

JUDGMENT

DISTRICT COURT OF THE HAGUE

Civil Law Sector

Case/docket no.: 407402/HA ZA 11-2675

Judgment of 19 December 2012

in the matter of:

1. the association in Dutch law with full legal capacity
VERENIGING BUMA,
of Amstelveen
and
2. the foundation in Dutch law
STICHTING STEMRA,
of Amstelveen,
plaintiffs,
Counsel: Ms J.M.B. Seignette of Amsterdam

versus

JIMMY PAUL HUBERT JOHAN ANTOINE SOUREN
residing in Amsterdam
defendant
Counsel: O.G. Trojan of The Hague

The plaintiffs will be referred to hereinafter as “Buma” and “Stemra” individually and as “Buma/Stemra” jointly. The defendant will be referred to as “Souren”. The substance of the matter was handled on behalf of Buma/Stemra by the aforementioned attorney and by B.D.P. van Eijk and M.R.F. Senftleben, attorneys in The Hague, on behalf of Souren.

1. The proceedings

1.1 The course of the proceedings is evidenced by:

- the writ of summons of 9 November 2011 with exhibits 1-24;
- the Statement of Defence with exhibits 1-18;
- the interlocutory judgement of 15 February 2012 in which a hearing of the parties was ordered;
- the official record of the hearing of the parties conducted on 26 July 2012 and the documents referred to therein.

1.2 The date of the judgment was fixed for today’s date.

2. The facts

- 2.1 Buma and Stemra operate, exploit and uphold copyrights to musical works. Buma focuses on publication rights and Stemra on reproduction rights.
- 2.2 Buma and Stemra base their rights to exercise copyrights on agreements which they conclude with the makers of musical works and agreements which they have entered into with fellow organisations outside The Netherlands.
- 2.3 Souren operates websites offering radio portals. A radio portal is a website which offers hyperlinks to broadcasts by various radio stations on internet (“radio streams”). Souren operates two radio portals with links to radio streams from Dutch radio stations, i.e. www.nederland.fm (hereinafter: “Nederland.fm”) and www.op.fm (hereinafter: “Op.fm”). He also operates a series of radio portals with links to radio stations outside The Netherlands (hereinafter: the “foreign radio portals”), i.e. www.deutschland.fm, www.belgie.fm, www.lafrance.fm, www.norge.fm, www.danmark.fm, www.england.fm, www.italia.fm, www.polska.pl, www.espana.fm, www.sverige.fm, www.america.fm, www.india.fm and www.zongghuo.fm.
- 2.4 The hyperlinks to the radio streams on Souren’s website are incorporated in images of the logos of the relevant radio stations on the home pages of the websites. The home page of Nederland.fm for example looks like this:

[illustration]

- 2.5 Hyperlinks link the browser of an internet user who clicks on that link to certain content, and that content is referred to in the shape of a uniform resource locator (url) which for example specifies on which server the content is available. The hyperlinks on Souren’s websites refer to radio streams which are available on the radio stations’ media servers.

- 2.6 The following illustration sets out in four steps what happens when, starting on the website of the radio station or of Nederland.fm, an internet user listens to radio streams.

[illustration]

In step (1), the user goes to the Nederland.fm website or to the website of a specific radio station.

In step (2), after the user has clicked on a hyperlink, the Nederland.fm web server or the radio station web server gives the user’s browser the url for the radio stream.

In step (3), the user’s browser requests the radio stream from the media server recorded in the url.

In step (4), the media server sends the radio stream to the user's computer, which opens the radio stream with the appropriate software (such as a media player).

2.7 A website designer can decide how the content to which the hyperlink refers is presented after the hyperlink is clicked on: he can for example decide to present the content in a frame within an existing window or in a new, smaller screen which appears after the hyperlink is clicked on (a pop-up). In the latter case, the designer can for example change the precise size of the pop-up and where it is located on the screen.

