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Content indicator: A service provider may be obliged to provide the information sought to rights holders (or their representatives). For this purpose, the Court must first of all be satisfied that there have been (unlawful) infringement activities by the subscribers concerned and, secondly, that it is beyond reasonable doubt that those whose identifying information is made available are also actually those who have been guilty of the relevant activities. In such a case, it may be that the privacy interests of those concerned in retaining the secrecy of their information must yield to the interests of the rights holders in countering the illegal activities. Those criteria are applicable in this case.

Judgment

AB/MB

Judgment of 24 August 2006

**COURT IN THE DISTRICT AREA OF AMSTERDAM
INTERLOCUTORY JUDGE IN INTERLOCUTORY PROCEEDINGS
JUDGMENT**

in the case numbered 345291 / KG 06-1112 AB of:

the foundation **STICHTING BESCHERMING RECHTEN ENTERTAINMENT
INDUSTRIE NEDERLAND** (BREIN Foundation), having its registered office in
Amsterdam,

Plaintiff in a Summons of 21 July 2006,

Counsel: J.M.B Seignette,

Advocates J.M.B. Seignette and R.M. Brouwer, Amsterdam,

against:

the private limited liability company **UPC NEDERLAND B.V.**, having its registered
office in Amsterdam,

Defendant,

Counsel: Chr. A. Alberdingk Thijm.

HISTORY OF THE CASE

At the hearing on 15 August 2006, the Plaintiff, hereafter referred to as 'BREIN',
after reducing its claim, made its argument and claim in accordance with the

photocopy Summons annexed to this Judgment. The Defendant, hereafter 'UPC', led its defence and pled for rejection of the relief sought. After further debate, the parties asked for a Judgment to be issued.

GROUND OF THE DECISION

1. This Judgment proceeds on the basis of the following facts.
 - a. BREIN's purposes, in terms of Article 3 of its Articles of Association, include:
 - “a. the prevention and combating of illegal exploitation of information media and information in the broadest sense;
 - b. assisting the Foundation's affiliates and also individual members of those affiliates in the defence of their interests;
 - c. raising and arranging for the raising of legal actions to protect the rights and interests of its affiliates and the members of those affiliates, and to obtain payment of any losses sustained by them as a result of illegal exploitation of information (...).”The BREIN affiliates include BUMA and STEMRA, the members of the Motion Picture Association of America, the members of the Netherlands Association of Producers and Importers of Audio and Visual Media, and the Netherlands Association of Film Hirers.
 - b. UPC is an internet service provider and provides these services under the name of Chello. Chello offers its subscribers cable access to the internet. Subscribers to Chello receive an email address and/or can make one up, ending in the suffix @chello.nl.
 - c. Service providers provide their subscribers' computers (or servers) with an 'IP address' for the provision of the internet, for each time a subscriber connects to the internet. With an IP Address, certain internet transactions can be traced back to the computer (or server) from which they were carried out.
 - d. On 15 April 2005, a number of service providers (including UPC) issued a Summons against BREIN in a proceeding on the merits at the District Court in Haarlem. In these proceedings, the service providers included a plea for a declaration at law, to put it briefly, that they were not acting unlawfully towards BREIN by failing to provide name and address information of their subscribers, and that they were not obliged to provide such information, pursuant to the Dutch Protection of Personal Information Act [*Wet bescherming persoonsgegevens*].
 - e. In the period between 1 April 2005 and 9 February 2006, feature films, television series, music, software and computer games, or parts of them, were offered via the 'Bit Torrent' network 'Dikke Donder' (available during the period in question via www.dikkedonder.org, www.dikkedonder.nl, www.dikkedonder.be en www.dikkedonder.tk), without having applied for permission from the rights holders. Using the Bit Torrent technology, a file can be downloaded in sections from several computers at the same time, with the downloaded sections then being immediately uploaded again to other users. Bit Torrent is therefore suitable for the exchange of large files via the internet.
 - f. Having obtained leave from the Interlocutory Court in Dordrecht, BREIN placed an attachment on the computer server for the Dikke Donder website (hereafter 'the server') on 9 February 2006. Since then, the Dikke Donder website has no longer been available via the domains mentioned above. The owner of the server renounced this accessibility in favour of BREIN. The Dikke Donder website showed what titles were being offered via Dikke Donder, who was offering

