

# The Netherlands

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## Introduction to software protection under Dutch law

### Body of law

In the Netherlands, the protection of software by copyright is regulated in the Dutch Copyright Act (“Auteurswet”, hereafter: “Copyright Act” or abbreviated as “CA”). This law transposes<sup>1</sup> the provisions of Council Directive (91/250/EEC) of 14 May 1991 on the legal protection of computer programs<sup>2</sup> (hereafter: “Software Directive”) into Chapter VI of the Copyright Act.

As the Software Directive is transposed into the Copyright Act itself, the regulatory regime for the legal protection of computer programs is no different than for other literary, scientific or artistic works (“works”). Chapter VI of the Copyright Act, however, contains special provisions with regard to computer programs.

### Copyright Act: Object of protection

Chapter 1, paragraph 3 of the Copyright Act refers to the works protected by copyright. Article 10, paragraph 1 states that, for the purposes of the Copyright Act, works include (amongst others) computer programs and the preparatory material.<sup>3</sup> Thus, all computer programs,<sup>4</sup> including the preparatory material,<sup>5</sup> are subject to the Copyright Act.<sup>6</sup> Note that the expression (in any form) of a

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<sup>1</sup>Act of 7 June 1994, Stb. 1994, no. 521.

<sup>2</sup>Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122 17 May 1991, p. 42.

<sup>3</sup>Art. 1 para 1 Software Directive states that “Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works”.

<sup>4</sup>According to the Explanatory Memorandum TK 1991-1992, 22 531, no. 3, all forms of computer programs, such as object code or executable code, source code, disks, tapes, firmware, embedded software et cetera, are protected. However, the District Court of Amsterdam held that the user interface of a computer program is not an independent copyright protected work, but forms an integral part of the computer program itself: President District Court (“Rb”) Amsterdam 18 November 1993, Computerrecht 1994, p. 129 with annotation by Meijboom. The District Court of Utrecht considered midi-files as computer programs under the Copyright Act, as well as phonograms under the Neighbouring Rights Act: Rb. Utrecht 7 May 1997, Computerrecht 1998, p. 259.

<sup>5</sup>Art. 1 para 1 Software Directive states that “the term “computer programs” shall include their preparatory design material”. Preparatory design materials include functional designs, technical designs, flow charts, data models et cetera, see: Van Schelven & Struik 1995, Softwarerecht, p. 27 ff.

<sup>6</sup>According to the preamble of the Software Directive, the term “computer program” includes “programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage”. The function of a computer program “is to communicate

computer program is protected. Ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright.<sup>7</sup>

According to Dutch case law, only works that have their own, original character and possess the personal stamp of the author<sup>8</sup> can benefit from copyright protection. This means that the work's form must not be derived from any other work, and should be the result of the intellectual creation of human labour. Thus, the author should have made its own creative choices, i.e. choices that are the product of its own human mind.<sup>9</sup> There should be a creative performance of the author that is reflected in its work. Thus technical, objective and inventive works are not subject to the creativity that the Copyright Act protects.<sup>10</sup>

The Dutch requirements that a work should have its "own, original character" and that it should possess "the personal stamp of the author" seems to differ from Article 1, paragraph 2, of the Software Directive: "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection". Thus, if a computer program is an independent product of own creation, the requirement of originality should be fulfilled.<sup>11</sup>

Until very recently<sup>12</sup> the Copyright Act also gave limited<sup>13</sup> protec-

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and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all ways in which they are intended to function".

<sup>7</sup>Preamble and Art. 1 para 2 Software Directive. Moreover the preamble states that "in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive", nevertheless "the expression of those ideas and principles is to be protected by copyright".

<sup>8</sup>"een eigen, oorspronkelijk karakter bezit en het persoonlijk stempel van de maker draagt", Supreme Court of the Netherlands ("HR") 4 January 1991, NJ 1991, 608, AMI 1991, p. 177 (Van Dale v Romme).

<sup>9</sup>This excludes, at minimum, everything that has a form that is so banal or trivial, that one cannot designate any creative work of any kind behind such form: HR 30 May 2008, ECLI:NL:HR:2008:BC2153 and Hof The Hague 16 July 2013, ECLI:NL:GHDHA:2013:2477 (Endstra v Nieuw Amsterdam).

<sup>10</sup>HR 16 June 2006, NJ 2006, 585, ECLI:NL:HR:2006:AU8940 (Lancôme v Kecofa), HR 24 February 2006, NJ 2007, 37 (Technip v Goossens), ECLI:NL:PHR:2006:AU7508. Recently: HR 22 February 2013, ECLI:NL:HR:2013:BY1532. According to the Software Directive "no tests as to the qualitative or aesthetic merits of the program should be applied"~ "in respect of the criteria to be applied in determining whether or not a computer program is an original work".

<sup>11</sup>Compare: D.W.F. Verkade, *Intellectuele eigendom*, in Franken (Ed.), *Recht en computer*, 3rd edition, Deventer: Kluwer 1997.

<sup>12</sup>Amendments to the Copyright Act in connection with the abolition of protection of writings without original character or personal stamp of the author: "33 800 Wijziging van de Auteurswet in verband met de afschaffing van bescherming van geschriften zonder oorspronkelijk karakter of persoonlijk stempel van de maker". See also: HR 17 January 2014, ECLI:NL:HR:2014:88 (Ryanair v PR Aviation)

<sup>13</sup>Only provable derivation can be forbidden: See for instance HR 27 January 1961, NJ 1962, 255 (Explicator) and HR 25 June 1965, NJ 1966, 115 and 116 (Televisier).

tion for writings that are not original:<sup>14</sup> the protection of writings (“geschriftenbescherming”), Article 10, paragraph 1, sub 1 CA. However, according to Article 10, paragraph 5, computer programs were already expressly excluded from this protection of writings.<sup>15</sup>

### Authors/Beneficiaries

The Copyright Act does not explicitly state that the actual creator of a work is the copyright owner. Nevertheless, when one reads Article 1 CA — which stipulates that copyright is the exclusive right of the author of a work,<sup>16</sup> or his successors in title, to communicate that work to the public and to reproduce it, subject to the limitations laid down by law — in conjunction with Articles 4—9 CA, it is made clear that, in principle, the person who has created the computer program is the author of the work and thus the copyright owner.<sup>17</sup>

### Rules of evidence

Article 4 CA provides the statutory rules of evidence: the person who is named as the author in or on the work or — for instance the name of the person, or the user of, or the entitled party to the logo or brand — shall be deemed the author of the work. If there is no such indication, then the person who, when the work is communicated to the public, is named the author by the party making the work known to the public, shall be deemed the author of the work, unless there is proof to the contrary. If the author is not named, the person who delivers a recitation which has not appeared in print shall be deemed the author thereof, unless there is proof to the contrary.<sup>18</sup>

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<sup>14</sup>Schedules, theatre programmes, catalogues, telephone directories, broadcasting data and other data sets that do not have an original character and that are intended to be made public are subject to the protection of writings: HR 8 February 2002, 2002, 515, ECLI:NL:HR:2002:AD6093 (EP Controls v GEC).

<sup>15</sup>See: A. Meijboom, *Recht en Informatietechnologie*, 7.3.2.3, p. 11, September 1999.

<sup>16</sup>According to Article 2 para 1 of the Software Directive “the author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rights holder by that legislation”. If the “computer program is created by a group of natural persons jointly, the exclusive rights shall be owned jointly”, according to Article 2 para 2 of the Software Directive.

<sup>17</sup>As a consequence, if a one-man business is to be converted into a legal entity such as a private company with limited liability, the one-man business has to assign its copyrights to the successive legal entity. See: Rb. Den Bosch 26 April 1996 and Court of Appeal (“Hof”) Den Bosch 8 September 1997, *Computerrecht* 1998, p. 67, with annotation by Thole (Stuve v Hanekroot).

<sup>18</sup>A copyright notice does not qualify, in principle, as presumptive evidence of authorship. The purpose of a copyright notice is to provide security for copyright or certain rights in countries that are not party to the Berne Convention or TRIPS, but are party to the Universal Copyright Convention. See: A. Meijboom, *Recht en Informatietechnologie*, SDU: The Hague 1999, 7.3.2. p. 13 and Verkade, *Intellectuele Eigendom, Tekst & Commentaar* Article 4, annotation 2, Deventer: Kluwer 2009. Nevertheless, the Dutch court can derive presumptive evidence of the copyright notice, if another name is mentioned on the software, on the basis of Article 177 Dutch Code of Civil Procedure and eventual Article 4 of the Copyright Act. See: Sub-district Court (“Ktr.”) Alkmaar 20 July 1998, *AMI* 1999, p. 32. See also: Rb.

## Compilations

With regard to compilations, Article 5, paragraph 1, CA provides that, if a work consists of separate works by two or more persons, then the person under whose guidance and supervision the work as a whole has been made or, if there is no such person, the compiler of the various works, will be deemed the author of the whole work, without prejudice to the separate copyright in each of the works.<sup>19</sup>

## Joint works

With regard to joint works, Article 26 CA, provides that, when the copyright in a work belongs jointly to two or more persons, it may be enforced by either one of them, unless agreed otherwise.<sup>20</sup> The rights to a joint work can, in principle, only be enjoyed if both authors agree upon such enjoyment (Article 3:166 ff. of the Dutch Civil Code (“Burgerlijk Wetboek”, hereafter: “Civil Code” or “CC”)).<sup>21</sup>

## Fictional authorship

Article 6 CA states that if a work has been made according to the draft and under the guidance and supervision of another person, then that person will be deemed to be the author of the work. If the supervisor, however, has provided such a detailed design of the computer program that the final programming is nothing more than just a straightforward, non-creative process, then the supervisor, in this event, is deemed to be the author of the computer program.<sup>22</sup>

More importantly, Article 7 CA provides that, where the labour carried out by an employee consists of the making of certain works,<sup>23</sup> then the employer will

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Gelderland, 17 May 2013, FAWBG, ECLI:NL:RBGEL:2013:1367

<sup>19</sup>See HR 25 March 1949, NJ 1950, 643, with annotation by DJV, and J.H. Spoor & D.W.F. Verkade & D.J.G. Visser, *Auteursrecht, naburige rechten en databankenrecht*, Kluwer: Deventer: 2005. For instance, separate (graphic) user interfaces (but: compare Pres. Rb. Amsterdam 18 November 1993, Computerrecht 1994, p. 129, with annotation by Meijboom), source codes and/or sounds.

