

THE COURT OF APPEAL OF AMSTERDAM, FIFTH DIVISION FOR CIVIL AFFAIRS

DECISION

In the case of:

the foundation in Dutch law STICHTING BESCHERMING RECHTEN ENTERTAINMENT  
INDUSTRIE NEDERLAND, BREIN,  
with registered offices in Hoofddorp, municipality of Haarlemmermeer  
APPELLANT  
*procurator litis*: W.A. Roos

versus:  
the private limited liability company TECHNO DESIGN "INTERNET PROGRAMMING" B.V.,  
with registered offices in Zoetermeer  
RESPONDENT  
*procurator litis*: K.P. Evelein

**1. The proceedings in appeal**  
1.1 In its writ of summons in appeal of 11 June 2004, the appellant, Brein, appealed against a number of elements of the judgement rendered between the parties by the District Court of Haarlem under cause list no. 85489/HA ZA 02-992 and pronounced on 12 May 2004, summoning the respondent, Techno Design, to appear before the Court of Appeal of Amsterdam.

1.2 In its subsequent Notice of Appeal, Brein lodged thirteen objections against the disputed judgement, offered to provide evidence and submitted exhibits to the proceedings, concluding, if the Court of Appeal understands this correctly, that the Court of Appeal should quash the disputed judgement, to the extent that Techno Design's claims had been admitted and Brein's claims had been rejected and, rendering judgement anew to that extent, should reject Techno Design's claims as yet and admit Brein's claims in full in an immediately enforceable decision, and should order Techno Design to bear the costs of the proceedings in both instances.

1.3 Techno Design responded in its Notice of Reply in appeal, deferring to the Court of Appeal's decision.

1.4 Finally, the parties requested the Court of Appeal to render a decision on the basis of the documents submitted in first instance and in the appeal.

**2. The objections**  
The Court of Appeal refers to the Notice of Appeal for the objections.

**3. The basis on which the Court of Appeal is proceeding**  
The District Court confirmed a number of facts in legal consideration no. 2 under a. to g inclusive of the judgement of 12 May 2004. The first objection concerns the facts confirmed under e. The Court of Appeal will discuss that objection below. The facts

otherwise confirmed by the District Court are not in dispute, so that the Court of Appeal will also proceed on the basis of those same facts.

#### 4. The appeal

4.1 The present proceedings focus on the following.

4.1.1 Brein was incorporated by a number of organisations: the foundation in Dutch law, *Geluidsdragers* (the Dutch Association for the producers and importers of image and sound carriers or *NVPI*), the Motion Pictures Association (MPA), the *Nederlandse Vereniging van Filmverhuurders* (the Dutch association for film rental or *NVF*) and the *Nederlandse Uitgeversbond* (the Dutch Publishers' Association or *NUV*). These 'incorporating' organisations and their members are affiliated to Brein. Brein's objects are to protect the interests of the right-holders to audio, video and interactive products. In order to achieve this, Brein also takes legal action against the wrongful exploitation of data carriers and the data recorded thereon. The *Buma*, an association in Dutch law, and the members of the International Federation of Phonographic Industries (IFPI) have authorised Brein to promote their interests in connection with the wrongful exploitation of recordings of musical performances and, in order to achieve that, to lodge claims for damages and to demand prohibitions on their behalf. The persons and organisations affiliated to Brein (hereinafter: 'the Brein members') hold the copyrights and/or neighbouring rights to approximately 90% of the recordings of musical performances published on sound carriers in The Netherlands.

4.1.2 Techno Design is proprietor of the *zoekmp3.nl* website and a number of similar sites (hereinafter jointly referred to as: *zoekmp3.nl*). On *zoekmp3.nl*, Techno Design offers its visitors the opportunity to locate mp3 music files (which are compressed data files) on the 'World Wide Web'. If a search ordered by a user of *zoekmp3.nl* produces results, Techno Design supplies hyperlinks or deep links to the desired mp3 music files on that 'World Wide Web'. If its visitor clicks on that link, his computer will contact the server where the file has been found, and that file can then be directly downloaded onto the user's computer. Techno Design's website also offers the user information on the mp3 music files, for example on the quality; this information is stored on Techno Design's database.

4.1.3 Techno Design generates income by screening advertisements on its website: the more visitors to its website, the more income. Techno Design also sells ring-tones on its site; these are, at least to some extent, simplified versions of the musical works to which Techno Design's hyperlinks/deep links refer.

4.1.4 Most of the links on Techno Design's database are for the mp3 music files in the pop repertoire (the Top 40 etc.). *zoekmp3.nl* largely targets internet users in the 13 to 25 age bracket, and it is a popular site with this group of mp3 downloading internet users, scoring more than 100,000 page views per day, at any rate until the disputed judgement was rendered.

