

JUDGMENT

THE HAGUE DISTRICT COURT

Civil Law Division

case number / docket number: 366481 / KG ZA 10-639

Judgment in Preliminary Proceedings of 2 June 2010

in the case of

the company under Dutch law

FTD BV,

established in Haarlem,

claimant in the principal action,

defendant in the cross-action,

attorney: mr. G. Brunt in Haarlem,

versus

the company under Dutch law

EYEWORKS FILM & TV DRAMA BV,

established in Amsterdam,

defendant in the principal action,

claimant in the cross-action,

attorney: mr. P.J.M. von Schmidt auf Altenstadt in The Hague

Hereinafter the parties will be referred to as FTD and Eyeworks.

1. Proceedings

1.1. By writ of 17 May 2010 FTD summoned Eyeworks to appear at the session of 19 May 2010 before the Preliminary Relief Judge of this court. Prior to the session Eyeworks filed a statement of defense also including (conditional) statement of counterclaim and submitted seventeen exhibits. By letter of 18 May 2010 FTD submitted five exhibits, as well as a copy of the statement of rejoinder in the cross-action, filed by it on 24 March 2010 in proceedings on the merits instituted with the Haarlem District Court between FTD and Stichting Brein.

1.2. FTD had its case pleaded by mr. Brunt, aforementioned. The case was pleaded on behalf of Eyeworks by mr. D.J.G. Visser and mr. M. Bakker, both attorneys in Amsterdam. The counselors of both parties used oral pleading notes which have been submitted. Moreover mr. Brunt submitted at the session as Exhibits 6, 7 and 8 several pictures and a cost specification.

1.3. Next the parties asked for the giving of judgment. The judgment was set at this day.

2. Facts

2.1. The issue of this case is the downloading from Usenet of copyrighted material and the role played by FTD in this. For a proper understanding of the matter it is useful to briefly explain the major notions.

Usenet

2.2. Usenet is a protocol which, by using the Internet, allows users to participate in debates in so-called news groups. To that end text or other files (also called binaries) are posted on one or more servers, and next others can download and store such files in their own computers. To get access to Usenet or news servers – in other words to be able to download the files available on Usenet – one must be registered with a Usenet provider.

2.3. Whereas originally Usenet mainly served as platform for debates held by means of posting text files, in the course of time the exchange of binaries has become more and more important. Often it concerns copyrighted material which is reproduced and made available without the consent of the right owners.

2.4. Since a limit has been set to the volume of files that can be downloaded, large files, like movies, are split up into small sub-files or articles which are stored in one or more Usenet servers. To allow to download such a file as a whole, the individual articles – in some cases many hundreds or more – have to be located, downloaded and merged into one file.

2.5. Although search engines are available which allow users to search the Usenet servers, the localization of a specific file is not easy. Usenet comprises a large amount of content and the uploaded files are moreover – often intentionally – named in such manner that they are hard to find.

FTD

2.6. FTD provides a service by which users can find and download files on Usenet in an easy way. To that end it gives access to a computer application, referred to hereinafter as FTD Application, by which users can share information about files stored in Usenet servers. In the FTD Application users post so-called spots, data regarding files which are considered interesting by users. A spot comprises the name under which the file in question can be found on Usenet.

2.7. The FTD Application allows users to search spots and has the spots organized in different categories, like DVD, HD, Playstation and Xbox. Moreover moderators appointed by FTD are active which – by their own initiative or not – check files for quality and if necessary remove such files.

2.8. The file name from the spot can be used to find and download the desired file by means of a Usenet search engine. To that end several steps have to be made. By means of the right software one can partly let this process be performed automatically. If the spot of the desired file is found in the FTD Application, it the file can thus be downloaded with several mouse clicks.

2.9. The FTD Application has over half a million users.

The ex parte order of 11 May 2010

2.10. Eyeworks is the producer and copyright owner of the movie “*Komt een vrouw bij de dokter*”. This movie was viewed for some time at the cinemas and is for sale and rent on DVD and BluRay since 27 April 2010.