- them and when. The site also maintained a Top 250 list of the biggest uploaders. The uploaders with the user names of lex1a, muzan en bws were amongst those at the top of the list. These uploaders were offering films such as Harry Potter and the Goblet of Fire, Monster in Law, Memoirs of a Geisha, Bambi 2 and Flodder in America, often when these films had not yet been shown in the cinema in the Netherlands and/or before they had been brought out on DVD.
- g. The server contained IP addresses of the three uploaders mentioned above, and also the email addresses they had used to log on to Dikke Donder in or about April 2005, namely [email address 1] (lex1a) (relevant IP address according to the Summons [IP address]), [email address 2] (muzan) (IP address according to the Summons [IP address]) and [email address 3] (IP address according to the Summons 213.93.135.66)
 - h. In an email of 3 March 2006, Mr. T. Kuik, managing director of BREIN wrote the following to [manager UPC] manager of policy and regulation at UPC: “As we discussed, we will be asking for release of the relevant personal information from you in the near future. In this connection, we discussed that I would in the meantime give you the IP numbers so that you could get on with tracking down and retaining the relevant name and address information.”
 - i. On 11 and 16 March 2006, BREIN wrote to the uploaders at the said email addresses, holding them liable for the losses sustained as a result of infringement of intellectual property rights, and asked them to sign a restraint declaration. No response was forthcoming. A report was also generated to the effect that the said email addresses were no longer in existence.
 - j. In a letter of 12 June 2006, BREIN asked UPC to provide the name and address information pertaining to the said three email addresses.
 - k. On 10 August 2006, UPC copied to its lawyer email messages from the UPC technical department, dated 3 and 7 March 2006, containing the name and address information for the email addresses [email address 1] and [email address 3], partly based on an investigation into the IP addresses. No information was supplied in relation to [email address 2]. Under the printout for the said IP address of the user muzan, there was a note stating: “Cannot match any customer”. UPC lodged these documents in process, including the name and address information for two of the three uploaders, by sending them to the Interlocutory Judge and the lawyer for BREIN.
 - l. In a report dated 11 August 2006, prepared at the request of BREIN’s lawyer by Dr. R.J. Veldwijk and F.G.W. van Orden (IT experts trained at the Free University, Amsterdam [*Vrije Universiteit Amsterdam*] and the University of Twente respectively), the authors concluded “that the link in the Dikke Donder database between a particular email address and a particular User ID means, with virtual certainty, that the user of that email address has uploaded the torrent files and the content files of the titles noted in the database for that User ID.”
 - m. In an email of 14 August 2006, Kuik asked Weening to supply once more the name and address information for the email address [email address 2]. UPC did not respond to this.
2. BREIN withdrew its claim for the disclosure of the name and address details for the email addresses [email address 1] and [email address 3], because it had by then received this information via the exhibits lodged by UPC. It is now confining its claim to an order against UPC to disclose (in writing) the name and

address information relating to the email address [email address 2], with a note of the period during which this individual was a subscriber to UPC (between 1 April 2005 and the date of disclosure), under penalty of a judicial fine and with an order against UPC for the costs of the proceedings.

