

ALAI 2001 National Report
Session IC, ID1 and ID2
Netherlands

Protection of technical measures and access right

Report by a study committee of the Dutch group of ALAI¹

A.	Introduction	1
B.	Existing legislation and case law related to technical protection issues	2
1.	‘COMPUTER INTRUSION’	2
2.	WIRETAPPING	3
3.	UNAUTHORISED ACCESS TO A TECHNOLOGICALLY PROTECTED BROADCASTING OR ON LINE SERVICE	3
4.	TORT LAW	4
5.	PROTECTED COMPUTER PROGRAMS	4
6.	CONCLUSION	5
C.	Access right	5
1.	WHAT IS (AN) ACCESS RIGHT?	5
2.	DIFFERENCE BETWEEN PROVIDING (PUBLIC) ACCESS AND OBTAINING ACCESS	6
3.	USE COMPENSATION IN DUTCH COPYRIGHT LAW	6
4.	THE TEMPORARY COPY-DISCUSSION	7
5.	THE FORTHCOMING EUROPEAN COPYRIGHT DIRECTIVE.....	8
	<i>Protection of Access Controlling Measures.....</i>	8
	<i>Temporary reproduction.....</i>	9
6.	EUROPEAN CONDITIONAL ACCESS DIRECTIVE	9
7.	CONCLUSION	10
D.	Balance between protection of technical measures and copyright limitations.....	10
1.	EXISTING DUTCH LAW	10
2.	LIMITATIONS ON ACCESS CONTROL TO SERVICES	11
3.	COPYRIGHT LIMITATIONS AND PROTECTION OF TECHNOLOGICAL MEASURES IN THE COPYRIGHT DIRECTIVE.....	12
4.	CONCLUSION	12

A. Introduction

This report contains a reply to the three (overlapping) questionnaires on protection of technical measures and on access right (1C, 1D1, 1D2).² Following the meeting program, we will start off with a description of other areas of the law than copyright law, which protect technological measures. Then, we will address the issue of the “new or evolving access right”. Lastly, we will go into the question of the relation between the protection of technological measures and the (existing) scope of copyright.

Before dealing with these issues, it is important to stress that – in our view – a clear distinction must be made between technological measures which protect against copyright infringements or (other) restricted acts, and

¹ 15 April 2001. Natali Helberger, Bernt Hugenholtz, Kamiel Koelman, Jacqueline Seignette, Rob Stuyt and Dirk Visser (chair)

² Questionnaire 1C: Situating legal protections for copyright-related technological measures in the broader legal landscape: anti circumvention protection outside copyright, prepared by Séverine Dusollier.

Questionnaire 1D1: Technological Protection of Copyrighted Works, and Copyright Management Systems. What is the appropriate scope of copyright in a world of technological protections? The New or Evolving “Access Right”, General Reporter, Jon Bing.

Questionnaire 1D2: The scope of the prohibition on circumvention of technological measures - exceptions, prepared by Pierre Sirinelli and Jane Ginsburg.

which therefore merely “boost” copyright protection, and measures which protect against unauthorised access. The latter technological measures inhibit acts which do not constitute infringement under traditional copyright and must therefore be analysed differently.

The main part of this report consists of a description of the existing legislation and case law in the Netherlands related to technical protection issues. Where relevant, rulemakings issued at the European level will also be discussed.

B. Existing legislation and case law related to technical protection issues

This subsection mostly deals with areas of the law other than copyright, which protect technological measures. As will be shown below, these provisions mainly concern protection against the circumvention of measures which control access, and not against measures which inhibit copyright infringing acts. Moreover, most of the technological measures protected are not specifically directed at copyrighted works, but at online services, computer systems and transmitted messages. Dutch law of unfair competition (tort), however, may be of help in keeping devices off the market which enable the circumvention of technological measures aimed at preventing copyright infringements. The only provision in Dutch law that clearly protects technological measures applied to copyrighted works is specifically limited to computer software.

1. ‘Computer intrusion’

Gaining access to a technologically protected computer system is prohibited by a penal law provision introduced in 1993, as part of computer crime legislation in the Dutch Penal Code (DPC). Article 138a DPC (as amended) reads as follows:

1. A person who intentionally unlawfully intrudes into a computerised device or system for storing or processing data or a part of such device or system is guilty of computer intrusion and liable to a term of imprisonment of not more than six months or a fine of the third category [€ 4538.00], where he:
 - a. thereby breaches any security, or
 - b. gains access by technological means, with the help of false signals or a false key, or by assuming a false capacity.
2. Computer intrusion is punishable by a term of imprisonment of not more than four years or a fine of the fourth category, where the offender subsequently copies the data stored in a computerised device or system, to which he has gained access unlawfully, and records such data for his own use or that of another.
3. Computer intrusion committed through the telecommunications infrastructure or a telecommunications facility used to service the general public is punishable by a term of imprisonment of not more than four years or a fine of the fourth category, where the offender subsequently
 - a. uses processing capacity of a computerised device or system with the object of obtaining unlawful gain for himself;
 - b. gains access to the computerised device or systems of a third person through the computerised device or system into which he has intruded.

