

**CASE NOTE:
THE NETHERLANDS**

CASE CITATION:
LJN: BW 3415

NAME AND LEVEL OF THE COURT:
Arnhem Appeal Court

DATE OF DECISION:
12 April 2012

Virtual abusive images of children, sexually explicit images in cartoon format

The District Court acquitted the accused of being in possession of three sexually explicit images in cartoon format, also called 'hentai' images.

At trial the Advocate General took the position, summarily, that with regard to images of sexual acts involving children or seeming to involve children, the possession of which (amongst other things) is penalized in article 240b Criminal Code, what must be considered is what the image to the average citizen seems to purport or signify, and whether it is potentially harmful to children in general. What should further be considered is whether it is an image which is manifestly fit to and suitable for contributing to a subculture which presents sexual acts with and by children as normal and acceptable. In connection with this, the Advocate General referred to, amongst other things, the conclusion of the Advocate General in the Supreme Court judgment of 7 December 2010, LJN BO6446, as well as to the history of the development of the amendment to article 240b referred to above, which entered into force on 1 October 2002. The Advocate General also paid attention to international conventions from which a wider application of the prohibition on abusive images of children could be concluded, such as, for instance, the Council of Europe *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*. The Advocate General's conclusion with regard to the possession of the three images referred to in the charges, of which the accused was acquitted by the District Court, is that they should be deemed as images that fall under the penalization of article 240b Criminal Code because of their clearly sexual nature, even though they cannot be put on a par with realistic images of children.

The Appeal Court finds that the text of the description of the offence is still based on involvement of an individual who has yet to reach the age of 18, or the apparent involvement of such an individual, even though now, in comparison to the original penalties imposed for the possession of abusive images of children, there is to a

degree a wider scope for that provision. This wording can only mean, in the Appeal Court's view, that either an actual, existing child is involved in the sexual act, or that the realistic suggestion is evoked, for instance by the use of certain technical means, that an actual, existing child is involved in a sexual act. In view of the clear text of this law, the Appeal Court sees no scope to apply a different criterion to invoke a (possibly) changed perception that society might have regarding penalties for possessing abusive images of children.

This means that images that do not meet the requirement of 'a realistic image of a child' do not fall under the provisions of article 240b of the Criminal Code, even if the unmistakable purport of it was to arouse certain people sexually.

With regard to the three images referred to in the charges by the Advocate General, the Advocate General has not denied that the children depicted in them are not realistic. Also, the Appeal Court has established that they, by the way in which they are depicted – unlike the sexually explicit images in cartoon format which the District Court did declare proved – differ for the most part from the requirement of a realistic image, and can therefore not be designated as images in which someone who has not yet reached the age of 18 is seemingly involved. As with the District Court, the Appeal Court finds that acquittal for possession of these three images should follow.

The Appeal Court confirms the judgment that was appealed against having regard to the above considerations.

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