

FACTSHEET

Copyright in software

Copyright in software: protection, ownership, and contractual risks

Software is one of the most valuable digital assets many organisations hold. Yet the legal protection surrounding it remains surprisingly unclear. Who owns the copyright in the source code your development team has written? What happens when you bring in an external agency? And what do your supplier's general terms and conditions actually say?

Copyright in software has been harmonised across the European Union through the Software Directive (Directive 2009/24/EC) and implemented in the Netherlands through the Copyright Act (Auteurswet, Aw). The law answers many questions, but in practice those answers often catch parties off guard. And the law does not stand still: recent rulings from the Court of Justice of the EU are reopening debates on long-established principles.

Protection

Ownership

Contractual risks

This factsheet covers:

- When software qualifies for copyright protection
- Who holds the rights in different situations
- What is and is not protected
- Which contractual risks arise and how to avoid them

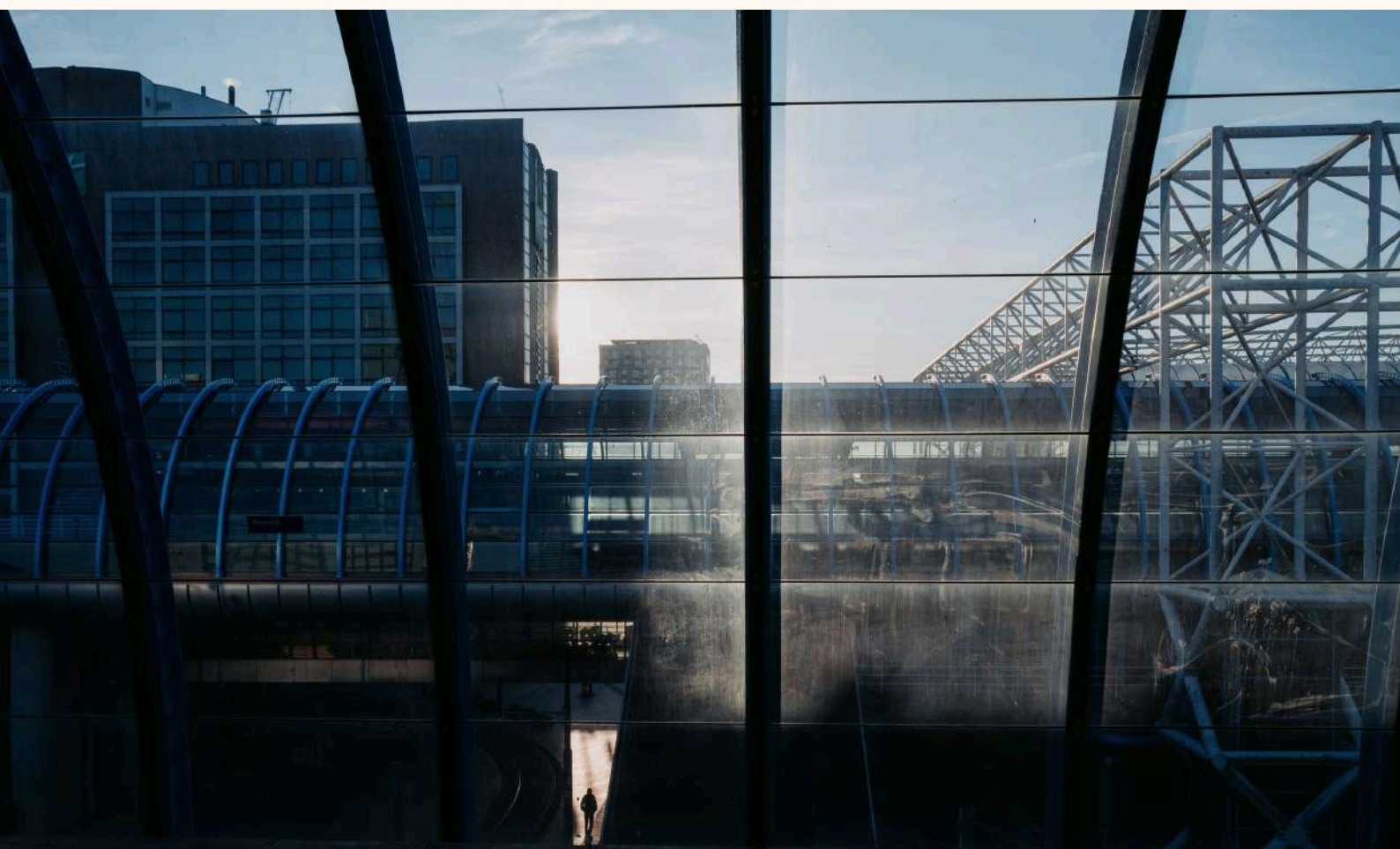


When is software protected?

