⁵² no matter what contractual agreements the parties engage into; otherwise Article 25, paragraph 3 would be devoid of substance.¹⁵³ Perhaps, the contractual and the legal border to waiver lie not so far apart. Under contract law, agreements in which authors contractually consent to mutilations so serious that the exploiter may not reasonably rely on the conclusion that this corresponds to the actual will of the author, may not be binding.

Proof of prejudice to honour and reputation

If the above is right, the mutilation as such would in principle also constitute prejudice to the honour and reputation of the maker, unless there is a due cause for the mutilation in the form of a contract or other circumstances.¹⁵⁴ The District Court of Amsterdam seemed to follow this reasoning in a case where it stated that the prejudice to the reputation followed from the – various – infringements and that simply challenging that prejudice without further explanation would not hold.¹⁵⁵ At this point however, the opinions differ. In his – critical – accompanying note, Spoor challenges the prejudice to the reputation and the mutilation each and

¹⁵² Also see Grosheide in his note on Court of Appeal Arnhem 2 March 1993, *OHRA v. Oxenaar and Kruit*, *AMI* 1995, p. 90, at p. 93.

¹⁵³ However, E.A. Mout-Bouwman, 'Droit au respect: kind van de redelijkheid', *BIE* 1997, p. 43-44, is of the opinion that authors should have complete freedom to waive rights to the extent they wish.

¹⁵⁴ Like for example the fact that an alteration is made necessary because an architect supposedly has constructed a building which does not comply with reasonable practical requirements: see the notes of L. Wichers Hoeth and Sonja Boekman on President of the District Court of Leeuwarden 12 July 1988, in (respectively) *IER* 1988, p. 89 and *BIE* 1990, nr 18 p 55.

¹⁵⁵ District Court of Amsterdam (provisional measures) 11 January 2007, *AMI* 2007, nr 8, p. 51 nt. Spoor, *Dijkman v. Van Tiggelen*. A sign that it concerns an 'integrated question' can also be found in President District Court Maastricht 30 October 2008, *Van Dijk v. Province of Limburg*: the court rejects that there exists a risk of prejudice to the reputation of the author although it has already found that there is no mutilation. In that case, any consideration concerning prejudice to the reputation is redundant, unless that very prejudice could be a cause to (nevertheless) find a mutilation or derogatory action.

independently. Likewise, Judica Krikke chided the District Court of Groningen¹⁵⁶ for not making separate considerations as to the question whether the mutilation which was found in that case moreover risked to cause prejudice to the reputation of the author. However, in the light of the reasoning followed above, such considerations should perhaps be read in the reasons given for the finding of a mutilation, in particular where the court states, in paragraph 2.6 of the judgment, that the work occupies an important place in the oeuvre of the artist and has been described in a brochure.

7. Conflicts between the exercise of a moral right and other proprietary rights on the “carrier” of the work

(e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)

Demolition as an unlawful act: Miletic

As has been observed in relation to other more controversial exercises of the moral right, the courts first approached the subject from the angle of unlawful conduct. In 1975, the Hoge Raad ruled in the case of Miletic. During a long absence in his home country, the municipality of Amsterdam had vacated the atelier it rented out to the Yugoslavian (we write 1970) artist and sculptor Slawomir Miletic. When he returned, the bewildered artist discovered that his works had been removed and subsequently stored by the municipal cleansing department. His entire oeuvre lay in ruin. Miletic accused the municipality; the municipality pretended that this was the condition in which the works had been found; the contrary was hard to prove. Eventually, the Court of Appeal of Amsterdam at least in part found that there was unlawful conduct on the part of the municipality. The case led to no less than two appeals in cassation. In the second of these appeals, the Dutch supreme court enigmatically remarked:¹⁵⁷ “It is possible that such conduct also provides a ground to grant compensation for other damages than financial loss, in particular when those actions also amount to an “impairment” of those works of art in the sense of Article 25, first paragraph, introduction and under c), of the Copyright Act, and consequently of the personality right of the maker meant there. However, the getting lost of those works of art as a consequence of an unlawful conduct by the municipality will not be enough.”

