

IN THE NAME OF THE QUEEN

13 July 2006
given by anticipation

AMSTERDAM COURT OF APPEAL

FOURTH THREE-JUDGE CIVIL SECTION JUDGEMENT

in the case of:

1. The foundation STICHTING BESCHERMING RECHTEN ENTERTAINMENT INDUSTRIE NEDERLAND (BREIN), having its registered office in Hoofddorp,
2. The foundation STICHTING STEMRA, having its registered office in Hoofddorp,
3. The association VERENIGING BUMA, having its registered office in Hoofddorp,
the phonogram producers, also members of the Nederlandse Vereniging van Producenten en Importeurs van beeld en geluidsdragers (NVPI):
4. The private company with limited liability ALA BIANCA BENELUX B.V., having its registered office in Baarn,
5. The commercial partnership ARTIST & COMPANY V.O.F., having its registered office in Haarlem,
6. The commercial partnership BALTIC NEDERLAND V.O.F., having its registered office in Utrecht,
7. The private company with limited liability BASIC BEAT RECORDINGS B.V., having its registered office in Rotterdam,
8. The private company with limited liability BASTA AUDIO/VISUALS B.V., having its registered office in Aalsmeer,
9. The private company with limited liability BLACK HOLE RECORDINGS B.V., having its registered office in Breda,
10. The private company with limited liability BMG NEDERLAND B.V., having its registered office in Hilversum,
11. The private company with limited liability CORBEAU MUSIC MASTERS B.V., having its registered office in Hilversum,
12. The private company with limited liability CRISIS MUSIC B.V., having its registered office in Hilversum,
13. The private company with limited liability CHALLENGE RECORDS SERVICES B.V., having its registered office in Hilversum,
14. The private company with limited liability CHANNEL CLASSICS RECORDS B.V., having its registered office in Herwijnen,
15. The private company with limited liability CNR MUSIC B.V., having its registered office in Naarden,

16. The private company with limited liability COAST TO COAST MUSIC GROUP B.V., having its registered office in Capelle a/d IJssel,
17. The private company with limited liability CORAZONG RECORDS B.V., having its registered office in Koedijk,
18. The private company with limited liability COTTON RECORDS B.V., having its registered office in Loosdrecht,
19. The private company with limited liability DE HASKE SOUND SERVICES B.V., having its registered office in Heerenveen,
20. The foundation STICHTING DONEMUS, having its registered office in Amsterdam,
21. The private company with limited liability STRENGHOLT MUSIC PRODUCTIONS B.V., trading under, amongst other names - DURECO, having its registered office in Naarden,
22. The private company with limited liability EMI MUSIC NETHERLANDS B.V., having its registered office in Hilversum,
23. The private company with limited liability EPITAPH EUROPE B.V., having its registered office in Amsterdam,
24. The private company with limited liability ESSENTIAL DANCE MUSIC B.V., having its registered office in Hendrik Ido Ambacht,
25. Willem Marinus BREUKER, trading under the name HAAST GRAMMOFOONPLATEN, having his business address in Amsterdam,
26. The private company with limited liability HARMONIA MUNDI NANDI B.V., having its registered office in Den Haag,
27. The private company with limited liability IDOL MEDIA B.V., having its registered office in Amsterdam,
28. The private company with limited liability JUPITON B.V., having its registered office in Amsterdam,
29. The commercial partnership LIEDJES V.O.F., having its registered office in Roermond,
30. The private company with limited liability MASCOT PROVOQUE B.V., having its registered office in Berkel en Rodenrijs,
31. The private company with limited liability MEDIA RECORDS & SONGS B.V., having its registered office in Baarn,
32. The private company with limited liability MIRASOUND B.V., having its registered office in Amersfoort,
33. The private company with limited liability MUSIC & WORDS B.V., having its registered office in Nieuwegein,
34. The private company with limited liability NEWS RECORDS NEDERLAND B.V., having its registered office in Hilversum,
35. Bernardus Arend Gabriel KLEIKAMP, trading under the name PARADOX, holding offices in Leiden,
36. The private company with limited liability PENTATONE MUSIC B.V., having its registered office in Baarn,

