

OPINION

Slimming Down Intellectual Property with Lon Fuller*

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LT Intellectual property; Morals and law; Netherlands

Introduction

Jaap Spoor was appointed to a professorial chair at VU University Amsterdam in 1990. His inaugural address¹ was surprising given that it incorporated criticism of the increasing extent of intellectual property law in a number of respects. As a matter of fact, the law of intellectual property in the Netherlands had, until a few years before, consisted of just a few acts of Parliament and the odd handbook. Its previously trim and athletic figure had since become rather plump. Jaap Spoor questioned this expanding waistline of intellectual property law, wondering how it could be explained. Was it simply a sign of progress? Did it result from intensive or even excessive lobbying? Possibly; but in his view the growth of intellectual property also results from autonofactors. The seemingly well-defined notions of what may constitute copyright works, patentable inventions or registrable trade marks are in fact fluid. The more we trust them, the more they tend to run away with us.

Seventeen years later, the expansion in the scope of intellectual property has continued undiminished. In the field of copyright law alone, eight European directives have led to changes in Dutch law. A copyright rent law, public lending right, and resale right have been introduced. The duration of copyright has been extended by 20 years. The juristic object of copyright law is now much broader, ranging from computer programmes to perfumes. Two new types of intellectual property have been created: "neighbouring rights" and database rights. To an extent, these developments are naturally the result of such trends as intensive computer and internet use, but one may wonder whether the growth in intellectual property law is not excessive.

In this opinion, I would like to test three interesting judgments against the eight principles for an effective legal system formulated by the legal philosopher Lon L. Fuller.² As I shall show, those principles are in fact violated, and an "extreme makeover" would seem to be in order.

Three remarkable cases

A "kinetic scheme" as a cultural expression?

Technip holds the copyright in a computer programme called Spyro, which simulates such things as the control of the production process

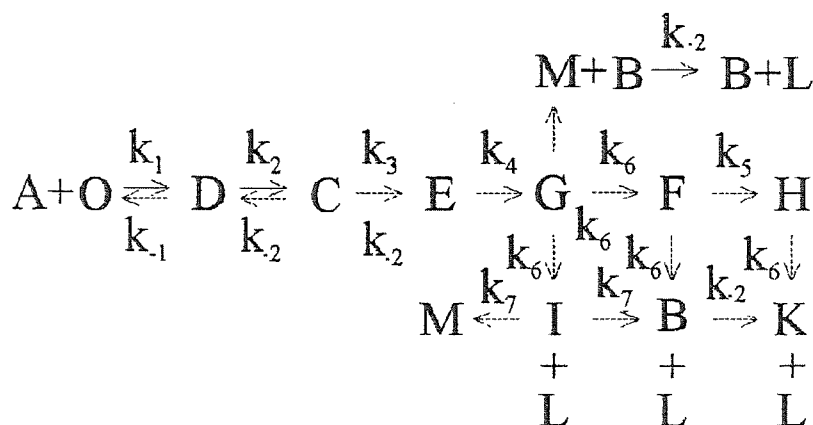


Figure 1 Example of a kinetic scheme

* Tribute to Professor Jaap Spoor on the occasion of his retirement in June 2007.

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1 J.H. Spoor, *De gestage groei van merk, werk en uitvinding*, (rede, Zwolle, 1990).

2 L.L. Fuller, *The Morality of Law*, 13th edn (New Haven/London, 1976).

for ethylene and propylene in the petrochemical industry. One essential component of Spyro is a “kinetic scheme” in which the production process is shown diagrammatically in, amongst other things, a collection of reaction equations. After being employed by Technip for 13 years and involved in that capacity in the development of Spyro, Goossens developed a computer programme for the same purpose as Spyro. Technip objected. In 2002, the parties agreed a deed of compromise in which Goossens recognised that his simulation programme infringed the Spyro programme. He agreed to cease and desist from any act of disposition in this respect. Eighteen months later, Goossens decided that he wanted to publish the kinetic scheme on which his computer programme was based. Technip applied, amongst other things, for a prohibition on publication because of infringement of copyright. Goossens considered that the data belonged in the public domain.

In proceedings on the merits of the case,³ the Utrecht District Court ruled that, given the large number of options, the relatively limited number of components and reaction equations included in the kinetic scheme, and the lack of patterns or objective basic principles enforcing the choices that had been made, the conclusion was justified that the kinetic scheme had an “original character of its own”. A publication ban was imposed on Goossens.