Demolition as an infringement of the moral right? The debate.

For a long time it was very much debated whether the author’s *droit au respect* included the right to object against destruction of the work.¹⁵⁸

A minority in the doctrine, supported by some case law, sustained that destruction or demolition did not only mean an impairment of the work, but that moreover the prejudice to the honour or

¹⁵⁶ District Court of Groningen 10 September 2004, Irene Verbeek v. Groningen (“Ceiling paintings municipal theatre Groningen”), LJN AR1050; *AMI* 2005, p. 225 note Judica I. Krikke; *JIN* 2004, nr 37, p. 137.

¹⁵⁷ Dutch Supreme Court 16 November 1984, NJ 1985, 270, Miletic v. Amsterdam

¹⁵⁸ Verzijden, ‘Morele rechten in de polder’, *AMI* 2000, p. 37-44.

reputation of the author required by Article 25(1)(d) was, in principle, brought about by the act of destruction as such.¹⁵⁹ The supporters of this view submitted that, unlike the right to object against alterations *not* amounting to a mutilation in Article 25, para. 1 under c, the right to object against mutilations and other impairments was not subject to a supplementary test of reasonableness and fairness. Therefore, it was considered that the rights of the artists had priority, only limited by the doctrine of abuse of copyright. Although under Dutch law the possibility to apply the general doctrine of abuse of a right is not theoretical at all, the system of private law required rather exceptional circumstances to successfully invoke it, so that there seemed to be little reason to fear that the exercise by artists of their moral rights would be considered to constitute an abuse.

The other extreme was also supported: authors could *never* oppose destruction and demolition of their work on the basis of the moral right, because the destruction excluded as such the possibility of any prejudice to the honour or reputation of the author.¹⁶⁰ In this view, prejudice to the honour or reputation of the author could only be caused where a work was presented to the *public* in a distorted or mutilated way. As the public could have no access in whatever way to a work after destruction or demolition, the risk was excluded that the work would reach the public in a state or form the author had not intended. There was no risk of a ‘false impression’ with the public and, consequently, no risk of prejudice to the honour or reputation of the maker.¹⁶¹

The majority of courts¹⁶² and authors¹⁶³ adopted a view which formed a compromise between the two extremes: the destruction as such would not suffice for a successful action based on the integrity right, but it was required that this destruction materially caused prejudice to the honour and reputation of the author. Such prejudice to the honour and reputation was not caused were

¹⁵⁹ In particular Court of Appeal Leeuwarden 17 March 1999, *NJ* 1999, 707; *AMI* 1999, p. 158, note Kabel; *IER* 2000, p. 16. The decision lacks consistency, because in the end the Court of Appeal gives in to a test whether there was a well-grounded reason for demolition (which, in the view of the court, was not given).

¹⁶⁰ *i.c.* Court of Appeal Den Bosch 17 December 1990, *NJ* 1991, 443; *IER* 1991, 63 note SdW; *AMI* 1992, 33, Lennartz v. Sittard; District Court of Zwolle 21 November 2001, *IER* 2002, 139; Krikke, note on Court of Appeal Arnhem 2 July 2002, Jelles v. Zwolle, *AMI* 2002, p. 191; District Court of Utrecht 3 June 1998, Van Schijndel v. Utrecht, *Informatierecht AMI* 1998, p. 39-42, acclaimed by H. Cohen Jehoram in his note.

¹⁶¹ H. Cohen Jehoram, *AMI* 1993, 190; also see *AMI* 1999, 41; S. Gerbrandy, *Kort Commentaar op de Auteurswet 1912*, Arnhem: Gouda Quint 1988, p. 304; Krikke, note on Court of Appeal Arnhem 2 July 2002, *AMI* 2002, nr 19 p. 187, at 191, Jelles v. Zwolle.