The provision is directed against the intrusion in (access to) computer *systems*. Thus, it does not apply specifically to the act of gaining access to information or copyrighted works. However, it is likely that a person ‘intruding’ into e.g. a password protected web site in order to gain access to the copyrighted material contained on that site will be punishable on the basis of Article 138a DPC.³ To download the material stored on accessed computer system constitutes an additional offence under Subsection 2. Since in the Netherlands the provisions of the Penal Code may serve as a basis for a civil (tort) action, a person whose interests were harmed by the breaking into the computer system as defined in Article 138a DPC can hold him accountable under civil law. Consequently, even though the provision was inserted to protect the *pax computationis* – an equivalent of the privacy of the home – a side effect of it may be that it protects copyright owners against those who by breaking into a computer system gain unauthorised access to their works stored in the system.

³ The mere gaining of access to information without authorisation is not considered ‘theft’ under the general penal provision on theft. The Hoge Raad (Dutch Supreme Court) has ruled that computerised data can not be ‘stolen’ in the sense of the Dutch Penal law provision relating to theft. HR 3 December 1996, NJ 1997, 574.

2. Wiretapping

The interception or recording of data, protected (encrypted) or not, by means of the telecommunications infrastructure by a person for whom the information is not intended, is prohibited by art. 139c DPC introduced in 1993. Article 139c DPC (as amended) reads as follows:

1. A person by whom data not intended for himself or for the person by whose order he is acting, transferred by means of the telecommunications infrastructure or through a telecommunications facility used to service the general public, or by means of the peripheral equipment connected to it, intentionally are intercepted or recorded with the help of a technical device, is liable to a term of imprisonment of not more than one year or a fine of the fourth category.
2. Section 1 is not applicable to intercepting or recording:
 - (1) data received by a radio receiver, unless a special effort was made or a prohibited receiver was used to make such reception possible;
 - (2) by or by order of the person entitled to the connection used for telecommunication, except in cases of clear abuse;
 - (3) for the purpose of ensuring that the telecommunications infrastructure or a telecommunications facility used to service the general public is working properly, for the purpose of criminal investigation, or by the joint special authorisation of the Prime Minister and the Minister of Justice, the Minister of the Interior and the Minister of Transport and Public Works, to be given to the Head of the National Security Bureau on each occasion for a period of not more than three months, in cases in which the interest of the security of the State so requires.

This provision is directed against the unauthorised interception of information intended for someone else. This arguably may protect right holders against the act of gaining access to copyrighted works transmitted by means of narrowcasting. In view of the broad meaning of ‘telecommunications infrastructure’ and ‘telecommunications facility’⁴ Internet traffic may also be covered by this provision. Thus, a provider of an on demand service which streams data to paying customers may be protected against unauthorised interception.

3. Unauthorised access to a technologically protected broadcasting or on line service

Article 326c DPC is a provision of penal law introduced in 1993 which prohibits the unauthorised access – by using a technical device or false signals – to a protected on line or broadcasting service offered to the public through telecommunication. Article 326c DPC (as amended) reads as follows:

1. A person who, with the object of not paying for it in full, by technological means or by means of false signals, uses a service offered to the general public via telecommunication is liable to a term of imprisonment of not more than three years or a fine of the fifth category.
2. A term of imprisonment of not more than one year or a fine of the third category shall be imposed upon a person who intentionally
 - a. openly offers for dissemination;
 - b. has at his disposal for dissemination or with a view to importing such into the Netherlands; or
 - c. manufactures or keeps for motives of pecuniary gain;an object or data clearly intended to be used in the commission of the serious offence specified in section 1.
3. A person who commits the serious offences specified in section 2 as a profession or business is liable to a term of imprisonment of not more than three years or a fine of the fifth category.

This provision protects against the use without payment of technologically protected ‘services’ and is therefore not specifically directed at copyright works. However, as many online services provide access to copyrighted works, making use of such a service and thereby gaining access to copyrighted works will be covered by the provision. In addition, Subsection 2 of the provision explicitly punishes the production and distribution of circumvention devices which protect against unauthorised access of services. Again, because of the existence of

⁴ Article 1.1 under d and g of the Dutch Telecommunications Act.

this penal law provision, the acts prohibited by this provision may also constitute unlawful acts (torts) under civil law.

The public prosecutor generally does not put high priority on copyright related cases. Recently, however, the public prosecutor's office launched a criminal investigation under Article 326c PC against a Dutch publisher who published an article on how to modify a pay TV decoder in order to view pay TV broadcasts without payment.

