[seal of the Court of Zwolle-Lelystad]

Judgment

In the name of the Queen

COURT OF ZWOLLE-LELYSTAD

Section for civil matters

case number / cause-list number: 106031 / HA ZA 05-211

Judgment of 14 March 2007

in the case of

1. the legal entity under the law of Norway
STOKKE AS,
with its registered office in Skodje (Norway),
2. the private company with limited liability
STOKKE NEDERLAND B.V.,
with its registered office in Tilburg,
3. PETER OPSVIK,
residing in Oslo,
plaintiffs,
procurator M.F.H.M. van Haastert,
lawyers T. Cohen Jehoram and R.L.H.I. Schiphorst in The Hague,

against

the private company with limited liability
MARKTPLAATS B.V.,
with its registered office in Emmeloord,
defendant,
procurator R.K.E. Buysrogge,
lawyer Chr. A. Alberdingk Thijm in Amsterdam.

Hereinafter parties will be referred to as Stokke and co and Marktplaats

1. The proceedings

1.1. The course of the proceedings appears from:
- the interlocutory judgment of 3 May 2006;
- the document after the interlocutory judgment of Stokke and co;
- the document commenting on the interlocutory judgment of Marktplaats;
- the defence after the interlocutory judgment of Stokke and co;
- the defence commenting on the interlocutory judgment of Marktplaats;
- the document commenting on the exhibit of Stokke and co.

1.2. Finally judgment is rendered.

2. Further judgment

introduction

2.1. In the interlocutory judgment the Court considered that the Directive and the Personal Data Protection Act do not preclude the collecting and registering of the names, addresses and domiciles of its advertisers by Marktplaats, but this does not imply that Marktplaats is obliged to collect this data from advertisers using the names STOKKE or TR1PP TRAPP. In view of the framework for assessing described by the Court in the legal grounds 4.23 and 4.24 of the interlocutory judgment Marktplaats is only obliged to do so if it acts negligently by omitting registration. In order to be able to determine whether this is the case the Court had given parties the opportunity to comment on some questions formulated in the judgment.

2.2. Parties (amply) used the opportunity offered to them. Firstly, the Court shall consider the questions asked by it and it shall consider parties' statements in reply to those answers. Subsequently the Court shall draw up the balance based on these statements.

the questions

2.3. Firstly, the Court asked parties which other possibilities Stokke and co has to obtain the names, addresses and domiciles of the infringing advertisers on Marktplaats.nl based on the advertisers' E-mail addresses.

Marktplaats stated that beside an E-mail address the advertisers also provide other data (in any case their postal codes –which are compulsory- and besides this –not compulsory- their addresses, telephone numbers and full names) In "a significant number of cases", besides the E-mail address, also other data are provided to and registered by Marktplaats. Marktplaats is prepared, upon request, to provide Stokke and co with this data.

In the event only the E-mail address is known, Stokke and co can try to trace the address by contacting the given E-mail address. If this does not work, then, according to Marktplaats, identification can take place through the Internet provider, the company or the organization that had made the address available or the provider of web-mail. Based on the Lycos-Pessers judgment and under certain conditions, Marktplaats points out that within this framework these third parties are obliged to provide this data when requested.

2.4. Stokke and co stated that in cases in which only the E-mail address is available it is very time-consuming and unpractical to try to obtain the name, address and domicile through the provider or other third party. Within this framework they pointed out that providers can have their business location everywhere, therefore also "in the most exotic jurisdictions". Therefore the alternative possibilities to obtain the addresses of infringing advertisers mentioned by Marktplaats are no realistic options. According to Stokke it not a simple and realistic possibility that it has to make offers arising from infringing advertisements in order to be able obtain the advertisers' names, addresses and domiciles.

2.5. The Court shares Stokke's argument that in situations, in which only an E-mail address is available and in which the advertiser, after being requested to do so through E-mail, refuses to make its name, address and domicile available, it is very time-consuming, therefore almost impossible, to try to retrieve the address, name and domicile of the advertiser in question through a third party, such as an Internet provider. Within this framework it is important that the responsibility of the said third party for the possible infringing acts committed by the advertiser, who makes use of the Internet services offered by the third party, is limited. The said third party's services are the instruments for the (secondary) infringing act by private individuals. The Court refers to the part it considered in legal grounds 4.17 of the interlocutory judgment concerning to Marktplaats' services. The services are in an even further remote connection with that act than the services offered by Marktplaats. Therefore the fact that Marktplaats refers Stokke and co to those third parties is no realistic option.

