

Copyright trolls

How to recognise them and how to combat them

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Copyright trolls are companies that acquire or represent others' copyrights in order to collect fees far in excess of usual voluntary licence fees. They do this by putting users on various ways to put pressure on them. This contribution is about copyright trolls and their behaviour, the reasons why they exist and how they can be fought.¹

Introduction

This contribution is about copyright trolls and their behaviour, the reasons why they exist and how they can be fought. This contribution does not aim to provide an overview or analysis of (case law on) damages in (text and photo) copyright cases. Reference should be made to earlier research by and publications of (Sandvliet and) Engelfriet², Meurkens³, Bekema,⁴ Speyart⁵ and Deurvorst.⁶ The main purpose of this contribution is to put copyright trolls in the spotlight⁷ and to provoke further discussion on their qualification and combating.

Copyright trolls are companies that acquire or represent others' copyrights to collect fees that are much higher than usual voluntary licence fees. They do this by pressurising users in various ways.

They include:

- a. the fact that especially since the introduction of the full process award in IP cases (in 2006), there is a significant threat of litigation costs;
- b. the fact that subdistrict courts are often prepared to award damages which I) follow 'standard tariffs' that are much higher than market rates and II) apply all kinds of surcharges of up to 250% because of the allegedly needed deterrent effect, loss of exclusivity and violation of personality rights;
- c. the fact that most users are forced to settle for far too high amounts, after which these settlements can be used as pressure against other users and as 'evidence' in court cases that such fees are customary;
- d. the fact that users often litigate in person and present poor defences and do not contest the amount of damages claimed, litigation costs and other costs, while the plaintiffs selectively refer to case law favourable to them;

1 As a lawyer, author Visser has regularly assisted victims of copyright trolls, often gritting his teeth and advising them to settle for what he considers excessive sums. This contribution has come about with the help of many experts by experience, in particular corporate lawyers and legal advisers, who come into contact with copyright trolls. Author Bogaerts wrote his thesis in Leiden on copyright trolls.

2 K. Sandvliet & A. Engelfriet, 'Determining damages for online copyright infringement', *AMI* 2012-5, pp. 204-209 and A.P. Engelfriet, 'Damages for online copyright infringement: state of play 2015', *AMI* 2015-5, pp. 125-130.

3 R.C. Meurkens, 'Punitive damages for the enforcement of intellectual property rights', *IER* 2017/34 (p. 257), R. Meurkens, 'Damages budgeting for copyright infringement: observations following the *MergenMetz/Cozzmoss* judgment', *IER* 2018/41 and R. Meurkens, 'Damages

'Budget in case of copyright infringement by a photographer: a discussion based on judgments rendered by district courts 2019', *IER* 2019/36.

4 A. Bekema, 'Photo copyright and the quantification of damages', *AMI* 2019-66, p. 192-196.

5 H. Speyart, 'Damage surcharges in IP law: unlawful punitive damages or lawful flat-rate calculation?', *IER* 2013/5, pp. 406-411.

6 T.E. Deurvorst, 'Damages and litigation costs award in copyright infringement', *AMI* 2012-3 p. 85-89. And of course:

T.E. Deurvorst, *Schadevergoeding, voldoening van een redelijke gebruiksvergoeding en winstafdracht bij inbreuk op intellectuele eigendomsrechten* (diss. Utrecht), Deventer: Kluwer 1994.

7 In Tolkien's books, trolls are strong dumb creatures that turn to stone when shone upon by the sun (source: [https://nl.wikipedia.org/wiki/Trol_\(Tolkien\)](https://nl.wikipedia.org/wiki/Trol_(Tolkien))).

e. the fact that increasingly sophisticated software is available to look up online content. Nothing goes unnoticed anymore.

History, definition and qualification

A *patent troll* is a patent owner who does not produce or invent anything himself, but only buys patents and then sues or threatens to sue parties who allegedly infringe them. As this puts these parties in a coercive position, partly because of the high litigation costs, the *patent troll* forces them to take out a licence, with payment of the accompanying licence fees, of course. *Patent trolls* often involve patents whose validity is uncertain.

The essence of 'trolling' in the context of intellectual property rights is that people are more concerned with threatening litigation and claiming damages than with product sales. Like the *patent troll*, the term *copy-right troll* originated in the United States. The first time the term *copyright troll* was used in court in the United States was in 2006.⁸

In this contribution, a copyright troll refers to a party whose main business is to claim fees for use of other people's work that are much higher than usual voluntary licence fees and who often also structurally claims more costs than he actually incurs. Unlike in patent law, the validity of copyright is generally not in dispute. The widely shared feeling that there is socially undesirable behaviour and abuse of rights here is the same with copyright trolls as with patent trolls. Abuse of right⁹ is not further elaborated in this contribution as a possible defence. Such a defence would certainly not be hopeless under circumstances and deserves further study. In the case of copyright trolls, one might initially also think of tort-based 'prohibitions to blow the whistle', which are well-known from patent law in particular.¹⁰ However, these do not seem applicable on closer inspection, because there, unlike in the case of patent trolls, the *validity* of the right invoked is, as mentioned above, as a rule precisely *not* at issue. This does not alter the fact that there are also conceivable circumstances under which the conduct of a copyright troll would be unlawful because, for example, misleading or constitute an unfair commercial practice. Those possible lines are also not elaborated on here.¹¹ This contribution focuses on



Troll
Daniel Holm (1835-1903), from: *Svenska folksägner*, Herman Hofberg (1882)

on a restrained application of damages law, in line with a development already visible in legal speech. It should be noted here that copyright infringements are of course undesirable and must be combated. However, the remedy should not become worse than the disease, nor should support for copyright be undermined by enforcement practices that are perceived as unreasonable and burdensome. Therefore, this contribution focuses on the use of the term 'copyright-rights-troll (behaviour)' to emphatically put the discussion on the map and provoke reactions.¹²

Fees and charges

In this contribution, 'standard licence fees' refers to the fees charged by authors that users are *voluntarily* willing to pay *in advance* for the use of a particular copyrighted work. These are to be distinguished from 'compulsory licence fees' that are paid afterwards under the *threat* of damage claims in legal proceedings.¹³ By 'standard fees' are meant here

⁸ *Perfect 10/Amazon.com*, 508 F.3d 1146 (9th Cir. 2007).

