

Legal aspects of web archiving from a Dutch perspective

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CONTENTS

1. Introduction.....	5
1.1 Digital cultural heritage.....	5
1.2 Digital heritage versus the law.....	5
2. Intellectual property rights.....	6
2.1 Introduction.....	6
2.2 Legal qualification of a website and its parts.....	6
2.3 Copyright law.....	7
2.3.1 Works.....	7
2.3.2 Copyright owners.....	8
2.3.3 Term of protection.....	8
2.3.4 Scope of protection and exemptions.....	9
2.4 Neighbouring rights.....	10
2.5 Database right.....	10
2.5.1 Substantial investment and scope of protection.....	10
2.5.2 Database right for the KB?.....	11
2.6 Trademark rights.....	12
2.7 Patent rights.....	12
2.8 Conclusion on intellectual property rights.....	13
3. Intellectual property rights and the different phases of web archiving.....	13
3.1 Harvesting.....	13
3.1.1 Introduction.....	13
3.1.2 Temporary reproductions for transmission purposes.....	13
3.1.3 Copies for personal use.....	14
3.1.4 Preservation exemption.....	14
3.1.5 Works by public authorities.....	14
3.1.6 Public domain and Creative Commons licences.....	15
3.1.7 Technical protective measures and robots.txt.....	15
3.1.8 Opt-out approach.....	16
3.1.9 Comparative law: legal deposit.....	17
3.1.10 Conclusion on the harvesting of websites.....	18
3.2 Archiving.....	19
3.2.1 Introduction.....	19
3.2.2 Migration copies.....	19
3.2.3 Back-up copies.....	19
3.2.4 Changes/adaptation.....	20
3.2.5 Conclusion on the archiving of websites.....	20
3.3 Making websites available to the public.....	21
3.3.1 Introduction.....	21
3.3.2 Access copy.....	21
3.3.3 Closed network inside the building.....	21
3.3.4 Education.....	22
3.3.5 Temporary reproductions for transmission purposes.....	22
3.3.6 Public authorities, public domain and CC licences.....	22
3.3.7 Software for keeping websites accessible.....	22
3.3.8 International aspects.....	23
3.3.9 Conclusion on making websites available to the public.....	23
4. Web archiving and personal data.....	24
4.1 Introduction.....	24
4.2 The Dutch Personal Data Protection Act (Wbp).....	24
4.2.1 Wbp and web archiving.....	24
4.2.2 Personal data.....	24
4.2.3 Processing personal data.....	25
4.2.4 Special personal data.....	25
4.2.5 Reporting the processing of personal data.....	26
4.2.6 Providing information to the persons involved.....	26
4.2.7 Rights of the persons involved.....	27
4.2.8 Wbp: enforcement and liability under civil law.....	27
4.3 Conclusion on the protection of personal data.....	28

5. Liability under civil law and criminal law	28
5.1 Introduction to liability under civil law	28
5.1.1 Portrait rights	28
5.1.2 Defamation.....	29
5.1.3 The legal risks: liability and indemnity	29
5.1.4 Indemnity.....	29
5.2 Liability under criminal law	30
6. Literature and other documents used	33

1. Introduction

1.1 Digital cultural heritage

As the national library of the Netherlands, the Koninklijke Bibliotheek (henceforth: the KB) considers one of its tasks to be that of preserving and managing the nation's cultural heritage and making it accessible.¹ Our cultural heritage today exists in digital as well as analogue form, and one important category of the digital heritage comprises the many websites on the Internet. They often contain valuable information of which there is no analogue equivalent, and because of the rapid 'turnover rate' they are always at risk of being lost forever. As Charlesworth has remarked, '(...) the failure to adequately preserve at least some aspect of this immense potential archive would leave an unrecoverable historical gap in the historical record. The extent and implication of the possible loss has been compared to the early history of television, from which relatively little archival material remains.'²

The fact that websites, as digital heritage, are worthy of preservation has been internationally recognized in the UNESCO Charter on the Preservation of the Digital Heritage of 2003. This charter understands the 'digital heritage' as resources of information and cultural expressions that have been produced, distributed, made accessible and maintained in digital form. It points out that 'digital heritage is at risk of being lost and that its preservation for the benefit of the present and future generations is an urgent issue of worldwide concern.'

1.2 Digital heritage versus the law

Article 2 of the UNESCO Charter fully expresses the need for a fair balance between the general concern for preserving the digital heritage and legal concerns:

The purpose of preserving the digital heritage is to ensure that it remains accessible to the public. Accordingly, access to digital heritage materials, especially those in the public domain, should be free of unreasonable restrictions. At the same time, sensitive and personal information should be protected from any form of intrusion.

Member States may wish to cooperate with relevant organizations and institutions in encouraging a legal and practical environment which will maximize accessibility of the digital heritage. A fair balance between the legitimate rights of creators and other rights holders and the interests of the public to access digital heritage materials should be reaffirmed and promoted, in accordance with international norms and agreements.

The archiving of websites does indeed touch on various areas of the law. Article 2, for instance, mentions 'legitimate rights of creators and other rights holders'. This is a reference to intellectual property rights, but it may include the rights of portrayed persons, as well. The article also refers to 'international norms and agreements', which includes the protection of personal data.

Chapter 2 of this report begins with a discussion of the intellectual property rights that may apply to a website (or parts of a website). In Chapter 3 we will then discuss the way these rights affect the successive phases in the process of web archiving by the KB: harvesting and archiving websites and communicating them to the public. The protection of personal data is the subject of Chapter 4, while

¹ Art. 2.1 paragraph 2, opening words and point 1 of the Management Regulation of the Koninklijke Bibliotheek. The legal task of the Koninklijke Bibliotheek is enshrined in the Higher Education and Research Act (art. 1.5 paragraph 2). Also see Krikke 2000, p. 48. In its Strategic Plan 2006-2009 the KB identifies its mission as:

- 1) giving researchers and students access to scholarly information;
- 2) allowing everyone to share in the riches of our cultural heritage;
- 3) stimulating the national infrastructure for scholarly information;
- 4) promoting permanent access to digital information at the international level.

² Charlesworth 2003, p. 4.

Chapter 5 deals with the KB's liability under civil and criminal law that arises from defamation, violation of portrait rights or other unlawful acts committed by the website owner.

These subjects are dealt with according to Dutch law. Comparative law will come up in our discussion of national laws regarding legal deposit, while international aspects will also be addressed in relation to the KB's liability in making its web archive available worldwide.³

2. Intellectual property rights

2.1 Introduction

Of all the intellectual property rights, the most relevant forms of protection for websites and their individual parts are copyright, neighbouring rights and database right.⁴ These all offer protection against the reproduction and making available of works without the prior consent of the rights holders. Web archiving encroaches on these exclusive rights because a copy is stored and is then made public (depending on the specific choices made by the KB).

The protection offered by intellectual property rights has gradually expanded as digital technology develops. This is related to the fact that many rights holders feel threatened by the phenomenon that a computer can make large quantities of identical digital copies of a work without much effort. Their call for better protection has been answered in the European Copyright Directive,⁵ which strengthens their rights (the exemptions rule out every form of commercial use) but also includes a prohibition on the circumvention of technical protective measures. This makes the fair balance mentioned in art. 2 of the UNESCO Charter even less attainable. Exemptions for the preservation of cultural heritage have been introduced, but those unfortunately do not go far enough to enable web archiving, as the following will show.

2.2 Legal qualification of a website and its parts

A website consists of various parts such as text, photographs, short films, etc. Distinguishing between the various website parts is also important for the legal ramifications, since not only are there rights covering the website as a whole but also rights which cover its individual parts. In addition, these rights may be vested in different persons or legal entities, as is shown by this table:

Material	Legal protection	Rights holder ⁶
Text	1. Copyright or 2. The Dutch <i>geschriftenbescherming</i>	1. Author 2. Publisher
Photograph	Copyright	Photographer and/or stylist
Lay-out, typefaces, etc.	Copyright	Designer
Music	1. Copyright and/or 2. Neighbouring rights	1. Composer, lyricist 2. Performing artists, recording company
Film (including television programmes)	1. Copyright and/or 2. Neighbouring rights	1. Actual creator(s): director and other makers and/or film producer, soundtrack composer

³ See sections 3.1.9 and 3.3.8 respectively.

⁴ Other rights which may be relevant are the rights of trademarks (see section 2.6), patents (see section 2.7), trade names, designs and plant varieties.

⁵ Directive 2001/29/EC, which is in turn a transposition of the Copyright and Neighbouring rights treaties enacted by the World Intellectual Property Organization (WIPO) in 1996.

⁶ According to the general rule. The employer's copyright (see section 2.3.2) is an important exception.

		and lyricist 2. Film producer, broadcasting corporation.
Database	1. Copyright and/or 2. Database right	1. Author of an original selection or arrangement 2. Producer
Website as a whole	1. Copyright and/or 2. Database right	1. Author of an original selection or arrangement 2. Producer
Search software or other software	1. Copyright and/or (perhaps in the future): 2. Patent right	1. Designer 2. Depositor
Trademark or logo	1. Copyright and/or 2. Trademark right	1. Designer 2. Depositor

2.3 Copyright law

2.3.1 Works

Copyright law applies to a website and its parts, provided that these are original. The criterion employed by the Dutch Supreme Court holds that the material must 'have its own original character and bear the personal stamp of the author'.⁷ This threshold does not coincide with that of aesthetic quality. It does not matter whether the material is created by professional makers or by hobbyists; both may create original material. The Dutch Copyright Act calls material that is original (and therefore protected) a 'work'.

A website is in fact a collection of different (separable) contributions that either have been made especially for the website or are pre-existing works (such as photographs) that have been re-used on the website. As noted in the above table, copyright can apply to parts of a website such as text,⁸ photographs,⁹ short films, music, trademarks, databases, lay-out, typefaces, software¹⁰ and the like.

The entire website can also be protected by copyright as a collection (also called a database).¹¹ For this, the selection and/or arrangement of the website's contents must be its author's own intellectual creation (whether the individual parts themselves are protected or not is irrelevant). This criterion also applies to electronic databases incorporated in websites such as a photo database. A website as a whole is probably more likely to enjoy copyright protection than a database that is part of that site. Such databases are usually searchable according to logical, functional criteria; a database that

⁷ Dutch Supreme Court 4 January 1991 (Van Dale/Romme), *Nederlandse Jurisprudentie* 1991, 608.

⁸ Even if the text on a website is not original (and was made public, or intended to be made public), it is still protected under the Dutch Copyright Act. This is called the *geschriftenbescherming* (protection for non-original writings), but it only protects against literal copying and does not apply when the same data are collected from other sources. The *geschriftenbescherming* has proven to be relevant in practice for telephone listings (paper, CD-ROM or online), timetables, broadcasting information and real estate information about houses for sale. Producers of this information often consciously insert small errors in their material to be able to trace unauthorized copying.

⁹ There may be doubt with regard to photographs of two-dimensional objects (such as drawings or paintings in museums or documents in archives), which are merely intended to reproduce the objects as faithfully as possible. Such photographs often appear on the websites of museums and archives. On the other hand, it is highly likely that photographs of three-dimensional objects, in which the photographer made original choices with regard to position, lighting, etc., are original and therefore are protected. Press photos and photos in the collection of a photo museum are also obviously autonomous, protected works.

