The Dutch Supreme Court recognises 'dilution of copyright' by degeneration of a copyright design into unprotected style. The Flying Dutchman: All Sails, no Anchor II

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(Summary)
In its Elwood decision on a trendsetting design the Dutch Supreme Court has introduced a new kind of annulment of copyright, its 'dilution' by 'degeneration of a work into an unprotected style', a mixing up of copyright and trademark law. With this invention the Court has again created a new obstacle to the free movement of goods in the EU.

The Elwood decision

On 8 September 2006 the Dutch Supreme Court has handed down its unreflected decision in a lawsuit between the Amsterdam firm G-Star and the Italian firm Benetton. G-Star had marketed new fashionable blue jeans, the 'Elwood' jeans. The characteristics of this product were simultaneously described in the trademark register: 'slanted stitchings from hip towards crotch, knee parts, inserted piece in the seat, horizontal stichings at kneehight on the rear, wave-band on the rear at the bottom of the leg of contrasting color or other material, also used in combinations.' Later the Benetton jeans appeared on the market, which, according to G-Star infringed her trademark and copyrights in the Elwood jeans. The Amsterdam Court of Appeal awarded both claims. The Supreme Court suspended its decision on the trademark claim until the European Court of Justice would have answered a preliminary question regarding European trademark law. In this article only the final copyright decision of the Supreme Court will be considered.

The defendant Benetton had argued that the copyright design of the Elwood jeans had degenerated into a common style, which was free for the taking, an analogy to trademark law where a trademark can degenerate into a generic term and thereby lose its protection, like for instance the original trademark Grammophone. In court this reasoning failed, but *only* because G-Star had consistently sued third-parties infringers of her copyright. Her *own* use of the design could of course not result into the degeneration of the design into a common and copyright-free style. The new construct of dilution of a design copyright in itself found favor, first with the Advocate-General at the Supreme Court Verkade. The Court then followed this advice. The application of the construct in this case *only* stranded on the fact, already stated, that plaintiff G-Star had consistently warded off infringers of her copyright. This argument in itself is again consistent with accepted trademark law. The mixing up of copyright and a certain particular element of trademark law as such was not rejected, and this is the alarming message of the G-Star decision of the Dutch Supreme Court.

Copyright-free style

It is of course an axiom of copyright law that ‘style’ or ‘ideas’ are unprotectable by copyright law. This is widely accepted in Dutch copyright law since a fundamental decision of the Supreme Court of 1946. It is also a rule of American copyright law, where it comes under the famous idea-expression dichotomy, which has finally been laid down in article 9, section 2 of the TRIP’s Agreement.

Style is free, whether it is a collective one of a certain period, like Jugendstil or Art Deco, or a personal one like the distinctive personal drawing style of Dick Bruna, an internationally famous Dutch writer and illustrator of children’s books. Legally no distinction should be made between collective and personal style. Only a certain Dutch copyright expert, the lawyer and Utrecht professor Grosheide, wanted it differently. He defended copyright in at least a personal style, although this particular kind of style had already been at issue in the famous Dutch copyright decision of 1946 mentioned before, denying copyright in the personal style at issue. Grosheide argued that personal style and personal character are essentially synonymous in the copyright requirement of personal imprint of the author on a work. He wanted copyright protection of a whole ‘oeuvre’ of an author, his existing works, and the ones still to be created. He called this the ‘handwriting’ of an author. He forgot that copyright does not protect ‘handwritings’, and no ‘oeuvres’. Grosheide confused copyright protection of a personal work with protection of the character of the author himself. As I wrote before: ‘Le style est l’homme même’ (the style is the person himself). The person as such however is not protected by copyright, only his specific works.

The trendsetter problem

Undeniably though, the question can become more complicated when the work of an artist has been copied by others by way of style. This is the trendsetter problem, which has also been at issue in the Elwood case.

A first decision on the subject was rendered by the Dutch Supreme Court in the Decaux/Mediamax case in 1995. This ended a legal battle between two producers of billboards as part of street furniture. Plaintiff Decaux argued *inter alia* that he himself had created the style of these objects. This did not help him because style is not protected by copyright: anybody may follow a style, also the style of the trendsetter. In his comment on the decision Verkade wrote, and here we are nearing the Elwood case: ‘as long as the trendsetter is still the only one who makes use of the style, introduced by himself, the distinction between unprotected style and protected work can be a problem. From the decision of the Court of Appeal it becomes clear however that the style, stemming from the plaintiff Decaux, had alreay been widely followed, and that Decaux had not acted in court against this. I already indicated that a trendsetter can have good commercial reasons for this. But then he cannot later complain about the copying of his style.’ As I have already remarked above, in the Elwood case plaintiff *had* sued third copiers and only that made him win his case.