4.1.5 Visitors to the Techno Design website use *zoekmp3.nl* to download music files which have been communicated to the public in a manner which is 'tortious' vis-à-vis the right-holders, in view of the fact that these works are protected by

copyrights and neighbouring rights and in view of the fact that the right-holders have granted no permission for their works to be communicated. Brein wishes to end this practice. It believes that those visitors are breaching rights which are vested in its members, and that by offering these facilities on its website, Techno Design is breaching the principles of due care. Techno Design adopted the position that it was not guilty of any legally relevant 'tort', after which it took legal action against Brein, in brief, to seek the court's confirmation that its actions were permissible in law. Brein conducted a defence and lodged counter-claims.

4.1.6 Techno Design closed zoekmp3.nl down on 11 June 2004. Brein however fears that Techno Design will nevertheless resume operating what it (Brein) believes to be illegal mp3 sites.

4.2 The disputed judgement

4.2.1 In the disputed judgement, the District Court issued the following declaratory judgements on the subject of Techno Design's claim in the principal action:

- that Techno Design is not infringing on the copyrights or neighbouring rights of the Brein members by offering links on the zoekmp3.nl website, as described in legal consideration 2.e of the judgement;
- that Techno Design is not acting 'tortiously' vis-à-vis the Brein members by acting in the manner described above, barring the extent to which it is offering links to mp3 music files which the Brein members report to Techno Design as constituting an infringement of their copyrights or neighbouring rights or an otherwise 'tortious' mp3 file, while there is no reasonable doubt of the accuracy of that claim.

The remainder of Techno Design's claims were rejected and Brein was ordered to bear the costs of the proceedings.

In the cross-action, the District Court rejected Brein's claims, and ordered it to bear the costs of the proceedings.

4.2.2 The District Court motivated its decisions in respect of the copyright and/or neighbouring rights on which Brein had based its claims as follows. The District Court bouring rights on which Brein had based its claims as follows. The District Court opted for the position that the Brein members are the holders of the copyrights and/or neighbouring rights to a number of musical works (or a substantial portion thereof) which can be accessed via the links in the zoekmp3.nl database and that their rights are being infringed on if those musical works are being communicated to the public without their permission (legal consideration 6.5). The District Court then went on to discuss the question whether Techno Design's actions could be deemed to constitute a primary communication to the public in the sense of the 1912 Netherlands Copyright Act or the Dutch Act on Neighbouring Rights. The court however responded to that question in the negative, after having concluded that Techno Design was not making music files available to the users of zoekmp3.nl independently (legal considerations 6.8 to 6.10 inclusive).

Neither did the District Court believe that there was question of a secondary communication to the public, believing that the fact that the mp3 music files were being transmitted directly from the file's individual provider to the user after Techno Design had informed the user via the hyperlinks/deep links where the desired mp3 file could be found was of conclusive significance. The District Court sought support in EC directive no. 29/10 by the European Parliament and the Council of 22 May

2001 concerning the harmonisation of certain aspects of copyrights and neighbouring rights in the information society and the position adopted by the Dutch legislature in the implementation of this directive in Dutch legislation (legal considerations 6.11 and 6.12).

After having confirmed that none of Techno Design's other disputed actions constituted an infringement of the copyrights or neighbouring rights of the Brain members, the District Court concluded that Techno Design was not infringing on the copyrights or neighbouring rights of the Brain members (legal considerations 6.13 and 6.14).

4.2.3 The District Court then went on to examine whether Techno Design's actions were 'tortious' vis-à-vis the Brain members.

The mere fact that a search for mp3 files on the internet is greatly simplified by using the facilities which Techno Design offers on its website, is insufficient to conclude that Techno Design is guilty of a 'tort', at any rate according to the District Court. This is especially relevant in view of the fact that zoekmp3.nl's service also provides access to applications which are in principal legitimate, such as playing mp3 music files for private use (legal consideration 6.18).

Moreover, the fact that facilities and services which could lead to infringing and 'tortious' acts by third parties are being made available, does not in itself entail that the provider of those facilities and services is in fact guilty of a 'tort'. This could be otherwise in exceptional circumstances, but the District Court believed that there was no question of such circumstances in this case and that the circumstances submitted by Brain in this connection were insufficient for such a conclusion. The District Court believed that this also does not lead to the conclusion of actual knowledge or relevant control (legal considerations 6.19 to 6.22 inclusive).