4. Tort Law

Under Dutch law, as is mentioned above, a criminal offence may constitute an unlawful act for the purpose of (civil) tort law. Consequently, the above-mentioned provisions can serve as the basis for a civil action. Thus, the Court of Appeals of The Hague ruled in November 1999 that the sale of illegal pay TV decoders was unlawful (a tort) on the basis of Article 326c DPC.⁵

In the TV decoder case discussed above, the President of the District Court of Haarlem ruled that it was unlawful (a tort) to publish in a magazine a method to manipulate a decoder in order to view pay TV broadcasts without payment, because it was not pointed out to the readers that such manipulation is a criminal offence under Article 326c DPC.⁶ The court held that such publication could prejudice the pay TV company's interests as protected by Article 326c DPC. The court was not clear on the issue whether or not the publisher of the magazine had himself committed an act in violation of Article 326c(2) DPC, but the decision shows that such a qualification would indeed be possible.

Even if the penal provisions would not exist, the provision of circumvention devices may constitute unfair competition and as such be actionable as a tort (under Dutch law unfair competition is viewed as a species of tort). Prior to the adoption of the above-mentioned penal provision in 1993, Dutch courts repeatedly held that the sale of pay TV decoders without authorisation of the pay-TV operator resulted in an unlawful act.

See *Filmnet v. Planken*, President of the District Court of The Hague 20 January 1986, *Kort Geding* 1986, 92; *Esselte v. Ten*, Court of Appeals Amsterdam 2 May 1991, *Mediaforum* 1991, p. B-73 comment Van Engelen on p. 94 (also published in *AMI* 1992, p. 70, comment Verkade; *Groeneveld vs. TDS*, Hoge Raad (Supreme Court) 17 December 1993, *Nederlandse Jurisprudentie* 1994, 274, comment Alkema (also published in *AMI* 1994, p. 111, comment Cohen Jehoram). In all cases the court held that the sale of decoders which allowed the viewing without payment of encrypted subscription television constituted an unlawful act.

These cases concerned the distribution of decoders for viewing encrypted pay-TV services without payment. They did not deal with devices specifically aimed at circumventing technological measures for the protection against copyright infringements. While the contents of pay-TV services may be protected by the neighbouring rights of broadcasters (Article 8.1e of the Dutch Act on Neighbouring Rights, DANR), to provide decoding equipment will probably not be considered an infringing act under the DANR. After all, the provider does not perform a restricted act; arguably, the right of making available to the public would be over-stretched if the distribution of decoders would be viewed as such.

However, even though it has never been decided, it is not unlikely that the distribution of devices which have as their sole purpose to facilitate the circumvention of technological measures that protect against copyright infringements, will similarly be held to constitute unfair competition. If the device can also be used for non-infringing purposes (e.g. copying permitted by the Dutch Copyright Act, DCA), the provider may have a good defence. The act of circumvention for private purposes will most likely not be viewed as an act of unfair competition, as the person circumventing the technological measure does not compete with the copyright holder.

5. Protected Computer Programs

The above provisions and doctrines of tort law may have as a side effect that they protect copyright holders against certain acts of circumvention (of access controlling technological measures), or enable them to keep circumvention devices off the market. There is one provision in Dutch law, which is specifically written for the latter purpose. The

⁵ *Canal+ v. Ropla*, Court of Appeals of The Hague 18 November 1999, rolnr. 98/1082 (not published).

⁶ *Canal+ v. VNU*, President of the District Court of Haarlem 28 July 2000, rolnr. 66855/KG HZ 00-388.

Dutch Copyright Act (DCA) contains a penal law provision based on Article 7.1 of the European Software Directive. Article 32a DCA reads as follows:

A person who intentionally:

- a. offers for public distribution;
- b. has in his possession for the purpose of reproduction or distribution;
- c. has in his possession for the purpose of importing into the Netherlands, or
- d. keeps for profit

any means designed exclusively to facilitate the removal or overriding, without the consent of the author or his successor in title, of a technical device for the protection of a work as referred to in article 10, paragraph 1, sub 12 [i.e. a computer program], is liable to a term of imprisonment of not more than six months or a fine of the fourth category.

This is currently the only provision of Dutch copyright law dealing with technological measures. It is limited to the offering of means designed exclusively to facilitate the removal or overriding of a technical device for the protection of a protected computer program. The act of circumvention is not covered.

Although the Public Prosecutor is usually not very active in cases concerning Article 32a DCA, there is at least one example of a criminal conviction under art. 32a DCA.⁷ This case is concerned with the sale of so-called mod chips, which de-activate the protection embedded in Sony PlayStation consoles and video games. The person in question was sentenced to four months imprisonment.

