DISTRICT COURT OF UTRECHT
Commercial and Family Law Section

RULING
of the judge in the preliminary relief judge
instituted by:

1. the foundation FOUNDATION FOR THE PROTECTION OF RIGHTS OF THE ENTERTAINMENT INDUSTRY IN THE NETHERLANDS (BREIN), having its registered office in Hoofddorp (the Netherlands),
2. the foundation MECHANICAL COPYRIGHT ORGANIZATION (Stemra), having its registered office in Hoofddorp,
3. the association BUREAU OF MUSICAL COPYRIGHT (Buma), having its registered office in Hoofddorp,

the phonogram producers, also members of the Dutch Association of Producers and Importers of Image and Sound Carriers (NVPI):

4. the private company with limited liability ALA BIANCA BENELUX B.V., having its registered office in Baarn (the Netherlands),
5. the general partnership ARTIST & COMPANY V.O.F., having its registered office in Haarlem (the Netherlands),
6. the general partnership BALTIC NEDERLAND V.O.F., having its registered office in Utrecht (the Netherlands),
7. the private company with limited liability BASIC BEAT RECORDINGS B.V., having its registered office in Rotterdam (the Netherlands),
8. the private company with limited liability BASTA AUDIO/VISUALS B.V., having its registered office in Aalsmeer (the Netherlands),
9. the private company with limited liability BLACK HOLE RECORDINGS B.V., having its registered office in Breda (the Netherlands),
10. the private company with limited liability BMG NEDERLAND B.V., having its registered office in Hilversum (the Netherlands),
11. the private company with limited liability CORBEAU MUSIC MASTERS B.V., having its registered office in Hilversum,
12. the private company with limited liability CRISIS MUSIC B.V., having its registered office in Hilversum,
13. the private company with limited liability CHALLENGE RECORDS SERVICES B.V., having its registered office in Hilversum,
14. the private company with limited liability CHANNEL CLASSICS RECORDS B.V., having its registered office in Herwijnen (the Netherlands),
15. the private company with limited liability CNR MUSIC B.V., having its registered office in Naarden (the Netherlands),
16. the private company with limited liability COAST TO COAST MUSIC GROUP B.V., having its registered office in Capelle aan den IJssel (the Netherlands),
17. the private company with limited liability CORAZONG RECORDS B.V., having its registered office in Koedijk (the Netherlands),
18. the private company with limited liability COTTON RECORDS B.V., having its registered office in Loosdrecht (the Netherlands),
19. the private company with limited liability DE HASKE SOUND SERVICES B.V., having its registered office in Heerenveen (the Netherlands),
20. the foundation STICHTING DONEMUS, having its registered office in Amsterdam,
21. the private company with limited liability STRENGHOLT MUSIC PRODUCTIONS B.V., among others trading under the name of Dureco, having its registered office in Naarden,
22. the private company with limited liability EMI MUSIC NETHERLANDS B.V., having its registered office in Hilversum,
23. the private company with limited liability EPITAPH NETHERLANDS B.V., having its registered office in Amsterdam,
24. the private company with limited liability ESSENTIAL DANCE MUSIC B.V., having its registered office in Hendrik Ido Ambacht (the Netherlands),

