Thresholds in copyright law
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by Hans Jonkhout
Marree en Dijxhoorn Advocaten
Amersfoort, NL

Introduction

In Dutch jurisprudence recently the High Court had to decide on a very extraordinary and peculiar case, which in three court instances (inclusive High Court) lead to a fundamental and extremely complicated discussion on the very question: what is actually protected by copyright and what is not? About this startling case later.

What is protected by copyright law and what is not? The Berne Convention tells us. Protected by copyright are original works of art, literature or science. But then the question is which works are works of art, literature or science, and which works are not?

Or in fact more elementary: what is a work? Are there any other works, than works of art, literature or science at all? Is in fact anything made by man, whether physically present, digital or ephemere a work or art, literature or science?

In some jurisdictions this last question is answered by a definite “no”. In other this last question is answered no that clear. Jurisprudence in almost all jurisdictions of the first kind has developed certain criteria to make out if a work is eligible for copyright protection or not. Clearly in Germany courts have developed certain threshold criteria. So have courts in for instance UK, France, the USA, Russia and The Netherlands.

These threshold criteria seem to vary from jurisdiction to jurisdiction. In Germany criteria tend to be more of a qualitative nature. In Anglo-Saxon jurisdictions there criteria tend to be more an assessment of statistical novelty. In the Netherlands courts have always taken a position in between.

Although the Berne Convention in some soft way has had a harmonising effect on copyright in general and on the matter of meeting the threshold criteria for obtaining copyright protection, these threshold criteria have been set by national court is somewhat differing criteria in jurisprudence.
The matter of meeting the threshold criteria for obtaining copyright protection is not matter harmonised by European legislation.
Still we can deduct two general notions widely accepted by all countries that are member to the Berne Convention.

The first is: “Copyright protection shall extend to expressions, not to ideas, procedures, and methods of operation or methematical concepts as such.” See also article 9 section 2 of the Trips Agreement.

The second is: Copyright protection is not limited to works art, written with a capital “A”, works of literature written with a capital “L”, or works of science, written with a capital “S” only. Is widely accepted that these three categories are to be interpreted in a wide and liberal meaning. In fact a work is a work protectable by copyright as long as the work can be perceived visually or auditively.

But is anything made by man which is perceivable visually of additively a work protected by copyright? The answer is: no. Certain minimal threshold criteria must or at least do apply here.

The Netherlands Van Dale/Romme

In the Netherlands the High Court had lastly determined a standard in this respect in its judgement f the case Van Dale/ Romme dating from 1988. In brief the criterium for a work to be protected by copyright was: “***A work must be original and it must bear the impress of its maker”.***

The facts of the case were as follows: Van Dale is the name of a famous and the most prestigious dictionary of the Dutch language, published by company of the same name. Romme was one of the first digital publishers, who launched a dictionary on CD in the Dutch market. Van Dale was of the opinion that the content of this CD was copied from the prestigious hard copy, three volume of over 1000 pages each dictionary. The heart of the matter was: Can the mere selection (with the sole aim to present an exhaustive representation of Dutch vocabulary) with regards to collection of Dutch words be a work within the meaning of Dutch Copyright act. The outcome was positive for Van Dale. The selection met the criterium: “.must be original and it must bear the impress of its maker”. One might think quite definitely different about the collection of banknotes issued in Madagascar if the only aim and criterium of the selection would be that the collection must comprise all such banknotes. Yet the Dutch High Court was of the opinion thta when it came down to make an exhaustive dictionary, this could be done in more than one way, which made the selection protectable by copyright law. Mind you there was no database legislation in those days.

This criterium is twofold: “original” is in the sense that the work should be new, not made before, deviating from older works substantially enough. “Bear the impress of the maker” in the sense that the work must be retraceable to the maker and/or that the work is recognisable as an expression of that what the maker has moved to make it. This twofold criterium is rather vague, but is has been practicable ever since as to the outcome in the vast majority of court cases.

The Endstra tapes

Now finally I come to the startling case of the Endstra tapes. This case has no connection with the dilemma between the technical necessary features on the one hand and the creative freedom of the maker of the work on the other hand. It is a strict philosophical, moral issue with regard to copyright as such.

To set the scene I will need to tell the entire tale. The story starts in the mid seventies of the last century, when the huge company of Heineken is missed a number of employees and who were made redundant. Amongst these employees was a certain Mr. Holleeder, who had son called Willem Holleeder. Accidently he is my age and in fact and even more accidently my wife and girlfriend Mirjam actually was a classmate of his for some years.

