

'Spreading' a work under Dutch copyright law: the gift that should not have been given

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Introduction

The Copyright Act 1921 grants the author of a literary, scientific or artistic work or their successor in title the exclusive right to:

- disclose the work to the public; and
- reproduce it.

The right of disclosure, which is set out in Article 12 of the act, is generally understood to include both the act of communicating the work to the public and the right of distribution as provided for in Articles 3 and 4 of the EU Copyright Directive (2001/29/EC).

Act of 'spreading'

Article 12 of the Copyright Act lists a number of acts that fall within the definition of 'disclosure to the public'. In addition to the more straightforward cases of disclosure (eg, broadcasting, rental or presentation in public), Article 12(1)(2) specifically stipulates that disclosure also includes *verbreiding* (translated in English as 'spreading') all or part of a work or a reproduction thereof where the work has not yet appeared in print.

The act of spreading concerns distributions of the work on a limited scale (eg, sending a manuscript to a limited number of people, such as an editorial board or a committee) before it is intended to be published and made available to a wider audience. According to the legislative preparatory works of the Copyright Act, Article 12(1)(2) aims to give authors of unpublished works additional control in order to enable them to share their works on a small scale without losing control of their exclusive right of disclosure. This additional protection is as an extension of an author's moral rights, as it further safeguards the connection between authors and their creations during the creative process. This additional control ends the moment that a work is published – after that time, it can no longer be 'spread' as is meant in the provision. The provision is somewhat unconventional, as its location within the legislation is not logical and the wording is not entirely clear.

Article 12(1)(2)'s purpose is not to consider a spread work to be a disclosed work, as the latter can subsequently be freely circulated within the European Economic Area without the author being entitled to oppose such circulation. An important aspect of the exclusive right to disclose is that it is limited to the first distribution of a work or a reproduction thereof. The first sale or other transfer of ownership in the European Economic Area of the original of a work or a copy thereof by the rights holder (or with their consent) exhausts the right to control the resale of that work in the European Economic Area (Article 12b of the Copyright Act). However, this applies only if the work or reproduction was first put on the market. Article 12(1)(2) of the Copyright Act should be understood to refer to an act that does not put the work on the market.

Amsterdam Appeal Court case

Facts

Although there is little case law on the act of spreading, the subject was recently debated in an Amsterdam Court of Appeal case. In this case, the claimant was a photographer and the author of an artwork, who was asked to contribute 37 pictures to an exhibition in New York in 2012. The photographer had two copies of each picture printed by another person. One copy went to the

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exhibition in New York, where it was displayed from 12 to 30 March 2012, while the other was donated to the printer in exchange for his assistance. The photographer added a personal note to the copies to express his appreciation and delivered them in September 2012. The printer subsequently sold and transferred ownership of the copies to a third party.

Arguments

The photographer argued that the transaction constituted an infringement of his copyright and initiated litigation. Unsurprisingly, the photographer was unhappy that his gift had been used for financial gain and that he was unable to profit from the sale of his work.

The printer argued that the copyright in the copies had been exhausted, as the ownership thereof had been transferred to him by the photographer.

However, the photographer argued that he had not exhausted his copyrights in the artwork because he had merely spread the work (and not published it). Since the work should not be considered disclosed, there was no room for exhaustion.

Decision

The Amsterdam Appeal Court, like the first-instance court, disagreed with the photographer. According to the court, spreading a work implies that it is provided only to a limited number of people on a confidential basis as a preview of the eventual work. This was not the case in the present dispute because, when the photographer had donated the copies to the printer, the originals had been on public display in New York.

Thus, the court held that a gift could not be considered an act of spreading within the meaning of Article 12(1)(2) of the Copyright Act. On the contrary, the act constituted a disclosure that led to the exhaustion of the claimant's copyright. The court also stated that exhaustion does not require an author to receive payment for a copy of their work. Rather, it is sufficient that the ownership of the copy is transferred by the author or with their consent. The fact that the copies in the case at hand were a gift and that the photographer had added a personal note did not change this rule of law. The court further added that the gift should not be regarded as a mere act of generosity towards the printer because he had provided his services for free. Since printing activities usually have a certain commercial value and no payment was involved, the court considered the printing activities to be a remuneration for the printing services.

Comment

Article 12(1)(2) of the Copyright Act aims to give authors control over the disclosure of work which has been spread and are subsequently ready to be distributed to a larger audience. The question that arises from this case is whether the outcome would have been different if the photographer had donated the works to the recipient before the exhibition, instead of after, which would have caused the works to have been spread before their publication. Although in those circumstances the act could have qualified as an act of spreading, it is arguably still different from sending a manuscript to an editorial board or committee, as the works were not meant to be an embargoed pre-publication.

A further question is whether a copy of a work that is distributed by means of an act of spreading before publication of the work remains within the control of the author only during the period between the initial spread and the eventual publication of the work or also once the work has been published at a later stage. Taking account of the spirit and purpose of the provision described above, one could make the argument for the former interpretation since the interests of an author mostly relate to controlling their work in the pre-publishing phase. However, a situation could also arise where the final published version of a work differs from the spread draft. In such situation, the author may still have an interest in keeping the spread copy out of the public domain. All of these questions remain unanswered in this decision.

For further information on this topic please contact [Roderick Chalmers Hoyneck van Papendrecht](mailto:rchalmers@akd.nl) at AKD by telephone (+31 88 253 5000) or email (rchalmers@akd.nl). The AKD website can be accessed at www.akd.nl.

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