<sup>20</sup>Besides that, Article 3:166 ff. of the Dutch Civil Code applies to the joint copyright as well, unless agreed otherwise. If one has developed software in joint ventures that are not a legal entity, such as a general partnership (“Vennootschap onder Firma”) or commercial partnership (“Maatschap”), problems may arise after the rescission of the joint venture, if no arrangement is made concerning the rights related to the jointly developed software. See for instance Rb. Amsterdam 18 November 1993, Computerrecht 1994, p. 129 with annotation by Meijboom.

<sup>21</sup>See: Hof 's-Hertogenbosch 25 May 1994, AMI 1996, p. 116, with annotation by Grosheide (rijbewijsboeken).

<sup>22</sup>A. Meijboom, *Recht en Informatietechnologie*, SDU: Den Haag 1999, 7.3.2. p. 13, and P.C. Van Schelven & H. Struik, *Software-recht*, Deventer: Kluwer 1995, pp. 46-47.

<sup>23</sup>Thus, the employee should have the task of developing software. This means, on the one hand, that if an accountant develops a computer program — during his spare time or not — then this employee does not lose his copyright to his employer, because his task is not to develop software. See: Pres. Rb. Haarlem 29 August 1986, Computerrecht 1988/5, p. 254; Pres. Rb. Rotterdam 21 March 1989, Computerrecht 1989/3, p. 149; Pres. Rb. Den Bosch 12 July 1990, Computerrecht 1990, p. 256. On the other hand, if an employee does have the task

be deemed to be the author unless otherwise agreed between the parties.<sup>24</sup> Note that this article only applies to the employer/employee relationship. Thus, if such a relationship is absent, this article does not apply. However, in the event of, for example, secondment, freelancing or traineeships, one of the parties has to agree explicitly, by deed of transfer,<sup>25</sup> that the copyright will be assigned to the company.

Public institutions, associations, foundations and/or companies which communicate a work to the public (“openbaarmaken”) as its own, without naming any natural person as its author, will be regarded as the author of that work, unless it is proved that the communication to the public in such a manner was unlawful, according to Article 8 CA.

### Exclusive rights

The author of a work has the exclusive right to communicate the work to the public (“openbaarmaken”, Articles 1 and 12 CA)<sup>26</sup> and to reproduce it (“verveelvoudigen”, Articles 1 and 13 CA)<sup>27</sup>, subject to the limitations laid down by law. The special provisions concerning computer programs, as provided by

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of developing software, and develops it during his own spare time, then the copyright will be credited to the employee.

<sup>24</sup>See Article 2 para 3 Software Directive. This article uses the wording “entitled to exercise all economic rights in the program”. The interesting question is whether non-economic rights, such as personality rights, stay with the actual author, the employee. This article applies to both private and public parties. See: Ambtenarengerecht Amsterdam 20 December 1989, Computerrecht 1990, p. 141.

<sup>25</sup>Article 2 para 2 of the Copyright Act.

<sup>26</sup>According to Article 12 of the Copyright Act, communication to the public includes the communication to the public of a reproduction of the whole or part of a work; the distribution of the whole or part of a work, or of a reproduction thereof, as long as the work has not appeared in print; the rental or lending of the whole or part of a work, with the exception of works of architecture and works of applied art, or of a reproduction thereof which has been brought into circulation by or with the consent of the rights holder; the recitation, performance or presentation in public of the whole or part of a work or a reproduction thereof; the broadcasting of a work incorporated in a radio or television programme by satellite or other transmitter or by a closed-circuit system as referred to in Article 1 sub g of the “Wet op de Telecommunicatievoorzieningen”. This means that, more specific to computer programs, the communication to the public includes selling, or offering to sell, the carrier of the software, or making the software available for third parties to consult. According to Article 45h of the Copyright Act, the rental of computer programs is also a communication to the public.

<sup>27</sup>According to Article 13 of the Copyright Act, the reproduction of a work includes the translation, arrangement of music, cinematographic adaptation or dramatization and generally any partial or total adaption or imitation in a modified form, which cannot be regarded as a new, original work. This means that loading the software onto the hard disk or making a back-up is also a reproduction, compare: Pres. Rb. Arnhem 24 January 1995, Computerrecht 1995, p. 68. Thus, the criterion is that there have to be two or more copies of the work in order to amount to a reproduction. It is not relevant whether the copies are temporary or permanent. See also: D.W.F. Verkade, “Intellectuele Eigendom” in: Franken (Ed.), *Recht en computer*, Deventer: Kluwer 1997, p. 195, Verkade, *Intellectuele Eigendom, Tekst & Commentaar* Article 45i, annotation 2, Deventer: Kluwer 2009 and Rb. Zutphen 29 April 1999, Computerrecht 1999/4 (DWSS/Van Meggelen et al.).

Article 4 of the Software Directive,<sup>28</sup> are implemented into Article 45j — 45n CA.<sup>29</sup> As a consequence, communicating to the public includes selling or offering to sell the carrier of the software, or making the software available for third parties to consult. According to Article 45h CA, the rental of computer programs is also a communication to the public. Reproduction includes the normal use of computer programs, including the correction of errors (Article 45j CA); the reproduction of a back-up (Article 45k CA); the observation, study or testing of the computer program (Article 45l CA); as well as the decompilation of the computer program (Article 45m CA).

### Exceptions to exclusive rights

Articles 15-17c CA<sup>30</sup> provide general exceptions to the copyright of the author, including for instance the right to quote from works that are communicated to the public by or on behalf of public authorities, public lending rights and the use of works for teaching purposes.

Another exception is provided by the first sale doctrine<sup>31</sup> and Article 4 sub c of the Software Directive, which stipulate that the first sale<sup>32</sup> in the Community<sup>33</sup> of a copy of a program by the rightholder, or with his consent, will exhaust the

<sup>28</sup>“Subject to the provisions of Articles 5 and 6, the exclusive rights of the rights holder within the meaning of Article 2, shall include the right to do or to authorise: (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 necessitates such reproduction, such acts shall be subject to authorization by the rights holder; (b) the translation, adaption, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program; (c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rights holder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.”

<sup>29</sup>Please note that Articles 45j — 45n of the Copyright Act only apply to software as such, thus, preparatory materials are not included. See: A. Meijboom, *Recht en Informatietechnologie*, SDU: The Hague 1999, 7.3.2., p.10.

<sup>30</sup>Article 45n of the Copyright Act provides that the Articles 5, 16b, para 1 and 17, para 1 do not apply to computer programs.

<sup>31</sup>J.H. Spoor & D.W.F. Verkade & D.J.G. Visser, *Auteursrecht, naburige rechten en databankenrecht*, Deventer: Kluwer 2005; P.C. van Schelven & D.W.F. Verkade, *Auteursrecht*, Deventer: Kluwer 1993, pp. 69-75.

<sup>32</sup>Thus, this does not include, for instance, rental of the work.

<sup>33</sup>In the Netherlands, the general copyright principle is based on international exhaustion. Thus, for the purposes of the exhaustion rule it does not matter where in the world the work is sold for the first time. Since the Dutch legislature has not implemented Article 4 sub c into the Copyright Act it is not clear if the international or Community-wide exhaustion principle was applicable to software. In Pres. Rb. Den Haag 7 July 1995, IER 1995, 30 with annotation by De Wit, the court held that for software only Community-wide exhaustion is applicable. In ECJ 16 July 1998, C-355/96, IER 1998, 35, with annotation by Arkenbout (Silhouette), the European Court of Justice decided that the first sale doctrine for trademarks provides for Community-wide exhaustion, rather than international exhaustion. The same applies to the first sale doctrine for copyrights. See: A. Meijboom, *Recht en Informatietechnologie*, SDU: The Hague 1999, 7.3.2, p. 22.

distribution right of that copy within the Community, with the exception of the right to control further rental of the program or a copy thereof. The ECJ decided that this first sale doctrine also applies to standard software downloaded from the internet: an owner of copyright in software cannot prevent a perpetual licensee who has downloaded the software from the internet from selling his ‘used’ licence.<sup>34</sup>

The Articles 45j — 45n CA provide the special exceptions to the exclusive rights concerning computer programs, based on Articles 5 and 6 of the Software Directive.

### Reproduction of software

Article 45j CA<sup>35</sup> provides that the reproduction of a computer program by the lawful acquirer<sup>36</sup> of a copy of the said work, when this is necessary for the use of the work for its intended purpose,<sup>37</sup> shall not be deemed an infringement of copyright.<sup>38</sup> Such reproduction, in connection with the loading, displaying or correcting of errors<sup>39</sup> cannot be prohibited by contract.<sup>40</sup>

### Back-ups of software

Article 45k CA<sup>41</sup> provides that the reproduction of a computer program by the lawful user<sup>42</sup> of the said work, serving as a back-up copy, where this is

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<sup>34</sup>ECJ 3 July 2012, C-128/11, UsedSoft/Oracle. See also: Rb. Dordrecht, 11 August 2010, HA ZA 08-2747, ECLI:NL:RBDOR:2010:BN3863, Rb. Almelo 11 July 2012, KG ZA 12-117 ECLI:NL:RBALM:2012:BX2173 and HR 12 July 2013, ECLI:NL:HR:2013:CA0265 (Allposters/Pictoright). Further reading: A. Engelfriet: “De Usedsoft-uitspraak: een kleine revolutie”, IT979, <http://www.itenrecht.nl/index.php?//De+UsedSoft-uitspraak%3A+een+kleine+revolutie///31800/>

<sup>35</sup>Implementing Article 5 para 1 of the 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 rights holder 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”.