¹⁰ Software that is used for keeping different software formats of a website readable can be protected by copyright. See section 3.3.7.

¹¹ Art. 10 paragraph 3 Dutch Copyright Act (henceforth called DCA): Collections of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means, shall be protected as a separate work, without prejudice to other rights to the collection and without prejudice to the copyright or other rights to the works, data or other materials included in the collection.

is arranged according to creative, unusual criteria would not be very user-friendly. On the other hand, the way a website as a whole is designed may leave more room for original choices as to the arrangement and/or selection of its parts.

2.3.2 Copyright owners

It does not happen often that all the protected parts of a website are created by the same person. This may be true for a private person's hobby site, but professional institutions often hire third parties to design their website and/or to create parts of their website. Museums, for instance, may contract out the design work to web designers and/or have freelancers write the texts. If nothing is mentioned in the commission or freelance contract, the commissionee/freelancer holds the copyright in the created parts. In that case only a one-off licence is given for the way the museum would like to use the work and on which there is agreement (tacit or in writing). The same may be true for websites of newspapers or of broadcasting networks which contain parts by freelancers.

The general rule, therefore, is that the actual creator is the one entitled to the copyright. An important exception applies to works made under conditions of employment; in that case the copyright goes to the employer, provided that there is an employment contract and that the making of works falls within the employee's job description.¹² An example is a photographer employed by a museum. In the case of software the copyright also usually goes to the developer's employer.

Another exception to the general rule is when a work is made public by a public institution or legal entity (foundation, organization, company) without mentioning the actual creator.¹³ Although the former owns the copyright in that case, the actual creator can provide evidence to the contrary. An example is a museum folder in which the commissioned advertising agency is not mentioned, or the website of a cultural institution in which the names of the contributing freelance photographers or authors are not mentioned with the contributions themselves or in the colophon.

There is a separate rule for films. Many people contribute creatively to the making of a film, and according to the Dutch Copyright Act the film producer is entitled to the copyright (as regards films made after 1985). The producer is the person (or legal entity) who is responsible for bringing the film about with a view to marketing it. In practice this is often the legal entity that has enabled the making of the film in both financial and organizational terms. Exceptions are the composer and the lyricist of the soundtrack music; they own their own copyrights in their contributions. Such professional films (which, according to Dutch copyright law, include television programmes) may, for example, be found on the websites of broadcasting corporations.¹⁴ For short films (including amateur work) made by one person the general rule is that the actual creator owns the copyright.

A creator can also completely transfer his copyright in a certain work to another person.¹⁵ Then that person will be the one to grant use licences; the creator no longer has a say over the work in question.¹⁶ To protect the creator from ill-considered decisions, the Dutch Copyright Act requires that a transfer must always be made in writing.¹⁷

2.3.3 Term of protection

Copyright is in fact a monopoly of limited duration. Its starting point is the date of creation of the work (registration or filing is not necessary) and it ends 70 years after the death of the author. This 70 years term applies in all the Member States of the European Union. After the death of the author the copyright is automatically transferred to the heirs.¹⁸ In practice this may create problems if there are several heirs who have different ideas about how they want to exercise the copyright in the work.

¹² Art. 7 DCA.

¹³ Art. 8 DCA.

¹⁴ Also see the neighbouring rights of broadcasting corporations that apply to the programmes they transmit, in section 2.4.

¹⁵ That person then becomes the 'assignee' in the sense of art. 1 DCA.

¹⁶ He does keep his moral rights, however, see section 2.3.4.

¹⁷ Art. 2 paragraph 2 DCA.

¹⁸ With the exception of personal rights, which must be transferred in writing; see section 2.3.4

Thus, in principle the life of the author is the decisive factor. The situation is different if the copyright originates in a legal entity or a public institution (such as an employer or a publishing entity).¹⁹ Then the copyright lasts only 70 years after the publication of the work. (This does not apply if such an institution acquired the copyright in a work at a later date, by way of transfer from the author; in that case the term of protection remains 70 years after the death of this author).

There is a different and rather complicated rule for films: the copyright in a film (which is usually held by the producer) ends 70 years after the death of the last of four persons to survive: the principal director, the screenwriter, the writer of the dialogues and the soundtrack composer.

2.3.4 Scope of protection and exemptions

Art. 1 of the Dutch Copyright Act defines copyright as:

the exclusive right of the author of a work (...), or of his assignees, to make the work available to the public and to reproduce it, subject to exemptions imposed by law.

Another word for 'reproduce' is 'copy', as in making digital copies by a computer or paper copies using a photocopier, or producing copies on a CD-ROM. 'Making the work available to the public' includes uploading on the Internet, distributing physical copies, exhibiting, broadcasting and the like. Both rights together are called the 'exploitation rights' because they enable the copyright owner to ask third parties for a compensation (licence fee or royalty) in return for his permission to reproduce his work and/or make it available to the public. Web archiving implies both reproduction and (if the decision is made to do so).making the website and its parts available to the public.

In principle, the permission of the maker of the work is always required to reproduce the work and to make it available to the public. This permission is often given once by means of a licence.²⁰ An example is putting a work of art on a website after the artist has been paid a licence fee (whether or not through the Dutch Visual Arts Rights Association, the 'Stichting Beeldrecht'). The problem with web archiving is that the artist's permission does not also extend to the copy of the website that the KB would like to make available;²¹ permission is required every time the work is reproduced and/or publicized. In a number of situations, however, prior permission is not required and the work can be used free of charge: that is, when the legal exemptions of the Copyright Act can be invoked. New exemptions were introduced in the Dutch Copyright Act in 2004 especially for libraries, museums and archives for the benefit of preserving their collections and communicating them to the public within a closed computer network. In the following chapter we will discuss whether and to what extent these exemptions may be useful for web archiving.

Besides exploitation rights, a copyright owner is also protected by moral rights (or in Dutch: personality rights). These give him the right to attribution as well as the right to oppose changes, mutilation or any other impairment of his work. He can oppose changes unless doing so would be contrary to the principle of reasonableness (such as in case of a minor alteration). He may protest against mutilation or other impairment (such as publishing a photo of a website home page within a racist context) if the impairment is deemed to be harmful to his honour or reputation. Even if another person is permitted to use the work on the basis of a legal exemption he must always respect the author's moral rights. Moral rights are non-transferable; they remain with the creator, even when the exploitation rights are transferred. They are only transferred to the heirs under Dutch copyright law if the creator explicitly stipulates this in his will, which many creators forget to do.

¹⁹ See the previous section and notes 12 and 13.

²⁰ More drastic is the total transfer of the copyright in a work; see the end of section 2.3.2.

²¹ While the website owner may very well want to give permission for web archiving.

In the process of web archiving, websites and their parts (or reproductions of them) may undergo change in terms of their outer design or technical format. The outer design changes could possibly interfere with the moral rights.²²

2.4 Neighbouring rights

The protection offered by neighbouring rights is almost equivalent to copyright protection. Neighbouring rights have only existed in the Netherlands since 1993 and apply primarily to the work of performers or interpreters such as musicians, stage actors and film actors.²³ They have the right to record their performance for the first time and to decide about the reproduction and the making available of that performance. If a performing artist is employed, his employer has the exploitation rights, but in return the artist is entitled to a fair compensation for every form of exploitation of his performance. Performing artists are also protected by moral rights.

The second category of people who enjoy neighbouring rights are not creative themselves but serve principally as investors: phonograph producers and broadcasting corporations. They have the right to exploit the recordings of the music they produce or the radio or television programmes they broadcast. Film producers also have neighbouring rights.

Protection under neighbouring rights extends 50 years from the first performance (or recording of that performance), or the first recording of the music, or the first broadcast of the television programme.

Thus, websites that communicate to the public music or theatre performances, music recordings by phonograph producers, films, or radio or television programmes that have already been broadcast by broadcasting organizations, need the permission of those who hold the neighbouring rights.

2.5 Database right

2.5.1 Substantial investment and scope of protection

Since 1999 the Netherlands has had a special form of protection for database producers (resulting from the European Database Directive) which is the so-called database right.²⁴ A database, as defined in the Dutch Databases Act, is: 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means and for which the acquisition, control or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment.'²⁵

The condition for protection by the database right is that a substantial investment must be made in the production of the database. This threshold does not seem to be very high. The European Court of Justice has recently ruled that investments made in the creation of new information may not be included.²⁶ The idea behind this is that producers who create their own data, and are therefore the only source of these data, would otherwise gain a monopoly on these data via the database right. The problem is that 'the creation of new information' is not an easy criterion to apply in practice: would it include maintaining a website/database with real estate information, or a stock market website that shows the latest quotations? Dutch case law showed that estate agents do not hold database rights in

²² See sections 3.2.4 and 3.3.2.

²³ See the Dutch Neighbouring Rights Act (in Dutch: Wet op de naburige rechten, henceforth: WNR).

²⁴ Copyright can also apply to databases (including websites), see section 2.3.1.

²⁵ Art. 1 paragraph 1 Dutch Databases Act.

²⁶ European Court of Justice, 9 November 2004 (British Horseracing Board/William Hill), case C-203/02.

their housing databases,²⁷ and broadcasting corporations do not hold such rights in their television programme listings.

Although the costs of creation may not be taken into account according to the European Court of Justice, such 'single source' databases might possibly enjoy the database right anyway if a sufficient amount were invested in their verification and/or presentation. Examples may be the costs for updating, digitizing existing information, licence costs for incorporated software, costs for the outer design and the like.

Websites may be databases in and of themselves and may also include other databases as part of their contents. One such example may be a photo database on the website of a museum or archive. The question always is whether a substantial investment has been made in the production of the database. If new information (such as new photos) is created especially for the website and/or database, the costs involved may not be taken into account, but this is different for the cost of digitizing existing photos, for instance. In general, it is difficult to predict whether database right will apply to the websites/databases of cultural institutions. This will have to be evaluated on a case by case basis; such an evaluation is not easy because so far case law is scarce.

The database right provides the producer²⁸ with protection against the reproduction and/or making available²⁹ of an entire database or substantial parts of it. So harvesting and publishing these is a violation of the database right that applies to the database from which the data were appropriated. Extracting one element from a database, however, does not constitute an infringement of the database right (but it may infringe any rights in that individual element). Infringement of the database right does occur when someone repeatedly and systematically extracts non-substantial parts from a database in order ultimately to reproduce the entire database or a substantial part of it and thereby to inflict considerable harm to the investment made by the database producer.³⁰

The database right applies automatically and lasts for 15 years starting with the completion of the database or the date when it was first made available to the public. It is possible to extend its protection, however, by way of a substantial investment made for a substantial change of the database/website.

