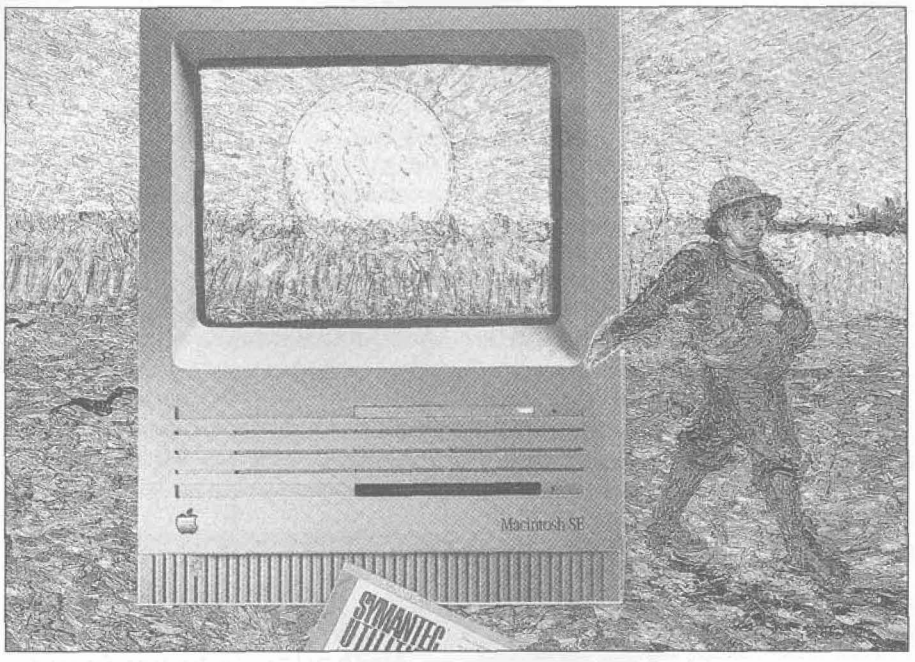
Copyright Protection for Software in the Netherlands: the Status Quo

by Dick van Engelen



In this article the current protectability of computer programs under copyright law will be examined, particularly in the light of the presumed non-patentability of software in the Netherlands.

In line with international developments, copyright protection of computer programs became a topic in the Netherlands after the patentability of computer programs was denied by the Netherlands Patent Office in its *Telephone Exchange* decision of 1970. Relatively soon thereafter, the first publications appeared in which it was maintained that computer programs may constitute a "work" within the scope of the Netherlands Copyright Act of 1912.

The discussions that followed focused for the most part on the question whether a computer program could meet the "originality" requirement. Whether computer programs could be deemed to be a work of "literature, science or art" was not so much an issue in these disputes. This was due to the general consensus amongst copyright experts that discussions about the "art issue" should be avoided, because courts should — as far as possible — refrain from acting as "art critics".

Inspired by this doctrine, legal scholars were also inclined to take the position that the criteria that have to be applied to evaluate whether a work meets the originality requirements should be limited to the "statistical test" of whether it is unlikely that two persons, faced with the same task, will create the same work. If such a result is unlikely, the result of such labour should be deemed to be "original" and therefore to constitute a work protected by copyright. Given this broad perspective of what may constitute a copyright-protected work, it will not come as a surprise to the reader that the general view was that computer programs could be protected by copyright. In the light of this consensus amongst legal scholars, Netherlands Courts also granted copyright protection to computer programs in a number of cases.

During the last couple of years, however, some criticism of this broad application of copyright protection for computer programs has arisen. Critics pointed out that a computer program is determined to a very large extent by technical (*ie* functional) requirements, which should have at least some consequences both for the copyrightability of computer programs and for the scope of the protection granted. They therefore took the position that copyright as such is therefore not the correct vehicle to protect computer programs. Instead of copyright, they advocated the applicability of a *sui generis* protection provided by statute, or through the application by the courts of a misappropriation doctrine under the principles of unfair competition law. In this regard it is of importance to note that some courts avoided the copyright issue by granting protection under unfair competition law instead of copyright in several cases of piracy.

It should also be noted that the Netherlands Patent Office reversed its position concerning the patentability of software related inventions in 1983. Bearing in mind that the discussions about the copyright protectability of computer programs are inspired to a large extent by the fact that computer programs could not be patented, this change of policy of the Patent Office — as well as of the European Patent Office in this respect — also seems to justify a more reserved position concerning the copyright-protectability of computer programs.