2.8 After a user clicks on a radio stream on Nederland.fm, the radio stream and the relevant visible content such as the radio station's logo are presented in a frame in the middle of the Nederland.fm home page. The following illustration of the Nederland.fm home page for example displays the content of Skyradio in the middle of the screen:

[illustration]

2.9 On Op.fm, the radio stream is presented in a pop-up. The following illustration of the Op.fm home page for example has a pop-up with the content of the radio station Qmusic:

[illustration]

2.10 Nederland.fm is a popular website, and it claims to have more than 2,470,000 unique users, 6,700,000 visits and 23,700,000 clicks per month.

2.11 Souren makes money from his radio portals by selling advertising space on his sites and by selling the data on the click and listening patterns on the websites.

2.12 Souren contacted Buma/Stemra for the first time in 2004 to reassure himself that he was not required to pay Buma/Stemra any fee for making his radio portals available. The parties subsequently consulted each other incidentally.

2.13 Buma/Stemra granted licences to the radio stations that have the radio streams to which the hyperlinks on Nederland.fm and Op.fm refer on their servers. A professional radio station pays 13% of the net income generated on that station's website, with a minimum of € 65 a month or € 780 a year (excluding VAT).

2.14 In 2009, Buma/Stemra also started granting licences for radio portals. The basic rate for radio portals is 10% of the net income generated by the website per year, with the following minimum sums:

2-25 channels:	€ 585
26-50 channels:	€ 1,112
51-100 channels:	€ 1,585
101-175channels:	€ 2,012

176-275 channels:	€ 2,396
276-400 channels:	€ 2,741
401-550 channels:	€ 3,052 (excluding VAT)

3. The dispute

- 3.1 To summarise, Buma/Stemra is claiming a ban on the communication to the public of the musical works on Souren's radio portals, an order to provide information on profits, an order to compensate damage and hand over the profits (to be fixed in separate proceedings), the payment of an advance on those damages, and that Souren be ordered to pay the full costs of the proceedings.
- 3.2 Buma/Stemra bases its claims on the argument that, by giving internet users the opportunity to listen to radio streams (and therefore the music on the radio streams) via the radio portals, Souren is communicating that music to the public or, at any rate, he is jointly responsible for that communication to the public. In addition, Buma/-Stemra has submitted that Souren has reproductions of musical works on his servers or, at any rate, that he can decide to put reproductions on his servers at any time.
- 3.3 Souren conducted a defence
- 3.4 To the extent necessary, the court will discuss the parties' claims below.

4. The adjudication

No reproduction

- 4.1 It must be assumed that Souren's server does not include copyright-protected musical works. With reference to a statement by its head of IT and outsourcing (Buma/-Stemra's exhibit 25), Buma/Stemra itself explained that the music which an internet user can listen to after he has clicked on a radio station on Souren's website, comes directly from that station's media server (notes for pleading, paragraphs 12 and 13. See also legal consideration 2.6. above). This is in line with Souren's explanation on how his websites work. In the light of the above, Buma/Stemra cannot maintain that Souren uses his websites to reproduce musical works. As Souren has rightly submitted, that entails that Stemra's claims must be rejected.
- 4.2 Buma/Stemra's claim that Souren can decide to put reproductions of musical works on his servers at any time cannot change that conclusion. The mere possibility of that happening is insufficient to assume a serious threat of infringement, especially in view of the fact that Buma/Stemra has failed to prove why Souren should change the operation of his websites in such a way that the musical works are transferred onto his servers.