The District Court nevertheless concluded that, on the basis of the generally-accepted principle of due care, Techno Design could be required to co-operate in taking reasonable steps as soon as it became aware of an infringement of copyright rights or neighbouring rights or otherwise 'tortious' actions. Techno Design could be required to intervene in such cases, for example by removing links to infringing documents and would be acting 'tortiously' vis-à-vis the right-holders if it failed to do so, but it did not need to take any further action of its own volition other than the action it was already undertaking (legal considerations 6.23 and 6.24).

4.2.4 The District Court did not accept that there was question of any 'tortious' acts consisting of any punishable offence on the basis of a copyright infringement (legal considerations 6.25 to 6.29 inclusive).

4.2.5 On the basis of these legal considerations, the District Court ruled partially in favour of Techno Design in the principal action, after having ruled that its claims were sufficiently specific to that extent.

4.3 Brain's objections have been lodged against various links in the District Court's line of reasoning.

Objection 1 was lodged against some of the facts which the District Court confirmed and chose as point of departure, both in the principal action and in the cross-action. Objections 2 to 12 focus on elements of the grounds which the District Court used to support its rejection of the claims in the cross-action.

Objection 13 focuses on the District Court's conclusion in the principal action that the declaratory judgments being requested could be admitted, despite the fact that the subject against which these were lodged is insufficiently specific. The Court of Appeal will discuss some of these objections in inter-relationship with each other in the manner and in the sequence it will adopt below.

4.4 The first objection has been lodged against the District Court's conclusion that the data, the URLs, are largely compiled by a robot - a 'webspider'. In this objection, Brein poses the question of how to quantify the extent of Techno Design's involvement in the compilation of its database (which enables its visitors to find unauthorised mp3 music files on the 'World Wide Web'). Brein believes that this involvement is greater than the extent taken into account by the District Court in its disputed conclusion.

This objection must fail, as Brein has overlooked the fact that, by using the word 'largely', the District Court has taken account of the fact that the database is not only compiled automatically using one or more webspiders, but that this also requires some manual activity from Techno Design. The remarks on the objection, and specifically the appeal to the opinion by the expert Coppin and the range of ringtones, does not inevitably lead to the conclusion that, by using the term 'largely', the District Court has given a false impression of the way in which Techno Design compiled its database. Brein had after all explained in some detail which manual activities had to be undertaken, but it was much less expansive in its explanation of the extent of the automatic compilation of that database, and therefore in indicating what the ratio was between the manually-compiled and the automatically-compiled files.

The significance of this conclusion will be discussed below.  
The first objection must therefore fail.

4.5 Objections 2 to 6 can be summarised as raising the question whether and, if so, to which extent, Techno Design's actions constitute an infringement of any copyright and/or neighbouring rights. The Court of Appeal will however not discuss these objections, preferring to proceed with objections 7 to 12, as it believes that the latter are well-founded and that that which Brein posits in this connection leads to the admission of its claims. Via various angles, those objections raise the question whether Techno Design's actions must be deemed to be 'tortious' vis-à-vis the Brein members.

4.6 In discussing this, the Court of Appeal firstly wishes to point out that making mp3 music files available via the internet constitutes a communication to the public in the sense of the 1912 Netherlands Copyright Act. This means that the downloading of those files can only be preceded by a communication to the public which is relevant in the copyright or neighbouring right sense. If the communication to the public is made without the right-holder's permission, that communication constitutes an infringement of those right-holders' copyrights and/or neighbouring rights. This means that downloading unauthorised music files must necessarily be preceded by an infringement of the right-holders' copyrights and/or neighbouring rights. The fact that the person downloading an unauthorised mp3 music file only uses it for himself does not entail that in that case, the communication must not (or no longer) be deemed to be an infringement of the right-holder's copyright or neighbouring right. After all, that private use is irrelevant to the 'tortiousness' of the

communication to the public. That means that the question whether the recipient is permitted to make a 'private copy' does not need to be discussed any further in this connection.

4.7 Techno Design can not be deemed to be a kind of ISP (an internet service provider), as its actions go considerably further than those of an ISP. That means that it does not qualify for the same protection as an ISP, in view of its significance in society. In the words of the 'Agreed Statement' to article 8 of the WIPO Copyright Treaty:

"It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11 bis (2)."

Techno Design's actions were most certainly not restricted to the passive role reflected in article 8. After all, Techno Design not only made it possible for its music-loving visitors to communicate with other music-lovers, but it also manipulated the data it had compiled in such a way that it greatly simplified its visitors' search for mp3 music files. It furthermore gave its visitors the necessary information on those files.

