

This document should be interpreted and/or explained in accordance with Dutch law. In case of conflict, the Dutch version is leading.

FAQs on Intellectual Property Rights

Members of the EUR staff posed the questions given below to Professor Tobias Cohen Jehoram during the 'copyright lecture' on 22 April 2016. The questions and answers were initially adopted literally from the video recording made of this lecture, including a few personal adjustments to the text, and verified by Professor Tobias Cohen Jehoram. Despite the fact that the report was compiled with the utmost care, no rights may be derived from the text below. After a meeting with Fadjar Schouten (HR), Claudia Rutten (RSM), Melika Nariman (UL), Jerimi van Laar (ALA), Sadjie Theeuwes (ALA) and Denise Korthals Altes (ALA) on 4 July 2016, additions and adjustments were made to the document. The answers must explicitly be viewed in this connection. The Administrative & Legal Affairs Department (ALA) will be further elaborating certain points in this document in a follow-up to these FAQs.

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27. We may depart from Article 7 of the Copyright Act (Copyrights and Employment) in an agreement. Does this also apply to departures in agreements concluded with PhD students?

General

1. It is often difficult to determine the identity of the copyright owner. What should we do in such cases?

This mainly depends on the type of work involved. The best thing would be to apply to a collective administrative organisation. If it concerns an image, for example, you can apply to the Images Foundation for a patents licence. If it concerns a piece of music, you should apply to Bumra Stemra or Sena, and if it concerns a publication, you can usually apply to the publisher.

2. In which cases do we have to ask the author's permission?

In principle, you should always ask the author's permission unless an exception has been made within the meaning of the act. The author is entitled to compensation in many cases.

3. In respect of the exceptions specified in Article 15a of the Copyright Act (exceptions to copyright infringements), do we first have to obtain permission from the copyright owner?

No, you do not require permission in such cases. You can invoke the restriction, which is based on Article 15a of the Copyright Act, if you fulfil the requirements specified in this Article. These requirements do not include the author's consent.

Addition by Administrative & Legal Affairs

Article 15a reads as follows:

1. **No** infringement of copyright with respect to a work of art, literature or science exists if this concerns quotations from such works in announcements, assessments, polemics or scientific treatises or for any statement with a comparable objective, **provided that:**
 - the work quoted from has been legally published;
 - the quotation is in accordance with what is considered reasonably acceptable by society as a whole, and the number and length of the quotations are justified by the objective to be attained;
 - the works are quoted with due observance of Article 25;
 - the source, including the author's name, is clearly stated as far as reasonably possible.
2. Quotations as referred to in this Article shall also be taken to mean quotations in the shape of press reviews taken from articles published in daily or weekly newspapers or journals.
3. This Article also applies to quotations in a language other than the original.

The letters "No" in bold type above indicates the exceptions, while "provided that" refers to the conditions (requirements) to be fulfilled in order to avoid copyright infringement.

4. Can authors withdraw their permission for no apparent reason?

No, they cannot do that if a licence agreement has been concluded. A licence agreement cannot generally be unilaterally terminated for no apparent reason.

5. What happens to the copyright if someone gives verbal permission to use their work?

Permission is permission, no matter whether it is given verbally or in writing. In practice, however, it is better to obtain permission in writing because then you have proof in black and white. And lack of clarity is always to the user's disadvantage.

6. Does 'embedding' entail a copyright infringement?

No. 'Embedding' is permitted in the same way as 'hyperlinking' and 'deep linking' (*Administrative & Legal Affairs: in most cases*).

Addition by Administrative & Legal Affairs

As a result of the Britt Dekker ruling,¹ *hyperlinking may constitute an infringement of the holder's copyright under certain circumstances, i.e. a form of publication to which the copyright holder is exclusively entitled.*

However, as a result of the Britt Dekker ruling, the Supreme Court referred to the Court of Appeal for a preliminary ruling on certain questions concerning the interpretation of a European regulation, viz. Article 3 paragraph of the Copyright Directive. On 7 April 2016, the Advocate-General gave a recommendation on the matter. The European Court of Justice generally follows these recommendations. The Advocate-General was of the opinion that redirecting users to another website which is freely accessible to the public and where works protected by copyright are posted without the copyright owner's permission does not constitute an announcement to the public pursuant to Article 3 paragraph 1 of Directive 2001/29/EC. Pursuant to Article 3 paragraph 1 of this Directive, it is not relevant either whether the person redirecting users is aware or ought to be aware of the fact that the copyright owner has not given permission for this. Therefore, hyperlinks to such websites do not constitute announcements to the public and therefore **do not infringe** the copyright. After the European Court of Justice has given its ruling, the Dutch Supreme Court will adopt this preliminary ruling for its own judgment in the Netherlands. To be continued at the European Court of Justice and the Supreme Court.

