

judgment

DISTRICT COURT OF AMSTERDAM

Private Law Division, preliminary relief judge, civil matters

case number / cause-list number: C/13/686678 / KG ZA 20-610 MvW / JD

Judgment in preliminary relief proceedings, 22 September 2020

in the case of

the private limited liability company

JELURIDA IP B.V.,

established in Amsterdam,

claimant, by summons of 10 July 2020,

attorney: *mr.* M.R.A. Schonewille, Amsterdam,

versus

the company established and existing under non-Dutch law

APOLLO FINTECH, LTD.,

established in Hong Kong,

defendant,

attorney: *mr.* A.P. Meijboom, Amsterdam.

The parties are referred to hereinafter as: "Jelurida" and "Apollo".

1. The proceedings

Jelurida provided an explanation of the summons during the oral hearing on 25 August 2020. Apollo has put forward a defence, and has provided an explanation of the statement of defence that it has submitted. Both parties have submitted exhibits in the proceedings, and described their respective positions using speaking notes. Following a further debate, today was selected as the date for rendering judgment.

The following persons were present at the oral hearing:

for Jelurida:

- *mr.* Schonewille;

- L. Malovic, English-language interpreter;

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- [name 1 / developer 7], to represent Jelurida, present via a Skype connection;
 - [name 2 / developer 14], similarly to represent Jelurida and also present via a Skype connection;
- for Apollo:
- *mr. Meijboom*;
 - *mr. M.R.S. Bacon*;
- L. Crul, English-language interpreter;
- [name 3], CEO of Apollo, present via a Skype connection.

2. The facts

- 2.1. Jelurida is part of a group bearing the same name, which was founded in 2016 and whose operations involve developing and maintaining the “Nxt Software”. Jelurida holds all this group’s intellectual property rights. Jelurida offers third parties the possibility of implementing the Nxt Software in their own projects, for which purpose it gives permission to use the software under the Jelurida Public License (hereinafter: “JPL”).
- 2.2. Apollo is a company that is established in Hong Kong and whose operations involve offering a variety of financial software services. Since the summer of 2018, Apollo has offered a cryptocurrency via its website (based on blockchain technology), under the name “Apollo Currency”.
- 2.3. One of the products that Jelurida offers is the “Nxt Blockchain”, which can be used for various types of transactions. The Nxt Software, which was first launched in November 2013, is the basis for the Nxt Blockchain. Besides carrying out transactions, users can also create their own “cryptotokens” that run on the Nxt Blockchain. The Nxt Software contains a pre-programmed application that gives users this possibility.
- 2.4. A person with the fictitious name “[user 1 / developer 1]” announced the launch of the Nxt cryptocurrency on the forum on the website bitcointalk.org on 28 September 2013. A page for that project was created on the GitHub platform, where the software was available and where the code could be added and modified (<https://bitbucket.org/JeanLucPicard/nxt-public>). The project’s administrator was a user with the fictitious name “[user 2 / developer 3]”. The first release of the Nxt Software (version 0.4.7e) on GitHub came on 2 January 2014.
- 2.5. On 3 January 2014, a licence was posted on Nxt’s Github page, in the file named “MIT-license.txt”, which includes the following notice:
- " +Copyright (c) 2013-2014 [user 1 / developer 1] and the Nxt core developers.
- +Permission is hereby granted, free of charge, to any person obtaining a copy
- +of this software and associated documentation files (the "Software"), to deal
- +in the Software without restriction, including without limitation the rights
- +to use, copy, modify, merge, publish, distribute, sublicense, and/or sell +copies of the Software, and to permit persons to whom the Software is +furnished to do so, subject to the following conditions:

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+The above copyright notice and this permission notice shall be included in

+all copies or substantial portions of the Software."

2.6. The root folder of Nxt's GitHub also contained a file named DEVELOPER-AGREEMENT.txt, which included the following notice:

" 0. License.

The Nxt software is distributed under the GPL version 2, with the exception of the client UI code currently under /html/ui which is distributed under the MIT license.

(...)

