

A Century of Dutch Copyright Law
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Limitations and Exceptions



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The Problem



EU acquis in a nutshell

broad
exclusive
rights

exhaustive
enumeration of
exceptions

three-step
test



The Solution



Precisely-defined exceptions?

**exception
prototypes
at EU level**

**Learning from
national laws**



Necessity test



Inner distance test



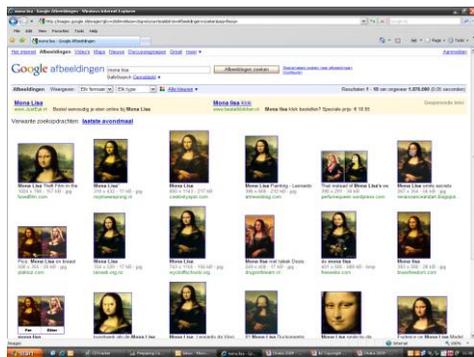
Inner distance test



Free adaptation rule or parody exception?



Quotation right or implied consent?



Digital dangers or comparable functioning?

NL: District Court
The Hague

D: Federal Court of
Justice

- internal press summary
- analogue exception (+)
- digital (-) conflict with three-step test
- digital version endangers normal exploitation of newspaper articles
- internal press summary
- analogue exception (+)
- digital (+) digital version has same function
- broad interpretation of exceptions if legal provision is outdated

Agreed Statement Art. 10 WCT

'It is understood that the provisions of Article 10 permit Contracting Parties to **carry forward and appropriately extend** into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.'

'Similarly, these provisions should be understood to permit Contracting Parties to **devise new exceptions and limitations** that are appropriate in the digital network environment.'

Work to be done



New Art. 5(5) Copyright Directive

'In cases comparable to those reflected in the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4, the use may also be exempted, provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder.'

- similar proposal in European Copyright Code
- WITTEM project, www.copyrightcode.eu

Application by analogy

- Dutch Supreme Court, 20 October 1995, Dior vs. Evora, para. 3.6.2
 - new exceptions on the basis of a comparable balancing of interests
 - but no freedom of speech underpinning, entrepreneurial copyright instead
 - later cases directly based on Art. 10 ECHR
- time ripe for analogy rule to safeguard freedom of expression/information?

CJEU, Eva-Maria Painer

'Article 5(3)(d) of Directive 2001/29 [= right of quotation] is intended to strike a **fair balance between the right to freedom of expression** of users of a work or other protected subject-matter and the reproduction right conferred on authors.'

(para. 134)

- impact of the EU Charter?
- also in contractual relations?

Enforcement and societal acceptance



Levy system or enforcement?



The end. Thank you!

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'senftleben' on www.ssrn.com.



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