

Judgment

COURT OF APPEAL THE HAGUE (GERECHTSHOF DEN HAAG)

Department of Civil Law

Case Number: 200.105.418/01

Case-/Roll No. District Court: 374634/HA ZA 10-3184

Judgment of 28 January 2014

in the case of

1. ZIGGO B.V.

Based in Groningen,

Hereinafter Ziggo,

Barrister: J.J. Allen in Amsterdam,

2. XS4ALL INTERNET B.V.

Based in Amsterdam,

Hereinafter XS4ALL,

Barrister: W.P. den Hertog in The Hague (*Den Haag*),

Appellants,

Hereinafter referred to collectively: *Ziggo et al.*

Against

Translated from Dutch by X-Media Strategies (www.xmediastrategies.eu)

The foundation **FOUNDATION FOR THE PROTECTION OF RIGHTS OF THE ENTERTAINMENT INDUSTRY IN THE NETHERLANDS, 'BREIN'**

Based in Amsterdam,

Respondent,

Hereinafter referred to as: Brein,

Barrister: B.J.H. Crans in Amsterdam.

The course of the proceedings

By writ of 16 February 2012, *Ziggo et al.* appealed the judgments delivered between the parties by the District Court (*Rechtbank*) in The Hague (*Den Haag*) on 8 December 2010 (interlocutory judgment) and 11 January 2012 (final judgment). In its statement of appeal (hereinafter SAZ) Ziggo formulated 14 counter-pleas against the final judgment. By separate statement of appeal (hereinafter SAX) XS4ALL formulated 23 counter-pleas against the final judgment. Subsequently, a special inquiry occurred, which resulted in a judgment of this court on 13 November 2012, in which the demands of Tele2 Nederland B.V, Tele2 Internetdiensten B.V., T-Mobile Netherlands B.V., Koninklijke KPN N.V. and KPN B.V. to be granted permission to join the case on the side of *Ziggo et al.* were rejected. Then Brein produced a Memorandum of Reply (hereinafter MoR) in which it contested the counter-pleas of *Ziggo et al.*.

Parties had their positions pleaded at the hearing of this court of 19 September 2013; Ziggo by its Barrister and his colleague E.A. de Groot, XS4ALL by Chr. A. Alberdingk Thijm and C.F.M. de Vries, Attorneys-at-Law in Amsterdam, and Brein by J.C.H. van Manen and R. van Kleeff, Attorneys-at-Law in Amsterdam. Counsel used written pleas (hereinafter PA = Plea in Appeal, the written pleas in the First Instance will be referred to as PF).

In view of the arguments the parties sent a number of productions to the court and to the other party, namely:

- Submitted on 23 August 2013: Ziggo productions 64 to 81;
- Received on 4 September 2013: XS4ALL productions of 49 to 74;
- Received at the Court on 5 September 2013: Ziggo production 82, containing the cost statement of the appeal;
- Received at the Court on 5 September 2013: a change in the demand made by Brein and production 126 to 147;
- Received at the Court on 10 September 2013: XS4ALL Production 75, containing the cost statement of the appeal;
- Received at the Court on 18 September 2013: Ziggo production 83, containing an updated cost statement of the appeal.

On behalf of Brein objection was made to XS4ALL production 75 on the ground that they had not received it in a timely manner.

Assessment of the appeal

The facts

1. The Court takes the following facts as established.

a. The Pirate Bay (hereinafter: TPB) is a BitTorrent website created by three natural persons (the administrators). BitTorrent is a protocol that allows Internet users to exchange files ('filesharing'). The users of the BitTorrent protocol are called 'peers', the BitTorrent protocol is therefore sometimes referred to as a 'peer-to-peer' or 'P2P' protocol. The essence of BitTorrent is that the files to be exchanged are cut in small pieces, so that it is not necessary to keep a central server for the storage of those files. In the case of 'filesharing' using TPB, the following is of importance:

- To 'fileshare' the 'peers' must first download specific software (a BitTorrent *client*). This software is not offered by TPB.

- Torrents are files which contain meta-information on files residing on the computers of peers, such as media files (audio, video, games, software or e-books). In particular, this meta-information provides information on how the media files are divided into small pieces and where these can be found. Furthermore, the torrents refer to the so-called tracker, a server which keeps track of the peers which are available for a particular torrent / media content. In addition to this central tracker system using a server, there is a decentralized system, the Distributed Hash Table (DHT), in which each participating 'peer' itself acts as a tracker.

- The so-called 'initial seeders', who are prepared to make available a media file (for example, a song or a movie) on their computer to their 'peers', create a torrent file by using their BitTorrent *client*.

- Nowadays, instead of torrents, magnet links are used mainly; these are links that do not refer to a particular media file, but which identify the contents of a torrent file using a hash (fingerprint).

- The information generated by the 'initial seeders' torrents / magnet links is uploaded by them to a site like TPB which then indexes the torrent / magnet links.

- As a result of the indexation by TPB, the uploaded torrents / magnet links can be found by the 'peers'. Thus, the peers can search on TPB for their desired media files. They can then download these files in several pieces, using the BitTorrent *client*. It is this *client* which initiates the download process. In doing so, TPB plays no role.

b. A part of the torrent / magnet links offered by TPB refers to material which is protected under copyright and / or neighbouring rights. (Usually), the rights holders did not grant permission to the managers and users of TPB granted permission to perform. Restricted actions by the beneficiaries

c. Ziggo and XS4ALL are Internet access providers. There are subscribers of these providers which (used to make) use of TPB.

d. Brein is a foundation to which the rights holders with respect to the bulk of the music and film works and computer games on the Dutch market are connected. Under its articles of association, the objective of the foundation is to combat the illegal exploitation of media and information and to represent, to this end of the interests of rights holders to information and the legitimate users thereof, especially of those affiliated to the foundation.