4. Re-licensing

Re-licensing of the Nxt software under a different license requires the agreement of all copyright holders whose work is being re-licensed. To ensure that an unreachable copyright holder cannot prevent the active development team from making licensing decisions, each copyright holder who leaves the development team shall provide an Nxt account [sic] number in the AUTHORS.txt file, at which he can be contacted to discuss such decisions. Lack of such contact info, or lack of any type of response to a re-licensing permission request after more than 28 days, as recorded in the Nxt blockchain, shall be interpreted as an irrevocable permission to the then active development team to perform the specific re-licensing for which such a permission has been sought."

2.7. The "GPL version 2" to which the Developer Agreement refers is a standard open-source licence for software, the *GNU General Public License, version 2* (hereinafter: "GPL"). The text of this licence was also posted on Nxt's GitHub, in the file named COPYING.txt. The GPL includes the following provisions.

" 1. You may copy and distribute verbatim copies of the Program's source code as you receive it (...) provided that you (...) keep intact all the notices that refer to this License (...); and give any other recipients of the Program a copy of this License along with the Program."

2.8. The "AUTHORS.txt" file to which the Developer Agreement refers was posted on Nxt's GitHub and contains a list of 14 developers.

2.9. During the period from 2014 until the end of September 2016, more than 80 new releases of the Nxt Software were published on GitHub.

2.10. On 15 September 2016, two Nxt Tokens were generated, belonging to accounts [account 1] and [account 2], which state (in summary) [user 2 / developer 3]'s rights to the Nxt Software belong to [name 4], and that [user 5 / developer 5]'s rights to the Nxt Software are transferred to [name 6]. On 20 September 2017, a Nxt Token was generated, belonging to account [account 3], which states that [name 7 / pseudonym 10] Berzelius transfers his rights to [name 4].

2.11. Jelurida Holding B.V. was founded on 30 September 2016. In the Contribution Agreement of the same date, [name 4], [name 8 / developer 7], [name 6] and [name 9 / developer 12] agreed to transfer their intellectual property rights to the Nxt Software to Jelurida Holding B.V.

2.12. On 21 June 2017, Jelurida Holding B.V. and Jelurida agreed in the Asset Purchase Agreement for Jelurida Holding to transfer all the intellectual property rights to Jelurida.

2.13. Jelurida makes the Nxt Software and its source code available to third parties, on terms that it

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has laid down in the Jelurida Public License (hereinafter: "JPL"), including:

2.1 You may copy and distribute verbatim copies of the Covered Work's Source Code as you receive it (...) provided that you (...) publish on each copy an appropriate copyright notice (...); keep intact all the notices that refer to this License (...); and give any other recipients of the Covered Work a copy of this License along with the Covered Work.

2.2 You must keep intact all authorship and copyright notices and when conveying or offering to convey copies (verbatim or modified) you must also avoid any misrepresentation of the origin of the Covered Work. (...)

3 You may modify your copy or copies of the Covered Work or any portion of it, thus forming a work based on the Covered Work, and copy and distribute such modifications or work under the terms of Article 2 above, provided that you also meet all of these conditions:

(...)

3.4.1 The token holders from the original distributed ledger instance shall be allocated a portion (an "airdrop") of the tokens in that new DLT Instance proportional to their token balances. This shall also apply to anyone who intends to make a copy of your copy, i.e. any such person needs to allocate the same airdrop of the newly created tokens to the account holders from the original DLT Instance (not to your copy). (...)

5 You may not use, copy, modify, or propagate the Covered Work except as expressly provided under this License. Any attempt otherwise (...) will automatically terminate your rights under this License. (...)

2.14. On 14 June 2018, Apollo posted a cryptocurrency that it had developed - the Apollo Currency - online. On that same day, it reserved 10% of the created Apollo Currency for the "NXT Community". It released the source code for the Apollo Currency to the public via GitHub, at <http://GitHub.com/ApolloFoundation/Apollo>. Apollo also included the full JPL in the LICENSE.txt file, which was published on Apollo's GitHub.

2.15. On 25 October 2019, Apollo deleted the text of the JPL from the LICENSE.txt file. On 3 June 2020, Apollo released version 1.44.2 of the Apollo Software to the public. That version does not make any reference to the JPL. On 12 June 2020, Apollo once more included the text of the JPL in the LICENSE.txt file in the GitHub repository. The terms of the JPL are not included in version 1.44.2 of the Apollo Software. On 20 August 2020, Apollo released version 1.44.3 of the Apollo Software to the public. That version once more includes the JPL.