Copyright arises automatically, without registration or any other formality, at the moment a work is created. The same applies to software. To qualify for protection under the Copyright Act and the Software Directive, software must meet three cumulative requirements:

Requirement	Explanation
Original character	The software is not derived from someone else's work. Coincidental similarities are permitted; deliberate copying is not.
Personal stamp of the author	The software is the result of creative human effort, involving personal choices by the developer. Code that is purely dictated by technical necessity falls outside the scope of protection.
Perceptibility	The software must be perceptible. In practice, this requirement is almost always met.

The threshold for protection is low in practice. Settled case law from the Court of Justice of the EU and the Dutch Supreme Court (Hoge Raad) confirms that protection arises readily, provided the developer had some creative freedom when writing the code. Think of the way the code is structured, the architecture chosen, or the approach taken to solving a problem.



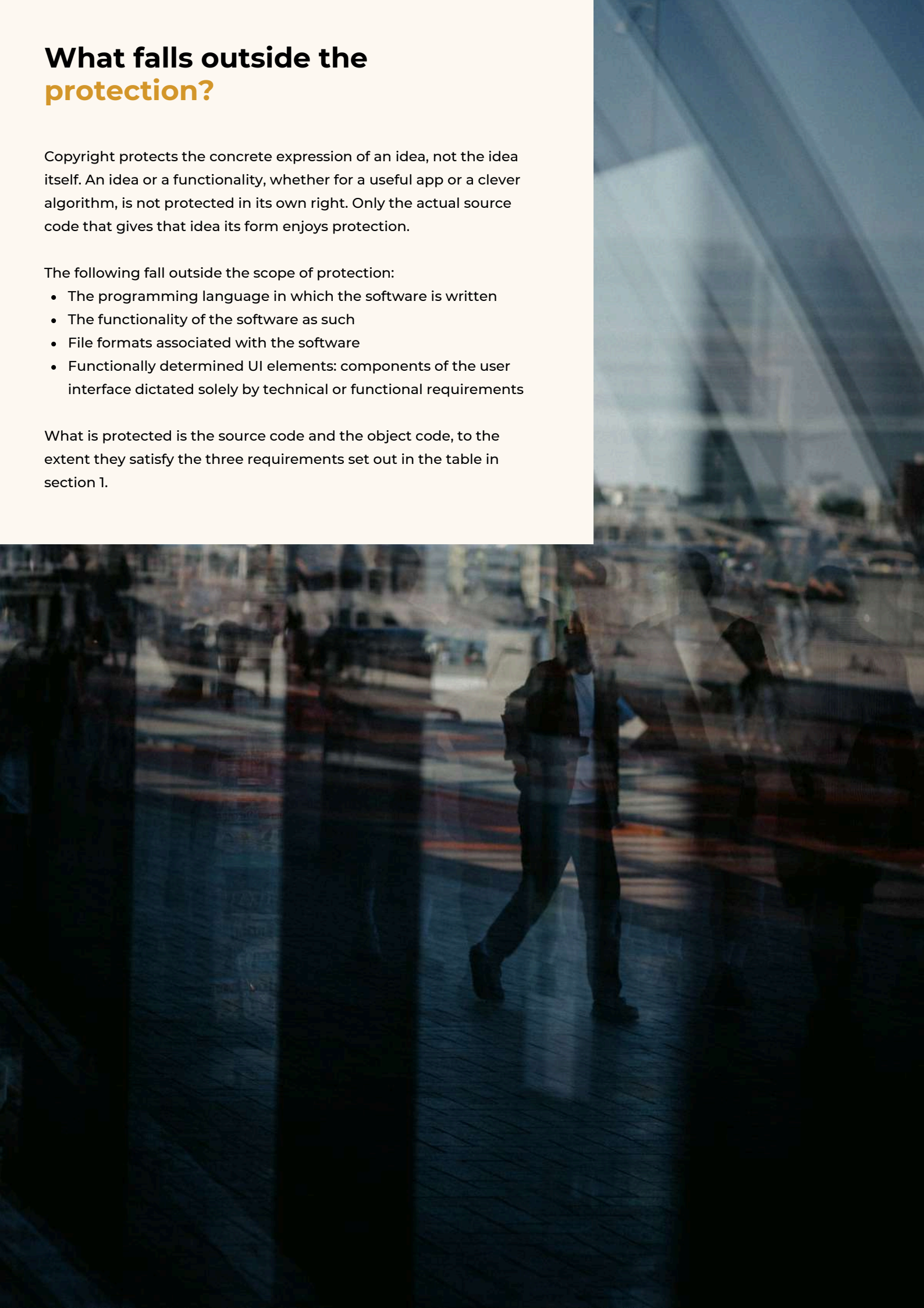
What falls outside the protection?