2.6. However, Marktplaats also pointed out that the chance is small that an advertiser will refuse to give its name, address and domicile when it is contacted as a result of an advertisement. Stokke and co did not sufficiently substantiate the fact that it would not be very well possible for Stokke and co to obtain the name, address and domicile through offers, as stated by them. Without further explanation, which is actually missing, it is difficult to judge why it would not be relatively easy for Stokke and co, as suggested by Marktplaats, to make an offer on an infringing advertisement in order to obtain the advertiser's name, address and domicile. The fact that it would be (too) time-consuming for Stokke and co to respond that way on infringing advertisements had not been stated nor proofed. That such an action is not effective in many cases had also not been made plausible. The advertiser must

provide its data within the framework of the entering into of a possible purchase agreement after all.

2.7. Therefore the conclusion is that Stokke and co has realistic possibilities to retrieve the name, address and domicile itself through the Internet address in the advertisement. In cases in which the intended result cannot be obtained, it is indeed difficult for Stokke and co to obtain the name, address and domicile through third parties.

2.8. Therefore the Court asked parties to indicate how often it had occurred in the last couple of years that Stokke and co was not able to retrieve infringing advertisers' names, addresses and domiciles.

According to Stokke and co since the middle of 2003 it had hundreds of infringing advertisements, among other things, removed from Marktplaats.nl. For which Stokke and co made use of the "Tip the webmaster" option for quite some time. Besides these removals Stokke and co, as stated by them, had also warned individual infringers – most of them multiple offenders and professional traders – by sending them an E-mail containing a warning to the coded E-mail address that was available through Marktplaats' Website. It concerned 35 warnings in the period between autumn 2004 and summer 2005. Stokke and co received the desirable abstinence statements from 24 of the summoned advertisers. The other 11 advertisers did not respond. Stokke and co did not have these advertisers' names, addresses and domiciles. Stokke and co emphasise that infringing advertisements are placed on a regular basis, often under another name.

2.9. Marktplaats stated that Stokke and co made use of the possibility to obtain identifying information on a certain advertiser based on the Personal Information Agreement only 5 times. It is not known to it in how many of the five cases Stokke and co were able to retrieve the names, addresses and domiciles based on the information provided. According to Marktplaats it is questionable in how far Stokke and co, in view of this and the information provided by Stokke and co themselves, are really interested in the infringers' names, addresses and domiciles.

2.10. The Court determines that the information provided by Stokke and co evidences that, in a period of three quarter of a year, it had reason not to only have 35 cases of infringing advertisements removed, but it also took action against the advertisers. In 24 cases this action produced the desired result and in 11 cases – 15 on a yearly basis– not. It is not clear what the relationship is between these cases and those claimed on the basis of the Personal Information Agreement.

When we proceed from the many hundreds of infringing advertisements, according to Stokke and co's information, it is obvious that they had reason to take action against the advertisers only in a small part of these advertisements and in 1/3 of these cases these actions, therefore a small part of the total number of infringing advertisements, did not produce any result. Therefore according to the Court it cannot be assumed that Stokke and co has much advantage in the fight against infringing advertisers by using the names, addresses and domiciles. Anyhow, in the event Stokke and co indeed has advantage herein, they failed to sufficiently explain why they attached so little interest herein in the past.

2.11. The Court also referred to parties the question whether it is possible to change the procedure for the placing of an advertisement in a manner that each advertiser, or each advertiser who uses the names STOKKE and/or TRIPP TRAPP, is obliged to provide its name, address and domicile. Furthermore the Court also asked how much time it will take to implement this change and as a result hereof how much this is going to cost. In order to answer these questions parties had relied on the reports drawn up by parties' experts. The Court now will discuss these reports and parties' points of view based on these reports.