3. BREIN's explanation of its claim is as follows. Uploading works such as films and music is a form of publication within the meaning of Section 12 of the Copyright Act and provision of availability as defined in Sections 2.1.d and 7a.1.c of the Ancillary Rights Act. As this occurred without permission from the rights holders, these were unlawful actions against them. In order to address this, BREIN requires the name and address information. Even if there were no ostensibly unlawful actions on the part of the uploaders, which there are in this case, the service provider - UPC in this case - would still be obliged to provide the relevant information to BREIN. It is acting unlawfully by failing to do so. The privacy interests of the subscribers carry less weight in such a case than the interests of BREIN in being able to take steps against those perpetrating infringements. It is virtually certain that whoever uses the relevant email address is also the actual person perpetrating the infringements. It is also beyond doubt that the individual who connected to Dikke Donder in April 2005 using the email address [email address 2] retained this address thereafter, at least during the period when he was uploading illegal films under the user name of muzan. The chance of another innocent user using this name in the interim is minimal. UPC would also be able to establish this from its administration records. The fact that the IP address could not be connected to the relevant user at particular times does not detract from this. In addition, BREIN approaches those parties potentially involved with caution so that, in the hypothetical case that the email address belongs to someone other than the individual perpetrating the infringements, that third party would suffer little or no inconvenience. The Dikke Donder site may well have gone 'off air', but there is a significant chance that the major uploaders will hunt down a different Bit Torrent network in order to continue their practices. Film-makers, producers and other rights holders will lose a lot of income as a result. BREIN, which represents their interests, accordingly has a major and urgent interest in the claim being awarded. UPC had originally promised to heed to opinion of the Court on the issue of disclosing the name and address information, but lodged substantive defences at the last moment, much to BREIN's surprise.
4. UPC denies having made this promise and has lodged a reasoned and substantive defence against the claim, which defence will be discussed below, in the assessment of the dispute.

Assessment of the dispute.

5. The underlying assumption is that the publication of music, videos and films via the internet, so that they become accessible to other users, can be classified as publication within the meaning of the Dutch Copyright Act and as provision of availability as defined in the Dutch Ancillary Rights Act. This means that, if this is done without the permission of the rights holders, there will in principle be an infringement of the rights (intellectual property ones and/or ancillary ones) of those rights holders and thus unlawful action in relation to them. It is not in

dispute that the rights holders of a (large) proportion of the titles offered via the Dikke Donder network are affiliated to BREIN and that, because of its purposes, BREIN therefore has title and interest in instituting the claim for disclosure of the name and address information.

6. Contrary to the allegation by UPC, BREIN has an adequate - urgent - interest in the relief sought, namely its interest in bringing alleged infringement activities to an end as quickly as possible. It cannot be required to wait for the results of a proceeding on the merits that has been raised in the meantime.
7. A service provider may, in certain circumstances, be obliged to provide rights holders (or their representatives) with the information asked for. For this, the Court must first of all be satisfied that there have been (unlawful) infringement activities by the subscribers concerned and, secondly, that it is beyond reasonable doubt that those whose identifying information is made available are also actually those who have been guilty of the relevant activities. In such a case, it may be that the privacy interests of those concerned in retaining the secrecy of their information must yield to the interests of the rights holders in countering the unlawful activities.
8. The Court is satisfied that the individuals who made the files available ('uploaded') via Dikke Donder, under the user names of lex1a, muzan and bws, did so without having obtained permission from the rights holders and that they infringed the latter's copyright and/or ancillary rights. It is unlikely that there had been only incidental uploading, or uploading of files in small segments (comparable with making a copy for private use), in which case there might not have been an infringement, or else the way in which the infringing individuals were dealt with might have been disproportionate. The files found in the BREIN server do, in fact, point to the enormous scale of the provision of availability of a number of (protected) works.
9. Also, UPC has not denied that the said users used the email addresses, which are the subject of this action, when logging on to Dikke Donder. Thus, in the report mentioned at point 11, the investigators concluded that the user of the relevant email address was, with virtual certainty, the individual who made the files available under the relevant user name. UPC has now arranged for BREIN to have the name and address details for two out of the three email addresses. The question that remains is whether it is established beyond reasonable doubt that the third address [email address 2] might (still) belong to the individual whose user name is muzan, and whether that is actually the same individual who acted unlawfully. UPC has alleged that this individual may well have logged on originally using this email address, but that it is what is described as a 'secondary' email address (not composed by UPC, but by the individual himself), that can be altered at any time without UPC keeping a record of this. UPC has been able to establish that this secondary email address is currently active, but does not know how long that has been the case and therefore does not know whether the usage has been uninterrupted. Muzan could, in a manner of speaking, have cancelled the address the day after he logged on, whereupon it would be freely available to other users. As Muzan is a quite commonly occurring Arabic name, UPC considers there is every chance that a third-party,

'innocent' user took on the name at a later point, so that there is indeed some doubt as to whether the email address still belongs to the actual uploader. In order to remove this doubt and to identify the potential infringing party sufficiently, BREIN ought to have provided, at the least, three combinations of identifying data (IP addresses) with dates and times, according to UPC.