Copyright protects the concrete expression of an idea, not the idea itself. An idea or a functionality, whether for a useful app or a clever algorithm, is not protected in its own right. Only the actual source code that gives that idea its form enjoys protection.

The following fall outside the scope of protection:

- The programming language in which the software is written
- The functionality of the software as such
- File formats associated with the software
- Functionally determined UI elements: components of the user interface dictated solely by technical or functional requirements

What is protected is the source code and the object code, to the extent they satisfy the three requirements set out in the table in section 1.



Who holds the rights?

The general rule under Article 1 of the Copyright Act is straightforward: copyright belongs to the author, the person who made the creative choices and left their personal mark on the work. In practice, however, developers rarely work alone. Where multiple authors are involved, the law draws a distinction:



Situation	Rule
Composite work	The contributions can be distinguished separately. Each author holds copyright in their own contribution and may enforce it independently.
Joint copyright	The contributions are inextricably intertwined. All authors hold copyright jointly and must each give consent for exploitation (Article 26 Aw).

There are three important exceptions to the general rule.

Exception 1 – Employer's copyright (Article 7 Aw)

Where an employee creates software in the course of their employment, the employer is deemed to be the author and acquires the copyright. Two conditions must be met:

1. There is an employment contract in place (a relationship of authority, remuneration, and continuity).
2. Creating the software falls within the employee's job description.

In practice, a number of borderline cases arise:

- Software created outside working hours: this may still fall under the employer's copyright if it falls within the job description.
- Interns: in principle, the employer's copyright rule does not apply.
- Freelancers and self-employed individuals: the employer's copyright rule does not generally apply, but the line between an employment contract and a services agreement is not always clear. Whether an employment relationship

exists depends not only on what is set out on paper, but also on how the working arrangement looks in practice. The Dutch Supreme Court confirmed this in the Deliveroo judgment (HR 24 March 2023, ECLI:NL:HR:2023:443).

