[NL] Refusal of Dutch Broadcasting Organisation to License its Broadcasting Schedules is an Abuse of a Dominant Position

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On 6 June 2003 the Dutch Broadcasting Organisation (NOS) lost an appeal before the Supreme Court in its case against the daily newspaper Telegraaf. NOS tried for years to prevent the Telegraaf from using and publishing NOS 's broadcasting schedules in a weekly magazine, claiming this infringed its intellectual property rights.

Although the Supreme Court accepts that the broadcasting schedules are protected by the Dutch pseudo-copyright for non-original works, the Court states that the competition law aspects of the case will be decisive (see also IRIS 1998-4: 12) and that these set aside the intellectual property aspects. Referring to the Magill (see IRIS 1995-5: 5) and Bronner cases of the European Court of Justice, the Supreme Court declares that the broadcasting schedules must be considered to be an essential facility and therefore NOS 's refusal to grant or license the schedules constitutes an abuse of a dominant position under the Dutch Competition Act. NOS complained in its appeal that the Court of Appeal wrongly concluded that no objective justification had been established for NOS' s refusal. The Supreme Court declares, referring to Magill and Bronner, that the Court of Appeal was right in looking for an objective justification, considering that the Court of Appeal had already stated that NOS' s approach excluded any competition. The Court of Appeal could not find sufficient grounds for the refusal in NOS 's propositions and, according to the Supreme Court, concluded therefore correctly that no justification was established. NOS also complained that the Court of Appeal had not followed an appropriate reasoning in determining whether an exceptional circumstance, found in Magill and Bronner, was established. NOS claimed that for this purpose the Court of Appeal should have concluded that there was a lack of a real or potential substitute for the product of the Telegraaf. The Supreme Court declares that the Court of Appeal did determine that there was a demand for the product of the Telegraaf "on the side of consumers" and that this continuous and regular demand implies a lack of a substitute (in the Magill case, the European Court of Justice, in addition to requiring a lack of a substitute, also required that the product be new. This is however not mentioned by either the NOS or the Supreme Court and thus the judgment does not entirely follow the reasoning of the Magill case).

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The Supreme Court decides that the Court of Appeal rightly included in its judgment, as cumulative conditions, the real need for the product, the exclusion or distortion of competition as well as the lack of an objective justification. The appeal fails; the Court of Appeal's decision is upheld. NOS abuses its dominant position.

Hoge Raad der Nederlanden, Arrest in de zaak van NOS v. Telegraaf , 06.06.2003, LJN-no. AF5100

http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=47996

Judgment of the Dutch Supreme Court of 6 June 2003, NOS v. Telegraaf , LJN-no. AF5100

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