3. The dispute

3.1. In summary, Jelurida seeks the following relief:

- I that Apollo be ordered to fulfil its obligations under the JPL;
- II that Apollo be ordered to cease and desist from any and all further infringements of Jelurida's copyrights;
- III that Apollo be ordered to submit a statement of:

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- a. the total number of infringing reproductions of the Nxt Software distributed after 25 October 2019;
 - b. the prices for which those distributed reproductions were sold;
 - c. a calculation of Apollo's earnings from distributing those reproductions;
 - d. the names and addresses of all persons and legal entities that are or were involved in distributing those reproductions;
- IV that Apollo be ordered to send a message to all commercial customers of the Nxt Software stating — in short — that the preliminary relief judge has found that Jelurida's rights have been infringed and including a request to remove the purchased software;
- V that Apollo be ordered to display a message to the same effect on the landing page of its website;
- VI that Apollo be ordered to pay cumulative penalties to Jelurida for every instance of non-compliance with the relief described at I to V, and for every day that the non-compliance continues;
- VII that Apollo be ordered to pay the full costs of the proceedings under Section 1019h of the Dutch Code of Civil Procedure, plus the subsequent costs and interest at the statutory rate;
- VIII that the period of time as meant in Section 1019i of the Dutch Code of Civil Procedure be established at six months.

3.2. Jelurida's claims for relief are based - in essence - on the argument that it holds the copyright to the Nxt Software, given that Jelurida and its predecessors in title developed and wrote the Nxt Software from scratch. It released the source code for the Nxt Software to the public in its entirety and permits it to be used (for example copying, distributing and modifying), though only on terms that it has described in the JPL. Apollo released the Apollo Software (which is a modified version, or else a partial copy, of the Nxt Software) to the public during the period from 25 October 2019 to 20 August 2020 without including the terms of the JPL in the software package.

According to Jelurida's assertion, Apollo was therefore acting in breach of the terms of the JPL, which it accepted under Article 6 of the JPL, meaning that it failed to properly fulfil its resulting obligations.

As a result of the breach of the terms of the JPL, Apollo did not have permission to release the Nxt Software that is included in the Apollo Software, to the public during the period from 25 October 2019 to 20 August 2020. Apollo nevertheless did so, and as a result it infringed on Jelurida's copyright to the Nxt Software. Jelurida's urgent interest in the relief that it claims lies in the fact that Apollo is provisionally acting in accordance with the JPL under protest but refuses to sign a cease-and-desist declaration.

3.3. In response, Apollo has put forward the following defence (summarised here).

First, Apollo disagrees that it failed to properly fulfil its obligations under the JPL, by reason that the Apollo Software constitutes a materially different product that is far enough removed from the Nxt Software to qualify as an independent work.

Second, Apollo argues that the JPL was misrepresented to it. At the time, it did not know that the Nxt Software actually was, or should have been, subject to an open source licence. As such, the JPL is voidable, and Jelurida cannot derive any claims for fulfilment from it. Third, Apollo disagrees that

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Jelurida holds the copyright to the Nxt Software, since the Core Developers' copyrights were never transferred to Jelurida in a legally valid manner.

Last, Apollo has put forward the alternative argument that Jelurida can, at most, be a co-owner of the copyright to the Nxt Software. It cannot commercially operate the Nxt Software without the consent of all the copyright owners, and as such Apollo cannot be required to apply the JPL.

3.4. The parties' arguments are addressed below, in so far as they are relevant.

4. The assessment

4.1. The parties are in dispute about the question of what rights Jelurida can exercise in respect of the Nxt Software and whether Apollo is using or did use that software in a lawful manner. The dispute therefore also lies in whether Apollo has an obligation to release the Apollo Software to the public exclusively under the terms of the JPL. In light of Article 6 of the Special Conditions of the JPL, which states that disputes relating to the JPL will be referred to the District Court of Amsterdam, Section 8 of the Dutch Code of Civil Procedure assigns the preliminary relief judge of this Court jurisdiction to hear this dispute. Article 6 of the Special Conditions of the JPL also states that the legal relationship existing (now or formerly) between the parties in connection with the JPL is governed by Dutch law.

