

Judgment

DISTRICT COURT IN THE HAGUE

Commercial division

Hearing location The Hague

Case number / case list number: C/09/460412 / KG ZA 14-178

Judgment in preliminary relief proceedings dated 7 April 2013

in the case of:

the legal person incorporated under foreign law

AUTODESK, INC.,

with its registered office in San Rafael, California, United States of America,
plaintiff,

lawyer Mr. D. Knottenbelt in Rotterdam,

versus

1. the legal person incorporated under foreign law

ZWCAD SOFTWARE CO., LTD.,

with its registered office or at least its principal place of business in Guangzhou, People's Republic of China, defendant,

lawyer: mr. M. Elshof in Amsterdam,

2. the legal person incorporated under foreign law

ZWCAD DESIGN CO., LTD.,

with its registered office or at least its principal place of business in Guangzhou, People's Republic of China, defendant,

lawyer: mr. M. Elshof in Amsterdam,

3. the legal person incorporated under foreign law

RTOC BVBA, also doing business as TECH CAD BVBA and TECHCAD SOFTWARE SOLUTIONS,

with its registered office in Heusden-Zolder, Belgium, defendant,

lawyer Mr. J.L. ten Hove in Maastricht,

Parties will hereinafter be referred to as Autodesk on the one hand and as ZWSoft, ZWDesign and RTOC on the other. ZWSoft and ZWDesign are jointly referred to as ZWSoft et al. For Autodesk the case is substantively handled by Mr. R.M. Kleemans and mr. J.D. Drok, lawyers of Amsterdam. For ZWSoft et al. the case is substantively handled by the lawyer mentioned above and Mr. E.H.M. Bieleveld, lawyer in Amsterdam. The previously mentioned lawyer acted on behalf of RTOC.

1. The proceedings

1.1. The course of the proceedings is evidenced by:

- the writ of summons dated 19 February 2014;
- Exhibits 1 through 23 of Autodesk;
- additional Exhibits 24 through 25 of Autodesk;
- the statement of defence of ZWSOft et al., with Exhibits 1 through 18;
- Exhibits 19 and 20 of ZWSOft et al.;
- the cost specification of parties;
- the oral hearing dated 17 March 2014 and the pleadings submitted and presented for that purpose.

1.2. Initially, Autodesk also summoned Mr. George Henry Lahmers (hereinafter: “Lahmers”). Autodesk has withdrawn the claims against Lahmers.

1.3. Autodesk requested to handle its Exhibit 23 confidentially pursuant to article 28 of the Dutch Code of Civil Procedure (hereinafter: DCCP) and to enjoin parties from making any disclosure about this pursuant to article 29 DCCP. The Preliminary Relief Judge rejected this request during the hearing.

1.4. Judgment is set for today.

2. The facts

2.1. *Computer-Aided Design* programmes (hereinafter, CAD programmes) enable a designer to draw and design with the aid of a computer. CAD programmes could be used for architecture, civil engineering, mechanical engineering, building and media.

2.2. Autodesk operates a business involved in the development and sale of a CAD programme called AutoCAD. Autodesk commercialized the first version of AutoCAD in 1982. The produce then underwent further development and new versions were commercialized from time to time, including AutoCAD 2008. Autodesk treats the source code for AutoCAD as an trade secret.

2.3. The company Softdesk, Inc. (hereinafter, “Softdesk”) developed a software platform called IntelliCAD that can be used to develop CAD programmes. The drawings made with these CAD programmes are interchangeable with drawings made with AutoCAD.

2.4. ZWSOft has commercialized a CAD programme under the name ZWCAD. This programme was developed using the IntelliCAD software platform. ZWSOft put the first version of ZWCAD on the market in 2002. The product underwent further development since then and new versions appeared from time to time, most recently in 2012.

