

The Concept of Work in Holland: technical challenges and +zero level

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I. *OFFICIALLY*,
INFOPAQ RULES HOLLAND

NL converted to EU concept of work

- HR 25 October 2013, S&S Import en Export/ Esschert Design
- Hoge Raad accepts 'total harmonisation' of the concept of work
- fire baskets imported from Germany, where they were not eligible for copyright
- HR *overrules* German law



HR 25 October 2013, S&S/Esschert: Design directive vs ECJ

- Article 17 of the Design Directive, 69(2) Reg. leave member states free as to whether a design will be protected by copyright
- In the years following the entry into force of these European rules, the European Court has harmonised the concept of work in copyright
- That means that the freedom that the European legislator wished to reserve for the national legal systems, has been limited by this case law of the ECJ.

HR 25 October 2013, S&S/Esschert: reference to ECJ Flos

- This is confirmed in ECJ 27 January 2011 (Flos)
- Which, in its nr. 34 as to the eligibility of unregistered designs
- In particular refers to the Copyright Directive,
- “if the conditions for that directive’s application are met”
- Therefore, the Court of Appeal was right in orientating itself on this European case law
- (4.1.2)

Hoge Raad 4.1.1991, Van Dale/Romme

Definition of originality

- “in order to be regarded as a work of literature, science or art (...)
- it is required that [the thesaurus of a dictionary]
 - has an **own**,
 - **original character** and
 - bears the **personal imprint** of the maker”

Van Dale/Romme: Europe proof?

- A-G Verkade and most Dutch authors:
- “The Van Dale criterion is Europe proof”
- **Let’s test!**

The tripod of originality

- Three components can be distinguished in the Van Dale criterion :
 - Original in the sense of a *personal stamp*
 - Original as a *minimum creative level*
 - Original as meaning *not copied*
- Consistent with ECJ case law?

II. PERSONAL STAMP (VAN DALE) PERSONAL TOUCH (PAINER)

Personal stamp/touch and the copyright domain

- Originality in the sense of personal stamp
- Can serve to delimit the copyright **domain**
- sometimes **positively** – by including a new category of creations
- Sometimes **negatively** – by *excluding* them

**II (A) LANCÔME:
COPYRIGHT FOR PERFUMES**

Personal stamp as a positive domain test: “Trésor perfume”



HR 16 juni 2006, Lancôme/Kecofa
“Trésor perfume” (IIC 2006, p. 997):

the description given in Article 10 of
the Copyright Act (...) is **general** and
does not rule out scents.

what is decisive is whether a scent is
open to human perception..

and whether it has an **own original
character** and bears **the personal
stamp** of the author. (...)

Positive test of “Trésor perfume” : Painer-proof?



- ECJ 1 December 2012, C-145/10, Eva-Maria Painer:
- “the author’s own intellectual creation is an author’s own if it reflects his **personality**” (nr 88). That is the case if the author makes “**free and creative choices**” (nr 89)
- ‘Trésor’ could be in conformity with EU law (“No other criteria”)
- Unless perfumes categorically qualify as a ‘simple application of know-how’ (CdC 13 June 2006, Nejla Bsiri-Barbir)

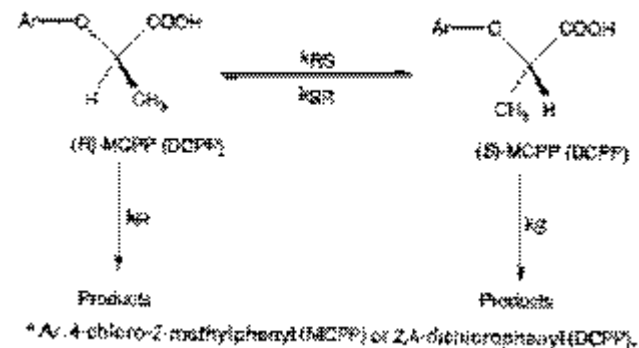
**II (B). TECHNIP:
RESULTS OF SCIENTIFIC RESEARCH**

HR 24 February 2006, Technip (kinetic scheme): technical nature

Can a kinetic scheme be original?

Example of a simple kinetic scheme

- “.... the Court of Appeal has rightly examined whether the **selection of the data** (...) in the kinetic scheme,
- has an **own, original character and bears the personal stamp** of the maker.



HR 24 February 2006, Technip (kinetic scheme): technical nature

- “... this requirement [own original character, personal stamp, AQ] can be complied with, if the selection(...),
 - is **based on scientific or technical knowledge**, understanding and experience,
 - whereas the selection **relates to objective scientific data** and patterns
 - and is **aimed at goals of a scientific or technical nature**.