Does a publication ban based on copyright law for a kinetic scheme tally with the objective underlying patent law of making technical-industrial information as widely available as possible?

Clog dance on slippers

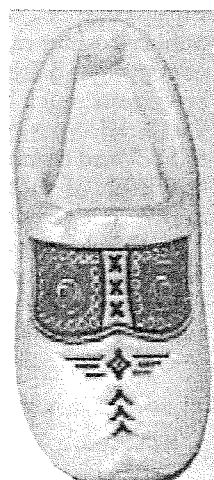


Figure 2 The “Cloggy”

Elcee Haly marketed a pair of velvet slippers, “Cloggy”, with the same colour, design and look of traditional Dutch clogs. Buis also marketed yellow velvet clog-like slippers with a design that was different but also traditionally Dutch. Thirteen years before Elcee Haly began marketing its Cloggy slippers, a third company had already marketed plain yellow clog-like slippers and registered them as a design with the Benelux Designs Office. That design right had since lapsed due to the passage of time. Elcee Haly requested the Court to rule against Buis, and to impose a prohibition together with accompanying injunctions.

In the first instance, the Preliminary Relief Judge of the Amsterdam District Court denied Elcee Haly’s claims, which were based on the Buis slippers being a “slavish imitation” of its Cloggy slippers. In the first place, the Court found that the Cloggy slippers were not subject to copyright objection because they could not be considered as an “original work with a character of its own” within the meaning of s.1 of the Dutch Copyright Act (*Auteurswet*). The claims in respect of slavish imitation were also denied

³ Technip/Goossens LJN AY9550, October 4, 2006, District Court Utrecht. See also *AMI*, February 24, 2006, Dutch Supreme Court, at 13, with note by A.A. Quaedylied.

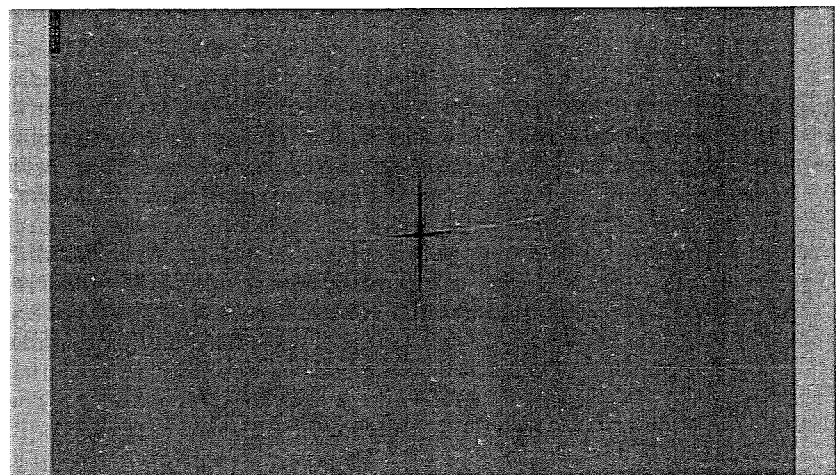
because the Buis clog-slippers differed sufficiently from Elcee Haly's Cloggy slippers.

On appeal, the Amsterdam Court of Appeal confirmed that the Cloggy slippers were not a creation with an original character bearing the personal stamp of the maker and rejected copyright as the basis for the claims. However, the Court of Appeal also considered that the claims could indeed be based on slavish imitation: the Cloggy slippers were distinctive and Buis had failed to comply with its obligation to ensure that similarity between the products did not lead to or increase the risk of confusion. In the view of the Court of Appeal, Buis, without good reason, had created a risk of the two pairs of slippers being confused, or had increased that risk. A prohibition, with accompanying injunctions, was imposed.

A few months later, there was a virtually identical case against another defendant, Nijhuis, before the Preliminary Relief Judge of the District Court in The Hague. The judge denied Elcee Haly's requests, which were based on slavish imitation, because he considered that the Cloggy slippers were not in fact distinctive—a third party had already marketed plain yellow clog-slippers—and were not uniquely positioned in the market. Moreover, granting Elcee Haly's requests would amount to giving the company a monopoly on selling them. The pattern on the Cloggy slippers made no difference: this had been applied to wooden clogs for decades.⁴

However, doesn't copyright and design right become useless if Buis is made the object of a prohibition, with accompanying injunctions, due merely to a certain measure of similarity between the Buis clog-slippers and those in which Elcee Haly held neither the copyright or the design right?