4.2. The claimed relief of fulfilment and non-infringement on the copyright and the additional relief sought can only be awarded as preliminary relief if it is sufficiently plausible that the court hearing the merits of the case will follow Jelurida's positions, and if Jelurida cannot be expected to wait for the outcome of the proceedings on the merits of the case.

Copyright to the Nxt Software

4.3. Jelurida has argued, and substantiated, that the developers made creative choices in the creation of the Nxt Software that are visible in the source code, both at the very highest level (for example the programming language and structure) and also at the level of the details (such as the positioning and phrasing of individual comments or lines of code). Apollo has not addressed that argument. Accordingly, in the present proceedings the Nxt Software is presumed to be a work that is protected by copyright.

4.4. Apollo has contested that Jelurida owns the copyright to the Nxt Software, arguing that none of its developers contributed their rights to the company in accordance with the legal requirements. Neither party disputes that the Nxt Software was developed by (at a minimum) the following fourteen core developers, as listed in the AUTHORS.txt file (see 2.8):

- [user 1 / developer 1];
- [developer 2] (pseudonym: [pseudonym 1]);
- [user 2 / developer 3];
- [developer 4] (pseudonym: [pseudonym 2]);
- [name 5 / developer 5] (pseudonym: [pseudonym 3]);
- [developer 6] (pseudonym: [pseudonym 4]);

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- [name 8 / developer 7] (pseudonym: [pseudonym 5]);
 - [developer 8] (pseudonym: [pseudonym 6]);
 - [developer 9] (pseudonym: [pseudonym 7]);
 - [developer 10] (pseudonym: [pseudonym 8]);
 - [developer 11] (pseudonym: [pseudonym 9]);
 - [name 9 / developer 12];
 - [developer 13];
 - [name 2 / developer 14] (pseudonym: [name 7 / pseudonym 10]).

4.5. As evidenced by the copies of the three “Nxt tokens” submitted by Jelurida (see 2.10), core developers [user 2 / developer 3], [name 5 / developer 5] and [name 7 / pseudonym 10] intended them to constitute transfers of their shares in the copyright to the Nxt Software to [name 4] and [name 6] (respectively) in September 2016. [name 2 / developer 14] confirmed at the hearing that he was the person behind the pseudonym [name 7 / pseudonym 10]. In the Shareholders Agreement of 30 September 2016, [name 4] and [name 6], plus core developers [name 8 / developer 7] and [name 9 / developer 12], agreed to transfer their shares in the Nxt Software to Jelurida Holding B.V., which company then transferred its copyright to the Nxt Software to Jelurida IP B.V. by means of the Asset Purchase Agreement of 21 June 2017 (see 2.12). Jelurida has also submitted a screenshot of a Signed Message from core developer [user 1 / developer 1] dated 1 November 2016, in which [user 1 / developer 1] wrote that he transferred all intellectual property rights to his contribution to the Nxt Software to Jelurida IP B.V.

4.6. As matters stand, it is unclear how this series of transfers (or contemplated transfers) of the copyrights to the Nxt Software to (ultimately) Jelurida IP B.V. should be qualified for legal purposes. Apollo has argued, and substantiated, that those transfers do not satisfy the requirement imposed by Section 2(3) of the Dutch Copyright Act (*Auteurswet*) that transfers of intellectual property must be made by deed. The question of whether the Nxt tokens - in which core developers [user 2 / developer 3] and [name 7 / pseudonym 10] are identified by pseudonyms and that state GPG public keys and Nxt account numbers - may be qualified as written documents that evidence the parties' intention and that are signed by the persons contemplating the transfer of the copyrights depends in part on whether the authenticity and identities of the parties described there can be established with a sufficient degree of certainty. This will require an investigation into the facts, which goes beyond the scope of the present preliminary relief proceedings.

It is also unclear to what extent the question of whether or not the requirement of a deed as laid down in the Dutch Copyright Act is relevant, given that it is not apparent at this moment whether the transfers should be assessed by the standards of Dutch law. This will require more information, including about the core developers, than has been presented in these proceedings: Section 47 of the Dutch Copyright Act states that the Act applies only to works that were first “published” in the Netherlands, and to works by Dutch makers or, in some cases, makers whose habitual place of residence is in the Netherlands.