Communication to the public

- 4.3 The parties do not dispute that making a radio stream available can be qualified as communicating the musical works in that radio stream to the public, and that is also the case if the radio stream can only be heard after the user of one of Souren's websites has clicked on a link to that stream. The parties do however differ on the question of whether Souren is (jointly) responsible for that communication to the public in a situation in which, after the user has clicked on a hyperlink on a radio portal, the user's browser downloads the radio stream directly from the radio station's media server. In the court's opinion, that question must be responded to in the affirmative because Souren has designed his websites in such a way that the linked radio streams can be listened to as part of his websites.
- 4.4 A prime consideration is that Souren's involvement in the communication to the public goes further than merely offering a hyperlink to the radio streams. In the case of Nederland.fm, Souren decided to present the radio stream and the visual content linked to it in a frame within the Nederland.fm home page. In that way, Souren is ensuring that, when listening to the radio stream, the user is presented with the Nederland.fm home page. Souren achieves a similar effect in the case of Op.fm by presenting the radio stream in a pop-up. Depending on how the user's browser operates, that pop-up will appear over or behind the Op.fm home page. If the pop-up appears behind the home page, the visual content linked to the radio stream is not visible to the user, but the radio stream with the copyright-protected musical works can naturally still be heard. If the pop-up appears over the home page, most of that home page remains visible because the pop-up screen is relatively small (see for example the illustration in 2.9 above). In both cases, at least a large part of the Op.fm website remains visible to the user while the radio stream is being played. This means that Souren's involvement in the communication to the public therefore goes further than making facilities available for a communication to the public.
- 4.5 The radio streams are presented to the users of Souren's websites as a result of Souren's intervention, making the musical works these include accessible to a public other than the public which Buma/Stemra intended when it granted the radio stations permission for the use of those musical works. This is because Souren's websites are different audio-visual products than the radio stations' websites and they therefore have a different public. In addition to this, it has been established that Buma/Stemra was not targeting the users of Souren's websites when it granted the radio stations permission to communicate the musical works to the public. Buma/Stemra has explicitly submitted that the licence which it grants radio stations does not entail permission for the use of the radio streams as part of third parties' websites. In this connection, Buma/Stemra for example referred to the information which it publishes on the use of radio broadcasts on internet (Buma/Stemra's exhibit 16), in which it distinguishes between the fees for radio stations and the fees for radio portals. Souren has insufficiently disputed the accuracy of that claim. When questioned on this subject during the hearing of the parties, Souren declared that he had no information on the licence agreements between Buma/Stemra and the radio stations.

- 4.6 The fact that Souren presents the radio streams as part of his own websites is relevant from a copyright perspective because he is thereby creating an opportunity for himself to profit from the radio streams and the musical works these contain. Souren's *modus operandi* in fact gives him the opportunity to exploit the musical works, and, in practice, he takes advantage of that opportunity: his websites' home pages include advertisements. Because of the way his websites are designed, those advertisements remain visible when the radio streams are played. In this way, Souren is generating income from the copyright-protected musical works belonging to the parties represented by Buma/Stemra.
- 4.7 The mere fact that the user's browser obtains the radio streams which can be listened to as part of Souren's websites directly from the radio stations' media servers can not lead to a different conclusion. This fact possibly entails that the radio stations are jointly responsible for the communication to the public, but that possibility need not be explored in the present proceedings in view of the fact that the radio stations are not party to these proceedings. The involvement of the radio stations at any rate does not detract from Souren's responsibility for his own intervention.
- 4.8 Neither does the fact that the opportunity to listen to the radio streams also depends on the capacity of the radio stations' media servers and the availability of the radio streams on those servers preclude the fact that Souren is (jointly) responsible for communicating those streams to the public as part of his own websites. That dependence entails that no musical works will in fact be communicated to the public if the capacity is insufficient and if the streams are not available on those media servers, but does not prejudice the fact that there is a communication to the public as long as the radio streams are on those servers and as long as there is sufficient capacity. Buma/-Stemra has otherwise rightly pointed out that, in practice, this dependence does not seem to lead to any restrictions, in view of the fact that millions of radio streams are listened to every month as part of a visit to the Nederland.fm website.

Freedom of expression

- 4.9 Souren's appeal to the fundamental right to the freedom of expression in the sense of e.g. article 10 of the European Convention on Human Rights and Fundamental Freedoms (published in the Dutch Treaties and Convention Gazette, *Trb* 1951, 154 and as most recently amended in *Trb* 2010, 112) can not lead to a different conclusion. In itself, Souren has rightly submitted that the admission of the claims would entail a restriction of his freedom of expression and his users' freedom of information. In the court's opinion, in this case, that restriction is however necessary in a democratic society to protect the copyrights of the makers of musical works. Souren's argument that the freedom of information should have priority is based on his claim that a portal with hyperlinks plays an important part in making information available on the internet. Although that may be true, Souren's radio portals do more than just offer an overview of hyperlinks. As confirmed above, Souren has designed his websites in such a way that, after a hyperlink has been clicked on, the radio streams can be listened to as part of his own websites, so that he is taking the opportunity to exploit

the musical works himself. The specific design of the website infringes on the makers' exclusive right to exploit their works but does not offer a clear advantage for the freedom of information.