“Who's Afraid of Red, Yellow and Blue? III”



Who's afraid of God?

Figure 3

In the 1990s, the Archbishopric of Utrecht came up with a campaign aimed at encouraging young people to discuss the topic of God. Not long before, a vandal had used a knife to cut horizontal slashes across Barnett Newman's painting *Who's Afraid of Red, Yellow and Blue? III*. As part of its campaign, the Archbishopric distributed a poster showing the damaged painting in reverse and with the slashes in the form of a cross. Below the image was the text “Who's afraid of God?” and “Drop in and visit him”. Newman had already been dead for almost 20 years. His heirs had set up the Barnett Newman Foundation, which in its turn instructed the Image Copyright Foundation (*Stichting Beeldrecht*). The latter took the matter to court, requesting a prohibition, recall of the posters, and payment of compensation for material and non-material damage.

⁴ See *IER* 2006, nos. 6 and 7 (Elcee Haly/Buis), September 8, 2005, Amsterdam Court of Appeal, per Preliminary Relief Judge of the District Court in The Hague, 22 November 2005.

The President of the Utrecht District Court found that there had been an infringement of copyright and personality rights. Given Newman's philosophical views, which were anti-Catholic, and the Christian purpose of the Archbishopric's campaign, the President ruled that the Barnett Newman Foundation should receive compensation for non-material damage, setting the advance payment at €2200.⁵

Is it fair or appropriate for compensation for pain and suffering to be awarded to a foundation set up by the heirs of an artist (the author of the work concerned) who has already been dead for 20 years?

Fuller's "The Morality of Law"

The cases outlined above are interesting because they embody a number of problems that must be confronted by the onward-marching law of intellectual property. To discover the cause of this tension, I shall consult L.L. Fuller's masterly work *The Morality of Law*.⁶ Fuller formulates a clear set of criteria for fair and appropriate law that gives parties a stable framework for their conduct towards one another. Fuller refers to the sum total of these criteria as the internal morality of law; if the system of law complies with these basic functions, he believes it acquires moral status.⁷

Fuller introduces the various criteria through the story of "King Rex". Rex decides to reorganise things in his kingdom, where the administration of justice has become outdated and is characterised by lengthy and costly proceedings, archaic language, and slovenly, sometimes corrupt, judges. He repeals all the existing legislation and sets out to create a new legal code. Unfortunately, he makes eight classic errors.

Given his defective education, he is unable to generalise. He therefore decides to adjudicate cases on an ad hoc basis in the hope of a system of rules gradually emerging. His subjects are unable, however, to detect any pattern in his rulings, resulting in great confusion.

Rex therefore sets out to draft a legal code, but lacking confidence in its quality, he decides to keep it a state secret. This is greatly resented by his subjects; after all, it is very unpleasant to have your case decided on the basis of rules that you are not aware of.

Rex thereupon decides to publish the code but also that henceforth he will adjudicate all cases that arise during a given year at the beginning of the *next* year, doing so by means of legislation developed with the benefit of hindsight. This will allow him to make retroactive use of insights gained after the fact. This method also leads to protests from his subjects, who naturally want to know *in advance* what rules they need to observe.

Rex realises that he needs to draft a code of law that will only have future effect. This is naturally more difficult and, despite his diligent work, results in a code so obscure that not just ordinary citizens but also trained lawyers are unable to understand it. There is general indignation, for how can anyone be expected to comply with legal rules that nobody can understand?

The code is swiftly withdrawn and Rex sets a group of legislative experts to work on drafting a new version. The new code is beautifully clear, but it immediately turns out to be riddled with contradictions. Rex once more withdraws it for revision. By now, he is fed up with his subjects' complaints. He instructs his legal experts to get rid of all the inconsistencies but to drastically tighten up all the provisions. In actual practice, though, it is impossible to comply with all the code's requirements, and leading citizens say they intend ignoring its provisions. Legislation that cannot be complied with, leads to nothing more than confusion, fear, and chaos.

Rex now tells his experts to rewrite the legislation so that it can in fact be complied with. The result is a code of law that is clear, consistent and easy to comply with, as well as properly printed and distributed. However, when it comes time for it to take effect, it turns out that its substance is out of date in light of economic and institutional events. A stream of amendments follows. Once more there is discontent among Rex's subjects, for a law that changes every day is worse than no law at all.

