[NL] Judicial Ban on Broadcast and Broadening of Definition of "Portrait"

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On 2 May 2003, the Hoge Raad der Nederlanden (Dutch Supreme Court HR) adopted a decision in the so-called Breekijzer case (see IRIS 2000-2: 7), in which it upheld a court decision to impose a ban on a broadcast and broadened the definition of "portrait" under the Auteurswet (Dutch Copyright Act Aw). Breekijzer is a television programme that claims to help individual consumers in their disputes with companies or governments by using a "hold-up" method, in which the presenter visits companies, and films and interviews people representing the company without their prior consent. In this case, an insurance company, Inter Partner Assistance (IPA), had requested the Rechtbank Amsterdam (Court of Amsterdam Rb) to impose a ban on an intended broadcast of the programme and the Court had granted this. Breekijzer appealed this decision, stating that a judicial ban on a broadcast is contrary to Article 10 of the European Convention on Human Rights (ECHR) and Article 7 Grondwet (Dutch Constitution Gw), which protects freedom of expression and prohibits censorship. The Gerechtshof Amsterdam (Amsterdam Court of Appeal Hof) rejected Breekijzer's appeal and confirmed the Court of Amsterdam's decision. The case was then brought before the Supreme Court, which has now come to the conclusion that there was no violation of Article 10 ECHR since the restriction was prescribed by law, namely Article 3:296 Burgerlijk Wetboek (Dutch Civil Code), which deals with the imposition by courts of obligations to act or to refrain from acting. The Supreme Court also held that these restrictions were necessary in a democratic society for the protection of the reputation of IPA, since the behaviour in Breekijzer was considered illegitimate and damaged IPA 's reputation.

With regard to Article 7 of the Constitution, the Supreme Court found that a judicial ban on a broadcast is not incompatible with this provision, even though the article itself does not specify any possibility for restrictions. According to the Supreme Court, Article 7 of the Constitution allows a judge to prohibit illegitimate behaviour and expression, for the purposes of effective legal protection.

The broadcast ban was partly based on a supposed infringement of the portrait right of the director of IPA. Breekijzer's claim that a portrait right cannot be used to prohibit television broadcasting was dismissed by the Supreme Court, since the text of the law gives no support to this claim. Breekijzer also claimed that, since they had made the face of the director partly unrecognisable, there was no infringement of the portrait right because there was no "portrait", in the sense of

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Article 21 of the Dutch Copyright Act. The Supreme Court dismissed this claim because the remaining picture could still be a portrait, in particular if it could reveal the identity of the director. By this decision the Supreme Court thus gives a broader definition of a portrait, which was previously limited to the face of a person. If the identity of a person is recognisable from the remaining picture, this picture can still constitute a portrait.

Hoge Raad der Nederlanden 's-Gravenhage, LJN-nummer: AF3416 Zaaknr: C01/240HR, Datum uitspraak: 2-05-2003, Datum publicatie: 2-05-2003

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Dutch Supreme Court, Judgment of 2 May 2003, Case C01/240 HR

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