

## THE LOCUS OF COPYRIGHT

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Piet Mondrian was a Dutch painter who lived from 1872 until 1944, and is famous for his cubist paintings. According to the US-based Mondrian Trust, which holds the copyright to most of Mondrian's works, much (but not all) of the copyright expired on January 1, 2015.

However, according to US copyright law, works published after 1923 are protected for 95 years from the time the work was first published in Europe. According to the Mondrian Trust, this means that one cannot publish all the Mondrian works online, regardless of whether the online publisher is located in or outside the US, or has a website with a European domain name extension. According to the Mondrian Trust, US citizens are able to visit such websites and therefore US copyright law is applicable, meaning those works are subject to the longer term and an online publication would constitute copyright infringement.

The Municipal Museum of The Hague in the Netherlands disagrees with the trust. According to the museum, Dutch copyright law is applicable, as Mondrian was a Dutch citizen. The museum will be publishing a website dedicated to Mondrian on March 7, 2015—his birthday—so the question of who is right is timely.

To determine whether copyright still exists in Mondrian's work, the applicable law needs to be determined. Under Dutch law, copyright is applicable to works created by Dutch citizens in the Netherlands, but US copyright law also dictates that US law is applicable.

Both US and Dutch law state that a work enjoys 70 years of protection after the death of its creator. As 70 years have passed since Mondrian died, under Dutch law his work no longer enjoys copyright protection. But as noted, US law provides a special consideration, according to which some of Mondrian's works would enjoy 25 years of extra protection in the US. Therefore if these works were published on the internet, one could argue that this publication, at least under US law, would infringe the copyright.

This has already led to a conflict between the Trust and the Dutch newspaper *Trouw*, which published images of the works on its website. According to the trust, if Americans were to visit *Trouw*'s website (and similarly, the museum's website), *Trouw* would infringe the extended US copyright.

Does this mean that an image can't be reproduced online if it still enjoys copyright protection in the US, even if the work and artist originate from a different country? *Trouw* didn't wait for an answer: it took a photograph of the work in question (in this case *Victory Boogie Woogie*) but with a lady and a buggy next to it. The picture was named 'Victory buggy wuggy'.

The Netherlands and the US have both signed the Berne Convention. Based on article 7 (8) of the convention, a work's copyright term is governed by the legislation of the country where protection is claimed and will not exceed the fixed term in the work's country of origin. Therefore if the Mondrian Trust claims protection in the Netherlands, Dutch law is applicable and the copyright has expired.

The Mondrian Trust reasons that US law is applicable for online use

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in general, since US citizens, as well as any other internet users worldwide, can access the online publications. But the internet is not US territory.

The question that needs to be answered further is therefore which copyright law is applicable to online publications. Even if one would consider that the availability of an online publication in the US means US copyright law is applicable, this would mean that access for a US internet user to the website should be blocked, not the website's access to the whole world.

Having said that, Dutch copyright protection agencies that have tried to block access from inside the Netherlands to 'foreign' websites know how difficult it is to get access blocked. Perhaps the trust has a chance in the US against works clearly being published in and for the US, but I believe the museum is free to publish the images on the nationality-free World Wide Web. ■

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## THE RIGHT TO BE FORGOTTEN



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In May 2014, the Court of Justice of the European Union (CJEU) ruled in a case in which a Spanish court had referred questions regarding ‘the right to be forgotten’. The result was that in the EU, search engine provider Google had to allow people to ask it to remove search results. Under certain circumstances, Google now has to do so.

This ‘right to be forgotten’ case put two rights in opposition to each other: privacy and information (some of which might be protected by intellectual property). In February, a Dutch preliminary judge ruled in a similar case and had the opportunity to weigh these rights against one another.

Indirectly these decisions affect Google’s right to freely exploit its IP, which in this case is its database through which the search engine provides results. Under the Dutch Database Act, such a database is protected and provides its producer with the right to limit the unauthorised use of it by third parties. The opposite, a means of protection against forced limitation of public access, is not provided. It is imaginable that, under some circumstances, the right for a database producer to freely exploit its database comes into conflict as well.

