The Dutch approach to the legality of hyperlinks

The debate in the Netherlands over the legality of hyperlinks with regard to whether such links infringe on the copyright of works on the internet has been reignited recently by a pair of court decisions, by the District Court of Amsterdam and the Appeal Court of Amsterdam respectively. Both courts ruled on cases where the hyperlinks were found to be unlawful, yet the legal grounds leading to such a verdict differed. Win Yan Lam, a Senior Associate at Hogan Lovells International LLP, examines these two decisions and the differing legal approaches that have emerged in relation to hyperlinks and copyright infringement.

Hyperlinks have been the subject of many disputes across the world, including in the Netherlands. Back in 2002, the Supreme Court of the Netherlands had a chance to consider this issue[1]. Some in the Dutch legal community viewed this decision by the Supreme Court as a threat to hyperlinks. The situation in that case was as follows: when a visitor of a website clicked on an image (a hyperlink), the text of a third party website would pop up in a frame of that third party website. The Supreme Court found that by clicking on the image, the third party text was retrieved and communicated to the visitor. The Supreme Court therefore concluded that this constituted a 'simple repetition' (in Dutch: *eenvoudige herhaling*) of the third party text. 'Simple repetition' is the criterion of infringement in the case of non-original writings that can enjoy protection under Dutch copyright law. In view of this, the aforesaid finding of the Supreme Court gave rise to an animated discussion on the legal status of hyperlinks in the Netherlands.

A decade later, two decisions - one by the District Court of Amsterdam and one by the Appeal Court of Amsterdam - have renewed the attention on the topic of hyperlinks. In both decisions, the conclusion was that the hyperlinks concerned are unlawful, but the legal grounds leading to this conclusion were not the same.

Hyperlinks may constitute copyright infringement

In September last year, the District Court of Amsterdam ruled that posting a hyperlink to copyright-protected content in the case at hand constituted copyright infringement[2]. In that case, the Dutch blog GeenStijl featured an article about leaked photos of a Dutch reality TV star. These photos were meant to be published in an upcoming edition of a magazine. The article on the website of GeenStijl contained a hyperlink which directed visitors to the leaked photos on a third party file sharing and storage website. When Sanoma, the publisher of the magazine, managed to have the photos removed from the file sharing website, the Dutch blog updated its article by posting a new hyperlink that directed the visitor to another third party website on which the photos were available. The publisher of the magazine succeeded in having the photos on that website removed too, but by then the photos had already spread across the internet and visitors of GeenStijl kept posting new hyperlinks to the photos by way of comment on the article.

The District Court of Amsterdam considered whether posting a hyperlink on the internet constitutes a communication to the public (in Dutch: *openbaarmaking*) within the meaning of Article 12 of the Dutch Copyright Act. If so, GeenStijl had infringed the copyright in the photos by posting the hyperlinks. The District Court held that the following circumstances are particularly relevant when assessing whether there is a communication to the public: (1) if there is an intervention, (2) as a result of which a (new) public is reached, and (3) if the intervention is aimed at making a profit. The District Court then used these three criteria to determine if the hyperlinks in the case at hand constituted a communication to the public.

First of all, the District Court considered that the photos at hand initially could not be easily found and accessed by the public. Only the small number of people who knew the exact URL of the two file sharing and storage websites could view the photos. Thus, by posting the hyperlinks, the blog had intervened to provide the public with access to the photos. Further, the article of GeenStijl read 'And now the link to photos you all have been waiting for.' In an update, the blog wrote: 'Not seen the photos yet? They are HERE.' In view of the foregoing, the District Court held that GeenStijl intervened in full knowledge of the consequences of its actions. Secondly, the District Court found that a new public was reached: 230,000 daily visitors of the blog. The only thing that these visitors had to do to get to the file with the photos was to click on the hyperlinks posted by GeenStijl. The third criterion was met, too: according to the District Court, GeenStijl had posted the hyperlinks with the intention of luring visitors to its website or to keep its current visitors. It also appeared that the article containing the hyperlinks was the blog's most viewed article of the year. All in all, the District Court concluded that by posting the

hyperlinks, the Dutch blog had communicated the photos to the public. Consequently, the blog had infringed the copyright in these photos.

