

Unofficial rough translation into English with Google:

*Court of The Hague*

*19 July 2010*

*Decision in*

*BREIN v ZIGGO*

LJN: BN1445, Rechtbank 's-Gravenhage ,  
365643 / KG ZA 10-573

Date of decision: 07.19.2010

Date of publication: 19/07/2010

Jurisdiction: Civil Other

Type of procedure: interim measures

Contents Indication:

BREIN Foundation (Protection Rights Entertainment Industry Netherlands) requires that Ziggo, an Internet service provider, the site of The Pirate Bay block for all its customers. XS4ALL has joined in support of the defendant. The BREIN's claim relates to a prohibition order for all subscribers of defendant because of the infringement of copyright and neighboring right holders.

Such far-reaching, action, on the basis of Articles 26d Aw WNR and 15e to provisional opinion is not assignable. The requested facilities by the District Court denied. Plaintiff is ordered to the costs, both in substance and in the incident.

**Pronunciation**

verdict  
COURTS HAGUE

Civil Justice Division

Case number / roll number: 365643 / KG ZA  
10-573

Interim order of July 19, 2010

in the case of

Foundation  
RIGHTS PROTECTION FOUNDATION  
ENTERTAINMENT INDUSTRY  
NETHERLANDS, BREIN,  
registered offices in Amsterdam and offices  
in Hoofddorp,  
Plaintiff in the main,  
defendant in the incident,  
Lawyer: Mr. D.F. Groenevelt, Amsterdam,

against

The private company with limited liability  
Ziggo B.V.,  
located in Groningen,  
defendant in the main,  
defendant in the incident,  
Lawyer: Mr. J.J. Allen, Amsterdam,

and

The private company with limited liability  
XS4ALL INTERNET BV,  
located in Diemen,  
Plaintiff in the incident,  
Joined party in support of defendant in the  
main,  
Lawyer: Mr. Chr.A. Alberdingk Thijm  
Amsterdam.

Plaintiff will hereafter 'BREIN' are  
mentioned, defendant "Ziggo 'and plaintiff in  
the incident to intervene "XS4ALL". The  
case for BREIN was handled by Mr. J.C.H.

van Manen, Amsterdam Bar and the lawyer said. Ziggo occurred for the lawyer and said mw. Mr. M.G. Schrijvers, lawyer in Amsterdam. XS4ALL is assisted by the lawyer and said mw. Mr. M.M.E. Antic, lawyer in Amsterdam.

## 1. The procedure

### 1.1. The course of the proceedings shows:

- The writ of May 6, 2010;
- Productions 1 to 32 on the part BREIN;
- Productions 1 through 20 on the part Ziggo;
- Incidental finding to intervene under Article 217 Rv XS4ALL received at the Registry on 24 June 2010, with three productions;
- The reaction on the part of the BREIN June 24, 2010;
- The reaction on the part of XS4ALL June 25, 2010;
- The act of June 28, 2010 eiswijziging with production on the part BREIN 1933;
- The speaking notes of the lawyers of the parties;
- The deed on the part exhausts eiswijziging Ziggo of July 1, 2010;
- The deed on the part exhausts eiswijziging XS4ALL July 1, 2010;
- Act on the part of the answer-Mind of July 5, 2010.

### 1.2. The hearing was held on June 28, 2010. At the hearing XS4ALL in particular paragraph

1.1. conclusion that incidental to intervene in support of Ziggo taken. Initially BREIN announced opposition to the intervention is withdrawn in court. Ziggo has request not oppose the joinder. The judge told the Oral award made in which the intervention is allowed on the grounds that sufficient XS4ALL interest in the joinder. Granting the application of BREIN, the status of XS4ALL indeed may affect.

1.3. After further discussion, the parties requested verdict, which was determined at present.

## 2. Facts

2.1. BREIN has the object of legal enforcement of intellectual property rights of its member parties are entitled in respect of

the vast majority of music and films and computer games in the Dutch market. BREIN represents the interests of these beneficiaries.

2.2. The Pirate Bay is a website that launched in 2004. The website has a number of years become the world's largest BitTorrent site. The Pirate Bay to be known torrents available, files that are associated with media files eg audio, video, games, software or books (E-books) can contain and situated on the computers of users of The Pirate Bay. The Pirate Bay torrents are indexed, categorized and accessible. When opening a torrent, a user connection made with the various providers the linked media file, each of whom a portion of the total stock will received. Every part of the user downloads a file is simultaneously in uploading offered by that user to other users. The exchange of files this way, peer-to-peer file sharing known.