¹⁶² Court of Appeal Amsterdam 11 June 1992, *Informatierecht AMI* 1993, 186 note H. Cohen Jehoram, Staal v. Beurspassage (‘Metropoolgebouw’); Court of Appeal of Leeuwarden 13 April 1992, Kuipers v. Municipality of Groningen (destruction of unique traffic signs); Court of Appeal Leeuwarden 29 December 1993, Van den Berg v. Rijksuniversiteit Groningen, *Informatierecht AMI* 1996, 13 (with note H. Cohen Jehoram at 16); Court of Appeal Amsterdam 26 July 2001, Röling v. Haarlem, *AMI* 2001, 148-153, note Quaedvlieg; Court of Appeal Arnhem 2 July 2002, Jelles v. Zwolle, *AMI* 2002, nr 19 p. 187, note Krikke; *IER* 2002, nr 48 p. 297; Pres. District Court of Maastricht 21 February 1990, *IER* 1991, 63; Pres. District Court of Amsterdam 17 October 1991, *Informatierecht AMI* 1993, p. 35, Staal v. Beurspassage; Pres. District Court of Groningen 22 October 1993, *Informatierecht AMI* 1994, 102, Van den Berg v. Rijksuniversiteit Groningen; District Court of Utrecht 3 June 1998, Van Schijndel v. Utrecht, *Informatierecht AMI* 1999, 39, note H. Cohen Jehoram; Pres District Court of Haarlem 18 May 2001, Röling v. Haarlem, *AMI* 2001, 148.

¹⁶³ Spoor/Verkade, *Auteursrecht*, 2nd ed., Deventer: Kluwer 1993, nr 216 p. 322; somewhat more reluctant in the present 3rd ed. of Spoor/Verkade/Visser, para. 7.16 p. 379; Grosheide, *IER* 2000, 55; Kabel, note on District Court of Zwolle 21 November 2001, Jelles v. Zwolle, *IER* 2002, 39; Van Lingen, *Auteursrecht in Hoofdlijnen*, 5th ed. 2002, p. 113; Quaedvlieg, *Auteur en aantasting, werk en waardigheid*; also see Seignette in her note on the decision of the Hoge Raad in *AMI* 2004, p. 151.

there was a 'gegronde reden', a 'due reason' for demolition. If the demolition or destruction was, by all reasonable standards, justified or even inevitable, it was considered difficult to imagine how this could (illicitly) cause prejudice to the honour and reputation of the author. On the other hand, a more or less needless destruction of a work could make the impression that it concerned a disposable without value and might therefore be a derogatory action.¹⁶⁴ In practice, this meant that the exercise of the right to object to destruction was subject to a weighing of interests. Reasonable practical interests of owners or users would have priority over the artistic interests of the author, but in some cases the moral right would prevail and in others, a compromise was found in the form of a financial indemnification for the author.

The abovementioned 'due reason doctrine' developed by the lower courts, although widely applied, had never been legitimized by a decision of the Dutch Supreme Court, so that the possibility continued to exist that the majority opinion was not the correct one. During the eighties and nineties, an ever-increasing flow of case law developed around the role of the *droit au respect* in the case of destruction, so that the existing uncertainty began to make itself felt. Therefore, it came as a relief when on 6 February 2004, the Dutch Supreme Court finally ruled on the question.¹⁶⁵

Advocate General Verkade strongly advised against the application of the criterion of prejudice to the honour and reputation of the author, criticizing it for its vagueness and considering that it would not be fit to protect against excessive claims.¹⁶⁶ Nonetheless, the judgment turned out less unequivocal than many might have hoped for. As to the possibility as such to invoke the right of integrity against the destruction of a work the Hoge Raad was unambiguous:

"The total destruction of an object in which a work of authorship is embodied, cannot be qualified as an impairment of the work forbidden by the Copyright Act 1912."