⁹ Within the meaning of Art. 3:13 of the Civil Code.

¹⁰ Cf. HR 29 September 2006, ECLI:NL:HR:2006:AU6098, *NJ* 2008./120, *IER* 2006/94, *BIE* 2007, p. 294 (*CFS Bakel/Stork Titan*), para 5.8: 'the patentee who relies on a pre-examined patent that is later revoked or invalidated [acts] unlawfully [...] if he knows, or should know, that there is a serious, non-negligible likelihood that the patent will not stand up in opposition or invalidity proceedings'.

¹¹ These lines also deserve further study and elaboration and these will hopefully be taken up by other researchers.

¹² Photographic press agencies whose main activity is the active granting of voluntary licences are not 'copyright trolls'. That said, they may be guilty of 'copyright troll behaviour'.

¹³ Copyright troll Permission Machine calls this on its website tariffs for 'regularisation by a retroactive licence'. See <https://permissionmachine.com/nl/tariffs/> (accessed 22 July 2020).

meant rates which are regularly referred to by parties and courts and used in determining damages. Some parties publish their own standard rates, giving the impression that these are actually 'customary licence fees' for the work in question, whereas in practice they are only accepted as 'compulsory licence fees'.

A special standard rate is the rate of Foto- Anoniem Foundation.¹⁴ That rate is intended for users who cannot trace the creator of a particular photo. Against payment of a certain amount, Foto- Anoniem Foundation assumes responsibility for handling the claim if the rights holder presents himself. The Photo Anonymous fee is thus a kind of insurance fee and certainly not a usual licence fee. However, it is often (wrongly) used in compulsory licence fees and in compensation payments by canton judges. An amount of €360 per photo per year is definitely not a customary licence fee for online use. Professional users, including large publishers, often pay at most € 75 all-in for very long-term use for various media simultaneously via photo purchasing agencies to photo press agencies such as ANP and Getty. Newspaper and magazine publishers pay for long-term online use to photo agencies such as ANP and Getty for professional photos in the range of €5 to €10. €50 per photo (€50 is already a lot). With regard to commissioned photography, the Amsterdam subdistrict court ruled that €65 is a 'fair fee' (within the meaning of Section 25c(1 Aw)) for the placement of a photo by an experienced photographer in a regional daily newspaper (including online).¹⁵ Stock photos can be licensed for online use for as little as €1.¹⁶ Amounts of between €30 and €100 for one year of commercial use online are mentioned on the website of www.stockfood.nl, for example.

Areas where copyright trolls operate

Text

The first copyright troll in the Netherlands was Cozzmoss B.V. which from 2007 to 2013¹⁷ collected rights-based claims from daily magazine publishers for the use of text on websites. After it filed a suspected unlawful

publication had found, Cozzmoss claimed damages under its own name¹⁸ based on copyright infringement.¹⁹ Cozzmoss claimed damages in the form of a certain fee per word,²⁰ multiplied by a factor between 1.25 and 2.5 as compensation for losing the exclusivity of the publication and the reduction of exploitation opportunities.²¹

Photos

After the claims about texts came the claims about *photographs*. These claims are made partly on behalf of individual photographers, partly on behalf of photo press agencies such as Getty, Corbis, Masterfile, Performance Impressions and ANP. The latter-named parties behave like trolls in this regard by claiming exorbitant damages. Also in this area, 'real' copyright trolls have now emerged, such as Image Law and Copytrack and, currently the best known, the Belgian Permission Machine.²²

For claims relating to photographs, subdistrict courts often relied on alleged standard fees and - at least until recently - applied all kinds of increases to them. On top of this came highly variable but often high court cost orders, and investigation and administration costs, often because their amount was not or not sufficiently disputed.

Video

Meanwhile, new copyright trolls are also active with regard to viral videos. Viral videos are made by individuals with the aim of having them spread 'virally' through the internet and social media. Copyright trolls like ViralHog, Storyful and Jukin Media scour the internet looking for (potential) viral videos.²³ They offer the parties who made them a percentage in exchange for transfer or exclusive licence. The creators often get only 50% of the licence revenue. At Viral Hog, the creator gets nothing at all if less than \$75 is earned.²⁴ Storyful pays 50% on the net profit (after deducting miscellaneous costs) and pays no more than \$1,000 per transaction.²⁵

14 http://fotoanoniem.nl/wp-content/uploads/2020/03/Tarievenlijst_SFA.pdf
15 Rb. Amsterdam 17 May 2019, ECLI:NL:RBAMS:2019:3565; Rb. Amsterdam 1 November 2019, ECLI:NL:RBAMS:2019:8099 (*Photographer/De Persgroep*). Appeal lodged. Visser is involved in these proceedings as counsel for De Persgroep.

16 With subscription forms, even for less, see e.g. <https://www.shutterstock.com/en/pricing>.

17 See A.P. Engelfriet, 'Damages for online copyright infringement: state of play 2015', *AMI* 2015-5, p. 125.

18 Arnhem-Leeuwarden Court of Appeal 11 July 2017, IEF 16965, para 3.3.

19 Cf. among others ECLI:NL:RBAMS:2013:8642,

ECLI:NL:RBMNE:2013:BZ5075 and ECLI:NL:GHARN:2012:BZ4286.

20 This did rely on a freelance rate of €0.47 per word (Arnhem Court of Appeal 18 December 2012,

ECLI:NL:GHARN:2012:BZ4286 (*Cozzmoss v Remie Consultants*), r.o. 4.18) or €0.37 per word (Arnhem-Leeuwarden Court of Appeal 11 July 2017,

IEF 16965 (*MergenMetz/Cozzmoss*), para 5.16).

21 R.C. Meurkens, 'Estimating damages for copyright infringement: observations following the MergenMetz/Cozzmoss judgment', *IER* 2018/41, p. 398 et seq.

22 A. Bekema, 'Photo copyright and the quantification of damages', *AMI* 201966, p. 192.

23 <https://nos.nl/artikel/2330820-duizenden-euro-s-voor-eeen-kort-movie-so-the-industry-works-behind-viral-video-s.html> (accessed 23 July 2020).

24 <https://viralhog.com/terms-service/>.

25 https://video.storyful.com/storyful_content_agreement/#h_182059770381579703659007.

