

QUESTIONNAIRE – ALAI CONGRESS 2018 – MONTREAL

Since the congress theme should attract many copyright practitioners, the Canadian group has chosen to develop a questionnaire which you are asked to complete with succinct answers, in either **French, English or Spanish**. The answers will be compiled in an analytical table that will be given to congress participants so that they can leave with a document allowing them to quickly compare the situation prevailing in several countries.

It is therefore essential to complete the table below by briefly answering each question. We invite you to refer to the legal provisions that apply in your country, if any.

For national groups who would also like to provide additional information related to certain questions, we ask you:

1) to indicate "* see also answer No. X below" after the short answer that you have provided in the table.

2) to put your more detailed answer after the table.

Please note, however, that only the answers to the table will be compiled in the practical tool that will be given to the participants.

The Netherlands											
Nathalie Rodriguez and Jacqueline Seignette											
QUESTIONS FOR THE SUMMARY TABLE	1) Are statutory damages available? If so, please indicate the criteria for awarding them and the amount of such damages.	2) If punitive damages are available, indicate the criteria for awarding them.	3) Are class actions or class remedies available in copyright matters? If so, indicate in what circumstances they are used.	4) If seizures before judgment are available, indicate what gives rise to such procedures and the criteria for granting them.	5) Are there in your country 1) criminal remedies; 2) customs measures, in connection with copyright? If so, which ones?	6) Describe how circumvention of technological protection measures is dealt with, if such is done.	7) Is there a mandatory notice and notice regime or notice and take down regime for intermediaries in the case of alleged copyright infringement? If so, describe it briefly, and indicate if how it is dealt with differs based on which rights holder requests it.	8) Does the notion of secondary copyright infringement in the digital world exist in your country? If so, describe it briefly.	9) Indicate for which rights collective management is available.	10) With respect to collective management, indicate who sets the tariffs and how they are set.	11) Indicate whether copyright remedies are within the power of specialized courts or common law courts, and in the case of a mixed system, please specify in which cases an action should be brought before one rather than the other.