Rex consequently decides that he will adjudicate cases on the basis of the most recent version of the code. For a time, everyone is content—until they discover that the judgments handed down by the King bear no relationship

5 *Mediaforum* 1998 (*Who's Afraid of Red, Yellow and Blue?*), per President of the Utrecht District Court, March 26, 1998 at 29.

6 Fuller, *The Morality of Law* (1976), pp.33–94.

7 On this topic, see also W.J. Witteveen, "Laws of lawmaking" in Witteveen and Van der Burg, *Rediscovering Fuller*, p.335.

to the code those judgments are supposedly applying, despite each judgment explicitly declaring that it is based on that code. Leading citizens are virtually in open revolt. Then Rex suddenly dies. His successor, Rex II, decides to take away the powers of government from the lawyers and to confer them on psychiatrists. In this way, he can make his people happy without rules.⁸

Rex violated a number of principles.⁹ Using the cases outlined above, I shall demonstrate that European and Dutch legislators and judges make the same errors in the area of intellectual property.

Rule 1: The law must consist of general rules and not of rules for particular cases

The *Technip/Goossens* case shows the consequences of law on an ad hoc basis. Introducing copyright protection for a technical product such as a computer programme, alongside items of a cultural nature such as literature, scholarship, or art, has opened the door to copyright protection for countless other technical products, such as protection for the underlying kinetic scheme. The result of this is a boundless expansion of the juristic object.

Rule 2: The parties must be able to take note of the content of the rules in advance

In the Cloggy dispute, Buis found itself dealing with a pair of clog-slippers that had not been registered as a design. The design was also not sufficiently original to be protected by copyright law. Moreover, a third party had already marketed plain slippers of the same design.

Applying the broad doctrine of slavish imitation nevertheless led the Court of Appeal to assign Elcee Haly an exclusive right vis-à-vis Buis regarding the sale of a product of similar design to the Cloggy slippers. In my opinion, this system of law is not based on any kind of logic that a party can use to determine its behaviour.

What is more, three separate courts ruling in a single virtually identical case made use of totally different arguments. The dispute seemed to be a kind of contest, but with unknown rules. Parties are seemingly expected to find such differences of opinion among judges perfectly normal. A certain measure of subjectivity is naturally unavoidable, but I believe that a difference of opinion of this extent is unjustifiable if there is no new information that throws new light on the case. If there is no clear line in how justice is administered, how is the citizen to know what is expected of him?

Rule 3: The law should not have retroactive effect

Legislators do not appear to be concerned by this rule when it comes to design law. When Elcee Haly put the Cloggy slippers on the market, s.14(8) of the (old) Benelux Design Law meant that it could not invoke slavish imitation if it failed to register the design within a certain period. The only possible supplementation by ordinary law applied to actions that in fact lay beyond the scope of design law, for example derogatory criticism, misleading statements regarding the design, or eliciting infringement. Implementation of Directive 98/71 ("the Design Directive")¹⁰ on December 1, 2003 did away with the prohibition on invoking slavish imitation. Implementation of that Directive remedied, with retroactive effect, the failure of Elcee Haly to register the Cloggy design, with this being to the disadvantage of Buis.

Rule 4: Legal rules need to be simple and comprehensible, and the outcome of a dispute must be predictable

Intellectual property has become more complex and obscure. It is now regulated by countless conventions, regulations, and laws. Various subjects are regulated in more than one piece of legislation. Database rights are

⁸ Fuller, *The Morality of Law*, (1976), pp.33–38.

⁹ Fuller deals with the various principles at length. Fuller, *The Morality of Law* (1976), pp.47–94.

¹⁰ Directive 98/71 on the legal protection of designs ("the Design Directive").

regulated in the Copyright Act and the Database Act. Trade name rights are covered by the Trade Names Act, the Benelux Convention on Intellectual Property, and the law on wrongful acts. Protection for the appearance of a product can also be invoked via branches of the law other than design law, such as copyright law and s.6:162 of the Dutch Civil Code (*BW*).

A preeminently technical work such as a kinetic scheme is protected not by patent law but by copyright law. The computer programme based on it, moreover, is protected to an extent that deviates even from the normal copyright law. Simplicity is therefore something hard to find in the realm of intellectual property.