2.5.2 Database right for the KB?

Another question is whether the KB's database of archived websites (its web archive) is protected by the database right. The KB receives the contents of the database free of charge, but it does have to pay for the harvesting software, storage capacity and infrastructure, and for the software and hardware for migrating the sites and managing the various versions. Costs are also incurred for making the websites available to the public; these include the design of the website, the interface and the like, which may be created by third parties.³¹ In addition, the KB must pay the necessary personnel costs for the web archiving procedure; this includes selecting websites, negotiating licence contracts, executing careful version management and so forth. Thus, it is conceivable that the KB will be able to claim the database right for its web archive. In that case it would (at least in theory) be able to charge a licence fee if someone wanted to extract a substantial part of this database. However, this depends on the arrangements the KB makes with the website depositors. Moreover, commercial exploitation does not seem suitable for a non-profit institution safeguarding our cultural heritage.

²⁷ President Arnhem District Court, 16 March 2006 (Makelaars en NVM/Zoekallehuizen.nl), *AMI* 2006/3, p. 93 with comments by C. Alberdingk Thijm; *Mediaforum* 2006/4, p. 114 with comments by T. Overdijk and Arnhem District Court 4 July 2006 (Makelaars en NVM versus Zoekallehuizen.nl), on the Internet: www.rechtspraak.nl, LJ-nr. AV5236.

²⁸ This is the person who bears the risk of the investment made for the database. In commissioning situations it has not yet been ruled who is the owner of the database right. Is it exclusively the commissioning party who pays for the work, or may the commissionee be the co-owner of this right?

²⁹ In the Databases Act this is called extraction and reutilization respectively.

³⁰ European Court of Justice, 9 November 2004 (British Horseracing Board/William Hill), case C-203/02.

³¹ It seems advisable to transfer all the rights that may apply to material created by third parties.

The database right also offers the KB protection against persons who copy and/or make public its entire web archive or substantial parts of it. This could be clearly communicated to users by way of a warning on its web archive. However, the database right does not offer protection against copying and publishing one single website from its archive (with or without commercial purpose). Yet, the rights holder(s) of the website itself is entitled to take action against such use on the grounds of his intellectual property rights.

2.6 Trademark rights

Websites may also contain trademarks or logos, such as the logo of an institution. These may be protected by both copyright and trademark rights. For the latter right an application must be filed. This can be done by registering it with the Benelux Trademarks Office (for a trademark valid within the Benelux) or its international equivalent (for a trademark valid in all countries indicated in the registration). When registering, the products and services for which the trademark will be used must also be indicated.

Besides the website owner's own trademark, the trademarks of others are sometimes used on websites or in domain names (rightfully or wrongfully), such as the sites of competitors or complaint sites.³²

Web archiving probably would not infringe the trademark rights of others. There is no problem if the site owner himself is the owner of the trademark on his website and has given permission for archiving his site. Even if the website contains trademarks of others (legally or illegally), the KB will probably not infringe these trademark rights since it is not making use of the trademarks as part of an 'economic activity'. Infringement is deemed to be taking place only if a trademark is used in the context of an activity with a commercial goal.³³ In addition, use of the trademark that does not occur as part of an economic activity can be regarded as infringement if the said use damages the reputation of the trademark. This is not likely to happen in the KB's web archive. Should it occur, the KB has a 'valid reason' for the use of the trademark. With its goal of maintaining the digital heritage, the KB would probably have a valid reason for 'using' the trademark in its literal reproduction of the website.³⁴

2.7 Patent rights

Software may be protected by copyright, but for a long time it has been argued within the EU that software should also be protected under patent law, as in the United States.³⁵ However, a proposal for a European directive introducing patent protection was rejected in July 2005 when a large majority of the European Parliament voted against it.³⁶ The discussion does not seem to have subsided, but for the time being Dutch law does not offer protection under patent law for computer programs.³⁷

³² President The Hague District Court, 31 June 2005. The court deemed the domain name www.injeholland.com an infringement of the trademark INHOLLAND because a potentially confusing sign was used without a valid reason. The site owner was free, however, to simply refer to the trademark INHOLLAND on his site (but under another domain name) in order to make the desired criticism.

³³ This condition of a valid reason must be met if the trademark is used on the site for products, whether or not they are the same as those for which the trademark was registered. See art. 2.20 paragraph 1 subparagraphs a to c of the Benelux Convention on Intellectual Property (BVIE).

³⁴ Under art. 2.20 paragraph 1 sub d of the BVIE the valid reason may be invoked when use of other people's trademarks is not made for products nor for an economic activity.

³⁵ In May 2006, the American Patent and Trademark Office once again ordered an investigation of the validity of Amazon.com's much criticized 'one click' patent.

³⁶ EU Directive on the patentability of computer-implemented inventions, 2002/0047/COD.

³⁷ Art. 2 paragraph 2 subparagraph c Dutch Patent Act 1995. Software issued in combination with a special apparatus is, however, patentable.

2.8 Conclusion on intellectual property rights

A whole gamut of intellectual property rights may apply to a website and its parts. Some parts, such as music or films, can even be protected by several kinds of rights. In addition, the entire website may be protected as a database by copyright and/or the database right.

Usually there are several rights holders with regard to a website; rarely is the website owner himself the only holder of the rights in the site's contents. This is because websites often incorporate existing material made by others and/or material especially designed for the site by others. The copyright in such material may or may not be transferred to the owner of the site, or a licence may be issued to him for re-use of a work on his website. For third parties such as the KB, it is not possible to determine from the websites themselves how many rights holders there are because the KB does not know what arrangements the site owner made with the contributors. It is also possible that the website owner has reproduced works and made them public on the site without permission of the creators – that is, unlawfully. This may occur on sites of cultural heritage institutions in which works of untraceable rights holders (such as unknown photographers) are included.

In principle, every act of reproduction and making available of a website that occurs in the process of web archiving requires the prior permission of those who own the rights in the various elements of the website. The next chapter will delve deeper into the phases of web archiving in relation to copyright, neighbouring rights and the database right. The legal exemptions from which the KB may be able to profit for its web archiving will also be discussed.

3. Intellectual property rights and the different phases of web archiving

3.1 Harvesting

3.1.1 Introduction

From the point of view of copyright law,³⁸ the harvesting of a website and its parts touches on the creator's exclusive reproduction right. Harvesting is also problematic from the point of view of the database right if an entire database or a substantial part of it is harvested.

The process of harvesting involves making a copy of the work/database, which is permanently stored in the KB's e-Depot system.³⁹ The question at this point is whether permission is required from the rights holders. To determine this, the Dutch Copyright Act must be checked for exemptions that would make such use possible without permission. The only exemptions being discussed here are those that (at first glance) seem promising:

3.1.2 Temporary reproductions for transmission purposes

According to article 13a, the making of temporary reproductions is not subject to permission from the rights holder.⁴⁰ These reproductions must be temporary and exclusively needed for the transmission of data. For example, when a user wants to consult a website, innumerable copies are made in the computer network to transport the data to his computer before the site appears on his computer screen. These temporary copies, which are made in a network maintained by network managers or Internet service providers, are technically necessary and are only used for the purpose of data transmission.

However, the KB cannot invoke this exemption because harvesting does not involve temporary but permanent reproductions that are meant to remain stored in the e-Depot system.

³⁸ Also read: from the point of view of the neighbouring rights.

³⁹ This is the 'preservation copy', which is of higher technical quality than the 'access copy' – the copy that is made available from another system for access purposes (outside the e-Depot system).

⁴⁰ Also see art. 6:196c paragraph 2 Dutch Civil Code.

3.1.3 Copies for personal use

The exemption which permits the (digital) reproduction of a work for personal use⁴¹ applies only to natural persons, whereas the KB is a legal entity. In addition, the reproduction made by this natural person may only be for the purpose of his own practice, study or use, which implies that he is not going to make the copy available to the public in turn. Thus, the KB cannot invoke this exemption for its harvesting.

3.1.4 Preservation exemption

Article 16n allows libraries to make reproductions of works *in their collection* if the purpose is to restore them or, in the case of threatening deterioration, to preserve a reproduction for the institution, or to keep such works available for the public via migration copies if the technology used to access them falls into disuse.⁴² This exemption is not relevant to the KB in the harvesting phase, however, because harvesting constitutes the *previous* step of obtaining copies of websites by legal means; it is only after this step that the works form part of the collection. Yet, this exemption is relevant to the archiving phase that follows harvesting.⁴³

3.1.5 Works by public authorities

Article 15b stipulates that works which are made available to the public by public authorities *and* of which those authorities are the creators or rights holders may be freely reproduced and made available unless the copyright has been expressly reserved.⁴⁴ In the case of websites of municipalities, ministries and the like, this may be indicated in the colophon. More importantly, however, art. 15b also does *not* apply to elements of the website in which third parties own rights.⁴⁵

The term 'public authority' comprises public institutions (such as ministries, municipalities, provinces) and also autonomous administrative bodies insofar as they carry out public tasks. This might well mean that works originating from officials of municipal museums and services/agencies of ministries such as the National Archives or the Netherlands Institute for Cultural Heritage (ICN) are also included. Art 15b also applies to legal entities governed by private law to which the public authority has delegated its administrative tasks and from which ensues the publishing of works.⁴⁶ Receiving subsidies or funding from the government does not seem to be a decisive factor for this, decisive is instead whether publishing of the works is done in the context of a public task. As noted, however, these institutions can expressly reserve copyright in their website. A complication is that websites maintained by heritage institutions (whether they come under art. 15b or not) often contain works in which third parties own rights, which make it impossible to re-use these sites in their entirety without permission.⁴⁷

In the Dutch Databases Act there is an equivalent provision to art. 15b for databases made by the public authority. Thus, the public authority cannot claim the database right in them unless it has expressly reserved it.⁴⁸

⁴¹ Art. 16c.

⁴² Also see the equivalent art. 10f in the WNR.

⁴³ See section 3.2.2.

⁴⁴ Remarkably enough, free re-use does not apply to works of the public authorities that are protected under neighbouring rights such as broadcasts by the broadcasting corporation of the Lower House, 'Postbus 51' advertising spots (the Dutch government's central information point) or ministerial promotional films.

⁴⁵ Thus the website of the Ministry of Education, Culture and Science (www.minocw.nl) does not appear to contain a copyright restriction (it has no colophon), but it does contain documents and reports that were commissioned by the Ministry and written by third parties who reserve all the rights for their work. The Dutch government site www.overheid.nl also has no copyright restrictions, but only with regard to elements of the site that were provided by third parties.

⁴⁶ Spoor/Verkade/Visser 2005, p. 141. It has also been argued that privatized government museums fall under the scope of art. 15b, but there is no certainty in this regard. Compare Kabel et al. 2001, p. 42-43, who provide an overview of relevant literature.

⁴⁷ See, for example, the ICN collection database at www.icn.nl.

⁴⁸ Art. 8 paragraph 2 Databases Act.

No copyright subsists in laws, decrees or ordinances issued by public authorities, or in judicial or administrative decisions.⁴⁹ Databases made by the public authority containing this material are not covered by the database right, either.⁵⁰

3.1.6 Public domain and Creative Commons licences

The KB cannot invoke an exemption from the Dutch Copyright Act (apart from art. 15b) for its website harvesting. This means that it must always ask for prior permission from the rights holders of the sites. An exception applies, however, when the rights holder(s) of a website have made it clear that the website is in the public domain and that they will not claim in it. Such a website may be compared to material in which the copyright has expired and it is therefore free to be used by anyone for any purpose.