6. Conclusion

Existing Dutch law (both penal and civil) provides certain protection against circumvention and the provision of circumvention devices. The protection against circumvention is limited to gaining unauthorised access to online or broadcasting services and to computer systems. Since these systems and services may contain copyrighted works, circumvention to gain access to copyright works is indirectly covered. If the circumvention prejudices the copyright holder's interests e.g. because he provides the information service himself or because he is the operator of the access protected web site on the computer system, it is likely that he can bring a civil action in court.

Additionally, the tort of unfair competition may provide the grounds to hold a person liable who distributes devices, which enable to circumvent to perform a restricted act.

C. Access right

The above section shows that Dutch law protects certain types of access control. This protection can very well be compared with the protection actors in the off-line 'hard copy' distribution chain enjoy. Breaking in into a bookshop (to steal a copy of a work) has its equivalent in the provision on computer intrusion (to download a copy). To access a theatre against the will of the owner of the theatre will constitute trespassing, thus the theatre has the legal means to ensure that only paying customers can view a performance of a play or a movie. The protection provided to online services by Article 326c DPC has a similar function.

If the copyright holder is the owner or possessor of the bookshop or theatre, he is directly protected. If he is not, his interests may be involved indirectly. Similarly, it depends whether he is the operator of the online service or the web site or not. The 'access right' that is discussed here would go (at least) one step further.

1. What is (an) access right?

Access right, as referred to by the organisers of ALAI 2001 Congress is, as far as we understand it, ultimately a right separate from the right of reproduction and the right of communication to the public to directly prohibit any unauthorised reading, listening to or looking at a work protected by copyright. It is a right for the right holder to fully control the mere consumptive use of a work by an end user. Every end user would need a license every time he wants to consume a work, e.g. pick up a book and read it. In contrast, to read a pirated hard copy, to

⁷ District Court of Alkmaar 30 November 2000, case number 14/060065-99 (not published)

view an unauthorised broadcast or to attend an unauthorised performance are generally not considered copyright infringing acts. Consequently, the reader, listener or viewer does not need a license.

2. Difference between providing (public) access and obtaining access

Traditionally, copyright has always focused on and in fact has been limited to acts of *providing* access to works. The reproduction right is the right to control the means of providing access to works through the distribution of copies. The right of communication to the public is the right to *provide* access to works to the public.

It is a common misunderstanding that the fact that certain kinds of *obtaining* access by the end user require payment by the end user, implies that the act of obtaining access in itself is subject to authorisation by the rightholder. The fact that we have to pay for a book in a bookshop and for a ticket in a concert hall does not imply that these acts have any relevance under copyright. It is up to the bookseller and the organiser of the concert to make the end users pay and to comply with the conditions under which the right holder gave him permission to distribute the book or organise the concert.

In the Netherlands we have always had and are in favour of a broad exclusive right to control the providing of access (to the public). At the same time there has always been strong opposition in Netherlands against tendencies of interpreting existing rights under copyright that might lead to a right to prohibit the obtaining of access, i.e. mere consumptive use of a work. One reason is that it is felt undesirable in a democratic society that individual access to information is controlled. To enforce a right of access as described above would necessarily involve metering of any use of copyrighted works.

3. Use compensation in Dutch copyright law

In the introduction to questionnaire 1 D.1 it is stated:

“In the analog context, copyright owners used to be able to control access to their works by limiting their disclosure to public performances rather than distribution in copies. Mass market tape machines, however, made it possible to convert broadcasts to copies, thus obliterating the distinction between distribution of copies and public performance. In the digital environment, by contrast, this blurring of performance and reproduction will be enhanced, but legal control over access may be retrieved, notably through the doctrine of “temporary copies” made in a computer memory or in the course of digital transmissions. As a result, copyright laws that prohibited unauthorized temporary reproductions might be viewed as establishing an access right.”

The questionnaire here refers to an ‘access right’ in a broader sense, including indirect access control achieved through the public performance and reproduction right. In the Netherlands, the public performance and reproduction rights are directed at providing access to works rather than at obtaining access. The public performance right does not give the copyright owner the right to stop anyone at the door of a concert hall where his work is being performed. He can not prevent the access to the performance. He may however force the owner of the concert hall to stop someone at the door, threatening that he will otherwise prohibit the public performance. Similarly, the right to distribute copies allows the right holder to prohibit third parties from providing access to copies, it does not allow the right holder to control the end-use.

Dutch copyright law does provide certain features that guarantee right holders compensation for the actual use of copyright works:

- levy on blank tapes (Article 16c DCA): when confronted with mass copying of audio and audio-visual works, the Dutch legislator specifically decided not to abolish the exemption for private use as this might violate the right of privacy. Instead, the legislator introduced a right of remuneration. Taping a musical or audio-visual work does not constitute infringement of the reproduction right provided the right holder receives a remuneration. The remuneration must be paid by the manufacturer or importer of blank tapes;
- photocopying of articles and small parts of books for internal use in companies and institutions does not constitute infringement of the reproduction right provided an equitable remuneration is paid to the copyright holders (Article 17 DCA). Currently, this right to an equitable remuneration is exercised only in respect of libraries, educational and governmental institutions.

