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http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AV4204&u_ljn=AV4204

District Court of Amsterdam – March 9, 2006

Curry v. Audax

Interim measure, Case no. 334492 / KG 06-176 SR

[Adam Curry c.s., claimant]

v.

[Audax c.s., defendant]

[...]

1. This ruling is based on the following facts.
 - a. Audax publishes the weekly magazine Weekend. The [second defendant] and [third defendant] are the editors-in-chief of this magazine. In Weekend issue 3 of 2006 (published on 18 January 2006) pages 8 – 11 contained a report about the claimants. The report is announced on page 4 of the same issue by “The Sad Life of [second claimant] and [first claimant]”.
 - b. The heading on pages 8 and 9 reads: “This is the Life [second claimant] and [first claimant] Present to the Outside World”. On these pages four photographs are published made by the [first claimant] and they are photographs of the claimants. The photographs are accompanied by the statement: Photographs © [first claimant]. The four photographs were taken from www.flickr.com. The [first claimant] had placed the photographs on this website.
 - c. The heading on page 10 reads: “... But This is Their Daily Life!”. On this page two photographs of the [second claimant] are published showing her doing her shopping.
 - d. On page 11 under the heading “Separate Lives? [first claimant] Lives in the US and [second claimant] is More and More Alone” an article about the claimants is published. This page also includes a photograph of their home. Under the subtitle “Failure” the following text is published:

“[third claimant] (15) has also settled in her new country. Every morning a taxi collects her and takes her to school, just outside [city/town]. She is at [city/town] County School, which specializes in music courses. (...)

Apparently the [claimants'] memories of their stay in the Netherlands are not altogether positive. [Second claimant] even stated several times that her heart complaints were due to the constant flow of negative publicity regarding her family. [Second claimant] was, among other things, the centre of a diva war with [C.B.] and [P.B.], her cosmetics brand [La P.] was not the success she had hoped for and died a quiet death, and [first claimant] faced one business disaster after another. Some of their property was attached and various former business partners published their stories in the newspapers. Add to this the substantial tax assessment which came as a complete surprise.”

- e. By letter of 20 January 2006 the claimants' counsel requested or demanded from Audax – stated succinctly – that it cease the sales of Weekend issue 3, that it refrain from publishing any portraits of the claimants in future, that it publish a rectification and pay € 10,000 as an advance to the damages.
- f. In issue 4 of 2006 of Weekend, published on 25 January 2006, the following is published on page 4:

Notification regarding family [claimants]

In the previous Weekend issue we drew attention to [first claimant], [second claimant] and their daughter [third claimant]. [first claimant] informed us, through his lawyer, that this publication constituted a serious infringement of the privacy of him and his family. The publication was accompanied by photographs taken from a virtual photo album on the Internet. We should have requested permission for publication of those photographs. We regret that we failed to do so and would like to apologize to the family [claimants].

Weekend Editorial Board

- 2. The claimants presently claim – stated succinctly – the following:
 - i. to order the defendants, subject to a penalty, to refrain from any use, any reproduction and/or any disclosure of works and/or portraits of the claimants without prior permission, unless such use is in accordance with the Creative Commons Public License Attribution-NonCommercial-ShareAlike 2.0 (hereinafter: the License);
 - ii. to order Audax, subject to a penalty, to submit a statement of all producers, agents and buyers of Weekend issue 3 of 2006 and of the number of sold copies;
 - iii. to order Audax, subject to a penalty, to send a letter, stating the text included under iii of the claim for relief of the summons appended to this ruling, to all buyers referred to under ii. with – inter alia – the request to return any copies of Weekend issue 3 of 2006 to Audax that they still have in their possession;
 - iv. to order the defendants, subject to a penalty, to publish a rectification in Weekend, amounting to two pages with the following text:

“In Weekend of 18 January 2006 four photographs of [first claimant], [second claimant] and [third claimant] were published on page 8 and 9. The publication of

those photographs constitutes an infringement of the copyrights of [first claimant] and the portrait rights of [first claimant], [second claimant] and [third claimant]. The publication on page 10 of two photographs of [second claimant] constitutes an infringement of her portrait rights. The publication on page 11 regarding, inter alia, [third claimant] is unlawful vis-à-vis her. The Preliminary Relief Judge of the Amsterdam District Court so decided by ruling of [date ruling].