4.8 In principle, Techno Design is at liberty to operate its own search engine and to make a profit in doing so, even if this is a search engine which is designed to track down mp3 music files. In themselves, its actions are not 'tortious' vis-à-vis all those in whom the copyright or neighbouring rights to those mp3 music files are vested, even if it is aware of the fact that the persons who communicate the files are committing an infringement of the copyrights or neighbouring rights of third parties. It is therefore necessary to examine whether those acts can nevertheless be deemed to be 'tortious' in the special circumstances of this case. The Court of Appeal wishes to point out the following in this connection.

4.9 Techno Design compiled its database by utilising the mp3 music files communicated via the World Wide Web. Techno Design has insufficiently refused the claim that the lion's share of the mp3 music files communicated via the Web (and in which Techno Design is interested and in respect of which Techno Design facilitates the search via its search engine), are unauthorised and that it is aware of that fact. Without satisfying its search arguments to support this refutation - which are lacking - Techno Design's claims do not give grounds for believing otherwise. The fact that Techno Design compiled its database *inter alia* using one or more webspiders does not entail that it is not necessary to proceed on the basis of that awareness. Techno Design can not hide behind the webspiders.

4.10 Neither has Techno Design sufficiently disputed Brein's claim that most of the visitors to its website go there in search of unauthorised mp3 music files and that it, Techno Design, is aware of that fact.

4.11 All of the above mean that Techno Design was aware that its search engine system-atically and consistently linked visitors to unauthorised communications of mp3 music files which were protected by copyrights and neighbouring rights.

4.12 It must furthermore be pointed out that Techno Design obtained income from its search engine. Its income from advertising increased as it attracted more visitors to its website, and it had a larger market for the ringtones it was offering for sale. The number of visitors depended on the scope which its search engine offered for finding mp3 music files, largely unauthorised mp3 music files: more links to mp3 music files meant more visitors. Techno Design therefore not only enabled its visitors to download unauthorised mp3 music files, it went one step further: its enterprise or the turnover made therewith was largely based, or at any rate to an important extent based on the availability of unauthorised mp3 music files.

4.13 Techno Design therefore acquired most of its income, or at any rate an important proportion of its income by systematically taking advantage of the availability of unauthorised mp3 music files on the World Wide Web, clearly without heeding the interests of the holders of the copyrights and neighbouring rights. Bearing in mind the fundamental interests of the right-holders which are at stake in this connection, the above actions are in breach of the principles of due care which Techno Design is required to observe, and are therefore tortious vis-à-vis the right-holders whose interests are promoted or represented by Brein.

4.14 The conclusion that Techno Design is acting tortiously is not impeded by the fact that it warned its visitors against downloading unauthorised mp3 music files. That warning is inadequate, as it wrongly ignores the reality - of which Techno Design was aware - that most of its visitors were looking for unauthorised mp3 music files and that they tended to completely ignore such a warning. Techno Design was therefore not entitled to assume that its warning would prevent an infringement of copyrights and neighbouring rights. Finally, the fact that it is not yet easy, technically, to ensure that a search engine distinguishes between authorised and unauthorised mp3 music files under the conditions in which Techno Design operates does not give Techno Design any relevant excuse for its actions.

4.15 The conclusion of these considerations must be that Brein has at any rate succeeded in its tenth and eleventh objections.

4.16 None of the arguments raised by Techno Design in its defence, including those in the court of first instance, can impede the admission of Brein's claims. And specifically, Techno Design cannot alleviate the 'tortiousness' of its actions by appealing to article 10 of the European Convention on Human Rights. It has no option but to accept the restrictions which arise from copyrights and neighbouring rights: these are provided for in law and necessary in a democratic society to protect the rights of others. It is furthermore worth pointing out at this juncture that it is sufficiently likely that the Brein members have suffered damage, so that the claim under D can be admitted.

4.17 Finally, on the basis of Brein's thirteenth objection, the Court of Appeal is required to examine whether the declaratory judgments rendered by the District Court in the principal action can be upheld. According to Brein, these declaratory judgments are too wide and too generally-formulated, whereby it refers in particular to the fact that Techno Design used a website which brought together dozens of different legal facts and which was linked to dozens of other sites, as well as the fact that Techno Design continued to modify the functionality of the website in the course of the proceedings in the court of first instance.

The District Court rejected this defence, basing this rejection, in brief, on the fact that it had been established that the zoekmp3.nl users could access links to URLs with mp3 music files which could be found elsewhere on the internet and that they are able to download these files to their own computers, as well as the fact that Techno Design can not be held responsible for any infringing communication to the public or any other 'tortious' act.