2.3. The Pirate Bay is not operated by a corporation, but by three natural persons, namely Mr [A] [B] and [C], which then also The Pirate Bay have set up (The managers). They were all initially living in Sweden.

2.4. On July 30, 2009, the chamber of the Amsterdam District Court two decisions rendered on The Pirate Bay. A verdict was rendered in absentia and between BREIN administrators. In this ruling, the judge offered the managers in the offenses Netherlands of copyright and related rights of its members to strike and of BREIN permanently refrain. The other award is made between BREIN and Global Gaming Factory X AB (Hereinafter GGF), a company that the acquisition of The Pirate Bay announced. GGF is be published in the proceedings. The judge in ruling that offered from the GGF The Pirate Bay when they took over the Netherlands in breach of copyright and related rights of the members of the BREIN to stop and to keep.

2.5. The managers of the aforementioned resistance came in absentia. On October 22, 2009 The judge in ruling out resistance. The judge has it considered that for the moment can not be established that The Pirate Bay - in short - copyright infringer. It is assumed that The Pirate Bay acted

unlawfully by systematically to enable users to infringe copyrights. The judge, the managers - summary - all offered on the Website torrents files which works to which the members entitled to BREIN Copyrights can be exchanged, removed and disposed to hold on What command execution should be given by the websites thepiratebay.org, piratebay.org, piratebay.net, piratebay.se, thepiratebay.com, thepiratebay.net, and thepiratebay.nu the piratebay.se, or other variations thereof, shall torrents inaccessible to Internet users in the Netherlands.

2.6. The trustees have in the order of October 22, 2009 laid down commandments respected. BREIN, the verdict, which the operators are no appeals have come to absence of any known place of residence, public do mean.

2.7. By order of June 16, 2010, restored by restoring order of June 23, 2010, the court Amsterdam in the main proceedings between BREIN and administrators award made by default. The dictum includes bans infringe on copyright and related rights in the BREIN affiliated holders, or at least offering their services as intermediaries for the purposes Article 26d of the Copyright (the Copyright Act) and Act 15th related rights (hereinafter: WNR), at least the faults in the Netherlands to cease and to keep, and - in short - The Pirate Bay site inaccessible to users in the Netherlands.

2.8. Ziggo is the leading Internet provider of cable Internet service (broadband internet) in Netherlands. It lends to almost 1.5 million Dutch users accessing the Internet. Ziggo advertise its services, in particular, it offers very high internet speeds, and promotes it to download movies and other media.

2.9. XS4ALL is also an internet service provider. It was founded in 1993 and is now part of KPN.

2.10. In 2009 there were approximately 6 million broadband Internet connections in the Netherlands.

2.11. By letter dated March 26, 2010 BREIN Ziggo injunction has access to The Pirate

Bay for all its subscribers to block and keep locked.

2.12. BREIN Ziggo has by letter dated April 7, 2010 indicated no willingness to voluntarily abide by the summons in the matter.

2.13. BREIN on the day of the hearing a summons on soil and Ziggo XS4ALL do mean.

### 3. The dispute

3.1. After amendment of claims claim Brein - in short - that the judge, enforceable, Ziggo dictates its services that are used to infringe copyright and neighboring rights holders to cease and to keep using the blocking and blocked access to its subscribers to the deed eiswijziging said on IP addresses and domain names through which The Pirate Bay operates and, in case The Pirate Bay through other IP addresses or domain names would be operate, its customers access to these other IP addresses or domain names on first BREIN request to block and keep locked, and another under a provision of a penalty and ordered to Ziggo in the full proceedings under Article 1019h Rv.

3.2. BREIN has its assets primarily in Articles 26d and 15th Aw WNR underlying presented, alternatively unlawful act of Ziggo.

3.3. Ziggo, supported by XS4ALL joined as party defendants, reasoning. On the arguments of the parties is below, where relevant, in more detail.

### 4. The assessment Competence Competence

4.1. The jurisdiction of the judge of this court in this dispute to take is not contested.

#### Admissibility

4.2. BREIN is under its jurisdiction to statutes on behalf of the beneficiaries of this procedure to perform. Having regard to

Article 3:305 a Civil Code may thus be received in its claims.

Urgency interest

4.3. The BREIN of urgent interest in the action brought by it stems from the alleged continuing infringement by subscribers Ziggo the intellectual property rights of its member owners.