If the contemplated transfers should be assessed according to the standards of non-Dutch law, however, it is safe to assume that a deed will nevertheless be required in many cases. Whether a transfer under a pseudonym, in a Nxt Token bearing a GPG public key and a Nxt account number,

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constitutes a deed, if one is required, will then also need to be assessed according to the non-Dutch law.

4.7. All in all, it is safe to assume that it was at least the intention of core developers [user 2 / developer 3], [name 5 / developer 5], [name 7 / pseudonym 10], [name 8 / developer 7] and [name 9 / developer 12] to transfer their copyrights to the Nxt Software. As no plausible case has been made that those transfers are not legally valid on formal grounds, the present proceedings will continue on the assumption that the transfers are valid. However, this will not be assumed in respect of the supposed transfer of copyrights by [user 1 / developer 1]: unlike the Nxt tokens, the Signed Message contains neither an Nxt number nor a GPG public key. As matters stand, it has not been made sufficiently plausible that the Signed Message offers any point of reference for establishing the authenticity and identity of [user 1 / developer 1] with a sufficient degree of certainty.

4.8. The foregoing does not diminish the fact that no transfer was made to Jelurida by the other core developers ([pseudonym 2], [developer 6], [developer 8], [developer 9], [developer 10], [developer 11] and [developer 13]). Jelurida claims that [developer 9], [developer 10] and [developer 13] did not contribute to the source code for the Nxt Software. For [pseudonym 2], [developer 6], [developer 2], [developer 8] and [developer 11], Jelurida acknowledges that they contributed to the source code for the Nxt Software. This means that it is sufficiently plausible that Jelurida owns at most part of the copyright to the Nxt Software. The parties disagree on what part that is: Jelurida's position is that those core developers contributed less than 8% to the source code as a whole. Apollo contests that percentage, and argues that [pseudonym 8] and [developer 9] also made significant contributions to the source code for the Nxt Software. Jelurida in turn disputes this, arguing that [developer 9] and [pseudonym 8] contributed only to the user interface for the Nxt Software, not to the source code.

4.9. Whichever is true, the conclusion based on the foregoing is that it is sufficiently plausible at this juncture that Jelurida is a co-owner of the copyright to the Nxt Software. Precisely what share it holds in the copyrights to the source code cannot be established in these preliminary relief proceedings: that requires a further investigation into the facts, for which these preliminary relief proceedings are not the appropriate venue.

Commercial operation of the Nxt Software

4.10. Neither party disputes that at a particular moment Jelurida modified the licensing terms under which it releases the Nxt Software from the GPL (which was declared applicable in Article 0 of the Developer Agreement) to the JPL. Apollo has argued that this change is in contravention of Article 1 of the GPL and Article 4 of the Developer Agreement. However, Apollo is not the licensor as defined in the GPL, nor a party to the Developer Agreement, and for that reason cannot rely on those provisions to avoid Jelurida's claims.

4.11. Another argument put forward by Apollo is that not all the co-owners of the copyright to the Nxt Software consent to its commercial operation by Jelurida under the JPL, and that Jelurida is therefore not entitled to commercially operate the Nxt Software and claim performance of the JPL. The Nxt Software is plausibly an indivisible work. Under Section 26 of the Dutch Copyright Act, each and any of the rightholders may exercise the copyrights to an indivisible work. However, under Section 166 of Book 3 of the Dutch Civil Code, commercial operation of an indivisible work is possible only if all the co-owners of the copyright consent.

4.12. Apollo supports its position by submitting a statement from core developers [developer 9] and [developer 2], and a contract that shows that core developer [pseudonym 8] has transferred his copyrights to the Nxt Software to Apollo. Contrary to what Apollo asserts, however, those exhibits do

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not demonstrate that [developer 9], [developer 2] and [pseudonym 8] have not consented to Jelurida's commercial operation of the Nxt Software under the JPL. In so far as Apollo argues that it has become a co-owner of the copyright as a result of the transfer by [pseudonym 8], Jelurida contested that position at the hearing, with substantiating arguments. As such, this cannot be assumed in these preliminary relief proceedings.