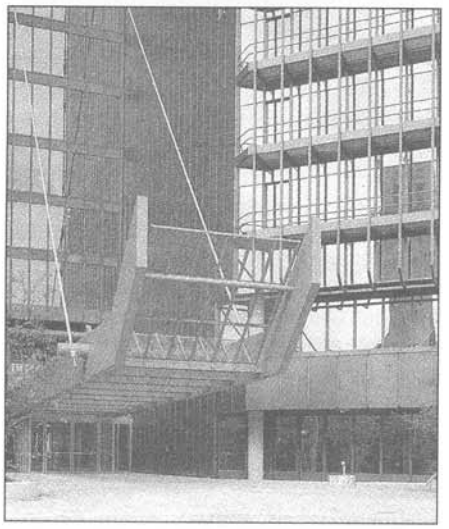
Legislative activity

In 1984 a Governmental Committee issued a report containing a number of recommendations for combating piracy of works protected by intellectual property rights. With regard to computer programs the committee advised that computer programs should be included in the list of examples of works set forth in Article 10(1) of the Netherlands Copyright Act. The reason for this proposal was that the mention of computer programs in the list of copyright-protected works should put an end to possible disputes about the copyright-protection of computer programs as such. The Committee also indicated, however, that it was of the opinion that there was no specific need for such an amendment of the Act, in view of the existing case law of the Netherlands courts.

In 1987 the Netherlands Government introduced a Bill into parliament to amend the Copyright Act of 1912. This Bill contained a number of proposals for amendments of the Copyright Act; these were intended to facilitate the position of copyright owners against pirates, in line with the proposals of the Committee. One of the Government proposals was to introduce computer programs in the list of examples of copyright-protectable works of Article 10 of the Act. This suggestion was

considered to be of minor importance at the time.

It should be remembered that this list of examples of objects which can be protected by copyright is by no means decisive for determining whether a program is protected by copyright. The courts — irrespective of any reference to computer programs in the list of Article 10 of the Copyright Act — will have to determine, on a case-by-case basis, whether or not a particular computer program does indeed constitute a copyright-protectable work. Further, it must do so by applying the *general principles* of copyright.



The European Patent Office — shifting attitudes towards software protection

As will be explained in more detail below, the Netherlands Copyright Act also contains a special régime which grants a more limited form of copyright protection to "all writings", irrespective of their originality. This special régime has been the subject of political debate, because it functions as a vehicle to support the governments' policy towards public broadcasting organizations and the banning of commercial television. Because of this special protection of "all writings", broadcasting organizations can claim a copyright in the compilation of data for TV- and radio-guides. The control over these data enables the various public broadcasting organizations to favour their own publications, of which the number of subscribers is of crucial importance for the distribution of broadcasting facilities and public funds.

The opponents of the governmental policy concerning public broadcasting and commercial television suggested including in the proposed amendment of the Copyright Act a provision to the effect that computer programs could not benefit from this specific protection for "all writings". This suggestion seems to have been inspired solely by the desire to limit the rôle of this special protection, because of the objections against the existing media statutes. It is of importance to note, however, that there was no material criticism concerning the applicability of this specific protection for "all writings" to computer programs as such. Much to the surprise of the majority of legal scholars, this proposal was thereafter adopted by the Minister of Justice.

The proposed exclusion of the possibility of computer programs being an object of the specific protection for "all writings" was thereafter several times criticized in legal publications, particularly because it had never been seriously disputed that computer programs could indeed benefit from this special form of copyright protection. One of the features of this special protection for "all writings" is that originality as such is not required. The mere fact that there is a "writing" is sufficient. The exclusion of computer programs from this régime would therefore mean that courts would be required to investigate whether or not a specific program does indeed meet the usual originality requirement of the Copyright Act. In most cases, this will require the hearing of expert witnesses before a court will be able to render a decision. This will obviously hinder a relatively easy and adequate protection of computer programs by means of preliminary injunctions, even in cases of downright "piracy". The result of this proposed amendment of the Copyright Act would therefore probably be counterproductive to the struggle against the piracy of computer programs.

Following this severe criticism, the Minister of Justice finally decided in 1988 to withdraw all proposed amendments of the Copyright Act referring to computer programs. The official argument for this manoeuvre was that the government preferred to await the outcome of the discussions pertaining to the protection of computer programs on an EEC level, pursuant to the publication by the European Commission of the Green Paper on Copyright and the Challenge of Technology. This decision seems to be a wise one in view of the disputes amongst legal scholars about the nature of the protection which can, or should, be granted to computer programs under Netherlands law.

