

And the private copy war continues: news from the Dutch front!

Kluwer Copyright Blog
May 4, 2011

Lucie Guibault (Schulich School of Law.)

Please refer to this post as: Lucie Guibault, 'And the private copy war continues: news from the Dutch front!', Kluwer Copyright Blog, May 4 2011, <http://copyrightblog.kluweriplaw.com/2011/05/04/and-the-private-copy-war-continues-news-from-the-dutch-front/>

On April 11, 2011, the Dutch secretary of state, Fred Teeven, sent his long awaited 'Priorities Letter Copyright 20@20' to the House of Representatives. Among the priorities mentioned, is 'the promotion and protection of new business models on the Internet through a bill to combat infringing websites and facilitating a re-evaluation of the private copying exception. To this end, the download from obviously illegal source will be declared unlawful in conjunction with a balanced enforcement framework in which a balance is struck between the protection of right holders and the importance of an open Internet!'. The argument put forward by the secretary of state is that free and illegal file sharing activities stand in the way of any legal download service. To curb this negative spiral, legal offers must increase and illegal activities must be banned. According to this proposal, the enforcement of a prohibition to download 'from obviously illegal sources' would be directed against commercial websites and services that facilitate the unauthorized free file sharing of copyright protected material. Consumers, who merely download material on a small scale, would not be the object of legal pursuit.

This would actually codify the current practice, where the download of copyright protected material by individuals has been recognized as falling within the scope of article 16c of the Dutch Copyright Act (District Court of Haarlem and Court of Appeal of The Hague), but the act of facilitating unauthorized file sharing of protected material by websites or service providers has been deemed unlawful (Court of Appeal of The Hague).

The proposal to introduce a ban on downloading 'from obviously illegal sources' launched an intense discussion among copyright scholars in the Netherlands. In addition to the arguments raised by others on the pro's and con's of this proposal, let me react on two points put forward by the secretary of state in support of the introduction of this ban.

First, the letter states that this proposal would **reconcile the regime applicable to games and software with that of other categories of works**, like films and music, where in the case of the former the download from illegal sources has long been unlawful (Article 45n Copyright Act). In my opinion, this statement is misleading: there is, of course, no private copying exception for games and software since the adoption of the Computer Programs Directive. The right of the lawful user of a piece of software to make a back-up copy in so far as it is necessary for that use should not be confused with the broader private copy exception. The two exceptions pursue entirely different aims and are subject to distinct application requirements. If the back-up copy regime needs to be reconciled with that of the private copy regime, this cannot occur simply by making downloads from illegal sources unlawful. Other (more important) criteria would need to be reassessed as well, like the nature of the person who is allowed to make the copy (natural or legal person), the commercial character of the activity pursued, the amount of copies authorized and last but not least, the need to pay fair compensation to the rights holder or not.

Second, the letter also states that within Europe, the **only other country besides the Netherlands** where downloads from illegal sources is allowed is Switzerland. I don't know which information our secretary of state possesses but reading, for example, the copyright acts of [France](#), [Denmark](#), or even [Italy](#), I find nowhere the mention that making a private copy from an illegal source is unlawful. Of course, a user may not require from the rights holder that he gives him the means to exercise the private copy exception with respect to a illegally obtained copy of a technologically protected work (in application of art. 6(4) para. 2 of the InfoSoc Directive). But this is entirely different from prohibiting illegal downloads altogether.

Although I am definitely not an advocate of the proposed ban on illegal downloads, should it go through, it should at least be supported by stronger arguments than those put forward so far.