Recent development – ONB judgment (CJEU 6 March 2025, ECLI:EU:2025:141)

The Court of Justice of the EU has recently questioned statutory arrangements that transfer copyright without consent. In the ONB case, the Court held that a Belgian Royal Decree requiring the mandatory transfer of neighbouring rights from musicians was incompatible with EU law. Although the case concerned neighbouring rights, Dutch lawyers are now asking whether the employer's copyright rule can withstand scrutiny in light of this judgment. For the time being, the Dutch system appears to hold, thanks to the "unless" clause in Article 7 Aw, but developments in this area are worth monitoring.

[1] <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2023:443>

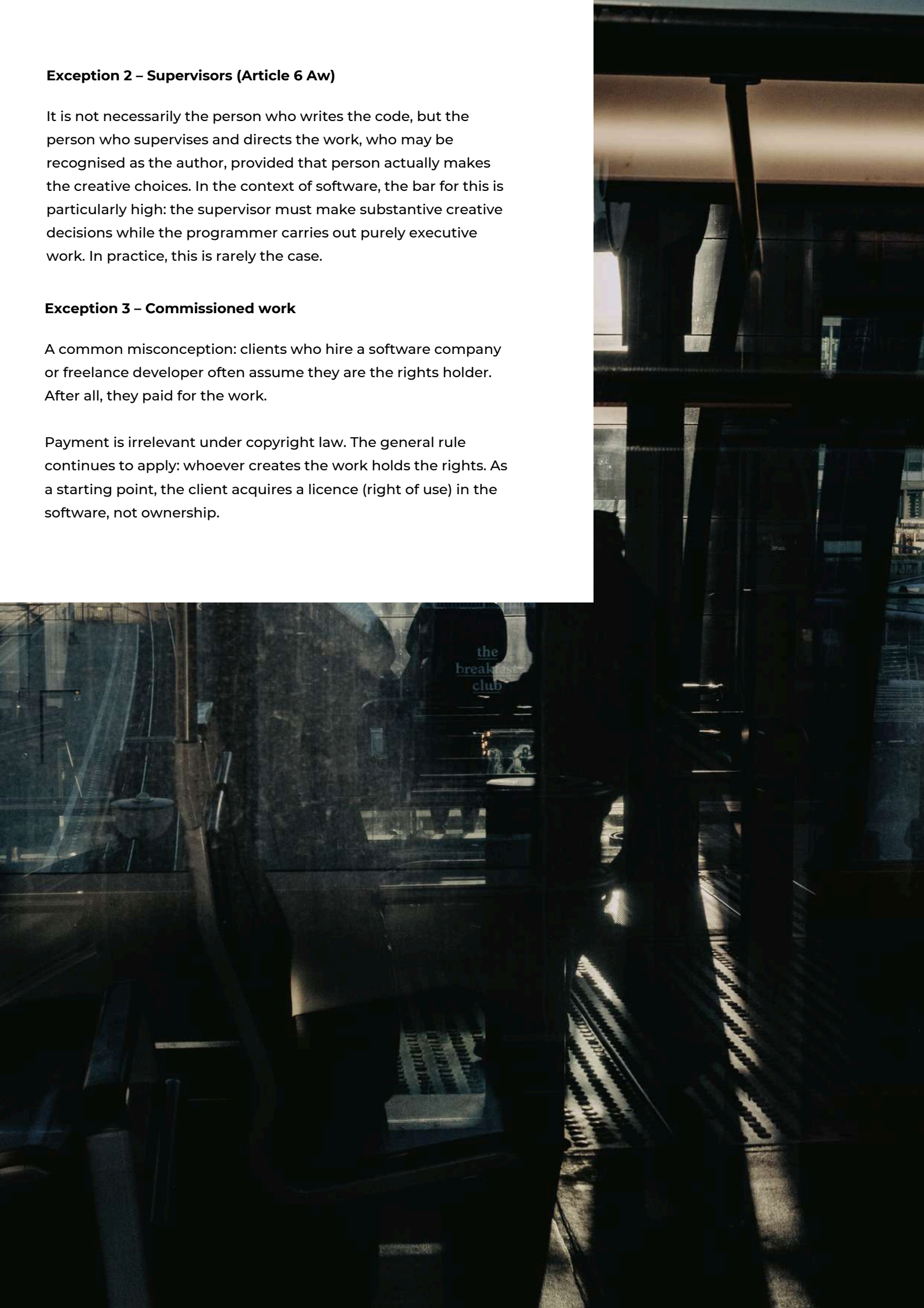
Exception 2 – Supervisors (Article 6 Aw)