4.13. It follows from the findings described above at 4.8 that the possibility cannot be ruled out that core developers [pseudonym 2], [name 5 / developer 5], [developer 6], [developer 8], [developer 11] and [developer 13] are co-owners of the copyright to the source code for the Nxt Software. Apollo may therefore be granted that it is possible that they, as co-owners of the copyright, have not consented to commercial operation of the software under the terms of the JPL, constituting a breach of Section 166 of Book 3 of the Dutch Civil Code. That is not enough, however, to now assume that Jelurida is not entitled to commercially operate the Nxt Software. It was Apollo's responsibility to then further substantiate who among those core developers are in fact enforcing rights to the Nxt Software and that they have in fact not consented to Jelurida's commercial operation of the software. This applies similarly to Apollo's argument that numerous other developers were possibly involved in the creation of the Nxt Software who also hold shares in the copyright to the Nxt Software. These factors lead to the conclusion that it is plausible to assume as matters stand that Jelurida is permitted to commercially operate the Nxt Software under the JPL.

4.14. It follows from the above that Apollo's position that the JPL came about under the influence of a deliberate misrepresentation of the situation, and as such is voidable, is not immediately plausible.

Question of infringement of Jelurida's copyright

4.15. Neither party disputes that Apollo modified the Nxt Software, and added lines of code when it was developing the Apollo Software. Jelurida has submitted a report by Dr A.K. Seewald, dated 19 August 2020, which compares the codebase for the Nxt public blockchain platform with the Apollo Foundation codebase. Seewald's conclusion is that the Apollo Software contains a significant portion of the Nxt Software code, at the levels of files, functions and lines of code: 60% to 73% of the Nxt Software's functions are at least a 50% match to the functions of the Apollo Software. Three quarters of those corresponding functions are identical, and 93% of the lines of code for those corresponding functions can be traced back to the Nxt Software's core developers. Apollo's position, conversely, is that it has added 400,000 lines of its own code, and that it refactored the code, and that as a result the Apollo Software is a manifestly different product that is sufficiently far removed from the Nxt Software to be considered an independent work.

4.16. Partial reproductions and creating modifications fall within the scope of the exclusive rights accruing to authors under Sections 1 and 13 of the Dutch Copyright Act. This is different in so far as the modification should be regarded as a new and original work. The bare assertion that Apollo has added 400,000 lines of code and has refactored the Nxt Software code is not enough to automatically assume that a new and original work has been produced. As matters stand, it is plausible to assume that, by copying a significant portion of the Nxt Software code, Apollo infringed on Jelurida's copyrights to the Nxt Software during the period from 25 October 2019 to 20 August 2020, in so far as it did not have permission to do so under the JPL.

Performance of the JPL

4.17. Neither party disputes that Apollo (initially) agreed to the JPL. Jelurida argues that Apollo did not include the JPL in the software package for the Apollo Software, version 1.44.2, which was made available for downloading on 3 June 2020. Apollo's position is that it did not remove the JPL from the source code, and that it only moved the JPL information to the third-party license folder. It argues

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that it included an additional licence in the software package for the portion of code that it had added itself, but that the JPL always remained in place. However, this does not diminish the fact that Apollo deleted the JPL from the LICENSE.txt file on its GitHub account on 25 October 2019: after that date, that file only named Apollo as the copyright owner. This constitutes a breach of Article 2.2 of the JPL. Apollo has furthermore not contested that it did not include the JPL in a copyright notice in the software package that it released (version 1.44.2), which constitutes a breach of Article 2.1 of the JPL. Under Article 5 of the JPL, the breaches of the JPL caused the permission to modify and distribute the Nxt Software to be cancelled. As a consequence, as per the findings described at 4.16, it may now plausibly be assumed that Apollo infringed on Jelurida's copyrights.

4.18. Apollo has since reposted the JPL on its GitHub page, and made arrangements to ensure that users of Apollo's website must actively accept the terms of the JPL to access the Apollo Software (now version 1.44.3) there. Given that Apollo has implemented these measures under protest, pending the present proceedings, and refuses to give any undertaking that it will continue to apply the JPL in the future, Apollo will be ordered to fulfil the terms of the JPL. Jelurida has an urgent interest in this as Apollo's failure to apply the JPL means that any third parties who use the source code for the Apollo Software will not be agreeing to the JPL. This situation has the potential of causing loss or damage for Jelurida, for example in light of the airdrop obligation contained in Article 3.4.1 of the JPL. The order will carry cumulative penalties, in accordance with the relief sought, as an incentive to comply.

