

## Downloading to become illegal in the Netherlands, but no enforcement against downloaders

*The mission statement of State Secretary for Public Safety and Justice, Fred Teeven, of 11 April 2010, introduces a proposal to modernise the Dutch copyright regime. Teeven plans, among other things, to ban downloading from evidently illegal sources and wants to abolish the private copy levy system. According to the State Secretary this change is necessary due to recent technological developments and is appropriate in light of initiatives of the European Commission. At the moment, downloading from illegal sources for private use is permitted under Dutch law (see De Brauw's [Legal Alert - Two Remarkable Copyright Rulings of the Court of Appeal of The Hague on 15 November 2011](#)). Consumers pay a levy on rewriteable CDs or DVDs that make it possible to make copies for private use.*

### Downloading and uploading

Teeven emphasises that it is important to focus on the role of intermediaries, like website owners, hosting providers and other facilitators. Copyrights would not be enforced against individuals who download, regardless of whether a legal or illegal source is concerned. In addition, it would also not be possible to act against individuals who upload on a limited scale. It is highly questionable whether this is appropriate in light of the exhaustive enumeration of exceptions and limitations of the Copyright Directive and the three-step-test, also codified in the TRIPS agreement. Teeven fails to see that the Directive does not allow a limitation to the right of communication to the public for private use. Contrary to the US fair use doctrine, the European Directive contains an exhaustive list of exceptions.

In addition, the proposal introduces a new safe haven for Internet Service Providers. They would not be obligated to provide copyright holders with contact details of consumers who infringe copyrights on a limited scale. However, it is again

questionable whether this proposal meets the obligations under the Directive on the Enforcement of Intellectual Property Rights ("**IP Enforcement Directive**").

Furthermore, it is debatable whether Teeven's mission statement enhances the enforcement of copyrights, as the proposed codification does not go beyond the existing case law regarding the liability of intermediaries for (facilitating) copyright infringement.

Teeven also sees an important role for search engines, which should give priority to search results referring to websites offering legal content. Does this mean that search results referring to illegal content will not be allowed? Or that search engines should manipulate or filter the 'natural' search results? Under the E-commerce Directive no general monitoring obligation can be imposed. Moreover, the involvement of a search engine in prioritising search results may constitute an indication of knowledge or control and consequently the engine may not rely on the safe harbour provisions of the E-commerce Directive. One thing is for sure, Teeven's proposal will not make it easier for intermediaries to find their way through the jungle of rules.

The mission statement includes plans to strengthen copyright enforcement when the infringing activity takes place outside the Netherlands. Copyright owners must then be able to request from the Internet Access Provider to block access to specific websites. This plan seems unnecessary, as (art. 26d of) the Dutch Copyright Act implementing the Copyright Directive and the IP Enforcement Directive already establishes such a regime.

The State Secretary wants to stipulate that it is illegal to download copyright protected material from an evidently illegal source. However, it

remains unclear what is to be considered an evidently illegal source. As mentioned above, what is given with the one hand is immediately taken back with the other: even though this will constitute a copyright infringement, there will be no measures available to enforce the copyrights against individuals. This seems an ill-conceived compromise. Also, the State Secretary states that if copyright holders want to protect their work, they need to start applying technological measures. This contradicts Teeven's starting point that infringers are inventive when it comes to avoiding technical protection measures, and of course it denies the fact that the industry has tried this already, with consumers ending up complaining. Consequently, the copyright holders might very well end up empty handed, especially as the State Secretary at the same time wants to abolish the Dutch private copy levy system.

#### **Abolition of Dutch private copy levy**

Teeven argues that if downloading from an illegal source is no longer allowed, there is no longer a need for a private copy levy on blank CDs. The State Secretary suggests that copyright owners should instead increase the price of their products. Paradoxically, consumers who buy a legal copy would then need to pay more in order to compensate for others who download illegally (and against whom the copyright cannot be enforced). Other questions come to mind as well. For example, what about copies made in the offline world? People still buy CDs, which are copied for private use as well. And what about the compensation for downloads from not evidently illegal sources?

Even more problematic is Teeven's reasoning based on the unrealistic assumption that enforcement measures against intermediaries who facilitate evidently illegal downloading, will reduce all private copies to a minimum level. It is

remarkable that in this respect he refers to the ruling of the EU Court of Justice (ECJ) in Case C-467/08, *Padawan v SGAE* in which the ECJ – to the contrary – stipulates that right holders should be “adequately” compensated for the use made of their protected works.

#### **Conclusion**

Overall, Teeven's copyright mission statement falls short of the goals set by the European Parliament in September last year to combat infringements in the digital environment. It leaves individuals free to download regardless of whether illegal sources are concerned. Insofar as the European directives would even allow for the proposed changes, the proposal is an empty shell, at best.

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