

**BREIN – KPN (dutchtorrent.org)**

*LJN*: AZ5678, Court of The Hague, the Netherlands, 276747 / KG ZA 06-1417

Date of this judgment: 5 January 2007  
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Area of the law: Civil – other  
Type of action: Summary Proceedings

Summary: Stichting Brein v. KPN Telecom B.V. Until recently, torrent files of e.g. films, music and software were being offered on a bit torrent website. The website owner has a contract with KPN. Stichting Brein requested the Court to order KPN to disclose the name and address details of the website owner and to disconnect the current ADSL connection of the contracting party in question and any other Internet connection to be used by that party for that website or for a similar website, all of this on pain of a penalty and while ordering KPN to pay all the costs of the proceedings in accordance with Directive 2004/48/EC (the ‘Enforcement Directive’). In the opinion of the Summary Proceedings Judge, the actions of the website owner are wrongful, not because the website owner is infringing the copyrights or neighbouring rights vested in the rightful owners, but because its actions conflict with the due care to be observed towards the rightful owners. It is facilitating structural infringement of copyrights and neighbouring rights. The Summary Proceedings Judge orders KPN to provide Stichting Brein with the name and address details of the website owner and to disconnect the ADSL connection of that contracting party if it again places the website in question or a similar website on the Internet via that Internet connection. Although Stichting Brein filed its claims to safeguard intellectual property rights, the rules of reasonableness stand in the way of ordering KPN to pay all the costs of the proceedings in accordance with the Enforcement Directive.

JUDGMENT

COURT OF THE HAGUE

Civil Law Division

case number/ cause-list number 276747 / KG ZA 06-1417

Judgment in the summary proceedings of 5 January 2007

in the case of

STICHTING BESCHERMING RECHTEN ENTERTAINMENT INDUSTRIE  
NEDERLAND BREIN,

a foundation,

having its registered office in Amsterdam, the Netherlands,

Plaintiff in the Principal Action,

Defendant in the (Conditional) Cross Action,

*procureur*: P.J.M. von Schmidt auf Altenstadt,

solicitor: D.J.G. Visser in Amsterdam,

v.

KPN TELECOM B.V.,  
a private limited liability company, having its registered office in The Hague,  
Defendant in the Principal Action,  
Plaintiff in the Conditional Cross Action,  
*procureur*: W.P. den Hertog,  
solicitor: Chr.A. Alberdingk Thijm in Amsterdam.

The parties will be referred to below as ‘Stichting Brein’ and ‘KPN’.

## **1. The proceedings**

- 1.1 The course of the proceedings is apparent from:
- the writ of summons dated 1 December 2006;
  - the hearing on 15 December 2006;
  - Stichting Brein’s Statement of Oral Pleadings;
  - KPN’s Statement of Oral Pleadings;
  - the conditional claim in the Cross Action; and
  - the exhibits submitted by the parties.

1.2 Judgment was scheduled to be passed today.

## **2. The facts**

The following will be regarded as the established facts in these proceedings.

2.1 Stichting Brein’s Articles include the following provision:

‘The Foundation’s objects are to combat the unlawful commercial operation of data carriers and data, and for that purpose to promote the interests of the rightful owner of the data and of their rightful operators, in particular of its affiliates, in particular by enforcing, promoting and obtaining adequate legal protection of the rights and interests of those rightful owners and operators, all of this in the broadest sense.

The Foundation will attempt to realise these objects by (...) conducting and causing the conduct of legal proceedings to protect the rights and interests of its affiliates and the members of those affiliates (...), whereby the Foundation may take legal action in its own name in order to realise and protect its objects as well as for the benefit of its affiliates and the members of those affiliates’.

2.2 Until recently, a bit torrent website was active on the Internet under the [www.dutchtorrent.org](http://www.dutchtorrent.org) domain name. The person operating that website (referred to below as the ‘Website Owner’) is a contracting party of KPN. KPN connects the server on which the website runs to the Internet by means of a Direct ADSL connection.

2.3 Torrent files of e.g. films, music and software (which films, music and software will be referred to below as the 'Works') are offered on the website. By downloading those torrent files, the users of the website are enabled to connect to the computers of other users. The Works (or parts of the Works) are then downloaded from the computers of those other users and are subsequently immediately uploaded from the user's computer, so that they are made available to other users who wish to download the files.

