The Netherlands

“Endstra Tapes”

Copyright Act (Auteurswet 1912), Arts. 1, 10 – *Endstra’s Sons v. Middelburg, Vugts and Nieuw Amsterdam*

Decision of the Supreme Court (Hoge Raad – First Chamber)

30 May 2008 – Case No. C07/131HR

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1. Conversations on the back seat of a car may constitute a copyrightable work.
2. In order to qualify as a work of literature, science or art under Arts. 1, 10 Dutch Copyright Act, it is required that the work has its own original character, and that it carries the personal stamp of the maker.
3. The personal stamp means that the product must be the result of creative human activity and thus of creative choices. This must be recognisable from the work itself. It is not required that the maker consciously wanted to create a work and consciously made creative choices. The work does not need to have the character of a coherent creation.

Facts:

The plaintiffs are the sons of real estate agent Endstra, who was murdered in 2004. In the period before he died, Endstra was being blackmailed. For this reason, he held several confidential conversations with officers of the Criminal Intelligence Unit (*Criminele Inlichtingen Eenheid*) of the Amsterdam police, which took place on the back seat of a driving car. The conversations were sound recorded, after which part of them were literally transcribed. After the murder, the transcript was provided to the National Criminal Investigation (*Nationale Recherche*), which used it in a report. The defendants, Middelburg and Vugts, somehow obtained a copy of the report. They included the “back seat conversations” in a book, which was published by defendant Nieuw Amsterdam. In preliminary proceedings before the Court of First Instance of Amsterdam, Endstra’s sons and joint-heirs claimed, inter alia, withdrawal and destruction of the books and a prohibition of further publication.

The plaintiffs substantiated their claims by invoking copyright in the conversations held by their deceased father. The Court of First Instance determined that no copyright subsisted in the back seat conversations. This was confirmed by the Amsterdam Court of Appeal. Thereafter, the Endstra sons appealed in cassation to the Supreme Court.

Findings:

4.3 According to established judicial practice, in order to qualify as a work of literature, science or art under Art. 1 in conjunction with Art. 10 of the Dutch Copyright Act, a work must have its own original character and carry the personal stamp of the maker [citations omitted]. The appeal court also adopted this standard (in para. 4.4).

4.4. The considerations of the appeal court reproduced in para. 4.7, as confirmed by the passage from the expert opinion of Professor J.H. Spoor cited with approval by the appeal court, obviously assumed that the fact that Endstra put the information communicated by him into words in his own way admittedly meant that what was spoken had a character of its own, determined (“associated”) by the type of choice of words, but that the precondition of the author’s personal stamp required the work to be the result of creative human activity involving a creative choice. In order to satisfy this condition, it is, in the opinion of the appeal court, necessary for the work to be conceived by its creator as a coherent creation and deliberately cast by him into a specific form.

4.5.1 The appeal court rightly distinguished between the two elements of the standard to be applied. Firstly, the product must have its own original character, which put briefly means that the form must not be borrowed from another work (cf. Art. 13 of the Dutch Copyright Act). Secondly, the work must bear the personal mark of its creator, which means that it must be a form that is the result of creative human activity and thus of a creative choice, hence the product of the human mind. Accordingly, protection in any event is not extended to a form that is so banal or trivial that it does not disclose any creative achievement of whatever kind.

4.5.2 These features must be evident from the work itself. Accordingly, there is no precondition that the author consciously wanted to create a work and consciously made creative choices, which moreover could cause the parties concerned insoluble difficulties in terms of evidence. For the same reasons, there can be no requirement that the author deliberately selected the form that his work has been given. The considerations raised in para. 4.5.1 mean instead that the creation, in order to be a work in the copyright sense, need not have the character of a coherent creation. ...

4.6 ... The court of appeal, to which the case is returned, shall, taking into account the legal opinion set out in this decision, have to decide again whether the “back seat conversations” are works that bear the personal mark of Endstra as author.

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