37. The private company with limited liability PLAY IT AGAIN SAM B.V., having its registered office in Hilversum,
38. The private company with limited liability PURPLE EYE PRODUCTIONS B.V., having its registered office in Bussum,
39. The private company with limited liability QUINTESSENCE RECORDS B.V., having its registered office in Leersum,
40. The private company with limited liability RED BULLET PRODUCTIONS B.V., having its registered office in Hilversum,
41. The private company with limited liability SONY MUSIC ENTERTAINMENT (HOLLAND) B.V., trading under, amongst other names - EPIC, COLUMBIA, SONY, having its registered office in Hilversum,
42. The foundation STICHTING JAZZ IMPULS, having its registered office in Nijbroek,
43. The commercial partnership SYNCOOP PRODUKTIES V.O.F., having its registered office in Schiedam,
44. The private company with limited liability TELSTAR MUSIC PUBLISHING HOLLAND B.V., having its registered office in Weert,
45. The private company with limited liability TIMELESS RECORDS B.V., having its registered office in Wageningen,
46. The private company with limited liability UNIVERSAL MUSIC B.V., having its registered office in Hilversum,
47. The private company with limited liability V2 RECORDS (NEDERLAND) B.V., having its registered office in Hilversum,
48. William HAIGHTON, trading under the name VAN RECORD COMPANY, holding offices in The Hague,
49. The private company with limited liability EMI VIRGIN MUSIC PUBLISHING HOLLAND B.V., having its registered office in Hilversum,
50. The commercial partnership WALBOOMERS MUSIC V.O.F., having its registered office in Amsterdam,
51. The private company with limited liability WARNER MUSIC BENELUX B.V., having its registered office in Hilversum,
52. The private company with limited liability ZOMBA MUSIC HOLDINGS B.V., having its registered office in Hilversum
53. The private company with limited liability ZYX MUSIC B.V., having its registered office in Oosterhout (NB),

APPELLANTS in the main appeal,

RESPONDENTS in the conditional cross-appeal,

Procurator litis: W.A. Roos, L.L.M.

Versus

1. The private company with limited liability UPC NEDERLAND B.V., trading under the name CHELLO, having its registered office in Amsterdam,
 2. The private company with limited liability ESSENT KABELCOM B.V., trading under the name @HOME, having its registered office in Groningen,
 3. The private company with limited liability TISCALI B.V., trading under the name TISCALI BREEDBAND INTERNET / TISCALI ADSL, having its registered office in Utrecht,
 4. The private company with limited liability WANADOO NEDERLAND B.V., having its registered office in Amsterdam
 5. The private company with limited liability KPN TELECOM B.V., trading under, amongst other names - PLANET INTERNET / KPN INTERNET, having its registered office in 's-Gravenhage,
- RESPONDENTS in the main appeal,
APPELLANTS in the conditional cross-appeal,
Procurator litis: Chr.A. Alberdingk Thijm, L.L.M.

1. The appellate proceedings

The appellants in the main appeal and respondents in the conditional cross-appeal, hereafter jointly to be referred to in the singular as Brein, and the respondents in the main appeal and the appellants in the conditional cross-appeal hereafter to be referred to as the ISPs.

In a writ dated 3 August 2005, Brein appealed the judgement of the Preliminary Injunction Court of the Utrecht Court of 12 July 2005, rendered in interlocutory proceedings under KG No. 194741/KG ZA 05-462 between Brein as the plaintiff and the ISPs as the defendants.

In its statement of appeal, including exhibits, Brein adduced grounds of appeal against the appealed judgement and moved that – briefly stated – the Court of Appeal should reverse the judgement and – in rendering a new judgement – allow Brein's claim after all, and order the ISPs to pay the costs of the proceedings in both instances.