In the Court of Appeal's opinion, this is not a satisfactory refutation of Brein's defence. After all, Brein's defence made the point that there is no scope for the declaratory judgments being demanded (as described in section 3:302 of the Netherlands Civil Code) if it is not possible to state with a sufficient degree of certainty what the 'tortious' acts must be deemed to be. As the actions described in legal consideration 2 under e in the disputed judgment affect dozens of other sites, as the dissemination thereof is furthermore not stable and as Techno Design has not disputed this, the declaratory judgments being demanded go beyond the bounds to be laid down in this connection.

The disputed judgment can not be upheld to the extent rendered in the principal action and handled in the appeal. In the absence of a satisfactory benchmark for demarcating the declaratory judgments - which would resolve the problem raised by Brein - the declaratory judgments demanded by Techno Design must be rejected as yet. This is because the points made in respect of objections 7 to 12 above furthermore entail that the claim which resulted in the declaratory judgment rendered in 7.2 of the disputed judgment must be rejected.

4.18 Brein's other objections do not need to be discussed individually. Neither is there any need to provide evidence in the absence of any claims to that effect. The disputed judgment cannot be upheld to the extent that Brein deferred to the decision of the Court of Appeal. The Court of Appeal will therefore quash the judgment to that extent, and assuming that Brein also intended to lodge those claims on the legal grounds accepted by the Court of Appeal, will admit the claims previously lodged by Brein as yet and will reject the claims previously admitted in favour of Techno Design as yet.

As party judged to have been in the wrong, Techno Design is required to bear the costs of the present proceedings, both in the court of first instance and in appeal.

## 5. The decision

The Court of Appeal:

quashes the disputed judgment, to the extent subject to its adjudication and, rendering judgement anew, rejects Techno Design's claims;



(A) prohibits Techno Design from acting 'tortiously' vis-à-vis Buma/Stemra and the members of the IFPI/NVPI (as described in exhibit 1 to the Statement of Defence in the principal action, also Statement of Claim in the cross-action) in that - by creating and making available links or deep links to unauthorised music files - it promoted a situation in which it was possible to commit infringements on copyrights and neighbouring rights, as defined in the aforementioned Statement;  
orders Techno Design, within seven days of the service of this decision, to cease and henceforth desist from distributing and making unauthorised music files available via a telecommunications network (or causing this to be done), from undertaking or performing the above acts, causing this to be done or undertaken and/or being directly or indirectly involved therein in any manner whatsoever,  
penalising the breach of the prohibition and the order with a penalty of €10,000 for every day or part of a day on which Techno Design breaches the prohibition or order or, at the discretion of Brein, a penalty of €1,000 per unauthorised music file for every breach of the prohibition or order;

(B) orders Techno Design, within seven days of the service of this decision, to make it impossible to access any of the sites described in 33. of the Statement of Defence in the principal action, also Statement of Claim in the cross-action and to make it impossible to access the links to unauthorised music files created and/or made accessible by Techno Design via the sites incorporating a search box for zoekmp3.nl, doublemp3.com, mp3hitlist.net.nl and any other search box belonging to Techno Design, and orders Techno Design to remove links to unauthorised music files from all of its sites, in both cases at the forfeiture of a penalty of €10,000 for every day or part of a day on which it fails to remedy the breach of these orders;

(C) orders Techno Design, within seven days of the service of this decision, to remove the mp3 sites: zoekalbums.nl, fullalbumsearch.com and startmp3.com from its server, to deny the proprietor of these sites access to its server and orders it to remove these sites from its server, and to do so within two days of the date on which Brein acquaints it of the presence of unauthorised music files or illegal mp3 sites (as defined in the introductory writ of summons) on its servers, and to deny the relevant site holder access to its server, in both cases at the forfeiture of a penalty of €10,000 for every day or part of a day on which it fails to remedy the breach of these orders;

(D) orders Techno Design to compensate Brein for the damage suffered by the right-holders it represents as a result of the infringement of their copyrights and neighbouring rights via the sites operated by Techno Design, as defined in 33. of the Statement of Defence in the principal action, also Statement of Claim in the cross-action, to be fixed in separate proceedings and to be settled in the manner provided for in law;

(E) orders Techno Design to bear the costs of the proceedings, and estimates these for Brein in first instance in the principal action and in the cross-action at €193 for disbursements and €2,341.50 for the salary of the *procurator litis*, and in appeal at €371.78 for disbursements and €894 for the salary of the *procurator litis*;

declares that the present decision will be immediately enforceable to the present extent; rejects any further or alternative claims.

This decision was rendered by Messrs G.B.C.M. van der Reep and C.A. Joustra and Mrs E.A. Mout-Bouwman and pronounced in the public hearing of 15 June 2006 by the Justice presiding over the administrative hearing.