Willem Holleeder and one of his other former classmates, Cor van Hout, came to the idea of abducting Freddy Heineken, sole owner and CEO of the company of the same name. And so they did obduct Freddy Heineken and his chauffeur. The obductors demanded a huge ransom of something in the region of 40 mio. Dutch Guilders. After imprisonment of Heineken and his chauffeur for several weeks Heineken's family paid up the ransom money against the will of the Dutch police authorities at the time.

Heineken and his chauffeur were released from their captivity soon after. The police were able to locate the place where Heineken and his chauffeur had been kept empoisoned soon after. And soon after the police were able to find out that Willem Holleeder and Cor van Hout were the criminals behind it. Holleeder was the first to be caught. He was trialed and served a considerable sentence in prison. Cor van Hout was traced in Brasil, I believe. He was extradited and trialed too. Het too served a considerable sentence in prison. Most of ransom money was found, but several millions have never been recovered.

It is believed and widely suspected that both Wilem Holleeder and Cor van Hout after having served their sentence re-entered the Dutch criminal incrowd in Amsterdam. Although both of them themselves have never been or not yet been sentenced thereafter, it is widely believed that they have used what was left of the ransom money to set up an organisation dealing with money laundering and extorsion of entrepreneurs especially with regard to real estate transactions. In the nineties of last century and the first years of this century it was widely suspected that somehow this Holleeder and Van Hout, who himself at some point of time has been assassinated, had some involvement in a series of murder attacks on persons suspected of dubious real estate transactions.

During the first years of this century the Dutch police authorities began keeping an eye on Mr. Willem Endstra, who was a real estate broker and owner suspected of illegal transactions concerning real estate. It was a known fact that this Willem Endstra operated in the vicinity of Willem Holleeder.

The Dutch police and prosecution authorities, investigating the practices of Willem Holleeder too of course, were able to persuade Mr. Willem Endstra to give testimony about what he knew about Willem Holleeder's practices. Is has been said that Willem Endstra was willing, because he feared Willem Holleeder. For that reason Willem Endstra came to an arrangement with the Dutch police to keep absolute secrecy about the fact that Willem Endstra would be talking to the police.

Anyway Willem Endstra and the police for that reason came to an agreement: The police interviews were going to take place in a police civil car whilst driving in the Amsterdam area. These interviews were recorded on tape. There were 15 different interviews in 2002 and 2003; each one of those recorded on tape. Willem Endstra then was assassinated in front of his office in Amsterdam in May 2004.

Not long thereafter Willem Holleeder was arrested by the Dutch police. Not on suspicion of murdering Willem Endstra, at least not yet, but on suspicion of extortion of several real estate bobo's amongst which Willem Endstra and of money laundering. Willem Holleeder is taken in custody and is taken to the penal court of Amsterdam. He was found guilty and condemned to serve some years in prison. Willem Holleeder appealed, which appeal proceedings are ongoing to this very day.

The prosecution in the first instance before the court in Amsterdam submitted as evidence against Willem Holleeder the Willem Endstra interview tapes as well as transscripts thereof. During these proceedings before the court in Amsterdam two journalists of the local Amsterdam newspaper 'Het Parool' somehow got hold of copies of these tapes and transcripts. They of course were able to publish various interesting newpaper articles about this in Het Parool. What they also did was publishing the transscripts in a book through a publisher affiliated with their newspaper. The title of the book was “The Endstra Tapes” and it became a real bestseller in 2006.

Both journalists and the publishing company were summoned before the civil court of Amsterdam. By whom? By the heires of Willem Endstra. On what grounds? Violation of copyrights vested with and owned by (the late) Willem Endstra.

Court history of the Endstra Tapes

Please bear in mind that the litigation proceeding were all summary proceedings.

Please note that the matter of meeting the threshold criteria for obtaining copyright protection is not a matter harmonised by European legislation. There was no possibility for that reason to ask prejudiciary questions to the ECJ.

In both first instances before the District Court of Amsterdam and the Court of Appeal of Amsterdam the claims of the Endstra heires were denied. Basically on the following ground or line of reasoning. There is no copyright on the Endstra Tapes, because these were not conceived as a coherent creation by Endstra and it is not apparent from anything that Endstra has conciously chosen to present the results (of his conversatations with the police) in a certain, somehow premeditated form. In other words: Endstra's responses to the Dutch police had no deliberate intention of creating a work, within the meaning of the Berne convention or the Dutch Copyright law. It were just interviews.

