

Translation

24 February 2006
First Division
No. C-4/350HR
JMH

IN HER MAJESTY'S NAME

Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*)

Ruling

in the matter between:

TECHNIP BENELUX B.V.,
whose registered office is in Zoetermeer,
APPELLANT in the appeal to the Supreme Court,
Counsel: R.S. Meijer

and

Arie Gerhard GOOSSENS,
a resident of Bilthoven, the Netherlands,
RESPONDENT in the appeal to the Supreme Court,
not appearing.

1. The proceedings in the fact-finding instances

By writ dated 21 January 2004, the appellant in the appeal to the Supreme Court – hereinafter: “**Technip**” – summoned the respondent in the appeal to the Supreme Court – hereinafter: “**Goossens**” – to appear in summary proceedings for interim relief before the Relief Judge (*Voorzieningenrechter*) of the Utrecht District Court, claiming that the District Court, by judgment immediately enforceable to the extent possible:

- (A) to prohibit Goossens from publishing, offering, bringing on the market or otherwise disclosing to third parties the kinetic scheme of the computer program Primo/Genics or any other data deriving from the computer program Spyro, subject to an immediately payable penalty of EUR 100,000 for each day or part of a day that such prohibition is violated;
- (B) to order Goossens to provide a specification of each disclosure initiated by him of the kinetic scheme of the computer program Primo/Genics or any other data deriving from the computer program Spyro, subject to an immediately payable penalty of EUR 100,000 for each day or part of a day that such order is not complied with;
- (C) to order Goossens to undo, to the extent possible, any disclosures as referred to under (A) and (B) within three days after the judgment made hereunder, such action at any event to include the removal of any publications from the internet, subject to an immediately payable penalty of EUR 100,000 for each day or part of a day that such order is not complied with;
- (D) to make an award for costs against Goossens.

At the hearing, Technip increased its claim in the sense that it also claimed that Goossens be explicitly prohibited from disclosing the proposed publication, the draft of which has been submitted in these proceedings, or in any event the kinetic scheme in this publication.

Goossens contested the claim, bringing a counterclaim to the effect – in summary – that Technip be ordered to draft a statement for Goossens to present to third parties, this statement to set out that Goossens is entitled to apply his know-how and to publish papers advancing his know-how so as to enable him to earn an income.

Technip contested the counterclaim.

By injunction in the principal action of 26 February 2004, the Relief Judge ordered a ban prohibiting Goossens from publishing, offering, bringing on the market or otherwise disclosing to third parties the kinetic scheme of the computer program Primo/Genics, subject to an immediately payable penalty of EUR 100,000 for each day or part of a day that this prohibition is violated, with a maximum of EUR 1,000,000, dismissing all other applications as well as the counterclaim.

Goossens lodged an appeal against this judgment with the Amsterdam Court of Appeal.

In the appeal proceedings, Technip increased its claim, the claim now including:

- (A) to prohibit Goossens from using the kinetic scheme or any other data derived from Spyro, including the computer programs Genics, Primo and/or PRIMX, for the benefit of his commercial activities, and
- (B) to prohibit Goossens to refer, in publicity materials or other commercial materials, to the kinetic scheme or any other data derived from Spyro, including the computer programs Genics, Primo and/or PRIMX, in all cases subject to forfeiture of penalties.

By decision of 7 October 2004, the Court of Appeal set aside the contested judgment in the principal action, rejected the injunctive measures in the principal action after all, and confirmed the contested judgment in the counterclaim.

The Court of Appeal's decision is attached to this ruling.

2. The appeal to the Supreme Court

Technip lodged an appeal to the Supreme Court against the Court of Appeal's decision. The writ initiating this appeal is attached to this ruling and forms an integral part hereof.

The Supreme Court granted leave to proceed against Goossens, who was declared to be in default.

Technip had its counsel explicate its position.

The opinion of the Advocate General of the Supreme Court, D.W.F. Verkade, is that the appeal should be dismissed.

Technip's counsel replied to this opinion by letter dated 25 November 2005.

3. The facts on which the Supreme Court will found its decision

3.1 The Supreme Court will proceed on the basis of the following facts.

- (i) Technip is the holder of the copyright on the computer program Spyro (hereinafter: "**Spyro**"), a simulation program designed to control the ethylene and propylene production process in the petrochemical industry.
- (ii) An essential part of Spyro is a kinetic scheme, which produces a schematic representation of the production process by means of, for example, a collection of chemical reaction comparisons (hereinafter: the "**kinetic scheme**").
- (iii) On 10 September 2003, Goossens informed that he intended to publish the kinetic scheme of a computer program he developed, initially named Genics and later Primo, which program has the same application as Spyro. Technip responded by informing Goossens it would not allow him to effect such publication, arguing that such publication would infringe its copyrights on Spyro.

3.2 In the summary proceedings for injunctive relief, the Relief Judge held that the kinetic scheme is not a pure and simple enumeration of numbers devoid of any creative input,

rather that it came about – at least in part – on the basis of subjective criteria, making it liable for the work to have its individual, original character bearing the stamp of its maker or makers, thus qualifying it for protection by copyright. The Relief Judge allowed Technip's claim for a prohibition of the publication of the kinetic scheme. The Court of Appeal set aside the Relief Judge's decision, dismissing the claim after all.

