

CASE TRANSLATION: THE NETHERLANDS

CASE CITATION:

LJN; AY6903, Services Court Judge
Amsterdam, 345291 / KG 06-1112 AB

NAME AND LEVEL OF COURT:

Voorzieningenrechter In Kort Geding
(Services Court Judge Amsterdam)

The judgment is available at
http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoek en=true&searchtype=ljn&ljn=AY6903&u_ljn=AY6903

*Protection of intellectual property rights;
internet; illegal downloads; privacy of
customer personal data; right of interested
parties to require ISP to provide personal data*

LJN; AY6903, Services Court Judge Amsterdam, 345291 /
KG 06-1112 AB

Date of ruling: 24 August 2006

Date of publication: 24 August 2006

Jurisdiction: Civil other

Type of procedure: Interim measures

Index Indicator: A service provider may be required to provide the information requested by (an interested party acting as the protector of) the rights holder. For that, first, it has to be sufficiently plausible that the subscribers that have been identified must have undertaken infringing (illegal) actions, and second, it has to be beyond reasonable doubt that the person(s) that will be identified if the information is made available are actually the people who are the ones whose acts are in dispute. In such a case, it can be necessary to waive the privacy interests of those involved in respect of the secrecy of their data in order to give way to the interests of the right holders to act against the infringement. The criteria relating to this issue are applicable in this case.

Judgment

AB/MB

Court ruling August 24, 2006

AMSTERDAM THE DISTRICT COURT IN AMSTERDAM
PROVISIONAL Court ORDER

indezaakmetnummers 345291 / KG 06-1112 AB of:

The foundation STICHTING NETHERLANDS PROTECTION RIGHTS ENTERTAINMENT INDUSTRY (FOUNDATION BREIN), established in Amsterdam,

plaintiff to subpoena of July 21, 2006,

Attorney JMB Seignette LLM,

lawyers JMB Seignette LLM and RM Brouwer LLM,
Amsterdam,

Against:

The private company UPC NEDERLAND BV, based in
Amsterdam,
defendant,

Attorney Chr. A. A. Alberdingk Thijm LLM.

PROCEEDINGS OF THE PROCEDURE

At the hearing on August 15, 2006 the plaintiff, called BREIN, stated and claimed, after reduction of the claim as indicated below and in accordance with the subpoena as attached in photocopy to this ruling. The defendant, UPC, has defended with the conclusion to refuse the claimed provision. After further debate, the parties asked for judgment.

GROUNDINGS OF THE DECISION

1. This ruling is based on the following facts.

- a. BREIN has in accordance with Article 3 of its Statute (amongst other things) the following objectives:
 - a. "a. preventing and combating the illegal exploitation of media and information in the broadest sense;

CASE TRANSLATION: THE NETHERLANDS

- b. assisting the members of the Foundation as well as individual members of those affiliates in defending their interests;
- c. and to advance the legal proceedings to protect the rights and interests of its members and the members of these affiliates and to obtain compensation for the latter due to the illegal exploitation of information suffer damage (...).”

The BREIN affiliates include BUMA and STEMRA, members of the Motion Picture Association of America, members of the Dutch Association of Producers and Importers of picture and sound and the Dutch Association of Film Renters.