Eiswijziging

4.4. Ziggo has objected to the hearing that morning sent by Brein Act eiswijziging on. Although Ziggo must be admitted that it is highly desirable that such a procedural step in a late stage of the proceedings take place, the dismissed the objection now made or otherwise showed that Ziggo upset her defense compromised. The judge has allowed a party is bound further to take note where the eiswijziging should be addressed, an option which the parties use made.

Background dispute

4.5. This is a unique case for the Netherlands. BREIN and other international organizations entitled have (the managers) The Pirate Bay in recent years in various sought ways to account. It started at the source in the home the administrators, Sweden, and as both a criminal and a civil conviction obtained from the managers. Against the criminal conviction appeal what the punishment suspended. The civil law ban the administrators have not proceed. Then, in the absence of any tangible result, alternative measures sought. Thus, an action against the Swedish hosting provider The Pirate Bay established as a result of which The Pirate Bay has been off air. After two days was The Pirate Bay, however - through another provider, CB3ROB in Germany, back online. After CB3ROB by the court in Hamburg had ordered its services to The Pirate Bay to end The Pirate Bay has turned to a provider in Ukraine. The latest feat of BREIN it is in particular paragraph 2.7. mentioned in the original proceedings in absentia for the Amsterdam District Court, where managers are welded Pirate Bay completely inaccessible to users in the Netherlands. Yet the website is still online.

4.6. BREIN argued that legal remedies against The Pirate Bay itself are all

exhausted. It states that "the apparently pointless" to find out the ISP to The Pirate Bay going to the internet provider because ophelpt changes after each conviction. The All the recipients thus still remains, says BREIN, is the internet service providers to talk to their customers the opportunity to visit The Pirate Bay.

As the largest broadband internet provider Ziggo in the Netherlands with approximately 1.5 million subscribers, has BREIN in this - as she herself has also indicated at the hearing - test case Ziggo chosen as the first Internet service provider to speak.

Primary basis: Article 26d and 15e Aw Wnr

4.7. BREIN has its claims primarily based on the proposition that an intermediary Ziggo whose services are used by third parties for infringement of copyright and neighboring rights make.

4.8. In the assessment it is assumed that this argument only Brein has supported for the situation where subscribers Ziggo be classified as 'others' within the meaning of Articles Aw 26d and 15th WNR. The situation where (administrators) The Pirate Bay would be classified as 'others' within the meaning of these Articles is therefore expressly not to Procedure (see paragraph 33 pleannotes Mrs. Groenevelt and Van Manen).

4.9. A first question that needs answering is whether an intermediary within the meaning of Articles Aw 26d and 15th WNR independently, ie not in a procedure together with the prescribed infringer but in a separate, single proceeding against him, concerning which he services provided by a third party to infringe an intellectual property can be found. To this regard, the following applies.

4.10. Articles 26d and 15th Aw WNR are included in legislation resulting from Article 11 Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement Intellectual Property Rights (Enforcement Directive) .1 That provision states:

Article 11

## Injunction

Member States shall ensure that, where a judicial decision on an infringement of intellectual property right, the judicial authorities to order a cessation of the infringement against the infringer may issue. If national law for , references to non-compliance with an injunction, if appropriate, a penalty to comply with the banned. Member States shall also ensure that rightholders to injunction against intermediaries whose services through third parties used to infringe an intellectual property right, without prejudice to Article 8, paragraph 3, Directive 2001/29/EC.

4.11. In the Memorandum of Toelichting<sup>2</sup> in adjusting including the Copyright Act and the related rights of Article 26d, as follows:

Article 11, third sentence of the Directive [i.e. the Enforcement Directive, vzr] obliged to also to intermediaries to seek an order terminating the services provided by third parties used to infringe the intellectual property of the plaintiff. The court will It should consider whether this claim is appropriate given the share or the involvement of the intermediary in the infringement and whether the claim intended purpose and importance of owner outweighs the disadvantage or damage the claim, the intermediary any cause. The intermediary should reasonably be able to claim compliance, without disproportionate costs to make. If the intermediary itself no breach and sue the infringer's equally obvious and equally possible as the summoning of an intermediary, then the claim against the intermediary should be rejected. The claim against the intermediary will own goal to serve not otherwise be realized by the infringer itself. The claim is limited to an order terminating the services provided by third party used to infringe. Other additional claims are not possible. This also creates Article no liability of the intermediary in respect of the offending operations by the third.