<p>ANSWERS TO QUESTIONS FOR THE SUMMARY TABLE</p>	<p>No. See for explanation below.</p>		<p>Organisations whose bylaws state that their goal is to protect the interests of a certain category of right holders, may obtain court measures on behalf of these right holders, such as seizures, injunctions or declaratory judgements (Article 3:305a Civil Code). This is used <i>i.a.</i> by Dutch anti-piracy organisation Brein to institute proceedings against internet platforms for (facilitating the) unauthorized distribution of music and films.</p> <p>To claim damages on behalf of right holders Article 3:305a cannot be invoked.</p> <p>At the moment a legislative proposal for class actions is on the table.</p> <p>The Copyright Act provides for various collective remedies. See below.</p>	<p>Right holders may obtain a court order for seizure of evidence provided the right holder can make a reasonable case of (imminent) infringement (articles 843a, 1019a-b Code of Civil Procedure).</p> <p>Article 28 of the Dutch Copyright Act gives the possibility to obtain a court order for seizure of infringing goods. The right holder must show threat of embezzlement.</p> <p>The orders may be obtained in an <i>ex parte</i> proceeding or as a provisional measure in a regular proceeding.</p> <p>Pursuant to the EU Anti-Piracy Regulation (EU) No 608/2013) right holders may apply to customs to detain goods that infringe on their IP rights. The applicant must provide <i>i.a.</i> satisfactory evidence of the rights and specific and technical data on the authentic goods, including markings such as bar-coding and images where appropriate.</p>	<p>Yes. Prison sentences and fines may be imposed for intentional infringement, as well as for committing the following acts with respect to infringing copies, whether intentional or with reasonable suspicion of infringement: a) publicly offering for distribution, b) have on hand, for the purpose of reproduction or distribution; c) import, convey in transit or export; or d) keep in pursuit of profit. See below for sentences and fines. Also prison sentences and fines may be imposed for circumventing or dealing with goods that circumvent technological protection measures.</p> <p>2. Pursuant to Article 17(1) of the EU Anti-Piracy Regulation(EU) No 608/2013), customs authorities that identify goods suspected of infringing an intellectual property right (including goods suspected of infringing a copyright) shall suspend the release of the goods or</p>	<p>A person who circumvents any effective technological measures knowingly, or with reasonable grounds to know he is doing so, acts unlawfully (Article 29a(2) Copyright Act). Those who provide services or manufacture, import, distribute, sell, rent out, advertise devices, products or are in the possession of these for commercial purposes act unlawfully if such: a) are offered, advertised or marketed for the purpose of circumventing the protective operation of effective technological measures; or b) have only a limited commercial significant purpose or use other than to circumvent the circumvention of the protective operation of effective technological measures; or c) are particularly designed, manufactured or adapted for the purpose of enabling or facilitating the circumvention of the protective</p>	<p>There is no mandatory notice-and-take down regime. However, the Civil Code pursuant to the EU E-commerce Directive (2000/31/EC) exempts intermediaries from liability for damages if they respond to notices (Article 6:196c Civil Code). Courts have found not responding to notices to be unlawful and have ordered intermediaries to maintain notice and take down (and sometimes: stay down) procedures. Most intermediaries have voluntarily adopted NTD procedures.</p>	<p>Although it is not specifically designated as a theory on secondary infringement, case law does consider facilitating infringement unlawful under specific circumstances. Courts in that case may order the facilitating party to cease its unlawful actions and to reimburse damages.</p> <p>Pursuant to Article 26a Copyright Act, a cease and desist order may also be imposed on an intermediary without the requirement of proof of unlawful actions.</p> <p>In addition, pursuant to recent ECJ case law, online platforms that enable the making available of copyright content for profit may be directly liable for the communication to the public involved (ECJ 14 June 2017, Case C-610/15, Brein v. Ziggo).</p>	<p>Music: public performance, reproduction, broadcasting, cable retransmission, on demand</p> <p>Audiovisual works: cable retransmission, public screening of TV broadcasts, public archives</p> <p>Literary works, illustrations, photographs, visual arts: digital reproductions for internal use within companies and institutions; digital archives; cable retransmission</p> <p>Statutory remuneration rights: private copying, reprography, public lending, educational materials</p> <p>Phonograms: public performance, broadcast, cable retransmission</p> <p>Screenwriters and principal directors: right to equitable remuneration for communication to the public (other than making available).</p>	<p>Exclusive rights: CMO's set their own tariffs, subject to competition laws, specific legislation on collective management and supervision by the Supervisory Authority. CMO's and organizations of users must negotiate in good faith (Article 2l Act on Supervision on Copyright and Neighbouring rights Collective Management Organisations).</p> <p>Statutory remuneration rights: a) private copying, public lending: tariffs are set by a negotiating body consisting of representatives of rightholders and users and an independent chair (Article 15d, 16e Copyright Act). b) Reprography: by Royal Decree (16i Copyright Act). In practice photocopying within companies and institutions is covered by a set of industry agreements dealing also with digital uses. c) public performance and broadcasts of phonograms: by CMO Sena. d) equitable remuneration for</p>	<p>Copyright remedies are within the power of general civil courts.</p> <p>Disputes on the level of fees payable pursuant to statutory remuneration rights for private copying, public lending, reprography and public performance of phonograms are subject to exclusive jurisdiction by the District Court of the Hague (Articles 15e, 16g Copyright Act; Article 7(3) Act on Neighbouring Rights).</p> <p>Supervision of CMO's by Supervisory Authority.</p> <p>Review of copyright fees by Dispute Resolution Board (see question 10)</p>
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					detain them. Also, goods suspected of infringing an intellectual property right may, according to Article 23(1) of the Regulation, be destroyed under customs control.	operation of effective technological measures (Article 29a(3) Copyright Act. For criminal sanctions see question 5				screenwriters and principal directors (Article 45d(2) Copyright Act): industry agreement	
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FURTHER QUESTIONS (OPTIONAL)

Question 1:

Recital 26 of the EU Enforcement Directive states that the aim is not to introduce an obligation to provide for punitive damages, but member states are allowed to do so. According to Article 13(1) of the EU Enforcement Directive (2004/ 48/EC) the court may award either actual damages based on lost profits or unfair profits or, in appropriate cases damages based on a lump sum such as hypothetical royalties. The ECJ has held that a national law may provide that a court may award a lump sum up to twice the license fee that should have been paid if authorization has been asked, unless such sum would be much higher than the actual damages and as such would constitute abuse of right (ECJ 25 January 2017, C- 367/15 OTK v. SFP).