This is *Stichting Pro's* position on hyperlinks:

In most cases, members of the public may freely use links on Blackboard free of charge if such links redirect to a file that has been legally published. When posting such links, people may add a brief description of what the link relates to if they wish, but this has to be in their own words. With respect to links redirecting to articles posted on a private weblog: people frequently publish work by third parties in an unlawful manner because private individuals are not always familiar with the Copyright Act. The only party legally entitled to publish a file on the Internet or to give permission to third parties to do so, is the copyright owner.

With respect to redirecting users **on Blackboard** to the UL database where the entire article can be found: redirecting users to an article is permitted provided that this article is accessible to students. This means that redirecting users to an article in e.g. one of the UL's databases is permitted, provided that the following conditions are fulfilled:

- students themselves are allowed to open this article;
- direct redirecting is permitted pursuant to the licence terms governing the UL's use of the database.

These licence terms for databases specify precisely what type of use is permitted. For example, you may not be allowed to post articles in the database on your electronic

¹ Supreme Court, 3 April 2015, ECLI:NL:HR:2015:841 (Provincial Executive, Media/Sanoma c.s.). According to Sanoma, the hyperlink to the website on which Britt's photos were posted is a publication protected by copyright. The District Court was also of this opinion, but the Court of Appeal disagreed. The Supreme Court quashed the Court of Appeal's ruling.

environment free of charge. Please make sure you read the licence terms very carefully in this connection.

Recommendation from Administrative & Legal Affairs: please contact us if you are in any doubt.

7. Can scholars personally sign an agreement with a publisher?

No, scholars are not (usually) authorised to sign pursuant to the EUR Administration & Management Regulations (hereafter: 'BBR-EUR') and the General Administrative Law Act (hereafter: 'Awb').²

8. Are authors who sign a standard contract with a publisher allowed to copy their own work without any restrictions?

No, they are not allowed to do this. This matter is part of the standard contract. Standard contracts are concluded between authors and publishers and are formed in consultation between copyright owners and users. Authors who create their copyrights do not transfer this copyright to the publisher, but they do grant them an exclusive patents licence. This means that the author himself is not authorised to issue any additional licences without his publisher's consent.

Addition by Administrative & Legal Affairs

With respect to concluding a contract with a publisher, we refer you to this special UL/EUR website:

http://www.eur.nl/ub/nl/informatiepunt_auteursrecht/veelgestelde_vragen/uitgever_en_auteursrecht/

9. Is there a copyright attached to annotations to court rulings?

Yes, annotations to court rulings and the relevant summaries are copyrighted. However, no copyright attaches to the court ruling itself.

Administrative & Legal Affairs: court rulings relating to Intellectual Property Rights, including copyrights, can be found on various sites including Uitspraken.nl³.

10. Are there any fixed sums that can be claimed if a copyright is infringed?

No. With respect to (unauthorised) use of photos, there are certain guidelines maintained by copyright owners and/or their representatives as a basis for claiming compensation, either for damages or otherwise. These claims are not always allowed in legal practice.

Addition by Administrative & Legal Affairs

² For more information, please go to http://www.eur.nl/ub/nl/informatiepunt_auteursrecht/

³ <http://www.uitspraken.nl/rechtsgebied/civil-recht/intellectueel-eigendomsrecht>

Administrative & Legal Affairs has devised a step-by-step plan and a standard letter containing a lump sum, which we will be posting on the Administrative & Legal Affairs website.⁴

11. Can clients ask authors to relinquish their personality rights in full?

No, personality rights⁵ can only be relinquished in part. For example, a person may relinquish their right to lodge objections to amendments. They may not relinquish their right to lodge objections to defacement.

Use of images and videos

12. Google makes copies of images and has its own database. Is this legal?

This question mainly refers to ‘thumbnails’ (small images with fewer pixels). Google bases its use of thumbnails on the right to quote as specified in Article 15a of the Copyright Act. Google also quotes the source, thereby fulfilling the other requirements contained in Article 15a of the Copyright Act as far as practically possible. So yes, this is allowed. For Article 15a of the Copyright Act, see also question 3.