These video trolls also take advantage of the fact that internet platforms like YouTube and Facebook shut down users entirely after one or more copyright infringements and do not allow them back in until the copyright holder informs them that the case has been settled. This gives these trolls a lot more *leverage*. Companies cannot afford to have their Facebook page shut down for a long time, so they have to settle, in practice for thousands of euros. Some websites have now subscribed to such video trolls to reduce the risk of claims on viral videos. The special thing about viral videos is that they are often already very widespread before the video troll acquires the rights and starts claiming fees. Countless users have then already posted the video believing that the copyright on it is not being exercised at all. After all, forwarding and reposting funny or special self-made videos without expecting any payment for them is the primary goal for the creators of viral videos. Next, business bidders get claims from the video troll.

Music

Also, claims in respect of *music* are now emerging as music is also increasingly easy to find. In particular, American composers and producers whose fixation rights are not (or cannot be) exercised by BumaStemra²⁶ and Sena²⁷ submit claims against users who already pay BumaStemra and Sena for their music use. Here too, the claims take troll-like forms because use is made of the above-mentioned means of pressure and payments are made in settlements that are much higher than those received by composers and lyricists who are affiliated to Stemra for these forms of use.²⁸ Users faced with such claims would do well to refer to the Stemra and Sena fees that composers and lyricists would have received if they had been affiliated to BumaStemra and Sena.

had been. Yet here again, in practice, the temptation to settle for a few hundred, or even a thousand euros, proves great, with a significant portion presumably going to the lawyer acting for the plaintiff.

Abstract damage calculation²⁹

One of the causes of trolling is a (much) excessive or wrongly applied abstract calculation of damages. The starting point is the compensation the plaintiff (allegedly) would have stipulated if consent had been sought. Section 27(2) of the Aw expressly mentions the possibility of a "lump sum", but does not prescribe it ("*in appropriate cases the court may...*"). This is in line with Art 13 Enforcement Directive, which stipulates that the court *may*, 'in appropriate cases', set the damages as a lump sum 'based on elements such as at least the amount of royalties or fees that would have been due if the infringer had requested permission (...)'.³⁰

In many cases, it can only be determined afterwards in a fictitious way what price the plaintiff would have stipulated, or at least: on what terms the parties *would have agreed*.³⁰ An estimate will therefore have to be made. Usual rates or percentages *can* provide a realistic starting point.³¹ However, such rates *are certainly not* equivalent to any rate lists used by the claimant. Even less can claimants, who are not in the same position as colleagues who usually apply such rates, simply rely on them.³²

Recourse to this variant is certainly not possible if the tariff lists contain very substantial *increases in* case no prior agreement had been reached. After all, these are not the usual rates *agreed* or *to be agreed*, but unilaterally proclaimed rates.

26 Because there are no collective management organisations for fixation rights in America, there are some American composers who are affiliated (through American sister organisations ASCAP or BMI) with Buma (for the publication rights) but not with Stemra (for the fixation rights). This does not apply to the better-known and more successful composers, because they are/are affiliated to Stemra via their music publishers. Which composers are affiliated to Buma and/or Stemra can be found in BumaStemra's title catalogue: <http://www.bumastemra.nl/over-bumastemra/titelcatalogus/>.

27 Sena itself, on the basis of its legal mandate, only represents disclosure rights and not fixation rights. Sena does represent certain producers for certain recording rights on the basis of a mandate from the NVPI.

28 When negotiating those fees for use in Dutch-language or Dutch-focused websites, rights holders then (wrongly) refer to synchronisation deals for international television series where (obviously) higher fees can be demanded.

29 This passage constitutes an adaptation of para 11.17(c) of Spoor v Verkade v Visser, *Copyright* (2019).

30 Cf. in this sense, e.g. Rb. Rotterdam 15 April 1936, *NJ* 1936/701 (*Punch/ Wereldkroniek*); Amsterdam Court of Appeal 21 April 1994, *NJ* 1996/74 (*Halewijn*);

Spaarnestad); Rb. Den Haag 16 January 2013, *IEF* 12243 (*Brandweerforum*); Court of Appeal Arnhem-Leeuwarden 11 July 2017, *IEF* 16965 (*Cozzmoss v MergenMetz*).

31 See the case law cited in Lindenbergh, *GS Schadevergoeding*, art. 6:96 BW, ann. 4.2.6.5 ff, and for copyright cases see e.g. Rb. Roermond (ktr.) 10 March 1992, *NJ* 1993/282, *AMI* 1993, p. 198 (brief; with ill.) (*Van Pakhuis tot Appartement*); Rb. Amsterdam 20 November 1991, *AMI* 1994, p. 73 (*De Jong/Vara*); Court of Appeal of The Hague 22 October 1992, *AMI* 1994, p. 34, cf. JHS (*Van der Aa/Zeelenberg*); Rb. Hilversum (ktr.) 19 January 1994, *AMI* 1994, p. 78 (kort) (*Photo ver-moord meisje*) (incidentally with fairness review); Court of Appeal of The Hague 10 October 2002, *BIE* 2003/69 (*Aantjes/Kleinbouw*); Court of Appeal Arnhem 18 December 2012, *ECLI:NL:GHARN:2012:BZ4286* (*Cozzmoss v Remie*); Rb. The Hague 2 October 2013, *AMI* 2015-6, no. 12 (*Sena rates for dance-events*); Rb. Gelderland 27 January 2016, *ECLI:NL:RBGEL:2016:2739* (*Sena and Buma/Fun Village*); Rb. Overijssel 17 February 2016, *ECLI:NL:RBOVE:2016:800*, *BIE* 2016/20 (brief) (*Hacked software*).

32 Dissenting in this sense e.g. Rb. Amsterdam 28 August 1991, *AMI* 1991, p. 207 (brief) (*Reuse of lingerie photograph*); Rb. Zeeland-West Brabant 28 October 2015, *IEF* 15678 (*X v Schilpartners*).

finances. A basis for using equally meant 'fines' for calculating damages is not to be found in Sections 6:96 and 6:97 of the Civil Code, nor elsewhere in the law.³³ 'Punitive' damages are foreign to Dutch damages law.³⁴ For additional 'damages' caused by *nuisance*, the Civil Code offers - apart from the regulation of the order for costs of proceedings - the tailored solution in Section 6:96(2) for extrajudicial costs.

