Vereniging voor Auteursrecht

ALAI 2022 Questionnaire - Netherlands

PANEL I – PERFORMER'S RIGHTS – A COMPARATIVE OVERLOOK

Jytte Elfferich and Jacqueline Seignette

1- What types of performers are there according to your legal framework? According to the Dutch legislation regulating related rights (*Wet op de naburige rechten*; "Neighbouring Rights Act") performers are: the actor, singer, musician, dancer and any other person who performs, sings, recites or in any other way performs a literary, scientific or artistic work or an expression of folklore, as well as the artist who performs a variety show, a circus act or a puppet show. (Section 1a Neighbouring Rights Act).

2- Do all types of performers enjoy Neighbouring Rights protection? The protection is limited to performers that fall under the definition of 'performer' according to Section 1a Neighbouring Rights Act, as mentioned under question 1. Phonogram producers, broadcasters and film producers do not qualify as 'performers' but can also hold a neighbouring right under the Neighbouring Right Act.

3- Does the law distinguish between featured/non-featured performers? How? All performers are entitled to a proportional equitable remuneration for communication to the public of a film work by means of linear distribution by cable or otherwise. This remuneration is collected from the distributor by a CMO (Section 4 (2) Neighbouring Rights Act jo. section 45d (2) Copyright Act). In case of public performance of the film work, only the performer who has a major role in the film is entitled to a collectively managed proportional, equitable remuneration. Other performers are entitled to receive an equitable remuneration from the producer.

4- Which rights are awarded to each type of performer? The exclusive right to grant permission for one or more of the following acts:

a. The recording of a performance;

b. The reproduction of a recording of a performance;
c. Selling, renting, lending, delivering or otherwise circulating a recording of a performance or a reproduction thereof, or importing, offering or stocking such recordings for those purposes;
d. The broadcasting, making available to the public by means of cable transmission or otherwise, or making available to the public or any other way a performance or a recording of a performance or a reproduction thereof.

(Section 2 (1) Neighbouring Rights Act)

III- Are moral rights attributed to performers? Which prerogatives does it comprehend? Those who fall under the definition 'performer' are granted moral rights (Section 5 Neighbouring Rights Act). Performers are granted the following moral rights:

a. the right to oppose publication of the performance without mention of his name or other indication as performer, unless such opposition would be unreasonable.

b. the right to oppose publication of the performance under a name other than his own, as well as any alteration in the manner in which he is designated, in so far as that name or designation is mentioned or made public in connection with the performance

c. the right to oppose any other change to the performance, unless such change is of such a nature that opposition would be unreasonable

d. the right to oppose any deformation, mutilation or other impairment of the performance which might harm the honour or name of the performer or his value in that capacity.

A performer can waive the moral rights referred to under a, b and c.
A special regime applies to performers acting in audio-visual works.

5- What is the nature of those rights? – Statutory? Contractual? The moral rights listed above are laid down by law. The right to renounce the moral rights under a, b or c is also laid down by law (Section 5 (3) Neighbouring Rights Act).

If this question concerns the exclusive rights (and not moral rights): the exclusive rights mentioned under question 4 are statutory rights.

6- Which of them are exclusive rights/remuneration rights? *Note: in answering the questions below we assume that these questions refer to the exploitation rights and not to the moral rights.*
Question 4 lists the exclusive rights that belong to the performer.

7- Which exceptions/limitations generate remuneration rights for performers? Public lending is subject to payment of an equitable remuneration to the Foundation Lending Rights (*Stichting Leenrecht*). (Section 2 (3) Neighbouring Rights Act). Part of the collected income is distributed to CMO Norma for further distribution to performers. Educational and research institutions and libraries affiliated to these institutions, as well as the National Library are exempted from this obligation of paying a lending fee. (Section 2 (4) and (5) Neighbouring Rights Act).

A phonogram released for commercial purposes or a reproduction thereof may be communicated to the public (but not including making available) without the consent of the phonogram producer and the performer, provided that equitable remuneration is paid (Section 7 (1) and (2) Neighbouring Right Act). The equitable remuneration shall be paid to the Foundation for the exploitation of rights (*Stichting ter Exploitatie van Naburige Rechten*; "SENA").