<sup>36</sup>See: P.C. van Schelven & D.W.F. Verkade, *Auteursrecht*, Deventer: Kluwer 1993, pp. 79-82.

<sup>37</sup>See: P.C. van Schelven & D.W.F. Verkade, *Auteursrecht*, Deventer: Kluwer 1993, pp. 83-87 and D.W.F. Verkade, “Intellectuele Eigendom” in: Franken et al. (Eds.), *Recht en computer*, Deventer: Kluwer 1997, pp.198-200. But also: Pres. Rb. The Hague 24 August 1995, *Computerrecht* 1997, p. 303 with annotation by Meijboom and Verkade at (1.0) (*Siemens-Nixdorf v Biba*) and Hof The Hague 2 March 1995, *Computerrecht* 1995, pp. 173-174, at (13.6) (*SiemensNixdorf v Gemini*).

<sup>38</sup>See also: Rb. Dordrecht 11 August 2010, Case no. 78465 / HA ZA 08-2747, ECLI:NL:RBDOR:2010:BN3863.

<sup>39</sup>Explanatory Memorandum TK 1991-1992, 22 531, no. 3, p. 13.

<sup>40</sup>However, Article 5 para 1 and Article 9 para 1 of the Software Directive provide the possibility of agreeing otherwise. The Dutch legislature seems to have followed the preamble of the Software Directive, which states that it concerns mandatory laws, see Explanatory Memorandum TK 1991-1992, 22 531, no. 3, p. 12.

<sup>41</sup>Implementing Article 5 para 2 of the Software Directive: “The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use”.

<sup>42</sup>Although the Copyright Act does not define “rightful user” (“rechtmatige gebruiker”),

necessary for the use of the work for its intended purpose, shall not be deemed an infringement of copyright.<sup>43</sup>

## Ideas and principles

Article 45l CA<sup>44</sup> provides that a person who is entitled to reproduce the software program, which includes the loading, displaying, running, transmission and storage, insofar as these acts are necessary for the reproduction of said work, shall also be entitled, while performing those acts, to observe, study or test the functioning of the work in order to determine the ideas and principles underlying it. The rightful user is allowed to use tools such as electronic testing and controlling tools.<sup>45</sup>

## Decompilation

Article 45m CA<sup>46</sup> states that the making of a copy of a computer program and the translation of the form of its code shall not be deemed an infringement of

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it is generally understood that the rightful user is the person to whom the owner has made available the program (including resale), and also any subsequent purchasers of units for which the distribution right is exhausted. See: Rb. Dordrecht 11 August 2010, Case no. 78465 / HA ZA 08-2747, ECLI:NL:RBDOR:2010:BN3863.

<sup>43</sup>A. Meijboom, *Recht en Informatietechnologie*, SDU: Den Haag 1999, 7.3.2., pp. 27-28.

<sup>44</sup>Implementing Article 5 para 3 of the Software Directive: "The person having a right to use a copy of a computer program shall be entitled, without the authorization of the rights holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do".

<sup>45</sup>Explanatory Memorandum, TK 1991-1992, 22 531, nr 3, p. 14.

<sup>46</sup>Implementing Article 6 of the Software Directive: "1. The authorization of the rights holder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met: (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so; (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability; 2. The provisions of paragraph 1 shall not permit the information obtained through its application: (a) to be used for goals other than to achieve the interoperability of the independently created computer program; (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright. 3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program." The Community legislature aimed this article at software producers so that they would make the information available and to stimulate the development of open systems. See Explanatory Memorandum TK 1991-1992, 22 531, no. 5, pp. 31-32.



copyright if these acts are indispensable for obtaining information<sup>47</sup> necessary to achieve the interoperability of an independently created computer program with other programs,<sup>48</sup> provided that: a) these acts are carried out by a person who has lawfully<sup>49</sup> obtained a copy of the computer program or by a third party authorised by him to carry them out; b) the information necessary to achieve interoperability is not already readily available<sup>50</sup> to the persons referred to under a.; and c) these acts are limited to the parts of the original program which are necessary to achieve interoperability. The information obtained must not: i) be used for any other purpose than to achieve the interoperability of the independently created computer program; ii) be given to third parties except where necessary for the interoperability of the independently created computer program; iii) be used for the development, production or marketing of a computer program that cannot be regarded as a new, original work or for any other act which infringes copyright.

## Moral rights

The author of the work also has moral rights, or so-called personality rights (“persoonlijkheidsrechten”).<sup>51</sup> These rights protect the relationship between the author<sup>52</sup> and his work and includes the right for the author of a work — even after assignment of his copyright<sup>53</sup> — (a) to oppose the communication to the public of the work, without acknowledgement of his name or other indication as author, unless such opposition would be unreasonable; (b) to oppose the communication to the public of the work under a name other than his own, and any alteration in the name of the work or the indication of the author, in so

<sup>47</sup>This includes the determination of the ideas and principles underlying the computer program, Explanatory Memorandum 1991-1992, 22 531, no. 3, p. 14, Article 45l Copyright Act and P.C. van Schelven & D.W.F. Verkade, *Auteursrecht*, Deventer: Kluwer 1993, pp.89-90.

<sup>48</sup>Parties cannot agree contractually that decompilation is forbidden. See M. de Cock Buning, “Auteursrecht en “reverse engineering”, techniek en theorie”, 1993, p. 128 ff.

<sup>49</sup>The Explanatory Memorandum TK 1991-1992, 22 531, no. 3, p. 16 mentions licensees only.

<sup>50</sup>Explanatory Memorandum TK 1991-1992, 22 531, no. 3, p. 16.

<sup>51</sup>According to Article 25 of the Copyright Act, personality rights include the right to oppose the communication to the public of the work without acknowledgement of the author’s name or other indication of the author, unless such opposition would be unreasonable; the right to oppose a communication to the public of the work under a name other than the author’s own, and any alteration in the name of the work or the indication of the author, in so far as it appears on or in the work, or has been communicated to the public in connection with the work; the right to oppose any other alteration of the work, unless the nature of the alteration is such that opposition would be unreasonable; the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such.

<sup>52</sup>To our knowledge only two cases have dealt with the personality rights of a legal entity: *Rb. The Hague* 27 May 1992, AMI 1993, p. 94, with annotation by Quadvlieg (*Gorter et al. v PTT Post et al.*). and *Hof Amsterdam*, 10 December 2013, *Angry Nerds v Hotel Contact*, with annotation by Wouter Dammers: <https://www.lawfox.nl/mag-je-overgedragen-bronbestanden-wijzigen/>

<sup>53</sup>Again: *Hof Amsterdam*, 10 December 2013, *Angry Nerds v Hotel Contact*, with annotation by Wouter Dammers: <https://www.lawfox.nl/mag-je-overgedragen-bronbestanden-wijzigen/>

far as it appears on or in the work or has been communicated to the public in connection with the work; (c) to oppose any other alteration of the work, unless the nature of the alteration is such that opposition would be unreasonable; and (d) to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the name or reputation of the author or to his dignity as such. Personality rights are inalienable, but some may be waived (see sub a), or may be waived in so far as alterations to the work or its title are concerned (see sub b and c), in accordance with Article 25 CA.<sup>54</sup>

### **Term of protection**

For all works, including computer programs, the term of protection is 70 years as of January 1st following the death of the author (Article 37, paragraph 1 CA) or of the surviving author if more than one person is the joint author (Article 37, paragraph 2 CA). If the author is a legal entity this term begins on the January 1st following the first communication to the public (Article 38 CA).<sup>55</sup>

### **Special measures**

The Copyright Act provides the measures for enforcing copyrights. Besides the general measures, the Articles 31-36 CA set out specific criminal sanctions against copyright infringers and provide investigative powers for investigation officers. On the basis of these articles, for instance, a person who intentionally infringes another person's copyright, or who intentionally (a) publicly offers for distribution, (b) has in his possession for the purpose of reproduction or distribution, (c) imports, conveys in transit or exports, or (d) keeps for profit an object containing a work which infringes another person's copyright, is liable to a term of imprisonment of not more than six months or a fine of EUR 18,500. If these acts are committed by a person in the conduct of his profession or business, then that person is liable to a term of imprisonment of not more than four years or a fine of EUR 74,000. If a person acts in a manner stated under (a) to (d), and there are reasonable grounds to know that the object contains a work which infringes another person's copyright, he is liable to a fine of EUR 7,400. If a person intentionally acts in a manner stated under (a) to (d), 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 computer program, is liable to a term of imprisonment of not more than six months or a fine of EUR 18,500. A person who intentionally makes any unlawful alterations to a work which is protected by copyright, or to its title or to the indication of the author or impairs such a work in any other way that

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<sup>54</sup>For personality rights related to computer programs, see especially E.P.M. Thole, *Software een "novum" in het vermogensrecht*, Deventer: Kluwer 1991, P.C. Van Schelven & H. Struik, *Softwarerecht*, Deventer: Kluwer 1995, pp. 64-65 and D.W.F. Verkade, "Intellectuele Eigendom" in: Franken et al. (Eds.), *Recht en computer*, Deventer: Kluwer 1997, pp. 201-202.

<sup>55</sup>Implemented into the Copyright Act on 29 Dec 1995 because of the Council Directive 93/98/EEC of 29 October 1993 which harmonised the terms of protection of copyright and certain related rights.

could be prejudicial to the name or reputation of the author, or his dignity as such, is liable to a term of imprisonment of not more than six months or a fine of EUR 18,500. All these acts constitute serious offences. Moreover, reproductions which are declared forfeit by the criminal court shall be destroyed, according to Article 36 CA, or may be handed over to the copyright owner, if the latter applies to the office of the Clerk within one month of the judgment becoming final and conclusive. Upon such handing over, ownership of the reproductions shall be assigned to the rightholder. The court may order that the handing over be conditional on payment by the rightholder of an amount of compensation that shall accrue to the State.