In *Asser/Sieburgh 6-II* 2017, the objections to abstract calculation of damages are stated to be that it is difficult to reconcile this with the principle that the damage actually suffered must be compensated, and that it also gives the creditor an unjustified right of choice to choose the method of calculation of damages that is most favourable to him.³⁵ There it can also be read that, in view of the objections attached to the abstract method of compensation and the lack of clarity as to when it should and should not be applied, it cannot be said to be a rule of law, but rather a practical tool that in some cases can be useful in determining the damage.³⁶

Paragraph 26 of the Preamble to the Enforcement Directive reports: 'The intention is *not to introduce an obligation to provide for non-compensatory compensation, but to allow for compensation based on an objective basis (...)* (*emphasis added*). In the same vein, the CJEU ruled in 2017³⁷ that Art 13 Hand- having's Directive does not preclude a national (i.c. Polish) legislation according to which the holder of an infringed IP right may either claim from the infringer compensation for the damage suffered by him, taking into account all appropriate aspects of the concrete case, or - without having to prove the actual damage - payment of an amount equal to twice the appropriate compensation that would have been due if authorisation to use the work in question had been granted. Note: the Directive does not oppose this, but *neither does it prescribe it*. Moreover, the Polish scheme involved increases that also served to cover investigation and discovery costs and any moral damage. If such a for- dation 'clearly and significantly reduces the actual

'damages exceeds' may also be an abuse of rights under Polish law.³⁸

Vicious circle

However, in all areas where copyright trolls are active, they exploit a vicious cycle of overpaying settlements and convictions by district courts. Users feel compelled to pay hundreds or thousands of euros per work - always much more than the usual licence fee - simply because hiring a lawyer, let alone litigating, costs much more. These settlements are then abused to make other users and subdistrict courts believe that these are customary licence fees.³⁹ The judgements of the subdistrict courts that go along with this are in turn used to convince other subdistrict courts that these are customary and justifiable damages.

'The settlement agreements submitted by [%!], including the one submitted on appeal, do not provide sufficient points of reference [for the determination of damages] because they are generally concluded under the threat of proceedings and not in a free negotiating environment. Thus, [%!] failed to sufficiently substantiate the amount of damages it claimed, which under Dutch law does not include an increase to be qualified as a fine' (ECLI:NL:GHAMS:2019:3746).

Courts

Courts are much more critical of copyright trolls' damage claims, but because of the extra costs, the litigation cost risk and the appeal limit, few cases reach courts of appeal.

A brief review of the (few) court rulings of recent years in troll-like cases is instructive:

- In 2012, the Arnhem Court of Appeal assumed a €0.47 per word fee when taking over 43 newspaper articles on a website due to insufficient dispute, but reduced a 200% increase to 25%.⁴⁰

33 On the contrary: cf. Articles 6:91 et seq. of the Civil Code, which not only require an agreement for penalty clauses, but also indicate far-reaching limitations. Example of partial rejection, partial allowance of such claims: Rb. Utrecht (ktr.) 6 April 1995, *AMI* 1995, p. 119 (brief) (*Gerritsen/Nanton*). Examples of allocation: Rb. 's-Hertogenbosch (ktr.) 2 October 2008, ECLI:NL:RBSHE:2008:BF9979 (*Foto Cruiff*); Rb. Rotterdam (ktr.) 10 August 2012, ECLI:NL:RBROT:2012:BY3179 (*Foto parkeerterrein*). Examples of rejection: Rb. Amsterdam 27 August 2003, *AMI* 2004, p. 42 (brief) (*Bzztôh/GMG*); Rb. Amsterdam (ktr.) 4 December 2013, IEF 13312, *AMI* 2014-1, p. 40 (brief) (*Koppe/Kluun*); Court of Appeal of 's-Hertogenbosch 11 February 2014, ECLI:NL:GHSHE:2014:284 and 29 July 2014, ECLI:NL:GHSHE:2014:2524 (*Photo in video clip*); Rb. Amsterdam 26 November 2014, ECLI:NL:RBAMS:2014:8092 (*Getty Images/ TROS*); and Rb. Amsterdam (ktr.) 3 February 2017, ECLI:NL:RBAMS:2017:318 (*Crowdfunding on glmrr.com*).

34 Thus with regard to the profit remittance as a form of compensation pursuant to Art. 6:104 of the Civil Code, e.g. HR 18 June 2010, *NJ* 2015/32, m.nt. Hartlief (*D./Ymere*); and with regard to the profit remittance of Section 27a Aw HR 14 November 2014, ECLI:NL:HR:2014:3241, *NJ* 2015/193, cf. DWFV, *JIN* 2015/14, m.nt. Rijks, *BIE* 2015/7, m.nt. Deurvorst (*Shoppingspel III*), para 4.2.3. Cf. also Speyart, *IER* 2013/49.

35 *Asser/Sieburgh 6-II* 2017, no 37.

36 *Asser/Sieburgh 6-II* 2017, no 38.

37 CJEU 25 January 2017, C-367/15, ECLI:EU:C:2017:36 (*OTK/SFP*).

38 ECLI:EU:C:2017:36 (*OTK/SFP*), para 31.

39 This is evidenced by the examples known to us from practice.

40 Arnhem Court of Appeal 18 December 2012, ECLI:NL:GHARN:2012:BZ4286 (*Cozzmoss/Remie Consultants*).

- Court of Appeal of The Hague in 2015 set damages for online use of an image at €7.⁴¹
- The Arnhem-Leeuwarden Court of Appeal ruled in 2017 that the user in question 'would never have paid' an amount of €0.37 per word and would otherwise have refrained from using it, so that it could not be said to be a customary licence fee.⁴² The court of appeal sought a connection with missed advertising revenue of the newspapers in question and reduced the damages to €139.30 plus €150.75 in administration costs, rejected a 25% increase and compensated the litigation costs.⁴³
- Arnhem-Leeuwarden Court of Appeal in September 2019 set the damages suffered from 59 photos on a website and 78 photos on a Facebook page at €1,500, in light of the number and type of photos, the cooperation envisaged by the parties and at the time the photos were taken, and the fact that no commercial interest was involved.⁴⁴
- The Amsterdam Court of Appeal ruled in October 2019 that fixing agreements that "usually come about under the threat of litigation and not in a free negotiating environment" do not provide sufficient starting points for determining customary licence fees.⁴⁵ The court of appeal considered the amount of damages estimated by the subdistrict court of €1,750 reasonable (formed was: €20,746.77).
- Court of Appeal of The Hague in May 2020 for the online posting of postcards from the 1940s and 1950s by the Leid- se archive reduced damages from €75 to just over €4 per photo.⁴⁶