Rule 5: Legal rules should not contradict one another

In the Cloggy dispute, all the specific injunctions belonging to intellectual property law were imposed: a prohibition on offering, selling or delivering the Buis slippers; an order to provide information regarding the quantity, customers, prices, stocks, profits generated (for the surrender of profits); and a recall order. The Court of Appeal ruled that these injunctions could be granted in order to undo the damage that had been incurred and to prevent further damage. Imposing these sanctions, even if there is no design right or copyright as a basis, is not in line with the intention of the legislature that severe enforcement measures of this kind should be associated with infringement of specific subjective intellectual property rights.

Rule 6: Legal rules should not impose unreasonable requirements

Parties subject to the law are not independently in a position to co-ordinate their conduct with the legal rules of intellectual property. They are forced to spend an ever-increasing amount of money in order to acquire information about intellectual property rights and obligations. Large companies find it easier to acquire the necessary information than those with less in the way of financial resources. The excessive growth of intellectual property means that equality before the law is suffering.

It should also be noted that even if one has no intention to do so, one runs a significant risk of infringing intellectual property rights. A party that infringes these rights is nowadays subject to various severe sanctions, even if there is no question of piracy. The party can be ordered to pay the other party's full court costs and lawyer's fees, and also to surrender profits. There are now increased options for imposing a prohibition, even without the infringing party having been heard regarding the matter. The greater range of possibilities that now exists regarding the seizure of evidence means that a party can be compelled to allow its records to be inspected for the benefit of a competitor.¹¹ It is quite possible that these stringent sanctions will impede economic activity even further.¹²

Rule 7: Legal rules should not change too often

The boundless ambition of European Union legislators says a great deal about their attitude to this seventh rule. As we have seen, countless European Union directives have led to radical changes in the Dutch Copyright Act over the past 17 years. The stream of amendments gives the impression that legislators are trying desperately to keep up with developments without engaging in any fundamental discussion of basic principles.

Rule 8: Legal rules should be applied in accordance with their intention

The *Who's Afraid of Red, Yellow and Blue? III* case also raises the issue of whether the integrity of copyright law is in fact being monitored, by either the legislature or the courts. To what extent is it sensible for a foundation set up by Newman's heirs to receive compensation for financial loss and for

11 See Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L195/16, and Parliamentary Bills 30 322 and 30 392, which are based on Directive 2004/48 and which provide for amendments to legislation including the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*, *Rv*), the various acts regarding intellectual property, and the Agricultural Quality Act (*Landbouwkwaliteitswet*).

12 See for example K. Cox, "Censorship by Copyright" (Report of the Documentary Organisation of Canada (DOC) Copyright Survey, 2005), which presents the results of a survey of documentary filmmakers regarding the harmful effects of copyright protection of information that they wish to use in their work.

pain and suffering due to infringement of copyright and personality rights? Leaving aside the question of whether Newman would have decided not to create the work if the copyright died with him, the question arises of whether any personal “pain and suffering” was involved for which compensation for non-material damage should be awarded. Should the heirs or surviving relatives of an artist, and even a foundation that they have set up, receive compensation for pain and suffering because the work of their loved one was shown in reverse and bearing a symbol that would have displeased him? In this case, the apparently correct legal application of the *author’s* copyright in fact led to overcompensation of a party other than the author.¹³

“Extreme makeover” for intellectual property

Intellectual property is in need of an “extreme makeover”. In the interest of the patient, Fuller’s seventh rule needs to be suspended so as to allow a thorough revision. The most appropriate “doctor” to do this, the European Union’s legislature, should be encouraged to co-operate. The most important question is what needs to be done and how.

The various aims of the intellectual property laws should be clarified, by and for both the legislature and the courts. A plan must be drawn up with these objectives in mind. In the first place, all the existing “cosmetics” need to be removed—locally applied “band-aids” are no longer sufficient. The surplus rolls of flab—for example copyright protection of the creator’s heirs—need to be worked off. Sources of infection, such as the first 12 words of s.3.16 of the Benelux Convention, need to be removed. The patient’s teeth need to be fixed so that they are all in the right place, without any fillings or bridges (computer programmes would then be protected by patent law rather than copyright). The patient would receive aftercare to prevent any relapse; if this is not already the case, the various laws would be equipped with anti-cumulation provisions. The law of intellectual property would become slim, healthy, and athletic. Psychiatrists would no longer be needed.

¹³ See also L.P. Loren, “The Purpose of Copyright” *Open Spaces Quarterly*, II.1, 1.