Both these examples show that acts performed by end-users can be relevant under current Dutch copyright law. However, in both these cases the mere use or access is not relevant. By copying (privately) one could say that the

actor concerned competes with the copyright owner. Clearly, this is not the case where a person merely "consumes" or accesses a work.

4. The temporary copy-discussion

Article 4(a) of the European Software Directive reads as follows:

“Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder;”

Article 5.1 European Software Directive:

“In the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.”

Article 45i DCA:

“Without prejudice to the provision of Article 13, a reproduction of a work as meant in Article 10, first subsection, sub 12, also includes the loading, displaying, running, transmission or storage, to the extent that the reproduction is necessitated by these acts.”

Article 45j DCA:

“Unless otherwise agreed, the reproduction made by the lawful acquirer of a copy a work as meant in Article 10, first subsection, sub 12 which is necessitated for its intended purpose, shall not be an infringement of the copyright in that work...”

In the European Database Directive it is also explicitly mentioned that the database right includes temporary reproductions (Article 5a) but that the access by the lawful end user does not require the authorisation of the author of the database. Art. 6.1 European Database Directive reads as follows:

“The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the database and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.”

It has been argued that an access right regarding consumptive use by end users is acceptable or even desirable because it can be argued that it already exists with regard to computer programs. If the mere use of a computer program requires the making of a temporary copy and if every temporary copy is relevant under copyright law, then mere use (of a computer program) is relevant under copyright law. As mentioned above, there always has been strong opposition against this line of reasoning in The Netherlands.

Currently, it is unclear whether a temporary copy is relevant under Dutch copyright law.⁸ The Dutch Courts have never decided this issue on principle.⁹ Discussion exists as to whether the technical reproduction should be excluded from the reproduction right *per se* or whether certain reproductions should be exempted from the scope

⁸ D. Visser, 1998 (T&C IE), art. 13 Aw. Aant 2.; IEC/Overdijk/AuII-Artt.13-14, p. 47 e.v.

⁹ The *German* Supreme Court has done so on at least two occasions, stating that mere use is as such not relevant under copyright. (BGH 4 October 1990, GRUR 1991, p. 453 (Betriebssystem), BGH 20 January 1994, GRUR 1994, pp. 364-365 (Holzhandelprogramm). The District Court of The Hague in *Scientology vs. XS4all* held that the activities of Internet service providers do not constitute a reproduction in the sense of the Copyright Act. District Court The Hague, 9 June 1999, AMI 1999, p. 110.

of protection of the reproduction right.¹⁰ The Dutch government¹¹ and parliament¹² are generally against (over)stretching the reproduction right to include such technical temporary copies, and so are most of the scholars who have spoken out on the issue.¹³ Most scholars admit that it might well be that since the European Software directive the temporary technical copy and therefor *de facto* the mere use of computer programs is indeed covered by the right of reproduction, but they do not approve of this development.¹⁴

5. The forthcoming European Copyright Directive

Clearly, an explicit (copy)right of access does not exist in Dutch copyright law. And, arguably, it cannot be derived from the 'right of making available' and the 'right of temporary reproduction'. The pending European Copyright Directive, however, may imply an obligation for the EU Member States to introduce a prohibition to circumvent access controlling technological measures. As a result, it may in the future be unlawful to gain access to a technologically protected work.

Protection of Access Controlling Measures

The forthcoming European Copyright Directive¹⁵ may imply a 'right to control access to technologically protected works' in the sense that it will contain a prohibition to circumvent access controlling technological measures (Article 6). Although the conceptual framework of the Directive indicates that the initial intention of this provision was to support copyright protection, the relation between the protection of technological measures and the acts restricted by copyright seems to have blurred during the legislative process. As a result, the Directive, which currently is in its final stages of adoption, is rather ambiguous in this respect, as it is in many others.

Article 6(3) second sentence of the draft Directive states that:

“Technological measures shall be deemed ‘effective’ where the use of a protected work or other subject matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.”

Clearly, this could imply that systems are covered which prevent access to protected works. However, in the ‘Statement of The Council’s Reasons’ which accompanies the Common Position of the Directive, the Council of the European Union, which is the highest decision making body, states that:

“In Article 6(3) second sentence, the Council deleted the term ‘access to’ considering that questions relating to access to works or other subject matter fell outside the field of copyright.”

¹⁰ In the first sense the Advisory Committee to the Ministry of Justice in its 1998 report on the draft EU copyright directive; P.B. Hugenholtz, *AMI* 1997, p. 81. In the latter sense: J.M.B. Seignette, *AMI* 1999, p. 69.