4.19. Jelurida seeks a "cross-border injunction on infringement" for the whole of the European Union. Under the Brussels I Regulation (recast) (Regulation (EU) No 1215/2012), the Dutch courts may pronounce judgment on infringements of copyrights in other EU countries. The question that must be addressed then is what legal regime applies. Article 8(1) of Rome II (Regulation(EC) No 864/2007) states that the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right is the law of the country for which protection has been requested (*lex protectionis*). Before an injunction can be given against infringing in other countries, therefore, it must be established whether the acts constitute an infringement under the national legal regimes that apply, whether the defendant is also liable under those laws, and whether an injunction is in fact a form of relief for which the foreign law in question provides. With regard to these questions, Jelurida has argued only that European copyright law is becoming increasingly harmonised. While that might be the case, the European copyright law *acquis* is not harmonised to such a degree that it may be assumed, as matters stand, that infringement, liability and a similar form of relief can be said to exist in every country of the EU. As such, the relief that Jelurida claims will be limited to Dutch territory.

Other claims for relief

4.20. It follows from the order that Apollo must fulfil the terms of the JPL that Apollo may not commit any further infringement of Jelurida's copyrights to the Nxt Software. The preliminary relief claimed in that connection will therefore be refused, given the absence of any interest in such relief.

4.21. Jelurida has an interest in the information that it seeks to establish the extent of the loss or damage that it has suffered, and to understand the further distribution of the Apollo Software. As such, Apollo will be ordered to share the information sought at a to d in the description of the relief claimed, under III, for the period from 25 October 2019 to 20 August 2020. As this is a manageable period, with a limited number of customers, the relief claimed here and the relief described below to notify the customers can be qualified as ancillary claims that follow the main claim for relief in terms of the urgent interest. Jelurida cannot, within reason, be expected to bring separate proceedings to litigate the merits of these claims. As an incentive to comply, Apollo will be ordered to pay Jelurida

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cumulative penalties of €1,000.00 for every day (including part of a day) that Apollo fails to comply with this order.

4.22. Since the commercial customers of version 1.44.2 of the Apollo Software did not agree to the JPL when they accessed the software through Apollo's website, Jelurida has an interest in Apollo writing to its commercial customers to ask them to reinstall the Apollo Software. For that new installation, those commercial customers will have to actively agree to the JPL (see 4.18). As an incentive to comply, Apollo will be ordered to pay Jelurida cumulative penalties of €1,000.00 for every day (including part of a day) that Apollo fails to comply with this order.

4.23. The relief claimed for displaying a notice on the <http://apollocurrency.com> landing page goes too far as an order to that effect would constitute publication of the notice to a worldwide public. Presumably, only a small part of that public will need to be informed through Apollo, as Apollo will need to disclose its customers to Jelurida, and send the letter described above. This relief will therefore be refused.

4.24. The cumulative penalties will be capped at a total maximum (together) of €2,500,000.00

4.25. As the unsuccessful party, Apollo will be ordered to pay the full costs of the proceedings, under Section 1019h of the Dutch Code of Civil Procedure. However, the amount of €46,681.15 that Jelurida seeks does not seem entirely reasonable and proportionate. The attorney's fees are higher than the indicative rate (for the present proceedings: €25,000.00), without any specific reason given. These costs are 90% related to the infringement of intellectual property rights. As such, these costs will be awarded at a rate of 90% of €25,000.00. In additionally, the disbursements, including the costs of Dr Seewald's expert report, will be awarded in full. The disbursements (bailiff, translation, courier, interpreter) are costs that Jelurida was forced to incur for the entire proceedings, and it is fair that they should be reimbursed in their entirety. The expert's costs are 100% related to the infringement of intellectual property rights. The other costs will be awarded at the court-approved rates. The costs incurred by Jelurida as estimated at:

- court fees:	€	656.00	
- attorney's fees:	€	22,500.00	(90% of €25,000.00)
- disbursements:	€	15,477.73	
- Total IP costs:	€	<u>38,633.73</u>	
- attorney's fees:	€	147.00	(10% at the court-approved rate)
- Total	€	<u>38,780.73</u>	

plus subsequent costs and interest at the statutory rate.