However, destruction can amount to abuse of power or otherwise be unlawful:

"That does not mean that the owner of an object (including immovable objects) in which a work of authorship is embodied – a copy of the work – always is free to abandon that work to destruction and that the interests of the author are always second to the power to dispose of the owner. Indeed, the destruction of a copy of the work can amount to abuse of power in the cases as meant in art. 3:13, par. 2 Civil Code, or otherwise be unlawful against the author."

Therefore, in exchange for the elimination of the action based on copyright, the Hoge Raad offers an alternative based on general private law. The alternative could have been little more than a theoretical palliative in view of the fact that abuse of power under Article 3:13, para. 2 BW normally is subject to the heavy condition that the owner, taking into consideration the disproportion between the interest in exercising the right and the interest which is prejudiced by this exercise, reasonably could not have come to this exercise. But from what follows, it appears that a realistic alternative to the integrity right is offered, the exercise of which depends on

¹⁶⁴ Jan Kabel, in his note on Court of Appeal Leeuwarden 17 March 1999, *NJ* 1999, 707, in *AMI* 1999, p. 159.

¹⁶⁵ Dutch Supreme Court 6 February 2004, *Jelles v. Zwolle* ('destruction of the *Wavin*-building'), LJN AN7830; *AMI* 2004, p. 140-152, note Seignette; *IER* 2004, nr 19, p 102-119, note Grosheide.

¹⁶⁶ Conclusion Advocate General Verkade, *AMI* 2004, p. 148 para. 4.39 et seq.

conditions amazingly similar to the doctrine developed by the lower courts in relation to the right of integrity:

“Even a third party who destroys such an object can act unlawfully towards the author. Such abuse or otherwise unlawful behaviour will occur sooner to the extent that less copies of the work exist. As far as it concerns unique copies, as will most often be the case with regard to buildings, it can under certain circumstances be required from the owner that he only proceeds to destruction if a due reason therefore exists and if he respects the justified interests of the author at least in so far as, if requested, he takes care to have the building duly documented, or at least offers the author the opportunity to take the necessary measures for this himself.”

The importance of this must not be underestimated. As Van Maanen and Quanjel Schreurs have signalled, it means that in relation to works of literature and art, the whole doctrine of abuse of power must be interpreted in a specific, milder sense.¹⁶⁷ The requirement that the property to be destroyed must be duly documented, is just one example which hardly can be imagined in the traditional context of abuse of power.

The relative ambiguity on the level of the practical rule governing destruction thus introduced should not hide the potential significance of the case at a systematic level. The decision shows how close the relation tends to be which Dutch law construes between general private law and the exercise of the moral rights. Bob Wachter, in his important note on *Patrimonium v. Heirs Reijers* already quoted, perceived the moral right as a limitation of the rights of the owner, just as the property right could be limited by other existing mechanisms of private law. In *Jelles v. Zwolle*, the Hoge Raad of the Netherlands, although – whether rightly or not – fearing that the exercise of the integrity right against destruction might lead to results which are too ‘absolute’, nevertheless acknowledges the same principle that the right of the owner may be limited by the interests of the creative maker. It is no more than a gradual shift from one legal instrument, which looks sterner, to another, which might offer more space for a weighing of interests.

The practical way in which the *Wavin* case worked out however weakened the position of authors. Courts started to reason that if demolition of a work of art is no infringement of the moral right, it can be an alternative for owners who refuse to maintain the work in a good state, the last being an infringement.¹⁶⁸ The Court of Appeal Arnhem-Leeuwarden¹⁶⁹ ruled, technically correct, that the maker invoking abuse of power against an owner who wishes to remove a work will carry the heavy burden of proof that his interests as a maker are harmed in a disproportionate way. In this case, the costs of restoration and maintenance of the work of art proved to be more expensive than its realization. Also under the former doctrine of the integrity right, these circumstances would have made rather uncertain whether the author could have been successful in this case. However, proof that one’s interests as a maker are harmed in a disproportionate way may still be very difficult to prove in other cases where makers would have been much surer of success under the former doctrine.