It can be questioned, however, whether the solution to these problems will be provided for on an EEC level. The Commission's Proposal for a Council Directive on the Legal Protection of Computer Programs (89/C91/05) of 5 January 1989 only provides that the Member States should grant some form of copyright protection to computer programs in accordance with the provisions of their copyright legislation concerning works of literature. The Proposal, however, does not provide details about the contents and scope of such a copyright for computer programs. It should be noted that the special copyright for "all writings" is a copyright as provided for by the Copyright Act. Discussions about the nature of the protection to be granted to computer programs represent for the most part a dispute between those who view a copyright as provided for in the Netherlands Copyright Act of in the *droit d'auteur* tradition and those who view these rights in the spirit of the Anglo-American copyright doctrine. It does not, therefore, seem likely that the harmonization of applicable laws on an EEC level will provide the answer to this issue of Netherlands law.

In the meantime the Minister of Justice has established a working committee to render advice about the manner in which computer programs should be protected under the Copyright Act of 1912. The committee will probably issue a report in May 1990, unless the final version of the EEC Directive on computer programs is not yet available by then.

Aesthetic works

Since the 1950s there has been a growing trend in the Netherlands towards the position that *originality* is the sole requirement for the copyright protection of a work and that its "artistic" content (in the meaning of a capacity to appeal to one's *aesthetic senses*) should not be relevant. A work is original if it has an "original character, which bears the personal stamp of the creator", as it was recently defined by the Netherlands Supreme Court in the case of *Screenoprints* v *Citroën*.

...there has been a growing trend in the Netherlands towards the position that originality is the sole requirement for the copyright protection of a work...

There does not seem to be substantial objections to applying the doctrine that originality is the sole requirement when it concerns traditional works such as books, music, plays and movies. Applying any additional "aesthetic test" to such traditional works would be pointless since these works appeal to the aesthetic senses by their very nature. Computer programs however — a series of instructions to a machine — are of a technical nature and are,

as a general rule, not intended to appeal to aesthetic senses; they are only meant to make a machine perform specific functions.

The opponents of the doctrine that originality is the sole requirement for copyright protection indicate that copyright protection should not cover technical matters as such. It is for that reason that the Copyright Act refers — in line with the Berne Convention and the Universal Copyright Convention — to "works of literature, science and art" in order to distinguish such works from technical objects, which are in the domain of patent law. The opponents of the copyright protection of computer programs also indicate that copyright as such does not seem to be a glove that truly fits the needs and the possibilities of computer programs. For instance, the long period of protection, as well as the relatively distinct rôle of moral rights together with the strong position of the individual authors, does not seem truly applicable to computer programs. In this regard, it may also be of relevance that computer program licences as such do not so much relate to publications of the work but focus instead mainly on the right to *use* the program. Such a right to use a work, nonexistent in copyright law, is however one of the pillars of patent law.

It should be noted that those who take the position that a computer program should be a copyright-protected work seem to be inspired to a large extent by pragmatic arguments. In view of the earlier decisions of the Netherlands Patent Office, patent law did not seem to be a "safe harbour" for the software industry. Copyright, however, does seem to provide such a harbour, since a copyright is easily established without any formalities being required.

...it may also be of relevance that computer program licences as such do not so much relate to publications of the work but focus instead mainly on the right to use the program...

If one wants to exclude computer programs from copyright protection, it seems that such can only be done by applying an additional "aesthetic test". That copyright should be limited to "works of literature, science or art" and that, therefore, an additional "aesthetic test" has to be applied in some cases seems to be supported by the decision of the Benelux Court of Justice of 22 May 1987 in *Screenoprints* v *Citroën*. In that decision the court addressed a number of issues related to the coexistence of copyright and industrial design rights, as provided for by the Benelux Industrial Designs Act, pursuant to a question submitted to that Court by the Netherlands Supreme Court. The Benelux Court indicated that, as a general rule, originality as such is sufficient to constitute a work protected by copyright. In view of the circumstance that industrial designs — objects of a two or three dimensional character — by their very nature have the capacity to appeal to the aesthetic senses, such a general rule does indeed seem justifiable for such works. The Benelux Court, however, also ruled — even though it was unnecessary for it to do so — that copyright should not be applicable to those features of a work which are original but are necessarily

determined by technical requirements. For this reason, the Benelux Court ruled that original works which do not constitute a "work of art" should be excluded from copyright protection, even though they may meet the originality requirement. This decision of the Benelux Court of Justice does seem to indicate that an "aesthetic test" does indeed have to be applied under the Copyright Act if technical or functionality requirements are involved. It therefore seems that this decision may be of crucial importance for determining the issue of the copyright protection of computer programs.