13. Are we allowed to use photos posted on Twitter where no clear source is quoted?

That depends on whether you are linking or copying the photo. You are allowed to embed photos and to use deep links and hyperlinks, but you are not allowed to copy such photos.

Addition by Administrative & Legal Affairs:

Here is a brief explanation of the terms used:

Hyperlink: this is a link on a web page that redirects users to a different document or web page. This generally concerns texts, but images may also be used as hyperlinks. If you create a hyperlink to a page on a website which is not its home page, this is known as ‘deep linking’.

Deep links: these are links from other sites that immediately redirect users to a sub-page on a website instead of its home page.

Embedding: incorporating something from another website or application, generally a photo or video, into your own site or your own application. Embedding literally means enclosing or encasing.

For more information on hyperlinks, embedding, etc., see also the answer to **question 6**.

⁴ The website will be reproduced here after the documents have been posted on it.

⁵ Addition by Administrative & Legal Affairs: What these rights actually mean is that the author of the work may lodge an objection if his work is e.g. published under a name other than his own. Authors may also take action if their works are defaced or damaged by third parties. Examples of defacement or damage include a thick red line drawn across a painting, or a sculpture chopped into two halves without first asking the author’s permission. Moreover, authors may lodge an objection to other alterations made to their works, but only on condition that their objections are in accordance with standards of reasonableness.

14. If, on enrolment for the Erasmus Charity Run, it emerges from the text that the photos taken during this event will be used, does this mean we actually can use these photos?

Yes. If you enrol for this type of event, this means you agree to the conditions which include publication of the photos. So permission has been given to use the photos.

Addition by Administrative & Legal Affairs

However, these photos must be used in connection with the event itself, not for any other purposes.

15. If alumni are visiting the university, can we post the photos of these alumni at the get-together on the EUR website?

Portrait rights are assessed on the basis of the interests of the person or persons depicted. These may be commercial interests⁶ but they may also be privacy-related interests. If the photo(s) are used for advertising purposes, this will damage these persons' commercial interests. If embarrassing photos of participants are taken in a clandestine manner and subsequently published, this will damage their privacy-related interests. So we advise you to: (i) announce that photos will be taken and posted, (ii) make sure you do this in such a way as to be clearly visible to the person(s) depicted, (iii) refrain from using the photos for advertising purposes, (iv) refrain from posting any embarrassing photos.

16. Can we use a photo we have purchased on more than one occasion?

That depends on what is meant by "purchased". If the word "purchased" means that a person is in possession of a 'stock photo'⁷ and has paid for a licence for this photo, of course he is allowed to use it. Please note, however, that with respect to use of this photo, clear agreements should be made when purchasing the licence. A lack of clarity is to the user's disadvantage because the Court gives a limited interpretation of such licences in order to protect authors. Therefore, clear agreements are extremely important in such cases.

If you buy a 'physical photo' (a print), you may not reuse it, as this would entail publication and/or reproduction and you can only do this if you have bought a licence. You have merely obtained a copy of the photo which is intended for your own use. If the photo is sold, however, it may be used *for illustration purposes* pursuant to Article 23 of the Copyright Act.

Addition by Administrative & Legal Affairs

⁶ As a result of their profession, certain persons are so well known or famous that a photo of them is worth a considerable sum of money. This phenomenon is known as 'cashable popularity'. If everyone were able to publish photos of these famous people without paying them compensation, nobody would pay them for their photos any more. This means that it is prejudicial to their commercial interests. For this reason, famous people can often invoke their commercial interests in connection with portrait rights.

⁷ A stock photo is a photo purchased by a photographer through a stock photo agency. This photo is not exclusive and may be purchased by more than one party. If you purchase a stock photo, you may use it under certain conditions. These conditions depend on the intended use, and vary from one agency to another.

Article 23 of the Copyright Act runs as follows:

Unless otherwise agreed, the owner, possessor or holder of a drawing, painting, structure, sculpture or a work of applied art is entitled to reproduce or publish this work, insofar as this is necessary for public exhibition or public sale of this work, to the exclusion of any other commercial use.

17. Can we re-post photos of articles (this refers to ‘work’) on social media or Twitter?

No, because you would be reproducing and publishing the relevant photo. However, you are allowed to embed the photo and to use deep links and hyperlinks.