Private copying is subject to payment by the manufacturer or importer of recording devices of an equitable remuneration to the Foundation Copy Right (*Stichting de Thuiskopie*) (Section 16c (1) and (2) Copyright Act; Section 11 Neighbouring Right Act). Part of the collected income is distributed to CMO Norma for further distribution to perfomers.

8- Which rights are transferred to music/audiovisual producers? For how long?
Music: determined by contract.
Film: performers who contribute to a film work are presumed to have assigned the following rights to the producer, unless agreed otherwise in writing (Section 45d (1) Copyright Act jo. section 4 (1) Neighbouring Rights Act): rental and other modes of communication to the public ("openbaarmaking"), recording, subtitling and dubbing.

9- Are there any legal presumptions of transfer or is it voluntary/contractual?
See question 8

10- Are there any unavailable and inalienable remuneration rights? If a performer has assigned the rental right of a performance recorded in a phonogram to its producer, the producer shall owe the performer equitable remuneration for the rental. This right to equitable remuneration cannot be waived. (2a Neighbouring Rights Act).

A performer who has contributed to a phonogram cannot waive the following rights:
Where the rights of a performer have been transferred to the producer of a phonogram, and that transfer is subject to a non-recurring remuneration, the performer or, in the case of a plurality of performers, the performers jointly shall have the right to obtain an annual supplementary remuneration from that producer for each full year following the 50th year after that phonogram was first lawfully published or, if earlier, published. This remuneration shall be 20 percent of the revenues which the phonogram producer has derived from the reproduction, distribution and making available of the phonogram during the year preceding that for which the remuneration is paid. (9 (1), (2) and (4) Neighbouring Rights Act).

Where the rights in the fixation of his performance are transferred to the phonogram producer and that transfer is subject to the payment of a recurring remuneration, that remuneration shall be paid from the year following the 50th year after that phonogram was first lawfully published or, if earlier, made available to the public, without any contractually defined advance or deduction. (9 (3) and (4) Neighbouring Rights Act).

11- What type of compensation is paid in exchange? How is it set? For how long? For film works, performing artists are entitled to receive an equitable remuneration from the producer for the statutorily presumed transfer of rights and the exploitation of the film work (Section 45d (1) Copyright Act). All performers are entitled to a *proportional* equitable remuneration for communication to the public of a film work by means of linear distribution by cable or otherwise. This remuneration is collected from the distributor by a CMO (Section 4 (2) Neighbouring Rights Act jo. section 45d (2) Copyright Act). In case of public performance of the film work, the main actor is entitled to a collectively managed proportional, equitable remuneration. Other performers are entitled to receive an equitable remuneration from the producer. The proportional remunerations are set in agreements between the CMO's of authors and performers on the one hand and a collective of distributors on the other. The total remuneration in 2022 for authors and performers for linear distribution is EUR 0,19 per subscriber per month for 1 – 39 channels, EUR 0,21 for 40-79 channels, EUR 0,215 for 80-119 channels, EUR 0,22 for 120+ channels.

VOD distributors are required to pay an equitable proportional remuneration to the screenwriters, directors and main actors pursuant to an industry agreement. The remuneration is collected by the CMOs Norma, Lira and Vevam. The royalty is set by arbitration at 5.2 percent of gross revenue minus 25% cost forfeit. This industry agreement is currently under review; legislation is in preparation to introduce a statutory claim for proportional equitable remuneration.

For the broadcasting, rebroadcasting or public performance of phonograms, equitable remuneration must be paid to SENA. SENA has the exclusive right to determine the amount of the remuneration. With regard to what constitutes 'equitable remuneration', the CJEU has ruled that this term must be interpreted uniformly, whereby a model with variable and fixed factors may be used. To the extent that it 'strikes a fair balance between the

interests concerned'. The relevant criteria include: 'the number of hours of broadcast of phonograms, the viewing and listening densities of the radio and television broadcasters represented by the broadcaster, the contractually agreed tariffs relating to the rights to perform and to broadcast musical works protected by copyright, the tariffs applied by the public broadcasters in the neighbouring countries of the Member State concerned and the amounts paid by the commercial broadcasters'. (CJEU 6 February 2003, C-245/00, ECLI:EU:C:2003:68).

