

DUTCH ANTI-PIRACY FOUNDATION WALKS THE PLANK

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Piracy has been about for hundreds of years and has kept up with time. Instead of being (solely) active on the high seas, it now targets copyrighted material available on the Internet.

The most popular method of digital piracy worldwide involves the use of so-called 'torrents'. A large file, for example an illegally copied movie, is cut into thousands of small parts. The torrent is a small file containing metadata of the larger file, and how it has been cut. A special program ('a client') reads the torrent file, and downloads all the small parts through the Internet from users all around the world ('peers').

Once a small part is downloaded, it is also being sent (uploaded) to other users who request it. When all the small parts are downloaded, the main file is complete and the movie can be watched. Thus, all a user needs in order to download (copyrighted) material is a torrent. Torrents can be downloaded, for free, from many 'indexing' websites, the most notorious of which is called The Pirate Bay (TPB).

In a case between Ziggo & XS4All v BREIN, the Court of Appeal of The Hague was faced with the question of whether to limit services that provided access to TPB.

BREIN is a Dutch anti-piracy foundation of authors, artists, publishers, producers and distributors of music, films, games, interactive software and books. Ziggo and XS4All are both Internet service providers who provide Internet access to subscribers. In 2010, BREIN demanded that Ziggo c.s. be ordered to block specific Internet addresses that were used by TPB in order to reduce digital piracy. The provided services allowed access to the website of TPB and thus facilitated copyright infringement, the court agreed.

Ziggo c.s. appealed on the grounds that the measure wasn't proportional to the resulting effect, as the block wasn't effective and deprived Ziggo c.s. of its right to free entrepreneurship.

The High Court therefore had to determine the effectiveness of the block. Before doing so however, the High Court considered (agreeing with BREIN) that many of Ziggo c.s.' subscribers downloaded copyrighted material using TPB as an 'indexing' website, that while downloading these subscribers were also uploading, and that most torrents on TPB are linked to copyrighted material. Ziggo c.s. could therefore be classified as an intermediary as mentioned in Article 8(3) of the EU Copyright Directive.

While downloading copyrighted material is not considered illegal in the Netherlands (excluding copyrighted software), uploading is. This is also true for small parts of copyrighted material in the case of uploading using torrents.

“ATTORNEY GENERAL CRUZ VILLALÓN HAS ALREADY CONCLUDED THAT THE MEASURE OF HAVING A WEBSITE BLOCKED IS NOT IN PRINCIPLE DISPROPORTIONATE, SIMPLY BECAUSE IT ISN'T VERY EFFECTIVE.”

Referring to the L'Oréal/eBay case, the High Court considered that a remedy must be proportional to the goal/effect in mind. Interestingly, the High Court agreed with BREIN that uploading using torrents can infringe copyright, but it agreed with Ziggo c.s. that a block was not an effective measure and was disproportionate. Based on submitted reports, it considered that the block could easily be avoided by TPB by using new Internet addresses, or by subscribers by using a 'proxy' or simply by using one of the many other torrent websites.

Although the number of subscribers visiting TPB had decreased since the block was active, this wasn't considered relevant (nor surprising as the website was blocked), since the total use of torrents hadn't decreased and BREIN's ultimate goal is to decrease copyright infringement. The block was considered to be an ineffective measure towards that goal. Because of this and the fact that Ziggo c.s. was affected in its free entrepreneurship, the High Court ruled the measure to be disproportionate and lifted the block.

BREIN has already announced it is considering appealing to the Supreme Court. This is understandable since most European courts have ruled otherwise, but also because the CJEU will soon rule in a similar Austrian case. Attorney General Cruz Villalón has already concluded that the measure of having a website blocked is not in principle disproportionate, simply because it isn't very effective. Even if most subscribers manage to evade a block, some won't. The national courts will need to weigh all relevant interests.

BREIN has walked the plank, and the block of TPB has been lifted. It would seem that in the Netherlands at least, an ineffective digital measure is likely to be disproportionate, clearing the way for digital piracy. Whether this ruling will stand remains to be seen, however, and the Dutch pirates' victory may have been short-lived. ■

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INFRINGEMENT THROUGH HYPERLINKING REQUIRES NEW KID ON THE BLOCK

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The Internet has thrown protection of copyright into a whole new dimension. The counterparts of normally harmless actions can infringe copyright when performed on the internet. Giving an address of a location where one might see certain images, for example, is generally harmless in real life. On the Internet, however, it can be like opening Pandora's box.

