[NL] Court of Appeals Declares Downloading from Illegal Sources Legal for Private Use No.2

IRIS 2011-1:1/42

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In ACI c.s. v. Stichting de Thuiskopie & SONT, the second judgment issued by the Court of Appeals of The Hague district (Court of Appeals) regarding the private use exception under Dutch Copyright law, on 15 November 2010 (see IRIS 2011-1/41), the Court ruled on the appeal by ACI c.s. on the judgment of the District Court of The Hague. This is another judgment in a series of cases involving the *Stichting de Thuiskopie* (Foundation for the Private Copy) (e.g., see IRIS 2005-9/30).

The action was brought by ACI c.s. and questions the preconditions and criteria that are applicable in calculating the amount of private copying levies. These levies are collected by the *Stichting de Thuiskopie* and are set by the *Stichting Onderhandelingen Thuiskopievergoeding* (Foundation for the Negotiations of Private Copy Levies).

The Court of Appeals - contrary to ACI c.s. - did not find it necessary to refer questions for a preliminary ruling to the Court of Justice of the European Union due to acte clair. The Court of Appeals first clarified what losses are applicable for fair compensation. Rightsholders are only eligible for a fair compensation in the case of loss of income by private copies under Article 16c of the Dutch Copyright Act. This includes loss of licence fees and is the only criterion for a fair compensation.

The argument of ACI c.s. to not take into account copies for time-shifting purposes (e.g., recording a TV show for later viewing) and porting (copying for use with multiple personal devices) due the minimal effect on losses, was not followed by the court. The claim of ACI c.s. that the existence of DRM technologies should be taken into account for the calculation of the private copying levies is already being done according to the Court of Appeals and SONT.

Reiterating that uploading is illegal, the Court of Appeals held - similarly to the FTD v. Eyeworks case - that downloading from an illegal source for private use is not forbidden. It furthermore ruled that this fact should be taken into account for the calculation of the amount of private copy levies as well.

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Gerechtshof 's-Gravenhage, 15 november 2010, ACI c.s. v. Stichting De Thuiskopie & SONT, LJN BO3982, 200.018.226/01, 05-2233

Court of Appeals of The Hague, 15 November 2010, ACI c.s. v. Stichting De Thuiskopie & SONT, LJN BO3982, 200.018.226/01, 05-2233

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