In his comment on another Supreme Court decision in the field Hugenholtz wrote: ‘That the design has proved to be a trendsetter, cannot diminish the copyright of Bigott,

or does it nonetheless? The decision evokes the fascinating question whether the copyright in a work can be nullified by multiple use of copying, like this is not unusual in trademark law. Many popular trademarks have in the past degenerated into generic terms and have in this way gone under by their own succes. In the same way an in the first instance original work could gradually degenerate into unprotected "style". See ... Decaux/Mediamax.' The learned commentator refrained however from answering this 'fascinating question' himself. He obviously preferred to let his question wait for somebody else to answer. This would after some years turn out to be the Nijmegen copyright specialist Quaedvlieg.

This author proposes to make the protection of the trendsetter 'variable in time, to diminish'. He is of the opinion: 'In a breathing cultural (and industrial!) climate one cannot escape this' and: 'The trendsetting design can have laid bare a string which vibrates with the spirit of the time, or opens new perspectives.' In connection with 'the development of the common inheritance of design' he thinks: 'Copyright is not there to bind the spirit of the time, or the growth into something new'. He then pleads for a 'biologically breaking down of the trendsetting model'. Copyright is here apparently something like plastics in garbage which should be biologically broken down.

This elevated rhetoric seems to have started from a narrow base: his irritation at the multiple law suits, everywhere in the world, which the Norwegian firm Stokke has won against imitators of his Tripp Trapp chair, a famous adaptable dining table chair for small children. Millions of copies of this chair have been sold internationally and it has been correspondingly plagiarized. Quaedvlieg seems to confuse here a single succesful design with style, and mentions this one 'example' in order to plead for his 'declining scope of protection' of the 'trendsetter': 'Is it possible that an act which in 1975 would still be an infringement of the copyright in the Stokkke chair, in 2004 (the year of publication of his article) or in 2020 would be viewed with a milder eye? That question - he writes - can be answered affirmatively.' A successful appeal to the courts. Advocate-General Verkade and the Supreme Court itself seem to have this taken to heart in the Elwood decision, albeit still in principle and still not in a concrete case with respect to the Tripp Trapp chair. But the professor and lawyer Quaedvlieg has already positioned himself as *amicus curiae* for that future case. At the moment another Tripp Trapp case is before The Hague Court of Appeal: The Hague District Court had restricted the scope of coverage of the copyright in the chair. Perhaps this case will finally go up to the Supreme Court.

The mixing up of copyright and trademark law

In his article Quaedvlieg also writes: 'The solving of the puzzle to find a satisfying answer within copyright law for the dilemma of the trendsetting design makes little sense if other regimes of protection (besides copyright) are available which "bluntly protect". Several authors have paid attention to the fact that the subtleties of each protective regime relevant for one and the same product should not degenerate into unnecessary complications. They have pleaded for an integrated approach to the question of infringement. The whole thing should be "streamlined". Quaedvlieg concludes: 'Finally it

does not seem impossible to bend the policy of other, cumulatively applicable protective regimes, into a reasonable harmony to copyright as "pilot regime" for the trendsetting design.' The author appeals to a thought which has been developed by Grosheide, already mentioned above in another context, in a series of publications. Beginning with his doctoral thesis Grosheide has pleaded for a 'pluriform approach of copyright', for integration of copyright with social law or the law of conservation of monuments and cultural treasures. Grosheide writes: 'then it does not matter whether one reaches the desired outcome one way via copyright or the other way via another legal regime.' Indeed, with an 'integration' of legal regimes one can always reach some 'desired result'. This proposal reveals a very instrumental approach to law. In order to reach the 'desired result' one should open the whole legal toolbox and pick up the most appropriate instrument, conservation law, social law or trademark law or whatever field of law. The choice is unrestricted. Law apparently serves to fulfill the wishes of its inventive user, one way or the other. This approach might be tempting for a lawyer, eager to defend his clients interests with any means, but not for a judge, legal scholar or law maker, who should take care not to slide down the slippery road to the historic and infamous principle 'Recht ist was dem Volke nützt' (Justice is what benefits the People). Quaedvlieg can then point to a later publication in this vein of Grosheide which would indeed seem to have led straight to the doctrine of the Elwood decision. There we read: 'In his … lament under the *Decaux/Mediamax* decision Verkade inventorizes the different criteria of copyright law, design law, trademark law and unfair competition law, which answer the question of infringement. In that context he writes more specifically: "Nevertheless it is difficult to explain to laymen and students why in one and the same concrete factual constellation it should depend from subtly different criteria whether yes or no infringement may be accepted".' *In fine* Verkade's lament fits the recommendation of the (then) Advocate-General Asser to provide the judges which have to decide factual questions, in each case as far as possible with the same criteria of judgment.