The distribution of the royalty collected by SENA shall be shared 50/50 between the performers on the one hand and the phonogram producer on the other (Section 7 Act on Neigbouring Rights). SENA has drawn up a set of rules within this framework, which has been approved by the Supervisory Board. The term of protection for commercially released titles is 70 years.

12- How is "streaming" qualified in your Country for rights awarding purposes? The term 'streaming' is not defined by law. Streaming is a form of 'making available'. This definition is included in Section 1m of the Neighbouring Rights Act. The performer has the exclusive right to grant permission for, among other things, 'making available' and therefore also streaming.

13- Whose authorization is it required for the "streaming" of music/audiovisual content? For streaming music, the performer has the exclusive right to give authorisation for the making available to the public. Because streaming is a form of 'making available', the authorisation should come from the performer. Hence, performers often transfer this exclusive right to the producer, which enters into licensing agreements with streaming services. In practice, therefore, the authorization to stream music usually lies with record companies, and is granted by licensing agreement. The phonogram producer also has an independent neighbouring right (Section 7a Neighbouring Rights Act). Authorization therefore also requires the consent of the producer himself.

In the case of film, the exclusive right is presumed to have been assigned to the film producer. Therefore, in most cases, permission for streaming audio-visual content requires authorization from the film producer. (Section 7a(c) Neighbouring Rights Act). The film producer also has an independent neighbouring right (Section 6 Neighbouring Rights Act). Authorization therefore also requires the consent of the producer himself.

14- What is the estimated level of copyright infringement in your Country? The total amount of damage to creators, performers, publishers, producers and distributors of music, films, series, books, writings, images and games, among others, is close to 200 million euros per year in the Netherlands (Brein).

15- What is the current level of disclosure on economic returns from digital platforms?

16- How is performer's compensation determined for each business model?

See also question 11 above.

The income collected by the CMO is determined by the distribution rules of the CMO.

In case of equitable remuneration for (linear) communication to the public of a phonogram published for commercial purposes, the remuneration is divided equally between the performers and the producer (Section 7 (4) Neighbouring Rights Act).

The remuneration that must be paid for the lending of works with neighbouring rights is determined by Foundation Negotiating Lending Compensation (*Stichting Onderhandelingen Leenvergoeding*). The remuneration collected by Stichting Leenrecht is partly distributed to CMO Norma and distributed pursuant to Norma's distribution regulations.

17- Are there minimum amounts due? Any other economic benefits? Minimum amounts may apply.

18- Do UGC platforms contribute to such compensation schemes? How? Remuneration may follow from agreements between record companies and UGC platforms. Performers may participate depending on their contractual arrangements with producers.

19- Has the Beijing Treaty been implemented in your Country, at least, in part? No.

20- Which rights are collected by Collective Management Organisations (CMOs)? The following CMOs exist for performing artists: Sena collects and distributes remuneration for the neighbouring rights of performers and producers with respect to phonograms (see above). Norma collects and distributes the remuneration for performers with respect to lineair and VOD distribution of audio-visual works. Foundation Copy Right (*Stichting de Thuiskopie*) collects and distributes remunerations for the income that authors and neighbouring rights holders lose because their work is copied. Foundation Lending Rights (*Stichting Leenrecht*) collects remunerations and pays out the money collected to management organisations per category (writings, visual works, multimedia, audio, video). They then pay out part of the collected income to Norma.

21- Which CMOs represent performers in your Country?

See question 21

22- Do these CMOs comply with transparency principles?

Yes. The CMOs fall under the Act on Supervision and Dispute Resolution of Collective Management Organisations for Copyright and Neighbouring Rights (*Wet toezicht en geschillenbeslechting collectieve beheersorganistaties auteurs- en naburige rechten;* Act on Supervision and Dispute Resolution CMO's). On the

basis of that Act, transparency obligations apply. (See for example Section 2b (2) of the Act on Supervision and Dispute Resolution CMO's).

23- Is it possible to find out how much income is provided by each type of rights?

Data on collectively administered income are included in the annual reports and the reports of the Supervisory Board (C*ollege van Toezicht collectieve beheersorganisaties auteurs- en naburige rechten*).

24- What is the current litigation level for performers' rights in your Country?