¹⁶⁷ Van Maanen, Quanjel-Schreurs, ‘Nederlands Tijdschrift voor Burgerlijk Recht’, *NTBR* 2004, 72, p. 392-396.

¹⁶⁸ Quaedvlieg, Scheppers en slopers. Het nieuwe recht van verzet tegen vernietiging van kunst, *IER* 2005, nr. 45 p. 205-210

¹⁶⁹ Court of Appeal Arnhem-Leeuwarden of 12 November 2013, Municipality of Groningen/Milikovski, *ECLI :NL :GHARL :2013 :8518* ; *AMI* 2014, p. 36, with a sad note of Jan Kabel

8. Conflicts between moral rights and the right to freedom of expression/ other fundamental rights

That a conflict between the right of freedom of expression and the exercise of moral rights is far from unimaginable was illustrated in 2003 in by the *Scientology* case.

As was mentioned when dealing with the divulgation right, Article 15a, para. 1 requires for a lawful quotation that the work has legally been published. Likewise, Article 16, para 1 allows the use of works for the purpose of illustration for teaching, on the condition that the work has been lawfully made public. Many or most authors relate the criterion that the work has legally been published to the moral right.¹⁷⁰

However, as was already observed above, the condition that the work has lawfully been made public is open to various interpretations. In a first interpretation, there only would be a legal publication when the work is made available in print to the general public. This would entail sharp limitations for the freedom to quote and therefore for the freedom of expression. In a second interpretation, closer to the moral right spirit of the right of divulgation, the work would have to be considered as legally published as soon as it leaves, with his permission, the intimate sphere of the author. That is far from requiring a publication aiming at the general public.

In *re Scientology*, decided in 2003 by the Court of Appeal of The Hague,¹⁷¹ the artist and publicist Karin Spaink had published, on internet, large fragments of the 'religious' texts and secrets of the Scientology Church, with the intention to demonstrate how aggressive and dangerous this institution was. The Church of Scientology wished to prohibit this making available to the public of its texts. Karin Spaink raised several defenses. She contended *inter alia* that the use she had made of the texts was justified by the quotation right. The Court of Appeal of The Hague ruled however, that the condition that the work had legally been published meant that it must have been published in print. As with regard to the texts of Scientology, this was not the case, so that despite the fact that it had been established that *at least* 35.000 persons had been offered access to the works, they were considered not to have been published. Commentators were divided as to whether the decision should be approved of or not.¹⁷²

The Court of Appeal subsequently proceeded to the *direct* application of Article 10 ECHR, guaranteeing the freedom of expression, in order to allow the publication on internet after all. However, some authors raised the question whether the interest in the freedom of expression should not already be taken into account as an interpretative principle¹⁷³ at an earlier stage, in

¹⁷⁰ Spoor/Verkade/Visser, *Auteursrecht*, p. 180-181; J. Kabel, Privacy of Auteursrecht? Enkele ongekamde gedachten over grondslagen van het recht van eerste openbaarmaking, in: *Privaatrecht en Gros*, 1999, 237-251.

¹⁷¹ Court of Appeal of The Hague 4 September 2003, *Scientology v. Service Providers*, NJ 2003, 664; AMI 2003, p. 217, note P.B. Hugenholtz; BIE 2004, nr 57 p. 394, note Quaedvlieg; IER 2003, 352 note F.W. Grosheide; Computerrecht 2003, p. 350, note K.J. Koelman; Mediaforum 2003, nr. 45 p. 337, note Dirk Visser

¹⁷² In favour of the decision: P.B. Hugenholtz, F.W. Grosheide and Dirk Visser in their notes, quoted above; different: K. Koelman, in his note in Computerrecht; Quaedvlieg, Een modern citaatrecht belemmert niet de uitingsvrijheid: Scientology, het openbaarmakingsbegrip en de noden van de democratische samenleving, AMI 2006, p. 197-200 (strongly disapproving).