2.12. Stokke and co had relied on a report drawn up by W. Kraay and F.W. Bomhoff of TNO (Netherlands Organisation for Applied Scientific Research). They draw the following conclusions:

"Question c):

- *it is very well possible to change the procedure for the placing of advertisements in a manner that each advertiser is obliged to give its name, address and domicile;*
- *it is also possible to (automatically) apply this obligation only in cases of advertisements in which the names Stokke, Tripp Trap or similar terms are used; advertisements using these names can be distinguished quite accurately; also when alternative spellings are used;*
- *besides this there are possibilities to detect (afterwards) possible professional acts from the patterns of the placed advertisements.*

Question d):

- *in principle building in compulsory entries of the name, address and domicile is not difficult;*
- *building in a detector that only responds to specific names is very well possible;*

- *the time required for this (and as a result hereof also the costs) also depend on the architecture of the system involved and on what else must be done with the names, addresses and domiciles, required software modules for text analysis are available free of charge;"*

2.13. Marktplaats submitted the TNO report to professor H. Sips and J. Pouwelse PhD of the TU (Technological University) in Delft. Concerning the question whether it is possible to change Marktplaats' procedure in a manner that name, address and domicile must be provided at the placing of an advertisement containing the words TRIPP TRAPP and/or STOKKE they write, among other things, the following:

"It is challenging to provide effective automated filtering, Simple keywords filtering on keywords such as : "Stokke, Tripp Trapp, Tripp-Trap, Trip-Trap, Triptrap" will be ineffective, even when augmented 'with semantic nearness algorithms. We agree with TNO-ICT that building such a keyword-filter is easy. However, it will not work under operational Marktplaats.nl conditions. The reason is that once implemented there will be a strong motivation amongst professional illegitimate advertisers to test, understand, and bypass this technical measure. This problem is somewhat similar to the difficult ongoing efforts to filter e-mail spam, We are confident that within a few weeks such a simple automated keyword filter would be cracked and its limits published on underground message boards. Our expertise of operational websites leads us to conclude that an effective fully-automated solution is currently beyond the state of science. Therefore, a semi-automated filtering solution is required. Not only text filtering is problematic. The photo comparison possibilities as mentioned by TNO-ICT will suffer the same fate for the same reason, Note that photo comparison technology is still very immature and erroneous. An automated and effective solution is far beyond the capability of current science. "

Concerning the question how much time this will take and what the costs will be Sips and Pouwels write the following:
"The daily volume of 91,000 advertisements must therefore be checked by a semi-automated filtering system. Manpower is needed to both guard, maintain, and update the filtering keywords, as well as for the filter software updates. Furthermore, a procedure would be required to allow other external parties besides Stokke to suggest filtering keywords to Marktplaats, nl and manpower to handle this correctly. For example, a Marktplaats.nl expert would need to decide if a suggested new keyword is correct and effective or too broad and will yield too many false positives."

2.14. According to Marktplaats a change that obliges all its advertisers to give their names, addresses and domiciles would result in a heavy decline in turnover. During this procedure a large part of the advertisers might decide not to place their advertisements after all. The change would lead to labour costs amounting to 80,000.00 Euros (including 20 working days for the design of the required software) and would lead to costs for additional server capacity amounting to 100,000.00 Euros. Due to the non-availability of the employees during 20 days in respect of the changing of the procedures Marktplaats would suffer a loss of turnover amounting to 600,000.00 Euros.

According to Marktplaats the costs for the implementation of a filter would be much higher. Designing and placing the filter would require 200 working days and 850,000.00 Euros. The loss of turnover would, in connection with the said 200 days, be at least 6,000,000.00 Euros.

According to Marktplaats on top of this the costs of the wage of a fulltime employee to keep the filter up-to-date would be 80,000,00 Euros per year.

2.15. Stokke and co contradicted this statement. With regard to this they submitted an E-mail from Mister Bomhof of TNO. In this E-mail Bomhof puts Marktplaats statements concerning the costs in perspective. Within this framework Bomhof points out the availability of good Open Source software.