According to Article 36a CA, investigating officers may at any time, for the purposes of investigating offences which are punishable under the Copyright Act, require access to any documents or other data carriers in the possession of persons who, in the exercise of their profession or business, import into the Netherlands, communicate to the public or reproduce works, where inspection of such documents or data carriers may reasonably be deemed necessary for the performance of their duties. Moreover, on the basis of Article 36b CA, investigating officers are authorised to enter any premises to investigate offences which are punishable under the Copyright Act and to seize that which is subject to seizure. If they are denied access, they may gain entry, if necessary with the assistance of the police. They shall not enter a house against the will of the occupant unless a special warrant is presented in writing from — or in the presence of — a public prosecutor or an assistant public prosecutor. An official report of such entry shall be drawn up by them within twenty-four hours.

## **Unprotected software and public domain software**

As set forth above, only software that is original in the sense that it is an intellectual creation of the author benefits from copyright protection. Non-original software does not come into consideration for copyright protection and can, in principle, be used freely. In the Netherlands there is little to no case law about public domain software.

## **Analysis of free and open source software under Dutch law**

### **Copyrights**

One of the most important characteristics of free and open source software (“FOSS”) is that it is developed by the efforts of many programmers. The work evolves continuously through the improvements, additions and changes made by the open source community. These characteristics may have several legal effects. It is important, therefore, to examine, for instance, whether FOSS could qualify as a collaborative work under Dutch law; who owns the copyrights to FOSS software; and are contributions in themselves protected works in the sense of the Copyright Act?

## Qualification of FOSS

More than any other type of computer program, FOSS is often the result of collaborative work between software developers. Modifications to FOSS can either be distributed as separate computer programs or integrated in the initial computer program.

Whether the collaborators could be regarded as authors in the terms of the Copyright Act depends, amongst other things (including the question whether Dutch law applies), on the extent of their creative input. Under Dutch law, each contribution may be protected under the Copyright Act if it meets the criterion of originality, either as a separate computer program or one which is integrated into the original computer program. Often, small contributions such as “bug-fixes” will not be protected under the Copyright Act, and thus, not all contributors will become authors.<sup>56</sup>

It is important, therefore, to examine whether a contributor is the author of their particular contribution to FOSS, as only the author has the right to decide on the use of the work.<sup>57</sup>

If the FOSS is developed by an employed programmer, the employer, in principle, will be deemed to be the author of the work (Article 7 CA). If the employee is seconded, one can argue analogously that the copyrights then belong to the hirer.<sup>58</sup> If a public or private entity communicates the work to the public without naming any natural person as author, that entity will be regarded as the author of the FOSS, unless the communication to the public in this manner was unlawful. In all of these situations it is better to avoid uncertainty by mutually and contractually agreeing that eventual emergence of copyright on created works will be transferred to the employer, the hirer or the (public or private) entity.<sup>59</sup>

One can also think of situations where contributions by a number of parties have led to the creation of just one work. The Copyright Act does not provide many explicit provisions for cases such as these (just Article 26 CA, regarding the enforcement of joint authorship). Nevertheless, case law has developed the rules regarding the authorship and ownership of works created by multiple authors. These rules distinguish, on the one hand, situations where the work is the result

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<sup>56</sup>J. van Balen et al., *Auteursrecht en open source software*, in E. Thole, R. Scholten, W. Seinen (Ed.) *Open Source Software — Een verkenning naar de juridische aspecten van open source software*, NvvIR 2006, p. 44.

<sup>57</sup>One can also think of, for instance, a committee of experts, who examine whether contributions should be implemented into new versions of the software. In that case, the committee is a compiler in the sense of Article 5 of the Copyright Act, and would thus have the rights to the whole work, notwithstanding the rights that the contributors have in their contributions. See: K.J. Koelman, *Brothers in Arms: open source en auteursrecht*, 2004, 36.

<sup>58</sup>Compare, Ch. Gielen, D.W.F. Verkade (Eds.), *Intellectuele Eigendom, Tekst en Commentaar*, Kluwer: Deventer 2009, Art. 7 note 4.

<sup>59</sup>J. van Balen et al., *Auteursrecht en open source software*, in E. Thole, R. Scholten, W. Seinen (Ed.) *Open Source Software — Een verkenning naar de juridische aspecten van open source software*, NvvIR 2006, pp. 46-47.

of such close co-operation between authors that individual contributions cannot be separated from other contributions, and, on the other hand, situations where the individual contributions are clearly identifiable.<sup>60</sup> Notwithstanding any specific contractual arrangements, if the contributions can be distinguished, then each author enjoys a separate right on his own particular contribution. If the contributions are all combined into one work, then all the authors enjoy the rights on the work in joint ownership; this means the rights can only be exercised with the consent of every author.<sup>61</sup>

Finally, copyrights on FOSS — just as for any other works — can also be obtained by succession or transfer.

### **Rights of the original (co-)authors**

As stated, the author of a work has the exclusive right to communicate his work to the public and to make reproductions. This also means that the author can forbid or allow others to take these actions. Many FOSS licences do not restrict (*copyright*) the use of the software but allow (*copyleft*) others to use it under certain conditions in order to ensure the free and open character of the (modified) software.

### **Authors of modifications**

As FOSS has developed, works are often built on the basis of another FOSS work that has been created by other individuals. In this light, it is important to distinguish between two *legal* ways of making modifications which are set out in Article 10, paragraph 2 and Article 13 CA.

On the one hand, Article 10, paragraph 2 CA states that reproductions of a work and other adaptations and collections of different works will be protected as if they were separate works, without prejudice to the copyright on the original work. Thus, if a modification to FOSS can be regarded as a new and original work, it is a new copyright protected work, and in principle, the exclusive right of the contributor.

On the other hand (which in practice is more likely), Article 13 CA states that the reproduction of a work generally includes any partial or total adaptation or imitation in a modified form, which cannot be regarded as a new, original form. Thus, a modification to FOSS that cannot be regarded as a new and original work is considered to be a reproduction of the original work and, in principle, the exclusive right of the person entitled to the original FOSS.

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<sup>60</sup>See: L. Guibault and O. van Daalen, Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective, ITeR series no. 8, The Hague: TMC Asser Press 2006, p. 94; and HR 25 March 1949, 1950, No. 643 with annotation by D.J.G. Visser (La belle et la bête).

<sup>61</sup>Hof 's-Hertogenbosch, 27 December 1994, NJ 1995 No. 623 (Rooijakkers v Wouters), with annotation by D.W.V. Verkade. L. Guibault and O. van Daalen, “Unravelling the Myth around Open Source Licenses — An Analysis from a Dutch and European Law Perspective”, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 91-95.

Certain FOSS licences stipulate that derivative works should be distributed under the same licence terms as the original work. The term “derivative work” is not known in the Netherlands, but Article 10, paragraph 2 and Article 13 CA may provide guidance as to how it should be defined.<sup>62</sup>

### Moral copyrights

Moral rights play a more important role in relation to FOSS than they do for closed source software. The reason for this is because FOSS values the recognition of contributors very highly.<sup>63</sup> Nevertheless, moral rights may also conflict with the ideas underpinning FOSS: the right to oppose any alteration of the work may conflict with the *freedom* to tinker<sup>64</sup> or with forked projects. The Open Source Definition even specifies that authors of FOSS cannot oppose the use of the software by certain people and groups or for certain areas of application.<sup>65</sup>

However, in theory, the moral rights holders may oppose such alterations. Nevertheless, in practise, acknowledgments are desirable in FOSS communities. Many FOSS licences even oblige contributors to mention their names and their modifications in the mandatory notice.<sup>66</sup>

### Enforcing FOSS licences

If the FOSS is used, or distributed, in a way that is not allowed under the relevant FOSS licence and the law, then it amounts, in principle, to copyright infringement. The rightholders — or any one of them, unless agreed otherwise — can enforce their rights by seeking an injunction, compensation for damages, surrender of profits and seizure or destruction of the infringing software. In principle, licences do not have enforcement rights such as these, unless they are given the authorisation by the licensor. Most FOSS licences do not give this authorisation. In order to enforce FOSS licences effectively, the Free Software Foundation encourages the authors of FOSS to assign their rights to the software to the Free Software Foundation.

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<sup>62</sup>J. van Balen et al, Auteursrecht en open source software, in E. Thole, R. Scholten, W. Seinen (Eds.) Open Source Software — Een verkenning naar de juridische aspecten van open source software, NvIR 2006, pp. 48-49.

<sup>63</sup>See: Eric S. Raymond, The Cathedral and the Bazaar, O'Reilly, 1999, p. 53: “The *utility function* Linux hackers are maximizing is not classically economic, but is the intangible of their own ego satisfaction and reputation among other hackers. (One may call their motivation *altruistic*, but this ignores the fact that altruism is itself a form of ego satisfaction for the altruist). Voluntary cultures that work this way are not actually uncommon; another in which I have long participated is science fiction fandom, which unlike hackerdom has long explicitly recognized *egoboo* (ego-boosting, or the enhancement of one's reputation among other fans) as the basic drive behind volunteer activity”.

<sup>64</sup>The freedom to alter anything in the FOSS, without any restriction, even if the alteration would cause the destruction, mutilation and/or other impairment of the work.

<sup>65</sup>OSD Clauses 5 and 6.

<sup>66</sup>J. van Balen et al., Auteursrecht en open source software, in E. Thole, R. Scholten, W. Seinen (Eds.) Open Source Software — Een verkenning naar de juridische aspecten van open source software, 2006, pp. 52-53.

As FOSS licences have important differences from “normal” software licences, and most FOSS licences were developed from an Anglo-American perspective, it gives rise to the question as to whether the formation and content of the applicable FOSS licence would comply with Dutch law. How should the licence be qualified? Who are the contracting parties? Is its form and content valid under Dutch law?