It is not necessarily the person who writes the code, but the person who supervises and directs the work, who may be recognised as the author, provided that person actually makes the creative choices. In the context of software, the bar for this is particularly high: the supervisor must make substantive creative decisions while the programmer carries out purely executive work. In practice, this is rarely the case.

Exception 3 – Commissioned work

A common misconception: clients who hire a software company or freelance developer often assume they are the rights holder. After all, they paid for the work.

Payment is irrelevant under copyright law. The general rule continues to apply: whoever creates the work holds the rights. As a starting point, the client acquires a licence (right of use) in the software, not ownership.



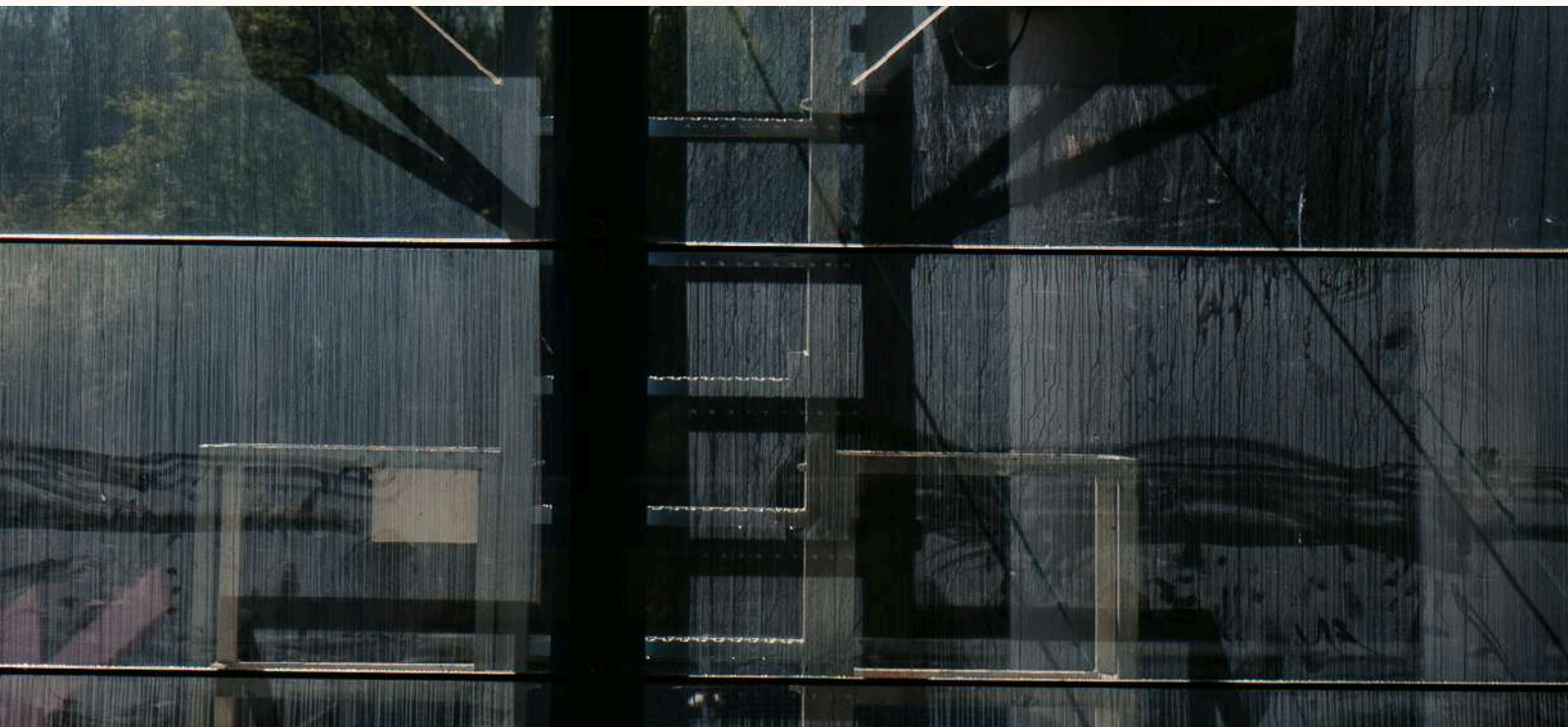
Licence or assignment?