2.16. What parties reciprocally stated and their statements based on the reports evidence that it is technically possible to change the advertisement procedure in a manner that each advertiser is obliged to give its name, address and domicile. Marktplaats did not sufficiently substantiated its statement that such an adjustment would result in high costs, certainly within the hot light of the comments that Bomhof brought into perspective. According to Bomhof Marktplaats' calculation, based on the hourly fees in the ICT branch, is founded on at least 600 working hours, while, based on his own experience, such an adjustment can be realized for a much lower amount. Furthermore, it is not clear why the non-availability of the employees during 20 days would lead to a loss of turnover amounting to 600,000.00 Euros. Without further explanation, which is actually missing, it is not possible to find out why some absent employees cannot be replaced by other employees (possibly by temporary hiring of

personnel), while it is also not obvious that and why there is a question of a direct relation between the absence of certain employees and the loss of turnover (which is primarily realised by advertisers anyway).

Marktplaats also did not sufficiently substantiate its statement concerning the scope of the costs of additional server capacity. Supported by reasons Bomhof explained that the server capacity has to be increased by 1% at the most. According to Bomhof an amount of 100,000.00 Euros for such an increase is “a little bit too high”.

2.17. The above-mentioned indeed implies that it has become plausible that the implementation of such a change, which is that all advertisers must give their names, addresses and domiciles, will lead to some costs. It is also plausible that the change can lead to loss of turnover due to the fact that potential customers will pull out during the following of the procedure.

2.18. TNO’s report shows that it is indeed possible to change the procedure in a manner that the names, addresses and domiciles must be given only in the case of advertisements containing the names “Stokke”, “Tripp Trapp” or similar words. The experts called in by Marktplaats did not sufficiently substantiate this finding of the report. It is true that the report shows that such a procedure can be circumvented by malicious advertisers, but this does not imply that the - non-airtight - procedure cannot be implemented. There is no question of technical obstacles. Therefore the Court takes that for granted.

2.19. The fact that the implementation of this procedure will lead to costs is also proofed. Whereby it is important that, otherwise than stated by Stokke and co, it cannot be assumed that the filter that is required for the implementation of this procedure can be installed based on the (free) Open Source software. Not taking into consideration the fact whether incorporating Open Source software in Marktplaats’ own software is allowed – parties do not share the same opinion with regard to this – and whether Marktplaats, in exchange for the said software, must make all its own software (its “crown jewels” as it describes them itself!) or only a part of its own software, that is related to the filter, available to others, what indeed has become clear is that by using, incorporating and adjusting the Open Source software in its own software to its own wishes will lead to costs and will have drawbacks. Therefore Marktplaats’ choice, if it would be obliged to place a filter, not to use the Open Source software, given the crucial meaning of its own software for Marktplaats, is a justified choice.

Marktplaats mentions very high costs. However, with regard to this item it had hardly substantiated its statements. Therefore the Court cannot assume that the design costs of the filter will be amounting to 850,000.00 Euros and the costs of maintenance amounting to 80,000.00 Euros per year. The amount for the design costs had been hardly substantiated. The time sheet based on a description of the work to be spent is missing. The exorbitant amount of 6,000,000.00 Euros for the loss of turnover had not been substantiated at all. The Court considers it plausible that the filter will result in some additional maintenance, but the Court considers it unlikely that Marktplaats will need a fulltime employee for the maintenance, who on top of this will cost 80,000 per year. Whereby it is important that the Court, together with Stokke and co, in view of those advertisers’ interests, does not consider it to be likely that potential advertiser will take much effort to circumvent the filter.

The conclusion is that it is plausible that the designing and implementing of an adequate filter will lead to a considerable amount, also because Marktplaats cannot be expected to work with the Open Source software, and that the maintenance of the filter also will lead to additional costs, but the amounts mentioned by Marktplaats within this framework is not realistic, therefore these amounts cannot be taken as starting point.

2.20. Finally, the Court asked parties which possibilities Marktplaats has to check the enquired names, addresses and domiciles. What parties and their experts put forward with regard to this item evidences that in practice the correctly checking of the names, addresses and domiciles, if it is possible, based on the means available at this moment, will take a couple of days. This implies that Marktplaats cannot be expected to verify whether the provided names, addresses and domiciles are indeed correct beforehand, which is before the advertisement is indeed place. There would be too much time lying between the provision and the placing of the advertisement. Therefore the check must take place afterwards, so after the advertisement is placed, (by Stokke and co). Therefore to determine whether the advertiser has provided incorrect name, address and domicile is only possible afterwards. If this is the case, then Stokke and co will only have the E-mail address of the advertiser in question at their disposal.