2.11. Almost immediately after “*Komt een vrouw bij de dokter*” was offered for sale and for rent, several spots were posted on the FTD Application for this movie. As appears from the Top 25 of Most Appreciated Submissions, which can be found on the website of FTD and where “*Komt een vrouw bij de dokter*” occurs multiple times, the popularity of the movie is high. Ranking in the Top25 means that the file in question is downloaded a lot.

2.12. By order of 11 May 2010 rendered following the petition for an ex parte measure under Article 1019e Dutch Code on Civil Procedure of Eyeworks, the Preliminary Relief Judge ordered FTD, summarizing, to cease and desist from infringement of the copyrights of Eyeworks in the work “*Komt een vrouw bij de dokter*”. As ground of its request Eyeworks alleged that FTD infringed the intellectual property rights of Eyeworks by operating a computer application which allows third parties to download the work from Usenet.

2.13. FTD complied with the order by removing the spots for the movie “*Komt een vrouw bij de dokter*”. Spots for audio files bearing the same title – a so-called audiobook has also been released – have not been removed.

3. The dispute in the principal action and (conditional) cross-action

3.1. FTD claims – summarizing – that the Preliminary Relief Judge will withdraw the order given by decision of 11 May 2010 by judgment, as far as possible notwithstanding appeal, while ordering Eyeworks to pay the costs of the proceedings in conformity with Article 1019h DCCP.

3.2. Eyeworks claims in the cross-action conditionally, in the event that the claims of FTD in the principal action may succeed - summarizing – that the Preliminary Relief Judge will order FTD by judgment, enforceable notwithstanding appeal, to cease and desist from any tort vis-à-vis Eyeworks as described in the petition, on penalty of forfeiting a civil fine while ordering FTD to pay legal costs in conformity with Article 1019h DCCP.

3.3. The parties plead a defense on both sides. The allegations of the parties will be discussed in more detail, as far as relevant.

4. Examination

4.1. The Preliminary Relief Judge states a priori that it is undisputed that the movie “*Komt een vrouw bij de dokter*” is offered on Usenet without the consent of Eyeworks, in other words, in respect of said movie Usenet is an ‘illegal source’ of copyrighted material. Nor is it disputed that someone who downloads the work of Usenet can watch, store and redistribute the movie. In other words: anyone who downloads, while using the facilities offered by FTD, the articles of the movie “*Komt een vrouw bij de dokter*” from locations divided over Usenet has gained access to the entire movie.

4.2. In this case Eyeworks aims its arrows exclusively at FTD, not at the individual user who downloads this movie. The question whether downloading from an illegal source is illegal does not come up in this case.

4.3. The present preliminary proceedings concern the question whether by its behavior FTD *makes the work available to the public*.

4.4. FTD argues that it does not make available, because the copyrighted files are not within its power at any time. The servers in which the files are stored are not controlled by it, nor does it have any influence on the downloading by users, so it argues. Be that as it may, provisionally judging it is not relevant whether the copyrighted files are actually in the power of FTD at any time. Instead it is important whether the behavior of FTD allows users to download copyrighted files (in an easier manner) and that it thus makes such files in fact available to the public. This is the case, provisionally judging.

4.5. To this view the Preliminary Relief Judge finds it also relevant that it has become likely that FTD is actively and substantially involved in the spots. Thus the moderators appointed by FTD check, by their own initiative or not, the quality of the spots posted, users are encouraged – inter alia by means of so-called kudos – to post files which FTD must presume to be copyrighted, and – by performing the *ex parte* injunction – FTD has shown to be able to meet with a considerable level of accuracy an order to cease the infringement of specific copyrights by removing spots which refer to specific work. This complex of actual involvement teaches that FTD performs a key part in making files available to the public. It is the maker, owner and manager of a key by which individual users get access to copyrighted material. Without the key of FTD it is considerably harder for users to gain such access and moreover then the content which they gain access to could be of poorer quality.

