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“Backseat conversations” not protected by copyright

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“The occasional use of an unusual expression – such as “she has a black belt in shopping, so uh …” to describe the shopping behavior of Endstra’s wife – is not enough to make a copyrighted work of an otherwise banal or trivial designed conversation.”

Amsterdam Court of Appeal, 16 Juli 2013 (Endstra heirs vs. Nieuw Amsterdam Publishers).

The 2008 decision of the Dutch Supreme Court in the Endstra-tapes case was, in the words of Professor Hugenholtz , “the most controversial decision of the decade. The case concerned the question whether the so called ‘backseat conversations,’ a series of conversations between the resale estate investor Willem Endstra and the Dutch police on the backseat of a car, were protected by copyright.” Endstra talked extensively with the police about his connections with prominent figures of the Dutch underworld. He was assassinated in broad daylight in May 2004.

In 2006, the book ‘The Endstra tapes’ was published, containing literal transcripts of police recordings of the backseat conversations. Endstra’s heirs subsequently sued the publisher and claimed that the book infringed Endstra’s copyrights.

After the Amsterdam Court of Appeal had ruled that the backseat conversations could not be protected by copyright, the Dutch Supreme Court concluded that copyright protection was not impossible by definition. The Supreme court concluded that, again in the words of Hugenholtz : “two criteria must be distinguished: a work must possess its own original character and bear the personal stamp of its author. The first requirement, according to the Court, essentially implies ‘that its form is not copied from another work’. The second requirement means ‘that there must be a form that is the result of human creativity and of creative choices, and thus is a product of the human mind. This excludes, in any case, all forms that are so banal or trivial as to not demonstrate any creative labor whatsoever’.” The decision led to much debate, as commentators feared that the

decision implied that "anything touched by human hand might be deemed a work."

The Supreme Court referred the case back to the appeal court to decide the case and to apply the conclusions of the Supreme Court on the facts of the case. This summer, the Amsterdam Court of Appeal decided again that Endstra's 'backseat conversations' could not be protected by copyright. The same conclusion as the first time, but now founded on the judgement of the Supreme Court. In its own words, the court stated:

"5.13 (…) Because the transcriptions are literal renditions of the backseat conversations, the formal structure/the structure of those conversations can be deduced completely from the transcriptions. According to the transcriptions, the texts as pronounced by Endstra consist of a seemingly endless series of unfinished, badly formulated and downright crooked sentences (reason why the transcriptions are difficult to read).

The design of the product in question does not give the impression, with regard to the design, that it is the result of creating, creative labour / an intellectual creation of Endstra. On the contrary, given the banality of the design, it cannot be assumed that what was pronounced by Endstra was based on creative labour of any significance.

(…) that the statements of Endstra have an own original character, is no longer subject for debate. Regarding argument iii, it is further considered that the occasional use of an unusual expression – such as "she has a black belt in shopping, so uh …" to describe the shopping behavior of Endstra's wife – is not enough to make a copyrighted work of an otherwise banal or trivial designed conversation."

5:14 Oral presentations, diaries/letters and jazz improvisations are, as is generally accepted, protected by copyright. The comparison made by the Endstra heirs between these works and conversations, is however incorrect in the opinion of the court. A clear and banality transcending design can generally be found in oral presentations, diaries/letters and jazz improvisations, but not in ordinary conversations, inherently (in general) with a good deal of poor syntax."

Although the decision was rendered in the very quiet holiday seasons, the first reactions followed soon. As could be expected, the demarcation line between banality and creativity inspired commentators. In response to the appellate court's argument that the transcriptions are 'barely readable', researcher Alexander Tsoutsanis stated in a short comment in a national newspaper inter alia that "A 'coherent creation' is not required. (…) Meaningful creative labour is no requirement. Creative labour 'of any kind' is required." Examples of incoherent or barely readable but acknowledged works of art are of course not hard to find.

A second demarcation line is the fine line between private copyright and the free flow of information in public domain. In this case the appellate court could avoid a discussion about copyright and article 10 EHRM, because it already concluded that the conversations were not protected by copyright. However, the possible social relevance of publishing police reports and (confessional) conversations and the personal relevance and interests of the 'conversation partners' may speak clearly from this case.

The unprecedented discussion and debate among scholars and practitioners that followed the Supreme Court's decision has not subsided yet and probably never will. Using an inherently vague definition to establish a clear lower limit of copyright protection requires a lot of creative labour.

A full summary of this case will be added to the Kluwer IP Cases Database (http://www.kluweriplaw.com).

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