¹¹ Letter of the Minister of Justice and the Secretary of State for Culture of 10 May 1999 (26538, 1), p. 4 and 5: “An approach in which also purely technical copies which are necessary for communication are covered by the reproduction right is unnecessary and undesirable”.

¹² Motion presented by MP Van Zuijlen and others on 4 December 1996 and accepted by the Second Chamber of Parliament on 10 December 1996 (nr. 25154, 1).

¹³ Advisory Committee to the Ministry of Justice in its 1998 report on the draft EU copyright directive; P.B. Hugenholtz, *AMI* 1997, p. 81.

¹⁴ See e.g. P.B. Hugenholtz, in: *Information Law towards the 21st Century*, Deventer/Boston 1992, p. 323, D.W.F. Verkade, *Computerrecht* 1992, p. 87, A.A. Quaedvlieg, *AMI* 1993, p. 118 and D.J.G. Visser, *Auteursrecht op toegang*, Den Haag 1997, p. 81-82.

¹⁵ Common Position (EC) No 48/2000 adopted by the Council on 28 September 2000 with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ... on the harmonisation of certain aspects of copyright and related rights in the information society, *O.J. C* 344/1 (12.1.2000).

Thus, while the Council purposely deleted one reference to access¹⁶, it did not delete all references to such control – as the above quoted provision shows.¹⁷ Therefore, it is not fully clear whether circumvention of access controlling technological measures is covered by the Directive or not.

Temporary reproduction

Article 2 of the upcoming Directive contains a very broad right of reproduction:

“Member States shall provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:...”

But article 5.1 of the Directive states that:

“Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process whose sole purpose is to enable [...] b. a lawful use of a work other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.”

Recital 33 of the Directive shows that browsing of (mere access to) a work is exempted to the extent such browsing meets the conditions of Article 5.1. Thus, the Directive does not necessarily imply that each temporary reproduction that occurs in the computer’s (or media-player’s) random access memory requires a license.

6. European Conditional Access Directive

Another European directive that must be taken into account while discussing an access right is the Conditional Access Directive,¹⁸ which gives legal protection to access controlled services. Like article 326c DPC, discussed above, this directive does not protect works or other subject matter of intellectual property law, but online and broadcasting services.¹⁹

The Directive intends to protect online services which use access control techniques, such as pay-TV and other online information services (e.g. websites with password control). This may suggest that the Directive establishes a right to control access to contents, but this is not the case. The Directive focuses expressly on the act of facilitating the unauthorised circumvention of devices, not on the act of circumvention - gaining access - itself. Consequently, this Directive does not oblige the EU Member States to introduce a ‘right of access to (information) services’. In the context of existing Dutch law, the Directive can be analysed as codifying case law according to which the provision of decoders is considered a form of unfair competition. This is supported by the fact that, pursuant to the Directive, access controlling measures are protected only if the service they control access to is provided ‘against remuneration’.

The wording of the Directive clarifies that only such measures are covered which control initial access to services. Thus, this Directive presumably does not cover the distribution of devices which facilitate the circumvention of technological measures aimed at controlling access to an acquired copy of a work (e.g. the DVD-protection).

The intention of the Conditional Access Directive is to restrict protection to cases where access control is used to protect direct remuneration interests. This is why the right to bring an action under the Conditional Access Directive is available exclusively to commercial (information) service providers and not to third parties such as

¹⁶ In the previous draft of the Directive, the so-called ‘Amended Proposal’, the provision contained two references to access control: ‘Technological measures shall be deemed “effective” where the access to or use of a protected work or other subject matter is controlled through application of an access code or any other type of protection process which achieves the protection objective in an operational and reliable manner with the authority of the rightholders. Such measures may include decryption, de-scrambling or other transformation of the work or other subject matter’.

¹⁷ See also *infra* par. D3.

¹⁸ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of conditional access.

¹⁹ It was held that the interests of right holders were subject to the proposed Copyright Directive, which is claimed to be complementary to the Conditional Access Directive.

holders of intellectual property rights. However, a right holder commercialising his own works (e.g. through a database service) by means of conditional access will probably qualify as service provider for the purpose of the Conditional Access Directive.²⁰ Since this will often be the case, the Conditional Access Directive may complete if not even overlap the protection of right holders; that is, in so far as the Copyright Directive indeed protects access controlling measures.

The Conditional Access Directive is currently in the process of implementation within the EU Member States. There have been no legislative initiatives in the Netherlands as of yet. Presumably, the Dutch government takes the position that an explicit implementation is not necessary because national law already provides for sufficient protection. In this context, reference is made to Article 326c(2) of the Dutch Penal Code (see above).