2.5. In 2012 ZWSOft put a new CAD programme on the market that it designates as ZWCAD+. ZWSOft stated at the launch of the programme that ZWCAD+ differs fundamentally from ZWCAD and that they built ZWCAD+ “*from the ground up*”. In 2012 the first ZWCAD+ product was commercialized under the name of ZWCAD+ 2012. Recently yet another ZWCAD+ product was commercialized under the name of ZWCAD+ 2014.

2.6. ZWDesign was founded in 2011 and is a 100% subsidiary of ZWSOft. ZWDesign is engaged in the development and distribution of software.

2.7. RTOC is distributor of ZWCAD+ products, among others, for Belgium. RTOC offers

ZWCAD+ products through a Dutch language website that is accessible from the Netherlands.

3. The dispute

3.1. Autodesk claims that ZWSoft et al. and RTOC - summarized - in a judgment provisionally enforceable to the extent possible:

- (I) be enjoined from infringing Autodesk's copyright in Europe, or at least in The Netherlands;
 - (II) be ordered to surrender a copy of the source code for all versions of ZWCAD+ in their possession to DigiJuris B.V., to be appointed independent custodian to retain the copies until further order;
 - (III) be ordered to prepare a schedule of distribution channels, information on infringing items that have been delivered, customers, turnover, and profit;
 - (IV) be ordered to recall the relevant ZWCAD+ products, while simultaneous with the sending of the letters concerned, providing Autodesk's lawyers with a list of the addressees with their complete addresses;
 - (V) ordering the destruction of stocks of infringing items;
- claims I through V subject to an incremental penalty payment

ordering ZWSoft et al. and RTOC to pay costs of proceedings estimated in accordance with article 1019h Dutch Code of Civil Procedure (hereinafter, DCCP) and with the request that the term under Article 1019i DCCP be set at six months.

3.2. Autodesk bases its claims on the following. ZWCAD+ was developed on the basis of the source code for AutoCAD, version 2008 (hereinafter, AutoCAD 2008), which Autodesk holds secret and to which ZWSoft et al. appropriated unlawfully. Respondents are infringing Autodesk's copyright to the source code for AutoCAD 2008 by commercializing ZWCAD+. Autodesk is furthermore entitled under article 39 the Convention concerning Trade Related Aspects of Intellectual Property Rights (TRIPs) jo. article 6:162 Dutch Civil Code (DCC) to prevent its source code for AutoCAD from being disclosed without its consent, acquired by, or used by others in a manner contrary to honest business practices.

3.3. ZWSoft et al. and RTOC have disputed the claims with reasons. The positions taken by the parties will be discussed, to the extent important, in what follows.

4. The assessment

international jurisdiction

4.1. Insofar as the claims are brought against RTOC the case comes under the scope of application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). Autodesk has put forward that RTOC ZWCAD+ distribute products on a Dutch language website that is accessible from The Netherlands and on which ZWCAD+ products could be sold out of The Netherlands. Proceeding from these arguments there is at the least a risk of harm in The Netherlands. That is sufficient to assume international jurisdiction on the ground of article 5 preamble and sub 3 Brussels I Regulation (cf. ECJ 3 October 2013, C-170/12, *Pinckney*). It is not in dispute that this jurisdiction is limited to The Netherlands.

4.2. As for the claims against ZWSoft et al. the jurisdiction of the Dutch courts pursuant to article 4 Brussels I Regulation is regulated by Dutch international private law. Under article 6 preamble and sub e DCCP the Dutch courts are competent to take cognizance of the claims

against ZWSoft et al. insofar as they pertain to The Netherlands. The latter condition is met. Autodesk has adduced that ZWSoft ZWCAD+ makes offers in The Netherlands via the website www.zwsoft.com and that ZWDesign “is responsible for the worldwide promotion and distribution of ZWCAD+, including in particular in The Netherlands”.

source code ZWCAD+ reproduction of source code AutoCAD 2008?

4.3. The injunction and ancillary claims III through V must be dismissed because Autodesk has made it insufficiently plausible that ZWSoft et al. “acquired” the source code for AutoCAD 2008 and used parts of it in the source code for ZWCAD+.