The demands of Brein and the decision of the District Court

2.1 Posing primary that subscribers of *Ziggo et al.*, when they consult TPB, and the administrators of TPB infringe copyrights and related rights by utilizing the services of *Ziggo et al.* and that (therefore) *Ziggo et al.* are intermediaries as referred to in Articles 26d Copyright Act (*Auteurswet*) and 15e Neighbouring Rights Act (*Wet op de naburige rechten*) and, posing alternatively that *Ziggo et al.* act wrongfully themselves, because they knowingly and structurally facilitate infringements by their subscribers, Brein demanded to the extent still relevant today:

I. to order *Ziggo et al.* to cease and desist their services used to violate the copyright and related rights of rights holders whose interests Brein represents by blocking and keep blocked a number of domains / (sub) domains and IP addresses specifically named, through which TPB operates;

II. in the case where TPB would operate through other IP addresses and / or domain names a command to *Ziggo et al.* to block and keep blocked their clients' access to these other IP addresses and / or domain / (sub) domains within 24 hours of a request from Brein to do so;

III. subject to forfeiture of a penalty in the case of non-compliance.

2.2 In its final judgment of 11 January 2012, the District Court upheld, the demands, albeit with some modifications, such as replacing '24 hours' by 'ten days' in demand II. This decision is based on the principle, primarily relied on by Brein and on the consideration that the subscribers of *Ziggo et al.* committed infringement by using the services of Ziggo. Because, already for these reasons, the District Court held the demands of Brein assignable it left

Brein's position that TBP had also used Ziggo's services to commit infringement, unaddressed (para. 4:51 of the final judgment). *Ziggo et al.*' position that the blockages demanded were not effective, was rejected by the District Court on the ground that the blockades, even though there were no doubts that there were subscribers who would be able to bypass them, were at least an extra barrier.

The appeal; preliminary considerations

- 3.1 *Ziggo et al.* came timely into appeal from the judgments of the District Court. XS4ALL has not mentioned in the SAX the interlocutory judgment and did not formulate any claim against it. Ziggo raised one complaint which can be considered as a counter-plea against the interlocutory judgment (see point 2 SAZ). Brein has modified its demand in appeal in the sense that she adjusted IP addresses and domain names / (sub) domains included in the list of demand I.
- 3.2 In Appeal - in particular in paragraph 796 MoR and paragraphs 141 (at f), 148 and 149 PA - Brein offered to submit further evidence on a number of points. In doing so, the word 'witness' was not mentioned, nor was referred to persons who could act as witnesses. Regarding the facts at issue which are presently disputed, witness evidence - which must relate to facts known to the witness from his own observations (Article 163 CCP) – evidence through witnesses is not obvious. Given the foregoing mentioned offers cannot be construed as tending to supply (counter-) evidence by witnesses, but these should be regarded as tending to supply written (counter-) proof. However, Brein could already have submitted evidence, such as expert reports/messages referred to in paragraph 148 of Brein's PA, upon its own initiative and without prior permission of the court. The Court sees no reason to offer Brein the opportunity to still bring written evidence. It also deserves to be noted that Brein did not submit a request referred to in Article 200 of CCP for the hearing of party experts.
- 3.3 In appeal, the court will first focus on Brein's primary demands. Insofar as these demands are based on Articles 26d Copyright Act (*Auteurswet*) and 15e Neighbouring Rights Act (*Wet op de naburige rechten*) which implement Article 11, 3rd sentence, of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Enforcement Directive, hereinafter 'ED') and / or the equivalent of Article 8 paragraph 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the Copyright Directive, hereinafter 'CD'), which reads as follows:

'Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right',

- 3.4 Hereinafter, for the sake of brevity, reference will only be made to copyright. This, however, also refers to rights related to copyright ('neighbouring rights').

Infringement by using the services of Ziggo?

- 4.1 The court preconceives the following. In recital 42 of the preamble to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') - hereinafter 'DEC' - specifies that the activities of access providers like *Ziggo et al.* are limited to the technical process of operating and giving access to a communication network over which information provided by third parties is transmitted (*mere conduit*) or temporarily stored (*caching*). As emphasized in recital 27 of the preamble to the CD the mere provision by *Ziggo et al.* of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of Article 3 of that Directive. This means that *Ziggo et al.* themselves do not commit copyright infringement, as all the parties in this case also take as a starting point.
- 4.2 Not disputed is that the uploading of copyrighted works on the Internet is a communication to the public which is reserved to the copyright holders, so that the performance of that act without permission constitutes copyright infringement. Also the downloading of games from an illegal source is copyright infringement. After all, the exception of Article 5, paragraph 2 under b CD does not apply to computer programmes. Whether, given this exception and the '3-step test' of Article 5 paragraph 5 CD, individuals who download music and films from illegal sources for their own use, are guilty of copyright infringement is a matter which is still open. On that issue, the High Court (*Hoge Raad*) requested a preliminary ruling from the Court of Justice of the European Union (ECJ), see HR 21 September 2012, '*Aci Adam cs / ThuisKopie*' (LJN: BW5879). Meanwhile, on 9 January 2014, the Advocate-General (AG) in these proceedings - which is registered under number C-435/12 - advised the ECJ to interpret Article 5 CD in such a way that the private use exemption in this article only applies to copies made of lawful sources. This position of the AG implies that the unauthorized copying from illegal sources constitutes copyright infringement.
- 4.3 With *Brein* the court assumes that:
- A significant portion of the subscribers of *Ziggo et al.* has downloaded media files using TPB as 'indexer' (hereinafter: 'via TPB');
 - Subscribers of *Ziggo et al.* who have downloaded via TPB, in most cases, have at the same time uploaded the pieces of the media file that they had downloaded for the benefit of their 'peers';

- A (very) large part of the magnet links / torrents which are placed on TPB includes references to illegal material, i.e., material which is posted / uploaded on the Internet without permission of the copyright holders.

From the foregoing, in conjunction with the facts reviewed in paragraphs 1.a-c, it follows that a non-negligible part of the subscribers of *Ziggo et al.* committed copyright infringement by uploading via TPB, without the consent of the rights holders of protected works. Since upload and download in this regard (almost) go hand in hand, it can be left an open whether the downloading 'per se' of music, films and books / e-books by subscribers of *Ziggo et al.* via TPB (for personal use) also constitutes copyright infringement and is no longer independent meaning is to be assigned to the copyright violations resulting from downloading games.