The three criteria which the District Court applied are derived from case law of the European Court of Justice regarding the question of what constitutes a communication to the public[3]. That case law does not explicitly deal with the issue of hyperlinks, but apparently this did not dissuade the District Court from applying these criteria to hyperlinks. Clarity on this subject matter will be given by the European Court of Justice itself: in October last year, the Swedish Court of Appeal referred *inter alia* the following question to the European Court of Justice in the case between Svensson, et al. and Retreiver Sverige AB: 'If anyone other than the holder of copyright in a certain work supplies a clickable link to the work on his website, does that constitute communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society?'[4]

Two Court decisions have renewed the attention for the topic of hyperlinks. In both decisions, the conclusion was that the hyperlinks concerned are unlawful, but the legal grounds leading to this conclusion were not the same.

Hyperlinks may also constitute an unlawful act

In the meantime, four months after the GeenStijl-decision, the Appeal Court of Amsterdam was to decide another case concerning hyperlinks[5]. In that case, a former maths teacher had posted hyperlinks on his website which directed the visitor to PDF copies of copyright-protected solutions to math problems on third party file storage websites. Contrary to the District Court, the Appeal Court did not use the three aforesaid criteria to assess the publisher's copyright infringement claim: the Appeal Court simply held that a hyperlink which merely 'shows the way' to a work does not constitute a communication to the public within the meaning of the Dutch Copyright Act.

Instead, the Appeal Court discussed, at much greater length, the question of whether the former teacher's posting of the hyperlinks constituted an unlawful act. The Court of Appeal considered that the hyperlinks made it possible or at least much easier for third parties to find the unlawfully published maths solutions. According to the Appeal Court, the availability of the maths solutions on the internet had a negative impact on the sales of the publisher. As a result of this, the publisher lost revenue. The Appeal Court therefore concluded that the former maths teacher had breached the standard of due care, which constitutes an unlawful act *vis-à-vis* the publisher. Probably in view of the GeenStijl-decision, the former teacher had also argued that his website was not aimed at making a profit: it was simply a hobby. The Appeal Court however rejected this defence, reasoning that the nature of his website does not alter the fact that he negatively affected the publisher's exploitation of the maths solutions.

Two possible approaches to hyperlinks in the Netherlands

The European Court of Justice is still to deliver its judgment in the Svensson/Retreiver Sverige AB case. It remains to be seen if that ruling will have any consequences for the way in which Dutch Courts deal with the issue of hyperlinks. For now, the two recent decisions discussed in the foregoing seem to give rights holders two possible approaches in the Netherlands when confronted with hyperlinks to copyright protected material.

In the first approach, copyright infringement can be argued using the three mentioned criteria: intervention, a (new) public and the aim of profit. In this approach, the focus is more on the party posting the hyperlink. Does this party post the hyperlink in full knowledge of the consequences of its action? Is it aiming to make a profit? In the second approach, the possible negative consequences of the hyperlink for the rights holder are the main consideration. In view of these negative consequences, the posting of the hyperlink may constitute a breach of the standard of due care which must be observed in society.

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1. The Supreme Court of the Netherlands 22 March 2002, NJ 2003/149 (El Cheapo).
2. District Court of Amsterdam 12 September 2012, MF 2012/23 (Sanoma/GeenStijl).
3. E.g. ECJ 7 December 2006, C-306/05 (SGAE/Rafael Hoteles).
4. Case C-466/12 (Svensson/Retreiver Sverige AB).
5. Appeal Court of Amsterdam 15 January 2013, LJN: BY8420 (Noordhoff).