Publishing works by means of Creative Commons licences (henceforth: CC licences) is a different matter. In this case the maker reserves his copyright but allows others to reproduce and publish his work free of charge, under certain conditions.⁵¹ CC licences that are frequently used are those requiring attribution and non-commercial use. But the creator can go one step further and, by means of a Creative Commons licence, can decide to attach a declaration of 'public domain' to his work, thereby releasing the entire work for any kind of use.

In a recent Dutch court case it was confirmed that CC licences are valid in the Netherlands.⁵² This case concerned family photographs made by Adam Curry, which he had made public on the site www.flickr.com under the CC licence permitting only non-commercial use. In summary proceedings the Amsterdam District Court ruled that the publication of these photos in the magazine *Weekend* by the publisher Audax was a violation of Curry's copyright because the photos were published for commercial use and therefore infringed the licence.

As part of its web archiving project the KB may freely use websites that have been published with a Creative Commons declaration of public domain, and also those that have been published with CC licences for commercial use and for non-commercial use.⁵³ The question is whether a CC licence permitting the creation of derivative works is also necessary. That depends on whether and to what extent the outer design of a website is changed during the process of web archiving. In addition, the other CC licences (attribution, share alike) that may be attached to the website by the rights holder(s) will have to be complied with. Entire websites that are published as belonging to the public domain or under CC licences, however, are still rare.⁵⁴ Often only parts of a site (photos, music) are offered in this way.⁵⁵

3.1.7 Technical protective measures and robots.txt

A complication that the KB could run into when harvesting is that many websites contain elements that are only accessible to authorized users by means of a password, such as databases, music and the

⁴⁹ Art. 11 DCA.

⁵⁰ Art. 8 paragraph 1 Databases Act.

⁵¹ In the case of open access, a method of online publishing used for scholarly publications, the author also reserves his copyright but gives others the right to continue to distribute the article in unchanged form as long as his name is mentioned. The Minerva Project of the American Library of Congress archives open access publications.

⁵² President Amsterdam District Court, 9 March 2006 (Adam Curry et al. versus Audax Publishing BV), on the Internet: www.rechtspraak.nl, LJ-no. AV4204.

⁵³ The definition of non-commercial use provided by Creative Commons is not unambiguous: 'use in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. The exchange of the Work for other copyrighted works by means of digital file-sharing or otherwise shall not be considered to be intended for or directed toward commercial advantage or private monetary compensation, provided there is no payment of any monetary compensation in connection with the exchange of copyrighted works'. One might ask whether any request for monetary compensation is to be construed as commercial use; this may also entail charging users actual compensation (in future) for the possibility of viewing the archived websites in order to help defray the expense of maintaining the infrastructure.

⁵⁴ Also see Charlesworth 2003, p. 69: JISC variant clauses under 4: waiver copyright and personal rights.

⁵⁵ See for example www.flickr.com.

like. Moreover, website parts may also be technically protected against copying or encrypted. Since 2004, the Dutch Copyright Act, the Neighbouring Rights Act and the Databases Act have stipulated that circumventing such technical protective measures is unlawful provided that the circumvention is done deliberately and successfully).⁵⁶ In addition, even if a website contains a database that is freely accessible to the public it is wise to get in touch with the rights holder(s), not only because extracting an entire database is a violation of the database right but also because harvesting an entire database may be a technically complex operation, which may have adverse effects on the accessibility of the site.

A website may also contain anti-harvesting codes such as robots.txt files or robots metadata, which indicate that the site (or parts of it) may not be indexed and/or archived. Recently, the Arnhem Court of Appeal has ruled that the use of robots.txt merely implies a request to which one is not bound in terms of copyright.⁵⁷ According to both written and unwritten Internet codes of conduct, however, one should respect such requests,⁵⁸ which we would also advise. The KB has also expressed this intention, and in principle it will limit itself to harvesting those parts of a website that are accessible to the general public without restrictions. Should it desire to harvest a website in its entirety, however, it plans to get in contact with the rights holder(s) in order to obtain permission to circumvent the anti-harvesting provisions.⁵⁹ Contacting rights holders is an approach which seems to fit better with a selective harvesting method than with automatic harvesting.⁶⁰

3.1.8 Opt-out approach

Strictly from a copyright point of view, harvesting a website is not possible without the prior permission of the rights holder(s) unless the site is made available as belonging to the public domain or under user-friendly CC licences. Copyright law (which grants the creator exclusive rights) is thus based on an 'opt-in' system; as a result, harvesting is not allowed without prior permission.

An alternative, pragmatic approach has been defended in the United States with regard to the indexing and caching of websites by search engines. This approach is based on an 'opt-out' system in which a site holder is supposed to have given implicit permission for the indexing and caching of his website if he has not explicitly declared otherwise (via robots.txt, for example). This point of view was expressed by an American District Court in the recent case of *Field versus Google*, in which the lawyer Blake Field had posted his own poems on a website and had wilfully chosen not to use robots.txt or robots metadata, after which he sued Google for copyright infringement because his site was accessible to others via Google's cache.⁶¹ The District Court of Nevada held that anti-robot measures are widely known and that Field was aware of them. The court was also favourably impressed that Google respects anti-robot measures, that it offers those who complain the option of removing cache links (opt out) and that the cache states that it provides a copy of the website and provides a link to the 'live' site. In addition, immediately after receiving the summons Google removed the cached links to all the pages of Field's website. According to the court it is impossible for Google to index all sites manually. The

⁵⁶ Art. 29a DCA, art. 19 WNR, art. 5a Databases Act.

⁵⁷ Arnhem Court of Appeal, 4 July 2006 (*Makelaars en NVM versus Zoekallehuizen.nl*), on the Internet: www.rechtspraak.nl, LJ-nr. AY0089. Grounds 4.11: 'Even if it is true that other search engines respect measures such as robot.txt (which do not prevent but only request), it does not follow that ZAH acted unlawfully towards the estate agents simply because it did not adhere to this "code" or "etiquette".'

⁵⁸ Charlesworth 2003, p. 30, for example, reports that within the context of its web archiving project *Kulturarw* the Swedish National Library respects robots.txt files and robots metadata, although it has noted that these codes were mainly introduced to resist indexing robots. This project also archives only sites that are accessible to all the public, not sites that require a password.

⁵⁹ In addition, the chance is considerable that in such a case the rights holders might want to restrict the accessibility of their entire website when this is made available through the web archive of the KB.

⁶⁰ However, see an intermediate form of semi-automatic harvesting that is planned to be used in France, according to Charlesworth 2003, pp. 32-33.

⁶¹ See <http://www.eff.org/IP/blake_v_google/google_nevada_order.pdf>. The lawyer seems to have wanted to force the case to serve as a test case.

court also found that Field had not sustained any damage because there was no demonstrable market for his work; he had not earlier been paid a licence fee for his poems.

Although this case was about caching and therefore about *temporary* archiving and *temporary* making available of the material,⁶² the KB might advance an analogous legal argument for web archiving. Asking prior permission to harvest the entire '.nl' domain by means of agreements is probably not feasible in practical terms, which makes automatic harvesting a logical choice. Now that anti-robot measures are becoming more and more customary and familiar (perhaps like web archiving), the non-use of such measures for a website could be interpreted as implicit permission to harvest it and archive it in a web archive. In addition, damage done to a website owner is difficult to demonstrate if his site is merely being archived.⁶³ Communicating the site to the public may well be a different matter, however.⁶⁴

One should, however, note that this pragmatic approach of opting-out is contrary to the strictly copyright-based opt-in system. On the basis of the opt-out approach, harvesting and archiving may be possible but making the material available to the public could remain problematic.⁶⁵ If taken to court the KB could try to make this defence; in some Dutch lawsuits the courts have sometimes been willing to think pragmatically when deciding on legal Internet questions.

3.1.9 Comparative law: legal deposit

Unlike many other countries, the Netherlands has no legislation obliging publishers to deposit published materials in the national library. The legal deposit legislation in Great Britain, Austria, Sweden⁶⁶ and Australia so far applies only to physical, offline publications. In Great Britain preparations are currently underway to expand the existing legal deposit legislation to include websites, as well. Online publications are included in the deposit legislation in Denmark,⁶⁷ France,⁶⁸ Germany,⁶⁹ Norway (only static online publications), Canada, New Zealand and South Africa.⁷⁰

The British Legal Deposit Libraries Act 2003, for example, stipulates that one copy of every book published in Great Britain must be sent to the British Library. This applies only to works published on paper, however. In expectation of a separate legal ruling for electronic publications, preparations for which are currently underway, the British Library now uses a *Code of practice for the voluntary deposit of non-print publications* in its collaboration with publishers. This applies only to offline electronic publications (CD ROMS, DVDs) and computer disks.⁷¹ The British Library has also

⁶² According to Dutch law, caching is permissible on the grounds of van art. 6:196c paragraph 3 BW, which is based on art. 13 of the European E-Commerce Guideline 2000/31/EC.

⁶³ It does not seem very likely that income could be generated from licensing an integral website or its parts merely for the purpose of creating an internal archive.

⁶⁴ If the KB were to make the archived site available online, substitution with the 'live' site could take place by which the site holder could miss out on page views and income from advertising. It might also be wise to adopt a waiting period before putting the archived website online and to make a link to the 'live' site. Third parties can also miss out on licence income with regard to parts of a website in which they hold the copyright, such as works of art.

⁶⁵ An argument that could be advanced for *making material available* and that draws a parallel with the activities of Internet service providers can be found in section 5.3.

⁶⁶ In Sweden the law covers only the web archiving project of the National Library in the form of a special decree allowing the Library to archive websites and make them available within the building. See footnote 117, the site of this library: <http://www.kb.se/Info/Pressmed/Arkiv/2002/020605_eng.htm> and Charlesworth 2003, p. 30-33.

⁶⁷ Here the legislation concerns Danish material published in electronic networks, which is understood to be the case if: '1) it is published from Internet domains etc. which are specifically assigned to Denmark, or 2) it is published from other Internet domains etc. and is directed at a public in Denmark.' See <http://www.bs.dk/content.aspx?itemguid=%7B332484E6-A5B1-4CEE-B953-059843182050%7D>.

⁶⁸ Via the French law no. 2006-961 of 1 August 2006. See <<http://www.legifrance.gouv.fr>>.

⁶⁹ The German *Gesetz über die Deutsche Nationalbibliothek* which went into effect on 29 June 2006 includes websites and other online publications. See <http://www.ddb.de/aktuell/presse/pressemittdnbg_neu.htm>.

⁷⁰ See <<http://www.nla.gov.au/padi/topics/67.html>>.

⁷¹ See <<http://www.bl.uk/about/policies/codeprac.html>>.

started a web archiving project for which it sends contracts⁷² to the rights holders of a selection of British websites in order to obtain permission for web archiving.