- 4.4 The uploading subscribers of *Ziggo et al.* are to be regarded as third parties who provide information transmitted or stored by *Ziggo et al.* to *Ziggo et al.* (see paragraph 4.1. above). As also considered by the District Court in paragraph 4.14 of its final judgment, these subscribers, for their copyright violations, use the services of *Ziggo et al.* which exist in providing their subscribers with access to the Internet, and thus *Ziggo et al.* are to be regarded as intermediaries within the meaning of Article 8 paragraph 3 CD, 11, 3rd sentence ED and 26d Copyright Act (*Auteurswet*). Counter-plea 5 Ziggo and counter-plea VII of XS4ALL, defending a different view, are not valid.
- 4.5 On appeal, Brein again argued that the administrators of TPB also commit copyright infringement. This is disputed by *Ziggo et al.*. The court did not come around to consider this dispute (see paragraph 2.2).
- 4.6 The operators of TPB, whether via magnet links, make in the torrent files contained meta-information accessible to the public (see paragraph 1.a). They thus provide access to the information needed to access the works uploaded by 'seeders'. This act of the TPB administrators in the view of the court does not constitute a communication of those works to the public within the meaning of Article 3 CD. For this, the access granted to such works is too indirect. That, as Brein states under 344 and 378 MoR, TPB creates magnet links and adds the torrent trackers / magnet links to those, does not change this now that magnet links and trackers also only refer to meta-information or contain meta information. From the other facts that BREIN has mentioned in paragraphs 335-390 MoR it can also not be inferred that TPB does more than providing access to uploaded works. Thus there is no question of an intervention as meant in the case law of the ECJ on the concept of 'communication to the public' (see in its judgments of 13 October 2011, C-432/09 concerning '*Airfield*', and 15 March 2012, C-135/10 concerning '*Marco del Corso*'), so it does not matter whether the TPB administrators acted for profit and whether perhaps a new audience for the work in question is tapped into. The positions grafted on this by Brein (MoR under 306-409) cannot help it. This leaves the possibility that the administrators of TPB act unlawfully against the rights holders by facilitating / promoting copyright infringement by others (including in any case the uploaders). However, this does not fall under the scope of Article 3 CD.

- 4.7 In support of its argument that the administrators of TPB itself infringe copyright, BREIN has additionally argued that the server of TPB stores hundreds of thousands of covers of film and game DVDs, music CDs, books, film posters and other "art work". *Ziggo et al.* did not (specifically enough) contradict this argument. In this case it must therefore be held that there is copyright infringement by the operators of TPB in that it communicated 'art work' (such as CD cases) to the public. The court will also take the position that the administrators of TPB, even though they have no contractual relationship with *Ziggo et al.*, use the (access provider) services of (among others) *Ziggo et al.* for these infringements now that 'art work' is communicated to the subscribers of *Ziggo et al.*. Hereby it is important to point to the Opinion of the AG of 26 November 26 2013 in the case '*UPC-Constantin/Wega*' (the '*Kino-case*') in which the Austrian Supreme Court asked preliminary questions to the ECJ, registered under case number C-314/12, on the interpretation of Article 8 paragraph 3 CD. The AG has proposed an affirmative answer to Question 1 being whether the operators of the website kino.to, on which films are made available to the public (amongst which customers of access provider UPC) without the permission of the rights holders (Constantin and Wega) made use of the services of UPC, although UPC is not the provider of those operators.
- 4.8 The conclusion from the above is that using the services of *Ziggo et al.* 'via TPB' copyright infringement is committed by:
- A relevant part of the subscribers of *Ziggo et al.*;
 - The operators of TPB, but only with respect to the 'art work'.

With regard to (only) those acts, Article 26d Copyright Act (*Auteurswet*) applies. This article and the underlying Article 8 paragraph 3 CD and 11, 3rd sentence ED do not envisage the situation in which a third party using the services of intermediaries, such as *Ziggo et al.*, (illegally) facilitates / encourages copyright infringement by others, but does not commit infringements itself (cf. paragraph 4.6., *in fine*).

The appeal of Ziggo et al. on the principle of proportionality and non-effectiveness

- 5.1 *Ziggo's* 12th Counter-plea (in connection with the items SAZ 5.1-5.6) and counter-plea XIII of XS4ALL are directed against the rejection by the District Court of their defence that the measures sought did not comply with the proportionality requirement, partly because they are not effective. *Ziggo et al.* explained this defence on appeal in more detail as follows. The blockade of TPB demanded by Brein can be easily be circumvented, not only by the Internet user (via a proxy, through which the site of TPB can be reached through a detour), but also by TPB itself (for example, by starting to use new IP addresses). In addition there are, even if the blockade is not circumvented, many similar alternative torrent sites available, on which up-and

downloaders can find refuge. It is, therefore, according to *Ziggo et al.*, not so that imposing a blockade of TPB on the access providers leads to a decrease in the number of copyright infringements. *Ziggo et al.* in this connection also pointed out that the measures sought jeopardized their freedom of enterprise (paragraph 318 SAZ; counter-plea XIV of XS4ALL). In support of their non-efficiency defence *Ziggo et al.* have submitted the following documents to the court:

- A TNO report of 7 June 2010 ('TNO I');
- A TNO report of 11 April 2012 ('TNO II');
- A report by the Institute for Information Law (IVIR) of 16 October 2012, entitled 'Filesharing 2©12' (hereinafter: the report "Filesharing 2©12');
- A 'working paper' by J. Poort and others of IVIR of 22 August 2013, entitled "Baywatch" (hereinafter the Baywatch report);
- A report by TNO of 2 September 2013 ('TNO III').