In their respondent's notice on appeal, including notice of cross-appeal, the ISPs disputed the grounds of appeal and moved that the Court of Appeal should declare Brein's appeal inadmissible, or at any rate should uphold its judgement, ordering Brein – as understood by the Court of Appeal – to pay the costs of the main appeal. Furthermore, the ISPs – in the cross-appeal – adduced three grounds of appeal and moved – briefly stated – that the Court of Appeal should order Brein to pay the costs of the experts engaged and for the rest, should uphold the judgement, and order Brein to pay the costs of the cross-appeal.

In its respondent's notice in the cross-appeal, Brein disputed the grounds of appeal in the cross-appeal and moved that the Court of Appeal order the ISPs to pay the costs of the cross-appeal.

The ISPs subsequently submitted a number of exhibits to the proceedings by deed.

At the hearing of 9 June 2006, the parties explained their positions by means of pleadings submitted to the Court of Appeal. On behalf of Brein, this was done by J.M. van den Berg, L.L.M., solicitor in Amsterdam, and on behalf of the ISPs, by their procurator litis. On this occasion, the ISPs withdrew their third ground of appeal in the cross-appeal and stated that the cross-appeal should be classified as a conditional one. The parties also responded to questions asked by the Court of Appeal.

Finally, the parties applied for a judgement regarding the documents submitted to the proceedings in both instances.

2. The Facts

The Preliminary Injunction Court – in consideration 2 of the judgement under 2.1 up to 2.16 inclusive – gave an enumeration of the facts that should be used as starting points in these proceedings. Brein observed that it is partially wrongly claimed in 2.12 that Brein stated incorrect times in the email message of 11 March 2005, while furthermore – in 2.14 – it is incorrectly stated that 41 subscribers failed to respond. According to Brein, this should be 42. If necessary, the Court of Appeal will return to this later on. Otherwise, the enumerated facts are not disputed, so that the Court of Appeal will also use them as a starting point.

3. Admissibility

- 3.1 The ISPs adopt the position that Brein's appeal should be declared inadmissible, as Brein has failed to formulate clear grounds of appeal against the judgement, so that it is unclear to the ISPs what they have to defend themselves against.
- 3.2 This defence is rejected. It cannot be reasonably stated that Brein failed to make their objections against the judgement sufficiently clear. Subsequently it also becomes clear from what the ISPs adduce in the "discussion of the grounds of appeal" that they have understood the grounds on which Brein objects to the judgement, so they have not been adversely affected in their defence.
- 3.3 Furthermore, the ISPs argue that the present case is complicated and does not lend

itself to a hearing in interlocutory proceedings. This is why they have commenced proceedings on the substance of the case before the Haarlem Court, in which they claim – insofar as is currently relevant – that it will be ruled that the ISPs have not acted wrongfully vis-à-vis Brein by refusing to provide the latter with the Name, Address and Residence particulars and that the ISPs also do not have an obligation to do so pursuant to the Personal Data Protection Act (Wbp). During the pleadings in the appeal, the ISPs' procurator litis adduced – by way of an increase of the claim – that it has also been claimed in the proceedings on the substance that it be ruled that the appealed judgement in the interlocutory proceedings was correctly rendered and – when asked – declared that the rejoinder in the counterclaim had already been delivered in the proceedings on the substance.

- 3.4 The Court of Appeal concurs with the consideration made by the Preliminary Injunction Court in the first part of Legal Consideration 4.1 and adopts this consideration. Otherwise, the Court of Appeal will discuss the consequences of the proceedings on the substance which have already been instituted, later on.