- b. UPC is an Internet service provider and provides services under the name Chello. Chello provides its subscribers access to the internet via its cable network. Chello subscribers may receive an e-mail address and/or can create an e-mails address, ending with @chello.nl.
- c. Service providers provide the computers (or servers) of their subscribers, for the purposes of transactions on the internet, with an IP address, allocated each time a subscriber connects to the internet. The IP address allows certain transactions on the internet to be linked to the computer (or server) with which such acts are performed.
- d. On April 15, 2005 a number of service providers (including UPC) took legal action against BREIN in main proceedings in the court in Haarlem. In this procedure, the service providers asked to declare as law, in summary, that they did not act unlawfully by refusing to provide BREIN with NAW data (Name, Address, Town) of their subscribers and that they are not obliged to do so under the Personal Data Protection Act.
- e. In the period from 1 April 2005 to 9 February 2006 through the Bit Torrent network called ‘Dikke Donder’ (during that period available through www.dikkedonder.org, www.dikkedonder.nl, www.dikkedonder.be and www.dikkedonder.tk) (parts of) movies, television, music, software and computer games, were available to download without the consent of the copyright holders. Using the Bit Torrent technology, a file is reduced to small pieces and downloaded from multiple computers simultaneously and the downloaded pieces are immediately uploaded to other users. Bit Torrent is therefore suitable for sharing large files via the internet.
- f. After obtaining permission from the court at Dordrecht, BREIN on 9 February 2006 seized facilities comprising the computer server of the website Dikke Donder. Since then, the Dikke Donder network has no longer been available through the above domain names. The owner of the server has waived these domain names for the benefit of BREIN. On the site of Dikke Donder it was possible to see which titles were offered through Dikke Donder, at what time and by whom. The site also retained a list of the top 250 people uploading the most files. Among the top uploaders were the user names lex1a, muzan and BWS. These uploaders have offered, amongst others, films such as Harry Potter and the Goblet of Fire, Monster in Law, Memoirs of a Geisha, Bambi 2, Flodder in America, often at times that these films had not been shown in the cinema in the Netherlands or have yet to be released on DVD.
- g. On the server, the IP addresses of the three uploaders and their e-mail addresses, under which they subscribed to Dikke Donder on or around April 2005, which was [e-mail address 1] (lex1a) (its IP address according to summons [IP address]), [e-mail address 2] (muzan) (IP address under subpoena [IP address]) and [e-mail address 3] (IP address according to the summons 213.93.135.66).
- h. By e-mail dated March 3, 2006, T. Kuik, director of BREIN sent a communication to the manager of UPC policies and regulations, including the comment: ‘As we discussed, we will in the near future ask you to provide the related personal data. In this context we discussed that I would already give you the IP numbers so that you can already find and keep the related NAW data.’
- i. On 11 and 16 May, 2006 BREIN wrote an e-mail to each of the uploaders that were liable for the damages of the infringement on intellectual property rights, and they were asked to sign an agreement to abstain from uploading any further items. There was no response to these e-mails.

There was also no report that indicated that the e-mail addresses did not exist.

- j. In a letter dated June 12, 2006 BREIN asked UPC to provide the NAW information belonging to above-mentioned three e-mail addresses.
 - k. On August 10, 2006 UPC forwarded e-mails, sent by (Technical Service) UPC dated 3 and 7 March, 2006, to her counsellor, including the NAW data of the e-mail [e-mail address 1] and [e-mail address 3], on the basis of an examination of the IP addresses. With regard to the address [e-mail address 2] there was no data. At the bottom of the printout on the basis of the above IP address of the user muzan, it was stated: 'No customer match'. UPC has brought these documents, including the personal information of two of the three uploaders, into the proceedings by transmission to the court facilities and the counsellor of BREIN.
 - l. In a report by researchers Dr. R.J. Veldwijk and Ir. F.G.W. van Orden (scientists trained at the Free University of Amsterdam and the University of Twente), written at the request of (the counsellor of) BREIN dated August 11 2006, they conclude that 'the link in the Dikke Donder database of a particular e-mail address to a specific User ID almost certainly means that the user of that e-mail address uploaded the torrent files and content files for the titles in the database specified to that user ID.'
 - m. In an e-mail message from Kuik to Weening, dated August 14, 2006, a request was made to provide the personal data of the e-mail address [e-mail address 2]. UPC did not address this request.
2. BREIN reduced its claims to provide the personal information belonging to the e-mail [e-mail address 1] and [e-mail address 3], because the details had already been made available through the supporting documents provided by UPC. It now only seeks UPC to provide the NAW data (in writing) associated with the e-mail address [e-mail address 2], indicating the period that the person (from 1 April, 2005 until the date of the declaration) had been a subscriber of UPC, under penalty of a fine and conviction of UPC in the costs of the procedure.
 3. BREIN supported her claim as follows. Uploading works as films and music is a form of making public within the meaning of Article 12 of the Copyright Act and the provision in Articles 2, paragraph 1 sub d and 7a paragraph 1 sub c of the Act on Related Rights. An unlawful act has been undertaken against the copyright owners because making the works public was without their permission. To take legal action against this, BREIN should have the NAW data. Even if there might not be any obvious illegal act by the uploaders, which is not the case, the service provider, UPC in this case, is held to provide the relevant data to BREIN. UPC acts illegally by refusing this. In such a case, the privacy interests of subscribers should not prevail over the interests of BREIN to be able to take action against infringers. It is almost certain that the person who uses the e-mail is the actual infringer. Also, it is beyond reasonable doubt that the person who subscribed to Dikke Donder on April 2005 by using the e-mail [e-mail address 2] retained this address subsequently, in any case during the period a person with the username muzan uploaded illegal films. The chance that another, innocent, subscriber is currently using this e-mail address is negligible. Moreover, UPC must be able to check this in its subscriber accounts. The fact that the IP address at certain times is not linked to the user does not change the foregoing. Moreover, BREIN approaches subjects in a careful manner, so that in the theoretical case that the e-mail address belongs to somebody else other than the infringer, this third party will have almost no disadvantage. Although Dikke Donder is no longer on the air, the odds are that the major uploaders will use another Bit Torrent network to continue their practices. Filmmakers, producers and other rights holder are missing a lot of income because of this. BREIN, who protects their interests, has a large and urgent interest in allocation of the claim. UPC has initially undertaken to refer to the discretion of the court regarding the release of the NAW data, but at the last moment, to the surprise of BREIN, they began to defend their position.
 4. UPC has denied that it committed itself to refer to the claim and defends herself with arguments which will be discussed in the considerations of the dispute below.

