Kluwer Copyright Blog

Dutch Supreme Court: Cable retransmission has ended, but the levy might be reintroduced

Kluwer Copyright Blogger · Monday, April 7th, 2014

Important ruling by Dutch Supreme Court on cable retransmission, film copyright and collective management of rights

Guest blog by Prof. Dr D.J.G. Visser, Institute for Private Law, Leiden University

"This could well mean that several Dutch collecting societies, in particular those representing actors, screenwriters and directors (Norma, Lira and Vevam) can no longer claim remuneration for cable (re)transmission of programs broadcast by Dutch broadcasters."

The cable distribution of Dutch television programs as it currently takes place in The Netherlands is no longer a 'cable retransmission' in the sense of the EU Satellite and Cable (SatCab) Directive, because it is no longer preceded by an 'initial transmission' 'intended for reception by the public'. Therefore, the mandatory collective management of cable retransmission rights prescribed by article 9 of the SatCab Directive does no longer apply, nor does the rule of article 9.2 of the same that the relevant collecting societies have a mandate to represent non-members.

Introduction

Back in the 1980's, The Netherlands was a pioneer in cable retransmission and copyright. In 1980 and 1984 the Dutch Supreme Court decided that cable retransmission constituted a 'secondary' communication to the public. According to the Court it was not relevant whether or not the cable retransmission reached a 'new public'. The fact that there was an intervention by 'by an organization other than the original one' in the sense of article 11bis of the Berne Convention was enough. On the basis this case law 'the Dutch cable contract' was concluded in 1985 between collecting societies, some of them brand new at the time, and the cable operators in The Netherlands. In the 1990's the status of cable retransmission was confirmed in the EU Satellite

and Cable (SatCab) Directive (93/83/EEC). The amount of copyright money paid and distributed for cable retransmission in The Netherland grew to over € 40 million in the first decade of this century.

Lately, there has been a fundamental discussion on whether cable transmission of television broadcasts in The Netherlands can actually still be considered 'secondary' cable retransmissions or whether they are in fact 'primary' broadcasts or communications to the public. This is a vital difference, because most collecting societies typically only hold the 'secondary' cable retransmission rights and not the 'primary' broadcasting rights. The latter category of broadcasting rights is typically dealt with directly in the contracts between the cable operators, the broadcasters and the producers, among themselves, without the intervention of collecting societies.

Supreme Court decision

On Friday March 28th, 2014, the Dutch Supreme Court has handed down an important ruling [1] on this issue, regarding film rights and collective management of rights. There are several important points in this ruling.

1. The cable distribution of Dutch television programs as it currently takes place in The Netherlands is indeed no longer a 'cable retransmission' in the sense of the EU Satellite and Cable (SatCab) Directive, because it is no longer preceded by an 'initial transmission' 'intended for reception by the public'. Since 2006 cable operators get the signal directly in a one-on-one transmission from the 'MediaGateway' at which the broadcasters make it available for them. Therefore the mandatory collective management of cable retransmission rights prescribed by article 9 of the SatCab Directive does no longer apply, nor does the rule of article 9.2 of the same that the relevant collecting societies have a mandate to represent non-members.

2. The transfer of rights from individual performing artists of all their broadcasting rights relating to their past and future performances to the relevant collecting society was not precise enough in this case and therefore not valid under Dutch civil law.

3. Whether the presumption of transfer of all exploitation rights in a film by individual authors and performers to the film producer laid down in article 45d of the Dutch Copyright Act can be set aside at all in an individual contract between the author or performer and the film producer, was not decided by the Court. The Advocate-General was of the opinion that this is not possible and that authors and performers cannot in advance transfer the rights relating to the exploitation of (future) films to a collecting society. The Court did not have to answer this question because it was of the opinion that the transfer was not valid in this case because it was not precise enough. This means that this important question still has to be answered, possibly in the proceedings on the merits between Lira and UPC & Ziggo.

This could well mean that several Dutch collecting societies, in particular those representing actors, screenwriters and directors (Norma, Lira and Vevam) can no longer claim remuneration for cable (re)transmission of programs broadcast by Dutch broadcasters. This represents 90% of the programs viewed in The Netherlands. Remuneration for programs broadcasted by foreign broadcasters is probably not affected, to the extent that those programs are still retransmitted. Performing rights societies Buma and Sena are not affected, because their rights are not limited to retransmissions, they also include broadcasting rights. Also, musical rights are not covered by the presumption of transfer to the filmproducer. Visual rights collecting society Pictoright is also not

affected because it mainly represents rights in preexisting works which are not covered by the presumption of transfer.

It is important to note, however, that the Dutch Ministry of Justice has started a consultation process [2] for a possible amendment to the bill copyright contract law that is currently pending before the lower house of the Dutch parliament. In this amendment a right to a proportional equitable remuneration, which is to be exercised collectively, is introduced relating to video-on-demand and all kinds of broadcasting including cable transmission. If this amendment would be accepted, a right collective right to remuneration for cable distribution would be reintroduced.

Dirk Visser

[1] Dutch Supreme Court 28 March 2014, ECLI:NL:HR:2014:735, (Norma/NL Kabel) (in Dutch).
[2] Possible amendment to article 45d of the Dutch Copyright Act, 10 March 2014, http://www.internetconsultatie.nl/filmauteurscontractenrecht (in Dutch).

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Monday, April 7th, 2014 at 3:55 pm and is filed under Case Law, Collective management, Jurisdiction, Legislative process, Netherlands
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.