### **Introduction to the Dutch legal system**

For a good understanding of the Dutch attitudes to FOSS licences and to appreciate the suggestions made about the contents of FOSS licences, it is necessary to briefly explain the pillars of the Dutch legal system.

In general, Dutch law does not provide mandatory requirements for the formation and content of an agreement. Thus, in principle, contracting parties have a lot of freedom. Moreover, Book 6 of the Dutch Civil Code provides a solid, though flexible, basis for contracting parties and sets out provisions that regulate the relationship between the contracting parties and the consequences of agreements. Most of these provisions have an additional effect, but some of them are mandatory (predominantly when regulating the relationship between professional parties and consumers). As most provisions are reasonably balanced, it is not necessary to include clauses in contracts regarding issues that are already included in the Dutch Civil Code, unless parties explicitly want to differ from these statutory provisions.

One of the most important principles in the Dutch Civil Code is the principle of reasonableness and fairness (“redelijkheid en billijkheid”) which is laid down in Articles 6:2 and 6:248 CC. This principle is implied in all agreements and has both an added effect as well as a derogatory one. It may have legal consequences on the agreement made between the contracting parties, but it could also affect the validity of the contractual terms in a way that the parties did not contemplate or intend when they entered into the contract. For instance, a contractual clause may not apply, if under the given circumstances, according to reasonableness and fairness, a clause such as this would be unacceptable.<sup>67</sup>

### **Nature of the agreement**

FOSS licences are agreements that create mutual obligations for the contracting parties. Although FOSS licences have not yet been “tested” in Dutch courts, most commentators argue that open source agreements can be qualified as a contract under Dutch law, in the same way as any other software agreement can. A contract consists in the parties’ manifestation of their actual or apparent

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<sup>67</sup>See: Wanda van Kerkvoorden, Software License Agreements and Software Distribution Agreements. The Dutch Way, in Esme Vos (Ed.) *Licensing & Distributing Software in Europe — A Country by Country Look at Structuring International Software Agreements to Fit Your Needs*, Aspatore Inc. 2005, pp. 164-167.

intention to be bound by obligations and to give them legal effect.<sup>68</sup> FOSS licences are generally referred to as licence contracts, which actually form an unnamed category of contracts in the Dutch Civil Code. What the nature of the relevant FOSS licence is, should be examined on a case-by-case basis, in accordance with the intention of the parties. The object of the licence is to regulate the private law aspects of the transaction of the licensed rights, such as the extent of the guarantee granted on the FOSS, and the copyright law aspects of it, such as the extent of the use that the licensee is entitled to make of the copyright protected FOSS.<sup>69</sup> Upon examining the legal nature of software licences, most Dutch commentators argue that software licences should be seen as conferring a right of use (“gebruiksrecht”) on the licensee. Accordingly, a software licence must be regarded as an agreement whereby the licensor grants the licensee permission to perform certain acts with respect to a copyrighted work, which would otherwise be prohibited on the basis of the licensor’s exclusive right on the work. The majority of FOSS licences, therefore, do not substantially differ from most conventional software licence agreements.<sup>70</sup>

### Contracting parties

Who are the contracting parties to a FOSS licence? It is clear that the licensee is one — this is the person who is using a copy of the FOSS — but who is the licensor? The text of a FOSS licence does not always contain a clear indication of the name(s) of the licensor(s), let alone the address(es) of the natural or legal person(s) granting the licence. As said, the question as to who is the copyright owner is a factual one which must be decided on a case-by-case basis, taking into account eventual subsequent transfers of copyrights. It is more difficult to examine who the licensor is: this has to be established according to the principle laid down in the *Haviltex* case. This landmark case states that one should take into account the respective expectations of the parties concerned.<sup>71</sup>

The licensor and the copyright owner can be the same person, but not necessarily. Following the FOSS ideology one would argue that the licensee receives the licence from all the other developers in the chain. However, as the licence is not clear about the identity of the licensors at each step of the development process, it is unclear for a subsequent user to determine who he is contractually bound with. In practice, little case law has emerged in relation to FOSS licences and so the difficulty of ascertaining the identity of the parties to the agreement has not raised any legal difficulties, yet. Nevertheless, whoever the licensor may be,

<sup>68</sup>L.M.C.R. Guibault, Copyright Limitations and contracts. An analysis of the contractual overridability of limitations on copyright, The Hague/London/Boston: Kluwer Law International 2002, p. 114.

<sup>69</sup>L. Guibault and O. van Daalen, Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 46-47.

<sup>70</sup>L. Guibault and O. van Daalen, Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 49-50.

<sup>71</sup>HR 13 March 1981, no. 11647, NJ 1981, No., 635 (*Haviltex*).



the licensee has a right to expect that the (legal or natural) person granting the licence is indeed competent to do so. The next question is whether the licence agreement is properly formulated so as to bind the user.<sup>72</sup>

### Validity of the contract

FOSS is made available to users in various ways. The terms of the FOSS licence may appear in a variety of ways as well. For instance, for online distribution, the terms of the licence may be programmed to appear on the user's computer screen display, or the user may download the FOSS only after he has given his consent to the terms of the online screen licence, by clicking the tick box "Yes, I agree to these terms of use". The user can also be linked to the licence terms somewhere else online. In other cases, the user may even be expected to consult the COPYING or LICENSE file that is distributed with the software. For offline distribution, FOSS licences are often inserted in an instruction manual or packed inside a box, or only communicated to the user when the software is installed.<sup>73</sup> Do these acts constitute a legal agreement between the concerned parties, under Dutch law?

Article 6:213 CC defines a contract as a multilateral juridical act under which one or more of the parties assumes an obligation towards one or more of the other parties. Juridical acts require an intention to produce a juridical effect, an intention which is manifested by a declaration (Article 3:33 CC).<sup>74</sup> The absence of intention corresponding with that declaration cannot be invoked against a person who interpreted another person's declaration or conduct in conformity with the sense which he could reasonably attributed to it in the circumstances as a declaration of particular implication made to him by that other person (Article 3:35 CC). Thus, the impression created by someone's apparent intention to produce juridical effects is enough cause for it to qualify as a juridical act.

Article 6:217 CC provides that the multilateral juridical act is formed by the exchange of an offer and its acceptance.<sup>75</sup> With regard to juridical acts which are done for free (juridical acts for no consideration, "rechtshandelingen om niet"), acceptance is presumed to have taken place more rapidly.<sup>76</sup>

Note that contracts can be validly concluded via electronic means, irrespective

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<sup>72</sup>L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective*, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 51-55.

<sup>73</sup>L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective*, ITeR series no. 8, The Hague: TMC Asser Press 2006, p. 55.

<sup>74</sup>The declaration of intention can be made in any form, thus it may also be inferred from conduct.

<sup>75</sup>Which can take place in any form, unless the parties have agreed otherwise. Thus, also offer and acceptance exchanged via electronic means forms a multilateral juridical act, see: R.E. van Esch, *Elektronische handel*, in H. Franken, H.W.K. Kaspersen and A.H. De Wild, *Recht en computer*, 5 impression., Deventer, Kluwer: 2004, p. 157.

<sup>76</sup>A.R. Bloembergen 1998, *Rechtshandeling en overeenkomst*, Deventer, Kluwer 1998, p. 71.

of whether a consumer is involved in the transaction or not.<sup>77</sup> However, for electronic transactions by “Information Society Services”<sup>78</sup> the Dutch laws requires that anyone who provides an Information Society Service must make certain information accessible to the recipients of the service in an easy, direct and permanent manner (Article 3:15d CC).<sup>79</sup>

Moreover Article 6:227b CC provides that, before a contract is concluded via electronic means, any Internet Society Service is required to give certain information in a clear, comprehensible and unambiguous way to the other party. More specifically, the Information Society Service must indicate the different technical steps which must be taken in order to conclude the contract,<sup>80</sup> and it should specify the technical means for identifying and correcting input errors, prior to the placing of the order. Before or during the conclusion of the contract, the Information Society Service must make the terms available to the recipient in a way that allows him to store and reproduce them so that he can access them at a later stage. Failure to comply with the obligations of Article 6:227b CC can result in annulment of the contract or the contract can be presumed null.

Besides that, a distinction should be made between professional users and consumers, since one would expect that professional users, more than ordinary consumers, would be aware of the FOSS licence. Moreover, the user may also be bound to the terms of the licence by the sheer act of reproducing, modifying or distributing the software.<sup>81</sup> The criterion is, in our opinion, whether the user actually accepted the legal consequences of his actions, and whether he accomplished these actions with the specific intention of being bound by the

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<sup>77</sup>Directive 2000/31/EC of the European Parliament and the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market, 17 July 2000, L 178/1, Art. 9 ff.; as transposed into the Dutch Civil Code by Aanpassingswet richtlijn inzake elektronische handel, Stb. 2004, no. 210.

<sup>78</sup>Any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. The Explanatory Memorandum of the Dutch implementation act (TK 2001-2002, 28 197, no. 3, p. 12), explains that this expression should be understood in broad terms and should not be limited to services where a contract must be concluded; it should also be understood as covering activities for which the buyer pays nothing, if these activities are generally offered against the payment of a price or if they otherwise possess a certain economic value. Thus, the vast majority of FOSS distributors on the Internet could constitute an economic activity that should be covered by the definition of Internet Society Service. See: L. Guibault and O. van Daalen, Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective, ITeR series no. 8, The Hague: TMC Asser Press 2006, p. 57.

<sup>79</sup>For instance the Information Society Service must supply its name and geographic address, as well as its electronic mail address, in order to allow rapid contact and communication in a direct and effective manner. Dutch law also provides similar obligations vis-à-vis information on suppliers of goods and providers of services to consumers (Article 7:46a ff. Dutch Civil Code), as a result of the implementation of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, OJ, L 144, 4 June 1997, pp. 19-27, Art. 4.

