

Update Netherlands

Legislation

The government postponed the publication of its policy on downloading and private copying until after the March elections. Last year the government announced that it would define a new policy rendering downloading illegal. At the same time, the government extended the freeze on levies, excluding a levy on MP3 players, I-pads and pc's until the end of 2012. The government also announced that it will not introduce a three-strikes-and-you're out procedure.

Last year's consultation on the draft bill on copyright contract law resulted in 57 reactions from interested parties. Most criticism concerned the provision that renders copyright inalienable during the life of the author and the provision that licenses automatically terminate after 5 years.¹

The government supports the European Commission's initiative for an instrument to promote pan-European music licenses, provided such instrument does not prejudice national cultural expression. The government would like the discussion on a green paper on online distribution of audiovisual works as announced by the European Commission to cover the possible introduction of a fair use exception in the Copyright Directive.

The bill to extend supervision on collecting societies is still pending.

Case law

The Court of Appeals of the Hague in *ACI v. Thuiskopie*² held that the downloading from illegal source falls within the private copying exception and, as such, should be taken into account in determining the level of the private copying levy. The decision may require the government to re-evaluate its freeze on the private copying levy.

In *FTD v. Eyeworks*³, the Court of Appeals of the Hague held that Usenet search engine FTD acts unlawful by stimulating the downloading of unauthorized Usenet files containing the feature film "Komt een vrouw bij de dokter". The court with reference to the *Rafael Hoteles* and *Divani* decisions of the ECJ interpreted the term 'communication to the public' so as to cover not only the distribution of a signal to the public (defined as 'communication to the

¹ <http://www.internetconsultatie.nl/auteurscontractenrecht>

² Court of Appeals the Hague, 15 November 2010, 200.018.226/01
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=rnl&querypage=..%2fzoeken%2fzoeken.asp&searchtype=kenmerken&vrije_tekst=aci

³ Court of Appeals the Hague, 15 November 2010, 200.069.970/01,
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=rnl&querypage=..%2fzoeken%2fzoeken.asp&searchtype=kenmerken&vrije_tekst=eyeworks

public in the strict sense'), but also the making available of the work in such a way that it is accessible to the public. An example of this second form of communication to the public is the hotel owner who installs TV sets in the hotel rooms and thereby provides access to television as well as the on and off switch and a channel search function. According to the court, the FTD search engine does not qualify as either form of communication to the public because the Usenet files are not distributed by FTD, nor does FTD supply the software which enables the downloading of the Usenet files.

In *Brein v. FTD*⁴ the District Court of Haarlem held that FTD acts unlawful by enabling the uploaders of Usenet files to reach the public. According to the court, FTD does not communicate to the public itself, because it is not possible to start downloading directly from the FTD client software. The user has to download a .nzb file from another website first, before being able to start downloading. FTD in that way differs from the Newzbin search engine that enabled downloading by a single press on a button available at Newzbin (UK High Court 29 March 2010, [2010]EWHC 608 (Ch)). FTD furthermore is not co-responsible for the communication to the public by the uploaders of the Usenet files because it has no influence on Usenet and cannot alter, remove or otherwise prevent files from reaching users. In *Agicoa c.s. v. Digitenne c.s.*⁵ the District Court of Amsterdam held that the digital terrestrial broadcast by Digitenne of the Dutch public broadcasting channels constitutes a communication to the public by Digitenne because Digitenne performs the broadcast and advertises its TV package so as to include the public broadcasting channels. The court dismissed Digitenne's argument that the public broadcasting channels are responsible for the communication to the public to the Digitenne subscribers as they have commissioned Digitenne to perform the broadcasts and since the signals can be received without a Digitenne subscription as well.

Jacqueline Seignette

ALAI Executive Committee

19 February 2011

⁴ District Court Haarlem, 9 February 2011, 158050 / HA ZA 09-782, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&collection=rnl&querypage=..%2fzoeken%2fzoeken.asp&searchtype=kenmerken&vrije_tekst=ftd

⁵ President District Court Amsterdam, 25 November 2011, <http://www.boek9.nl/search.php?q=digitenne&f%5Btitle%5D=&f%5Barticle%5D=&f%5BdateFrom%5D=&f%5BdateTo%5D=&f%5Bid%5D=>