

Kluwer Copyright Blog

Dutch press exception revisited!

Lucie Guibault (Schulich School of Law) · Tuesday, August 9th, 2011

The summer is no longer quiet for the communications departments of most public sector organizations across the Netherlands! The age long practice of circulating hard copies of newspaper clippings among the employees of an organization is seriously compromised following a [decision of the Court of appeal of Leeuwarden](#). On 13 July, the Court ruled that the unauthorized making of paper clippings of newspaper and magazine articles for which the rights were expressly reserved amounts to copyright infringement.

The facts of the case are straightforward: the department of communications and administrative support of the Province of Flevoland periodically produced and distributed paper versions of newspaper clippings to the employees of the province. These paper clippings contained a selection of articles from national and regional daily and weekly publications. Defendants, all publishers of daily and weekly papers and magazines, sued for copyright infringement on the ground that the exception of [article 15 of the Copyright Act](#) is not applicable since all rights in the publications had been expressly reserved. The plaintiff contested this, relying on a decision of the [Supreme Court of 10 November 1995](#) (known as the ‘Newspaper Clippings’ case or *Knipselkrantarrest*).

Based on the *Newspaper Clippings* decision, the parties in this case neither disputed the fact that the Province of Flevoland is a ‘press organization’ in the sense of article 15 of the Act or that the colophon of the publications in dispute contained a reservation of rights. The question at issue dealt rather with the scope of the reservation of rights and the interpretation to be given to ‘news reports and miscellaneous reports’ for which no reservation of right is possible under paragraph 2 of article 15 of the Act.

The Court observes that article 15 of the Act must be interpreted in the light of the Berne Convention and in conformity with Directive 2001/29/EC on copyright in the information society. Article 10 bis of the Berne Convention states that: “It shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved”.

Article 5(3)(c) of the Directive essentially reproduces the wording of article 10 bis of the Berne Convention. The Court then quotes recitals 9, 10 and 32 of the Directive, emphasizing the aim of the Directive to grant strong protection to authors and to secure them an equitable remuneration for the use of their works, as well as the exhaustive character of the list of limitations in article 5 of the

Directive.

Considering the above, the Court opines that, should the Dutch Copyright Act be interpreted as preventing a reservation of rights on copyright protected articles, this would be in conflict with the intention and the text of the Directive, in particular with the need to grant strong protection to rights owners and to secure equitable remuneration for the use of their work. The fact that the newspaper clippings are done for non-commercial purposes is irrelevant; what is relevant, in the Court's opinion, is the loss of revenue incurred by NDP as a result of not licensing this type of use to the Province of Flevoland.

Consequently, the only interpretation of article 15 paragraph 2 of the Dutch Act that is in conformity with the Directive consists in saying that the prohibition on the reservation of rights can only be made with respect to non-original news items. The Court distinguishes the present case from the *Newspaper Clippings* decision, saying that the Supreme Court had not examined the issue of the reservation of rights, nor had it considered the interpretation of 'news reports and miscellaneous reports'. The Court adds that the need to promote the free flow of information, upon which the Supreme Court had based its decision, never implied that the rights owners cannot reserve their rights.

Finally, to the plaintiff's objection that paragraph 2 of article 15 of the Dutch Copyright Act is devoid of any purpose, the Court of appeal replies that this provision is indeed necessary for otherwise, a publisher would be able to claim the unique protection granted in the Netherlands to non-original writings (*geschriftenbescherming*) by simply reserving all rights. The Court forgot to clarify that a reservation of rights on news reports and miscellaneous reports would in fact be in contravention of article 2 paragraph 8 of the Berne Convention which states that "the protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information".

For most Dutch commentators, this decision rings the death knell of the newspaper clippings practice in the Netherlands (see for example [blogpost from C. Alberdingk Thijm](#)). The practice of making electronic newspaper clippings had already been ground to a halt by a decision of the [District Court of The Hague](#) in 2005, where the court had estimated that such a practice was in contravention with the three-step-test as laid down in article 5 paragraph 5 of the Directive (which, by the way, is not expressly implemented in the Dutch Copyright Act!). Although I could find some sympathy for the arguments put forward by the Supreme Court in the Newspaper Clippings case, it is true that this interpretation of the Dutch Copyright Act had widened the scope of the provision to an unprecedented extent that found no counterpart in any of the neighboring countries, like France, Belgium or even Germany. The provision has now been brought back to more reasonable proportions, meaning that public sector organizations will, from now on, be obliged to obtain a license from the publishers for the making of newspaper clippings (whether on paper or electronic format). Knowing the precarity of the newspaper publishing business these days, this is a positive outcome for the rights owners.

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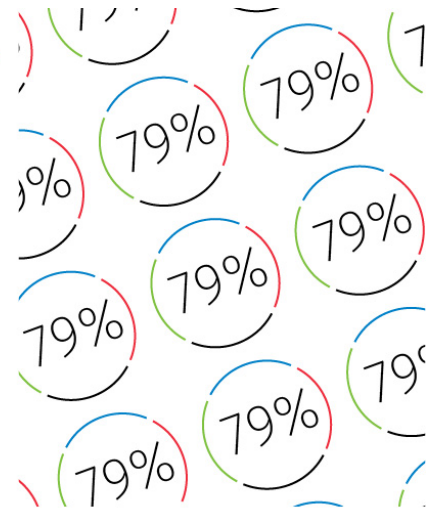
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