Weekend Editorial Board.”

- v. to order the defendants to pay an advance on the damages of € 10,000;
- vi. to order the defendants to pay an advance on the surrender of profit of € 10,000;
- vii. to grant such relief as deemed necessary by the Preliminary Relief Judge in the proper administration of justice;
- viii. to set the time-limit as meant in Section 260 of the Dutch Code of Civil Procedure at six months;
- ix. to order the defendants to pay the costs of the proceedings.

[Arguments put forward by Adam Curry c.s.]

3. [first claimant] states that he owns the copyright on all four photos from www.flickr.com. Weekend has acknowledged this by using the copyright notice ©. In adding the text «Photos: © [first claimant]» the suggestion is actually made that [first claimant] has given permission for insertion of the photos. Such permission is expressly negated however. After all the photos are published on the website under the conditions laid down in the [Creative Commons] License. This is cognizable for every visitor of the website, since the photos are accompanied by the text «some rights reserved». If the visitor clicks the symbol near that text, he is linked through to the abridged text of the License. Subsequently one can click through to the full text of the License. The applicability of the License terms follows from the opening lines of the License, which read: «By exercising any rights to the work provided here, you accept and agree to be bound by the terms of this license».

[First defendant] has not complied with the requirements for using the photos set by the License. Article 4 sub c of the License stipulates that the use (of the photos) may not produce any commercial benefits. Weekend is a downright commercial magazine. Article 4 sub a of the License stipulates that distribution and public display of a work have to be accompanied by a copy of the License. Weekend has not observed this requirement: every reference to the License is lacking. In violating the above requirements [first defendant] fails to execute the contract to which it was bound. [first defendant] has recognized this by the way; Weekend no. 4 of 2006 contains a statement that permission ought to have been asked for publication of the photos as well as an apology for the intrusion on [first claimant's] privacy. It is furthermore of importance that [first defendant], as a professional market player, bears a special responsibility. [first defendant] ought to have contacted [first claimant] in advance of publication. The fact that close to the photos the text «This photo is public» is displayed does not detract from [first claimant's] position. It merely signifies that the photos may be looked at by anyone. It does not give any right to reproduce the photos or publish them somewhere else.

[...] (arguments regarding the privacy issues raised)

[Arguments put forward by Weekend/Audax]

4. [First defendant] has remonstrated that [claimants] have actively sought publicity for years. From late 2002 to early 2004 [claimants]. have been on TV weekly in the 'real-life-soap' «The Family». This weekly TV show included the [claimant's] then 12 year old child. At present still hundreds of private pictures of [the claimants]. are accessible for anyone to see at www.flickr.com. Also [first claimant] frequently uses his weblog and podlog to make details of his and his family's private life public.

The four photos at dispute have been published in weekend in good faith. The statement «This photo is public» put Weekend/Audax under the impression that it had the permission to publish the photos, with the note that the copyright rests with [first claimant]. The link to the License is not traceable in an obvious manner. Audax became aware of the License only after notification by [first claimant's] lawyer. Therefore Audax cannot be blamed the violation of the requirements set in the License. As Audax was nonetheless sorry to find [claimants] so disgruntled about the publication of the four photos, it placed the statement that permission ought to have been asked for publication of the photos as well as an apology for the intrusion on [claimants's] privacy in the proximate edition of Weekend. In addition it voluntarily offered to pay a compensation of € 1,500. This is a large sum; the value of the photos is nil because anyone can look at the photos on the internet.

Even if in this case the conditions as laid down in the License *would* be applicable, then it is important to note that Weekend's not mentioning the conditions of the License did not cause [first claimant] to suffer any harm at all. After all, the fact that the copyright on the photos rests with [first claimant] *has* been mentioned. Article 4 sub c of the License has not been violated either. Weekend's principal reason to publish the photos is not to make a profit but to inform its readers. Audax is entitled to such freedom of expression. De requirement at hand seems to be meant to prevent merchandising (*e.g.* production of picture postcards), not to prevent placement of photos to illustrate news reports.