Sharing an address on the internet is hyperlinking. A more advanced form of hyperlinking is embedding, which is basically the same except that the viewer does not have to click a link: the target website is loaded inside the host website and both can be viewed at the same time. Hyperlinking and embedding are generally harmless. When the given address concerns copyrighted material, however, things change.

In a recent preliminary ruling, the Court of Justice of the European Union (CJEU) looked into a case referred to it by the Svea Court of Appeal into whether hyperlinking and embedding should be considered as acts of communication to the public, as mentioned in Article 3 of the European Copyright Directive. The case involved a number of Swedish journalists (Svensson *et al*) and Retriever Sverige, a company that provides links to online articles in which the journalists own the copyright.

The CJEU splits the concept of communication to the public into two criteria: 'the act of communication', and 'the public'. It considers that the requirement of communication is easily fulfilled—merely putting a link on a website is sufficient. Whether the link is used is irrelevant.

Where it concerns 'the public', the CJEU considers that infringement requires a new public. This means "a public that was not taken into account by the copyright holders when they authorised the initial communication to the public".

Practically speaking this means if the website with the copyrighted content is freely accessible, the author's intended public is everyone. Thus the public clicking the link that refers to this website (or content) cannot be considered 'new', because the target website was freely accessible and therefore the link-clickers are the intended public. However, it is considered infringing when the link circumvents an accessibility restriction to the content. In this case the public clicking the link is considered to be a new kid on the block, since without the link the content would have been inaccessible.

In November 2013, the Appellate Court of Amsterdam ruled similarly. The case concerned www.geenstijl.nl, a website that hyperlinked to unpublished photographs, which were to be printed in a magazine published by Sanoma. The court did not speak of 'new public', but it considered that the website did not provide a new channel of accessing the photos by sharing a link to already accessible content. From this point of view, infringement was not assumed.

"PRACTICALLY SPEAKING, THIS MEANS IF THE WEBSITE WITH THE COPYRIGHTED CONTENT IS FREELY ACCESSIBLE, THE AUTHOR'S INTENDED PUBLIC IS EVERYONE."

Although the approach is slightly different from that of the CJEU (focusing on providing an access channel instead of the author's intended public), the results are similar.

On the surface, the CJEU's judgment is clear, and seems to define legal hyperlinking. But things are not what they seem, as the judgment has loose ends.

The CJEU speaks, for example, of authors when they authorised the initial communication to the public. But what of the scenario, as in the Dutch case, where no authorisation was ever given to put the content online? It would seem that in this case the public is always 'new' as the author has never given permission and thus never intended the public to see his or her work. But the 'linker' cannot always know if he or she provides a link to legal or illegal content, so this seems unreasonable.

The CJEU also seems to suggest that hyperlinking and embedding are interchangeable concepts. But embedding allows for partial communication of copyrighted content. Imagine for instance an image with explanatory text next to it. Through embedding, it is possible to only show the image. It can be argued that this creates a different viewing 'experience', and thereby a new public for the image. A Dutch copyright protection organisation, Buma/Stemra, does not seem to agree, however, as it recently lifted its 'embedding tax' as a result of the preliminary ruling.

According to the CJEU, with a new kid on the block, hyperlinking and embedding are infringing. But the judgment requires refinement. The CJEU has not called on the Advocate General's opinion, and it shows.

There are several scenarios that require a deeper understanding and more research into the relationships between hyperlinking, embedding and communication to the public. ■

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3D PRINTING AND COPYRIGHT: BACK TO SQUARE ONE

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Although copying other people's work has been around for ages (as painters of old will confirm) we seem to have entered an actual 'age of copying'. After many years, the resulting copyright issues have been solved (with time and pain). But now it seems to have started all over again with a new innovation: 3D printing.

3D printing is exactly what the name suggests. Instead of printing a piece of paper, or burning a CD or DVD, entire objects can be printed. Although the technical workings are (naturally) quite complex, the 3D printer uses a digital 3D model (a CAD file) to print the object. The technology has many possibilities. But, as with all other forms of printing and copying, there is a catch: copyright.

Most countries—if not all—are unprepared for the coming of 3D printing, and that includes the Netherlands. Under the Dutch Copyright Act (DCA), which features articles more than 100 years old, whenever a work is original and the personal 'mark' of its creator can be found in that work, the work is copyright protected. A work is defined in Article 10 which mentions, for example, books, music, movies, works of art, etc. A work of art can, basically, be anything.