In this regard it seems peculiar that the European Commission takes the position in its Proposal for a Directive that the only criterion which should be applied to determine the eligibility for protection is that of originality, that is, that the work has not been copied and that no other aesthetic test should be applied. This seems to illustrate that the Commission has in mind the model of Anglo-American copyright and does not seem to be fully aware of the circumstance that, under the Berne and Universal Copyright Conventions, copyright is not a uniform matter. Given the decision of the Benelux Court of Justice on this issue, it also seems that the Commission might have to reconsider its position in this respect.

"All writings"

The Netherlands Copyright Act of 1912 does contain a list of examples of copyright-protected works in Article 10(1). Paragraph 1 of that provision does refer to "books, brochures, news magazines, periodicals and *all other writings*". The history of the Act learns that the phrase "all other writings" was used by the legislature in 1912 in order to continue the protection that had previously been granted by the Netherlands Supreme Court in its decisions of 1892 and 1895 under the Copyright Act of 1881, in which the Supreme Court ruled that, because of the language of that Act, all writings were by their very nature protected by copyright, even if they lacked originality.

The granting of copyright to "all writings" has been almost unanimously criticized by legal scholars from 1912. The majority of them take the position that unoriginal works might be entitled to some sort of protection under the laws of unfair competition, but that granting of a copyright as provided for under the Copyright Act of 1912 is not appropriate. The Netherlands Supreme Court finally settled the matter in three decisions, all of which concerned the publication in TV guides and newspapers of the compilation of the TV and radio programme listings by publishers which did not obtain them under an agreement with the public broadcasting organizations.

In its decisions of 1953 and 1961, the Supreme Court ruled that non-original writings were indeed protected by copyright as intended by the legislature in 1912. In its decision of 1965, however, the Supreme Court ruled that, since these writings are of a different nature from original works, such writings are not entitled to the benefit of all the provisions of the Copyright Act. The Supreme Court decided that the copyright protection granted to such works was limited to an exclusive right against the mere reproduction of such a writing, provided that it was meant for publication. In particular the scope of this copyright is much more limited, in that the rights owner cannot act against adaptations of the work except in the case of an only slightly

altered version of the work. In addition, the Court ruled that other provisions of the Copyright Act are only applicable to such writings to the extent which seems justified, taking into consideration the specific nature of such writings.

The exact scope of this specific copyright protection had to be further determined by the Courts on a case-by-case basis.

The effect of this was that the Supreme Court in effect created a special *sui generis* copyright protection within the framework of the Copyright Act for non-original writings. This special copyright is not at all equal to the protection granted by the Copyright Act to an original work. The exact scope of this special régime is not yet clear, in the absence of further decisions (in particular from the Supreme Court) after 1965.

This special copyright for writings that do not have an original character bearing the personal stamp of the author seems to be based on the circumstance that these writings are the result of expenditure and labour. This illustrates that these non original writings like mere compilations of facts seems to be in line with the concept of copyright under Anglo-American law, where original is defined as "the result of expenditure, labour of skill".

Consensus

There seems to be a consensus among those who dispute the current copyright protectability of computer programs, that computer programs can — and should — benefit from this special copyright for "all writings". Since the making of a computer program *does* require expenditure, labour and/or skill, the granting of this special protection to computer programs seems to be justified. In addition, it is argued that computer programs can benefit from the special protection granted to "all writings" in view of the fact that a computer program is written matter in the form of the listings of a program, from which it follows that computer programs should be considered to be "writings" as understood by the Act.

The support for the position that computer programs at least constitute a non-original writing has been growing, in particular since it provides the possibility of developing a specific copyright of which the scope of protection can be limited to the specific requirements of computer programs and the software industry. An additional advantage of this approach would be that the actual scope of this protection will have to be further investigated by the courts on a case-by-case basis without having to deal with a strict body of law provided by statute.

In view of the foregoing it is obvious that it came as a surprise when the Minister of Justice adopted the proposal to provide specifically in the Copyright Act that computer programs as such cannot constitute a "writing". While computer programs would nevertheless be mentioned in the list of examples of copyright protectable works, it was feared - and not without reason — that this might result in a situation in which the Courts would deny the copyright protectability of most computer programs and would also have to refrain (in view of an explicit provision in the Copyright Act) from granting the special copyright protection for writings.

Taking into consideration that everybody agrees that a computer program is entitled to some form of protection similar to the protection granted to "all writings", it is clear that the result of such an amendment of the Act could be disastrous. Therefore the decision of the Minister of Justice to withdraw all proposed amendments of the Copyright Act concerning computer programs seems to be a very wise

decision indeed, in particular since it has been clearly stated that this decision is not meant to affect the already-existing case law in any way whatsoever.