3.3 To this end, the Court of Appeal made the following grounds for its decision.

“4.2 The court in the first instance based its allowance of Technip's first claim on – briefly put – the following considerations (hereinafter: “**grounds 1 to 5 inclusive**”). (1) The court considered it likely that the kinetic scheme constituting an essential element of the computer program Spyro has its own individual, original character bearing the stamp of its maker or makers, (2) qualifying the work for copyright protection. (3) Because the kinetic scheme is a constitutive part of Spyro – the copyrights to which are held by Technip – the court held publication (of part) of the kinetic scheme to constitute an infringement of Technip's copyright. (4) The court deems it a fact that the kinetic scheme of the computer program Primo/Genics is based on and largely similar to the kinetic scheme of Spyro, (5) it being the preliminary conclusion of the court that the publication of the kinetic scheme of Primo/Genics would constitute an infringement of Technip's copyright with respect to Spyro.

4.3 The first ground is based on the Relief Judge's view that it takes the kinetic scheme to have been created – in any event in part – on the basis of subjective criteria, as the court deems to be a fact, or in any event not (sufficiently) contested, Technip's argument, including references to written statements put forth by Professor Grievink (of 29 January and 11 February 2004, summarized in ground 4.2 of the contested judgment), that the selection of the components and reactions to the kinetic scheme eventually took place on the basis of a subjective evaluation grounded in the knowledge, insight and experience of the maker.

4.4 To the extent that Goossens's grounds for appeal I, II and III challenge the above view, they are justified. For now, the statement of Professor Grievink, in so far as relevant here, does not simply imply that the selection of the components and reactions expressed in the kinetic scheme eventually took place on the basis of a subjective evaluation.

4.5 The only conclusion to be drawn from Professor Grievink's statement is that, far from being a mathematical automatism, such selection can be made only by testing the theoretical insights obtained and to improve on them by means of experiments, requiring the maker of the selection – who should be familiar with literature in the field of chemical reactions – to set up and conduct a sound experimental programme for the purpose of testing hypotheses; and also that the required theoretical and experimental efforts can take many years, the effectiveness of these efforts depending on the individual power to assess and analyse of the maker of the selection. Thus, Professor Grievink did not state that the evaluation of the maker of the selection is subjective, nor is there any such implication in his statements.

4.6 Nor does this lead to the subsequent conclusion that Goossens failed to challenge to a sufficient extent that the selection of components and reactions as reflected in the kinetic scheme eventually took place on the basis of a subjective evaluation, grounded in the knowledge, insight and experience of the maker.

4.7 The parties differ in opinion about the answer to the question whether the kinetic scheme – seen separately from the computer program Spyro, of which it is an essential

element – is itself a work with its individual, original character bearing the stamp of the maker. Without any examination into the facts of the matter, for which these proceedings leave no scope, that question cannot be answered. This means that the first ground for the lower court’s judgment cannot be regarded as being correct.

4.8 It follows that the second ground for the lower court’s judgment is premature and, for now, cannot be considered to be correct either.

4.9 The third ground for the lower court’s judgment fails likewise. Ground for appeal IV, which challenges this third ground, is to be held well-founded, because the mere circumstance that the kinetic scheme constitutes an essential element of Spyro does not entail that publication of this element (or part thereof) is to be considered an infringement of Technip’s copyright on Spyro. No challenge has been mounted against the assertion that the kinetic scheme also lends itself to being used in computer programs other than Spyro.

4.10 It follows that the fourth and fifth grounds for the lower court’s judgment cannot be endorsed either, and that the relief sought by Technip cannot be based on the alleged infringement of a copyright held by Technip on a kinetic scheme constituting an essential element of the computer program Spyro. Technip’s first claim is not based on any other copyright infringement. Thus, grounds for appeal I to VI inclusive need not be discussed.”

3.4 Before proceeding with the evaluation of parts 1 and 2 of the appeal, the Supreme Court posits that the pivotal question in this matter is not whether the kinetic scheme itself is to be considered a computer program or “preparatory material” (within the meaning of Section 10(1), twelfth indent, of the Dutch Copyright Act 1912 (*Auteurswet 1912*) for a computer program, nor whether the kinetic scheme, as a manuscript (“*geschrift*”) within the meaning of Section 10(1), first indent, of the Dutch Copyright Act 1912, qualifies for manuscript protection (“*geschriftenbescherming*”) under the Dutch Copyright Act 1912. The pivotal question is whether the kinetic scheme qualifies as a work (“*work*”) within the meaning of Section 10(1), opening and closing words, of the Dutch Copyright Act 1912: “...*en in het algemeen ieder voortbrengsel op het gebied van letterkunde, wetenschap of kunst, op welke wijze of in welken vorm het ook tot uitdrukking zij gebracht*” (“... and in general any product of literature, science or art, expressed by whatever means and in whatever form”). A requirement is that the product has its individual, original character and bears the stamp of its maker (see the 4 January 1991 decision of the Supreme Court, no. 14449, *NJ* 1991, 608).