¹⁷³ Cf. P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989, p. 170

establishing what is meant by the condition that the work has legally been published. Instead of only consulting, as the Court of Appeal did, the Berne Convention and the Dutch Copyright Act, the European Convention should not have been disregarded. In view of the freedom of expression, it is very well conceivable that a work must be considered as legally published once the author allows it to leave his intimate circle. Several courts had already decided in this sense.¹⁷⁴

In his Conclusion of 18 March 2005 in this case for the Supreme Court,¹⁷⁵ Advocate-General Verkade, whilst admitting that the requirement that the work had legally been made public followed from the moral right, interpreted the requirement as one referring to a publication aiming at the general public. Verkade based his choice on the legislative history, in which it was remarked that the quotation right was not meant to apply to manuscripts or to works for a restricted public.¹⁷⁶ The A-G added that the view taken by the legislator should perhaps be reconsidered, but that the choice he made in 1985 was not inconsistent. The negative consequences of this choice could be remedied by allowing a not too narrow possibility of recourse to Article 10 EHRM, which the A-G considered to offer better tailored criteria.

What makes a publication legal?

In the same procedure of Scientology, the interesting question was raised when a publication can be considered legal in the sense of Article 15a. Should this be restricted to the case that the author himself had granted permission, or could also publication without his permission, but allowed on the basis of a legal provision suffice? In the *Scientology* case, texts of the Scientology had been made available when in the U.S., the *Fishman affidavit* had been deposited for inspection with the court.

It is interesting that the question could also be reversed. What if the *authorities* forbid the publication but the author allows it? In 2003, the Court of Appeal of Amsterdam prohibited the publication of Dimitri Yemets' Russian novel *Tanja Grotter and the Magical Double Bass*, which it considered to infringe J.K. Rowlings *Harry Potter and the Philosopher's Stone*. The prohibition of this satirical piece of Russian literature, written in an exuberant style and bulging with literary references to Greek and European mythology, would still be worth a public discussion;¹⁷⁷ but would it be allowed to *quote*, in the *Netherlands*, from this work in order to corroborate one's views? It has never been published, and the prohibition to do so irrevocably applies!

Freedom of Art

The freedom of art may have played an underlying role a case concerning a production of the famous theatre play *Waiting for Godot* of Samuel Beckett, in which all male roles were played by female actors in travesty.¹⁷⁸ Beckett was furiously opposed to this. The Dutch judge allowed the production.

¹⁷⁴ President of the District Court Arnhem 3 April 1987, BIE 1991, nr. 19, p. 58 Notu c.s. v. Mediaset; President of the District Court Zutphen 28 April 1981, AMR 1982, p. 16; BIE 1982, nr. 62, p. 182, Huijgen c.s. v. Van IJzendoorn c.s.

¹⁷⁵ AMI 2006, nr. 18 p. 206

¹⁷⁶ TK (Parliament) 1982-1983, 16 740, nr. 7 (Memorandum of Reply), p. 8, quoted by the A-G at nrs. 5.9 and 5.20 of his Conclusion

¹⁷⁷ The author of these lines (A.A. Quaedvlieg) acted as counsel for Yemets; he stays convinced that publication of the novel should have been allowed.

¹⁷⁸ President of the District Court of Haarlem 29 April 1988, Informatierecht AMI 1988, p. 83-85, note Herman Cohen Jehoram, Beckett/Toneelschuur (*Waiting for Godot*). Also see Quaedvlieg, *Le théâtre-laboratoire au laboratoire du droit: la liberté du metteur en scène*, Les Cahiers de Propriété Intellectuelle Vol 21 nr 3, October 2009, p. 673-693

9. How do authors exercise their moral rights in practice?

Do they consider this a matter of importance?

Yes.

How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)?