Case law

- 4.10 To the extent that the decisions rendered by other courts and cited by the parties concern comparable facts, i.e. a situation in which a copyright-protected work is made available after a hyperlink has been clicked on as part of the website of the party offering the hyperlinks, these decisions unanimously confirm that in that case there is question of a communication to the public by the party offering those hyperlinks (Oberlandesgericht Dusseldorf, Germany, 8 November 2011, *Multimedia und Recht* 2012, 118, District Court of Amsterdam, 24 August 2011, *LJN* BT1960, Court of Appeal of Den Bosch, 12 January 2010, *IER* 2010, 34, legal consideration 4.99; interim relief proceedings District Court of Haarlem, 5 September 2007, *LJN* BB3144 and interim relief proceedings District Court of Leeuwarden, 30 October 2003, *LJN* AN4570). To that extent, the case law cited by the parties supports the correctness of the above.
- 4.11 The court need not discuss the case law to which Souren refers to support his position that hyperlinks as such cannot be deemed to be a communication to the public in view of the fact that, as stated above, Souren's intervention goes further than merely offering hyperlinks.

Foreign radio portals

- 4.12 The claims will be rejected to the extent that these concern Souren's radio portals outside The Netherlands. The parties do not dispute the fact that Buma/Stemra is not authorised to take action on musical works communicated to the public outside The Netherlands and that is why, also to the extent that they concern radio portals outside The Netherlands, Buma/Stemra's claims are targeted at The Netherlands only. Buma/Stemra's claim that the foreign radio portals also target The Netherlands must however be rejected. The websites are formulated entirely in the language of the country at which the website is targeted and refer only to foreign broadcasts. The domain name is also in the language of the country at which the website is targeted, and the top level domain of the domain name is not the Dutch top level. In the light of these facts, the mere fact that the radio portals are accessible to Dutch internet users, that the domain name is held by a Dutch party and that the radio portals are hosted on a server in The Netherlands is insufficient for assuming that the radio portals are also targeted at The Netherlands.
- 4.13 Neither can the fact that Dutch-language advertisements are screened if a Dutch internet user visits the foreign radio portals lead to a different conclusion in this case: Souren has explained – and this has not been disputed – that the relevant advertisements are placed by a third party which automatically brings the language of that advertisement into line with the user's nationality, and this is fixed on the basis of the

IP address of the user's computer. It has neither been alleged nor become apparent that Souren took the initiative to screen Dutch advertisements or that this depends on the contents of the website.

Questions referred to the ECJ for a preliminary ruling

- 4.14 The District Court is aware that the way in which Souren's *modus operandi* has been formulated could raise eyebrows, from a copyright perspective, on the interpretation of the term "communication to the public" in the sense of article 3 of the Copyright Directive (Directive 2001/29/EC). When questioned on this subject during the hearing of the parties, Souren declared that he would therefore like the District Court to refer questions to the European Court of Justice for a preliminary ruling. The District Court will however not do so in this case and has also decided not to wait for the answers to the questions recently referred to that Court by a Swedish court of appeal (*Svea Hovrätt*) in a case which is in some respects comparable (Request for a preliminary ruling of 18 September 2012, C466/12, *Svenson et al – Retriever Sverige*). This is because, during the hearing of the parties, Buma/Stemra explicitly declared that it did not wish the District Court to refer such questions, as it wanted a quick decision. That interest should have priority in this case.