The Netherlands has no legislation concerning legal deposit; instead the KB relies on voluntary deposit. This has proven to work very well in practice; the degree of coverage of books and periodicals published in the Netherlands is almost 100%,⁷³ while 70% of the so-called 'grey literature' is represented in the collection of the KB. From a legal point of view, however, a regulation requiring legal deposit has one important advantage. No permission is required for the harvesting of websites under such a legal regulation as long as it is worded broadly enough so that it applies to both online and offline electronic publications.⁷⁴

The Dutch Public Records Act does contain an archiving requirement with regard to websites of government agencies. This is because the term 'archival record' is technology-neutral, which has been confirmed by the head of the Public Records Office.⁷⁵ However, under the Public Records Act government agencies are not required to preserve their entire websites in all cases; sometimes the relevant archival records merely consist of individual elements of websites. The Public Records Act also does not guarantee the permanent preservation of digital archival records. This is true only if such records are selected for permanent storage by those responsible, in that case they will ultimately end up in archival institutions.

3.1.10 Conclusion on the harvesting of websites

For harvesting websites, the KB in most cases cannot invoke exemptions in the Dutch Copyright Act, the Neighbouring Rights Act or the Databases Act. Exceptions apply to websites of the public authorities as long as certain conditions are met, and in the rare case that an entire website is made public as belonging to the public domain or under Creative Commons licences that permit web archiving.

Thus, from a strictly legal point of view, for the vast majority of the websites on the Internet the KB will have to establish prior contact with the holders of the rights in the (parts of the) websites and to ask for their permission.⁷⁶ Moreover, technical protective measures may have been taken and it is illegal to circumvent them.

Another approach which might be taken is a pragmatic one. This 'opt-out' approach assumes implicit permission for web archiving if the site holder has not taken any anti-harvesting measures, such as robots.txt. On this basis, automatic harvesting and mere archiving without making the website available may be permissible. However, making the site available to the public is more problematic. It is still difficult to say how the Dutch courts will decide with regard to this pragmatic approach.

Another alternative is the introduction of a broadly worded regulation concerning legal deposit in the Netherlands, which renders superfluous the requesting of permission from all rights holders.⁷⁷

⁷² This Standard Permissions Letter is reproduced in Appendix 1 in the UKWAC Evaluation Report 2006.

⁷³ This concerns books and periodicals with ISBN and ISSN numbers respectively.

⁷⁴ For websites it would have to be decided whether a regulation should contain only sites under the .nl domain or all sites in Dutch.

⁷⁵ See his letter to the Ministry of the Interior of 3 April 2006, on the Internet at <<http://www.advies.overheid.nl/5149/>>.

⁷⁶ Even if the harvesting were contracted out to the European Archive/Internet Archive (EA/IA), the KB would be indirectly responsible for making the reproduction. The KB would either be found to be the infringer itself because it commissioned the making of the reproduction, or it would be found to have obtained, in bad faith, an illegally made copy from the infringer EA/IE, for which it would not escape liability either.

⁷⁷ See the Communication of the European Commission of 30 September 2005 entitled *i2010: Digital Libraries*, COM(2005) 465 def, in which undesirable differences in the deposit legislation between Member States are noted. Also see the Recommendation of the European Commission of 24 August 2006 on the digitization and online accessibility of cultural material and digital preservation 2006/585/EG, *PbEG* 2006 L 236/28, consideration 13, which advocates national legislation that makes provision for web archiving.

3.2 Archiving

3.2.1 Introduction

In order to enable the permanent archiving of a harvested website and its successive versions, it is necessary to make several copies of it. For websites from the public authorities, public domain websites and sites with specific CC licences this is possible without prior permission under certain conditions.⁷⁸ For the majority of the websites, however, the following applies.

3.2.2 Migration copies

In the e-Depot system, a good quality 'preservation copy' will be stored in the original format in which the website was created. To keep this copy readable, regular migrations will have to be made. As a result, many migration copies in various technical formats will be made and stored in the e-Depot system.

Making such copies is permitted under the Dutch Copyright Act. As already noted in section 3.1.4, art. 16n contains a so-called preservation exemption that makes it possible for libraries to restore and migrate a copyright protected work in their collection without the permission of the rights holder(s).⁷⁹ According to this article, a reproduction of a work may be made in order to keep it accessible if the technology used to make it accessible has fallen into disuse.⁸⁰

When migration copies are made, the moral rights of the rights holder(s) must be respected, according to art. 16n. Thus, attributions may not be removed, unreasonable changes in the work may not be made, and the work may not be mutilated or impaired in any other way if this could harm the reputation of the rights holder(s).

This exemption also requires that the work must belong to the organization's own collection, which implies, according to the Minister of Justice, that the work was legitimately obtained.⁸¹ A copy of a website that was harvested without permission would therefore not profit from this exemption. However, the requirement that the work must have been legally obtained is not explicitly stated in art. 16n, and the interpretation of this article is ultimately up to the courts. If the harvested website had been stored by the KB with prior permission, this copy would most probably be regarded as belonging to the KB collection (indeed, archiving websites is now part of the KB's collection policy), and migration copies of it could thus be lawfully made on the basis of art. 16n.

The exemption discussed here applies to works that are protected by copyright. A problem, however, is that the preservation exemption does *not* apply to databases (including websites) that are protected by the database right.⁸² This means that permission for making such copies is still needed from the producer of the database/website.

3.2.3 Back-up copies

Besides migration copies, back-up copies of websites will also have to be made with an eye to possible calamities. The Dutch Copyright Act seems to contain no exemption in this regard. Art. 16n does allow for a reproduction to be made if there is a threat of deterioration,⁸³ but during the parliamentary discussion of this article the Minister of Justice explained that a threat of deterioration is present when 'there is reason to believe that the work is threatened with falling into disrepair'. This seems to point at the threatened decomposition of, for example, a newspaper rather than the *preventative* making of a

⁷⁸ See sections 3.1.5 and 3.1.6.

⁷⁹ Koelman and Westerbrink argued for a preservation restriction as early as 1998, see K. Koelman, B.N. Westerbrink, *Auteursrechtelijke aspecten van preservatie van elektronische publicaties*, Amsterdam: Instituut voor Informatierecht 1998. Also see Krikke 2000, pp. 143-146.

⁸⁰ Art. 16n paragraph 1 subparagraph 3 DCA.

⁸¹ Kamerstukken II 2002-2003, 28482, nr. 5.

⁸² It may also not apply (on the grounds of art. 1 paragraph 2 Copyright Directive) to databases protected only by copyright, nor to computer programs protected by copyright.

⁸³ Art. 16n paragraph 1 subparagraph 2 DCA.

copy 'just in case'. Perhaps, the exemption can also be invoked if there were an actual threat of, for instance, a jammed or instable computer network, natural disaster, terrorist attack, etc.⁸⁴ For lack of case law, art. 16n for the present does not seem to apply to 'ordinary' back-up copies of websites, which means that permission of the rights holder(s) is required.

3.2.4 Changes/adaptation

The KB takes as its point of departure that the appearance and content of the migration and back-up copies of the websites will be changed as little as possible in comparison with the 'original' preservation copy. It is impossible to predict, however, whether more substantial changes will be necessary in the future, such as changes to maintain the accessibility of the access copy.⁸⁵ Another complication may be that in the future, Internet websites (the source material) will no longer have a uniform appearance but their look and feel will be personally geared to each particular user.

Copyright protects the outer design of a work and requires (in art. 13) the permission of the rights holder(s) for 'any partial or total adaptation or imitation in a modified form which cannot be regarded as a new, original work'. Relevant to web archiving is the fact that introducing (minor) changes in the design and/or contents⁸⁶ of the website and/or its protected parts is regarded as a form of reproduction of the original work, which means permission is again required.

Without prior permission such alterations may also be at variance with the moral rights of the rights holder(s).⁸⁷ Some of these alterations may perhaps be regarded as minimal changes that the maker cannot reasonably oppose, but that depends on how far-reaching they are. For example, an access copy might be of lesser quality than the original website and/or the preservation copy.⁸⁸ As an example against which opposition might be possible, Koelman and Westerbrink mentioned the making available of an image at a lower resolution than the original.⁸⁹

3.2.5 Conclusion on the archiving of websites

Several different kinds of copies will be made for the purpose of archiving a website, both within and outside the KB's e-Depot system. Some copies may profit from a copyright exemption, namely migration copies. Migration copies may, however, not be made of databases protected by the database right without permission of the rights holder.

It is quite probable that permission is also required to make back-up copies of websites, whether they are/contain works protected by copyright and/or databases protected by the database right. The permission of the rights holder(s) is also required for making substantial alterations in the outer design or contents of a work or database. Moreover, moral rights may also be affected by alterations.

For this reason it seems wise to ask permission for all possible copies, if possible by means of a single contract provision that allows the making of every kind of copy including changed copies, to the extent necessary for the KB's method of web archiving.

⁸⁴ In such a case the moral rights must be respected as well; also see the previous section.

⁸⁵ Thus Arms 2001, p. 15 in the Final Report of the Minerva Project of the American Library of Congress reports that this library 'often makes small editorial changes to the materials for reasons of access and preservation. For instance, the Library might change an absolute URL to a relative URL, or a dynamic date to the date on which the item was collected.' See on the Internet: <<http://www.loc.gov/minerva/webpresf.pdf>>. Also see section 3.3.2 on access copies.

⁸⁶ Whether changes in technical functionality touch on adaptation rights or moral rights is not entirely clear. It does not seem likely because copyright protects only the outer design of a work. In addition the exemption for migration implies that the rights holder will have to allow this.

⁸⁷ See section 2.3.4.

⁸⁸ When making a copy available to the public, it is in any case wise to indicate that it has been archived by the KB and perhaps also to include a link to the 'live' website of the depositor.

⁸⁹ Koelman/Westerbrink 1998, p. 14. Also see Muir 2006, p. 8.

3.3 Making websites available to the public

3.3.1 Introduction

Although there may be value in mere archiving, a web archive only has added value for the public if they can access the archived websites. One might say that the preservation of cultural heritage is not an end in itself but rather it serves the public interest of ensuring that as many people as possible can become acquainted with it.

The KB identifies its mission as letting everyone share in the wealth of our cultural heritage by making its collection widely accessible. Thus, it is logical not only to archive harvested websites but also to make them available for public perusal.⁹⁰ To this end an access copy is made of the preservation copy in the KB's e-Depot system. This access copy is stored in a system outside the e-Depot system, from which authorized users can obtain access to the website copy.

This brings with it activities that are of legal relevance. First, making an access copy involves reproducing the website. Second, making websites accessible qualifies as 'making the work available to the public' in the sense laid down in the Dutch Copyright Act. Whether the sites are actually consulted or not is irrelevant, nor is the size of the public that can access them of any relevance. 'Making available to the public' also occurs when the website is accessed by only a small group of authorized users. There are a few exemptions to the making available right; a protected work may be made public without the permission of the rights holder(s) for certain kinds of use, which will be discussed hereafter.

3.3.2 Access copy

The phenomenon of the access copy does not exist in the Dutch Copyright Act, nor are there any related exemptions; this means that permission to make access copies will always be necessary. On the other hand, in practice the access copy may be difficult to distinguish from the migration copies or the back-up copies which belong to the archiving phase, and a migration copy may be made without permission.

It is possible that the access copy will necessarily undergo minor or, perhaps in the future, major alterations compared to the originally archived website. Separate permission may be needed for substantial alterations in the contents or outer design of protected parts or the entire website because such alterations may constitute an adaptation,⁹¹ while moral rights may thus also be affected.