4.26. The subsequent costs will be awarded in the manner described in the decision.

5. The decision

The preliminary relief judge

5.1. orders Apollo to fulfil its obligations under the JPL in respect of Jelurida, immediately after this judgment has been served, in full and unconditionally, within the territory of the Netherlands,

5.2. orders Apollo to provide Jelurida's attorneys, within 14 days after this judgment has been served, with a written, complete and accurate list, substantiated by copies of underlying

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documentation, of:

- a. the total number of reproductions and/or public releases of the Nxt Software distributed by Apollo, either as part of the Apollo Software or otherwise, during the period from 25 October 2019 up to and including 20 August 2020;
- b. the selling prices of the distributed reproductions and/or the number of public releases of the Nxt Software, either as part of the Apollo Software or otherwise, broken down by customer, not including consumers, during the period from 25 October 2019 up to and including 20 August 2020;
- c. an itemised calculation of the total earnings that Apollo enjoyed from distributing the reproductions and/or public releases of the Nxt Software, either as part of the Apollo Software or otherwise, during the period from 25 October 2019 up to and including 20 August 2020;
- d. the names and addresses of all persons and legal entities that are or were involved, in the capacity of their profession or business, in distributing the reproductions and/or public releases of the Nxt Software, either as part of the Apollo Software or otherwise (including a list of the numbers of reproductions per person or legal entity), during the period from 25 October 2019 up to and including 20 August 2020,

where all references to reproductions and public releases refer to reproductions and public releases shared with customers within the territory of the Netherlands,

5.3. orders Apollo to send a notice, within seven days after this judgment has been served, to each and every commercial customer that acquired access to the Nxt Software via Apollo's website or GitHub page within the territory of the Netherlands during the period from 25 October 2019 up to and including 20 August 2020, with a copy to Jelurida's attorney, that contains the following information, and only the following information, with no covering letter:

"Re: Request to delete Apollo Software

Dear madam, sir,

Recently, you have downloaded or obtained a copy of our Apollo Software as part of our Apollo Currency. On 22 september 2020, the interim relief judge of the court of Amsterdam, the Netherlands, held that the software used for the Apollo Currency likely infringes the copyrights of Jelurida IP B.V. 's vested in its Nxt blockchain software.

We therefore request you to permanently delete and remove any copies or versions you may have obtained of the Apollo Software (version 1.44.2) in the period between 25 October 2019 until 20 August 2020.

We note that the further distribution, copying, or use of the Apollo Software (version 1.44.2) you have obtained from us in the period between 25 October 2019 until 20 August 2020 likely constitutes an unlawful act towards Jelurida IP B.V., and infringes its copyrights.

Sincerely,

The Board

Apollo Fintech Ltd",

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- 5.4. orders Apollo to pay Jelurida cumulative penalties of €25,000.00 for every day (including part of a day) that it fails to comply with the order given at 5.1,
- 5.5. orders Apollo to pay Jelurida cumulative penalties of €1,000.00 for every day (including part of a day) that it fails to comply with the orders given at 5.2 and 5.3,
- 5.6. establishes that the cumulative penalties described at 5.4 and 5.5 will be capped at a maximum total (together) of €2,500,000.00,
- 5.7. orders Apollo to pay the costs of the proceedings, assessed by Jelurida until this judgment at €38,780.73,
- 5.8. orders Apollo to pay the costs that arise after this judgment, which are assessed at €157.00 in attorney's fees, plus €82.00 and the costs of the writ of service if this judgment is served, plus interest at the statutory rate on those amounts, calculated from fourteen days after this judgment is served until payment has been made in full,
- 5.9. establishes the period as meant in Section 1019i of the Dutch Code of Civil Procedure at six months after the date of this judgment,
- 5.10. declares this judgment, up to this point, immediately enforceable notwithstanding appeal,
- 5.11. dismisses all other and further claims.

This judgment was given by *mr. M. van Walraven*, judge in preliminary relief proceedings, assisted by *mr. J. Dekker*, court registrar, and pronounced in open court on 22 September 2020.

[Illegible signature]

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typed by: JD

certified copy: MV

ISSUED AS A FIRST ENFORCEABLE AUTHENTICATED COPY
The registrar of the District Court of Amsterdam
[Illegible signature]