The claims

- 4.15 On the basis of the above, it must be concluded that Souren has infringed on the rights of the makers who are represented by Buma. That entails that a ban can be admitted. Otherwise than Souren has argued, that ban need not be restricted to just the specific design of Souren's present website, because Souren has announced that he intends to modify his websites and it is possible that an infringement will also be committed if the websites are designed differently (cf. Netherlands Supreme Court, 3 January 1964, *NJ* 1964, 445). Contrary to Souren's request, this judgement cannot sum up which designs are not infringing because the present proceedings considered no designs other than the present designs of Nederland.fm and Op.fm (and the foreign radio portals which are designed in the same way.)
- 4.16 In this specific case, the ban will not become effective immediately after the judgment has been served. This is because, on the one hand, Buma/Stemra has indicated that its concern is to ensure that Souren applies for a licence so that the right holders will receive a remuneration for the use of their music. Souren will also be required to pay that remuneration in the shape of damages if he continues to operate his websites in the same way (see below, legal consideration 4.17 et seq.). On the other hand, Souren has indicated that he will need some time to re-design his websites. That is why, in this case, the period for executing the order will be fixed at one month after the service of this judgment.
- 4.17 In view of the infringement, Buma is entitled to compensation for the damage which it suffered - and to the handover of the profits which Souren made - as a result of the infringement. Souren has however rightly submitted that the sum payable for loss of

profits and the handover of profits cannot be accumulated (Netherlands Supreme Court, 14 April 2000, *LJN AA5519, HBS Trading – Danestyle*). There would be question of such an accumulation in this case because Buma/Stemra is basing its claim for damages on the loss of licence income and the depreciation of the copyrights. The compensation for loss of licence income is a type of compensation for loss of profits which cannot be accumulated with the handover of profits which Buma/Stemra is claiming. The compensation for depreciation which Buma/Stemra is claiming cannot be admitted because Buma/Stemra did not base that claim on the infringement, but on the claim that Souren “openly cast doubt on the idea that permission was necessary for operating a radio portal” and that Souren thereby encouraged third parties to also refrain from entering into licence agreements with Buma/Stemra. Buma/Stemra has however not submitted that openly casting doubt on the requirement of permission is wrongful vis-à-vis Buma/Stemra. And, in view of Souren’s right to freedom of expression, that cannot simply be assumed. There are therefore no grounds for awarding compensation for the alleged depreciation.

- 4.18 The court must ignore Souren’s defence that Buma cannot claim compensation for damage because Buma itself decided not to charge websites making use of embedded content a fee in past years. The District Court is assuming that Souren intended to claim that Buma had forfeited its right to claim compensation for damage or at any rate that claiming compensation for damage from Souren would be in breach of the principle of equality. This argument cannot succeed for the mere reason that it must be assumed that the policy to which Souren refers does not concern radio portals. With reference to an exhibit on that subject (exhibit 30), Buma/Stemra has demonstrated that the policy only concerns websites with background music and not radio portals whereby the music is more in the foreground. In this connection, Buma/Stemra pointed out that it had made various attempts to also enter into licence agreements with other parties offering radio portals and that it indeed entered into a licence agreement with one such provider.
- 4.19 Buma has based its claim for loss of income on its loss of income from licence agreements. When computing the extent of that sum, otherwise than Buma has proposed, the court cannot simply proceed on the basis of the draft licence agreement which Buma/Stemra offered Souren in the past, for the mere reason that that licence agreement also covered the reproduction of musical works and there is no question of the latter in this case (see legal consideration no. 4.1 above). In view of the fact that, aside from the above, the parties provided insufficient data to fix the extent of the licence fee, the court refers to separate proceedings to fix the extent of that damage. For the same reason, no advance can be awarded in the present proceedings.
- 4.20 Buma is entitled to require Souren to render account for the profits he made as a result of the infringement in view of the order to hand over profits to be admitted by the District Court, (section 27a.1 of the Dutch Copyright Act, hereinafter the *DCA*). Contrary to what Souren has suggested, Buma is not basing this claim on its “mediation monopoly” in the sense of section 30a.2 of the *DCA*, but on its claim that, on the grounds of its agreements with the makers, it is authorised to exercise copy-

rights on behalf of those makers. That claim was not disputed and is sufficient for admitting the claim to order Souren to render account.