Considerations of the dispute

5. The starting point is that the provision of music, videos and movies via the internet, making them accessible to other users, can be regarded as making public under the Copyright Act and as making available within the meaning of the Act on Related Rights. This means that when this happens without permission of the copyright holders, in principle there will be an infringement of intellectual property (and/or related) rights of those rights holders and therefore an unlawful act against them. It is not in dispute that the right holders to a (large) part of titles offered through the Dikke Donder network are connected to BREIN and BREIN, because of its objective, is thus entitled to and has an interest in filing the claim to provision of the personal data.
6. Unlike the arguments put forward by UPC, BREIN has a sufficient - urgent - interest in the information requested, namely the importance to stop alleged infringing activities as soon as possible. It cannot be right that BREIN should have to wait for the results of the substantive proceedings (merits).
7. Under certain conditions, a service provider can be held to provide the information requested to (a protector of interests) the rights holders. For that, first, it has to be sufficiently plausible that there are infringing (illegal) actions of the subscribers that have been identified, and second, it has to be beyond reasonable doubt that the person(s) that will be identified if the information is made available are actually the people who are the ones whose acts are in dispute. In such a case, it can be necessary to waive the privacy interests of those involved in respect of the secrecy of their data in order to give way to the interests of the right holders to act against the infringement.
8. It is sufficiently plausible that the persons who have made files available (uploaded) via Dikke Donder under the user names lex1a, muzan and BWS, have done so without the permission of the copyright holders and that they have infringed their copyright (and related rights). It is unlikely that such files have been uploaded only occasionally or in small portions (similar to making a copy for private use), in which case, there would possibly not have been a violation, or obtaining the addresses of the offenders would be disproportionate. The files that are found in the server by BREIN show that these acts of making available of many of (protected) works has occurred on a huge scale.
9. UPC has not disputed that a user uses their e-mail address to log in to Dikke Donder. In addition, the researchers in the above-mentioned report concluded that the user of the e-mail address was almost certainly the person who made files available under the corresponding user name. In the meantime UPC has provided BREIN with the corresponding NAW data for two out of three addresses. The question that now remains is whether it is beyond reasonable doubt that the third address, [e-mail address 2] (still) belongs to the person with username muzan and that person actually is the person who has acted unlawfully. UPC has argued that this person, although initially subscribed with this e-mail address, created this as a “secondary e-mail” (not by UPC, but created by the person under consideration), which may at any time be amended, without UPC keeping a record. UPC has noted that the secondary e-mail address is active, but does not know from when it was active and whether it has been active all the time. Muzan can have removed the address the day after his subscription, after which the address is freely available to others. Now Muzan is a fairly common Arabic name, and according to UPC there is a reasonable likelihood that a third, ‘innocent’ user has the address, so that indeed there is doubt about whether the e-mail address is still associated with the actual uploader. To eliminate this doubt and identify the potential infringer, BREIN needs to identify at least three combinations of identification data (IP addresses) with dates and times and has to provide this to UPC, says UPC.
10. Based on the information in the Dikke Donder server, in each case it must be assumed that ‘muzan’ during the period April 2005 to February 2006 provided files under this user name. When registering he had specified [e-mail address 2] as the contact address. At the time of the court session, the same e-mail address was ‘in the air’. That was also the case in May 2006, when BREIN sent the summons to the address, because otherwise it would have been returned as

'undeliverable'. UPC has not disputed that the Dikke Donder network username and e-mail to that effect are linked, that someone who did not change the user name kept the same e-mail address. So, if muzan wanted to receive messages from the Dikke Donder network, this would only have been possible using the same e-mail address. A secondary e-mail address is - as declared by UPC during the court session, linked to a primary e-mail address. It has not been stated, nor are their indications, that the primary e-mail address connected to [e-mail address 2] has changed since April 2005.