HR Technip vs ECJ Football Dataco

- Hoge Raad
24 February 2006

Technip:

- [the originality requirement can be complied with because]
- in the frame of the selection, **the personal vision** of the maker(s) of the kinetic scheme,
- which amongst others rests on experience and analytical capacities, **plays an important role**

- ECJ 1 March 2012,
C-604/11,

Football Dataco :

39 By contrast, that criterion is **not satisfied when** the setting up of the database is dictated **by technical considerations, rules or constraints** which leave **no room for creative freedom**

Personal stamp as a negative domain test: ECJ Softwarova (BSA), Football Dataco

- Personal stamp as a *negative domain* test: functionality *excludes* originality
- ECJ 22 December 2010, C-393/09, **Softwarova**
48. [the criterion of originality] cannot be met by components of the graphic user interface which are **differentiated only** by their **technical function**.

49 [...] where the expression of those components is **dictated by their technical function, the criterion of originality is not met**, since the different methods of implementing an idea are **so limited** that **the idea and the expression become indissociable**.
- ECJ 1 March 2012, C-604/11 **Football Dataco**
39 By contrast, that criterion is **not satisfied when** the setting up of the database is dictated **by technical considerations, rules or constraints** which leave **no room for creative freedom**

What are *free* choices?

- If an expression is dictated by its technical function, the criterion of **originality** is not met (softwarova)
- Because technical considerations, rules or constraints leave no room for **creative freedom** (Football dataco)
- By making “**free and creative choices**”, the author can “**stamp** the work created with his ‘**personal touch**’ (Painer, nr 88-92)

Functionality and personal stamp

- “free” might mean *arbitrary*
 - A functional choice can be original in the sense of rare, brilliant or surprising
 - But it can never be arbitrary in the sense of dependent only upon the *personal* preference of the author
 - Because if as a consequence of this personal choice makes that the desired function is not realised, the maker will change his choice
 - Consequently, the makers choice may be creative (in other meanings) but *not* arbitrary
- Consequently:
 - personal stamp is used as a **domain criterion** for
 - it excludes technical subject matter



II. C

TECHNICAL SHAPES:

THE STOKKE SAGA – 3 CASES

Not *solely* determined by technical constraints...

Court of Appeal The Hague 31 May 2011, Hauck/Stokke

- The slanting position of the side supports is not solely technically determined
- Even if the angle between the the side supports and the bottom legs
- Is determined also by the **anatomy** of man (the child)
- And furthermore by **practicle and technical conditions**, *such as*
 - *The length of the bottom legs and the side supports*
 - *And the stability of the chair*

**Supreme Court 12 April 2013
Hauck/Stokke endorsed this; ‘facts’**



III. THE MINIMUM CREATIVE LEVEL SCHÖPFUNGSHÖHE

III. A

**DUTCH SUPREME COURT : ENDSTRA
TAPES**

HR 30 May 2008, “Endstra Tapes” “personal imprint”: ‘> zero’ threshold

- ‘> zero’ threshold
 - “personal imprint” means that the form is a result of creative human activity and thus of **creative choice**, “hence the product of the human mind” and
 - that protection is **not** extended to a form which is so banal or trivial that it does **not disclose any** creative achievement of whatever kind (4.5.1)

Hoge Raad: domain and threshold are strictly one

- Where a category of intellectual productions offers *room for creative human choices*, that *category* work belongs to the copyright *domain*.
- Copyright may extend to forms if even 1 creative choice has been made
- Endstra papers?
 - Although it is hard to deny that the Endstra interviews contain certain creative choices, the huge discussion which arose proves that many feel this alone is not enough
 - See end decision of the Court of Appeal of The Hague in Endstra of 16 July 2013, which, *ignoring* the Supreme Court, in the end denied protection on grounds which from a *legal* point of view are disputable