The distinction between a licence and a full assignment of copyright is crucial in practice, and lies at the heart of many disputes between clients and software suppliers. Under a software licence agreement, the rights holder grants permission to use the software on certain conditions, without transferring the copyright itself. A licence can be broad or narrow: it determines, for example, whether the software may be modified, further developed, or made available to third parties. Drafting a balanced software licence therefore requires careful attention to the scope of the right of use.

	Licence (right of use)	Assignment of copyright
What is it?	Permission to use the software under certain conditions	Full transfer of copyright to another party
Written deed required?	Only for an exclusive licence (Article 2(2) Aw)	Yes, always (Article 2(2) Aw)
Author retains rights?	Yes	No
Maintenance/further development by a third party?	Requires separate permission, unless contractually arranged	Permitted, unless contractually restricted

Software developers typically work with reusable building blocks: libraries, standard modules, and architectural patterns they deploy across different projects. A full assignment can restrict their ability to use their own codebase. A licence agreement offers a workable solution: the client gets what they need to exploit the software, while the developer remains free to continue using their building blocks.

Partial assignment is perfectly possible: elements developed specifically and exclusively for the client are well suited to being transferred separately. This does require the split to be expressly recorded in the contract and clearly separable from the rest of the code.



Contractual risks

by situation

Ownership of software rights is far from self-evident. That applies to employers who assume all code written by their staff belongs to them, to clients who believe payment equals ownership, and to developers who unintentionally give up their own building blocks. The table below sets out the most common situations, the associated risks, and the recommended steps.

Situation	Risk without a proper contractual arrangement	Recommended measure
Employer	Uncertainty over whether a particular piece of software falls within the employee's job description	Include an explicit IP clause in the employment contract; use a separate deed of assignment where necessary
Client	Supplier retains copyright; client holds only a limited right of use	Record assignment or a broad licence contractually, including the right to have maintenance carried out by a third party
Developer / supplier	Unintended transfer of generic building blocks or reusable modules	Draw a clear contractual distinction between generic components and bespoke elements
Employee / freelancer	Software created outside working hours may still belong to the employer	Record this contractually before the employment begins; use a separate deed where there is any doubt

Please note:

an assignment of copyright is only legally valid if it is recorded in writing in a signed deed that sets out the assignment explicitly and unambiguously (Article 2(2) Aw). A verbal agreement or an email is not sufficient. The same applies to an exclusive licence.