- 4.21 It is not possible to simply proceed on the basis of the definition of the term “relevant income” in the aforementioned draft agreement in order to compute the profits made by Souren as a result of the infringement. Not the definition is conclusive, but the statutory term “profits originating from the infringement” in the sense of section 27a of the DCA. When computing those profits, the income from banners must be taken into account, but not the income generated by selling data on the websites’ users. In the opinion of the District Court, the latter income is too unconnected with the infringement to be deemed to be “profit originating from the infringement”. On the other hand, if Souren generates any income from the advertising clips displayed along with the radio streams, this must be taken into account. If, as Souren alleges, it is true that the income from such clips is not paid to him but is paid in full to the relevant radio stations, the information he must provide need only state that he obtained no income from that source.
- 4.22 The penalty being demanded by Buma/Stemra can be awarded for the ban and the order to provide information, albeit that this will be moderated and bound to a maximum.
- 4.23 Unlike Souren, the District Court believes there are no grounds to declare the judgment otherwise than immediately enforceable. Souren’s claim that Buma/Stemra is treating the present proceedings as a test case does not preclude the fact that Buma/-Stemra has a justified interest in executing the judgment pending any appeal the parties may wish to lodge.
- 4.24 As party judged to have been largely in the wrong, Souren will be ordered to pay the costs of the proceedings in the case brought by Buma. With reference to section 1019h of the Netherlands Code of Civil Procedure, Buma/Stemra is claiming a total of € 50,119.53, but has not broken down this sum according to the costs payable to Buma and those payable to Stemra. The District Court is assuming that the plaintiffs intended to divide these costs into two, and will therefore award Buma a sum of € 25,059.77. Souren has not disputed the reasonableness and proportionality of that sum and that sum will therefore be awarded in full.
- 4.25 Stemra must be deemed to be the party judged to have been in the wrong in the case of Stemra versus Souren and it will therefore be ordered to pay Souren’s costs. With reference to section 1019h of the Netherlands Code of Civil Procedure, Souren is claiming a total of € 63,543.06, but has not broken down this sum according to the costs payable for the case brought by Buma and those payable for the case brought by Stemra. The District Court is assuming that half of these costs can be attributed to Stemra. Stemra has not disputed the reasonableness and proportionality of that sum and will therefore be ordered to pay Souren a sum of € 31,771.53.

5. The decision

In the case of Buma

- 5.1 the District Court orders Souren to cease and desist any communication to the public in The Netherlands of a musical work or a portion thereof represented by Buma, and, more specifically, to cease and desist the intervention described in the present judgement as a result of which musical works for which no permission has been granted are made accessible to the users of the Nederland.fm and Op.fm websites, and to do so within one month of the service of this judgement;
- 5.2 the District Court orders Souren to pay Buma a penalty of € 1,000 for every day or part of a day on which Souren fails to comply with the order set forth under 5.1, with a maximum of € 50,000;
- 5.3 the District Court orders Souren to inform Buma's counsel of the following in writing and to do so within eight weeks of the service of this judgement:
 - all the income enjoyed by Souren as a result of the infringement since 1 January 2009, including the income from banners and any income from advertising clips;
 - all the costs which Souren incurred to operate the Nederland.fm and Op.fm websites since 1 January 2009;enclosing a signed statement by a registered accountant or accounting consultant that that data is true, full and fair.
- 5.4 the District Court orders Souren to pay Buma a penalty of € 1,000 for every day or part of a day on which Souren fails to comply with the order set forth under 5.1, with a maximum of € 50,000;
- 5.5 the District Court orders Souren to compensate Buma for the damage which it suffered in the past and may suffer in the future as a result of the infringement confirmed in the present judgement or, if that sum is higher, to hand over the profits enjoyed as a result of that infringement, to be fixed in separate proceedings, to be settled in the manner provided for in law and to be increased with statutory interest as of the date of the writ of summons until the date of payment in full;
- 5.6 the District Court orders Souren to pay the costs of the proceedings, fixed for Buma at € 25,059.77 up to today's date;
- 5.7 the District Court declares the judgement to be immediately enforceable to the present extent;
- 5.8 the District Court rejects any further or alternative claims;

In the case of Stemra

5.9 the District Court rejects the claims;

5.10 the District Court orders Stemra to pay the costs of the proceedings, fixed for Souren to today's date at € 31,771.53;

5.11 the District Court declares that the award of costs will be immediately enforceable.

The present judgment was rendered by P.H. Blok and pronounced in public on 19 December 2012.