Litigation by CMO's is a regular occurrence, litigation by individual performers not so much.

25- Are there any relevant Court Decisions concerning performer's rights?

Supreme Court 12 November 2021, ECLI:NL:HR:2021:1668
In this judgement of the Supreme Court, an explanation is given of what is equitable renumeration according to Section 7(1) Neighbouring Rights Act.

Court of The Hague 11 January 2017, ECLI:NL:RBDHA:2017:218.
In this case the Court of The Hague ruled on the question of whether royalties should be paid to SENA for embedding radio stations. The court ruled on the basis of case law of the ECJ that there is no communication to the public, and therefore no obligation to pay.

Court of Justice of the European Union 6 February 2003, C-245/00 ECLI:EU:C:2003:68 (*SENA/NOS*). In this judgment it is ruled that the concept of equitable remuneration in Section 8(2) of Directive 92/100/EEC must be interpreted uniformly in all the Member States and applied in such a way that each Member State adopts the most relevant criteria in its territory in order to ensure, within the limits imposed by Community law and by this Directive in particular, respect for that Community concept, and that the Directive does not preclude a model for the calculation of the equitable remuneration of performers or producers which includes variable and fixed factors, such as the number of hours of broadcast of phonograms, the audience shares of the radio and television broadcasters represented by the broadcaster, the contractual rates charged in respect of the rights to perform and broadcast musical works protected by copyright, the rates applied by the public broadcasters in the countries neighbouring the Member State concerned and the amounts paid by commercial broadcasters in so far as that model strikes a fair balance between the interest of performers and producers in obtaining remuneration for the broadcasting of a given phonogram and the interest of third parties in being able to broadcast that phonogram under reasonable conditions and does not conflict with any principle of Community law.

26- Does the Principle of National Treatment apply to all foreign performers?

With respect to the equitable renumeration for a the making available of a commercial phonogram the Principle of National Treatment applies to all foreign performers.
This follows from CJEU 8 September 2020, C-265/19 ECLI:EU:C:2020:677, (RAAP/PPI). The CJEU's ruling in RAAP/PPI briefly states that Section 8(2) of Directive 2006/115 precludes (1) the exclusion of performers from countries within the EEA from the right to equitable remuneration on the grounds that they are not domiciled or resident in that country and that they have made their contribution to the phonogram in the EEA, (2) that a Member State shall limit the right to obtain a single equitable remuneration in relation to performers and producers of phonograms who are nationals of third States, and (3) that the right to obtain a single equitable remuneration provided for in this provision shall be limited in such a way that only the producer of the phonogram in question obtains a remuneration, without having to share it with the performers who contributed to that phonogram.

27- Are there "appropriate and proportionate remuneration" provisions?
The performer is entitled to an equitable remuneration (s. 2(b) Neighbouring Rights Act jo. s. 25c(1) Copyright Act) and in certain cases a proportional equitable remuneration. See questions 3 and 11. The performing artist is entitled to an additional equitable remuneration if the agreed remuneration is disproportionate in relation to the proceeds of the exploitation of the work in view of the mutual performances. See question 30.

28- Are CMO´s mandates always exclusive and encompassing all rights?
Yes in the case of Sena. Sena is appointed by virtue of law and has exclusive competence in the rights it manages. Norma's mandate is based on contract, the rights are mostly exclusive, the mandate does not encompass all rights.

29- Are there any partial/global revocation of transfer of rights agreements provisions?
Yes. Pursuant to Section 25e of the Copyright Act, the author of a work is entitled to terminate the agreement with a producer if the copyright on the work is not sufficiently exploited within a reasonable period of time, or if after the initial exploitation, the copyright is no longer sufficiently exploited. The right to terminate the agreement arises after the author has granted the other party a reasonable period of time to exploit the work to a sufficient extent and the work is not exploited within this period. This Section also applies to the contract between a performer of a phonogram and the producer of that phonogram (Section 2b Neighbouring Rights Act).

30- Are there any provisions on contractual remuneration adjustments?
Yes. Pursuant to Section 25d of the Copyright Act, the author of a work may claim an additional equitable remuneration, if the remuneration agreed upon is disproportionate to the revenue generated by exploitation of the work. This provision applies mutatis mutandis to the performer (Section 2b Neighbouring Rights Act).

