

# Not all alterations of architectural works result in infringements of moral rights

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## Introduction

On 29 March 2019 the Supreme Court ruled on an architect's moral rights of paternity and integrity. (1)

In the Netherlands, moral rights are protected under Article 25 of the Copyright Act. Article 25(1) of the act states as follows:

*Even after assignment of his copyright, the maker of a work has the following rights:*

- a. the right to oppose the making public of the work without mention of his name or other indication as maker, unless such opposition would be unreasonable;*
- b. the right to oppose the making public of the work under a name other than his own, as well as any alteration in the name of the work or the indication of the maker, in so far as these appear on or in the work or have been made public in connection with the work;*
- c. the right to oppose any other alteration made to the work, unless the nature of the alteration is such that opposition would be unreasonable;*
- d. the right to oppose any distortion, mutilation or other impairment of the work that could be prejudicial to the reputation or name of the maker or to his dignity as maker.*

The underlying matter in the case at hand concerned an author's right of integrity as mentioned in Articles 25(1)(c) and (d) of the act. As there has been little Supreme Court case law on this right to date, this decision was long awaited.

## Facts

The architect was involved in the development of a building called "*De Vier Jaargetijden*" (ie, The Four Seasons) in the village of Edam in 1973. At that time, an initial group of buildings already existed at the location of the development. However, the architect was commissioned to develop an additional building in order to make the group of buildings a suitable office location. This development was finished in 1978.

In 2015, after the office building had been unoccupied for several years, a real estate developer bought the building and decided to convert it into eight apartments. This conversion required architectural changes, including to the northern and southern sides of the building. The architect objected to the intended changes on the basis of his moral rights. He initially lodged these objections during the administrative procedure through which the building permit had been requested. However, he was unsuccessful and the building permit was granted. The architect subsequently initiated summary proceedings before the Noord-Holland District Court, claiming a breach of Articles 25(1)(c) and (d) of the Copyright Act on the following grounds:

- The intended amendments to the northern side of the building were alterations which he could oppose.

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- The intended amendments to the southern side of the building would impair the architectural work, which gave him sufficient reason to oppose the changes.

### **Lower court decisions**

On 30 November 2016 the Noord-Holland District Court rejected the architect's claims.<sup>(2)</sup> On 31 October 2017 the Amsterdam Appeal Court confirmed this decision.<sup>(3)</sup> The fact that the building qualified as a copyrighted work under Article 10(1)(6) of the Copyright Act was not disputed. However, even though the courts held that the northern and southern sides of the building had been altered and impaired, respectively, within the meaning of Articles 25(1)(c) and (d) of the Copyright Act, the architect's claim of infringement of his moral rights was still unsuccessful. Referring to the nature of the alteration, the courts held that:

- the architect's opposition to the alteration was unreasonable; and
- the impairment would not damage his reputation or name or his dignity as the maker.

### **Supreme Court decision**

The Supreme Court concluded that the abovementioned decisions were correct and well substantiated. The court – and the advocate general in his opinion on this case – referred to the historical background of the moral rights provided for in the Copyright Act. In particular, the court noted that the wording of Article 25 of the Copyright Act was largely influenced by changes to Article 6*bis*(1) of the Berne Convention, which in 1948 stipulated as follows:

*Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right... to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.*

The wording of Articles 25(1)(c) and (d) of the Copyright Act is somewhat surprising because the 'modification' mentioned in Article 6*bis* of the Berne Convention was included in Article 25(1)(c), while all other impairments were set out in Article 25(1)(d). Thus, the Dutch legislature made a distinction which does not exist in the Berne Convention. Under Dutch law, these two provisions assume a different level of impairment or damage to the moral interests of an author. This results in a system where only impairments that may affect an author's reputation or name are governed by Article 25(1)(d) of the Copyright Act, while impairments that will not damage an author's reputation or name and alterations to a work that do not qualify as impairments are governed by Article 25(1)(c).

The Supreme Court has confirmed that for a claim to succeed on the basis of Article 25(1)(d), it is insufficient to prove that there is a distortion, mutilation or other impairment of the work. The claimant must separately prove that the distortion, mutilation or other impairment is of such a nature that their reputation or name will be damaged. The Supreme Court reiterated that this corresponds with the interpretation of Article 6*bis*(1) Berne Convention as set out in the laws of other countries.

### ***Evidence of prejudice to author's reputation or name***

The next step for the court was to establish under what circumstances an author's reputation or name may be prejudiced. In this regard, public perception is decisive; therefore, only circumstances that can influence public perception are relevant (and not, for example, merely the personal opinion of the author). According to the Supreme Court, the circumstances to be considered include:

- the nature and gravity of the impairment;
- the extent to which the (architectural) work and the author are known to the public;
- the reason for the impairment;
- the visibility of the impairment for the public; and
- the timeframe between the impairment and the author's completion of the work.

Finally, once it has been established that there has been a distortion, mutilation or other impairment and that the author's reputation or name may be prejudiced, there is no room for an additional balancing of interests.

### ***Alteration without prejudice to author's reputation or name***

As mentioned above, if an author is unable to show that their reputation or name may be prejudiced or that the alteration is not an impairment within the meaning of Article 25(1)(d) of the Copyright Act, they can still rely on Article 25(1)(c). However, in such situations, the author's opposition must not be unreasonable.

The Supreme Court clarified that the reason for an alteration is an important circumstance to be

considered in this regard. In a situation like that in the present case (ie, where the alteration was necessary to enable a change in the building's function), it is less likely that an opposition will be considered reasonable than in a situation where a work's function remains the same.

In the case at hand, the lower courts found it essential that the changes to the original design were relatively minimal and had been made solely to enable a change in the building's function. For this reason, the court concluded that:

- the impairment would not damage the architect's reputation; and
- the architect's opposition was unreasonable.

As such, the Supreme Court confirmed that the lower courts' decisions had been sufficiently substantiated.

### **Comment**

In recent years, several Dutch judgments have considered whether architects can oppose changes to their original building designs. In general, the outcome of such disputes was difficult to predict. It is helpful that the Supreme Court has now provided some guidance on the relevant circumstances that must be taken into consideration in this regard. As regards alterations of architectural works specifically, the court's decision further clarifies that it is difficult for architects to oppose changes where they are necessary to alter a building's function.

*For further information on this topic please contact [Roderick Chalmers Hoyneck van Papendrecht](#) at AKD by telephone (+31 88 253 5000) or email ([rchalmers@akd.nl](mailto:rchalmers@akd.nl)). The AKD website can be accessed at [www.akd.nl](http://www.akd.nl).*

### **Endnotes**

(1) ECLI:NL:HR:2019:451.

(2) ECLI:NL:RBNHO:2016:9878.

(3) ECLI:NL:GHAMS:2017:4431.

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