What does the High Court consider:

1.
The Court of Appeal by considering that these “back seat conversations” are not eligible for copyright protection, because these were not by Endstra concipiated as a coherent creation, and that it is not apparent thtat Endstra has consciously chosen to come to an intellectual creation, and that these conversations do not show what Endstra had consciously moved to present the result in the realised form, has neglected the criterium to apply when assessing if a product can qualify as a work within the meaning of the Dutch Copyright Law)Berne Convention'.

2.
According to Dutch jurisprudence it is established that a result can be regarded as a work of literature, science or art if it has a original character of its own end it bears the mark of the maker. Again the formula of Van Dale -Romme' If a work does not meet these criteria it is considered to be banal, trivial, mor commonplace, for which no creative effort is needed or being carried out.

3.
The Appeal Court has acknowledged that these Back Seat Conversations do bear the personal mark of the maker (.i.c. Endstra), but that on top of that it is required that this shows, that these are the result of his human creation, showing that he has made personal choices. The appeal court held that for this Endstra should have had the intention as the maker (author) to come to a coherent creation, being conciliated en consciously shaped in a certain form or expression,

4.
The High Court is of the opinion that (the additional threshold) that the Appeal Courts finding that there is a requirement of human creation, showing that the maker has made personal choices and that there is an implied necessary demand for an intention of the maker (author) to come to a coherent creation, being concipiated en consciously shaped in a certain form or expression, is contrary to Dutch copyright law (and jurisprudence).

Conclusion: Coherent creation by personal choices and/or the intention to come to a coherent creation in a certain consciously shaped form is not a requirement for a work to be protected by copyright.

The back bench conversation were basically interviews. The police officers in the car were interviewing Endstra, who evidently did most of the talking. However the interviewing police officers did their bit in conducting the conversations.

This raises some questions.

One of the questions to be asked would be. If president Obama has been interviewed by a journalist and this journalist or his newspaper has made an article in its columns, is then the copyright owner to the interview the journalist/newspaper of president Obama? Or Both?

Some works made by man that can be perceived visually or auditively are evidently not the result of a coherent creative and personal intention of shaping an expression or form. Think for instance of: the performance of a football player on the pitch, the act of a busdriver whilst driving a bus, the act of the performance of a policeman in riot action, or the shopping list drawn up by your spouse, or the compilation of telephone numbers in the yellow pages, or a list of objects for sale at an auction, and so on, and so on. But how about the improvising jazz musician, the interpreter (not neighbouring rights we are talking about here, mind you). One might certainly think slightly different here.

And what about the work of an author that is mentally disabled? Or the work that is being made by serendipity. There a lots of famous painter artists, that make extremely costly paintings just by throwing paint onto the canvas.

Another view amongst the scholars in the Netherlands was, that conversations or interviews had no other function than the exchange of information, which exchange of information is not eligible for copyright protection, for it would mean that in fact any and all conversations would enjoy copyright protection. Participants in a conversation are usually unaware of actually making a work within the meaning of copyright law.

Is it then required that in order to conceive a work protected by copyright the maker or the author shall have to follow a premeditated process or programme? Or is it perhaps required in order to conceive a work protected by copyright the maker or the author must have an ex post judgment on his own account? If you would say yes to these last two questions, then you have to consider this would be a contradiction with the idea that any and all works are protected by copyright even if the maker or author has decided the work has not been completed and that its the sole maker's or author's prerogative to decide whether or not to divulge, to reproduce or to publish it. The intention to divulge, to reproduce or to publish is completely irrelevant for the birth of copyrights, according to classic copyright dogma's.

What does this all boil down to? In my opinion this judgment of the Dutch High Court means in fact that anything made by man can be a work. On the one hand there are works eligible for copyright protection if it is original and bears the impress of its maker. And on the other hand there are works that are just trivial, commonplace and banal, being not eligible for copyright protection. This shall imply that courts are bound to have an opinion to some extent about the quality of an expression or a form shaped by makers of authors. It calls for an esthetical judgment not an ethical, legal judgment. I have my doubts if courts are equipped to decide on the quality of esthetical issues.

Hans Jonkhout,
Düsseldorf , 9 May 2009.