Article 27a of the Dutch Copyright Act provides that aside from awarding damages the court may order the surrender of profits made by the infringing party. This has been interpreted by the Dutch Supreme Court to mean that the court cannot award damages and surrender of profits, but only the highest of them. The provision is not interpreted as a punitive measure.

Dutch law does not provide for a provision that allows courts to set damages at twice the royalties missed out. Courts however may estimate the damage (Article 6:97 Civil Code). Lower courts have awarded damages in the amount of two times the royalties missed out.

Question 3:

CMO's may sue for unauthorized cable retransmission on behalf of affiliated and non-affiliated rightsholders whose interests are represented pursuant to the CMO's byelaws (Article 26a Dutch Copyright Act). Also the CMO's for directors and screenwriters may sue distributors to retrieve equitable remuneration for cable distribution and other communications to the public (other than on demand transmissions) (Article 45d(2) Dutch Copyright Act).

Organisations representing authors are entitled under the Copyright Act to submit a dispute between authors and producers /publishers to the Dispute Resolution Board (Article 25g(3) Dutch Copyright Act).

Question 6:

Yes. Prison sentences and fines may be imposed for intentional infringement (Article 31): max 6 months, max € 20,500; when done professionally: max 4 years or € 82,500). Also prison sentences and fines may be imposed for committing the following acts with respect to infringing copies: a) publicly offering for distribution, b) have on hand, for the purpose of reproduction or distribution; c) import, convey in transit or export; or d) keep in pursuit of profit. If done intentionally: max 1 year or 4 years if done professionally, max € 82,000 (Article 31a). If done without intent but infringement may reasonably be presumed: max. € 8.200 (Article 32 Copyright Act). The above acts with respect to goods that circumvent technological protection measures: max 6 months imprisonment or a fine of max € 20,500 (Article 32a Copyright Act).

2. Pursuant to Article 17(1) of the EU Anti-Piracy Regulation(EU) No 608/2013), customs authorities that identify goods suspected of infringing an intellectual property right (including goods suspected of infringing a copyright) shall suspend the release of the goods or detain them. Also, goods suspected of infringing an intellectual property right may, according to Article 23(1) of the Regulation, be destroyed under customs control. Prison sentences and fines may be imposed for intentional infringement (Article 31): max 6 months, max € 20,500; when done professionally: max 4 years or € 82,500).

QUESTION: Are there recent legislative or jurisprudential developments in your country that would be interesting to share with the ALAI public?

QUESTION: Are there any special remedies in your jurisdiction that, to your knowledge, are less or not available in other jurisdictions

The Dutch law system allows right holders to obtain injunctive relief by means of a preliminary proceeding on the merits ('kort geding'). The plaintiff files suit stating and substantiating its claims. An oral hearing on the merits of the case is then held, generally within 4 weeks or less in case of an urgent matter. Both parties may file exhibits prior to the hearing and may plead their case during the hearing. The plaintiff has to make a reasonable case in order for the claims to be sustained. In deciding on the case, the judge provisionally decides on the alleged infringement and validity of the rights claimed. The judge generally renders judgement within 14 days, in case of an urgent matter judgement may be rendered on the same day. The plaintiff may ask for an injunction, accounting, requests for other information, rectification and, in case of a clearcut infringement: an advance on damages. The judgement will lose its effect if the plaintiff does not institute regular proceedings within a period defined by the court upon the plaintiff's request (mostly 6 months) and provided the defendant files an application to this effect with the court. If the claims are sustained and the defendant does not appeal, the case is usually settled after judgement without need for regular proceedings.