2.21. In the current situation, in which Stokke and co only have the advertisers’ E-mail addresses at their disposal, 2/3 of the advertisers who were warned at the said E-mail addresses, indeed responded to Stokke and co’s warning (legal ground 2.6). When a filter would be implemented, then Stokke can (also) have the other advertisers’

names, addresses and domiciles at its disposal and can warn them using these data, but only if the data provided by them is correct. When they are not correct, then Stokke and co can only reach these advertisers through the provided E-mail addresses. The Court considers it plausible that especially those advertisers, who offer chairs for sale on a large scale and in a (semi) professional infringing manner, the recidivists, will be likely inclined to give incorrect names, addresses and domiciles. Therefore it is likely that Stokke and co will not obtain these advertisers' correct names, addresses and domiciles through the filter.

Conclusion

2.22. In the interlocutory judgment the Court took grounds that Markplaats can be expected to take measures in order to prevent or to limit damage to Stokke as a result of the infringing advertisements, with regard to the answer to the question which measures are appropriate a consideration should be made between parties' interests, whereby, to a large extent, the costs for the said measures – which must remain limited – and the consequences of the measures on Marktplaats' conduct of business should be taken into consideration.

2.23. Based on the above-mentioned criterion the Court believes, in view of all that parties had put forward, that Marktplaats cannot be expected to oblige its advertisers or the advertisers of – in short – STOKKE products to give their names, addresses and domiciles. Whereby the following is relevant:

- Stokke and co's interest in the provision of names, addresses and domiciles is limited, in the past when the names, addresses and domiciles were not yet known Stokke and co had only warned a relatively small number of advertisers for their infringing advertisements. At that time Stokke and co were already able to reach 2/3 of the advertisers warned through the E-mail addresses. This share could have been increased when Stokke and co would have tried to obtain the advertisers' names, addresses and domiciles by means of making an offer first. Furthermore it is still the question whether Stokke and co, as desired by them, can reach the advertisers whom they currently cannot easily reach concerning the provision of the names, addresses and domiciles due to the fact that these personal data cannot be checked prior to the placing of the advertisement. This implies that it is likely that Stokke and co still cannot obtain the proper personal data after the implementation of the change proposed by them.
- Marktplaats cannot be expected to enquire all advertisers' names, addresses and domiciles, given the consequences hereof on Marktplaats' conduct of business. In an earlier stage of the proceedings Marktplaats already explained in a convincing manner that and why it had chosen not to ask its advertisers' names, addresses and domiciles.
- Although, according to the Court, Marktplaats (over)exaggerated the costs incurred in the placing of the filter, we should, also in view of what Stokke and co's experts noticed about the costs, depart from the fact that implementing the filter will cost more than an insignificant amount of money. Relevant is that Marktplaats rightfully pointed out that when it is obliged, towards Stokke and co, to collect the names, addresses and domiciles, then it would also be obliged to do the same towards other intellectual property rights owners.
- Stokke and co's relatively small interest in the acquisition of the names, addresses and domiciles is outweighed by (especially) Marktplaats' financial interest not to place the filter for the acquisition of the said data.

2.24. The above-mentioned ensues that Stokke's claims mentioned under c and 1 are not allowable. In the interlocutory judgment the Court had already considered and decided that the remaining claims are also not allowable. Therefore all Stokke and co's claims are turned down.

2.25. Stokke and co is fully declared at fault. Therefore the Court will order them to pay the costs of the proceedings. These costs are calculated as follows:

Court registry fees	€ 650,00
Procurator's fee (fee III. 5.5. points)	€ 2.894,50 +
	€ 3.544,50

3. The decision

The Court

3.1 turns down the claims;

3.2 orders Stokke and co to pay the costs of proceedings and determines these costs, in as far as payable by Marktplaats until this day, at 3,544.50 Euros;

3.3 declares that this order to pay the costs of proceeding provisionally enforceable

This judgment is given by J.W.F. Houthoff, H. de Hek and H. Vegter and is pronounced in open court on 14 March 2007.

[Signature]

[Signature]

CERTIFIED AS A TRUE COPY, issued to the procurator R.K.E. Buysrogge / Zwolle dated 14 March 2007. The registrar of the District Court in Zwolle.

[Signature]