The right to be forgotten became reality following the CJEU’s ruling in May 2014. This case was about a man (Mario Costeja Gonzalez) whose past came to haunt him. When someone used Google to search for Gonzalez’s name, the search results referred to articles in newspapers about an auction of his property, in 1998, following his financial difficulties. He was of the opinion that, although the content of these newspaper articles was true, it was no longer relevant. The articles were about a situation in 1998, so the search results no longer provided the information the Google user was likely to be looking for.

The CJEU ruled that Google, as the operator of the search engine, was responsible for the way it yields results. After all, it is Google that determines how its engine works and which results (and related advertisements) it displays. When asked to do so by an individual, Google (or any other search engine operator for that matter) can be required to remove or mask results normally shown by the search engine. An individual can only make such a demand if search results are insufficient, or no longer relevant, or extreme compared to their purpose and the elapsed time (save exceptional circumstances).

In the following six months, there were more than 11,000 requests for the removal of search results in the Netherlands alone. One of these requests was from ‘X’, a partner of professional services firm KPMG. X wanted to have the search results that led to newspaper articles about this dispute removed. Google refused.

The preliminary judge found that Google had rightly refused. This case did not concern grave circumstances, the court ruled, and X “just did not want to be associated with the incident” any more. Moreover,

“THE RIGHT TO INFORMATION SHOULD NOT EASILY BE LIMITED, FOR THIS CAN BE DISASTROUS FOR FREE SPEECH, FOR EXAMPLE.”

the information provided by the search engine was correct, relevant, not extreme and up to date.

The preliminary judge had to weigh the right to privacy of X and the general right to information.

Of course, not all matters of privacy can be supported. The conflicting right has to be considered. The right to information should not easily be limited, for this can be disastrous for free speech, for example.

Although the owner of a database enjoys certain rights to exploit this IP right, the extent of its exploitation is further governed by other (fundamental) rights relating to the content of its database, such as the right to privacy and the freedom of speech. ■

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## A MATTER OF TASTE

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The experience of the taste of food is very personal. Someone's preferences might change over time, and the tasting experience of food can also change. For good reason, the saying goes 'there's no accounting for taste'. This may also imply that a taste is too subjective to be protected by copyright, but a ruling on January 13, 2015 by the District Court of the Hague suggests otherwise.

In the case a company called Levola requested that before making a judgment, the court would give permission for the seizure of items made by the European Food Company (EFC). Levola based its request on the claim that it was the copyright owner of the taste of a cheese spread product called Heks'nkaas.

The EFC produced and marketed a cheese spread product with a similar (if not identical) taste, called Magic Cheese. Levola stated that a taste can be protected under Dutch copyright law and that the Magic Cheese product infringed this copyright. As these were preliminary proceedings, the court found that Levola had sufficiently shown there was an infringement (and therefore that a taste can be copyright-protected), and awarded the request.

As limited as the ruling may be—this was only an *ex-parte* request and the EFC did not have the opportunity to reply to the petition—the court for the first time decided on copyright protection for taste. The court based its ruling primarily on the *Lancôme v Kecofa* ruling of the Dutch Supreme Court, which had been the first to decide on protecting scent (in perfume) with copyright.

An important question in the *Lancôme v Kecofa* case was whether a scent is a "work" defined in Dutch copyright law. In the Dutch Copyright Act, which is based on harmonised European law, a work is broadly defined in a non-exhaustive list. The primary problem with taste and scent as works is their perceptibility. Taste and scent are perceptible, but cannot be recorded. To protect something it has to be defined, which is difficult when recording it is impossible.

Furthermore, a scent (and this is probably applicable to taste as well) is hard to perceive accurately. This not only has to do with it being hard to define a certain scent, but also because our senses simplify scents the more complex the mixtures get.

Despite all this the Supreme Court ruled that a scent can be a work, as it meets the requirements for a work—having its own "original character" and that it "bears the personal stamp of the maker".