Autodesk has not substantiated with documents that ZWSoft et al. “acquired” the source code for AutoCAD 2008 and also did not explain how ZWSoft et al. could have done so. The source code for AutoCAD 2008 is - of course - not freely available. Autodesk itself emphasized that it does all possible just to keep the source code secret. The only indication put forward by Autodesk for the alleged acquisition is the argument that portions of the source code for ZWCAD+ match portions of the source code for AutoCAD 2008. It deduces from this that ZWSoft et al. *must* have gained access to the source code for AutoCAD 2008.

4.4. Also the argument by Autodesk that portions of the source code for ZWCAD+ match portions of the source code for AutoCAD 2008 was not substantiated by direct evidence. Autodesk has not made a comparison of the source codes of the programmes (because Autodesk does not have the source code for ZWCAD+). Autodesk can therefore base this only on similarity of the functionality of the programmes. That is problematic since - as Autodesk explicitly acknowledged - similar functionalities can be achieved with different source codes. Respondents argue that that is precisely what is going on here. ZWSoft et al. wished to develop a programme that fit with AutoCAD in terms of functionality because AutoCAD is the market standard for CAD programmes. Respondents argue that ZWSoft et al. achieved that by studying how AutoCAD works and then developing a programme themselves with comparable functionalities. It is not open to discussion that if these arguments are correct respondents bear no blame.

4.5. In substantiation of its argument that portions of the source code for ZWCAD+ match portions of the source code for AutoCAD 2008, Autodesk made reference to a number of points of similarity in the functionality and interfaces of ZWCAD+ and AutoCAD 2008 which according to Autodesk constitute concrete indications that portions of the source code for ZWCAD+ are taken from the source code for AutoCAD 2008. In order to grant an injunction in proceedings for interim relief based on copyright infringement (and breach of trade secrets), concrete indications are not sufficient, however, certainly not when these indications have been refuted with reasons, one by one. The correct standard for the establishment of facts in interim relief proceedings is, even where borrowing source codes is concerned, whether the argued facts are provisionally sufficiently plausible to grant the interim relief requested or that further production of proof, for which proceedings for interim relief do not lend themselves, is needed. Any other opinion - other than as Autodesk thinks - does not follow from the judgments it has cited (District Court in The Hague 23 April 2003, BIE 2004/6, p. 40, *Bridge and Amsterdam* District Court 9 May 2012, IEPT20120509, *Moog*). These are judgments rendered in actions on the merits in which the district courts have found that evidence would be provided by an independent expert when there are any concrete indications for borrowing.

4.6. The points of similarity in the functionality of ZWCAD+ and AutoCAD cited by Autodesk are in the case insufficient to deem that the alleged infringement and breach of trade

secrets are provisionally plausible. Autodesk points primarily to a number of errors in the functionality of AutoCAD 2008, which appear also in ZWCAD+. Autodesk argues, making reference to a statement by its employee Oak (Exhibit 23 of Autodesk) and a statement by its expert, Professor Jansen (Exhibit 24 of Autodesk), that these errors are a logical consequence of taking over the source code for AutoCAD 2008 and do not support the respondents' arguments that ZWCAD+ imitates only the functionality of AutoCAD 2008. Respondents brought up against this contention that the same errors also appeared in versions of the old ZWCAD and that the errors resulted from taking over portions of the source code for that programme. In substantiation of this, the respondents introduced a statement by Professor Wang (Exhibit 20 of ZWSOFT et al.) who stated having compared the source codes for ZWCAD and ZWCAD+ and concluded as follows from that comparison:

My conclusion after having reviewed these examples [the examples of errors put forward by Autodesk, the IR Judge] is that ZWCAD + 's source code relating to these examples is inherited from ZWCAD.

If this conclusion of Professor Wang is correct, the errors put forward by Autodesk do not substantiate the alleged use of the source code for AutoCAD 2008. Autodesk challenges Professor Wang's opinion but further investigation would be needed in order to establish which party is right on this point. Proceedings for interim relief do not lend themselves for this.