11. The combination of circumstances as outlined by UPC - that muzan has used the same username, but removed the e-mail address he provided to Dikke Donder, so that he can no longer receive messages from Dikke Donder, and that an innocent third party, who has a primary e-mail address at his disposal since April 2005, has made exactly the same address as a secondary address, and started using this but does not respond to the summons of BREIN, is such a theoretical possibility that it cannot be equated with the existence of 'reasonable doubt' on whether the e-mail address (still) belongs to the person who acted unlawfully under the username muzan. That a reliable identification by providing the IP addresses in combination with different dates and times that this happened online would have been possible, does not make a difference in this.
12. UPC has argued that the claim of BREIN cannot be allocated since this would lead to an 'irreversible situation', namely the provision of information of a possible innocent third party. The mere fact that the measures can cause irreparable harm to a subscriber, leads not to the view that BREIN cannot be successful in its claim, or that the claim already for that reason should be rejected. The irreversibility of the consequences is a fact that is included in the opinion that the required provision is attributable. In this case, the possible effect on an innocent third party is not so substantial that the claim should be rejected.
13. The foregoing leads to the conclusion that, since the criteria in paragraph 7 are met, and BREIN has a sufficient interest by the urgent supply of this information, the request in this claim will be granted, while the penalty will be measured and maximized, as will be reported. Now UPC has stated to be unable to determine in which period the user of the address [e-mail address 2] from 1 April, 2005 has been a subscriber, except in the last three months when a change has taken place, since this is the retention period that has to be applied by UPC as a service provider, the conviction will be limited to the provision of the period during which the subscription has continued.
14. As the unsuccessful party, UPC will be required to pay the costs of these proceedings.

DECISION ON INTERIM MEASURES

The court facilities:

1. UPC is required within two days after service of this decision to provide the counsellor of BREIN in writing with the name and address of the (former) subscriber UPC with the e-mail address [e-mail address 2], indicating the period during which this person has been a subscriber in the past three months.
2. Determines that UPC forfeits a penalty of €1,000, - per day or part of a day that it fails to meet the conviction under 1 above, with a maximum of €50.000,-.
3. UPC will pay the cost of the proceedings to date, on the side of BREIN estimated at:
 - € 84.87 for service charges,
 - € 248, for fixed and
 - € 816, on costs for the prosecutor.
4. Declares that this ruling is immediately enforceable.
5. Rejects all other claims.

Ruled by vice-president AJ Beukenhorst LLM, provisions judge in court in summary proceedings in Amsterdam, and pronounced in open court of Thursday, August 24,

2006, in the presence of the Registrar.

Coll.:

Commentary

This decision in summary proceedings from the Court Amsterdam is of significance for all copyright organizations in the Netherlands. BREIN (the Dutch anti-piracy foundation for the entertainment industry) served a subpoena on UPC, an Internet Service Provider (ISP). BREIN wanted to hold some clients of UPC liable for copyright infringements on a large scale. To claim damages, UPC had to provide BREIN with the personal data (name and address) of these persons, to enable BREIN to initiate legal action against them. The court decided that UPC had to provide the data.

Facts

On 15 April 2005 several ISPs (including UPC) served a subpoena on BREIN in an action on the merits for the Court of Haarlem. The ISPs wanted a declaration that they were not acting unlawfully by not providing personal data of clients to BREIN and that they were not obliged to do so on the basis of the Dutch Data Protection Act.

During the period between 15 April 2005 to 9 February 2006 (parts of) movies, television series, music, software and computer games had been provided via the Bit Torrent network 'Dikke Donder' (available on www.dikkedonder.org / .nl / .be and .tk), without permission of the copyright holders. By using the Bit Torrent technology, files can be downloaded in parts from different computers at the same moment, while these parts are being uploaded to other users at the same time. This means that Bit Torrent is useful for the exchange of large files on the internet.

With permission of the Court Dordrecht, BREIN confiscated the server of 'Dikke Donder' on the 9 February 2006. On this server there were e-mail addresses and the IP addresses of some of the people that uploaded files. BREIN summoned UPC to provide the personal data of three persons. Two were identified by UPC, the third was said not to be matched to the IP address and e-mail address.

BREIN claimed the identifying the data of the third person without the permission of the rights holders is an unlawful act, stating that the uploading of movies and music is a form of making public in the sense of art.

