[NL] Appeal Court refuses to order removal of article from online media archive

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On 3 March 2020, the Gerechtshof Amsterdam (Amsterdam Court of Appeal) delivered a notable judgment on online news media archives, and whether media should be required to remove certain old articles which continue to appear in Google Search results from their online archives.

The case centred on an article published in 1999 by the Dutch media outlet *de Volkskrant*, which reported on the claimant's involvement with a "pyramid-scheme" company that had gone bankrupt. In 2011, the claimant sent a request to the media outlet to remove the article from its online archive, which is freely accessible on its website, and requested that Google remove the article from its cache. The claimant claimed that when his name is entered in a search query on Google's search engine, the article appears in the search results. Following the media outlet's refusal to remove the article from its archive, the claimant initiated legal proceedings. However, on 8 August 2018, the Rechtbank Amsterdam (Amsterdam District Court) rejected the application. Now, in its judgment of 3 March 2020, the Amsterdam Court of Appeal has upheld the earlier judgment, also holding that the application should be rejected.

The claimant had argued that publication was unlawful because the article contained factual inaccuracies; he had not been given the opportunity at that time to comment on the content of the article; and due to the Internet and search engines such as Google Search, he was still suffering because of the publication, after almost twenty years. In answer to the question of whether the publication was unlawful vis-à-vis the claimant, the Court began by noting that *de Volkskrant* 's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) could only be restricted if it was "provided by law", and "necessary in a democratic society."

The Court then examined the circumstances of the case, and first rejected the claimant's argument that the article wrongly gave the impression that he had taken millions from members of the pyramid scheme. The Court held that the article did not make this explicit claim, and that the article was supported by the facts, in that third parties had transferred five million Dutch guilders to the company. Secondly, the Court held that the fact that no rebuttal had been offered to the claimant was not determinative, as it would not have led to different content in the article, given that the claimant would not have been able to deny

that he had been involved in organising the pyramid scheme. Thirdly, the Court held that the article's publication had served the "public interest" at the time, and continued to do so in the online archive. Fourthly, the Court agreed with *de Volkskrant* that the claimant was a public figure, given his business activities, although the Court did state that it would take into account the fact that he did not "actively seek publicity". Having regard to all these considerations, the Court held that the freedom of expression on the part of *de Volkskrant* should prevail in the light of its task of discussing "socially relevant facts" in its publications, and as such, the publication was not unlawful, nor was its continued availability in the online archive. The Court considered that any negative consequences for the claimant did not outweigh the interest of *de Volkskrant* and the public interest in the article. Finally, the Court held that the claimant had failed to demonstrate any "special reason" why the article should be made accessible only in "anonymised form" in the archive.

Gerechtshof Amsterdam, 3 maart 2020, ECLI:NL:GHAMS:2020:624

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2020:624

Court of Appeal of Amsterdam, 3 March 2020, ECLI:NL:GHAMS:2020:624