- 5.2 According Brein the requirement of proportionality is satisfied. In its view, effectiveness is not part of this test and the advanced measures are indeed effective.
- 5.3 In paragraph 128 of its judgment of 12 July 2011 on *L'Oréal / eBay* (Case C-324/09), the ECJ emphasized that an injunction referred to in Article 11 ED to an intermediary is essentially different from an injunction against an infringer, because an order restraining the infringer logically consists in that it prohibits the continuation of the infringement, while the situation of the provider of the service through which the infringement is committed, is more complex and lends itself to a different kind of injunction. In paragraphs 136-138 of the judgment, the ECJ elaborated on this considering, in short, that the rules of national law, on the one hand, must be designed in such a way that the objective pursued by the ED, that the measures contained therein including the provision in Article 11, 3rd sentence, are effective and dissuasive, can be achieved, but on the other hand must also observe the limitations arising from the ED and from the sources of law to which that directive refers. In paragraphs 139 and 140 of the *L'Oréal / eBay* judgment, the ECJ further considered in this regard that in accordance with Article 3 ED the measures referred to in that Directive, including the measure of 3rd sentence of Article 11, must be fair and proportionate and must not be excessively costly, while it also follows from Article 3 of that directive that the measures set out in an injunction may not create barriers to legitimate trade. In the interpretation and application of Article 26d Copyright Act (*Auteurswet*) the Dutch court must focus on these principles and must thereby strike a fair balance between the various rights and interests (paragraph 143 of the *L'Oréal / eBay* judgment).
- 5.4 When weighing just described should also be involved fundamental rights of the Charter of Fundamental Rights of the European Union (the Charter), which was not entered at the time of

the facts in the *L'Oréal / eBay* store in operation. In particular, the following provisions of the Charter in this context:

Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17 Right to property

(...)

2. *Intellectual property shall be protected.*

Article 52 Scope of guaranteed rights

1. *Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

5.5 Unlike Brein thinks, efficacy (effectiveness) forms part of the proportionality requirement enshrined in the *L'Oreal / eBay* judgment and Article 52 paragraph 1 of the Charter, which means that the measures applied must be proportionate to the objective pursued. In general it can be said that as a measure is less effective, it is less likely that the objective can be achieved by it, and thus the measure would be less likely to be proportionate to the objective pursued. See also point 99 in the Opinion of the AG in the '*Kino*' case, already referred to in paragraph . 4.7.

5.6 It follows that one of the conditions for honouring a claim based on Article 26d Copyright Act (*Auteurswet*) is, that it satisfies the requirement of proportionality and the constituent effectiveness requirement. The appeal of *Ziggo et al.* on the principle of proportionality / effectiveness can therefore not be seen as a liberating defence, for which they have the burden of proof (cf. include HR December 15, 2006, NJ 2007, 203 and HR 11 July 2008, LJN: BC8967) . This means that Brein needs to bring forward and should prove by contesting in a reasoned manner that the measures sought by it are proportionate / effective. The observation of Brein under 141 PA, that the burden of proof lies with *Ziggo et al.*, can thus not be accepted as just.

5.7 Following the - now contested - final judgment of 11 January 2012, *Ziggo et al.* installed a blockade of TPB on 1 February 2012 (hereinafter: blockade A). Subsequently TPB began to operate from other IP addresses than those mentioned in that judgment. Based on the assignment in the final judgment of its demand II Brein requested *Ziggo et al.* to also block

these new addresses. *Ziggo et al.* acted by doing so (hereinafter: blockade A1). On 10 May 2012, the Hague preliminary injunction judge ordered the other major Dutch providers (UPC, KPN, Tele2 and T-Mobile, hereinafter in brief: *KPN et al.*) to blockade TPB. Since the end of May 2012 these providers also block access to this site (hereinafter: Blockade B). In this period, Brein also obtained court orders against a number of proxies to TPB obtained and took down plenty of such 'TPB-dedicated' proxies.

- 5.8 With Brein, the Court of Appeal assumes that in the Netherlands the number of visits to TPB significantly decreased after blockade A/A1, especially after blockade B joined, even if that site is still accessible to the Dutch internet users through proxies (if not yet 'taken down' by Brein), mirror sites and VPN connections. The correctness of this assumption is confirmed by Ton Huibregts of XS4ALL, who wrote in a blog on 4 July 2012:

"Yesterday is BREIN announced with great fanfare that the visit to the website The Pirate Bay has plummeted since the court obliged the Dutch internet providers to block that site. Yes, obviously. If you block access, the number of visitors goes down;; few people will be surprised by this. "

Incidentally, the decrease of visits to TPB according website statistics as Alexa and Google Trends is stronger than it will be in reality, since the traffic to TPB via a proxy is not measured as traffic to TPB but traffic to the website of that proxy (cf. paragraph 45 of PA XS4ALL and page 12, bottom, TNO III). The exact size of the decline does not need to be determined in these proceedings.

- 5.9 In the view of Brein the 'dramatic' decline of the number of visits to TPB after the blockades, is the only relevant fact in the context of the assessment of their effectiveness and in this case the increase or decrease of all BitTorrent traffic and the existence of alternative ways of infringement is irrelevant (amongst others PA under 62, 79 and 91). As was already expressed in 5.1, *Ziggo et al.* see the number of copyright infringements as the measure to use.
- 5.10 The objective of Brein's demands is copyright protection, which objective is also guaranteed / protected by Article 17, paragraph 2 of the Charter. In a framework as in the present case effective measures to achieve this goal can be (a) if persons who committed copyright infringement started doing this to a lesser extent, so that the number of infringements committed by them decreases, or (b) if the impact of infringements is reduced, for example because the public that perceives the infringing acts becomes smaller.
- 5.11 The measures demanded by Brein aimed at achieving that *Ziggo et al.* no longer provide their subscribers with access to the website of TPB, can only affect the behaviour of the subscribers and thus not on the number of infringements that they commit via TPB, but not on the behaviour of the operators of TPB and the number of infringements committed by them. However, such measures may affect the impact of the infringements committed by the administrators of TPB.

- 5.12 Due to the reduction of the visit to TPB as a result of the blockade, the number of infringements which subscribers of *Ziggo et al.* commit via TPB are reduced. However, if it were so that, as *Ziggo et al.* brought forward, these subscribers circumvent the blockades by resorting to alternative torrent sites, if they do not already bypass the blockade through proxies, then there will be no reduction in the number of infringements committed by subscribers - despite the blockades and the resulting decrease in the number of visits to TPB -, but there is only a change in the way (in circumvention through a proxy) or 'indexer' through which the infringements are committed. In that case, the objective pursued is not brought closer and the blockade cannot be considered as effective. To this extent, the arguments brought forward by Brein as reflected in paragraph 5.9 do not hold. With regard to the infringements by the operators of TPB this is somewhat different, since, as far as a result of the blockages diversions to alternative torrent sites (not operated by the TPB administrators) occurred, the result of these blockages has been that the communications by the TPB administrators reached a smaller audience than would have been the case without blockages – as the 'avoiders' disappeared as part of TPBs public - so that the impact of infringements by the TPB administrators is declined through the blockades.
- 5.13 The Court will now first examine whether the avoidance behaviour of their subscribers, brought forward by *Ziggo et al.*, actually occurs. In doing so, the court will use the general term 'evasion' which covers 'circumvention' (e.g., by proxies) and the use of alternative torrent sites.
- 5.14 TNO report III referred to in paragraph 5.1 above concerns the network traffic at XS4ALL in the period 31 October 2011 to 30 April 2012, i.e., the period of three months before and three months after the start of blockade A. More specifically, TNO III contains the result of the analysis carried out by TNO, based on the network information provided by XS4ALL over the period referred to, on:
- i. the total daily volume of Internet traffic;
 - ii. daily volume BitTorrent classified network traffic;
 - iii. the total daily volume of Internet traffic divided by the daily volume BitTorrent classified network traffic.