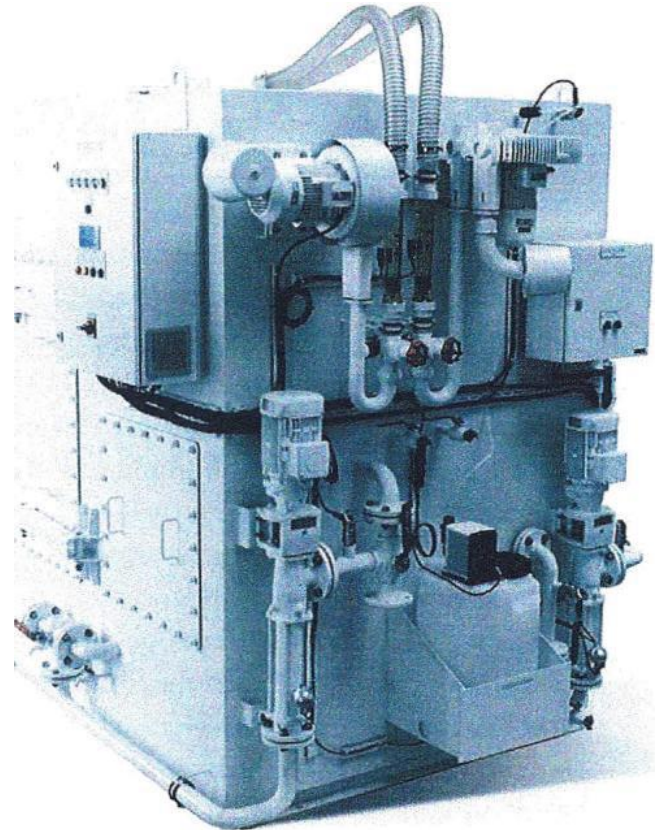
Would one creative choice suffice?

(and is “creative choice” a smart criterion at all?)

According to established case law, the TRIPP TRAPP chair only contains *two* creative choices



According to (someone), this machine is not at all creative, but its design probably shows a herd of ‘free creative choices’ where the ‘author’ could go either way



III.B

ECJ: INFOPAQ AND PAINER

- ECJ 16 July 2009, Case C-5/08
- The Eleven-Words-Work
 - The rule that works are protected if they are **original** in the sense that they are their author's **own intellectual creation** applies to all works;
 - “[...] !! given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, !!
- the possibility may not be ruled out
- that certain isolated sentences,
- or even certain parts of sentences,
- may be suitable for conveying to the reader the originality of a publication such as !! a **newspaper article** !!

ECJ 1 December 2012, C-145/10, Eva-Maria Painer

- [As stated in recital 17]
“the author’s own intellectual creation is an author’s own if it reflects his **personality**” (nr 88)
- That is the case if the author makes “**free and creative choices**” (nr 89)
- By making those choices, the author can “**stamp** the work created with his ‘**personal touch**’ (nr 92)

ECJ 1 December 2012, C-145/10, Eva-Maria Painer

- The ECJ uses ‘personal stamp’ as a criterion for
 - the **domain** question (works of free creativity) *and*
 - The required creative) **level** (the threshold for protection)
- But it does add *personal touch*
- Not every single creative choice results in a personal touch for the work (?)

creative *level* and personal stamp distinguished

- ‘creative choice’ is a good *domain* criterion
 - Indicating that the *possibility* of creative choices opens the *possibility* of being eligible for copyright protection;
- ‘creative choice’ is a bad *threshold* criterion
 - The work as a whole must reflect a minimum level of creativity
 - One or two ‘creative choices’ should not always suffice

Good Reasons for a more than minimal threshold

- Protection of ‘hardly-more-than-zero’ originality will:
 - Disproportionately hamper competition
 - Disproportionately reward minimal creativity
 - Create a considerable risk of double protection of creations of two (or more) independent makers and the complications this entails

The minimum creative level

IV.

‘NOT COPIED’

‘Not copied’: original in the subjective sense

- HR ‘Trésor’ nr. 3.4.2, *in fine*:
 - “in order to be protected by copyright it is not required that a work is new in the objective sense, but it suffices that it is **original in the subjective sense**, that is to say: from the perspective of the maker

HR 30 May 2008, “Endstra Tapes”

“own original character” = not borrowed

- Te Court of Appeal rightly distinguished both elements of the criterion:
- That the creation must have an **own, original character** means, in brief words
- That the form must **not be borrowed** from another work (see Article 13 Copyright Act)
- (The requirement that the creation must bear the **personal stamp** of the maker means that it is the result of creative human labour and thus of creative choices, etc.)
- (4.5.1)



ECJ and ‘not copied’

- No explicit confirmation yet
- Still, strongly present in the definition:
 - “own, intellectual creation”
- A copied work is
 - Neither someone’s *own* creation
 - Nor an (intellectual) *creation* of that person at all

Does 'Not copied' *define* the work ?

- The requirement that the work must 'not be copied' is *obvious*
- But is it just a requirement
- Or is it an authentic and vital part of the *definition* of the Concept of Work ?