<sup>80</sup>This does not apply to contracts concluded exclusively by the exchange of electronic mail or by equivalent individual communications.

<sup>81</sup>See, for instance, clause 5 GPLv2.

licence.<sup>82</sup>

### General terms and conditions

Moreover, FOSS licences generally take the form of a standard agreement, or of general terms and conditions (“algemene voorwaarden”), insofar as the terms of the licence are not individually negotiated between the licensor and licensee.<sup>83</sup> For this reason, the European and Dutch legislature have subjected the use of general terms and conditions to legal requirements relating to the formation of such contracts, even if a user has manifested his intention to be bound by the terms. Article 6:232 CC provides that the other party is bound by the general terms and conditions even if, at the time of entering into the contract, the user understands, or ought to understand, that the other party did not know the content of the conditions. The intention to enter into the contract needs to be directed to the applicability of the whole set of conditions to the actual transaction. When accepted, the other party cannot invoke the fact that he was not aware of the content of the terms.<sup>84</sup> The other party must have been given sufficient opportunity to acknowledge the general terms and conditions before, or during, the formation of the contract (Article 6:233b CC). Specifically for contracts concluded by electronic means, Article 6:234 CC provides that an Information Society Service must make the general terms and conditions available to the other party during, or before, the formation of the contract in such a manner that allows the other party to store and reproduce them so that he can access them at a later stage. If this is not reasonably possible, the user of the general terms and conditions must inform the other party, before the conclusion of the contract, of the site where the conditions may be electronically consulted, and of the fact that a copy of the general terms and conditions may, upon request, be sent electronically or by other means to the other party. In determining whether the other party was given sufficient opportunity to take notice of the general terms and conditions, a Dutch court will make a distinction between professional users and ordinary consumers. Thus, the key question is whether the other party understood or must have understood, by ticking a box “I agree” or by performing another certain act, that he accepted the applicability of the general terms and conditions.<sup>85</sup>

The manner in which FOSS licences are presented to the other party varies

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<sup>82</sup>L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective*, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 56-59.

<sup>83</sup>A term must be regarded as “not individually negotiated” where it has been drafted in advance and the licensee has not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. See: L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective*, ITeR series no. 8, The Hague: TMC Asser Press 2006, p. 61 and Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, of 5 April 1993, L 95/29.

<sup>84</sup>Explanatory Memorandum, Parliamentary History, InvW 6, no. 3, p. 1573.

<sup>85</sup>M. Berghuis, *Informatielicenties — Een analyse van UCITA en de rechtspraak in Nederland en de Verenigde Staten*, The Hague: SDU 2005.

considerably. Therefore, a case-by-case examination must be completed to ascertain whether the FOSS distributor is complying with the mentioned legal requirements and whether the mere act by a user of downloading FOSS onto his computer constitutes a manifestation of intention on his part to be bound by the licence agreement. Nevertheless, in the light of the foregoing, we believe that the FOSS community should adapt its licensing practises to ensure that the contract formation process meets the requirements of the law.

### Waiver and liability

In the case of software one can think of three possible forms of liability: liability resulting from a) breach of contract (Article 6:74 CC); b) tort (“onrechtmatige daad”) (Article 6:162 CC); or c) product liability (Article 6:185 CC and following). However, most FOSS licences contain provisions according to which the licensor limits all his liability for damages which result directly or indirectly from the use of the program. The question is whether such a (full) limitation of liability is valid under Dutch law.

As a result of the principle of the freedom of contract,<sup>86</sup> a limitation or exclusion of one’s liability in a “business-to-business” relationship is, in principle, permitted under Dutch law. However, this freedom of contract is restricted by a number of legal provisions. For instance, limitation or exclusion of liability may not be contrary to common decency (“goede zeden”) (Article 3:40 CC).<sup>87</sup> Thus, it is generally accepted that an agreement which limits a person’s liability for damages which were caused by his own deliberate behaviour, is void. Similarly, liability for damages which result from a person’s own gross negligence cannot be restricted. Also, if the agreement is not acceptable according to the principle of reasonableness and fairness (“redelijkheid en billijkheid”) (Art. 6:248, paragraph 2 CC), then the agreement is invalid.<sup>88</sup> Nevertheless, limitation of liability for software is not considered to be unreasonable per se. Thus, the assessment of a limitation or exclusion of liability should be dealt with on a case-by-case basis.<sup>89</sup>

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<sup>86</sup>This principle means that parties to an agreement are, in principle, free to determine the content of that agreement.

<sup>87</sup>For instance, restricting or disclaiming the legal liability of a seller or supplier in the event of the death of a consumer, or personal injury caused by an act or omission of that seller or supplier.

<sup>88</sup>HR 19 May 1967, 1967 No. 261 (Saladin v HBU): all relevant circumstances should be taken into account, including but not limited to the seriousness of the gross negligence, in particular in relation to the nature and gravity of the related interests; the nature and content of the agreement; the social position of the parties and their mutual relationship; the way in which the agreement was formed and the degree of consensus of agreement with the other party. Following this case, more relevant circumstances were suggested by legal scholars, some of which the Dutch Supreme Court has followed, for instance if there is a disparity between the price of goods and the possibility of damages, a disclaimer should be considered reasonable; and the possibility of insurance.

<sup>89</sup>See also: W. Dammers and M. Weij, *Aansprakelijk voor fouten in (open source) software, of toch niet?*, in H. Sleurink, J. Stedehouder and J.W. Broekema (Ed.) *Open source jaarboek 2009-2010*, Media Update Vakpublicaties: Gorredijk 2010, pp. 149-166.

Consumers or small businesses benefit from a protective regime.<sup>90</sup> This protective regime states, in Article 6:233 CC, that a clause in the general terms and conditions can be voidable if the clause is “unreasonably onerous” (“onredelijk bezwarend”) when one considers the nature and further content of the agreement, the way in which the general terms and conditions are formed, the mutual knowable interests of both parties and the remaining circumstances of the case.<sup>91</sup> In addition, Articles 6:236 and 6:237 CC contain a “black list” and a “grey list” (respectively) of terms that are either invalid because they are regarded as unreasonably onerous to the other party or are terms that, unless proven otherwise, are presumed to be unreasonably onerous. For FOSS licences, it is important to note Article 6:237 sub f CC as this article provides that a term is deemed to be unreasonably onerous if it frees the user or a third person, in whole, or in part, from a legal obligation to repair damage. The fact that most FOSS licences are distributed for free constitutes an important factor to take into consideration when evaluating the onerous character of the limitation of liability. Nevertheless, circumstances may illustrate that the limitation or exclusion of liability cannot be upheld.

Article 6:185 CC provides that the producer shall be liable for the damage caused by a defect in his product, unless the product has not been manufactured for the purpose of sale by the producer or for any other form of distribution by him with an economic object; or unless it has not been manufactured or distributed within the framework of the course of his profession or business. Nevertheless, we argue that product liability may possibly be irrelevant for FOSS, as software may not be qualified as a “product”.<sup>92</sup>

## The copyleft principle

### Principle

The copyleft principle, or share-alike principle, in FOSS licences purports to perpetuate certain obligations under the licence from one developer or distributor

<sup>90</sup>A company employing fewer than 50 employees, or other small businesses that are comparable to consumers, as they have a weaker bargaining position. Thus, such companies benefit from the reflex effect (“reflexwerking”) of a protective legal regime.

<sup>91</sup>However, this regime does not apply to terms that deal with the definition of the main object of the contract, or with the adequacy of the price and remuneration in relation to the goods or services supplied, insofar as these terms are in plain intelligible language (“kernbepalingen”). The unfairness of contractual terms is to be assessed in light of the nature of the goods or services for which the contract was concluded and all the circumstances attending the conclusion of the contract, as well as all the other terms of the contract. See: L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective*, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 83-84.

<sup>92</sup>However, this is not a clear-cut case. A product is a physical object subject to human control. One can argue that software is not “physical” (notwithstanding its physical carrier), and thus not a product (nor is the developer a producer). See: W. Dammers and M. Weij, *Aansprakelijk voor fouten in (open source) software, of toch niet?*, in H. Sleurink, J. Stedehouder and J.W. Broekema (Eds.) *Open source jaarboek 2009-2010*, Media Update Vakpublicaties: Gorredijk 2010, pp. 149-166.

to another. Thus, everyone in the chain of the FOSS licence needs to distribute the FOSS, including their own contributions, and/or derivative works, under the same FOSS licence to other users, if they choose to distribute such contributions and/or derivative works. In return, the developer can make free use of the FOSS, in accordance with the terms of the applicable licence.

## Validity

The copyleft clause raises a number of questions under Dutch law. More specifically, one could ask oneself how obligations are passed on to a subsequent licensee and do the rights and obligations under a FOSS licence bind the subsequent licensee? And thus, is a contract automatically formed every time the FOSS is distributed?<sup>93</sup>

The question of the binding character of a copyleft clause is a matter of the doctrine of offer and acceptance (as discussed above), and the legal requirements regarding the presentation of the general terms and conditions of sale to the other party. The licensee may obtain an automatic licence from the initial licensor, but this does not mean that the sublicensee has automatically accepted it.<sup>94</sup> However, the sublicense may be automatically accepted if the acceptance can be inferred from the conduct of the sublicensor. As already indicated, the binding character of the copyleft clause is complex due to the fact that the identity of the licensor(s) is/are not always made clear. All in all, the process of the formation of a contract is a very important issue with regard to FOSS licences.