4. Assessment

- 4.1 These proceedings evolve around the question as to whether the ISPs have an obligation to provide Brein's counsel with a written list of the names and addresses (hereafter: the NAR particulars) of the subscribers to whom each of the ISPs has assigned an IP address on the dates and times stated on the list provided by Brein, which was appended to the initiating summons. The Preliminary Injunction Court has denied Brein's claim to that effect. Brein contests the considerations made by the Preliminary Injunction Court in Legal Considerations 4.22 – 4.33, while the ISPs contest Legal Considerations 4.9 – 4.10, 4.12 - 4.15 and 4.33.
- 4.2 Primarily, Brein contests Legal Consideration 4.30 of the judgement, in which the Preliminary Injunction Court considered that allowing a claim such as the present one could not take place until it has been established without reasonable doubt that the IP addresses relate to users who are actually offering illegal music or other files on their computer. In this regard, Brein refers to the less strict criterion used by this Court of Appeal in the Lycos/Pessers case (Judgement by the Court of Appeal, 24 June 2004, cause-list number 1689/03 KG). The Court of Appeal considered in that judgement (Legal Consideration 4.10) that - when it has been made sufficiently plausible that the published information could be wrongful vis-à-vis a third party and he could consequently suffer damage – it would not be desirable from a social and economic point of view if this third party were to have no realistic possibility of calling the website holder to account for this – if necessary – at law. However, the present case does not relate to the wrongfulness of the published information, but to whether the IP addresses gathered by Brein relate to subscribers who have actually infringed on the copyrights of the

organisations and persons affiliated and represented respectively by Brein, and whether – if this is the case – the IP addresses of the subscribers in question have been rightfully obtained. These are different questions and that is why the Preliminary Injunction Court was justified to use a stricter criterion. The key requirement is that there can be no reasonable doubt about whether the IP addresses relate to subscribers who are illegally offering music files from their computer's 'shared folders'.

- 4.3 When describing the accuracy of the search method deployed by Brein regarding the users of the IP addresses in question, Brein refers to a statement made by E. Schmersel, Internet Anti-Piracy Manager at Brein, as submitted to the appeal. The ISPs observe that, in this regard, the statement is not objective and independent, as opposed to the statements which were submitted by the ISPs. They also state that the appendices which Schmersel refers to (A – G) are missing and Schmersel's considerations regarding IP addresses are largely incorrect. In this context, the ISPs refer to the statement which they submitted made by ir. H. Rood (Exhibit III b First Instance), which indicated that consumers are usually assigned dynamic IP addresses. This means that the user can be assigned a different IP address for each internet session. If Brein fails to provide at least three combinations of IP addresses with the corresponding dates and times, there is a possibility that the wrong person could be identified, according to the aforementioned statement (page 4, first and penultimate paragraph).
- 4.4 Considering these contradictory statements, it cannot be properly established in advance whether Brein's investigation was carried out with sufficient accuracy and due care and could serve as a basis for allowing the claimed injunctions. Moreover, the ISPs have asserted – without contest – that the music industry – next to legal means - also uses technical means to fight the unauthorised offering of music files, to wit the use of so-called 'decoy files' and 'spoofed content', files that resemble music files but, in reality, are not. Currently, 50% of the entire Kazaa network allegedly consists of spoofed content, while 90% of particular files are polluted. These figures have apparently been derived from the statement by Prof. Dr. Ir. H.J. Sips and Dr. Ir. J.A. Pouwelse (Exhibit II d of the ISPs in the first instance, p.2, 4th paragraph and p. 3, 4th paragraph). The latter is an expert in the field of P2P file sharing and has appeared before the American Federal Trade Commission in this capacity.
- 4.5 This is also clear from the ruling submitted by the ISPs, as given by the Federal Court of Canada on 31 March 2004 (Exhibit XII f of the ISPs in the first instance) in proceedings of the "Members of Canada's Recording Industry (..) to seek disclosure from five Canadian internet service providers (..) of the identity of certain customers who, it is alleged, have infringed copyright laws by illegally trading in music downloaded from the internet". Just like Brein (cf. Judgement, Legal Consideration 4.25) the music industry in Canada – when gathering IP addresses – used the services of MediaSentry Inc. In the Canadian proceedings, the President of MediaSentry, Gary Millin, was heard as a witness. The following can be derived from the ruling by the Federal Court:

[19] Mr. Millin also testified that his company provided a service called MediaDecoy which distributes bogus or inoperative files over the internet. People downloading these files think incorrectly that they are music files. The files are made to look like real music files, but they are inoperative. When he was asked whether he could tell whether any of the files allegedly copied from the alleged infringers were MediaDecoy files, Mr. Millin stated that he had not listened to any of the files copied from the alleged infringers and that listening to the files was not work that his firm was contracted to do (...). There is, thus, no evidence before the Court as to whether or not the files offered for uploading are infringed files of the plaintiffs.