In TNO III it is reported that none of these analyses shows a clear change, that the volume of traffic classified as BitTorrent network traffic in the three months after Blockade A was the same as during the three months before, and that, because the use of BitTorrent directly depends on the acquisition of torrent files and / or magnet links, the use of sources for these files, in spite of the blockage, appears to be unchanged. TNO mentions two potential causes, namely a) that the share of the TPB website on the availability and distribution of torrent files and / or magnet links in the Netherlands is less than expected, or b) that widespread use is made of the possibilities to circumvent the blockade of TPB. Cause a) is in the opinion of the

court, falls off on the grounds that, as Brein pointed out without being contradicted, before blockade A TPB was still high (unchallenged namely number 26) in the Dutch top 200 of most visited websites, so cause b) remains. Therefore, the findings in TNO III come down so that Blockade A is widely avoided. Additionally, TNO III refers to the in (*inter alia*) TNO II described ways to avoid a blockage, which include:

* The use of a different torrent site / 'indexer' than TPB (resorting to alternatives as mentioned in paragraphs 5.12 and 5.13);

* Reaching TPB by another route, for instance through a proxy (the circumvention mentioned in paragraphs 5.12 and 5.13).

These are the most simple avoidance methods requiring no additional software or modifications to the user's computer. With Brein (PA under 146) it is believed that the other methods of avoidance are too complicated for the average 'lazy' surfer (the 'average' surfer). Those other methods will therefore be discarded from further consideration

5.15 According to Brein no meaningful conclusions can be drawn, however, from TNO III (see paragraphs 168-194 PA). Firstly, Brein argued that it is not clear whether the traffic analysed by TNO 'all relates to BitTorrent traffic' now TNO III noted:

"By using this method of classification it is not possible to determine the exact amount of BitTorrent traffic. After all, other network traffic could be classified as BitTorrent, and vice versa. "

With this, Brein ignores however the fact that in addition to this passage, TNO III states (undisputed), that:

"This method of classification can, however, be used for an analysis of the relative volume of BitTorrent traffic. For example, an increase or decrease .

This makes Brein's argument as just mentioned, invalid. Furthermore, Brein put forward, that:

i. BitTorrent traffic shows strong growth - according to the report by Sandvine, submitted by Brein as exhibit 117, that traffic increased in the U.S. by about 40% - and in light of this trend, the fact that TNO sees no change "may well mean that the blockade might be effective."

ii. In TNO III no distinction is made between legal and illegal BitTorrent traffic while Facebook, for example, generates a lot of BitTorrent traffic. Failure to make this distinction is not convenient, according to Brein, because "Suppose there is a decrease in illegal BitTorrent traffic that is offset by a larger increase in the legal BitTorrent traffic? '.

These arguments, apparent from the accompanying terms used by Brein, also have a (very) speculative impact. In the Netherlands, it is apparent from TNO III, as far as it concerns XS4ALL, in the three months before blockade A, the situation did not occur that BitTorrent traffic

increased. Therefore, there is no reason to assume that there would have been an increase after that period, which, however, as Brein seems to wish to suggest, was prevented by the blockade. The court further notes that in the Sandive report, Facebook is in a different category than BitTorrent. In the light of this, the mention of Facebook in argument ii cannot be understood well. The final argument that Brein raised in this context, namely that the amount of BitTorrent traffic fluctuates sharply and that it is unclear where the fluctuations come from, does not change the fact that the total Internet traffic and BitTorrent traffic over the whole period studied, did not change significantly. The arguments discussed here, as it follows from the foregoing, cannot negate the finding, as reported by TNO, that blockade A is widely circumvented. It is also important that:

- Brein itself emphasized that other torrent sites like Kickass.to, Torrentz.eu and Isohunt have replaced TPB, that the 'lazy' Internet user who cannot immediately access TPB, will go to one of those competitors instead and that studies show that TPB users switch to alternatives (see *inter alia* PA 80-82, 91, 146, 150 and 170);

- Brein, although the burden of proof rests on her (see paragraph 5.6), did not make an eligible offer of (counter) proof (see paragraph 3.2).

Insofar Brein, given its statements in paragraphs 571 MoR and 132 and 140 PA, would still like to bring forward against TNO III that the measurement period used therein finished before many 'TPB-dedicated' proxies were 'taken down' (see paragraph 5.7. *in fine*), it cannot derive from this any valid argument, now that also the loss of a proxy, with the avoidance possibilities mentioned in paragraph 5.13 (an alternative torrent site or any other proxy) can easily be remedied. This also applies to blockade A1, which can therefore be aligned with blockade A preceding it.

5.16 In support of its argument that the measures sought are effective, Brein continued to rely on the Baywatch report and the 'Filesharing 2©12' report (PA under 155, 160 and 164).

5.17 The question raised in the Baywatch report is what the impact of the blockades is on online copyright infringement 'as a whole', examined on the basis of, *inter alia*, a *consumer survey* among a representative sample of the Dutch population aged 16 years and older. From that *consumer survey* (note 2 on page 8, 2nd paragraph on page 11) it emerged that, in the six months prior to the survey, approximately 25% of consumers had at some time downloaded from an illegal source and that of this group, approximately 20 - 30% (which is 4-6% of all consumers) as a result of the blockade started to download less from an illegal source or even stopped completely. On the other hand, there are also consumers who started to download more from illegal sources after the blockades, but (much) less than the 20-30% of downloaders which stopped or reduced their downloads. This result is consistent with the findings based on a *consumer survey* from the summer of 2012 referred to in Chapter 6 of the 'Filesharing 2©12' report, that after blockade A 1.9% of the customers of *Ziggo et al.* - of which 23.7%

downloaded from illegal sources – stopped with downloading from illegal sources and 3.6% downloaded less, while 1.1% downloaded more thereafter.