3.5 The words chosen by the Court of Appeal, against the backdrop of the dispute between the parties, both of which relied on the said decision, lead to the inevitable conclusion that the Court of Appeal applied the correct criterion. Contrary to the presumption made in parts 1a and 1b, the Court of Appeal used the term “subjective evaluation” – which the Relief Judge also used – apparently for no other purpose than to reflect the aforementioned requirement that the product, i.e. the kinetic scheme, must have an individual, original character and bear the stamp of its maker in order to qualify, as a

“work”, for copyright protection. Where the kinetic scheme is a schematic representation of the production process of ethylene and propylene in the petrochemical industry by means of, for example, a collection of chemical reaction comparisons, and the chemical reaction comparisons incorporated in the scheme are by themselves nothing but a number of objective scientific data which as such cannot be protected by copyright, the Court of Appeal was right to examine whether the selection of these data, with a view to the question of incorporating them – or not – into the kinetic scheme, has its own individual, original character and bears the stamp of its maker. Grounds 4.4-4.6 of the decision do not allow for the conclusion that the Court of Appeal failed to recognise that this requirement can be met if the selection, for the benefit of the kinetic scheme, of a large number of chemical components and reactions out of a much larger (and virtually infinite) number of such components and reactions is based on scientific or technical knowledge, insight and experience, while the selection relates to objective scientific data and laws and is aimed at scientific or technological objectives. To the extent that part 1c is based on the view that the Court of Appeal should have examined the question whether it is inconceivable that two (teams of) scientists, working independently from each other, would have come up with the same selection, part 1c fails because the answer to that question is but one of the points of view capable of being considered in the evaluation. Consequently, this part fails.

3.6.1 In case the grounds for appeal advanced in part 1 should fail, Part 2 is directed against grounds 4.4-4.6 of the decision, putting forward grounds for appeal based on issues of fact, which build on the grounds put forward in part 1. One of the grievances put forward is that the Court of Appeal did not take into sufficient consideration a number of arguments advanced in part 2a and that – in the light of the supplementary statement submitted by Professor Grievink – the Court of Appeal should have provided further grounds for its conclusion that the requirement referred to in par. 3.5, above, has not been met. Part 3 builds on part 2 in that it also puts forward the grievance that the Court of Appeal, in ground 4.7 of its decision, did not provide any insight into the question which factual information, which the Court of Appeal said could not be examined within the scope of the summary proceedings for injunctive relief, could have provided the answer to the question whether the kinetic scheme can be considered a “work” within the meaning of the Dutch Copyright Act 1912. Therefore, the appellant was justified in submitting the grounds for appeal, as summarized above, which can easily be dealt with as a single group.

3.6.2 Of the foremost importance here is that, even if it does not in so many words say that the assessment of the maker of the selection is subjective, the supplementary statement of Professor Grievink, as represented in the Court of Appeal’s ground 4.5 does, however,

strongly suggest that the personal views – based, among other things, on the experience and analytic powers – of the maker or makers of the kinetic scheme play an important part in making the selection. Consequently, the question why this scheme does not have an individual, original character, bearing the stamp of the maker(s) required further grounds, which the Court of Appeal did not provide. Given these circumstances, the Court of Appeal should not have restricted its grounds to the consideration that Professor Grievink failed to state that the assessment of the maker of the selection is subjective in nature and that his statement does not imply so either.

3.6.3 In the light of this information, further grounds should also have been adduced as to the issues in respect of which the Court of Appeal, in par. 4.7, considered an additional examination of the facts to be necessary and why the clarification deemed necessary could not be obtained by posing additional questions to Professor Grievink or in any other way deemed appropriate in the context of summary proceedings for injunctive relief that involves substantial interests for either parties, as they have argued. Yet, this is a case where the party commencing the action has a particularly compelling interest in obtaining relief with an eye to an effective protection of one's right.

3.6.4 Parts 2 and 3 need not be dealt with any further.

4. The Supreme Court's decision

The Supreme Court of the Netherlands:

Sets aside the decision of the Amsterdam Court of Appeal of 7 October 2004;

Refers the matter back to the Hague Court of Appeal for further consideration and a decision;

Orders Goossens to pay the costs of the appeal to the Supreme Court, which costs on Technip's part are estimated to amount to EUR 509.98 in disbursements and EUR 2,600 in legal and court fees, up to the date hereof.

This ruling has been made by the Vice President of the Supreme Court, D.H. Beukenhorst, as President, and by the Justices O. de Savornin Lohman, A.M.J. van Buchem-Spapens, J.C. van Oven and F.B. Bakels, and delivered in public by Justice E.J. Numann on 24 February 2006.

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[*official stamp:*]

Issued as a true bailiff's copy, by me, Clerk Registrar of the Supreme Court
of the Netherlands, on 24 February 2006
to [*hand-written:*] appellant

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