### **3. The claims**

3.1 Stichting Brein has claimed – briefly stated – that KPN be ordered to disclose the name and address details of the Website Owner and to disconnect the current ADSL connection of the contracting party in question and any other Internet connection that will be used by the contracting party for the [www.dutchtorrent.org](http://www.dutchtorrent.org) website or a similar website, all of this on pain of a penalty, while ordering KPN to pay all the costs of the proceedings in accordance with Directive 2004/48/EC (the 'Enforcement Directive').

3.2 Stichting Brein has based those claims, in addition to the urgency of the relief requested, on the following arguments, among others.

3.2.1 Almost all the torrent files offered on the website are Works that are protected by the 1912 Dutch Copyright Act or the Neighbouring Rights Act. Most of the Works by far belong to rightful owners affiliated with Stichting Brein. The rightful owners have not given permission for making the Works available.

3.2.2 Offering the torrent files for downloading the Works on the website must be regarded as '(independent) publication' within the meaning of the Copyright Act and as 'making available' within the meaning of the Neighbouring Rights Act by the Website Owner. This is in any event a case of co-publication and, even if that is not the case, the structural referral to unauthorised publication and thereby the promotion of copyright infringement or infringement of neighbouring rights must be considered unlawful.

3.2.3 Stichting Brein cannot take legal action against the Website Owner because it does not have that person's name and address details. KPN has refused to provide Stichting Brein with those name and address details. In light of the weighty interest of Stichting Brein in being able to sue the Website Owner, KPN is required to provide Stichting Brein with the name and address details. KPN is acting wrongfully by failing to do so.

3.2.4 KPN has furthermore refused to disconnect the ADSL connection of the Website Owner, which must also be regarded as wrongful towards Stichting Brein.

3.2.5 Stichting Brein bases its authority to file the claims on behalf of its affiliates on its Articles and on the provisions of Article 3:305a of the Dutch Civil Code.

3.3 KPN has presented a substantiated defence. In addition to the defences to be addressed below, KPN has argued that the Enforcement Directive does not apply to proceedings such as these. In case the Court were to believe otherwise and a counterclaim were

required in order to have Stichting Brein ordered to pay all the costs of these proceedings, KPN has filed that (conditional) counterclaim against Stichting Brein.

#### **4. The assessment**

##### *Urgent interest*

- 4.1 KPN believes that Stichting Brein has no interest, and definitely no urgent interest, in its disconnection claim because the website is currently no longer accessible and the Website Owner has allegedly promised that the website will not be reactivated. In light of the alleged wrongful actions in the past and since no written cease and desist declaration from the Website Owner is available, the Summary Proceedings Judge believes that there is sufficient urgent interest. The urgent interest is furthermore increased by the message on the Internet that has been submitted, dated 15 December 2006, which, as Stichting Brein has stated and has not been disputed, was made by the Website Owner or a person working together with him: ‘Do you all want dutchtorrent back online??? Yes of course, who wouldn’t?? But what’s more important, that dutchtorrent is offline a little longer and makes sure, when the ‘brainstorm’ has ended, that the site goes online again... (...) Just be patient people, then we can go our own sweet way again as usual...’ That message gives rise to the fear alleged by Stichting Brein that the Website Owner will continue its activities.

##### *The Website Owner’s actions*

- 4.2 The Exhibits submitted by Stichting Brein furthermore make it sufficiently likely – and KPN has not disputed in a substantiated manner – that most, if not all, of the torrents offered on the website relate to protected Works in the sense referred to above and that the rightful owners have not given their permission for actions reserved to them, including making the file available to other users of the Internet. Illustrative in this context are DVD files such as ‘Over the Hedge’, placed on the website on 30 May 2006, while stating that the film will not be shown in the cinemas until 5 July 2006, Click 2006, placed on the website on 6 July 2006, while stating ‘in cinemas after 19 October’, ‘The Devil Wears Prada’, ‘The Da Vinci Code’ (original rip), and the CD files ‘Evanescence – The Open Door (2006)’, and ‘Marco Borsato – Rood’. Uploading these files to other users of the website constitutes infringement of the copyrights (or neighbouring rights) vested in the rightful owners. KPN has not disputed that the rightful owners of most of the Works offered on the website are affiliated with Stichting Brein and that Stichting Brein is authorised to take action on behalf of those rightful owners against infringements of the rights vested in them.
- 4.3 Because the Works are copied directly from user to user and the role played by the server in this respect is limited to organising the uploading and downloading processes, the Summary Proceedings Judge cannot subscribe to Stichting Brein’s argument that the Website Owner’s actions must be regarded as independent publication. Although the part played by it is essential, for the present it is not considered comparable with the role of a director of a choir that makes a copyright-protected work public, as cited by Stichting Brein from the Dutch Supreme Court judgment of 18 June 1920, *NJ* 1920/797. This is therefore also not a case of co-publication, which concept the aforesaid judgment apparently considered possible.