- 5.18 On page 29 of its PA Brein calculated on the basis of the rates of 1.9 and 3.6 (mentioned in the 'Filesharing 2©12' report (5.5% in total) - assuming Ziggo has 1.788 million subscribers and XS4ALL has 338,000 connections - that 'some 100,000' Ziggo subscribers and 'some 20,000' XS4ALL subscribers started to download less or not at all since blockade A was imposed. This calculation is considered correct in itself, albeit that Ziggo and XS4ALL reported a somewhat lower number of subscribers than the number used by Brein for its calculations (Ziggo in paragraph 93 SAZ: 1,500,000 subscribers, and XS4ALL in paragraph 16 PA: 250 000 subscribers) and consequently the results are slightly lower (80,000 instead of 'some 100,000' for Ziggo and approximately 14,000 instead of 'some 20,000' for XS4ALL). On the basis of these data it can be established that from the XS4ALL subscribers –to which TNO III related - after blockade A (1.9% of 338,000 or 250,000 =) approximately 6,500 or 4,750 persons stopped downloading and approximately (20,000 – 6,500 / 14,000 – 4,750 =) 13,500/9,250 persons reduced downloading. According to Brein, this shows that the blockade did definitely have an effect (PA under 160).
- 5.19 However, in the effectiveness test to be used here, it's not so much the number of subscribers which (still or no longer) commit infringements, but the number of infringements (still or no longer) committed by the subscribers of *Ziggo et al.*, if two persons, X and Y, each commit 50,000 infringements, then a measure that only leads to the disappearance of infringer Y is effective, but if X commits 50,000 infringements and Y only 2, then the action against Y has little effect. Now that the findings in TNO III, that the BitTorrent use under the XS4ALL subscribers after blockade A is unchanged and that this is caused by large-scale evasion of the blockade, are not invalidated as considered in paragraph 5.15, and that therefore those findings are to be taken as a starting point in these proceedings, it must be concluded that the decline in the number of visits to TPB assumed in paragraph 5.8 has not led to a significant reduction in the number of copyright infringements by XS4ALL subscribers. This indicates that the approximately 6,500/4,750 subscribers of XS4ALL who stopped downloading after blockade A, before that only took a (very) small part of the infringements for their account and that the approximately 13,500/9,750 XS4ALL subscribers who reduced their downloading after blockade A, previously already committed few infringements or reduced very little. It is to be taken into account here that it is rather obvious that the blockade exactly had an effect on those who already committed few infringements. As a rule, these will be the untrained Internet users, and as described above, on page 11 of TNO I a blockade will generally create a certain barrier for, in particular, such Internet users, who are not well familiar with the various possibilities of avoidance. While it rests upon Brein to bring forward and to proof this (see paragraph 5.6), it did not bring forward concretely / substantiate and in any case did not show that the 'stoppers' / 'reducers' after the blockage (s) reduced their infringements to a relevant extent. Overlooking all this, the court comes to the conclusion that the Baywatch report and the 'Filesharing 2©12' report do not alter the findings in TNO III.

- 5.20 It is likely that the phenomenon reported in TNO III for XS4ALL subscribers also occurs for Ziggo subscribers. Although - especially in this framework – this would have been its onus (see also paragraph 5.6.) Brein did not bring forward that this is different. In any case, it has not offered to provide any eligible (counter-) evidence (para. 3.2). Under these circumstances, what has been considered in paragraph 5.19 should be considered as applying *mutatis* to Ziggo subscribers.
- 5.21 The *consumer survey* used for the Baywatch report further revealed that after the blockades the number of consumers downloading from illegal sources, increased. For example, 3 months after blockade A, 22.5% of the subscribers of *Ziggo et al.* downloaded from illegal sources, 10 months after this blockade (i.e., on 1 December 2012) that percentage had risen to 25.2 (see page 9 and Table 4 of that report). That, in spite of the fact that a number of consumers stopped downloading from illegal sources, there had been an increase in the number of illegal downloaders, is explained in the Baywatch report with hypothesis that there other consumers had begun downloading from illegal sources. The court will now go by this statement, as a different explanation is not well thinkable and also not defended by the parties. The fact that, despite the blockade, the number of illegal downloaders has increased, indicates that a blockade does not prevent newcomers, at least a significant number of them, to start downloading from illegal sources.
- 5.22 The foregoing implies that it cannot be assumed that blockade A/A1 ordered by the court following the demand made by Brein has been effective in regard to the subscribers of *Ziggo et al.* The blockade demanded affects the freedom of entrepreneurship of *Ziggo et al.* - the freedom to act at their own discretion -, which is not altered by the fact that, as brought forward by Brein in its MoR (under 509, 544 ff and 609) and which was not (anymore) challenged by *Ziggo et al.* in a motivated way, the blockade costs *Ziggo et al.* almost nothing, is very simple and gives them no hassle and that, as also brought forward by Brein and remained unchallenged, *Ziggo et al.* continue to block and disconnect subscribers at a large scale. Even if there are or no costs and efforts connected to the blockade for *Ziggo et al.*, it constitutes an infringement of their freedom to act at their discretion. Given the fact that the demanded blockade must be considered ineffective and therefore does not contribute to the objective aimed at, to protect intellectual property as also set out in the Charter – taking into account that *Ziggo et al.* themselves do not engage in any infringements (see paragraph 4.1.) -, the principle of proportionality brings with it that therefore the degradation of the freedom of entrepreneurship of *Ziggo et al.* which is also guaranteed by the Charter, is not justified.
- 5.23 Furthermore, Brein brought forward (in points 563-564 MoR) that it would be misplaced to connect to the fact that there are other ways to illegality (the avoidance possibilities already mentioned), the consequence that the measures demanded by it in this case would not be effective. These other ways are also will also be pursued by it as part of a broader approach to the illegal distribution of protected works. The court understands, bearing also in mind the statements in paragraphs 597 and 598 MoR, that Brein (also) wants to argue that it uses a

'step-by-step approach', to which it is inherent that they should start somewhere, in this case with blockade A, which Brein deemed necessary because the court Order it requested in 2010 in a Dutch procedure on the merits against the operators of TPB to make the site inaccessible, under penalty of forfeiture of penalties, had not proved feasible (Conclusion in Reply under 208-210). The operators of TPB, which in Sweden had been sentenced to long prison terms, are "elusive" according to Brein. From the theorems of Brein it can be derived that in its proposed 'broader approach' / 'step-by-step approach' the following (continued) measures are aimed at:

- a. to obtain an order instructing access providers to also prevent the use of alternatives to TPB;
- b. to 'knockdown' proxies;
- c. to take action against the operators of alternative torrent sites.