Procedures

Photo copyright claims are usually brought before the subdistrict court because the claim remains below the applicable limit of € 25,000. The advantage for the claimants is that they do not have to hire a lawyer. Moreover, trolls are *repeat players*, unlike most of their victims. Claimants litigate a lot (cheaply) in person or through a bailiff. Another advantage for the plaintiff in a photo infringement case is that appeals are rarely open. For admissibility in

appeal, the claim on which the court at first instance had to decide must exceed €1,750. Usually, damages in these cases remain below this amount. Only extrajudicial costs (administration costs, tracing costs) are added to the damages. The legal costs do not count towards the appeal limit.⁴⁷ Under art. 1019h Rv, all costs are lumped together, as a result of which the distinction between legal and non-legal costs is often difficult to make. In disputes in which the question is whether the appeal limit is met, the specification of costs submitted in first instance must therefore be consulted. However, that specification by no means always provides sufficient insight into the nature of the costs incurred. In the doubtful cases, the defendant/infringer will choose eggs for his money and refrain from lodging an appeal. There are also examples in case law where the lack of clarity about the nature of the costs is to the detriment of the infringer.⁴⁸

- If an appeal is at all possible, one again risks a (high) court cost order - will undoubtedly play a role in the settlement negotiations.

Foreign copyright trolls

Recently, this copyright claim culture for photos has expanded to include claims by *foreign* lawyers threatening to litigate against Dutch companies in foreign countries on behalf of foreign rights holders. They do so citing the fact that the websites can also be accessed in the foreign countries in question and that the courts there therefore have jurisdiction with regard to damages claims for that use.⁴⁹

This is currently done mainly by German lawyers. In some cases, these lawyers also file claims from non-German foreign rightholders, because the work is accessible in Germany. In connection with the court cost orders in Germany, the costs of using German lawyers and the unfamiliarity with how that then turns out there, in practice, settlements are now being made there for even higher amounts than for 'domestic' claims.

41 Court of Appeal of The Hague 30 June 2015, IEF 15105 (*Masterfile/Falcon*).

42 In the opinion of the Court of Appeal, it has been sufficiently established that this (small) party, MergenMetz, did not pay the alleged user fees of €0.36 and €0.37 per word respectively would never have paid for its chosen method of using the articles and it would not - faced with the licence fee - have included the articles in its system and it would not - faced with the licence fee - have included the articles in its system [...]', r.o. 5.16.

43 Arnhem-Leeuwarden Court of Appeal 11 July 2017, IEF 16965 (*MergenMetz v Cozzmoss*)

44 Arnhem-Leeuwarden Court of Appeal 3 September 2019, ECLI:NL:GHARL:2019:7104 (*Dutch-Creators v Drent Schilderwerken*)

45 Amsterdam Court of Appeal 15 October 2019, ECLI:NL:GHAMS:2019:3746 (*Sembono Travel v Performance*

impressions).

46 Hague Court of Appeal 19 May 2020, IEF 19216 (*Erfgoed Leiden*). Visser was involved in these proceedings as a lawyer for Erfgoed Leiden.

47 This has been settled case law since HR 24 February 1938, *NJ* 1938/952.

48 On this, C.J.S. Vrendenburg, note to Arnhem-Leeuwarden Court of Appeal 21 May 2019, ECLI:NL:GHARL:2019:4432, *IER* 2020/8; see also, e.g. Amsterdam Court of Appeal 27 October 2009, ECLI:NL:GHAMS:2009:BK3979 (*SDN/X*). In Court of Appeal Amsterdam 12 November 2019, ECLI:NL:GHAMS:2019:4093 (*appellant/Rodi Media*), the infringer was partially vindicated in the first instance; the appeal threshold in this case had been met, however, and so an appeal was open to the rightholder. Incidentally, there are also cases where the plaintiff/lawyer lost the procedure at first instance and was subsequently declared inadmissible on appeal due to failure to reach the appeal threshold; Amsterdam Court of Appeal 20 February 2013, IEF 12337 (*plaintiff/Gillissen*) and Den Bosch Court of Appeal 4 June 2013, ECLI:NL:GHSHE:2013:CA2309 (*X/A&C Media*).

49 This is evidenced by a large number of examples made available to us by various in-house lawyers and legal advisers.

For example, the Dutch company receives a claim on behalf of a foreign rights holder filed by a German troll acting under power of attorney. The claim is built up from costs for the photo plus a 120% surcharge for global reach. On this total amount, the troll charges a 100% surcharge for the lack of source reporting. On this, the troll charges 5% interest. On top of this high compensation, there are also documentation costs of €95 and legal costs of €627.50. A claim of, for example, €271 thus becomes €1,914.90 excluding interest when the claim is filed. These costs can add up if more communication follows.

So far, all claims by foreign (mainly German) lawyers have been settled or not pursued. We have not yet heard of a German judgment against a Dutch website, even though it is likely that if such a judgment existed, the trolls in question would immediately come up with it in summonses and settlement correspondence.⁵⁰

Owners of Dutch-language websites faced with a claim from Germany would be well advised to dispute that there has been infringement in Germany and that damages have been suffered there. This with reference to the *Football Dataco/Sportsradar judgment* of the CJEU.⁵¹ In that judgment, it was considered that it is relevant whether "there are indications that the act shows that the person performing it intends to target members of the public in that Member State". A Dutch-language website can be said not to target members of the public in Germany. Other case law of the CJEU shows that the German court could have jurisdiction in such a dispute, because the picture is 'retrievable' or 'accessible' in Germany, because damage *might* have occurred there because copyright rights *would have been* infringed there (after all).⁵² But jurisdiction is something different from applicable law (let alone damage). The Dutch owner of a Dutch-language website must take the position that the infringement in respect of a photograph he uses took place exclusively in the Netherlands and that only Dutch law applies to that infringement. In the alternative, he should dispute that damages were suffered in Germany or anywhere else outside the Netherlands. Otherwise, the course of action recommended below for 'domestic' troll claims is recommended.