3D printing has not yet evolved to the point where very complicated creations can be printed. Consider, for example, the mechanical parts of an object, or the internal composition which makes the object do what it does. As with all modern-day advances, technology catches up quickly. But even so, just being able to print a simple 3D object means that copyright infringement is possible. Think, for example, of the design of a chair. Consumers will be able to print all the extra chairs they need once 3D printers are readily available.

But can copying the design of a chair be considered copyright infringement? The DCA gives the copyright holder the exclusive right to duplicate his or her work. The fact that a CAD file is needed in the middle of the duplication process does not seem to matter, as the result of the duplication process is the same. But whether the information in a CAD file about the copyrighted work can be considered a duplication of a work remains to be seen. It can be argued that a CAD file is just a temporally digital version of a work. On the other hand, the information in the file contains the elements needed to be able to print the object (one of the reasons why libraries don't like photos of their books being taken), and can therefore be copied by anyone. In that second situation, the DCA provides, even at its respectable age, copyright protection.

3D printing may also have an impact on, for example, the arts. Article 16b of the DCA currently allows for the free duplication of copyrighted works

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of literature, science or art, as long as this is for personal use. This could mean that a sculpture could be scanned in a CAD file, which could then be printed by anyone for free personal use.

When downloading music and movie files became widespread, the DCA was 'enriched' with Articles 16d and e, which provided for a tax on recordable discs. The resulting tax is distributed among copyright owners who suffer financially as a result of the ease of copying music and movie files. Perhaps it is time (on a European scale?) to implement such a tax for 3D printers as well.

3D printing has not yet become available in the Netherlands on a scale sufficient to elicit a ruling. Case law around the world has also been limited. About a year ago, the US TV network HBO sent a letter to an individual who had created a CAD file based on a throne used in a TV series. With the CAD file, a 3D printer was able to create a mobile phone dock in the shape of the throne used in the TV series, which HBO regarded as infringing its copyright.

Without a doubt, 3D printing can result in copyright infringement, but many questions remain. As current regulations provide no guidelines on how to deal with 3D printing, it seems we are back to square one. However, in the Netherlands, although 3D printing is not mentioned anywhere in the law, the DCA will provide protection for copyright holders, as it has with all previous developments in the digital world. ■

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MODERNISING THE BENELUX COURT OF JUSTICE



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As treaties and courts are founded, the resulting jurisprudence requires treaties and courts gradually to change. The most recent example of this is the European patent, which has resulted in the creation of the unitary patent and the accompanying Unified Patent Court. The Benelux Court of Justice (BCJ), set up by Belgium, the Netherlands and Luxembourg, will be undergoing a similar renovation, possibly saving applicants for trademarks valuable time and money.

After the creation of the intergovernmental economic union of the three Benelux countries, the BCJ was founded in 1974, having its seat in Brussels. Currently, the BCJ is responsible for delivering rulings in judicial matters concerning officials working for the Benelux union, and giving pre-judicial decisions on matters relating to Benelux laws (including the Benelux Convention on IP, or BCIP).

Although the BCJ's role is similar to that of the Court of Justice of the EU, it is not as extensive. The number of rulings/decisions given by the BCJ averages about five a year.

To increase the role of the BCJ, but mainly to modernise it (as the institution has entered its 40th year of existence), the Benelux countries have chosen to allocate new tasks and responsibilities to the court. These involve mainly the possibility for applicants for trademarks to appeal to the court in matters relating to their trademarks and the rulings in this respect of the Benelux Office for Intellectual Property (BOIP).

Under the current system, the application for a Benelux trademark is centralised and regulated by the BOIP. Although it is recommended to use a trademark attorney, an online application for a trademark can be easily filed, which if successful will grant the applicant a trademark for a period of ten years. With more than 22,000 trademark applications a year in the Benelux countries, the BOIP handles a substantial number of applications.

If an application is unsuccessful, meaning that the BOIP disagrees with the applicant on the admissibility of the application, the applicant has three courts to appeal to: the Hague, Brussels or Luxembourg. These legal proceedings can be time-consuming and costly, like any other. This has also led to three different interpretations of the BOIP's decisions, depending on where the applicant appealed.