Under PA 147 Brein stated that - because the beneficiaries have reconciled themselves with the fact that not all the illegal traffic on the Internet can be stopped - it focuses on "the greatest excesses, such as The Pirate Bay, and Kickass.to and Torrentz.eu. Under 91 PA Brein stated that "at present (there are) only a handful of BitTorrent websites that can really handle competition with The Pirate Bay". Under PA 237 Brein stated that the cases against other illegal sites are in preparation, and that the present case is a test case against TPB, which apparently means: a test case against providers on the blockade of TPB.

- 5.24 Is not well understood - especially without further explanation - why Brein in its proceedings against the providers (this procedure and the procedure against KPN cs paragraph see paragraph 5.7) did not also demand an order to block the only 'handful' Bittorrent Sites competing with TPB which, jointly with TPB, form the 'greatest excesses' (Kickass.to, Torrentz.eu and perhaps Isohunt). Because this 'handful' of competitive Bittorrent Sites did not also have to be summoned in the proceedings against the providers - just as it was not necessary to challenge TPB in this procedure – this would not have yielded any special procedural and factual complications. In any case, it is difficult to understand why the cases concerning this individual alternative BitTorrent sites – a year and a half / almost two years after the time which has elapsed since the contested judgment on which basis blockade A was set - are still only in the preparatory phase. The argument evidently used for this by Brein that it first wants to await the outcome of the test case, which this case is in her eyes, is not conclusive because the outcome of this 'test case' is to a large extent defined by the fact that there are active alternative Bittorrent Sites. In this situation the court considers measure a. regarding the appeal on the use of a "step-by-step approach" not justified. There was no good reason for Brein to not already take the next step, at least Brein, although in the light of the above considerations and the considerations under 5.6 this would have been its onus, did not make (sufficiently) clear, that it had a good reason for this. Measure b. can, as already considered under 5.15 *in fine*, simply be avoided, while measure c. can also not be considered as providing solace. Now that court orders / prohibitions against the operators of TPB have not

proved feasible, it is not - at least not just like that – likely that the execution of judgments which may be obtained against the operators of the other ‘major excesses’ websites would be feasible. If it were feasible, then it is not (made) clear why Brein has (still) not taken action against (the operators) of such other sites. Therefore, also the follow-up measures b. and c. can not constitute a sufficient ground for Brein's appeal on a "broader approach" / "step-by-step approach. Therefore in this case, this approach cannot serve as compensation for the lack of (immediate) effectiveness. Brein's reasoning in paragraph 5.23 fails for this reason.

- 5.25 Given what has been considered under 5.12, it cannot be said that the blockade demanded by Brein lacked effectiveness with respect to the infringements on the 'art work' committed by the operators of TPB. However, Brein did not demand the blockade with a view to the protection of copyright in the 'art work', but with a view to the protection of copyright in music, film, games and (e-) books (see, inter alia, section 10 of the writ, paragraph 3 of the Conclusion in Reply, paragraph 7 MoR and paragraphs 15 and 47 of Brein's PA). Under PA 16-18 Brein again stressed that its target is the negative impact of "filesharing" on the sales of the entertainment industry. Filesharing does not relate to the "art work" on the TPBs server (see paragraph 4.7), but to the music, films, games and books / e-books themselves, and the sales of the entertainment industry are also not generated by the "art work" but by music, films, games and books / e-books. Therefore, the interests of the rights holders in termination / prevention of copyright infringement on the "art work" are not sufficiently important to justify the deterioration of the company freedom of *Ziggo et al.* - who do themselves infringe the copyright in the 'art work'. Although the non-effectiveness defence of *Ziggo et al.* for this category of offenses fails, the subsequent demands by Brein based on those fall through on account the principle of proportionality on which *Ziggo et al.* also relied more generally, regardless of their non-defence effectiveness.
- 5.26 All this leads to the conclusion that the measures demanded by Brein are inconsistent with the principle of proportionality / effectiveness. *Ziggo's* counter-plea 12 and counter-plea XIII of XS4ALL, in which the defences to this effect are laid down, is meaningful. This implies that the demands of Brein are not attributable on the basis of the primary arguments which were brought forward.

The demands of Brein on the basis of secondary arguments

- 6.1 The secondary arguments for the demands of Brein - now to be assessed – has been explained by it as follows. *Ziggo et al.* continued to give to TPB, even after the obvious illegal and harmful nature had been pointed out to them, together with the fact that the operators of TPB in a Dutch procedure on the merits had irrevocably been condemned to cease their services, while access could have been blocked easily and at low cost by *Ziggo et al.* and they also had included in their terms and conditions that their subscribers were not allowed to infringe any intellectual property rights. In so doing *Ziggo et al.* make themselves guilty of knowingly and

structural facilitation and thus of promoting large-scale infringements by their subscribers. According to Ziggo - which also points out that it acts exclusively on the basis of '*mere conduit*' (SAZ under 33-36) - it does not act unlawfully and cannot be reproached for this. XS4ALL also denies that it acted unlawfully. It states in particular that it provides a *mere conduit* service, that it follows from Article 12 Reh / 6:196 Civil Code that it is not liable for the information to which it provides its subscribers access, and that thus it cannot be obliged on the basis of standard of care measures to take certain measures (PF among 53-55, 12-15 SAX below). The Court further observes that the appeal of Ziggo and XS4ALL on the principle of proportionality / effectiveness should be presumed to have been done in this regard as well.