In Dutch literature,<sup>95</sup> the copyleft clause has been interpreted in light of the principle of the relative effect of contracts and of the third party effects of an agreement. These principles mean that a legal action between parties can only have an effect on those contracting parties. Thus, third parties are not affected by a contract to which they are not bound. As a consequence, the rights created under a contract are relative rights: they are only enforceable against the other party to the contract. The copyleft clause in FOSS licences may be passed onto a sublicensee according to Article 6:253 CC. This article states that an agreement creates the right for a third party to claim a performance from one of the parties, or to appeal against one of them regarding the observance of their agreement, if the agreement contains a stipulation to that effect (a third-party clause) and the third party has accepted this stipulation. A stipulation of the sort referred to in the previous sentence (third-party clause) may be revoked by the person who has stipulated it until the time that it is accepted by the third party. An acceptance or rejection of the stipulation (third-party clause) is made by a third party making a declaration to one of the parties to the

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<sup>93</sup>See: Article 6 GPL v 2.

<sup>94</sup>E.N.M. Visser, GNU General Public License — All rights reserved?, 2005, pp. 226-229.

<sup>95</sup>See: L. Guibault and O. van Daalen, Unravelling the Myth around Open Source Licenses — An Analysis from A Dutch and European Law Perspective, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 75-76.

agreement. If the third-party clause has been made irrevocable and it has been stipulated, towards the third party, for no consideration, it will be regarded to have been accepted if the third party did not reject it immediately after he obtained knowledge of its existence. In the context of some FOSS licences, it is not clear whether the licensee has accepted or rejected such stipulations. The construction of the copyleft clauses in FOSS licences fails to accurately reflect this process. The clause creates a relationship between the licensor and each of the licensees, regardless of the number of legal transactions between them.<sup>96</sup>

### Legal remedies

If one does not comply with the provisions of the relevant FOSS licence, one may infringe the copyrights of the author and/or commit a breach of contract. Notwithstanding the limitations and exclusions of liability in most FOSS licences, Dutch law provides the rightholder with several legal remedies for both situations. The most suitable course of action may depend on the specific facts of the particular case.

### Damages

For instance, on the basis of Article 27 CA, the author retains his right — even after assignment of his copyright wholly or in part to another — to bring an action for damages<sup>97</sup> against persons who infringe his copyright. After his death, this right belongs to his successors or legatees, until the copyright expires.

In addition to claiming damages,<sup>98</sup> Article 27a CA provides the author or his successor in title with the right to request the court to order anyone who has infringed the copyright to surrender the profits<sup>99</sup> flowing from the infringement and to render account therefor. These claims may also be filed by the author, or his successor in title, partly or wholly on behalf of a licensee, without prejudice to the licensee's right to intervene in the proceedings instituted independently or partly or wholly on his behalf by the author, or his successor in title, in order to obtain compensation for the damage he has suffered, or to obtain a

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<sup>96</sup>The original licensor offers the FOSS under a FOSS licence. The licensee acquires the FOSS from the licensor. The sublicensee acquires the FOSS from the licensee. If the sublicensee distributes the FOSS without the FOSS licence.

<sup>97</sup>Such as the loss of royalties and damages which are not financial losses (Article 6:106 Dutch Civil Code).

<sup>98</sup>Although the wording of the article is in addition to claiming damages (“naast schadevergoeding”), HR 14 April 2000, NJ 2000, 489, AMI 2000, p. 134, ECLI:NL:HR:2000:AA5519 (Danestyle v HBS) held that the aggrieved party may choose between these actions, whichever is more beneficial: a claim for damages or a claim for profits to be handed over. He is not entitled to claim both. See: Ch. Gielen, D.W.F. Verkade (Ed.), *Intellectuele Eigendom, Tekst en Commentaar*, Kluwer: Deventer 2009 Article 28 note 1 sub c.

<sup>99</sup>For the calculation of these profits, its relation to Article 6:104 Dutch Civil Code and the deductions to be taken into account see Deurvorst, *Schadevergoeding en winstafdracht bij inbreuk op intellectuele eigendomsrechten*, Lelystad 1991 and J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht, naburige rechten en databankenrecht*, Kluwer: Deventer 2005, par. 11.14 ff.

proportionate share of the profits to be surrendered by the defendant. A licensee may only file these claims if he has obtained the authority to do so from the author or his successor in title.

The Copyright Act does not provide specific provisions concerning the accountability for the damages, the different kinds of damage and how the damages should be calculated. One should, therefore, take into account Section 10, Title 1, Book 6 of the Dutch Civil Code, as discussed below.<sup>100</sup>

On the basis of Article 6:74 CC, every imperfection in compliance with an obligation is considered to amount to non-performance of the debtor and makes him liable for the damage which the creditor suffers as a result, unless the non-performance cannot be attributed to the debtor. Save to the extent that the performance is and will remain impossible, the debtor is only liable if he is in default, on the grounds of the Articles 6:81-6:83 CC (as described above).

Article 6:81 CC provides that the debtor is in default (“verzuim”) during the period that the performance of the obligation is not once it has become exigible and the requirements of Articles 6:82 and 6:83 CC have been met, unless the delay cannot be attributed to him or it has become permanently impossible for him to perform the obligation.

Article 6:82 CC states that default commences when the debtor is given written notice of default (“ingebrekestelling”), in which the creditor grants him a reasonable period of time during which he still may perform in conformity with his obligation, and there is no performance within that period. If the debtor is temporarily unable to perform or if it has become clear from his attitude that a warning would serve no purpose, then he may be held liable solely by a written notice to the effect that he is held liable for his non-performance.

Finally, Article 6:83 CC provides that the debtor will automatically be in default, without the necessity of a prior letter of formal notice to perform or a notice in which he is held liable for his non-performance: (a) when the obligation is subject to a time stipulation (expiry date) and he has failed to perform within the specified period, unless this time stipulation has another purpose; (b) when the obligation results from tort (“onrechtmatige daad”, Article 6:162 CC) or when it forces the debtor to pay for damages as meant in Article 6:74 paragraph 1 CC, and the obligation is not performed instantly; or (c) when the creditor must conclude from a communication from the debtor that the latter will fail in the performance of the obligation.

In the event that the debtor is indeed liable, Section 10, Title 1, Book 6 of the Dutch Civil Code applies. For relevance to the FOSS context we will only discuss some of the articles. Article 6:95 CC states that the damage that has to be compensated by virtue of a statutory obligation to repair damages (due by virtue

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<sup>100</sup>See Deurvorst, *Schadevergoeding en winstafracht bij inbreuk op intellectuele eigendomsrechten*, Lelystad 1991 and J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht, naburige rechten en databankenrecht*, Kluwer: Deventer 2005, par. 11.14ff.



of law), consists of loss to property, rights and interests and other prejudice, the latter as far as the law confers a right to damages therefor. According to Article 6:96 CC loss to property, rights and interests includes the loss incurred and the profit deprived. Also the reasonable costs (a) to prevent or minimise damage which could be expected to result from the event which caused someone to be liable; (b) for determining the nature and scope of the damage and of the liable persons; and (c) for attempts to get satisfaction via an out of court settlement, but, as far as the costs under point (b) and (c) are concerned, unless, in the prevailing case, the provisions for costs of litigation are applicable (Article 241 of the Dutch Code of Civil Procedure (“Burgerlijke rechtsvordering”, hereafter: “Code of Civil Procedure” or abbreviated “CCP”), and qualify for compensation as loss to property, rights and interests. The court estimates the extent of the damage in the manner that is most consistent with the nature of the damage caused. Where the extent of the damage cannot be assessed exactly, it will be estimated (Article 6:97 CC). Only damage that is connected in such a way to the event that made the debtor liable, that it, in regard of the nature of his liability and of the damage caused, can be attributed to him as a consequence of this event, is eligible for compensation (Article 6:98 CC).

Another important provision is Article 6:104 CC, which concerns the estimation of damage and the surrender of profits. If someone, who is liable towards another person on the ground of a tort or failure to comply with an obligation, has derived profit from this tort or failure, then the court may, upon the request of the injured person, estimate the damage in line with the amount of that profit or a part of it.

### **Other legal remedies**

As said, the Copyright Act gives the author of a work the exclusive right to communicate the work to the public and to reproduce it, subject to the limitations laid down by law. This means that the author can prohibit others from performing these actions. The copyright owner can also claim ancillary measures, such as a recall, a rectification, an account of profits and a claim for damages. More specifically, Article 28 CA<sup>101</sup> provides that the rightholder may claim goods which are not filed in the public records and which have been communicated to the public in violation of the copyright of the author, or are unauthorised reproductions, as his property. He may also apply for them to be destroyed or rendered useless. The rightholder may bring a claim for the surrender of the said goods so that they can be destroyed or rendered useless. The same right to claim goods exists (amongst others) with respect to monies that may be assumed to have been obtained by, or as a result of, an infringement of

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<sup>101</sup>Please note that these remedies may not be exercised in respect of goods in the possession of persons who do not trade in such goods and who have obtained them exclusively for private use, unless they have infringed the copyrights themselves. This article was implemented into Dutch legislation in 2007, as a consequence of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

copyright. The rightholder may also apply for the destruction or the rendering unusable of goods (or the handing over of goods — eventually on the condition of payment — so that they can be destroyed or rendered unusable) which have been used to effect an infringement of copyright. The licensee will have these rights as well, so far as their purpose is to protect the rights he is entitled to exercise.

Besides these copyright-specific measures, the licensor also has some legal remedies on the basis of the law of obligations. For instance, the creditor (i.e. the licensor) may immediately<sup>102</sup> demand performance (“nakoming”) by the debtor (i.e. the licensee).<sup>103</sup> This is specifically an effective remedy for demanding that a licensee make available the source code of the distributed FOSS, as obliged by the concerning FOSS licence, if he has not done so already.

Moreover, the creditor also has the possibility of rescinding the FOSS licence, under certain circumstances. This is regulated by Article 6:265 CC which states that if a party fails in the performance of its obligations, the opposite party is given the right to rescind the mutual agreement either in its entirety or in part, unless the failure, given its specific nature or minor importance, does not justify the rescission and its legal effects. If performance is not permanently or temporarily impossible, the right to rescind the mutual agreement only arises when the debtor is in default (as discussed above). According to Article 6:267 CC, the rescission of a mutual agreement is effectuated by means of a written notification from the party who is entitled to rescind the agreement, addressed to the opposite party to that agreement. If the mutual agreement has been concluded solely by electronic means, it may be rescinded in a similar manner by means of a notice conveyed to the other party by electronic means.<sup>104</sup> A mutual agreement may also be rescinded by a judgment of the court upon a right of action (legal claim) of the party who is entitled to rescind the agreement.