Addition by Administrative & Legal Affairs

For more information on hyperlinks, see the answer to question 6.

Art

18. Is the owner of a work of art allowed to have the work deleted?

Yes. Total or partial deletion or destruction is not regarded as “defacement” within the meaning of the Copyright Act. In addition, the right of ownership is the most comprehensive right in existence under the law. You could, however, contact the artist out of politeness and offer to return the work of art to him.

19. If a photo is taken of somebody and a work of art is visible on this photo, can we post this photo online? What about copyright?

Copyrights likewise apply to this type of art work. Posting them online means you are publishing them, and that is prohibited unless you have permission to do so. “Incidental processing” (see Article 18a of the Copyright Act) is an exception to this rule. Incidental processing means that the art work is located in a public place and does not constitute a significant part of the photo. By that we mean that there is no emphasis on the art work in the photo, and it does not serve any purpose in it.

20. What about voice recordings in cases where an external actor is engaged to record a number of phrases for a video? Or in other words, are voice recordings copyrighted?

Voices *as such* are not subject to copyright. However, pronouncement or reading of a copyrighted work may be protected. Pronouncement of a copyrighted work means you are performing this work, and in that case, the performer has a neighbouring right.⁸

Education and academic research

⁸ Protection is similar to copyright, which is why it is called a “neighbouring” right. In the same way as for copyrights, no formalities are required in order to obtain neighbouring rights. Neighbouring rights are internationally recorded in the 1961 Rome Convention. In the Netherlands, the rights of performing artists, producers of sound recordings, broadcasting companies and film producers are provided for in the 1993 Neighbouring Rights Act.

21. Can we use a photo published in a newspaper for educational purposes?

Yes, you can do this on the basis of the educational exception in Article 16 of the Copyright Act, provided that you use it to illustrate (non-commercial) education. In addition, you must observe the conditions arising from paragraph 1 of this Article 16. These conditions are as follows:

- the work reproduced must have been legally published. This means that the relevant photo must already have been made public in a legal sense;
- reproduction must be in accordance with what is reasonably acceptable socially;
- personality rights must be respected;
- the source must be quoted as far as possible;
- equitable remuneration, e.g. through collective administrative organisations.

22. With respect to commercial education (all legal entities under EUR Holding BV), does the educational exception in Article 16 of the Copyright Act apply here as well?

No. Article 16 of the Copyright Act does not apply to commercial education.

Addition by Administrative & Legal Affairs

Other regulations apply to commercial education due to its own corporate personality, and no authority relationship with EUR exists.

23. Is it possible to make agreements with students or new staff at EUR on their portrait rights?

Yes, it is possible - and also sensible - to lay down certain regulations in writing. For example, we can record that people may be photographed or filmed during lectures in EUR's internal regulations. We should also provide students with the opportunity to lodge objections in these same internal regulations so that they are guaranteed a place 'out of sight'. And we must inform students of the fact that if they have any questions, they can always come to us.

24. Can a lecturer refuse to be filmed on the basis of portrait rights?

No, lecturers cannot refuse on the basis of portrait rights. Lecturers who are filmed do have portrait rights, but they cannot invoke them because there is no question of any commercial interests or privacy-related interests. Giving lectures comes under performance, which is subject to neighbouring rights. Pursuant to these neighbouring rights, lecturers may object to being filmed depending on the agreements made at EUR in this respect. If it is customary at a university for students to film lecturers and if the lecturers are aware of this, they are considered to have given implicit permission to be filmed. We advise that this be included in EUR's internal regulations as well. Proposed text: "*Lecturers may not be filmed unless they explicitly consent or have consented to this*".

Addition by Administrative & Legal Affairs

There are a number of factors and/or situations involved with respect to filming lecturers and/or lectures: (i) who is filming the lecturer, (ii) and for what purpose.

Re (i), if a *student* wishes to film a lecturer, he must obtain permission from the relevant lecturer in each individual case. This is because lectures are works protected by copyright. The lecturer in question may decide whether or not he wishes his lecture to be filmed; this also applies to sound recordings. Students must always obtain permission from lecturers before filming or recording their lectures. If a lecturer consents to the filming of a lecture, this video may only be used personally by the relevant student. Distribution of the video is not permitted. Students may not film their fellow students during the recording of lectures pursuant to privacy legislation.⁹

If a member of the EUR staff makes a video on behalf of EUR, this will be assessed on a case-by-case basis. And this brings us to the purpose of making such videos.