3.3.3 Closed network inside the building

Art. 15h, introduced in 2004, allows a library to make works from its collection⁹² available to the public within a closed network by means of dedicated terminals inside its building. This means that the public must come to the KB's building; the works may not be made public via the Internet. Another condition is that the works may be made electronically available only for the purpose of research or private study by the public.⁹³ The public will therefore have to be told that they may use the protected information for these objectives alone.

Moreover, art. 15h is a regulatory exemption, which means that parties (such as publishers) can draw up a different contract with the KB. Such a contract might stipulate that works may not be made available without permission or that the rights holder(s) must be paid for such use. But if nothing is arranged in this regard, the exemption of art. 15h applies in the favour of libraries.

In order to communicate a work to the public within a closed network, not only does it have to be made available but it also has to be reproduced. Indeed, if it is a physical work from the collection

⁹⁰ Mere archiving does involve fewer risks with regard to liability of the KB for illegal website content. Also see section 5.3.

⁹¹ See section 3.2.4.

⁹² Concerning the requirement that the works must be lawfully obtained see section 3.2.2 on migration copies.

⁹³ Art. 16c allows a natural person to make a reproduction of a protected work as long as it is for his own practice, study or use. See section 3.1.3.

then a digital copy in the form of a photo or a scan will have to be made of it. Although a website is born-digital, the KB makes a reproduction of it as well; an access copy is made accessible outside the KB's e-Depot system. It is quite probable that art. 15h also allows for access copies to be made available within a closed network.

One problem is that the exemption in art. 15h does not apply to databases that are protected by the database right. Before making a database available in a closed network within the building the KB therefore must always ask the permission of the database producer.

3.3.4 Education

Works may be used without prior permission for the sole purpose of instruction for teaching purposes, as long as a fair compensation is paid to the rights holder(s). Online teaching is also included, but according to the Minister of Justice only educational institutions can invoke this exemption. Even if that had not been the case, the KB would not have been able to invoke this exemption because it does not make the websites available for teaching-related instruction alone. In addition, this exemption does not apply to websites protected by the database right.

3.3.5 Temporary reproductions for transmission purposes

The user who wants to consult a website must be able to retrieve the access copy of it. In order to have the site appear on his screen, countless temporary reproductions are made in the KB's system for the purpose of data transmission. These reproductions, which are necessary for technical reasons, are not covered by the reproduction right, which means that neither the KB nor the user of the web archive needs permission for them from the website's rights holder(s).⁹⁴

3.3.6 Public authorities, public domain and CC licences

As in the case of harvesting and archiving, websites published by public authorities, public domain websites and sites with specific CC licences may also be freely made available to the public.

3.3.7 Software for keeping websites accessible

To keep websites accessible it is necessary to continue using the accompanying software, which is usually protected by copyright. Sometimes, however, the licensing conditions allow for the software to be used for only a limited period, or to be run only on certain hardware. Even freeware that can be downloaded from the Internet, such as plug-ins, is subject to licensing conditions.⁹⁵

Unless a different arrangement has been agreed to in the licensing conditions, the lawful acquirer (the person who has legally obtained a copy of the software, offline or online) may reproduce the computer program if this is necessary for the use for which the software is intended.⁹⁶ A back-up copy of the software may also be made.⁹⁷ In both cases, however, use of the copies is also bound by the restrictions contained in the licensing conditions, such as time limits. There are no legal exemptions that would allow the KB to breach the licensing conditions. It is true, however, that the legal validity of shrink-wrap and click-wrap licences is not always undisputed; Dutch case law exists in which the courts ruled that the software acquirer was not bound to them.⁹⁸

If the KB wants to act correctly, it would be wise, when purchasing software or signing software licences, to insist that it be allowed to keep making unlimited use of the software for the purpose to which it intends to put it. With regard to software already purchased whose licence conditions do not permit such use, the KB can still approach the company holding the rights and ask

⁹⁴ Also see section 3.1.2.

⁹⁵ For example, see the licensing agreements for end users on www.adobe.com/products/eulas/players/.

⁹⁶ Art. 45j DCA.

⁹⁷ Art. 45k DCA. This article and art. 45j do not apply to software obtained before 1 January 1993; these products are subject to the licences that accompanied the software.

⁹⁸ Such as District Court The Hague 20 March 1998 (*Vermande versus Bojkovski*), *BIE* 1998, p. 390 with comments by A. Quaadvlieg; *IER* 1998/3, p. 111 with comments by J. Kabel; *Computerrecht* 1998/3, p. 144 with comments by J. Spoor.

for permission (provided that this company or a legal successor still exists). By appealing to the importance of keeping the cultural heritage accessible for the public the KB should not encounter any obstacles, since commercial interests are not at issue here.

Copyright problems may also arise in the situation of the emulation of software. Software may be copied and studied for the purpose of making it interoperable with a non-infringing computer program to be developed independently.⁹⁹ If, however, original old software (or elements of the software) is copied for the purpose of creating emulation software, this may be considered an act of copyright infringement and thus may not be done without permission of the rights holder.

3.3.8 International aspects

If the rights holder(s) agrees to let his website be accessed via the Internet (whether or not for authorized users only), this means that the website can be accessed worldwide. Any illegal contents on the website can therefore be seen anywhere in the world.

If someone in another country wants to lodge a complaint concerning a website's contents, he can do so in his own country. This is because in principle the legal system of each country where the site can be received is applicable, and not only the law of the country in which the provider of the information is established and/or the server was set up.

However, the simplest and most effective countermeasures can be sought in the country in which the server is located. For this reason it is highly doubtful that someone would attempt to institute legal proceedings against the KB abroad; most likely he would do so in the Netherlands. And if he does, he would probably first turn his attention towards the site holder. The site holder should then inform the KB when, in response to someone else's claim, he adjusts the contents of his website, after which the KB can decide to make the site (or part of it) inaccessible.

3.3.9 Conclusion on making websites available to the public

Communicating websites to the public that have been legally harvested and have accordingly become part of the KB collection involves reproduction (access copy) and making available. These activities in principle require permission from the rights holder(s). In view of the mission of the KB, it is logical that the websites will not only be archived but will also be made accessible. The KB has to decide how it is going to do so (closed network or public access via the Internet) and who the various public target groups will be (authorized users only or the general public).

These choices have diverse legal consequences, since the Dutch Copyright Act distinguishes between the various ways of making material available to the public. Making material from its own collection available in a closed network within the KB building is permitted in principle, as long as no agreements stating otherwise are or have been made. An example of such an agreement is the *Regeling elektronisch depot KB* (KB agreement on electronic deposit), which the KB has concluded with publishers with regard to their electronic publications. If the KB were to decide to make the websites available in a closed network only (for whatever target group), it would in principle not have to make any separate arrangements in order to go about this freely, as the KB is allowed to do so under the closed network exemption.¹⁰⁰

⁹⁹ Art. 45m DCA. The passages from this article that may be relevant are:

1. The making of a copy of a work as referred to in article 10, first paragraph, under 12°, and the translation of the form of its code shall not be deemed an infringement of copyright if these acts are indispensable for obtaining information necessary to achieve the interoperability of an independently created computer program with other programs, provided that:

(..)

c. these acts are limited to the parts of the original program, which are necessary to achieve interoperability.

2. The information obtained pursuant to paragraph 1 may not:

a. be used for any other purpose than to achieve the interoperability of the independently created computer program;

(...)

c. be used for the development, production or marketing of a computer program that cannot be regarded as a new, original work or for other acts which infringe copyright.

¹⁰⁰ See section 3.3.3.

For making material available via a public network like the Internet, however, permission is always necessary from the rights holder(s) of the website (and/or its elements). Under the Dutch Copyright Act it is irrelevant for this whether the websites are made available to authorized users or to the general public.

4. Web archiving and personal data

4.1 Introduction

Web archiving almost unavoidably involves the collecting, storing and making available of personal data in one way or another. For this reason it is necessary to examine Dutch legislation on this issue.

Personal data are data relating to an identified or identifiable natural person. Such data may be quite diverse, varying from telephone numbers, addresses and e-mail addresses to photos in which people are clearly recognizable, information about the composition of a person's family and the like. The Dutch Personal Data Protection Act contains rules for handling such data.

The idea that these data have already been made public by the website holder and that *for this reason* any subsequent activities involved in web archiving will be permitted is incorrect. Every activity with regard to personal data must in turn comply with the Wbp.

The possible consequences of this legislation can be illustrated by an example from Sweden. The legislation there follows the same lines as the Dutch legislation. A Swedish woman, Bodil Lindqvist, had a website on which she described a few members of her church congregation. She mentioned names and telephone numbers, and said of one of them that she had injured her foot and had taken partial sick leave. The person in question had not given her permission to publish this information. Bodil Lindqvist was prosecuted and ordered to pay a fine because she had processed personal data without reporting it to the Swedish Data Protection Board, the national supervisor. Moreover, the data concerned information about someone's health. This is a special kind of information which in principle may not be made public.¹⁰¹

4.2 The Dutch Personal Data Protection Act (Wbp)

4.2.1 Wbp and web archiving

When reading the following, the reader must bear in mind that the Dutch Personal Data Protection Act (in Dutch: de Wet bescherming persoonsgegevens, henceforth: Wbp) does not seem to be closely geared to what happens in web archiving. Indeed, the processing of personal data is not the main objective in web archiving but a side effect or a marginal phenomenon. Strict compliance with the law could mean that automatic web archiving – that is, without evaluating the content of the material intended for archiving – is in fact impossible.

What follows is a brief summary of the demands the Wbp makes on dealing with personal data. These are: personal data, the processing of personal data, special personal data, reporting the processing of personal data, providing information to those involved and the rights of those involved.

4.2.2 Personal data

Sometimes data appear on a website that have to do with living persons and can be directly or indirectly connected to identifiable individuals. Such data can be considered personal data in the sense of the Wbp.¹⁰² Sometimes information about deceased persons also provides personal data, as in the case of hereditary illness, since it tells us something about the health of any living children.

¹⁰¹ European Court of Justice, 6 November 2003 (Bodil Lindqvist), case C-101/01.

¹⁰² Art. 1a Wbp.

4.2.3 Processing personal data

Anything that is done with these personal data is regarded by the law as ‘processing’. The Wbp lists collecting, recording, arranging, storing and making the data available.¹⁰³ The steps involved in web archiving – harvesting, archiving and making the data available – are all processing in the sense contained in the Wbp.

The processing of personal data is only permitted in certain cases. For web archiving the following cases may be of importance:

- if the person involved (the person whom the personal data concern) has granted his unambiguous permission for processing the data;¹⁰⁴ or
- if the processing of the data is necessary for protecting the legitimate interests of the responsible party (the party doing the processing, i.e. the KB) or those of a third party to whom the data are issued, unless the interest or the fundamental rights and freedoms of the person involved, especially the right to protection in one’s personal private life, prevails.¹⁰⁵

The first case, unambiguous permission given by the person involved, is actually not a real option in web archiving. It is conceivable that the person involved did give permission for the initial publicizing of personal data by the website holder, but that does not mean permission was also given for the next phase of processing, and by another party to boot. In practice, therefore, lawful processing must comply with the formulation of the second option mentioned, art. 8f of the Wbp. In view of the KB’s objective (preservation of cultural heritage) and mission, web archiving by the KB is a ‘legitimate interest’ in the sense provided in this article, but this interest may have to yield to the interest of protecting a person’s private life. The question whether web archiving (which constitutes several forms of processing) is lawful in a specific case will then focus on a balancing of interests. There is no fast and simple rule that can be applied providing a definite answer as to what is allowed and what is not allowed.