10. Based on the information in the Dikke Donder server, it must in any event be accepted that 'muzan' made files available in the period between April 2005 and February 2006, under that user name. The contact address he had given when logging on was [email address 2]. At the date of the hearing, this email address was 'on air'. This was also the position in May 2006, as BREIN would otherwise have had its warning letter - sent to that email address - returned as being 'undeliverable'. UPC has not denied that the user name and the email address were linked to each other in the Dikke Donder network, in the sense that anyone who did not change his user name kept the same email address. If, therefore, muzan wanted to receive messages from the Dikke Donder network, that would only have been possible via the same email address. A secondary email address - as was explained on behalf of UPC at the hearing - is linked to a primary email address. There was neither argument nor evidence to the effect that the primary email address pertaining to [email address 2] had been changed since April 2005.
11. However, the concurrence of circumstances, as outlined by UPC - that muzan did indeed continue to use the same user name, but cancelled his email address as provided to Dikke Donder, so that he could no longer receive any messages from Dikke Donder, and that some innocent third party who has had a primary email address since April 2005, happened upon exactly this cancelled address and started to use it as his secondary address, but failed to respond to the warnings from BREIN - is so theoretical that it cannot be compared with the existence of 'reasonable doubt' on the question of whether the email address (still) belongs to the individual who must be assumed to have acted illegally under the user name of muzan. This is not altered by the fact that a reliable identification via the provision of the IP addresses, combined with various dates and times when these were on-line, should also be feasible.
12. UPC also alleged that BREIN's claim cannot be admitted as this would lead to an 'irreversible situation', namely the disclosure of information on a potentially innocent third party. The mere fact that the sanction sought might result in some irreparable disadvantage to a subscriber cannot, however, justify a finding that BREIN's claim should not be admitted, or that it should be rejected for precisely that reason. The irreversibility of the consequences is one of the circumstances that has been considered in assessing whether the sanction being sought is admissible. In this case, the consequences for the potential innocent third party are not so weighty that they justify the rejection of the claim on their own.
13. All of this leads to the conclusion that, since the criteria mentioned at point 7 have been fulfilled and BREIN has a sufficiently urgent interest in the claim being awarded, the claim shall be awarded, and the penalty will be meted out and maximised as detailed below. Since UPC has alleged that it cannot investigate when the user of the address [email address 2] became a subscriber

in the period after 1 April 2005, unless there had been a change in the preceding 3 months - which is the custody period UPC has to use as a service provider - the order to report the details for the period during which the subscription was active will be limited to that period.

14. As the unsuccessful party, UPC will be ordered to pay the costs of this action.

DECISION IN INTERLOCUTORY PROCEEDINGS

The Interlocutory Judge:

1. orders UPC, within two days after the date of this Judgment, to make a written report to BREIN's lawyer of the name and residential address of the subscriber (or former subscriber) to UPC with the email address [email address 2], and a note of the period during which this individual has been a subscriber during the past three months;
2. determines that UPC will forfeit a judicial penalty of €1,000 for every day or part of a day during which it fails to comply with the order made at 1, above, subject to a maximum of €50,000;
3. orders UPC to pay the costs of this action, estimated as at today's date, as far as BREIN is concerned, at:
 - €84.87 of bailiff's writ expenses,
 - €248.00 of Court fees, and
 - €816.00 for legal fees;
4. declares that this Judgment is enforceable regardless of any appeal;
5. rejects all other and further pleas.

Issued by the Vice-President, Judge A.J. Beukenhorst, Interlocutory Judge at the District Court in Amsterdam, and pronounced in the public session of the Court on Thursday 24 August 2006, in the presence of the Clerk of Court.