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National activities

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Herman Cohen Jehoram

### **A unique Dutch windfall for American recorded musicians**

The Dutch legislator made a costly mistake when he created the Neighbouring Rights Act of 1993, protecting *i.a.* performers and products of audio recordings. This mistake became apparent through the decision of the Dutch Supreme Court of 13 November 2009 (ThuisKopie/Norma-Irda). The question here was whether US musicians are entitled to the Dutch private-copying levy on recordings, which rests on article 16 c Copyright Act. American performers are not protected in the US nor are of course foreign performers. The international situation is regulated in two treaties, the Rome Convention of 1961, protecting among others performing artists and the Geneva Convention of 1971 on the protection of phonograms. The Netherlands is a party to both conventions, but the United States has only ratified the Geneva Convention.

The bone of contention in the ThuisKopie/Norma-Irda case pertained to article 32 of the Dutch Neighbouring Rights Act, which provides the criteria for protection of foreigners in the Netherlands. Criterion c here reads: ‘(if) his performance has been fixed on a phonogram protected by the Act’. According to article 32 section 2 a phonogram qualifies for protection *i.a.* if b) the phonogram was first fixed in the Netherlands or in a Rome or Geneva country. It was well-known in 1993 that the Dutch law would in some respects be more generous to right owners than the Rome and Geneva Conventions had prescribed, but *this* sloppily phrased criterion obviously went too far. Taken literally it would mean that US recorded musicians could claim a protection in the Netherlands they did not enjoy in their own country, which also would not reciprocate to Dutch performers. It was more or less on this last ground that in the two first instances of the ThuisKopie/Norma-Irda case the courts refused to subscribe to this literal interpretation of article 32 Neighbouring Rights Act. The Supreme Court however quashed those two decisions, because it felt compelled by the literal text of the law to do so.

The result is that many millions of dollars are waiting in the coffers of the Dutch neighbouring rights society ThuisKopie for American recorded musicians to claim, not only for the present year, but also for a back period of five years.