The Wbp also stipulates that data may only be used for a goal that is consistent with the goal for which the data were collected in the first place. This is called the ‘principle of specified purpose’. Web archiving probably satisfies this principle of specified purpose because the law allows data to be further processed for historic or scholarly purposes. What is required is that provisions must be made to assure the provider that any further processing will be only for the objectives mentioned.¹⁰⁶

4.2.4 Special personal data

There are personal data that are governed by a stricter regime. This is the category of so-called special personal data, which have to do with someone’s religion or philosophy of life, race, political leanings, health, sexual life, membership in a trade union or with data of a criminal nature. The processing of these personal data is not permitted in principle.¹⁰⁷ There are exceptions, however, some of which may be relevant (to some extent) for web archiving. The processing of personal data is permitted if it is done with the express permission of the person involved¹⁰⁸ or if the data were clearly made public by the person involved himself.¹⁰⁹ Special personal data may also be processed for the purpose of scholarly research or statistics, but in such cases the following conditions must be met:

- The research must serve the public interest;
- The processing of the special data is necessary for the research in question;
- Asking permission is out of the question or would require a disproportionate amount of effort;

¹⁰³ Art. 1b Wbp.

¹⁰⁴ Art. 8a Wbp.

¹⁰⁵ Art. 8f Wbp.

¹⁰⁶ Art. 9 Wbp.

¹⁰⁷ Art. 16 Wbp.

¹⁰⁸ Art. 23 paragraph 1 subparagraph a Wbp.

¹⁰⁹ Art. 23n paragraph 1 subparagraph b Wbp.

- Sufficient guarantees are built into the way the research is carried out so that the privacy of the person involved will not be disproportionately harmed.¹¹⁰

So the kind of personal data collection that may take place in web archiving relates only to the Wbp. The applicability of the first two exceptions (the person involved gave permission or made the data public himself) must be checked to see if such exceptions are indeed present. In the third and last case – processing as part of scholarly research – a test would have to be conducted to see whether the research in question does in fact meet the four requirements mentioned. This exception of scholarly research probably does not cover the phenomenon of web archiving anyway because at the moment of harvesting it was not yet entirely clear what kind of research would be conducted. Making special personal data available to a large, undefined public seems entirely out of the question.

If personal data were to be processed by the KB anyway, it might be possible to justify it with an appeal to the relative exemption included in the Wbp for journalistic processing.¹¹¹ This stipulates that special personal data may be processed for ‘journalistic purposes’. Legislative history suggests that this exemption was included in consideration of the importance of freedom of information. The KB could take the position that processing the data in question is lawful under the freedom of information principle, and that the citizen has a right to having that material be made available on the grounds of the same freedom.

4.2.5 Reporting the processing of personal data

Barring exceptions, the processing of personal data (which includes the gathering of such data) must be reported in advance to the Dutch supervisor, the Data Protection Authority (in Dutch: College Bescherming Persoonsgegevens, henceforth: CBP). There is an exception for processing exclusively for archival purposes.¹¹² This processing may only apply to:

- archival management;
- hearing disputes;
- carrying out scholarly, statistical or historical research.

If these limits are observed, the processing does not have to be reported to the CBP. Making the collected material available to the general public may not easily fit into the third application. So it is strongly recommended that the proposed processing be reported. Wrongful failure to report could result in the CBP imposing a fine of up to 4,500 euros. A special form for making such reports is available on the website of the CBP. We are not aware of any reports made to the CBP by archives or comparable institutions which made their collection (or parts of it) available online, which could have contained incidental personal data. Reports concerning internal computer networks have been made, however. For example, the National Archives has reported its internal administration of contact information concerning persons who have given their private archives on loan, and the Netherlands Institute for Cultural Heritage has reported its collection management system, which contains the administration of its lenders.

4.2.6 Providing information to the persons involved

The Wbp, whose goal is to achieve a certain transparency in the processing of personal data, requires the processor to make himself known to the person involved (the person whose data are being processed). This is not compulsory if the reporting of that information to the person involved ‘proves to be impossible or to involve a disproportionate amount of effort’.¹¹³ In the case of web archiving the latter is bound to happen, which means that the KB can decide not to make such reports.

¹¹⁰ Art. 23 paragraph 2 Wbp.

¹¹¹ Art. 3 Wbp.

¹¹² Art. 29 Exemption Decree Wbp.

¹¹³ Art. 34 paragraph 4 Wbp.

4.2.7 Rights of the persons involved

The Wbp grants the persons involved certain information rights and correction rights. For KB web archiving it is important that an involved person be able to make requests to improve the personal data that concern him, to add to them, to remove them or to screen them off, if the data are factually incorrect or, for the purpose or objectives of the processing, if they should prove incomplete or irrelevant.¹¹⁴ Such a request could present the KB with a technical as well as a substantive problem because the changed part is no longer a faithful reflection of the original. It should be noted that such requests can be refused, but the Wbp does require an explanation.¹¹⁵ There is a special ruling for cases in which the data are recorded in a storage medium to which no changes can be made.¹¹⁶ In such cases the user must be informed of the impossibility of improving, adding to, removing or screening off the material, despite the fact that grounds exists for changing the data. Depending on the technical possibilities (or impossibilities), the KB may be able to appeal to this last provision.

A comparable problem arises if an involved person invokes art. 40 Wbp. This provision gives involved persons the right to lodge an official protest with the party responsible (in this case the KB) against the processing of his data in connection with special personal circumstances. For example, the KB might make available an address or some other contact information by means of the web archive which creates an obvious security problem for the person involved. The KB would then have to decide whether this protest is justified. In such a case the processing would be discontinued and the particular data removed or screened off. It is clear that this also constitutes a possible threat to the integrity of the web archive or its elements.

4.2.8 Wbp: enforcement and liability under civil law

The Data Protection Authority (CBP) is the Dutch supervisor. It has far-reaching powers.¹¹⁷ The CBP may impose a fine of up to 4,500 euros if processing goes illegally unreported (see section 4.2.5). No fine will be imposed if it can be convincingly argued that the responsible party (in this case the KB) is blameless. In determining the amount of the fine, the seriousness and duration of the offence should be taken into account.¹¹⁸ If the CBP indicates that it plans to impose a fine, the responsible party still has a chance to respond. If the fine is actually imposed it will be in the form of an administrative ruling to which objections can be raised. If the objection is denied, the responsible party has access to the administrative courts, according to the rules of the General Administrative Law Act.

Besides possible administrative action by the CBP, criminal proceedings may be taken by the Public Prosecutor in a number of cases. There is also the possibility of liability under civil law. Violation of the provisions of the Wbp at the expense of a citizen can be considered a wrongful act.¹¹⁹ This can likewise result in legal action by the civil courts, in which the courts can demand that the personal data be removed or that damages be paid. The KB can try to protect itself from these kinds of claims by the owners of the original websites.¹²⁰ For monetary reasons, however, a more obvious move would be for the complainant to turn to the KB first and then to the CBP in an effort to bring about a solution.

¹¹⁴ Art. 36 Wbp.

¹¹⁵ Art. 36 paragraph 2 Wbp.

¹¹⁶ Art. 36 paragraph 4 Wbp.

¹¹⁷ Also see its website at www.cbpreweb.nl. Boudrez/Van den Eynde 2002, p. 82, report that the web archiving project started by the Swedish National Library in November 2001 had to be stopped by order of the Swedish CBP – the Data Inspection Board – until a relevant statutory regulation was created. See footnote 66 for this decree, which was drawn up especially with a view to the personal data that can be found on websites.

¹¹⁸ Art. 66 Wbp.

¹¹⁹ The civil courts may rule, for example, that the KB's motives for refusing to comply with a request to change or correct were insufficient, or that the interest put forward by the KB does not outweigh the privacy interests of the party involved.

¹²⁰ See section 5.1.4.

4.3 Conclusion on the protection of personal data

The mere harvesting and archiving of material such as websites that contain personal data is a form of processing, which is enough to make the Wbp applicable. Processing is permitted if it is 'necessary for protecting the legitimate interests of the responsible party [the KB], unless the interests or the fundamental rights and freedoms of the persons involved, particularly the right of protection of one's personal private life, prevail' (art. 8f Wbp). On these grounds only the harvesting and archiving of non-special personal data seem to be permitted, but it is never certain how the balancing of interests from art. 8f will turn out in particular cases. This balancing of interests could turn out quite differently if the material is made available online and can be searched by name. It is even more problematic if the contents of the archived websites can be indexed by search engines like Google, so that searches can be made by personal names without involving a visit to the KB site.

The processing of special personal data is always problematic, whether the purpose is for harvesting, archiving or making the material available. An appeal to the freedom of information may provide some solace.

The Wbp makes reporting the processing of personal data obligatory. There is an exception for processing solely for archival purposes. The KB must report other kinds of processing, such as that involved in making material available, to the CBP.

5. Liability under civil law and criminal law

5.1 Introduction to liability under civil law

Besides the liability that one can incur on the basis of an agreement, there is also liability under civil law for wrongful acts. A wrongful act is committed if a person has violated the rights of another or has acted contrary to a legal obligation, or if a person has breached the standard of 'due care' that must be observed in society. One example of violating the rights of another is copyright infringement. This is discussed in chapters 2 and 3.¹²¹ In the following section two other forms of wrongfulness under civil law that may play a role in web archiving will be discussed: infringement of portrait rights and defamation. This chapter ends with sections on liability under criminal law and (indirect) liability for unlawful website contents.

5.1.1 Portrait rights

In web archiving, so-called portrait rights may play a role. On the basis of portrait rights, a person who is recognizably depicted (in a drawing, photograph, painting or on film) can raise objections to his portrait being made public. A distinction must be made with copyright in portraits, since copyright is held by the maker, e.g. a photographer or painter.

Portrait rights are regulated in the Dutch Copyright Act of 1912. Here, a distinction is made between two categories: the portrait that is commissioned and the portrait that has not been commissioned. The position of a portrayed person is strongest in the case of a commissioned portrait. Examples might be wedding photos, official group photos or passport photos. Before these photos may be made public, permission is needed from the portrayed subject; making the photos public without permission is therefore unlawful. Commissioned portraits are not so common.

The category of portraits that have not been commissioned is much larger. It includes people who are photographed on the street as accidental passers-by. In this case the portrayed subject does not have an exclusive right to the photo, but he can oppose making it public if he has a 'reasonable interest'. This interest will have to be weighed against other interests, such as the interest of freedom of information. Case law suggests that one 'reasonable interest' is often the interest of privacy, but there are other known reasonable interests as well, such as the interest of safety (a police officer does not want to be physically identified), interest of resocialization (a suspect or convicted person does not

¹²¹ Possible defences can be found in sections 3.1.8 and 5.3 of this report (as to harvesting).

want to be physically depicted to make it easier for him to return to society later on), financial interest (a well-known Dutch person resists being publicly depicted because doing so reduces his exclusivity). As far as web archiving is concerned, the interest has to do with the fact that a portrayed subject, under certain circumstances, can resist being made public. The decision can then be made to screen off the portrait or to wait and see if any further steps are taken.