[20] As discussed above, the plaintiffs would like the ISPs to furnish the names of the account holders of certain IP addresses at certain times. However, neither the affidavits nor the cross-examination of Mr. Millin provide clear and comprehensive evidence as to how the pseudonyms of the KaZaA or iMesh users were linked to the IP addresses identified by MediaSentry.

[26] No evidence was presented that the alleged infringers either distributed or authorized the reproduction of sound recordings. They merely placed personal copies into their shared directories which were accessible by other computer users via a P2P service.

The Federal Court's decision was: "this motion is denied". The Federal Court of Appeal – in the appeal against this decision – considered in its ruling of 19 May 2005: "the appeal will be dismissed without prejudice to the plaintiffs' right to commence a further application for disclosure of the identity of the "users" (..)". Millin's statement was not disputed or called into question during the appeal.

- 4.6 So even if the user of the IP address was offering files from his/her computer to the internet at the time established by MediaSentry, it has not been consequently established that this constituted an infringement on any copyright or neighbouring right which belonged to the parties involved.
- 4.7 Insofar as Brein complains – as a ground of appeal – that the Preliminary Injunction Court based its disallowance of Brein's claim partially on defences made by the ISPs which Brein was unable to respond to properly, Brein currently no longer has any interest in this ground of appeal.
- 4.8 After having claimed otherwise in its statement of appeal, Brein has acknowledged at the hearing of the appeal that IP addresses can 'in principle' be classified as personal data. Furthermore, there is no longer a dispute between the parties as to whether the Civil Court is authorised to order the ISPs to provide the requested NAR particulars. Pursuant to Art. 8, opening words and under f. Personal Data Protection Act, the ISPs may provide personal details to Brein if this information is necessary to the promotion of Brein's justified interest,

unless the interests or the fundamental rights and freedoms of the subscribers in question, more specifically the right to privacy protection, prevail.

- 4.9 The Court of Appeal argues that, primarily, an infringement of the right to privacy protection would, in principle, constitute a wrongful act. The presence of a ground for justification would remove the wrongful nature of such an infringement. According to Brein, such a ground for justification can be found because it has been established that the persons involved acted wrongfully by the unauthorised offering of music files on the internet and Brein is authorised to take action against such wrongful acts, and it has also been established that Brein will not be able to do this without the co-operation of the ISPs. This key position means – according to Brein – that there is a legal duty upon the ISPs to assist Brein in the protection of its interests and rights. By failing to do so, the ISPs are acting wrongfully.
- 4.10 The Preliminary Injunction Court – summarised very briefly – ruled (Legal Consideration 4.24 ff.) that (a) processing personal data pursuant to the Data Protection Act is subject to very strict conditions, (b) it is significant that the Data Protection Board (CBP) ruled that Brein’s gathering of IP addresses is lawful provided that it observes the instructions given by the CBP, but (c) it has been established that Brein employed the services of MediaSentry, a third party, when gathering IP addresses, thus Brein failed to meet the conditions under which gathering IP addresses is lawful, according to the CBP. The Preliminary Injunction Court also considered the fact that MediaSentry is an American company and that the United States of America could not be considered to be a country that has an appropriate protection level for personal data. Furthermore, MediaSentry – by means of the software it employs - investigates the contents of the IP addresses’ ‘shared folders’, and these ‘shared folders’ can also include files that do not infringe on the rights of third parties, or files which are of a private nature. This led the Preliminary Injunction Court to conclude that the manner in which Brein had the IP addresses gathered and processed lacks a lawful basis, so that the ISPs must deny the request to disclose any NAR particulars. This is, therefore, the ground on which allowing Brein’s claim fails, according to the Preliminary Injunction Court.
- 4.11 Brein adduces that the ‘shared folder’ is the part of a subscriber’s private files which he/she puts in the ‘public space’ of the internet, accessible and available to everyone, so it is the subscriber who decides whether he/she opens a ‘shared folder’ to other users of P2P programs such as Kazaa. There is, therefore, no infringement on his/her right to privacy. Brein speaks in the context of a ‘public place’ or browsing market.
- 4.12 The Court of Appeal does not consider this argument to be conclusive. Users of IP addresses open their computers for a specific purpose, i.e. the exchanging of files with other users of the network, during which they should not need to make allowances for the possibility that an organisation, such as MediaSentry (employed by Brein), might peruse their ‘shared folder’ for