Re (ii), a non-exhaustive summary of situations in which lecturers can be filmed is given below:

- a. In cases where this is EUR policy, as explained in the answer to question 25; in such cases, the situations given below are also part of lecturers' normal duties.
- b. MOOCs: an MOOC may be regarded as a video or film within the meaning of Article 45a of the Copyright Act. The 'lecturer appearing' may be deemed to be the 'performing artist' within the meaning of the Neighbouring Rights Act. Normally speaking, persons with neighbouring rights are entitled to lodge an objection to infringements of their rights, but if a lecturer is collaborating in an MOOC, he is considered to have consented to being filmed.

In addition, we have Article 3 of the Neighbouring Rights Act (WNR), which states:

"Employers are authorised to exploit performing artists' rights as referred to in Article 2, insofar as this has been agreed between the Parties or is a consequence of the **nature of the employment contract concluded between the Parties**, or of customary practice or of the requirements of reasonableness and fairness. Unless otherwise agreed, or unless provided otherwise by the nature of the agreement, customary practice or requirements of reasonableness and fairness, the relevant employer is obliged to pay a reasonable fee to the performing artist or his successor in title for each form of exploitation of the latter's rights. The employer must respect the performing artist's rights as referred to in Article 5." MOOCs are generally free of charge, so there is no question of any 'reasonable fee'.

- c. Promotion: if lecturers are filmed for promotion purposes, e.g. to recruit students for an interesting master programme, they usually cooperate voluntarily in this and no permission is required.

⁹ Article 9.7 Copyright of the Students Article.

25. Can the university adopt a policy - in connection with employer-employee relations - to the effect that all lectures will be recorded on video as well as audio?

Yes. After all, recording lectures *may* count as the normal performance of lecturers' duties. There is still no specific policy on this point in force at EUR at present. On the basis of Article 1.20 paragraph 2 of the CAO NU (Netherlands Universities Collective Labour Agreement), EUR - as an employer - is nevertheless entitled to draw up further regulations on patent rights and copyright. If EUR should decide to draw up policy regulations in the future, the University Council Staff Delegation¹⁰ will have to consent to this because such regulations will affect the legal status of EUR staff. Moreover, consultations with the Local Consultative Body (EUROPA: Erasmus University Rotterdam Consultative Body for Staff Affairs) should result in consensus on the policy to be drawn up.

26. What is the situation with respect to an educational organisation's copyrights as the author of works, in connection with employer-employee relations?

If a person is employed by EUR (Legal & Administrative Affairs: holds an appointment at EUR), the copyrights are vested in EUR pursuant to Article 7 of the Copyright Act. However, we may depart from this Article in an agreement. The copyrights may relate to work such as examinations, readers, etc (tuition materials).

Addition by Administrative & Legal Affairs

The text of Article 7 of the Copyright Act runs as follows:

If the work performed in the employ of another party consists of the production of certain works of literature, science or art, the Party in whose employ such works are produced shall be deemed to be the author of such works, unless the Parties have agreed otherwise.

27. We may depart from Article 7 of the Copyright Act (Copyrights and Employment) in an agreement. Does this also apply to departures in agreements concluded with PhD students?

Yes, it does, provided that both parties approve it by agreement.

Addition by Administrative & Legal Affairs

PhD students who hold an appointment at EUR come within the scope of Article 7 of the Copyright Act. The copyright to these PhD students' work is vested in EUR, although we may depart from this under the law.

With respect to external PhD students, i.e. those who do not hold an appointment at EUR, the rule is that the work they produce is not in any way related to work that employees

¹⁰The staff delegation is the section of the University Council that consists of staff members elected by other staff members. Pursuant to Article 9.36 of the Higher Education and Research Act (WHW), the University Council Staff Delegation is authorised to give its consent on certain matters in the general interests of the university staff's special legal status. In view of Article 9.33a paragraph 2 sub a of the WHW, the University Council Students' Delegation does not play a role in this, either advisory or otherwise.

normally have to carry out. In such cases, the copyright is not vested in EUR as the employer, but is retained by the 'real' author. Therefore, the work not only has to be produced *during* employment but also *pursuant to it* in order to come within the scope of Article 7 of the Copyright Act.¹¹

¹¹ For more information, please go to <http://www.auteursrecht.nl/auteursrecht/De-maker>.