- 6.2 On appeal it is not (any longer) disputed that *Ziggo et al.* are access providers which, also in respect of TPB, solely commit acts which can be classified as *mere conduit*. Therefore, they do not infringe copyright, as set out under 4.1, and therefore, based on Article 12 Reh / 6:196 c paragraphs 1 and 2 Civil Code, they are exempted from liability. An access provider will typically not be invoked for negligent behaviour if it has taken under those articles the measures which are needed in order to qualify for exemption from liability, but it is not completely excluded. Under special circumstances, considering the specific interests involved, an act may perhaps be negligent anyway, so that - even though it won't be possible to claim damages due to the exemption - on the basis of article 3:296 Civil Code an order or judgment may be given. In the event, however, that the conditions for indemnification have been fulfilled and, in addition, the obligation placed upon the provider is disproportionate and / or ineffective, the failure of the provider to comply cannot be regarded as contrary to the standard of care - a provider is not obliged to take measures which are disproportionate or ineffective for him - so in that case, according to Dutch law, no order or judgment may be imposed (see paragraph 7.11 of the Leeuwarden Court of Appeal judgment of 22 May 2012 in the case of '*Stokke / Marketplace*' ECLI:NL:RBZLY:2007:BA4950). Now that it has been considered above that the measures demanded by Brein are not proportionate / effective, the secondary arguments brought forward cannot bear Brein's demands. Therefore, also on this basis its demands are not assignable.

Conclusion and costs

- 7.1 The contested final judgment will be quashed and the Brein's demands will be rejected.
- 7.2 XS4ALL cannot be declared admissible in its appeal against the interlocutory judgment, for the mere reason that it raised no objections against it. It is hard to see what interest Ziggo would have in its request - also still in SAZ - in requesting abrogation of the interlocutory judgment, in which Ziggo's requests to put the case on hold and ask prejudicial questions were rejected and which did not contain any decisions susceptible to execution. Ziggo will likewise not be declared admissible in its appeal against the interlocutory judgment.

- 7.3 Brein, as the unsuccessful party, is sentenced to pay the costs of the appeal and the first instance. Article 1019h Rv applies in this case. On the basis of this provision, both Ziggo and XS4ALL demanded in their SAs remuneration of the 'full' costs of the proceedings in both instances.
- 7.4 For the first instance, Ziggo and XS4ALL estimated their costs at € 137,673.63 and € 52,217.50 respectively. It is plausible that these costs are actually incurred, given the specifications submitted and in light of the fact that Brein itself had charged for the first instance a higher amount, namely € 148,262.44. The defence raised by Brein in the first instance that the cost of *Ziggo et al.* had been insufficiently specified (PF under 277) is rejected on this basis. The interest of the other defence brought forward by Brein in the first instance (see paragraph 276 PF), that the cost statements were submitted too late in the first instance, has now been rendered ineffective. On appeal Brein had yet the opportunity to respond to the cost statements which had been submitted in the first instance; however, it has not done so (in a sufficiently clear manner). The cost of *Ziggo et al.* for the first instance will be determined according to their estimates listed above.
- 7.5 XS4ALL sent, as production No. 75, a cost statement for the appeal, totalling - with the correction mentioned in paragraph 71 of its PA - € 67,550 - for the 'hours performed' already and € 14.500, - for the number of 'estimated hours' for the pleadings. This piece was received at the court on September 10, 2013, which is after the deadline set for the submission of documents in Article 2.17 of the National rules on court proceedings for civil summons cases in the courts of appeal 2011 (hereinafter the procedural rules), i.e., two weeks before the pleadings in the case at the latest (cf. The Hague Court of Appeal, 24-02-2009, '*Carmo / Reich*', IEPT20090224). The objection made by Brein on presentation of production 75 is therefore successful regarding the item 'hours already carried out' in the period before September 5, 2013, so that this piece will be disregarded to this extent. The claim based on article 1019h Rv for the amount of € 67,550, - lacks specification as a result of this and will for that reason be rejected. For the costs incurred in the last two weeks before the pleadings, the aforementioned rule of the procedural rules does not apply. The court considers the specification of these, having regard also to the cost breakdown of the other parties, to be sufficient. The article 1019h Rv claim related to this and amounting to € 14.500, - is therefore admissible. For the rest, the costs incurred by XS4ALL will be estimated on the basis of the liquidation rate on appeal (1 point for SAX).
- 7.6 Brein - rightly – did not object against the timing of the submission of Ziggo's cost statements on appeal. The fee calculated by Ziggo for the appeal total € 170,722.24 (or € 189,000, - as it noted in its plea). According to Brein, this amount is disproportionate, given its own costs on appeal of only € 113,878.15 (see Brein's production on appeal No. 147 Brein) and, in addition, contains meaningless descriptions like 'draft production' and 'various activities' which are insufficiently specified. Given the level of costs that Brein (unchallenged) claims to have made and taking into account that XS4ALL estimated its costs for the appeal at even less than

€ 100,000, the court will partially honour Brein's disproportionality objection fix the reasonable and proportionate legal costs and other expenses of Ziggo *ex aequo et bono* at € 120.000. Contrary to Brein's opinion, there is no reason to fix Ziggo's costs on appeal at a lower amount.

Decision

The Court of Appeal:

- declares *Ziggo et al.* inadmissible in their appeal against the interlocutory judgment delivered between the parties by the District Court of The Hague on December 8, 2010;
- annuls the final judgment between the parties delivered by the District Court of The Hague on January 11, 2012, and hereby re-doing justice:
- Dismisses the demands of Brein;
- condemns Brein in the costs of the proceedings at first instance, to date, on the part of Ziggo estimated at € 137,673.63, and on the side of XS4ALL at € 52,217.50;
- Condemns Brein in the costs of the appeal proceedings, to date, on the part of Ziggo estimated at €120.000, - and on the side of XS4ALL at € 16,030, -, of which € 666, - for disbursements and € 5,364, - for salary;
- Declares this judgment in respect of the costs of the proceedings enforceable.

This judgment was delivered by M.Y. Bonneur, A.D. Kiers-Becking and J.H. Gerards, it was pronounced in open court on January 28, 2014 in the presence of the Registrar.