A rescission releases the parties from all obligations created by the rescinded mutual agreement. If these obligations have already been performed, the legal basis for performance remains effective, but the law imposes an obligation on the parties to undo the performances they have already received by virtue of the rescinded agreement. In situations where the nature of the received performance makes its return impossible, it is replaced by a compensation of its value, calculated at the moment on which it was received. Where the received performance was not in conformity with the obligation, this compensation is limited to the value of the benefit that the recipient, in the circumstances, has actually gained from the performance, calculated at the moment on which he received it. Please note that the rescission of a mutual agreement as it is used in this context has no retroactive effect, except that an offer from the debtor to perform his

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<sup>102</sup>If no term has been set for the performance. See Article 6:38 Dutch Civil Code

<sup>103</sup>When a term has been set for the performance, Article 6:39 Dutch Civil Code states that it is presumed only to bar an earlier demand of performance. The right of performance is regulated in Section 6, Title 1, Book 6 Dutch Civil Code.

<sup>104</sup>Article 6:227a, para 1 Dutch Civil Code, applies accordingly.

obligation, made at a moment that the creditor has already brought a right of action (legal claim) to court in order to rescind the mutual agreement, will have no effect if the court subsequently decides to rescind that agreement.<sup>105</sup>

## FOSS cases in the Netherlands

In the Netherlands, no cases concerning FOSS licences have been reported yet (July 2010). A search in the case law on the website for the Dutch judicial system ([www.rechtspraak.nl](http://www.rechtspraak.nl)) only gives twelve results mentioning “open source”, none of which is really relevant to the legal issues concerning FOSS licences. Two case does, however, briefly deal with certain FOSS characteristics, but the court does not provide any final thoughts.<sup>106</sup> does not address the question as to whether the incorporation of open source software in Marktplaats’ own software is allowed. Also, it does not address the question, as to what extent Marktplaats is obliged to make its own software available, in the event that such incorporation would be allowed. (Is Marktplaats obliged to make available its own software (its “crown jewels”, as they themselves call it), or only the part of the proprietary software that is associated with the filter that is the subject in this case?) Nevertheless, the Court finds that it is clear that there would be necessary costs involved for making use of open source software and incorporating open source software into Marktplaats’ own software. There would also be costs involved for Marktplaats for adapting its own software to the needs of the open source software. Moreover there would be some drawbacks. Therefore, the Court considered that, in the event of Marktplaats being required to install a filter, Marktplaats’ choice not to use open source software is — given the crucial importance of the software to Marktplaats — a perfectly legitimate one.]<sup>107</sup> Thus, as stated earlier in this article, the Netherlands is still waiting for its first “real” FOSS case before any certainty on the different legal issues can be established.

## Legal procedures

### Parties

Depending on the circumstances of the case, the FOSS licensor may need to enforce his rights either on the basis of an alleged breach of the contractual obligations of the FOSS licence, and/or on the basis of an alleged infringement of copyright. As previously mentioned, one of the issues in this case is the difficulty

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<sup>105</sup> Articles 6:271, 6:272 and 6:269 of the Dutch Code of Civil Procedure.

<sup>106</sup> Rb. Zwolle-Lelystad 14 March 2007, ECLI:NL:RBZLY:2007:BA4950 (Stokke v Marktplaats) at [2.19]

<sup>107</sup> Rb. Zwolle-Lelystad, 21 November 2010, KG ZA 10-477, ECLI:NL:RBZLY:2010:BP5690 (Purple Pigeon/Quinarx). In this case, Quinarx defended itself against an infringement claim that Purple Pigeon waived its copyrights because it used open source software. Although the defense isn’t described more clear, it is in any event incorrect: use of open source software, in any event, does not mean that the author waived its copyrights. Besides that, the court seems to state that the open source software does not *contaminate* Purple Pigeon’s own software since it was allowed to encrypt its code.

of establishing the chain of ownership of rights on the FOSS. A consequence thereof is that it may be unclear who is entitled to institute proceedings against alleged infringers. Therefore, one should first enquire who the parties to the licence are. Also the question of authorship of rights with respect to the FOSS is of importance to determine who is entitled to exercise the exclusive rights on the software.

For instance, the authors of a work whose individual contributions cannot be distinguished cannot exercise their copyrights without the consent of the other co-authors; if the contributions can be distinguished, each individual author may enforce these rights (as long as the parties have not provided otherwise in a contractual arrangement).

The enforcement of rights on a collection of works may be easier, since the person under whose guidance and supervision the work as a whole has been made has the power to institute legal proceedings against the other parties.

If one has obtained a FOSS licence, one has become a licensee. The licensee has a right to institute legal proceedings if he has obtained the authority to do so from the author, or his successor in title (Article 27a CA).

As there is a lot of uncertainty as to who legally has the right to initiate proceedings, the Free Software Foundation has introduced the Fiduciary License Agreement (“FLA”). The FLA intends to remove this uncertainty by allowing authors to make the Free Software Foundation their fiduciary in all legal matters.<sup>108</sup>

## Procedures

The rightholder can initiate different legal proceedings in the Netherlands to enforce his rights under the Copyright Act and/or the Dutch Civil Code. For instance, the rightholder can initiate interlocutory proceedings (“kort geding”) at short notice, in an attempt to put a halt to the infringement, or the impending or potential infringement of its copyright. Interlocutory proceedings can only be initiated in relation to a matter of urgent interest, but a copyright infringement — or a threatened or potential infringement — is usually considered sufficiently urgent to justify such proceedings. A hearing can take place within a few weeks and it is often possible to obtain an injunction within just six to eight weeks. The judge in interlocutory proceedings (“voorzieningenrechter”) will render a decision on the basis of his preliminary assessment. Normally he will issue such an injunction if he is satisfied, by preliminary assessment, that the copyright is valid and infringed.

Interlocutory proceedings may also be initiated by the copyright owner to request ancillary orders, such as a recall, a rectification, an account of profits and

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<sup>108</sup>L. Guibault and O. van Daalen, *Unravelling the Myth around Open Source Licenses — An Analysis from a Dutch and European Law Perspective*, ITeR series no. 8, The Hague: TMC Asser Press 2006, pp. 149-152.

an advance payment for the damages, but the urgent need for such measures must be clearly explained by the copyright owner.

The copyright owner also has the possibility of requesting permission from the judge in interlocutory proceedings to conduct a seizure for the surrender of infringing goods at the premises of the alleged infringers (see: Article 28, paragraph 1 CA). The copyright owner can also request permission for a conservatory seizure of *any* type of goods, not necessarily the infringing goods, as a security for a monetary sum that he is claiming from the infringer. The copyright owner also has the possibility of requesting a seizure of goods for the preservation of evidence, on the basis of Articles 843a and/or 1019b and 1019c CCP.<sup>109</sup> In such a case, the copyright owner must make it plausible that the other party, who is not heard by the judge in interlocutory proceedings, is infringing his copyright or that there is a serious threat of this occurring; he must also demonstrate an interest in the requested measures. After such a seizure for the preservation of evidence, the copyright owner does not automatically gain access to the results, but must put forward a specific claim for this access before the court.

In very urgent matters, the copyright owner can request the judge in interlocutory proceedings to render an “ex parte injunction” (Article 1019e CCP).<sup>110</sup> This means that the (allegedly) infringing party is not heard. Ex parte injunctions are preliminary and can be requested in cases with an extraordinary urgent interest, especially if irreparable harm will be caused and normal (interlocutory) proceedings cannot be awaited (*periculum in mora*).<sup>111</sup> It is necessary for the copyright to be legal and valid at first sight (*prima facie fumus boni iuris*), and for the infringement to be clear-cut actual and, at least, imminent. In order for this to be seen as reasonable, the applicant should give full and frank disclosure. The judge in interlocutory proceedings only briefly assesses the request for an ex parte injunction on these grounds. An ex parte injunction can be obtained within two to three days. If the enforcement of an ex parte injunction is subsequently lifted or if proceedings on the merits lead to a different outcome, the enforcing party can be held liable for damages.<sup>112</sup>

Interlocutory proceedings, as well as the ex parte injunctions and seizures, should be promptly followed by proceedings on the merits, or the related preliminary injunction will lapse. Moreover, definitive remedies, such as declaratory judgments, revocation of copyrights, rescissions of agreements and the payment of damages cannot be awarded in interlocutory proceedings. For such reme-

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<sup>109</sup>Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>110</sup>As a consequence of the implementation of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>111</sup>This requirement can be accompanied by some subsequent implicit requirements such as necessity, proportionality and subsidiarity. See: W.F. Dammers, *Examining Ex Parte in Rei Patenti*, Wolf Legal Publishers: Nijmegen 2011.

<sup>112</sup>W.F. Dammers, *Examining Ex Parte in Rei Patenti*, Wolf Legal Publishers: Nijmegen 2011 and J.Berg and D.Visser, *Ex-parte-praktijk in het auteursrecht*, AMI 2009, no. 3, pp. 85-90.

dies, the rightholder should initiate proceedings on the merits. Of course, the rightholder can also request an injunction or ancillary orders during proceedings on the merits, such as a declaratory judgment, a recall of the infringing products, rectification, information about the distribution channels, an account of profits, destruction of the infringing goods and/or the materials for the production of the infringing goods, publication of the decision, the payment of damages or the surrender of profits and the payment of reasonable legal costs (provided that the copyright owner proves that he has an interest in such measures).

In intellectual property rights cases, the successful party in the proceedings is awarded a payment from the other party of all the reasonable costs that he incurred in taking the proceedings (Article 1019h CCP).

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