[NL] Dutch State liable for statements made by former State Secretary about downloading from illegal sources

IRIS 2019-1:1/29

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On 5 September 2018, the District Court of The Hague delivered its judgment in a class action lawsuit filed by several film producers against the Dutch State. The Court ruled that the Dutch State was liable for statements made by a former State Secretary for Security and Justice about the permissibility of reproducing material from illegal sources.

The statements concerned the question of whether, under the implementation in Dutch law of the Directive 2001/29/EC (Copyright Directive), reproductions from illegal sources fell within the scope of the private copying exemption. In short, this exemption provides an exception to the exclusive right for authors to authorise or prohibit reproduction of their works for reproductions made by a natural person for private use. From its implementation in Dutch law in 2004, it had been assumed that the scope of the exemption encompassed reproductions made from both legal and illegal sources. This position was thus also recorded in the explanatory memorandum to the Dutch Copyright Law. On several occasions during his term of office, the State Secretary had propagated this position accordingly, both in the parliamentary debate and in the public debate and media.

In 2014, however, the scope of the exemption was significantly narrowed with the judgment by the Court of Justice of the European Union (CJEU) in the ACI Adam/Stichting de Thuiskopie case (IRIS 2014-6:1/4). There, the CJEU ruled that the private copying exception cannot cover reproductions made from unlawful sources.

In light of this development, the film producers argued in court that some of the statements made in 2011 and 2012 by the State Secretary had been unlawful because these entailed an incorrect interpretation of the private copying exemption and raised the suggestion that downloading from illegal sources was permitted in the Netherlands. In doing so, the State Secretary had helped establish a climate in which downloading from illegal sources was justified and had come to be considered as an acquired right. In the film producers' opinion, this was unlawful, and prejudicial to them.

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The Dutch State, besides raising prescription and objections to admissibility as a defence, argued that the State Secretary could rely on parliamentary immunity. It argued that this constitutionally-granted immunity also stretched to statements made in the public debate and the media, as the substance of those statements corresponded to the ones the State Secretary had made in parliament.

In its judgment, the Court partly went along with the argument made by the Dutch State. The State Secretary's immunity, however, did not stretch to statements made in the public domain and in the media, even though the substance of those statements corresponded to statements made during the parliamentary debate. The Court ruled that the unlawfulness of the statements lay in the fact that they were presented as policy standards and thereby could have led to infringements of the rights of the film producers. It therefore held that the Dutch State was liable for these statements.

The Court did not assess the amount of damages suffered by the film producers. The causal relationship between the statements and the amount of damages will have to be determined at a later stage.

Rechtbank Den Haag 5 September 2018, ECLI:NL:RBDHA:2018:10645

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2018:10645

District Court of The Hague, 5 September 2018, ECLI:NL:RBDHA:2018:10645

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