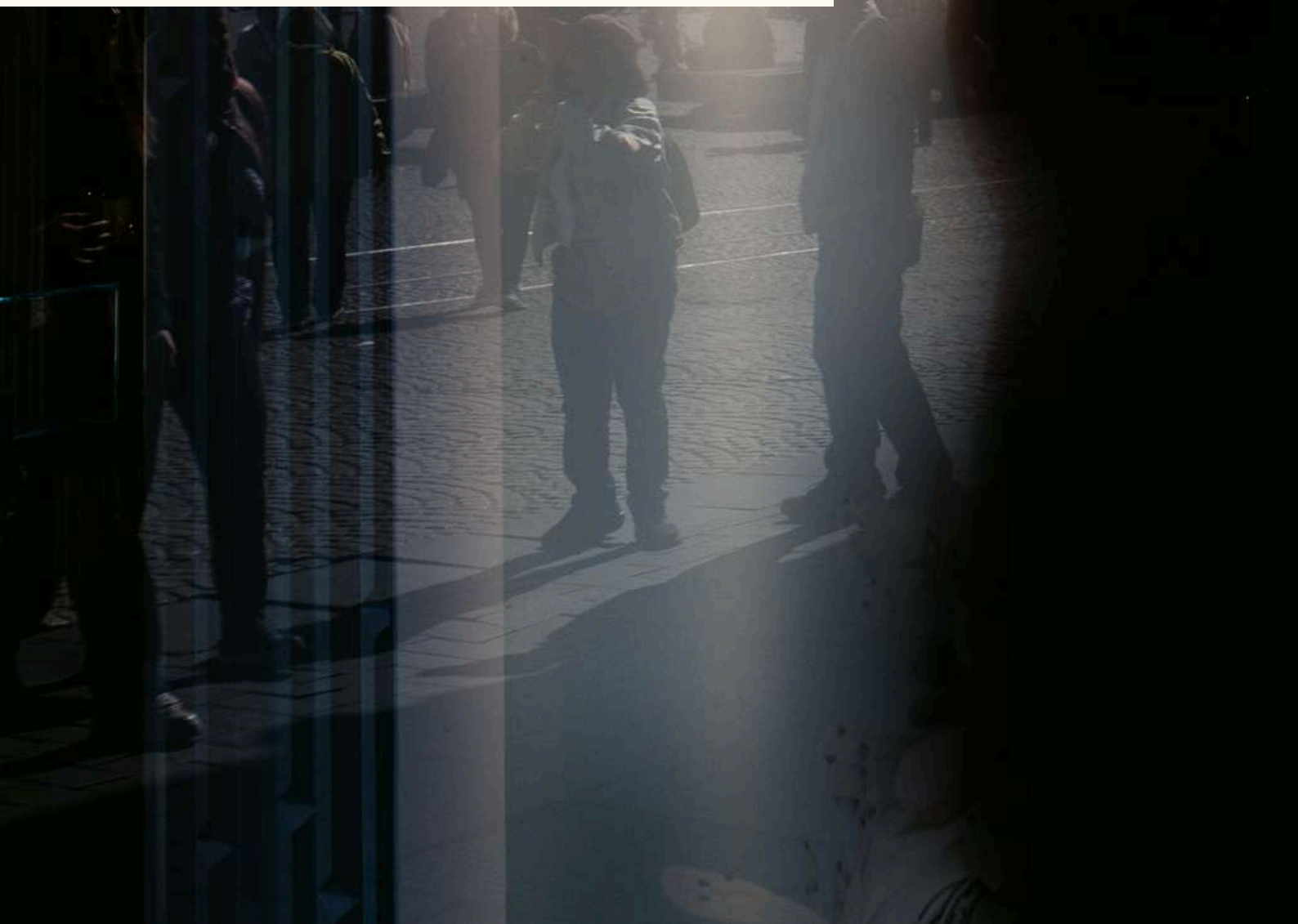


How can ICTRecht help?

Copyright in software may look straightforward at first glance, but in practice it involves countless grey areas, open-ended standards, and shifting case law. A wrong assumption about who holds the rights can have far-reaching consequences: for the exploitation of software, during an acquisition or investment round, or in a dispute with a supplier or former employee.

We advise organisations at the intersection of intellectual property and digital technology. Our services include:

- IP inventory and quick scan: a clear picture of your organisation's IP position, including risks and recommendations
- IP Proof: a comprehensive assessment of your digital IP portfolio
- Contract advice: drafting and reviewing development agreements, licences, and assignment agreements
- IP clauses in employment and services agreements
- Assessment of legal position and demand letter procedures in disputes over software ownership



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