[NL] Dutch Court Says that Facilitating Downloading Qualifies as Making Available

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The Hague District Court issued a judgment in preliminary proceedings on 2 June 2010 in the case of FTD BV v Eyeworks Film & TV Drama BV. The case concerned the role played by the defendant FTD in the downloading of copyright material from Usenet. FTD provides a service through which users can easily find and download Usenet files. To that end, FTD provides access to a computer application (the FTD application) with which users can share information about files, including copyright-protected works, stored in Usenet servers. The main question examined by the judge involved the extent to which this behaviour constitutes a form of making available to the public.

By means of the FTD application users post so-called spots, i.e. data regarding files which they consider to be interesting. The FTD application allows users to search for spots, which are organised in different categories, such as “DVD”, “HD”, “Playstation” or “Xbox”. Moreover, moderators appointed by FTD actively, whether on their own initiative or otherwise, check files for quality and, if necessary, remove files from the system. The file name as listed in the spot can be used to find and download the desired file by means of a Usenet search engine.

Eyeworks is the producer and copyright owner of the film “Komt een vrouw bij de dokter” (loosely translated, “A Woman Goes to the Doctor”). Almost immediately after the film became available for sale and rent, several spots for the film were posted on the FTD application.

FTD argued before the court that it is not engaged in acts of making available, as the files containing copyright-protected material are not at any point within its control. The servers in which the files are stored are not controlled by FTD nor does FTD have any influence on actual downloading by users.

The judge however ruled that whether the copyrighted files are actually within the control of FTD or not is not a relevant factor. Instead what is important is the fact that the behaviour of FTD allows users to download (in an easier manner) copyrighted files and that files are thus in fact made available to the public.

In his assessment, the judge also found relevant the fact that it appears likely that FTD is actively and substantially involved in the creation of the spots; the

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moderators appointed by FTD check, whether by their own initiative or otherwise, the quality of the spots posted, users are encouraged to post files which FTD ought to presume to be copyright-protected and FTD has been shown to be able to meet with a considerable level of accuracy a cease and desist order involving the infringement of specific copyrights, by removing spots which refer to a specific work. On this basis the conclusion must be drawn that FTD performs a key role in making files available to the public. The fact that the public can also gain access to the copyrighted files by other means does not make the act of making available by FTD less unlawful nor is this conclusion affected by the fact that FTD itself does not control copyrighted material. The judge found that, by reason of its behaviour, FTD has made the copyright work “Komt een vrouw bij de dokter” available to the public without the consent of Eyeworks.

It is worth noting that in his decision the judge referred to the court rulings in Brein v Mininova (Utrecht District Court, 26 August 2009 - see IRIS 2009-9: 15/23) and Twentieth Century Fox Film et al. v Newzbin (UK High Court, 29 March 2010 - see IRIS 2010-6: 1/32).

Rb.’s-Gravenhage, 2 juni 2010, FTD BV v Eyeworks Film & TV Drama BV, LJN BM6729, 366481 / KG ZA 10-639

http://www.rechtspraak.nl/ljn.asp?ljn=BM6729

District Court of The Hague, 2 June 2010, FTD BV v Eyeworks Film & TV Drama BV, LJN BM6729, 366481 / KG ZA 10-639

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