[...] (arguments regarding the privacy issues raised)

[Legal assessment of the dispute]

5. All four photos that were taken from www.flickr.com were made by [first claimant] and posted by him on that website. In principle, [first claimant] owns the copyright in the four photos, and the photos, by their posting on that website, are subject to the [Creative Commons] License. Therefore [first defendant] should observe the conditions that control the use by third parties of the photos as stated in the License. The Court understands that [first defendant] was misled by the notice 'This photo is public' (and therefore did not take note of the conditions of the License). However, it may be expected from a professional party like [first defendant] that it conducts a thorough and precise examination before publishing in Weekend photos originating from the internet. Had it conducted such an investigation, [first defendant] would have clicked on the symbol accompanying the notice 'some rights reserved' and encountered the (short version of) the License. In case of doubt as to the applicability and the contents of the License, it should have requested authorization for publication from the copyright holder of the photos ([first claimant]). [First defendant] has failed to perform such a

detailed investigation, and has assumed too easily that publication of the photos was allowed. [first defendant] has not observed the conditions stated in the License [...]. The claim [...] will therefore be allowed; defendants will be enjoined from publishing all photos that [first claimant] has published on www.flickr.com, unless this occurs in accordance with the conditions of the License."

6. Consequently it is relevant to consider the damage caused by the non-compliance with the License terms as well as the question how to minimize any harm. Pursuant to the arguments put forward by [claimants] two of those terms, laid down in Articles 4 sub a and 4 sub c, have been violated. Article 4 sub a of the License stipulates that with the use of the work in the form of (*inter alia*) distribution and public display a copy of the License is to be enclosed or supplied. [Claimants]. were right to postulate that in the edition of Weekend at dispute no reference whatsoever is made to the License. However considering the note «Photos © Adam Curry» accompanying the photos as well as [first defendant'] communication in Weekend no. 4 of 2006, [first claimant] has failed for the present to convincingly demonstrate the harm of non-compliance with said requirement. The same can be said with regard to the condition stipulated in Article 4 sub c of the License. This condition provides that the user is not entitled to use the work for commercial purposes. For the present, [first defendant] has violated that provision as well because publication of an entertainment magazine such as Weekend can be regarded first and foremost as a commercial activity. The commercial value of the four photos may be deemed limited since they are freely available on the internet. It has not yet become likely that the material damage suffered by [first claimant] as a result of publication of the photos, has not been adequately redeemed by the statement that permission ought to have been asked for publication of the photos and the apology for the intrusion on [claimant's] privacy, and by the offer to pay a compensation fee of € 1,500. It has not turned out that the photos have a higher (commercial) value than this sum. Neither has it become credible that publication of the photos which had been made public before, impairs the opportunities for commercial exploitation of Curry's and his wife's copyrights, portrait rights and trademark rights. [Claimants] have further argue that they have suffered emotional damage, damage to their reputation, or damage consisting in their desire not to be associated with Weekend, but this argument is ill-supported as well. The statement [in Weekend no. 4 of 2006] mentioned above is of importance in this context. The conclusion so far is that infringement of the License by the defendants does not result in any harm (anymore). Therefore infringement of the License cannot constitute a basis for the award of damages or other provisions for restoring harm such as a (practically infeasible) recall, or a rectification.

[...] (deliberations regarding the privacy issues raised)

Decision

The President of the District Court:

1. Prohibits the defendants after the pronouncement of this decision any use, any reproduction and/or any communication to the public of the works of Curry, that have been placed on www.flickr.com, without former authorization, unless the use, reproduction and/or publication is conform the conditions under which the works have been published on that website as laid down in the Creative Commons Public License Attribution-NonCommercial-ShareAlike 2.0, or conform statutory provisions , both on pain of a penalty of € 1.000,- per violation of this injunction with a maximum of € 20.000,-
2. As to the costs of the proceedings, rules that each party is to bear the costs in proportion to

those individually made.

3. Declares this judgment on the costs with immediate effect.

[...]