4.4 However, it does follow from the statements in paragraph 4.2 above that the Website Owner is facilitating structural infringements of copyrights and neighbouring rights. In light of the nature of the files alone, it cannot be otherwise than that the Website Owner is aware of this. It is furthermore relevant that income is being generated by means of the website because – before being able to download torrents – a user is required pay a certain amount. In these circumstances it must be concluded for the present that the Website Owner’s actions are wrongful, not because the Website Owner is infringing the copyrights or neighbouring rights vested in the rightful owners, but because its actions conflict with the due care that must be observed towards the rightful owners. This conclusion is not altered by the fact that, as KPN argues, the users can switch to another bit torrent site and the Website Owner therefore cannot make it impossible for the users to copy files. It is also irrelevant that Stichting Brein has not specifically pointed out to the Website Owner the torrents related to protected Works. In light of the structural nature of the infringements of the aforesaid rights, that would be a useless exercise.

*Obligation to provide name and address details*

4.5 KPN disputes that it is required to disclose the name and address details of the Website Owner to Stichting Brein. The assessment of this point of dispute must be based on the fact that in a case such as this KPN *may* be required in light of the due care that must be observed towards third parties such as Stichting Brein to provide those data and is therefore acting wrongfully if it refuses to do so. Whether or not it is required to do so depends on the specific circumstances of the case and the weight to be attributed to those circumstances (the Court refers to the Supreme Court judgment of 25 November 2005 addressed by the parties, *LJN AU4019 Lycos/Pessers*, in particular paragraphs 5.2.2 and 5.3.4).

4.6 KPN believes that the data must be provided to a third party that so requests only on the following conditions, which have been individually disputed by it.

- I. The manner in which the applicant obtained the identifying data may not be wrongful.
- II. It must be likely that the contracting party acted wrongfully towards the applicant.
- III. It must be beyond reasonable doubt that the identifying data provided by the applicant can indeed be traced to the person who acted wrongfully.
- IV. The applicant must have a realistic interest in obtaining the name and address data.
- V. There may be no less drastic means of tracing the name and address details of the contracting party than through the Internet provider.
- VI. In light of a weighing of the interests involved of the applicant, the Internet provider and the contracting party, the applicant’s interest must prevail.

The question is whether these conditions – cumulatively – must indeed be met. That will be assumed below for the sake of argument.

4.7 When studying these conditions it is first of all apparent that – contrary to the assumption in the *Lycos/Pessers* proceedings – there cannot really be any discussion

about the wrongfulness of the Website Owner's actions, as the Court believes for the time being. It is irrelevant, as KPN argues (with reference to condition III), that the Website Owner is working together with other parties and that the wrongful action must therefore be attributed to the collective. If this case involves cooperation with other parties, that does not alter the wrongful nature of the Website Owner's actions, also not if the Website Owner's role were limited to maintaining the server on which the website runs.

- 4.8 The Summary Proceedings Judge fails to see why Stichting Brein, as KPN furthermore argues, wrongfully traced to the Website Owner. It sufficed to consult the website and that, in and of itself, is of course not wrongful. The judgments to which KPN refers (Summary Proceedings Judge of Utrecht, 12 July 2005, *LJN AT9073* and Amsterdam Court of Appeal, 13 July 2006, *LJN AY3854*) do not relate to a similar situation.
- 4.9 KPN has argued (referring to conditions IV and V) that Stichting Brein can find the name and address details by means of some investigation in public sources on the Internet.
- 4.10 Stichting Brein has apparently concluded from the information on the website that the persons with the initials [initials] might be the Website Owner, but, as it has also stated at the hearing, further investigation led to an address at which those [initials] no longer lives. According to Stichting Brein, no response was received to e-mails sent to the [initials] in question. KPN has also established that the person in question no longer lives at the address found. It believes, however, that Stichting Brein, by consulting the telephone directories of the Netherlands, could have performed further investigations and notes that other companies also have the data of the Website Owner.
- 4.11 For the present, the Court considers Stichting Brein's efforts to retrieve the data to be sufficient. Retrieving the data from other companies not less onerous than the approach now taken and is therefore not a preferable alternative. It should be noted, incidentally, in respect of the simple investigation into the data described by KPN that in general such searching is much easier if, like KPN, one knows what one is searching for.
- 4.12 In light of the above and the weighty interest that Stichting Brein has in obtaining the name and address data in putting an end to the wrongful actions on the website, it must be ruled for the present that KPN is required to provide those data to Stichting Brein.