Grosheide then formulates his own 'phenomenological' viewpoint: 'I subscribe completely to what Verkade and Asser contend. I even want to go further and plead for a more integrated approach of the infringement question in the written and unwritten law of intellectual property, especially copyright and trademark law' and finally: 'A nuancing of the scope of copyright protection which has been oriented to trademark law, as proposed here, leads … to a more managable and transparent testing of the infringement question in copyright law and it also serves the interest of more coherence between the different areas of intellectual property law.' This 'manageable coherence' of the whole field of intellectual property law has indeed already been partly realised in the mixing up of copyright and trademark law in the Elwood decision. Grosheide now agitates for even a further merging of copyright and trademark law: the specific requirement of trademark infringement, 'confusion of the public', should also be used in copyright cases. The result of the system of the Utrecht professor and his followers would be that the absence of confusion of the public in a specific case should lead to the judgement that no copyright infringement has taken place. This implies that if a pirate publisher reprints a bestseller and takes care to mention the real author and his own pirate publisher's imprint and in

this way avoids any risk of confusion of the public, there would be no infringement of copyright. Would it not be simpler then to abolish the Copyright Act and those annoying treaties behind it in the first place? It remains to be seen what the Dutch Supreme Court will eventually decide on this proposed further merger: will it again succomb to the 'phenomenological' siren song of Grosheide? Or will it retreat from its Elwood decision?

Europe Europe

The Supreme Court has with its Elwood decision introduced a totally new kind of annulment of copyright, the trademark 'dilution' by 'degeneration of a work into an unprotected style'. This concept runs counter to the Dutch Copyright Act and all copyright treaties which only recognize the ending of copyright by lapse of the term of protection. The Elwood monster is an internationally unique invention. The Netherlands are in this way again out of step with copyright in Europe, which had just been harmonized by the EU with no less than seven Directives, all in order to realise the free movement of goods. The Dutch Supreme Court has with its new invention again created a new copyright obstacle to the European free movement of goods. A few months before this same Supreme Court had, again at the insistence of its Advocate-General Verkade, introduced another deviation from accepted copyright rules with its unfortunate Perfume Scent decision, which also had demonstrated a total oblivion of the European dimension of the ruling.

The European Commission shall have to put an end to both Dutch legal developments, although such a move may - I fear - further contribute to the europhobic aversion of trendy Dutch lawyers to 'Brussels'. It is to be hoped that the Supreme Court will retreat from its unreflected Elwood decision before the European Commission steps in.

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Grosheide, 'De stijl van de meester en het auteursrecht', BIE 1985, 186 and *Idem*, 'Bespreking Bruna II-arrest', IER 1988, 43.

See footnote 2.

H. Cohen Jehoram, 'Le style est l'homme même', Beeldrechtwijzer, The Hague, I.

Dutch Supreme Court 29 December 1995 (Decaux/Mediamax), NJ 1996, 546, commentary Verkade and AMI 1996/10, 199, commentary Quaedvlieg at page 195.

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Grosheide, ‘Zwakke werken. Een pleidooi voor een merkenrechtelijke benadering van de inbreukvraag in het auteursrecht’, Essays in honor of Theo Bremer, Deventer 1998, 133.

See footnote 7.

Grosheide, ‘Op de grens van auteurs- en merkenrecht’, Introductory paper to a working session organized by him for the Dutch Copyright Association at 27 October 2006.

See H. Cohen Jehoram, La Cour de Cassation des Pays-Bas reconnaît un droit d’ateur sur la fragrance d’un parfum. Le hollandais volant. - Toutes voiles dehors, pas d’ancre I, Propriétés intellectuelles, no 22, Janvier 2007, Libre Opinion, pp.6-9.