12 Copyright Act (Auteurswet 1912) and of making available in the sense of art. 2 § 1 sub d and art. 7a § 1 sub c of the Related Rights Act (Wet op de Naburige Rechten). To undertake action, BREIN needed the personal data of those people who infringed the rights of the owners of the copyright. If UPC refused to provide this data, it was argued that this was an unlawful act itself. It is sufficiently plausible that the person who uses the relevant e-mail address is the person responsible for the infringing actions. Therefore, privacy interests should not prevail above the interests of BREIN to stop the infringements.

Considerations

The starting point was that providing music, videos and films on the internet can be considered as making these works available to the public. This means that without the permission of the right holders there is an infringement of their intellectual property rights. Thus there is an unlawful act against them. The rights holders are members of BREIN, thereby authorizing BREIN to initiate the claim.

In contrast with the arguments of UPC, BREIN has a sufficiently pressing interest for the required provision. This is the interest to stop the infringing activities as soon as possible. Therefore it cannot be expected to wait for the outcome of the procedure on the merits.

Under certain circumstances, a service provider can be obliged to provide the required data to the rights holders (or their organized interest group). There are two requirements to be fulfilled: first it has to be sufficiently plausible that there is an (unlawful) infringement by the respective clients. Secondly, it has to be without reasonable doubt that the persons whose personal data are being provided are actually the ones that are responsible for the infringement. In that case, the privacy interests of the persons that have to stand aside for the interest of the rights holders to take action against unlawful acts.

In the current case, these conditions were fulfilled. Besides, the files found on the server indicate the making public of protected works on a very large scale. Furthermore, UPC stated that the claim of BREIN could not be granted because of the 'irreversible situation' of providing personal data from a possibly innocent third party. However, the court took this possibility into account in its considerations and the weighing of the interests.

Comments

This decision is one of great importance for the anti-piracy organizations. For BREIN it was a victory. In 2005, BREIN also tried to obtain personal data from people conducting infringing activities via the court. However, this claim was dismissed because BREIN illegally processed the IP-addresses of those people that were alleged to be infringing IPR rights by contracting a detective agency (MediaSentry Inc.) from the United States to investigate customers of the KaZaA network. Since the United States have a different view on piracy and personal data, there could not have been a legal processing of data by BREIN. This was also the case, because there had been an investigation in 'shared folders' of the customers, implying that the files in these folders were not sufficiently plausible files from the respective customers themselves (BREIN v ISPs, www.rechtspraak.nl/ljn.asp?ljn=AT9073).

This time, BREIN took the decision to confiscate the server of 'Dikke Donder' with permission from the court. There were no third parties involved in the investigations and all information came directly out of this server. Therefore, there was enough respect for privacy and also a sufficiently of plausible evidence of the infringement by the respective users. Obviously, this decision opens the way for BREIN and other anti-piracy organizations to deal with different kinds of IPR infringements.

Another very important point in this case is the privacy interest of clients from ISPs. In its considerations, the court has followed the decision of the Supreme Court of the Netherlands in the case *Lycos v Pessers* (see *Lov&Data* 86, Nr.2/2006, p.25-27). In *Lycos v Pessers*, there was an anonymous defamation against Pessers on the internet. The Supreme Court decided that Lycos had to provide identifying data from the anonymous users to Pessers, in order to enable Pessers to claim damages. There was a weighing of interests, with the result that the ability to claim damage had to prevail. The privacy of the anonymous

was of less importance.

In *BREIN v UPC*, UPC tried to protect the interests of the privacy of its customers. By making the same weighing of interests, namely claiming damage because of copyright infringement against the privacy of the infringer, the court decided that UPC had to provide the identifying data of those responsible for the infringing activities.

This decision provided a new standard for civil procedure in the Netherlands regarding the interests of privacy. There is no absolute right to privacy. Misuse of privacy will lead to the decision that interests of the other party have to prevail. Of course, these interests have to be sufficient and plausible, but at least there can be different kinds of interests, such as intellectual property rights or personal values (such as in *Lycos v Pessers*). Comparable procedures in the future will show if this reasoning will hold. However, at first glance, it seems very reasonable, without completely loosing respect for anonymity on the internet, because the arguments for eliminating anonymity have to justify this irreversible action in a sufficient way.

© Arnold Roosendaal, 2009

Arnold Roosendaal, LL.M, MPhil is a doctoral candidate at the Tilburg Institute for Law, Technology, and Society (TILT, the Netherlands). His research is on the digital representation of individuals and the implications for privacy and autonomy when such representations are used by governments and businesses to make decisions affecting individuals.

a.p.c.roosendaal@uvt.nl

<http://www.tilburguniversity.nl/webwijs/show/?uid=a.p.c.roosendaal>