[NL] Judgment on the Sideline Activities of Public Service Broadcasters

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On 10 February 2005 the Dutch Court of Appeal reversed a judgment taken by the Court of Amsterdam in interlocutory proceedings.

In December 2003 the Nederlandse Omroep Stichting (Dutch Broadcasting Foundation, NOS) - an umbrella organisation coordinating national public broadcasting - and the Nederlandse Programma Stichting (Programme Service Foundation of the Netherlands , NPS) - an organisation which complements the programming of national public broadcasters - jointly acquired a former commercial radio station called “Colorful Radio”. Following the acquisition, the Vereniging voor Commerciële Radio (Association for Commercial Radio, VCR) started interlocutory proceedings. They considered Colorful Radio to be a sideline activity of NOS and NPS in violation of section 57a, subsection 1, sub a and b of the Mediawet (Dutch Media Act), which led to unfair competition. According to VCR, Colorful Radio would compete with commercial radio stations and would also attract the same advertisers.

Section 13c of the Dutch Media Act states that the main task of public broadcasting is to provide a varied and high-quality range of programme services for general broadcasting purposes in the fields of information, culture, education and entertainment on open networks. According to section 57a of the Dutch Media Act, public service establishments that have been granted broadcasting time are allowed to perform sideline activities when this does not have a detrimental effect on the performance of their main task. Also, the sideline activities have to be connected with or have to support the main task. Finally, the sideline activity may not lead to unfair competition in relation to other parties offering the same or comparable products or services.

The Commissariaat voor de Media (Dutch Media Authority, CvdM) supported VCR 's view. It stated that Colorful radio was an ordinary music station, which did not meet the conditions in section 57a. The Court of Amsterdam accepted this point of view and VCR succeeded in its action. The Court of Amsterdam judged that the running of Colorful Radio by NPS and NOS was indeed a violation of the Dutch Media Act and that they had to cease broadcasting and exploitation of the radio station within four weeks.

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NOS and NPS appealed against this judgment. They stated that Colorful Radio was a thematic radio station focussed on a minority, namely multicultural youth. Therefore the radio station supported the performance of their main task and was a legitimate sideline activity.

The Court of Appeal judged that Colorful radio is not necessarily an ordinary music radio station, but may be qualified as a broadcasting station focussed on minorities. The fact that the programming of a radio station consists entirely of music does not mean that this cannot also serve cultural and social purposes. A music station can focus on certain groups of people and this can serve a useful goal, for example when such a group is not easy to reach. Stopping the exploitation of a radio station is a drastic measure that can easily have irreversible consequences, all the more so as the radio station in question targeted a group that is particularly difficult to reach. On the other hand, the Court weighs VCR 's interest, which it considers not to be very significant, because Colorful Radio's audience is quite small. In addition, the Court considers that it is likely that a proceeding on the merits of the case will be concluded before Colorful Radio's audience will have increased substantially, so that a full judgment in such a procedure can be awaited. Also, the Court takes into account that NOS has had very little time to realise its targets regarding Colorful Radio. Though the key question whether Colorful Radio can be qualified as a radio station for minorities remains unanswered in this case, the balance of interests results in the rejection of VCR 's claim.

Rechtbank Amsterdam 14.10.2004, LJN AR4653

http://www.rechtspraak.nl/

Court of Amsterdam), Summary judgment of 14 October 2004, LJN AR4653

http://www.rechtspraak.nl/

Gerechtshof Amsterdam 10.02.2005, LJN AS5931

http://www.rechtspraak.nl/

Amsterdam Court of Appeal, Summary judgment of 10 February 2005, LJN AS5931

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