Authors have the right to oppose to publication of their work without authorship credit unless this would be unreasonable. There are only few instances where authors have sued for not receiving authorship credit. Where authors sue for infringement of the economic rights, the fact that no authorship credit has been given may support the case for the plaintiff and increase damages.

Authorship credit on TV becomes less and less common. Credit lines at the end of a motion picture often are short version, in many cases limited to the name of the production company and year of production.

Credit on radio is mostly for the artist and hardly ever for the composer and lyricist.

How do they impose respect of their moral rights when they are faced with derivative works?

To the extent that their negotiating position allows for it, the contract with the publisher or producer may provide safeguards. If not, the author may invoke his right to object to modifications unless such objection is unreasonable (s. 25 sub c DCA), or his right to oppose to mutilations or other distortions of his work (s. 25(1)(d) DCA).

Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works?

Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organisations and that contain clauses regarding the moral rights? If so, which ones?

The model contract for original Dutch language literary works specifies how the author is credited in the work and provides that the author has the right to update the work if the publisher intends to publish a reprint or new version.

The license terms of collective management organisation BUMA Stemra for the digital distribution of music works provide that the moral rights of the authors must be respected.

The license terms of collective management organisation Pictoright for the use of artistic and photographic works provide that the moral rights of the authors must be respected and that the licensee refrains from alteration, mutilation or other distortion of the work.

10. Collective Management organisations

Do collective management organisations play a role in the exercise of the moral rights in your country?

Collective management organisation Pictoright may as a service to its authors support authors in moral rights infringement claims. Pictoright also initiates lawsuits that may have both an economic and moral right aspect. Pictoright sued poster distribution company All Posters for selling canvas prints of existing posters (existing prints pressed on to canvas without actual copying). The case has been decided in two instances on the basis of the economic rights of reproduction and distribution. The Supreme Court referred questions to the ECJ regarding the exhaustion of the distribution right. HR 12 July 2013, ECLI:NL:HR:2013:CA0265. Pictoright also sued art traders for selling art forgeries.

11. particular forms of use

In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:

- “artistic quotation”
- user generated content
- folklore
- orphan works
- cloud computing
- alternative (free) licensing schemes (in particular open source licences or creative commons)
- international aspects (determination of jurisdiction and applicable law)

The Copyright Act only contains a special provision on the last mentioned category: international aspects. Dating from 1912, it generally is considered outdated.

The main Article concerning international aspects is Article 47:

Article 47

- 1. This Act applies to all literary, scientific or artistic works which have been first published in the Netherlands or have been published within 30 days of its first publication in another country, either before or after this Act's entry into force, and also to all such works not published, or not thus published, the makers of which are Dutch nationals.**
- 2. For the purposes of the application of the preceding paragraph, makers who are not Dutch nationals but who are habitually resident in the Netherlands shall be equated with Dutch nationals in respect of unpublished works or works published after the maker has become habitually resident in the Netherlands.**
- 3. A work is published within the meaning of this Article when it has appeared in print with the consent of the maker or, in general, when the number of copies, of whatever kind, made available with the consent of the maker satisfy the reasonable requirements of the public, having regard to the nature of the work.**
- 4. The performance of a dramatic, dramatico-musical or musical work, the showing of a film work, the recitation or broadcasting in a radio or television programme of a work and the exhibition of a work of art is not regarded as a publication.**

5. With regard to works of architecture and works of visual arts constituting an integral part thereof, the construction of the work of architecture or the installation of the work of visual art is regarded as publication.

6. Without prejudice to the provisions of the preceding paragraphs, this Act applies to film works the producer of which has his seat or habitual residence in the Netherlands.

12. The digital context

The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work's authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights "shift" in a digital environment:

From a divulgation right to a right to the protection of privacy (private life)?

From a right to claim authorship (paternity) to a right to attribution?

From an integrity right to a right to respect the authenticity of the work?

Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?

Answer

These subjects have, up to now, received limited attention in the Netherlands.