New protocol

Once the new protocol on modernising the BCJ has been ratified by the parliaments of all three countries, all this is to change. Instead of having to seek justice in one of the three courts, applicants can soon call upon the BCJ in Brussels. This will save time and money, and probably take some stress off the three courts. Applicants will also be sure that their situation

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will be interpreted no differently from any case before them, increasing legal certainty. The court will have two chambers: the Second chamber which handles initial appeals, and the First chamber, which will rule on appealed rulings of the Second chamber.

Although a special committee researched and established the new protocol, the forthcoming workload may be too much for the BCJ to handle. The committee expects that about 25 extra cases a year will be handled by the BCJ as a result of the protocol. Although this may not seem excessive, it is still five times the number of cases handled at the moment. And if the aforementioned advantages appear to be true, this number will increase quickly. This will be a problem for the BCJ, in particular because it needs to be staffed by judges from the High Courts and Supreme Courts of the Benelux countries who have sufficient knowledge of the BCIP and are able to communicate in both Dutch and French.

A 'suction effect' may also be created by implementing the protocol. The ease and costs of appealing before a court are reduced, which motivates applicants to appeal in cases that they would have laid to rest in the current system. Since the BCJ judges are busy enough with their regular jobs in their home countries, which they keep in addition to their duties at the BCJ, this is not an encouraging omen.

Be that as it may, the possibility and method of seeking justice will be improved, which is generally a positive development. Applicants for trademarks in the Benelux union will soon find that not only the application procedure is unified and simple, but the same will go for appeals before a court on decisions given by the BOIP. We can only hope the BCJ will be prepared should it suddenly be swamped with work because of this. ■

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THE LICENSEE'S POSITION DURING BANKRUPTCY



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A bankruptcy is generally in no-one's best interest, and worsens everyone's position. The creditors will usually not see their claim fully awarded, and naturally the bankrupt is not happy with the situation either. This raises the question of what happens to the position of a licensee.

A licensee (of a patent, for example) is not a creditor in the normal sense. He does not have a claim upon the bankrupt, but his licence is dependent on the bankrupt's assets (in this case, the patent). This results in an uncertain position for the licensee, at least in the Netherlands. A July 2014 decision of the Dutch Supreme Court may have changed this.

In the Netherlands, before the recent decision, the licensee's fate was determined by the outcome of the so-called *Nebula* decision. In the *Nebula* decision, given on November 3, 2006, the court was presented with a case where the economic owner of a property rented out this property after the legal owner went bankrupt. In Dutch bankruptcy law, the bankruptcy trustee has to abide by existing agreements. But, the Supreme Court considered, this does not mean that a creditor (in whatever form) can exercise his agreement as if no bankruptcy ever occurred.

The reasoning behind this was that if, for example, a tenant's right to rent a property following from an agreement would have to be respected under all circumstances, the tenant would indirectly enjoy the full benefit of the assets, while the assets are reduced in value because of this. This would give a tenant (but also a licensee) a privileged position.

The bankruptcy trustee has to ensure he/she gets the most out of the assets to make sure the creditors receive as much of their claim as possible. So, the court considered, if a bankruptcy trustee can increase the value of a property (or patent) in the benefit of the assets by actively terminating an agreement, he/she is allowed to do so.

This decision created an uncertain situation for licensees in the Netherlands. Even while having an exclusive licence and all sorts of provisions about bankruptcy in an agreement, it appeared the bankruptcy trustee could ignore all of this.

The Supreme Court now seems to have (at least partially) changed its point of view. In the *ABN/Berzona* decision of July 11, 2014, the court had to decide if an already existing (rental) agreement could be terminated by the bankruptcy trustee, because the legal (and economic) owner of the property went bankrupt. This is not the case.

In its considerations, the court split the bankruptcy trustee's way of not honouring an agreement into two types: passively, for example by not paying a fee agreed in an agreement, and actively, by terminating an agreement.

“IT WOULD STILL MEAN THAT THE ACTIVE TERMINATION OF SUB-LICENCE AGREEMENTS BY THE TRUSTEE INTERFERES WITH EXISTING AGREEMENTS, AS THE LICENSOR WILL CEASE TO RECEIVE A SUB-LICENSING FEE.”

A trustee is allowed to passively dishonour an agreement. He is not, however, allowed to terminate an agreement actively, as this would conflict with the rule laid down in Dutch bankruptcy law that a bankruptcy will not affect existing agreements.