4.7. The other points of similarity between ZWCAD+ and AutoCAD 2008 put forward by Autodesk also are insufficient to be able to assume provisionally an infringement or breach of trade secrets. An explanation given for each of these points in a report cited by respondents (Exhibit 10 of ZWSOFT et al.) refutes the alleged borrowing. Even though each statement is not equally convincing and the combination of the many points of similarity between ZWCAD+ and AutoCAD 2008 raises questions, in the light of these statements an injunction cannot be granted without further production of evidence, for which proceedings for interim relief do not lend themselves.

4.8. Finally, Autodesk's argument that ZWCAD+ must indeed have been borrowed from AutoCAD since ZWCAD+ was developed in much less time than was AutoCAD, must be dismissed in the court's provisional opinion. Quite apart from it not being clear how long the development of ZWCAD+ did take, there are many explanations conceivable for the relative rapid development of ZWCAD+ other than borrowing portions of the source code for AutoCAD 2008.

copyright on dialogue windows

4.9. Autodesk also argued in the hearing that respondents also infringed Autodesk's copyright because (parts of) dialogue windows were taken over from AutoCAD into ZWCAD+. This argument must be disregarded because these (parts of) dialogue windows are not, in a provisional opinion, to be deemed Autodesk's own intellectual creation and thus not eligible for copyright protection. Autodesk also has not argued, let alone explained sufficiently why the design or content of these windows is original.

surrender of source code

4.10. The order to ZWSOFT et al. to surrender the source code for the versions of ZWCAD+ in its possession to a custodian will however be granted. Autodesk has not explained on which provision of law it bases this claim. Supplementing the legal grounds ex officio, the judge hearing interim relief proceedings assumes that Autodesk meant to base this claim on articles

843a and 1019a DCCP in combination with article 853 DCCP.

4.11. The interest adduced by Autodesk for placing [the source code] in custody, namely to preserve evidentiary material for an action on the merits, is urgent, and, in a provisional opinion, also a legitimate interest within the meaning of articles 843a and 1019a DCCP. The other requirements set by these provisions for the surrender of evidentiary material are, in a provisional opinion, also satisfied, including the required substantiation of the infringement. The conclusion drawn above in the assessment of the injunction concerning the lack of substantiation for the alleged infringement does not stand in the way of this. The threshold for granting an order for the surrender of evidentiary material is lower than is the threshold for granting an injunction against infringement. The evidentiary material whose surrender is claimed must be able to be used to substantiate the alleged infringement in proceedings in which an injunction is claimed. Furthermore, granting the claimed injunction is much more far-reaching for respondents than is granting the claimed order to surrender the source code, certainly since Autodesk does not claim it be surrendered to itself but rather surrendered to a custodian. It is therefore sufficient for the granting of an order to surrender evidentiary material that there are concrete facts and circumstances from which a reasonable suspicion of the infringement can follow (cf. The Hague Court of Appeal, 29 October 2013, ECLI:NL:GHDHA:2013:3941, *Red Networks*). In provisional opinion, the indications adduced by Autodesk that can be substantiated with reasonably available evidentiary material meet that standard. The fact that many functions of AutoCAD 2008 that make no contribution to the operation of the system that is meaningful for the user or that even could be qualified as errors appear in ZWCAD+ offers sufficient ground, in provisional opinion, to grant the claimed measure, whatever the explanations given by respondents for these similarities.

4.12. The defence by ZWSOft et al. that under Chinese regulation it cannot take the source code for its programme outside Chinese territory can be disregarded. In answer to this defence Autodesk proposed in the hearing that the source code be surrendered to a custodian in China. The order will be granted in this form. The objection of ZWSOft et al. is thereby sufficiently overcome.