PANEL II – PHONOGRAM PRODUCERS RIGHTS

Martijn Schok and Joep Meddens

1- Which rights are awarded to phonogram producers?

a) Reproduction; Yes. Statutory. Exclusive right.

b) Broadcasting; (we understand broadcasting to be always linear) Yes. Statutory. Linear broadcasting of commercial phonograms is allowed if equitable remuneration is paid to CMO; there is technically the option to arrange for permission from the rights holders directly.

c) Communication to the public; Yes, statutory. Regarding linear broadcasting see above (Remuneration right).

d) Distribution; Yes. Statutory. Exclusive right.

e) Rental; Yes. Statutory. Exclusive right.

f) Making available to the public; Yes. Statutory. Exclusive right.

g) Cable Retransmission; Yes. Statutory. Remuneration right.

h) Direct Injection; Yes, shared liability between the supplier of the signal via direct injection and the user of that signal who communicates it to the public for that one communication to the public.Statutory. Remuneration right.

i) Any other rights? No.

2- What is the nature of those rights? – Statutory? Contractual? - See above

3- Which of them are exclusive/remuneration rights? - See above

4- Which exceptions/limitations generate remuneration rights for phonogram producers? Private copy. Public lending. Linear communication to the public (including broadcasting) collectively managed. Public Lending and linear communication to the public are both allowed without permission from the rights holders as long as equitable remuneration is paid, meaning that technically there is also the option to obtain permission from the rights holders directly.

5- Are there any legal presumptions of transfer or is it voluntary/contractual? No.

6- What type of compensation is paid in exchange? How is it set? For how long? The remuneration that must be paid for the private copying and lending of works with neighbouring rights is determined by independent foundations with equal representation of users and rightholders (Stichting Onderhandelingen Leenvergoeding; Stichting Onderhandelingen Thuiskopievergoeding.)

7- How is producer's compensation determined for each business model?
The income collected by the CMO is determined by the distribution rules of the CMO.
In case of equitable remuneration for (linear) communication to the public of a phonogram published for commercial purposes, the remuneration is divided equally between the performers and the producer (Section 7 (4) Neighbouring Rights Act).

8- Are there minimum amounts due? Any other economic benefits? Not applicable.

9- Is digital piracy/streamripping still a major concern for phonogram producers? Yes.

10- Which rights are currently being collected via CMOs? Private copy. Public lending. Linear communication to the public (including broadcasting).

11- Which CMOs represent phonogram producers in your Country? Sena (50/50 with musicians). STAP (private copy and public lending). Phonogram producers are represented in the boards of the public lending right foundation and the private copying foundation.

12- Do these CMOs comply with transparency principles? Yes.

13- Is it possible to find out how much income is provided by each type of rights? Yes.

14- What is the current litigation level for phonogram producers in your Country? Low.
DJ Garrix vs Spinnin' records, , regarding who is phonogram producer. See: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2021:1923 .

16- Are there any revocation of transfer of rights' agreements provisions? No.

17- What is considered a "phonogram published for commercial purposes"? The recording of sound that is made and released for commercial purposes. A recording of a live concert that is not made to be commercially available would therefore not qualify.

18- Is there any type of phonograms that is published for non-commercial purposes? Yes. For example recordings made by private persons that are then shared online by them. As a phonogram is any recording of sounds only, there could also be a not-for-profit recording and publication (by a government agency or by a non-profit).

19 - Which rights are involved in audiovisual synchronization ("production music")? The reproduction right.

20- Which rights are involved in mood music/sound branding licensing? Reproduction right and communication to the public right.

PANEL III- BROADCASTERS AND FILM/AUDIOVISUAL PRODUCERS RIGHTS

Mireille van Eechoud

1- Which rights are awarded to broadcasters in your Country?

a) Fixation; yes
b) Reproduction; yes
c) Communication to the public (with /without admission fees); partial
d) Distribution; yes
e) Simultaneous retransmission by wire or wireless means; yes
f) Deferred retransmission by wire or wireless means; yes
g) Making available to the public by wire or wireless means; yes
h) Pre-broadcast program carrying signal protection; no
i) Any other rights?