By its nature, portrait rights are only involved when material in which people are visually recognizable is made available to the public. This means that the mere harvesting and archiving of portraits on websites does not incur liability. Liability only arises the moment the portrait is made available to others.

5.1.2 Defamation

'Defamation', briefly put, is damage to someone's honour and reputation. Defamation occurs in the Criminal Code and is a general term. It assumes that information has been made public. A special form of defamation is 'libel', in which someone is accused of a certain act. Yet another form is 'slander', which requires that the person who makes the statements knows that what has been said is not true. It is therefore possible that the Public Prosecutor will bring charges, but this rarely happens. Usually the victim decides to initiate civil proceedings. He will then argue that the public statement in question was negligent according to generally accepted standards and is therefore wrongful.

For web archiving, the situation is comparable to that of portrait rights. The mere collection, processing, archiving and similar treatment of defaming material cannot incur liability as understood here. Liability can arise if the material is made public.

5.1.3 The legal risks: liability and indemnity

If a person feels that the contents of a website are wrongful (if he feels insulted by it, for instance, or if he believes it violates his portrait rights), he can take legal action. The publisher of the material – in this case the KB – would then be issued a summons. Usually this is preceded by the possibility of making an out-of-court settlement. The complainant would argue that his portrait rights or his right to honour and reputation had been infringed and that the publication in question is wrongful.¹²²

The following may be demanded and then allowed by the court: to remove the objectionable information and to keep it from the public, and to pay damages. Both can be strengthened by a penalty payment that is forfeited if the judgement of the court is not complied with or is complied with too late. The court will also demand that costs be paid. These are not the actual costs incurred by the winning party but relatively low, fixed amounts. In the Netherlands, damages awarded for wrongful publication on the Internet are generally not high, and this also applies to legal costs. The costs charged by the lawyer, on the other hand, can be unexpectedly high. There are also hidden costs, such as the costs for deploying manpower from your own organization.

The other side of the coin is that the complainant will also have to incur costs to take his case to court. His chance of success is not high and he runs the risk of being ordered to pay the costs of the proceedings. In practice this will often serve as a great deterrent. Only a highly motivated complainant will be prepared to assume such costs. Complainants with low incomes might be able to appeal to legal aid, but they will still have to make a personal contribution and the risk of being ordered to pay court costs is still present.

5.1.4 Indemnity

The consequences of being held liable for wrongful publication can be laid on the shoulders of the website holder (depositor) by means of a so-called indemnity. With an indemnity the other party agrees to pay the costs of any damage that may arise through claims by third parties. This can be done by means of a generally formulated indemnity, which then covers the consequences of liability for any civil claim.

¹²² Art. 6:162 Dutch Civil Code.

It is by no means certain, however, that such an indemnity is always fair to the other party. This is because objections by a complaining party may arise at a time when the website holder himself is no longer showing the objectionable information on his site. In addition, the reasons for the objections may arise only after the website holder has removed the objectionable material from his own site. And possibly wrongful contents may accumulate in a web archive because successive versions of websites are being preserved. One practical question therefore is whether an indemnity as understood here is indeed acceptable for the other party. In order to meet these objections, an obligation for the depositor has been included in the model contract so that the KB will be kept informed once it has removed material from its site in response to claims or the threat of claims, after which the KB can render fully or partially inaccessible the website version(s) in question that are being kept in its web archive.

The KB can reduce the chance of liability by evaluating the contents of the websites to be archived and avoiding those with high-risk information. It is also recommended that the KB respond quickly and adequately to complaints in order to avoid any possible legal proceedings.

5.2 Liability under criminal law

Criminal norms can be violated through the use of any medium, and websites are no exception. It is therefore a good idea to discuss the most relevant crimes of expression followed by the possible consequences of violating these norms.

The Dutch Criminal Code (in Dutch: Wetboek van Strafrecht, henceforth: WvSr) contains the norms that are relevant to web archiving. Among them might be defamation ('ordinary' defamation, libel, slander);¹²³ crimes against public order such as sedition, defaming a population group, and inciting discrimination towards and hatred of a population group.¹²⁴ There are also provisions that concern the security of the state, such as the ban on releasing state secrets.¹²⁵ The Criminal Code contains other provisions that are aimed at the protection of health or public morals, including a ban on distributing child pornography.¹²⁶

Characteristic of most of these provisions is the need to show intent. In a number of cases that is mitigated to 'must know or reasonably suspect'. An exception is the text in art. 240b WvSr, which penalizes a number of actions having to do with child pornography. But it can be assumed that conviction is only possible if there is a certain degree of culpability. In the case of the KB there is no evidence of intent. The KB maintains only one-on-one archives and does not support the crimes committed by the site holder. There could be evidence of culpability if the KB knew or should reasonably be aware that the archived website contained criminal material.

An element in the crimes described above is the making available or publishing of certain content in one form or another. Archiving material without making it available does not make one criminally liable. An exception, once again, is child pornography; the mere storing of certain images, and keeping them stored, is a criminal offence.

Most defamatory crimes are offences that are only subject to persecution on complaint, which means that the Public Prosecutor can only prosecute if the injured party has lodged a complaint. The Public Prosecutor is not required to institute proceedings on the grounds of the so-called principle of prosecutorial discretion. In the context of this principle the Public Prosecutor may allow for an array of policy considerations, such as its own prosecution priorities, the seriousness of the offence, the expected result, problems of proof and the nature of the perpetrator. If there is an injured party (especially in the case of defamation), there is always the possibility that he would do better in the civil courts.¹²⁷ So it is likely that the Public Prosecutor would react with extreme restraint if the KB were accused of having committed a criminal offence.

¹²³ Art. 261 ff. WvSr.

¹²⁴ Art. 131 ff. WvSr.

¹²⁵ Art. 98-98b WvSr.

¹²⁶ Art. 240b WvSr.

¹²⁷ See section 5.1.2.

Unlike in civil liability matters, it is not possible for the KB have itself indemnified by the website owner against criminal prosecution. The penalties are fines and prison sentences of varying severity and/or length. In practice the KB – as a legal entity – risks financial penalties.

5.3 Conclusion: (indirect) liability of the KB for infringing or unlawful website contents

As shown above, websites may contain works which the website owner copied without permission of the rights holders, or material which is otherwise unlawful on the grounds of portrait right, defamation, Wbp or criminal law. The site owner thus infringes rights of others, or commits an unlawful act or a criminal offence, while the KB does the same in an indirect way because it copies the same site and makes it available to the public again.

One could argue, however, that in case the KB wishes to harvest websites automatically (without making a selection beforehand), its responsibility does not go so far as to require a check beforehand whether sites contain unlawful contents. Here, a comparison may be made with the position of an Internet service provider (hereafter: ISP) upon whom does not rest such a control duty, either. An ISP is not (indirectly) liable for infringing or otherwise unlawful material¹²⁸ which a client of his stores on his server provided that:¹²⁹

- He does not have actual knowledge of the illegal activity or information and, as regards claims for damages, ought not reasonably have knowledge of the illegal activity or information; or
- Upon obtaining such knowledge or awareness, he acts immediately to remove or disable access to the information.

This regulation for escaping liability do not only apply to ISP's but to all intermediaries which 'provide information society services', which means storing information originating from another party on request. Some lawyers thus argue that this regulation could also be applied to producers of peer-to-peer software and search engines.¹³⁰ Strictly speaking, however, the KB's web archive does not provide an information society service because such a service requires an economic activity which is usually provided against payment. Yet, it may be conceivable that the courts would be willing to accept an analogous defence by the KB based on the ISP-regulation when automatic harvesting is concerned.

Although it is a long-awaited wish of ISPs, no self-regulation has yet been developed concerning the conditions for immediate removal of disabling access to information on a website, the so-called 'notice and take down-procedure'.¹³¹ A difficult matter is whether and how an ISP is able to

¹²⁸ A site owner and (indirectly) an ISP can also be liable for hyper links which refer to unlawful material to another's website. This has been decided by the District Court The Hague 9 June 1999 (Scientology Church versus XS4ALL), *CR* 1999/4, p. 200 with comments by P.B. Hugenholtz; *Mediaforum* 1999/7-8, p. 205 with comments by D. Visser, and affirmed by the Court of Appeal The Hague 4 September 2003, *AMI* 2003/6, p. 217 with comments by P.B. Hugenholtz; *JAVI* 2003/5, p. 183 with comments by W. Pors. This situation does not require further study for the KB because hyper links on an archived website will probable not be clickable so that the unlawful information cannot be accessed.

¹²⁹ Art. 6:196c Dutch Civil Code.

¹³⁰ A search engine which enabled finding infringing music files (MP3s) was found not liable on the basis of this regulation by the District Court Haarlem 12 May 2004 (Techno Design versus Stichting Brein), *AMI* 2004/5 with comments by K. Koelman; on the Internet: www.rechtspraak.nl, LJ-no. AO9318.

¹³¹ On the other hand, the American Copyright Act contains a detailed regulation in section 512(c)(3) U.S. Code. If someone claims to be a rights holder and wishes his work to be removed from a website, he must send the ISP a notice containing the following:

- 1) A physical or electronic signature of a person authorized to act on behalf of the owner of the exclusive right allegedly infringed;
- 2) Identification of the copyrighted work or a list of the works claimed to have been infringed;
- 3) Identification of the material claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the ISP to locate the material;
- 4) Information reasonably sufficient to permit the ISP to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address;
- 5) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law;

judge if a website indeed contains infringing or unlawful contents; anyone can claim this but it is ultimately up to the courts to assess the validity of such a claim. Moreover, the courts differ on the question whether an ISP has a duty to reveal the name of the alleged infringer so that the claimant can directly hold the latter liable.

The KB will have to make sure that when it implements a 'notice and take down'-procedure for its web archive, it will have to act expeditiously when someone makes a complaint. Immediately removing or disabling access to the material concerned may prevent legal proceedings.¹³² For this, the KB must decide beforehand whether it will seriously assess the validity of each claim or whether (as American ISPs are obliged to do) it will take no risks and will remove or disable access to disputed material after every plausible notification.

6) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of the exclusive right allegedly infringed.

After receiving such a notice, in order to escape liability for copyright infringement an American ISP is obliged to remove or disable access to the copyrighted work. Interestingly, the Internet Archive has introduced an opt out-possibility which requires a notice which contains almost the same elements as required in America. The Internet Archive, on the other hand, does itself make a serious assessment of the complaint's validity, see its Copyright Policy (of 10 March 2001, see <<http://www.archive.org/about/terms.php>>): 'The Internet Archive may, *in appropriate circumstances and at its discretion*, remove certain content or disable access to content that appears to infringe the copyright or other intellectual property rights of others.'

¹³² Or perhaps a claimant may agree to merely including a warning on the archived website that it contains unlawful material. This solution is to be preferred for the preservation copy, however, a claimant may perhaps not consider this sufficient when the access copy is concerned.

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