[NL] Criminal Case against Suspected File-Sharers Declared Inadmissible

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On 22 December 2010, the Court of Appeal of The Hague dismissed a case brought by the public prosecutor against seven suspects charged with intentional copyright infringement.

The case regards two websites on which users exchange material that is protected by copyright. A file composed by the Dutch anti-piracy organisation Stichting BREIN (Bescherming Rechten Entertainment Industrie Nederland - Netherlands Entertainment Industry Rights Protection) served as the motive and the basis for prosecution. In total Stichting BREIN handed three files to the prosecution, the Team Opsporing Piraterij (Team Investigations on Piracy) of the FIOD (the Fiscal Information and Investigation Service, the Dutch anti-fraud agency). In the police report, parts of these files were cited. The seven suspects were charged with the crime of intentional copyright infringement.

On appeal, the defendant stated that the public prosecutor's case should be declared inadmissible as a criminal prosecution was initiated when civil law enforcement was indicated.

The Court of Appeal, assessing this defence, called upon the Aanwijzing Intellectuele Eigendomsfraude (Recommendation on Intellectual Property Fraud) of the College van Procureurs-Generaal (the board of the Dutch Public Prosecution Service). This Recommendation contains criteria for deciding whether a case requires civil or criminal action. Firstly, it states that the starting point in cases of intellectual property right infringement is that action by the rightsholder should initiate a case. However, when the general interest is at stake, such as for example when the public health or the safety of society in general are endangered, criminal action may be necessary; civil law is not the only option for enforcement in such cases. Criminal action is also required in the case of large scale infringements on the professional or commercial level that disturb the market and in cases where organised crime is involved.

The Court heard the public prosecutor as a witness at the court session of 24 December 2010. The witness declared that the infringement of copyright on a large scale was the most important criterion in deciding whether the suspect acted on the professional or commercial level. It also stated that prosecution

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would only take place when this criterion had been met.

Taking the above into account, the Court first pointed out that large scale infringements that harm the general interest are not the only criterion for criminal action. However, neither the file nor the court session provided the Court with evidence that there was a reasonable presumption of guilt as concerns the suspect infringing copyrights on a large scale or acting otherwise in ways mentioned in the Recommendation.

Whereas the witness declared that it was customary for the FIOD to perform further investigation before starting the prosecution, after receiving the files that were composed by Stichting BREIN, the Court observed that it is not apparent from the file that such an investigation had actually taken place. Therefore, the Court noted that only the files provided by Stichting BREIN formed the basis upon which the public prosecutor had decided to proceed with prosecution. The statements of the witness and the position of the Advocate General before the Court of Appeal provided no further information on this point. Also, the Court stated that indications that the suspect acted on a professional or commercial level follow neither from the file nor from the court session in first instance.

On the basis of the above, the Court concluded that by deciding to prosecute, the public prosecutor had infringed the principle of behoorlijke procesorde (due process). Therefore, the Court of Appeal declared the case inadmissible.

Arrest Gerechtshof 's-Gravenhage (hoger beroep), LJN: BO8239, 22-004284-07

http://www.rechtspraak.nl/ljn.asp?ljn=BO8239

Judgement of the Court of Appeal of The Hague (appeal), 22 December 2010, LJN: BO8239, 22-004284-07

Uitspraak vonnis Rechtbank Rotterdam (eerste aanleg), LJN: BB0268, 10/993183-05

http://www.rechtspraak.nl/ljn.asp?ljn=BB0268

Decision of the Rotterdam District Court (first instance), 24 July 2007, LJN: BB0268, 10/993183-05

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