4.12. In this context, for completeness, be mentioned that the Minister for the consideration of the bill the conditions for allocation by the court in a claim against an

intermediary relaxed uitgelegd.<sup>3</sup> The minister has noted:

The members of the SP-group questions if ISPs could be held to sites where intellectual property rights violations, to remove or in the memorandum listed five-step plan in which the interests of the rightholder be weighed against those of the ISP, then an appropriate testing framework is.

As indicated in the explanatory memorandum to the Directive on Aanpassingswet Electronic commerce (Papers II 2001/02, 29 179, No. 3, p. 51 and 65), the removal the site can reasonably be demanded. The action sought should therefore proportionate in relation to the infringement. It should be possible for the intermediary to acceptable cost and with human and technical measures to act. There should be no other, less far-reaching possibilities open to one end to the abusive situation and the measures applied for must not exceed the scope of strict necessary. The suggestion in the notes to Rules 26d and 26th Copyright Act, that the conditions for allocation by the court of a claim against an intermediary heavier requirements than the above is wrong. Members of the SPfractie point out quite correctly.

4.13. Preliminary view is to the particular paragraph 4.9. question, as follows from the parliamentary history, an affirmative answer: in principle, a right holder independent intermediary and a separate procedure for appeal by third by by using the services of the intermediary infringement, although the Claims under circumstances beaches.

4.14. The next question is whether in this case the conditions of Articles 26d and 15th Aw WNR is met or in Article 6:196 c BW liability regime laid down the Internet service provider does not allocate a prohibition order in any way. The latter can to preliminary assessment unambiguous answer. In the fifth paragraph of article 6:196 c Civil Code is Indeed, explicitly provides that the liability limitations contained in that article (Where the service under conditions free from liability over those which result from the transfer of another origin unlawful information caused injury) does not preclude an injunction or order. In equal meaning the Supreme Court held in its ruling of 25

November 2005.<sup>4</sup> This is different from XS4ALL argued, it is not impossible in the case of a 'mere conduit' or access provider as referred to in paragraph 1 of Article 6:196 c Civil Code (and the identical Article 12 paragraph 3 of Directive Electronic handel<sup>5</sup>), it is clear from the parliamentary geschiedenis.<sup>6</sup> The first point is more complicated, which is the following.

4.15. Articles 26d and 15th Aw WNR should be read in light of Article 11 Enforcement Directive, which they are shot. From that article follows that a necessary required for allocation of a strike order to the intermediary is that it has come established that infringement by the third question is, against this background must also be seen throughout the directive. Here is the rub.

4.16. BREIN, the infringement by subscribers Ziggo summarily been raised. In the summons is merely stated that "now the largest provider of cable Internet Ziggo in Netherlands and the highest download speeds, the conclusion [is] justified that Ziggo a substantial part of the Dutch users of The Pirate Bay to its subscriber base can count. "This is the finding that the infringement by subscribers Ziggo exists at totally inadequate. BREIN also has its own sample taken (production BREIN 22) which, based on four recent popular films was examined what percentage of those these films through The Pirate Bay download and upload a subscription Ziggo have. This sample shows that 325 of the Dutch controlled 27% of IP addresses to IP addresses of Ziggo belongs. Ziggo challenged by lack of knowledge that its subscribers, and so a portion of 27% thereof, infringe (as access provider may and may not know, so is its argument) and also considers that the sample is not representative.

4.17. Leaving in the middle or the rate of 27% of subscribers to infringe Ziggo intellectual property rights of members entitled to BREIN, is that least the vast majority of subscribers has not been established that they guilty of breach of copyright or related rights in the BREIN connected owners. Brein's claim does, however, a prohibition order for all Ziggo

subscribers. Such far-reaching, action however, is based on Articles Aw 26d and 15th WNR to being considered simply not assignable. A prohibition order based on those articles which will only relate to those 'others' who services of the intermediary used to infringe. The vast majority of at Ziggo connected subscribers is that, as mentioned, in any case not been established. The Articles 26d and 15th WNR Aw, interpreted in light of the Enforcement Directive, provide only a handle to a specific, concrete and identifiable in other words, infringement End. Only in those cases with the requisite degree of certainty that of violation. On that basis the progress beaches where they are based Articles on the 26d and 15th Aw WNR.