Dutch law recognizes those rights in broadcasts that EU legisalation prescribes, with no additional rights. This means that rights a-g are recognized with respect to broadcast programmes of broadcasting organizations.

There is no separate protection for pre-broadcast signal protection, but in exceptional cases the general tort provision of the Civil Code (art. 6:164 Burgerlijk Wetboek) may provide some protection.

Neighbouring rights for broadcasters, performing artists and phonogram producers were first introduced in the 1993 Wet op de naburige rechten (Neighbouring Rights Act) on the occasion of the Netherlands becoming party to the 1961 Rome Convention and the passing of the Directive 92/100/EEC (Rental right directive). Later film producers (with respect to first fixation of films) were added. The rights have been updated in keeping with changes in EU neighbouring rights law and international copyright law (WPPT etc).

2- What is the nature of those rights? – Statutory? Contractual?

The rights are statutory, exclusive rights (opposable to all), with a few exceptions.

3- Which of them are exclusive/remuneration rights?

The right to authorize retransmission via cable must be collectively managed (Art. 26a Copyright Act juncto Art. 14a Neighbouring rights act. There is however no mandatory collective management for retransmission of broadcasts by broadcasting organizations with respect to broadcasts in which they themselves own the rights.

4- Which exceptions/limitations generate remuneration rights for broadcasters?

Key ones are public lending, educational use and private copying.

5- Are there any legal presumptions of transfer or is it voluntary/contractual?

Rights are transferable. No presumptions exist.

6- What is the relevance of copyright infringement in relation to broadcasters' rights?

When broadcasters own the copyright (or have an exclusive license) in works that are broadcast, they can enforce their rights based in copyright as well as in the neighbouring rights. Copyright also protects against unauthorized adapations, whereas the neighbouring right only protects against (partial) copying.

7- Is digital piracy/streamripping still a major concern for broadcasters?

Yes, for example the offering of paid IPTV services which infringe intellectual property rights, or the offering of proxy/mirror sites to enable people to access (torrent)sites that have been blocked by ISPs under court orders because of hosting infringing content. Dutch public and commercial broadcasters are member of Brein, an organizations that targets infringement on behalf of the intellectual property owners it represents (including film producers, publishers, collective management organizations).

8- Do UGC platforms contribute to broadcasters' rights? How?

If the question is whether platforms like YouTube pay broadcasting organizations for the posting of conteny by third parties (i.e. not where the broadcaster itself chooses to use YouTube as a platform for its content), the answer is yes they must. This because they are held to be performing an act of communication to the public, following Art. 17 Directive on copyright in the Digital Single Market (DSM Directive). This is implemented in article 19b Neighbouring Rights Act (effective July 2021); which in turn refers to the more extensive implementation of Art. 17 DSM in the Dutch copyright act (= Articles 17d, 29c, first to eighth paragraphs, 29d and 29e of the Copyright Act). It applies only to online content-sharing service providers within the meaning of Art. 17 DSM Directive, not to all types of UGC platforms.

9- What is the current litigation level for broadcasters' rights in your ountry?

Relatively low, except perhaps with respect to infringement actions against large scale infringers (see question 7).

10- Are there any relevant Court Decisions concerning broadcasters' rights in your Country?

No important recent decisions specific to broadcasters'rights.

11- Are broadcasters acting as One-Stop Shop in relation to retransmission operators?

Unknown.

12- Which rights are awarded to audiovisual producers in your Country?

a) Reproduction; yes

b) Broadcasting; no

c) Communication to the public; no

d) Distribution; yes

e) Rental; yes

f) Making available to the public; yes

g) Retransmission; no

h) Direct Injection; no

i) Any other rights? no

Film producers have the rights to authorize:

- the reproduction of a first fixation of a film or of a reproduction of it;
- to sell, rent, lend, deliver or otherwise bring into circulation a first fixation of a film or a reproduction thereof made by him, or to import, offer or stock it for those purposes (subject to the exhaustion doctrine for copies legitimately put into circulation in the EU/EEA).
- the making available to the public of a first fixation of a film or a reproduction thereof produced by him (i.e. at a time and place of the viewer's choosing).

Unlike broadcasting organizations, film producers do not have a right of communication to the public via broadcasting, retransmission, etc.