### What is the creation?

The court also ruled that the substance in which the scent is incorporated cannot be considered part of the work. Only the scent is the actual work. This is similar to, for example, a painting. The picture is the creation, not the paint it was painted with. This also suggests that through the

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protection of a scent, any carrier substance is also protected, as a modified version of the work is also protected.

In Levola's case, this would mean that its copyright for the Heks'nkaas taste would apply to every product in general, not just the cream cheese. This situation seems unreasonable. Awarding copyright to a taste may therefore be a bridge too far. But if the Heks'nkaas taste satisfies the requirements of a work, this suggests it can be protected.

The original character and personal stamp of the maker is hard to point out in a taste (and scent). The ingredients of the substance resulting in the taste will not do. Similar ingredients can lead to different results (as we experience in cooking) while, *vice versa*, different ingredients can lead to similar results.

If we allow taste to be copyright-protected, and this may apply to scents as well, a way of defining the work needs to be found. A professional tasting panel may be a start. It may also be worth considering analysing the exact chemical composition of a substance containing the work. This would mean that the chemical composition (not the ingredients used) of the products in question will be compared, as well as hiring a professional tasting panel. This also limits the copyright of a specific taste to a specific carrier.

To prove infringement, the chemical compositions need not be identical, as this would provide an infringing party with an easy way out. If taste and chemical composition of both products are similar, infringement is more likely. ■

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# Shared copyright of a software application

10-08-2015

by Michiel Rijdsdijk

**In May 2015 a Dutch court ruled in a matter concerning the relationship between the interface of a software application (computer program), its source code and copyright.**

The case concerned 'Mr X', 'Mr Y' and an application called eKidz. The idea, functionality and interface design of the application originated from X, who had hired Y to develop the actual application. They worked together, with X leading the project and setting the course. This ended when a dispute between the parties arose. As the creator of the idea, the functionalities and the interface of the application, X claimed to be the owner of all copyright material related to the application, which Y disputed.

The court had to answer the question of whether the application could be (partially) protected by copyright, and if so to whom this would be attributable.

The court referred to article 10 (12) of the Dutch Copyright Law, which says that a computer program (which includes an application) can be a copyright-protected work. According to the court, a computer program can consist of two separate components: the source code and the interface, which can both be subject to copyright protection.

The court considered that the interface is not a computer program within the meaning of article 10 (12). However in this case, the design of the interface itself met the requirements for 'regular' copyright protection, which state that subject matter must be original in the sense that it is the author's own intellectual creation. Because X created these interfaces, and they are part of eKidz, X is therefore the copyright owner of the interface component of the application.

The protection of the source code of the application is based on article 10, sub 12 of the law, as it is the basis of a computer program. The code was written by Y, who claimed to be the copyright owner. X disputed this, stating that the source code was inspired by X's vision of the interface and idea of the application. The court agreed with Y, considering that Y was free to decide in which way the source code was created, provided it led to the desired functionality and interfaces. Y was considered to be the copyright owner of the source code.

## European trademark reform - a summary

**It takes a while for reforms to travel through the European administrative system. However, the European Commission, Parliament and Council have agreed on a trademark reform package. This brings change for new and existing Community trademark (CTM) owners.**

The package introduces an altered CTM Regulation, while also introducing a new Trademark Directive. The general goal of the package is to modernise the European trademark system and make it more accessible and efficient for businesses in terms of lower costs, speed, predictability and greater legal certainty.

### Fee reduction

Reductions in fees for the CTM (which will become known as the EU trademark) can, according to a press release from the commission, lead to savings of up to 37%. While this is always welcome, these costs are usually dwarfed by other costs, such as costs of marketing the trademark.

- Basic fee for an application for an individual mark by electronic means will be €850 (\$956);
- Fee for the second class of goods and services for an individual mark will be €50; and
- Fee for each class of goods and services exceeding two for an individual mark will be €150.