4.18. In addition, allocating the claim to being considered in conflict with the parliamentary history expressed subsidiarity requirement. BREIN, which, according to the above sample is familiar with the IP addresses of Ziggo subscribers, has chosen not to subscribers in this court about it. An argument for this, it argues that the "impossible and (Therefore) desirable [is] to (all) subscribers individually to speak. "Consequently, according to BREIN, Ziggo she speaks to. This argument is not convincing. At least fall, without explanation, that missing, not clear why it would not have any subscribers in court to speak. BREIN circumstances would the names and addresses of the subscriber to Ziggo to access, something Ziggo hearing also indicated it is in principle willing to are. There are, in other words, different and less far-reaching possibilities open to against the alleged violations by some of the subscribers to act. That it is not would be desirable to speak to individual subscribers, as BREIN has also argued, a argument of a different order and on its own balance of BREIN. The problem with the BREIN choice made is that the proportion of subscribers to which it is made to infringe, not by the courts contradiction can be heard, which is why especially the individual subscribers in court about it.

4.19. At present it is therefore likely that insufficient soil court the claim of BREIN on this basis will be allocated. What XS4ALL

Ziggo and also against the allocation of Claims have pointed out, that situation may remain unspoken.

Subsidiary base: an unlawful act of Ziggo

4.20. BREIN alternative, based on her claim of wrongdoing Ziggo itself.

BREIN in that context that Ziggo deliberately and structurally massive infringements its subscribers of copyright and related rights holders and thus facilitates encourages such violations, while these harmful acts with a touch can terminate it contains no less far-reaching alternative. This act Ziggo according BREIN conflict with the care that they owe to the rightholders take.

4.21. Also in its alternative basis to take BREIN premise that the subscriber Ziggo is intrusive. This makes the species under the provision (Article 26d Aw and 15th WNR) lined arguments on Granting the application in the way, equally, and even more, with respect to a more general provision apparently based on Article 3:296 BW, the claim that even this land is not allocated in eligible.

## 5. Conclusion

5.1. BREIN when will the losing party to pay the costs of procedure, both the main and in the incident.

5.2. Ziggo BREIN and have an appointment with regard to the effect that, if the judge sentencing a court under Article 1019h Rv place eight, the litigation on both sides € 45000.00 amounts. Now the claims are based primarily on enforcement of intellectual property rights under Article 1019 Rv, the costs are budgeted according to the regime of Article 1019h Rv so Ziggo a BREIN amount of € 45,000.00 will have to comply. Although Ziggo regarding the court did not expressly enforceable declaration sought to understand the judge the agreement on the litigation between the parties, given also the fact that so it is sought in the subpoena, said they have referred it to allocate enforceable amount should be declared, which would also be assigned.

5.3. XS4ALL has no condemnation proceedings under Article 1019h Rv advanced so that its costs will be budgeted

in accordance with the ordinary liquidation rate:

in the incident:

- Lawyer salary incident € 452.00

in the main:

- Fixed fee € 263.00

- Lawyer salary € 816.00

€ 1079.00

Now XS4ALL did not seek (and does not otherwise BREIN appointment in question is made) it will cost no conviction be declared enforceable.

## 6. The decision

The judge

in the incident:

6.1. BREIN condemns the costs of the incident on the side of XS4ALL thus far estimated at € 452.00;

in the main:

6.2. refuses the requested facilities;

6.3. BREIN condemns the costs of the proceedings, so far in support of Ziggo estimated at € 45000.00 and in support of XS4ALL € 1079.00.

6.4. certify this order as to costs as it relates to sentencing having to Ziggo enforceable.

This verdict was delivered by Mr. J.Th. of Walderveen in open court on July 19 2010 in the presence of the Registrar mw. Mr. B.O. Büller.

1 A similar provision was already included in Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (the Copyright Directive).  
2 Explanatory Memorandum, Lower House, session 2005-2006, 30 392, No. 3, p. 26.  
Note 3 following the report, Lower House, session 2005-2006, 30 392, No. 6, p. 10.

4 HR 25 November 2005, LJN AU4019 (Lycos / Pessers): "The Directive on electronic placing the restriction on the liability of intermediary service providers action does not preclude the possibility that the national court that the measures introduced these agents may be reasonably required in connection with incumbent upon them duties of care to illegal activities to detect and prevent. "

5 Directive 2000/31/EC of the European Parliament and the Council on June 8, 2000 certain legal aspects of information society services, in particular electronic commerce in the Internal Market ('Directive on electronic commerce).

6 Explanatory Memorandum, Lower House, session 2001-2002, 28 197, No. 3, p. 27: "The three discussed exemptions from liability to the possibility that the service provider whose intermediary by a judicial authority ordered to breach terminate or prevent (or Article 12 paragraph 3, Article 13 paragraph 2 and Article 14 paragraph 3 of Directive [on electronic commerce, vzr]).

END