4.6. The above is not, contrary to what FTD argues, altered by the fact that users can download the film in question without using the services of FTD, either by means of a third party who offers similar services, or by directly searching the Usenet servers. That the public can also gain access to the copyrighted files by other ways, does not make the making available by FTD less unlawful.

4.7. Nor is this altered by the fact that FTD itself does not control copyrighted material. The material is not uploaded by it to users who download it. The material is not stored as a whole or divided over articles in its servers. The qualification of FTD as party that makes available to the public in copyright law sense is not altered by this. A comparison comes up with the method of legal sites which make content available after payment. After all, for such type of sites it is a fact that after payment a key (code) is issued by which access is gained to content usually hosted elsewhere and not on the pay server. Although this virtual procedure remains almost entirely invisible to users, the procedures at FTD are not essentially different, save that there is no consent of the copyright owner. And so this method continues to be qualified as directly making available.

4.8. The Preliminary Relief Judge finds, provisionally judging, that by reason of its behavior FTD has made the copyright work “*Komt een vrouw bij de dokter*” available to the public without the consent of Eyeworks and threatens to do so again, if the injunction given on 11 May will be withdrawn. And so there is no reason to withdraw the order or to review the decision and the claims of FTD will be dismissed.

Decisions in similar proceedings

4.9. The Utrecht District Court found on 26 August 2009 in a case between Stichting Brein and Mininova BV¹ that the acts of Mininova disputed in said proceedings must qualify as a tort and not as copyright infringement. The court found relevant in that respect that Mininova was not directly involved in the up and down loading of the copyrighted works and so did not own such works at any time. The acts of Mininova are similar to some extent with the ones of FTD. It results from the above that the Preliminary Relief Judge in this case qualifies the acts of FTD, provisionally judging, as making copyrighted material available without consent.

4.10. The Preliminary Relief Judge looks for adhesion with a recent decision² of the English court. In a judgment with detailed reasons Justice Kitchin finds that Newzbin, a company operating in a way which is similar on relevant points with the behavior of FTD infringes copyrights, despite the circumstance that on the site of Newzbin no copyrighted works have been posted. Just like FTD, Newzbin offers a platform for the exchange of data concerning inter alia the exact location of copyrighted works in Usenet servers. Thus Newzbin allows its users to download such works (in an easier way). Just like FTD in this provisional judgment, Newzbin was actively and substantially involved in the data posted by users, inter alia by categorizing such data and – at the request of users or not – removing unusable spots. Moreover the activities of Newzbin were aimed, in the view of the English court, at (enabling) large-scale copyright infringement.

Claim in the cross-action

4.11. The order given by decision of 11 May 2010 stays in force. The Preliminary Relief Judge establishes that the condition made by Eyeworks has therefore not been met and so the (conditional) counterclaim does not have to be examined.

Legal costs

4.12. Being the party found to be at fault FTD will be ordered to pay legal costs. Eyeworks claims compensation of full legal costs which amount, according to its cost specification – not contested by FTD – to EUR 10,003.61. FTD specified that in the event that the Preliminary Relief Judge would find it to be at fault and he would not found his decision on intellectual property rights of Eyeworks, but on another basis in law, it objects to being ordered to pay legal costs under Article 1019h DCCP. Since the dismissal of the claim of FTD has been founded on considerations of copyright law, the costs on the part of Eyeworks will be assessed at said sum.

5. Decision

The Preliminary Relief Judge

5.1. dismisses the claims in the principal action and upholds the decision of 11 May 2010;

5.2. rules that the counterclaims do not have to be examined;

¹ LJN: BJ6008.

² [2010]EWHC 608 (Ch) UK High Court 29 March 2010 (Twentieth Century Fox Film Corporation et al. v. Newzbin Limited).

5.3. orders FTD to pay legal costs, assessed on the part of Eyeworks so far at EUR 10,003.61;

5.4. declares this judgment enforceable notwithstanding appeal as to the order to pay legal costs;

This judgment was rendered by mr.Chr.A.J.F.M. Hensen and pronounced in public on 2 June 2010 in the presence of the clerk of the court mr. R.P. Soullié.

(signatures)