The 'pay for one get two for free' system in terms of classes will no longer be applicable. Before, with one registration a trademark applicant could apply for goods and services in three different classes for the same price as for one class. This clogged the register with unused trademarks in certain classes, which is why this system will be abolished. The result should be a cleaner register which also gives a more accurate view of trademark use in specific classes, but also leads to more expense (and therefore less of a fee reduction) for trademark owners wishing to register in more than one class.

### No 'graphically displayable' requirement

The requirement that a trademark needs to be displayed graphically will be abolished under reference to the *Sieckmann* ruling. In this decision the Court of Justice of the European Union ruled that non-displayable signs such as smells and sounds may be registered, as long as they are described clearly and precisely. In the proposal it is now noted that a sign should be permitted to be represented in any appropriate form, so not necessarily by graphic means, as long as the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

"National trademark offices are to implement, within seven years of the introduction of the new directive, administrative procedures for the revocation and nullification of national trademarks."

### Class headings

The provisions concerning class headings will be updated according to the *IP Translator* ruling. In order to determine the scope of protection of a trademark, the applicant must clearly and accurately describe the goods and services in the classes in question. This also applies to trademarks already registered.

Trademark owners should ensure their registered CTMs still provide the scope of protection that was originally intended. The class headings covering the goods and services for which the trademark was

applied mean what they say. The mere mentioning of the class heading may not be precise enough. If not described clearly and precisely, the scope of protection might be significantly reduced.

One exception should be mentioned: trademark owners of applications from before June 22, 2012 have the possibility to further clearly and accurately describe their trademark(s). After the passing of a six-month sunset period, this will no longer be possible.

### **Administrative procedure**

National trademark offices are to implement, within seven years of the introduction of the new directive, administrative procedures for the revocation and nullification of national trademarks. This will save the trademark owner from starting court proceedings when trying to revoke or nullify, for example, an unused national trademark.

### **Goods-in-transit**

Procedures regarding in-transit goods will also be reformed. This aims to prevent the EU from being misused as a transit hub for counterfeit goods. The proposed measure aims to enlarge the scope of customs enforcement. A trademark owner can prevent in-transit goods from travelling on to the country of destination, unless the owner of the goods can prove that the trademark owner has no right to act against the goods in the country of destination.

While the aforementioned changes are the most prominent, there are others such as changes to the grounds for opposition and an increased number of grounds for refusal. The package is not in force yet: it still has to be approved by the parliament's Committee on Legal Affairs and the council. The International Trademark Association expected this to happen by September 2015. After the directive takes effect, member states have three years to implement the directive in their national legislation.

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"According to the court, a computer program can consist of two separate components: the source code and the interface, which can both be subject to copyright protection."

The court noted that this means that eKidz is a combination of works, which has two copyright owners, and that the parties had anticipated this in their initial agreement, as they agreed to sharing the profits from the app.

This reasoning of the court led to Y being ordered (among other things) to stop infringing X's copyright.

But is a different reasoning arguable?

The interface or functionality component of a program is, according to the Court of Justice of the European Union in *SAS Institute v World Programming*, not protected by the (predecessor of) the EU's Software Directive (No. 2009/24/EC). As X created the interface or functionality of the eKidz application, and this component is not a program within the meaning of article 10 (12) of the law, Y cannot claim he owns the copyright to this component by arguing he wrote the relevant source code.

It is also arguable that the freedom of design is sufficiently limited by very specific demands and therefore cannot lead to copyright right for Y on the source code component in question.

However, X's role could also make a difference.

Article 6 of the law grants copyright in a work physically created by a contractor of the patron, to the patron, provided that the work was created under the leadership and supervision of the patron. This does not mean that the patron needs to have created the work in detail. Applied to this case, it may be arguable that, if the limitations of 1) design and 2) leadership and supervision are met, X's role can be considered that of a patron, awarding him copyright to the source code component.

As the creator of the eKidz idea, the interface and the functionalities, the design requirement seems to have been met by X. The requirement of giving leadership and supervision to Y's work may be considered fulfilled by the limitations set by X, resulting in the necessary guiding of Y in creating X's design. X can then be considered the patron, and therefore the creator of the design of the source code component and copyright owner.

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