Revenue model: licence revenue, out-of-court costs and litigation costs

For copyright trolls, 50% of the net 'forced' licence revenue seems to be a usual retention rate and the core of their business model.

Besides this income, substantial out-of-court costs under Art. 6:96(2)(b) of the Civil Code are regularly added to the claim. These include, for example, filing costs, administration costs, collection costs and investigation costs. Pursuant to both Article 1019h of the Dutch Code of Civil Procedure and Article 6:96 of the Civil Code, these costs are eligible for compensation *insofar as they are reasonable (and proportionate)*. It is up to the (subdistrict) court to reject the costs of which the reasonableness is not or not sufficiently stated and substantiated.⁵³ One should also guard against *general* investigation and enquiry costs being reimbursed. Only costs *directly* related to the proceedings should be eligible for reimbursement.⁵⁴

In practice, the allocation of the amount of this turns out to be quite variable. For example, it can be €127.62,⁵⁵ but if the court takes a critical look at the actual costs, it can also be only €26.25.⁵⁶ For the same (mostly automated) tracing, the tracing costs in court can therefore differ times five. The differences can partly be explained by the fact that the rates of the Act norme- rating extrajudicial collection costs (WIK) and the accompanying Decree on extrajudicial collection costs (BIK) are usually not applicable and the recommendations of the BKG Integral Report⁵⁷ are not applied in all cases, on the basis of which costs are allocated up to a (small) fixed percentage of the principal sum.⁵⁸ In disputes with a consumer-debtor, this cannot be deviated from, but in B2B relationships, the scales are only regulatory law.

The fees and costs are claimed in the summonses under the threat of a full award of legal costs. However, it is not certain that if proceedings are instituted, a full award of legal costs will actually be granted. Since the changes to the Indicative Fees as of 1 April 2017, in principle, the liquidation rate applies to 'very simple cases', whereby the emphasis is on the fact that the costs of the proceedings will be awarded in full.

50 In our experience, the German judgements that are currently being sent along concern default judgements against foreign furniture sellers via the Internet, which (partly) target Germany.

51 ECJ EU 18 October 2012, ECLI:EU:C:2012:642 (*Football Dataco v Sportsradar*), r.o. 35 to 43.

52 CJEU 22 January 2015, ECLI:EU:C:2015:28 (*Pez Hejduk*) and CJEU 3 October 2012, ECLI:EU:C:2013:635 (*Pinckney*).

53 Hof Arnhem-Leeuwarden 3 September 2019, ECLI:NL:GHARL:2019:7104; Rb. Amsterdam 26 November 2014, ECLI:NL:RBAMS:2014:8092 (*Getty Images/TROS*); Rb. Oost-Brabant 24 April 2019, ECLI:NL:RBOBR:2019:2310 (*Planit Software/GTA*).

54 E.g. Rb. Overijssel 25 October 2016, ECLI:NL:RBOVE:2016:4111, r.o. 5.6. See further Vrendenburg 2018, no 104.

55 E.g. Rb. Rotterdam 10 January 2020, ECLI:NL:RBROT:2020:123.

56 E.g. Rb. Midden-Nederland 3 April 2019, ECLI:NL:RBMNE:2019:1500.

57 The BKG Integral Report 2013 is an 'inventory by a working group from the judiciary on the assessment of claimed extrajudicial costs' with recommendations on the application of the BIK and its graduated scales.

58 See Rb. Noord-Nederland 10 September 2019, ECLI:NL:RBNNE:2019:4096 (*Hollandse Hoogte v Raak*) in which an amount of 15% of the principal sum was awarded; in Rb. Rotterdam 10 January 2020, ECLI:NL:RBROT:2020:123, the applicable rates were also applied.

It was clearly stated that 'the obvious course of action would be to regard as "very simple" proceedings involving a minor infringement (e.g. a photo on a private individual's website that is removed at first request).⁵⁹ Since then, the courts have by no means always agreed to award full legal costs.⁶⁰ In addition, the possibility of ordering full costs is limited if fairness dictates otherwise.⁶¹ According to the legislator, this may be the case if the infringer is acting in good faith.⁶² The fairness correction is rarely applied so far.

The party sued can itself limit the litigation risks or possibly even deprive the plaintiff of the interest of a procedure by immediately removing the infringing material,⁶³ by acknowledging the infringement, by paying a (reasonable) amount⁶⁴ or by otherwise complying with the summonses.⁶⁵ In general, the costs of unnecessary or futile proceedings/claims are for its own account. Under circumstances, the causer of an unnecessary (continuation of a) proceeding may even be ordered to pay the other party's legal costs.⁶⁶

Personality rights?

Increases are often claimed for alleged violation of personality rights.⁶⁷ It usually involves

to the lack of attribution and/or the cropping and thereby modification or alleged mutilation of photos. As for name attribution: an author is indeed entitled to name attribution, but the damage he suffers if it is omitted is difficult to prove. The lack of attribution is already factored into FotoAnoniem rates anyway because, after all, they are intended for use of work by creators whose identity is not known and whose name can therefore, by definition, not be mentioned. So if those rates are (wrongly anyway) taken into account, an increase for lack of attribution is not at all an issue. As for 'cropping', this is common practice for use with permission (within certain limits) and is factored into the rates charged. Cropping is generally not a change a photographer can reasonably oppose. To qualify as 'mutilation' (within the meaning of Section 25d (1)(d) of the CA), there must also be a demonstrable damage to the reputation of the maker, according to the *De 4 Jaargetijden* judgment⁶⁸.

Copyright trolls are 'oboes'

Relatively unknown is that EU-based copyright trolls may, under circumstances, qualify as 'independent management organisation' (obo)⁶⁹ within the meaning of the Collective Management Supervision and Dispute Resolution Act.

59 Indicative rates in IP cases courts, version 1 April 2017 (to be advised via rechtspraak.nl), footnote 7.

60 No full costs order followed in: Amsterdam Court of Appeal 28 April 2020, ECLI:NL:GHAMS:2020:1193 (*appellant/Rodi Media*); Rb. Rotterdam 10 January 2020, ECLI:NL:RBROT:2020:124 (*ANP/defendant*); Rb. Rotterdam 10 January 2020, ECLI:NL:RBROT:2020:123 (*defendant/ANP*); Rb. Noord-Nederland 10 September 2019, ECLI:NL:RBNNE:2019:4096 (*Hollandse Hoogte/Raak*); Rb. The Hague 27 June 2019, ECLI:NL:RBDHA:2019:6619.