4.13. In a provisional opinion, articles 843a, 1019a and 853 et seq. DCCP also do not militate against granting an order to surrender evidentiary material that is located in China to a custodian in China (respondents also did not argue this). Articles 843a and 1019a DCCP only require evidentiary material to be surrendered to the control of the counterparty and that is - for ZWSOft et al. - indisputably the case (for RTOC see legal ground 4.18 below). As for the custodian article 854 DCCP provides that “any suitable person” can be appointed custodian. The article does not state that this person must be in The Netherlands and in this case, according to parties, a custodian in China is suitable.

4.14. In answer to the defence, that it is insufficiently clear for which versions ZWSOft et al. must surrender the source code, Autodesk has specified that this is the source code for ZWCAD+ 2012 and ZWCAD+ 2014. The order will be granted in this form.

4.15. Autodesk explained in the hearing that it claims surrender of the source code, including the *build* and *mastering scripts*, *third party binary components* and *libraries*. These components are necessary - as Autodesk put forward without challenge - to be able to verify whether the surrendered source code matches the source code for commercially available versions of ZWCAD+ 2012 and ZWCAD+ 2014. For clarity these components will be mentioned explicitly in the order.

4.16. For the sake of clarity it is noted that given articles 843a paragraph 1 and 857 DCCP the

costs of the custodian to which the copy of the source codes must be given shall be for Autodesk's account.

4.17. The order will not be granted against RTOC. Autodesk has not argued let alone made it provisionally plausible that RTOC had use of the source code for ZWCAD+, while RTOC expressly disputed this.

4.18. Parties have not yet proposed a person who can act as custodian in China. Autodesk and ZWSOFT et al. will therefore get the opportunity to be heard on that matter by each submitting contact details for at least three (legal) persons who:

- i. are independent of all parties to this proceeding;
- ii. are prepared and suitable to take custody for a reasonable fee of the copy of the source codes in accordance with the provisions of articles 853 et seq, DCCP; and
- iii. are prepared to declare on behalf of ZWSOFT et al. that they warrant the protection of the confidentiality of the materials they are to take into their custody with respect to Autodesk and third parties.

After that each side can react to the proposals made by the other side and the judge hearing interim relief proceedings will then decide in a final judgment. In connection with this, all other decisions will be stayed.

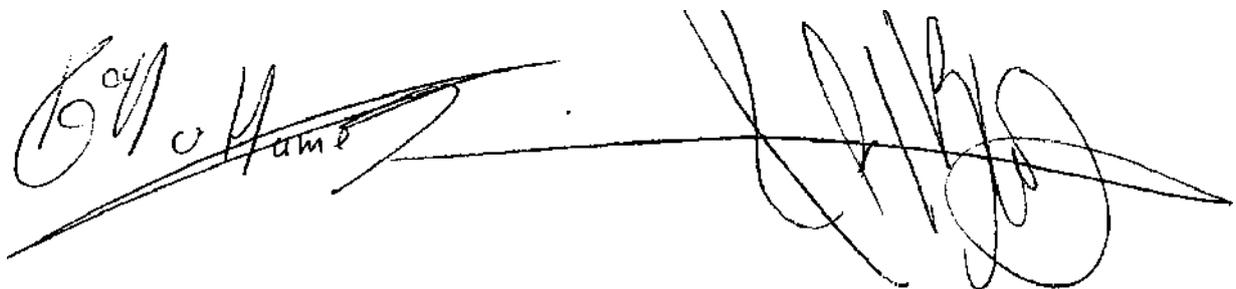
5. The decision

The judge hearing interim relief proceedings

5.1. offers Autodesk and ZWSOFT et al. the opportunity to express themselves by 16 April 2014 by letter to the judge in accordance with the provision of legal ground 4.19 of this judgment, after which they may react to the proposals of the other side no later than 23 April 2014 by letter;

5.2. stays all other decisions.

This judgment was rendered by mr. P.H. Blok and pronounced in open court on 7 April 2014, in the presence of the Clerk of the Court.

The image shows two handwritten signatures in black ink. The signature on the left is more legible, appearing to read 'P.H. Blok'. The signature on the right is highly stylized and illegible. Both signatures are written over a horizontal line.