#### *Disconnecting of the ADSL connection*

- 4.13 KPN draws attention to the difficult position that it would be in if it were forced to assume the role of judge. It feels confronted with two evils: Stichting Brein and KPN's contracting party. KPN does not wish to be continuously forced to study contentions, whether or not justified, regarding wrongful actions by its contracting parties.
- 4.14 The Summary Proceedings Judge appreciates that position and therefore assumes that, in principle, Stichting Brein's interest is sufficiently served by the disclosure of the

name and address data. Stichting Brein can then take legal action against the contracting party in respect of the alleged wrongful actions.

- 4.15 However, if KPN's attention is drawn to obvious (unmistakable) wrongful actions of its contracting parties on the Internet, it does not suffice for it to submit the name and address details, but it is furthermore required to disconnect the connection in question. Failure to do so would conflict with the due care that it must observe towards parties whose interests are violated by the wrongful actions and is therefore wrongful (reference is made to the judgments of this Court, addressed by the parties, of 9 June 1999, *LJN AA1030 (Church of Scientology)* and of the Amsterdam Court of Appeal of 7 November 2002 *LJN AF0091 (XS4ALL/Deutsche Bahn)*). Above, the actions of the Website Owner have for the present been designated as obviously wrongful, and therefore, in principle, the disconnection claim must also be allowed. As KPN itself has noted (paragraph 70 of the Statement of Oral Pleadings), Article 6:196c of the Dutch Civil Code, in light of paragraph 5 of that Article, does not stand in the way of allowance of the claim.
- 4.16 KPN believes that disconnection of the Website Owner would be disproportional because Internet must allegedly be regarded as a vital necessity of life. Be that as it may, the order set out below sufficiently takes into account the Website Owner's interests. KPN's argument is furthermore at odds with Article 14 in conjunction with Article 7 of its General Conditions, which provides for disconnection of the connection in circumstances such as these.
- 4.17 In light of the interests involved and to avoid enforcement disputes, the disconnection claim should not go beyond the limits specified below. The Court furthermore takes into account that the website in question is currently already no longer accessible. The period referred to in Article 260 of the Dutch Code of Civil Procedure is hereby set at six months.

#### *Cost order*

- 4.18 KPN, as the largely unsuccessful party, must pay the costs of these proceedings.
- 4.19 Stichting Brein filed the claims in question to enforce intellectual property rights. Therefore assuming the applicability of Article 14 of the Enforcement Directive, the rules of reasonableness nevertheless oppose ordering KPN to pay all the costs of these proceedings, as claimed by Stichting Brein. In respect of this ruling it is relevant that KPN itself is not infringing any intellectual property rights, and the Court furthermore takes into account KPN's position as described in paragraph 4.13 above. The costs of the proceedings will therefore be estimated in the customary manner.
- 4.20 In light of this ruling and the scope of the condition alleged by KPN, no ruling is required on the conditional counterclaim.

## **5. The judgment (in the Principal Action)**

The Summary Proceedings Judge:

- orders KPN within three days of service of his judgment to provide Stichting Brein with the name and address details of the contracting party of Stichting Brein who placed the [www.dutchtorrent.org](http://www.dutchtorrent.org) website on the Internet via KPN's Direct ADSL connection, on pain of the penalty of €1,000 per day, including part of a day, on which KPN fails to submit the name and address details;
- orders KPN within 24 hours of service of this judgment and after a request to that effect from Stichting Brein, to disconnect the access to the Internet of KPN's contracting party who placed the [www.dutchtorrent.org](http://www.dutchtorrent.org) website on the Internet via KPN's Direct ADSL connection, if it were established that that contracting party has again placed the [www.dutchtorrent.org](http://www.dutchtorrent.org) website, or in any event an entirely similar website, on the Internet via that or any other KPN Internet connection, on pain of a penalty of €1,000 per day, including part of a day, on which KPN fails to disconnect the Internet connection of the contracting party in the manner requested;
- orders KPN to pay the costs of these proceedings, estimated until this judgment on the part of Stichting Brein at €332.87 in disbursements and €816 in procurator's fees;
- declares this judgment thus far enforceable at once, regardless of appeal;
- disallows all other or further claims;
- rules that, without judicial intervention, this ruling will become ineffective if Stichting Brein has not filed its claim in the Principal Action within a period of six months of the day of this judgment and KPN has furthermore filed a statement to that effect with the Registrar of this Court.

This judgment was passed by the P.G.J. de Heij and pronounced in public on 5 January 2007.