13- What is the nature of those rights? – Statutory? Contractual?

See question 2

14- Which of them are exclusive rights? Which of them are remuneration rights?

See question 3.

15- Which exceptions/limitations generate remuneration rights for audiovisual producers?

Lending (not: public lending by educational institutions and royal library; not: for lending copies made under the exception for the visually impaired); private copying; copying for educational use.

16- Which rights are transferred to audiovisual producers? For how long?

Generally filmproducers will require authors, performing artists and other parties contributing to the production to transfer any rights for an indeterminate period. Authors and performers retain their moral rights, there are some limitations to how they can exercise them (e.g. around attribution, resisting changes made by the producer unless these qualify as distortion).

17- Are there any legal presumptions of transfer towards audiovisual producers?

Authors and performing artists are presumed to have assigned their economic rights to the film producer (Art. 45d Copyright Act, Art. 4 Neighbouring rights Act) with respect to their specific contribution to the film. They can agree otherwise. In exchange, they have a right to fair compensation from the producer. In addition, authors have a right to remuneration for all cable and other retransmission of the film. This right to renumeration is enforceable against the party performing the act of communication and must be collectively exercised. A third right to remuneration exists for the (head) director and script writer, as regards other forms of communication to the public (but excluding making available). Lead actors also have this right to remuneration.

The presumption of transfer does not apply to the author of a musical work composed specifically for the film.

Where the producer is the employer of authors or performers, she owns the initial copyright (for works created by employees) or has the exploitation rights in capacity as employer.

18- What type of compensation is paid in exchange? How is it set? For how long?

Mostly the level and duration of compensation is something for contracting parties to determine, i.e. for the authors/performers and the film producer.

19 - How is audiovisual producer's compensation determined for each business model?

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20- Are there minimum amounts due? Any other economic benefits?

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21- Do UGC platforms contribute to such compensation schemes? How?

Not known, but see question 8.

22- Is digital piracy/streamripping still a major concern for audiovisual producers?

See question 7.

23- What is the most recent estimation of rights' loss on account of digital piracy in your Country?

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24- What is the current rule in terms of audiovisual exploitation windows in your Country?

There is no rule, but still common to have window system i.e. for major releases it is cinema first (although this has come or under pressure somewhat also due to Covid), then Video on Demand (streaming or non-streaming) and broadcast. Due to high penetration of fast broadband, DVDs are no longer a major source of income in the Netherlands.

25- Which CMOs represent audiovisual producers in your Country?

Videma (public performance; CCTV); AGICOA (cable retransmission) and SEKAM (distribution of Videma fees); STOP.NL (cable retransmission), STAP en Sekam-Video (private copying)

26- Do these CMOs comply with transparency principles?

CMOs that are subject to the Act on Supervision and Dispute Resolution Collective Management Organisations in Copyright and Neighbouring Rights (Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten) have certain transparency obligations, in conformity also with EU law on this topic.

27- Is it possible to find out how much income is provided by each type of rights?

Annual reports of the CMO's and Supervisory Authority.

28- What is the current litigation level for audiovisual producers' rights in your Country?

Low.

29- Are there any relevant Court Decisions concerning audiovisual producer's rights?

No recent major decisions.

30- Are audiovisual producers acting as One-Stop Shop in relation to retransmission operators?

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PANEL IV - DATABASE PRODUCERS' AND PUBLISHERS RIGHTS

Hans Osinga

1- Are Databases legally protected in your Country? How?

In the Netherlands, there is currently a two-tier regime regarding the legal protection of databases. This means that databases (under certain conditions) are protected by copyright and (sui generis) database law.

In its Football Dataco v. Yahoo judgment[1], the CJEU defined the copyright protection criteria for data collections. According to this ruling, a database is protected by copyright when the selection/arrangement of data can be qualified as 'an original expression of the creative freedom of its author'.
The second protection regime is the so-called sui generis right. This sui generis right was introduced by the 1996 Database Directive. This directive has been implemented into Dutch law in 1999 by the *Databankenwet*.

2- Is there a Sui Generis Database producers' right or equivalent protection in your Country?
Yes, see previous question. The sui generis right of the 1996 Database Directive has been implemented into Dutch law by the *Databankenwet*.

