[NL] Court of Appeals Declares Downloading from Illegal Sources Legal for Private Use No.1

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On 15 November 2010 the Court of Appeals of the district of The Hague (Court of Appeals) issued judgments in two separate cases regarding the private use exception under Dutch Copyright law (see also IRIS 2011-1/42). In FTD BV v. Eyeworks Film & TV Drama BV, the Court of Appeals ruled on the appeal by FTD BV against a judgment in preliminary proceedings (see IRIS 2010-7/30).

The Court of Appeals ruled that FTD did not infringe the copyright of Eyeworks because their platform does not make copyrighted material available to the public. The FTD application did not contain any signal that referred to the films of Eyeworks; it merely contained indirect indications as to where the film could be found on Usenet. The film could therefore not be downloaded by merely using the FTD application. Additional steps and applications were needed to achieve that result. This argument was strengthened by the fact that the original application as provided by FTD (without any modifications by third parties) does not provide any NZB-files, which would make the process much easier for the end-user.

The Court of Appeals then ruled as to whether downloading from an illegal source is allowed under the private use exception of Article 16c of the Dutch Copyright Act (DCA). The Court of Appeals answered this question in the affirmative. It stated that article 16c DCA is either in compliance with the three-step test of Article 5 section 5 of the Copyright Directive or it is not. If it is not, according to the Court of Appeals, it is so contrary to the Copyright Directive that an interpretation in compliance with the Directive is not possible because it would be contra legem. In either case therefore the explanation of the Court of Appeals should prevail.

Despite the above-mentioned outcome, the Court of Appeals did find that FTD committed a tort. Deliberately, structurally and/or systematically providing an application that stimulates illegal uploading constitutes a tortious act, especially since FTD is gaining profit by advertisements featured in the application, while the copyright of Eyeworks is being breached. The Court of Appeals reversed the judgment in the preliminary proceedings and annulled the ex-parte injunction.

Gerechtshof 's-Gravenhage, 15 november 2010, FTD BV v. Eyeworks Film & TV Drama BV, LJN BO3980, 200.069.970/01, 0-639

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http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BO3980&u_ljn=BO3980

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