Misappropriation doctrine

In its decision of 27 June 1986 in the case of *Decca* v *Holland Nautic,* the Netherlands Supreme Court ruled that it is possible to grant a quasi-intellectual property right to an object which is not protected by a statutory intellectual property right, provided that such an object is of a similar nature to the subject matter of a statutory intellectual property right. The Supreme Court indicated that this is the minimum requirement which has to be met. However, the court ruled that the courts should use their powers with restraint.

If one wants to exclude computer programs from copyright protection, it seems that such can only be done by applying an additional "aesthetic test"

This Supreme Court decision does seem to enable the Netherlands courts to develop a misappropriation doctrine under which the results of "expenditure, labour and/or skill can be protected by exclusive rights against some specific forms of exploitation thereof. This approach also makes it possible for case law to develop and adjust itself to all kinds of new modern technological phenomena without the legislature being required to come up with instant solutions.

The exact scope of the *Decca* decision, however, is at present unclear because of the decisions of the Supreme Court that followed it. In *KNVB* v *NOS* the Supreme Court ruled that the National Football Association and the various football teams could not benefit from a quasi-intellectual property right pertaining to football games so as to ban the broadcasting of reports of a match. In *Staat* v *Den Ouden* the court ruled that the typesetting and printing by the governmental printer of the text of a statute does not justify a protection against commercially distributing photocopies thereof by another publisher. Although the opinions of the Supreme Court in these two cases do not provide much detail about the reasoning of the court, it is clear that the court was of the opinion that the organizing of a football match as well as the typesetting and printing of a statute do not qualify as efforts which justify a protection in the form of a quasi-intellectual property right. It is hard to follow this reasoning since both activities seem to represent the results of substantial expenditure, labour and skill comparable to (*eg*) the expenditure, labour and skill that is protected in case of the non-original writings mentioned previously.

The state of affairs became even more complicated after the Supreme Court ruled, in its most recent decision, that the work of *Elvis Presley* as a performing artist is entitled to protection against unauthorized duplication of recordings by another record company. It seems that the circumstance that the Netherlands government is in the process of ratifying the Rome and Geneva Conventions for the protection of performers, producers of phonograms and broadcasting organizations did have a crucial impact on the decision of the Supreme Court in this case, in particular since these Conventions provide guidance regarding the scope of the protection that can be granted.

In view of the *Decca* decision, it seems that under Netherlands law protection can be granted against some forms of unauthorized commercial exploitation of at least certain results of "expenditure, labour or skill". The exact scope of such a misappropriation doctrine, however, is at present unclear in view of the judgments of the Supreme Court in *KNVB* v *NOS* and *Staat* v *Den Ouden,* where the court ruled that the achievements concerned did not qualify for such protection. Given the *Elvis Presley* decision, however, it seems that these earlier decisions may have been examples of the restraint that courts have to apply when exercising their powers, as already indicated in the *Decca* decision. Such restraint seems to be in place if there is no statutory protection which can be easily applied by analogy.

Computer programs do certainly qualify as results of "expenditure, labour and skill" for which an intellectual property right is justified. Whether such a right can already be granted by the courts and whether it will eventually be confirmed by the Supreme Court, is not completely clear, given the background of the previous decision. Legislative efforts, however, both on a national and an EEC level, do make it likely that the Supreme Court will eventually rule in favour of such protection for computer programs.

Conclusions

It is obvious that computer programs do benefit from some sort of copyright protection under Netherlands law. The actual manner in which such a copyright protection should be structured, however, remains to be determined. At present there can still be some doubt as to what extent such protection can be granted by the courts under a misappropriation doctrine. Adequate copyright protection against piracy seems to be available by allowing computer programs to benefit from the special copyright protection for "all writings" — whether original or not — under the Netherlands Copyright Act of 1912. This will enable the courts to investigate further and develop this area of the law on a case-by-case basis and to respond to the needs and requirements of both the software industry and the general interests concerned. In addition it will be relatively easy for the legislature to draft statutory provisions which specifically address computer programs. The possibility of computer programs being protected by a full copyright under the Netherlands Copyright Act does seem to be limited, given that such protection seems to be restricted to aesthetic works.

...the decision of the Minister of Justice to withdraw all proposed amendments of the Copyright Act concerning computer programs seems to be a very wise decision

Accordingly, it seems most opportune for the legislature to decide that computer programs are at least protected as "writings" under the Copyright Act and to concentrate on drafting additional statutory provisions to the extent required by EEC regulations or by the specific nature of computer programs.

 The author is an attorney-at-law in Amsterdam with Stibbe, Blaisse & De Jong.