possible infringements on copyright. Moreover, this data processing remains unnoticed by the person involved. The CBP writes in its letter of 16 April 2004 (page 2, end): “The fact that the CBP has the possibility of instituting a preliminary investigation, pursuant to Article 31 (Data Protection Act, *Court of Appeal*) must be considered a compensating guarantee for not informing the user.” With regard to this investigation, the CBP then informed Brein, in a letter of 5 December 2005, that the CBP – considering the fact that this Court of Appeal “will fully discuss the parties’ points of view (regarding the lawfulness of the manner in which Brein gathers and processes IP addresses, *Court of Appeal*)” – will suspend the investigation until the Court of Appeal has ruled in this matter.

- 4.13 However, the CBP – in the position it adopts - fails to appreciate that these are interlocutory proceedings, and the Court of Appeal cannot independently order an (expert) investigation in such proceedings. In the preliminary opinion of the Court of Appeal, such a drastic decision as the one requested here (see Legal Consideration 4.1) – which will have a great impact on society – cannot be made dependant on the outcome of the procedural debate about the lawfulness of the manner in which Brein collects and processes IP addresses. Also in view of the considerations made under Legal Consideration 4.6 above, the Court of Appeal deems further expert advice is necessary.
- 4.14 Furthermore, the Court of Appeal also considers that the present dispute is currently pending before the court which is adjudicating on the merits of the case, and that, in these proceedings, the rejoinder has already been filed in the counterclaim proceedings. When asked about the pressing interest of its claim, Brein – at the hearing of the appeal – indicated that they would rather have a ruling today than tomorrow, but that does not mean, nor has it been shown, that its interest is such that they cannot wait for the ruling in the proceedings on the merits of the case, which will be rendered – it may be assumed – within a reasonable term.
- 4.15 The conclusion is that the grounds of appeal in the main appeal, which need not be discussed separately, must be denied. As the condition on which the cross-appeal was instituted – that (one of) the grounds of appeal in the main appeal is successful – has not been met, these grounds of appeal need not be discussed further. The appealed judgement will, therefore, be upheld. Brein, as the unsuccessful party, will be ordered to pay the costs of the proceedings of the main appeal. In the conditional cross-appeal, there will be no order to pay costs.

5. Decision

The Court of Appeal:

Upholds the appealed judgement;

Orders Brein to pay the costs of the main appeal, which are estimated at the date of this judgement to amount to EUR 291.00 for out-of-pocket expenses and EUR 2,682 for wages on behalf of the ISPs;

Hereby declares this cost award to have immediate effect.

This judgement was rendered by M.Coeterier, L.L.M., N. van Lingen, L.L.M., and R.J.F. Thiessen, L.L.M. and was pronounced in public by the cause-list justice on 13 July 2006.

[Signed]

ISSUED AS A BAILIFF'S COPY

TO: Chr. A. Alberdingk Thijm, L.L.M.

THE CLERK OF THE COURT