7. Conclusion

As a rule, the copyright owner has never had direct control over the access (mere use) of his works. This was not necessary because he was able to exercise control at an earlier stage in the chain of communicating his works to the public: the copy or the public performance. It is likely that a similar form of control will be enough in the digital environment. Especially now that, as is shown above, in the Netherlands (and probably in most other countries) digital equivalents exist of the control a bookshop or a theatre can exercise, there appears to be no need for an additional copyright of access.

There is no evidence to date of a (economic) necessity to introduce a general right to prohibit mere use in addition to the existing rights of reproduction and communication to the public. A new exclusive right can only operate if it can be upheld in practice. In order to be accepted by the public a new exclusive right needs a positive balance between the right holders' interest served by it and the restrictions to be imposed on the public, e.g. restrictions on the end users privacy and on their interest to access information. There is a serious doubt as to whether a general right to prohibit use would strike such a balance, particularly in view of Articles 8 and 10 of the European Convention on Human Rights.

D. Balance between protection of technical measures and copyright limitations

There is another issue to be considered in this context. One main characteristic of copyright law is the objective to find a balance between the interests of right holders and those of the users of information products. As technological measures facilitate control of more acts than can be controlled on the basis of copyright law – which concerns only the acts of reproduction and of making available to the public, and even these acts cannot always be prohibited – there is a tension between the protection of technological measures and the current limitations of copyright law. The phenomenon of these technological measures mean an increased tension between these various interests. If a right holder could object to the circumvention of any technological measures, regardless of whether it inhibits an infringing act or not, the 'legal reach' of the copyright holder would expand. One could say that the scope of copyright would then expand as well, even if it were not the use of the work which is unlawful, but the circumvention facilitating that use.

1. Existing Dutch Law

The only provision in Dutch copyright law on the protection of technological measures is Article 32a DCA, discussed above. It is not entirely clear whether this provision covers only technological measures which inhibit restricted acts with regard to copyright protected computer software, or instead any measure which protects computer software. However, Recital 50 of the pending Copyright Directive states that the exercise of activities that are exempted in the Software Directive – notably, reverse engineering and de-compilation – should not be hindered by the prohibition on circumvention devices of the Software Directive. Thus, these limitations affect the extent to which circumvention devices are prohibited in the latter Directive and, consequently, under Dutch copyright law.

It must be noted that Dutch copyright law contains no specific prohibition on circumvention (Article 32a DCA does not concern the act of circumvention). Consequently, no explicit exemptions on a prohibition to circumvent are needed for.

²⁰ Note that access control devices can be principally designed to serve both a remuneration interest and the protection of copyrights at the same time.

There is no case law dealing with the balance between protection of technological measures on the one hand and copyright limitations and user rights on the other. The main reason for this probably is that until now never has any person been tried for the act of circumventing a technological measure which protects against copyright infringements, or for the distribution of devices which enable such circumvention. Thus, the issue has never come up. However, during a discussion with Parliament on 26 May 2000, the Dutch Minister of Justice made the following comments on this subject (informal translation):²¹

“The Minister [of Justice] is therefore of the opinion that it is right that a rightholder must have the possibility to take legal action against unlawful circumvention of technical protection. It is however of utter importance that the effect of these technical measures and legislation is taken into account. There is after all, a risk that these technical measures will be used to over stretch copyright. The system of limitations can be put aside by massive technical anti-copying methods and this can lead to high barriers for the access and use of protected material. In ‘Brussels’ it will probably be determined that rightholders who apply technical measures will have to make sure that these measures do not go so far as to render the user rights provided for in legislation meaningless.

A library will be able to ask for a decryption key, an educational establishment can ask to be allowed to use it in a certain educational environment. It can also be relevant whether the information which is electronically locked is available in another, unprotected form on reasonable conditions. In order to determine whether a request should be met, it should be taken into account whether or not the information is available in paper form or in any other unprotected form. The Minister trusts that this new method can work, especially because in the digital environment it is easier to establish direct contact between the right holder and the user”.

The study committee recognises the concern of the Minister of Justice about the complexity a government faces when it seeks to reach a proper balance in regulating technological measures. In the committee’s view, copyright limitations are an important part of copyright law and will still have a function in the digital environment even if all uses of copyright can be controlled technologically. Below, the "Brussels’ approach" to the issue – in which the Minister of Justice put so much trust – will be dealt with.

2. Limitations on Access Control to Services

It is because of the need to find the above mentioned balance that, traditionally, in copyright law an unlimited control over the use of protected works is undesirable. Therefore, the exclusive rights are limited. A similar tradition does not exist with regard to the protection of online services (as opposed to works). Nevertheless, the European legislator has determined that it is undesirable that access to information services will in all situations be conditional. The Conditional Access Directive itself does not include any explicit restrictions or limitations of protection. Reference is made, however, to Article 3a of the Television Without Frontiers Directive which states that there is certain information of “major importance for the society” which may not be made subject to access control.²² Interestingly, a number of (European and non-European) states provide for similar rules defining situations in which the use of electronic access control is not considered desirable.²³ Article 72 of the Dutch Media Act opens the possibility for the Dutch legislator to draw up a list of (mainly sports) events of major importance which must be broadcast over an open channel. This list is currently in the process of being drafted. In short, access control to online (broadcasting) services is limited, not by allowing circumvention, but by prohibiting to block access in the first place.