A full award of costs was granted, for example, in Den Bosch Court of Appeal 11 June 2019, ECLI:NL:GHSHE:2019:2115, in which the court of appeal upheld the decision of the subdistrict court to apply the (then applicable) maximum fee for simple IP substantive cases of €10,000 and, on appeal, also applied the maximum fee of the Indicative Fees. In doing so, the court of appeal considered that '[a]lthough the copyright questions at issue in these proceedings are simple and the financial interest of the case is small, the court of appeal is of the opinion that the appeal should not be categorised as "simple" but as "normal" because of the very extensive fact-finding that [the appellant] had to do as a result of the disputes of [the respondent]'. This leads to the lawyer's fees for the appeal being valued at €20,000.00' (r.o. 6.6.3).

61 Section 1019h Rv.

62 MoT, *Parliamentary Papers II* 2005/06, 30 392, no. 3, p. 26.

63 Rb. Zeeland-West Brabant 30 January 2019, ECLI:NL:RBZWB:2019:3997 in which costs were compensated because the defendant removed the photo immediately after the summons and contacted the plaintiff. In Rb. Amsterdam 17 April 2020, ECLI:NL:RBAMS:2020:2364 (*X/NOS*), the legal costs were awarded up to €8,000, in which a factor was that NOS first carried out ver-weather and had *not* immediately removed the photo.

64 Rb. Rotterdam 10 January 2020, ECLI:NL:RBROT:2020:123 in which the subdistrict court considered that the defendant 'has not proceeded to pay any amount'. ANP is therefore on good grounds to bring this proce-

expensive commenced' (r.o. 4.18). A similar consideration can be read in Rb. Noord-Holland 10 September 2019, ECLI:NL:RBNNE:2019:4096 sub.

5.11 and in Rb. Utrecht 24 August 2011, ECLI:NL:RBUTR:2011:BS1232 (*Cozzmoss v Alliance*).

65 In Rb. Gelderland (vzr.) 1 November 2019, ECLI:NL:RBGEL:2019:4905 (otherwise a trademark case), the interim relief judge mitigated the legal costs because the defendant had explained that it no longer wanted to use the trademark and only disagreed with the fines and legal costs demanded in the summons letters (r.o. 4.9-4.10).

66 C.J.S. Vrendenburg, *Procedural costs orders and access to justice in IP cases* (BPP XIX) (diss. Leiden), Deventer: Wolters Kluwer 2018, no 102; P. Sluijter, *Steering with litigation costs* (BPP XII) (diss. Tilburg), Deventer: Wolters Kluwer 2011, p. 51.

67 That additional compensation for violation of moral rights is possible is shown, for example, by CJEU 17 March 2016, ECLI:EU:C:2016:173 (*Liffers*). That case concerned the use without consent of excerpts from a documentary containing personal and intimate stories of homosexuals and transsexuals in Havana (Cuba) in another documentary made about child prostitution in Cuba, showing criminal activities that had been recorded with a hidden camera. It should come as little surprise that this qualified as a rather serious violation of moral rights.

68 HR 29 March 2018, ECLI:NL:HR:2019:451 (*Dijkstra/De 4 Jaargetijden*).

69 It is also plausible that many if not all photographic press agencies qualify as OPOs, as they seem to fit the definition. However, the concluding sentence of recital 16 may raise doubts: 'managers and agents of authors and performers who act as intermediaries and represent rightholders in their relations with collecting societies should not be considered "independent management entities" since they do not manage rights in the sense that they set tariffs, grant licences or collect money from users' (*emphasis added*). If (self) rate-setting is a separate requirement, which is not clear from the text of the directive itself, copyright trolls could also be excluded for that reason.

organisations copyright and neighbouring rights (WTGCB),⁷⁰ respectively as an 'independent management entity' within the meaning of the EU Collective Management Directive.⁷¹ This includes, in particular, 'any organisation authorised by law or by way of assignment, licensing or other contractual arrangement to manage, as its sole or principal purpose, copyright or related rights related to copyright on behalf of more than one rightholder and in the common interest of those rightholders and which: i) is not directly or indirectly, wholly or partly owned or controlled by rightholders, and ii) acts for profit'.⁷² This means they have to disclose 'at least', among other things, the following information: 'standard licence agreements and normally applicable tariffs, including discounts' and their 'general policy on the distribution of amounts due to rightholders' and 'on management costs'.⁷³ Belgian Permission Machine is - according to the website of the Belgian regulator - subject to Belgian supervision⁷⁴ and now publishes its tariffs for 'regularisation through a retroactive licence' per rightholder. This shows that it charges an *average* of €185.50 for associations and individuals⁷⁵ and €265 for Companies and websites with a commercial model, plus in both cases €74.20 'file costs'. We could not yet find another aspect of its 'general policy on distribution and management fees', namely that it keeps 50% of net fees received for itself, on their website.⁷⁶

Only copyright trolls established in the Netherlands are subject to Dutch supervision by the CvTA, and the CvTA is currently not aware of any Dutch copyright troll. Copyright trolls operating from outside the EU are not subject to any European supervision.

To reiterate unnecessarily: the fact that Permission Machine publishes these 'regularisation fees' is still no proof that these are customary licence fees which (subdistrict) courts should interpret as normative (proof) of the damage suffered. They are and remain eminently misleading copyright troll fees that at most appear to be actually enforceable if the infringement has already taken place. Furthermore, the fact that copyright trolls/obos in many cases keep 50% of the received royalties for themselves provides an important argu-

ment that all file, investigation and administration costs can and should easily be covered by this 50% retention. Finally, it seems easily defensible that even if copyright trolls do not qualify as OPOs or are not subject to European supervision, the standards regarding the transparency of their fees, their costs and their payment percentages could be applied by analogy on the basis of reflex effect.

Search software

A final major incentive for copyright trolling (behaviour) is the accessibility, quality and convenience of search software. Even with Google Images, it is easy to track down all uses of a given photo, anywhere on the Internet. Copyright trolls make grateful use of this, using fully automated search engines for all the photos they manage to permanently search the entire Internet. As a result, all photos posted on the internet, including public social media, are found. Detection costs have become minimal. The only thing (really) left to check is whether the photo has not been published with permission or is under a copyright restriction. Many copyright trolls do not check even that and just use the shotgun approach: sending a bill for every use without checking anything. If the claim turns out to be false, they will hear about it. That means the tracing costs are verifiable. All this is more than enough reason to be highly critical of the alleged detection costs claimed by copyright trolls.