3- Is it possible to evaluate its efficiency and level of enforcement?
Independent (Dutch) researchers recently conducted an extensive study (as part of the recent evaluation of Directive 96/9/EC[2]) for the European Commission.[3] The researchers of this evaluation are critical to the efficiency of the Database Directive. According to this evaluation, most stakeholders have only experienced low, if any, benefits from the directive (except in terms of improved legal certainty). The study even suggests abolition of the Database Directive, considering the limited positive effects of it.

4- Is there any different form of protection for Database producers or for ownership of data?
In the Netherlands, three protection regimes applied until 2014. In addition to copyright and the sui generis database protection, there was *geschriftenbescherming* for the protection of non-original writings. Following rulings of the CJEU and the Dutch Supreme Court[4], the *geschriftenbescherming* was however discontinued, because of incompatibility with European law. In 2015, the legislator removed all references to the *geschriftenbescherming* from the Dutch Copyright Law.
Furthermore, elements of databases which can be qualified as press publication are protected under the press publishers' right provided in article 15 of the DSM Directive (see question 6).

5- How does it work? Is it effective?
The *geschriftenbescherming* for the protection of non-original writings is no longer in force, therefore this question is not applicable. It is too early to evaluate the effectiveness of the press publishers' right, given the fact that this protection recently entered into force.

[1] Judgement of March 1, 2012, ECLI:EU:C:2012:115 (*Football Dataco/Yahoo*), par 45.
[2] See: Staff working document on the evaluation of the Directive 96/9/EC on the legal protection of databases, SWD(2018) 146 final.
[3] European Commission, Directorate-General for Communications Networks, Content and Technology, Karanikolova, K., Chicot, J., Gkogka, A., et al., Study in support of the evaluation of Directive 96/9/EC on the legal protection of databases : final report, Publications Office, 2018, https://data.europa.eu/doi/10.2759/04895
[4] Judgement of the Dutch Supreme Court of January 17, 2014, ECLI:NL:HR:2014:88 (*Ryanair/PR Aviation*).

6- How do the courts of your Country balance the sui generis right with freedom of information and freedom of competition?

There are various examples of Dutch case law in which copyright protection is tested against fundamental rights. In e.g. the *Scientology/Spaink* case[5], the central question was whether the court could test copyright claims directly against freedom of information. Recent European case law, especially the *Funke Medien v Germany*-case, has provided more clarity about how fundamental rights relate to copyright. A parallel can probably be drawn with database law. I am not aware of any specific recent cases in which Dutch courts specifically balance the sui generis right with freedom of information and freedom of competition. There are however (limited) examples of situations where compulsory licenses on databases were imposed by the Dutch competition authority.

7- Is the sui generis right protected against circumvention of TPM designed for controlling access?

Yes, according to article 5a of the Databases Act, the circumvention of TPM (as defined in article 1(1)(e) of the Databases Act) is unlawful. This also applies to the provision or services intended to circumvent TPM. There have been several cases about this topic in the Netherlands – in which e.g. it was ruled that an attempt to block only one specific search engine is not considered as enforceable TPM.[6]

6- Is there a special protection against online uses of press publications in your Country?

The publishers' right provided in article 15 of the DSM Directive has been implemented in the Netherlands by the Neighbouring Rights Act. This new regime grants neighboring rights to press publishers with respect to online use of press publications by information society service providers.

7- Does it apply to scientific journals and hyperlinks? How does it work?

No, the implementation of the press publishers' right makes clear that periodical publications issued for scientific or academic purposes, such as scientific journals, are not regarded as press publications.[7] Furthermore, the law makes clear that hyperlinking to press publications does not fall under the exclusive rights of the press publishers.[8]

[5] Judgement of September 4, 2003 of the Court of Appeal The Hague, ECLI:NL:GHSGR:2003:AI5638 (*Scientology*).
[6] Judgement of Juli 4, 2006 of the Court of Appeal Arnhem, ECLI:NL:GHARN:2006:AY0089 (*Zoekallehuizen*).
[7] Art. 1(r) of the Neighbouring Rights Act.
[8] Art. 7(b)(2) of the Neighbouring Rights Act.