²¹ Dossier 26 538, nr. 3, Copyright, neighbouring rights and new media, *Second Chamber of Parliament Session 1999-2000*, p. 6.

²² Conditional Access Directive, Recital 9.

²³ See e.g. Article 10 Section 2.3 of the Canadian Radio Communication Law 1985, it is stated that “No person who decodes an encrypted subscription programming signal ... shall be convicted of an offence under that paragraph if the lawful distributor had the lawful right to make the signal available, on payment of a subscription fee or other charge, to persons in the area where the signal was decoded but had not made the signal readily available to those persons.” Section 705 (c) of the US Telecommunications Act 1934, as amended by Telecommunications Act 1996 states that no person shall encrypt or continue to encrypt satellite-delivered programmes included in the National Program Service or the Public Broadcasting Service ... ; unless at least one unencrypted satellite transmission of any programme subject to this subsection is provided.

3. Copyright Limitations and Protection of Technological Measures in the Copyright Directive

As mentioned above, except for devices which enable the circumvention of technological software protection, there is no legislation specifically on the protection of technological measures which protect copyrighted works. However, pursuant to Article 6 of the pending EU Copyright Directive, such legislation will probably have to be implemented in the near future.

The explanation to the latest draft of the Directive (the so-called Common Position)²⁴ states that the Directive “protects against circumvention of all technological measures designed to prevent or restrict acts not authorised by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5.” This seems to indicate that EU Member States are to protect against circumvention of technological measures even if the circumvention enables an act which is not a copyright infringement. Indirectly, the scope of copyright is expanded.

Clearly, in extreme cases this norm could render the copyright limitations meaningless. In Article 6.4 the European legislator attempts to take account of the copyright exemptions. There it is stated that the EU Member States must force a right holder who applies technological measures to “provide the means” to enjoy (only) some of the exempted uses enumerated in Article 5 of the Directive (listing the copyright exemptions Member States may implement in their national laws). However right holders may only be obliged to enable these exempted but technologically blocked uses, if they do not already facilitate the uses themselves or have reached an agreement on the issue with the person that could apply for the exemption concerned. Moreover, it appears (the Directive is not very clear) that a right holder who disseminates his technologically protected works on demand (online) and provides that the customer agrees (by scrolling through a contract and pushing the “I agree” button) that he will not perform any exempted act, cannot be compelled to let the customer enjoy the blocked but exempted use.

Considering that the latter exploitation model is expected to become widespread – in fact, the Directive encourages rights holders to employ it – the copyright exemptions may well become extinct in the digital environment. In the opinion of the study committee, the complexity of the proposed rules make it difficult to foresee at this moment their impact on the forthcoming practice. One could say that the issue is not completely dealt with by the mere existence of transparent and fair agreements between right holders and users. The argument may be made that this is not enough, but that attention should also be paid to other elements such as freedom of expression and fair competition, since these principles lie at the root of quite some exemptions. This line of thought could constitute a plea for certain exemptions to continue also in the digital era, even if any use can be controlled technologically and by means of contract.

Article 6.4 only obliges [rightholders] to provide under certain specific circumstances the “means” to perform some of the acts exempted by Article 5 of the Directive. Consequently, most of the acts covered by the exemptions listed in Article 5 will in practice not be possible if they are technologically blocked. Moreover, since the exemptions of Article 5 allow the reproduction and making available of works in specific circumstances but do not deal with access to the work in these circumstances, the means to gain access to a technologically protected work need never be provided. Consequently, if the Directive protects access controlling measures which may block exempted acts – in order to perform an exempted act one first needs to access the copyrighted work – under no circumstances will the act be possible.

4. Conclusion

Existing Dutch copyright law contains no explicit prohibition on circumvention and therefore no exemptions to such prohibition are needed. The Dutch Media Act does not allow for circumvention of measures which control access to broadcasting services, but prohibits applying access control to information services which are considered to be of major importance for society. The forthcoming Copyright Directive contains an absolute prohibition on circumvention, but under certain circumstances a right holder must provide to beneficiaries of certain exemptions the means which facilitate the use covered by the exemption. However, if the work is licensed (online) on demand, and the licensee agreed not to perform any exempted act, a right holder may not be compelled to facilitate statutorily exempted use.

²⁴ Nr. 43 of the “Statement of the Council’s Reasons” with the Common Position.