How to respond to claims by trolls?

Since it appears that many victims of copyright trolls often litigate in person for cost reasons and/or for other reasons do not raise the appropriate defences, it is useful to offer some concrete suggestions on how to respond to such claims. This is not legal advice that applies in all cases and, of course, 'no rights can be derived' from it, but it highlights the relevant defences. Moreover, it reflects the strategies of the more experienced victims of copyright trolls and 'industrial accidents' that can be gleaned from what real-world experience experts have indicated

70 Art. 1 sub d WTGCB 'independent management organisation: any organisation, not being a collective management organisation, which is established in the Netherlands and which is authorised by law or by means of transfer, licensing or another agreement by more than one rightholder, with the main objective of managing copyrights or neighbouring rights, for the benefit of one or more rightholders, in the joint interest of these rightholders and which is neither directly nor indirectly, wholly nor partially controlled by rightholders and is set up for profit'.

71 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright rights and related rights and the multi-territorial licensing of rights in musical works for their online use in the internal market.

72 Art. 3 sub b CB RI.

73 Art. 21(1) CB RI. jo. Art. 2(4) RI. CB resp. Art. 2p(1) WTGCB jo. Art. 25d WTGCB.

74 Control service of the copyright and neighbouring rights management companies. <https://economie.fgov.be/nl/themas/intellectual-property/copyright/control-service-of-the>.

75 By comparison even at PhotoAnonymous Foundation, the fee for online use by individuals is no more than €90.

76 If that 50% withholding is indeed not disclosed 'on its internet page in a clearly readable place and with clear reference in the main menu of the internet page' by Permission Machine, this would seem to be a violation of Article XI.266(5) and (6) in conjunction with Article XI.246 of the Belgian Economic Law Code (CIR), the Belgian implementation of the Collective Management Directive.

reaches. In most cases, the best way to respond to claims by copyright trolls is as follows:

1. remove the material immediately;
2. directly acknowledge the infringement (unless there is obviously no infringement);
3. dispute the amount of damage claim;
4. offer the reasonable/usual fee unconditionally with or including a small mark-up for investigation and/or legal fees; and
5. prefer to pay this fee immediately and thus not wait for agreement on the offer.

This last step is important according to the experts by experience: it shifts the litigation risk to the troll. After all, it is much less attractive to only litigate about the amount of damages if the infringement has not been disputed and a reasonable amount has been paid. The chance of the troll getting its litigation costs (fully) reimbursed is very small in such a case.

In practice, the biggest problem is that many users do remove the material but do not (immediately) acknowledge the infringement, which creates a legitimate interest for the copyright troll to go to court, even if only for the declaration of rights, and to incur costs that in turn qualify for compensation. The second problem is that users do not offer a user fee (reasonable or otherwise) or do so too late, which also creates a legitimate litigation interest.

If the above steps are followed, the experts say, it is important to keep a cool head and a firm foot. Then comes the well-known phase of bluff poker. The troll says it will process if a higher fee is not paid. Many users then give in (too much) because they do not dare to take on a procedure and the risk of the litigation costs order. If it comes to litigation, they go on to litigate in person in the subdistrict court, putting up poor and often even counterproductive defences.

There is usually infringement.⁷⁷ Again, this is evident from the practice known from case law.

Of course, sometimes it happens:

1. a photograph is not copyrighted due to lack of creativity (this chance is very small, but one might think of an exact photograph of a painting in which no choice (creative or otherwise) was made by the photographer); or

2. the copyright has expired (this only applies to very old photos, at least from before 1950⁷⁸) or
3. a restriction applies, (but this requires source and name attribution, which is usually lacking); or
4. no copyright-relevant conduct such as (embedded) linking (to a legal source).⁷⁹

But in most cases, there is simply infringement and it is important to acknowledge it immediately, remove the photo and offer a reasonable user fee. Professional users, such as news media, do this and often pay an amount immediately, e.g. €200. This is because discussion or correspondence about it quickly costs more and usually such an amount has to be paid anyway.

Next, usually the core of the most important and most promising defence is contesting the amount of the damages ordered. Here, the burden of proof is on the entitled party. He or she must prove what his or her damages are. In line with the rulings of the courts of appeal, this is in principle the usual licence fee, i.e. the fee for which the author can prove that he is actually and voluntarily paid in advance by consent for the type of photo in question.⁸⁰ It is not sufficient that another (better known or better) author can ask more, or that more can be asked for other (more special) photos. What matters is the photo in question from the author in question.

To cover certain costs and to compensate for the omission of the name and for additional administrative or investigative costs, an increase of 25% may be offered. This appears to be the maximum increase applied by courts to customary fees. Such an increase should really stop there, barring special additional circumstances that should not be assumed too quickly. 'Loss of exclusivity' is not an argument if the rights holder gives permission to several parties, which is by definition the case with copyright trolls, and usually the case with the most claimant photographers.

If a reasonable (customary) user fee has been offered, there is in principle no place for an order to pay the costs of the proceedings. In that case, it is precisely the plaintiff who should be ordered to pay the costs. Furthermore, it is rightly increasingly assumed in legal circles that photo copyright cases are 'very simple cases' to which the liquidation rate should be applied.

77 Unless, for example, it turns out that the plaintiff is not a right holder or does not have a power of attorney from the right holder to act against the use (this is quite common) or there is evidence of consent from someone who was entitled to give that consent (also quite common).

78 Anonymous photographs are subject to a protection period of 70 years after publication, cf. Section 38(1) Aw. (Cf. The Hague Court of Appeal 19 May 2020, *IEF* 19216, *Erfgoed Leiden*). Most photographs have a protection period of 70 years after the death of the creator, see Section 37 Aw.

79 The issue of permissible (embedded) linking from/to legal sources will not be discussed further here. That is (also) material for a separate contribution.

80 So these are emphatically not the rates that a party like Permission Machine has listed on its website as rates for 'regularisation by retroactive licence'. After all, such fees are only paid involuntarily. (<https://permissionmachine.com/nl/tariffs/>).