The right of *authenticity of authorship and work* was dealt with in the Dutch National Report for ALAI in 1977.¹⁷⁹ From this report, we quote:

(p. 223)

"[...] Dutch employers have not seemed to be inclined to effectively exercise the right of integrity. The reason that they are rather eager to keep their position as holders of the moral rights is not that they would have the intention to actually use those moral rights against third parties, but because they want to have absolute legal certainty that the employees will not hinder the employer's clients with claims based on copyright. [...] there has been a case of two free lancers who had designed Dutch banknotes for the *Nederlandse Bank*, the Dutch National Bank, invoking their moral rights against third parties who used the design of the banknotes for advertising purposes.¹⁸⁰ Although the action was dismissed by the Court of Appeal, this is probably not an idea which will appeal to many employers."

(p. 226)

¹⁷⁹ In : Dellebeke (ed.), *Copyright in Cyberspace/Le droit d'auteur en cyberspace*, Amsterdam: Otto Cramwinckel 1997, p. 221-233

¹⁸⁰ Court of Appeals Arnhem 2 March 1993, OHRA v. Oxenaar en Kruit, *Informatierecht AMI* 1993, p. 90-93, note Grosheide

“Where a strong protection of the personal expression of an artist as such can be very desirable or at least harmless to other people’s interests, a protection of the same strength can, in a commercial context, hamper competition and even lead to monopolistic consequences. To the extent that the work has been more explicitly created as or changed into a mass product, market-oriented principles of competition law will be more likely to be applied; the moral aspect, and with it the moral right, shrinks in that scenario.

[...] in order to protect the legitimate interests of producers and employers with regard to the authenticity of authorship and work, other instruments of intellectual property are available. Instruments which more effectively than copyright take into account the genuine commercial nature of the interests underlying the right of authenticity. Especially trade mark law might offer more appropriate ways to afford protection for these interests. Where producers and employers put their name on the product, it is, in the majority of cases, not so much an indication of original authorship but a means of identifying the goods and/or providing an indication of their origin. Moreover, and this brings us closer to the functions of the moral right, such an indication, like a trade mark, offers ‘*a guarantee that all good bearing it have been produced under the control of a single undertaking which is accountable for their quality*’.¹⁸¹ One could replace ‘control’ by the word ‘authorship’ and ‘quality’ by ‘authenticity of the work’ in order to illustrate that these concepts of trademark law and copyright law come, in a way, close together in this case: ‘works produced under the *authorship* of a single undertaking which is accountable for the *authenticity of the work*.’

Under the EEC Trademark Directive¹⁸² the trademark holder can supervise the condition of the goods which are sold under his trademark. In principle, the trademark right is exhausted once the goods have been put on the market in the Community by the proprietor of the trademark or with his consent (article 7(1) Trademark Directive). However, according to article 7 section 2, this rule shall not apply ‘*where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market.*’ Whereas this provision takes into account the interests of the trademark holder, it does not exceed the limits of the commercial field. It grants no protection against changing or impairing goods, if the trademark (*i.e.* ‘the name of the producer/employer’) is not affixed to the goods. It does not provide protection against the use outside the course of trade, and in purely private situations. There is no obligation to mention the trademark in relation to the goods. Even so, the trademark holder enjoys, under modern trademark law, a very good protection which does not give rise to serious complaints. Moreover, favoured by modern theories on the function of the trademark, Benelux trademark law seems inclined to provide a protection of ‘moral rights’ of the trademark holder, at least, to the extent that it protects the ‘integrity’ of the product’s image and its trademark.”

¹⁸¹ ECJ C-10/89 CNL-Sucal v. HAG [1990] ECR I 3711 (HAG II) and Case C-9/93, 23 June 1994, IHT v. Ideal Standard, IIC, Vol. 25, No. 5, 1994, p. 782-792

¹⁸² First Council Directive of 21 December 1988 to approximate the laws of the Member States relating to trademarks (90/104/EEC), OJ 11-2-1989 no. L 40/1