This seems to be a positive turn of events for licensees. The court seems to have changed its mind on the *Nebula* decision, even though it states that this is not the case because the *Nebula* decision involved a different situation. The agreement in question there was signed after the bankruptcy, and the agreeing party was the economic owner, with the legal owner having gone bankrupt.

This slight difference between the situations in the two cases presents licensees with a degree of uncertainty. In the *Nebula* decision, the Supreme Court considered that the bankruptcy trustee is allowed to restrict the rights following from a user agreement between the legal and economic owner (for example, a licence agreement). This is contradictory to the court's statement that the decisions do not conflict.

It has been suggested that the 'right to restrict a user agreement' of the trustee in combination with the recent *ABN/Berzona* decision should be understood in such a way that the trustee cannot act against an existing user agreement (licence agreement), but can act against agreements following from the user agreement (sub-licence agreements).

It remains to be seen if the above interpretation is correct. It would still mean that the active termination of sub-licence agreements by the trustee interferes with existing agreements, as the licensor will cease to receive a sub-licensing fee. For now it seems that a licensee's position in the Netherlands during bankruptcy has improved. However, true certainty can only be given when new case law is provided. ■

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DUTCH ANTI-PIRACY FOUNDATION WALKS THE PLANK ... YET AGAIN

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In the January/February issue of *WIPRI* I discussed a ruling by the appellate court of The Hague in a dispute between the Dutch anti-piracy foundation BREIN and two internet service providers (ISPs). In the case, BREIN tried to force the ISPs to block their customers' access to a particular website which facilitated copyright infringement. BREIN is still on a crusade against "online piracy", and now focuses on another method of possible online copyright infringement: Usenet.

Usenet has existed since 1979 and can best be described as a modern-day online forum. Users are able to post messages to specific "news groups", with each receiving its own ID. A message contains text and also a binary file, like a movie. To create the file, the text is coded by free software into an alphanumeric message that is stored on one of many Usenet Service Provider (USP) servers, which are spread throughout the world. These servers synchronise their messages, so that all servers show the same messages. In effect, the system is one giant "cloud", with the difference that messages are automatically deleted from the service after a certain amount of time. The amount of time differs per server, and is called retention time. The Usenet service is not free, and is offered by the USPs.

In a recent case between BREIN and News-Service Europe (NSE), one of these USPs, the appellate court of Amsterdam gave an interim ruling. In short, BREIN accused NSE of copyright infringement and acting wrongfully by sustaining a system through which copyright content can be downloaded on a grand scale (Usenet).

To assess whether a possible infringement had taken place, the court first decided that the alphanumeric messages containing copyright material can be considered as copyright material. The fact that a program was needed to decode these messages does not change this, especially because the necessary software is freely available on the internet, much as with torrents. In short, according to the court, NSE offered access to illegal copyright material.

Good news for BREIN. NSE, however, invoked article 6:196c. This excludes liability for parties which, in our current information age, are a "mere conduit" of data. The court splits NSE's activities in two: saving data on its servers, and sending this data (synchronising it) to other servers. Based on the article mentioned before, NSE can be excluded from liability. This is partly because sending the data is an automated, purely technical, process.

Second, when saving data on its servers, NSE is merely meeting requests from users who wish to save data. NSE does not take the initiative in what data to save. The fact that it determines the retention time does not change this.

"ONCE AGAIN A DUTCH COURT HAS RULED THAT THERE IS ONLINE COPYRIGHT INFRINGEMENT, BUT THE MEASURES TO COUNTER IT ARE WRONG."

However, based on article 6:196c NSE is also obliged to implement measures to counter infringement, and according to the court has effectively done so through notice and take down procedures (NTDs).

According to the court, NSE was not infringing copyright, acting wrongfully or carelessly by offering the Usenet services. NSE could not be obligated to check every message that was saved on its servers and passed on to others, as this would conflict with European regulations. Nor could NSE be obligated to maintain a NTD focused on synchronised messages, as this would still result in having to check every message NSE saves on its server. This does not mean that the appellate court thinks that no (extra) measure should be taken by NSE. What measure provides the best balance remains to be seen. Parties are allowed to reply in this regard later on in the procedure.

So once again a Dutch court has ruled that there is online copyright infringement, but the measures to counter it are wrong. In the previous case, this was due to ineffectiveness. In this case it is because of regulations, but the court does give room for parties to propose alternative solutions. This is a plus for BREIN. However, the ruling of the court shows once again that merely providing a service that is used for online piracy cannot be considered as acting wrongfully or as copyright infringement. ■

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