25. Willem Marinus BREUKER, trading under the name of Haast Grammofoonplaten, having its business address in Amsterdam,
26. the private company with limited liability HARMONIA MUNID NANDI B.V., having its registered office in The Hague (the Netherlands),
27. the private company with limited liability IDOL MEDIA B.V., having its registered office in Amsterdam,
28. the private company with limited liability JUPITON B.V., having its registered office in Amsterdam,
29. the general partnership LIEDJES V.O.F., having its registered office in Roermond (the Netherlands),
30. the private company with limited liability MASCOT PROVOQUE B.V., having its registered office in Berkel en Rodenrijs (the Netherlands),
31. the private company with limited liability MEDIA RECORDS & SONGS B.V., having its registered office in Baarn,
32. the private company with limited liability MIRASOUND B.V., having its registered office in Amersfoort (the Netherlands),
33. the private company with limited liability MUSIC & WORDS B.V., having its registered office in Nieuwegein (the Netherlands),
34. the private company with limited liability NEWS RECORDS NEDERLAND B.V., having its registered office in Hilversum,
35. Bernardus Arend Gabriel KLEIKAMP, trading under the name of Paradox, having its business address in Leiden (the Netherlands),
36. the private company with limited liability PENTATONE MUSIC B.V., having its registered office in Baarn,
37. the private company with limited liability PLAY IT AGAIN SAM B.V., having its registered office in Hilversum,
38. the private company with limited liability PURPLE EYE PRODUCTIONS B.V., having its registered office in Bussum (the Netherlands),
39. the private company with limited liability QUINTESSENCE RECORDS B.V., having its registered office in Leersum (the Netherlands),
40. the private company with limited liability RED BULLET PRODUCTIONS B.V., having its registered office in Hilversum,
41. the private company with limited liability SONY MUSIC ENTERTAINMENT (HOLLAND) B.V., among others trading under the name of Epic, Columbia, Sony, having its registered office in Hilversum,
42. the foundation STICHTING JAZZ IMPULS, having its registered office in Nijbroek (the Netherlands),
43. the general partnership SYNCOOP PRODUKTIES V.O.F., having its registered office in Schiedam (the Netherlands),
44. the private company with limited liability TELSTAR MUSIC PUBLISHING HOLLAND B.V., having its registered office in Weert (the Netherlands),
45. the private company with limited liability TIMELESS RECORDS B.V., having its registered office in Wageningen (the Netherlands),
46. the private company with limited liability UNIVERSAL MUSIC B.V., having its registered office in Hilversum,
47. the private company with limited liability V2 RECORDS (NEDERLAND) B.V., having its registered office in Hilversum,
48. William HAIGHTON, trading under the name of VAN Record Company, having its business address in The Hague,
49. the private company with limited liability EMI VIRGIN MUSIC PUBLISHING HOLLAND B.V., having its registered office in Hilversum,
50. the general partnership WALBOOMERS MUSIC V.O.F., having its registered office in Amsterdam,
51. the private company with limited liability WARNER MUSIC BENELUX B.V., having its registered office in Hilversum,
52. the private company with limited liability ZOMBA MUSIC HOLDINGS B.V., having its registered office in Hilversum,
53. the private company with limited liability ZYX MUSIC B.V., having its registered office in Oosterhout (province of North Brabant) (the Netherlands),

plaintiffs,
local counsel: J.A. Schurman
attorney at law: W.A. Roos practising in Amsterdam

versus

1. the private company with limited liability UPC NEDERLAND B.V., trading under the name of Chello, having its registered office in Amsterdam,
2. the private company with limited liability ESSENT KABELCOM B.V., trading under the name of @Home, having its registered office in Groningen (the Netherlands),
3. the private company with limited liability TISCALI B.V., trading under the name of Tiscali Breedband Internet / Tiscali ADSL, having its registered office in Utrecht,
4. the private company with limited liability WANADOO NEDERLAND B.V., having its registered office in Amsterdam,
5. the private company with limited liability KPN TELECOM B.V., among others trading under the name of Planet Internet / KPN Internet, having its registered office in The Hague,

defendants,
local counsel: B.F. Keulen
attorney at law: Chr.A. Alberdingk Thijm practising in Amsterdam.

The plaintiffs will hereinafter also be referred to in the singular as Brein and the defendants also as the service providers.

1. The course of the proceedings

1.1. The course of the proceedings has been as follows:
- writ of summons dated May 13, 2005, a photocopy of which is appended to this ruling;
- hearing was held on June 16, 2005;
- pleadings and exhibits by both parties.

During the hearing Brein gave a further explanation of its arguments in the form of a PowerPoint presentation.

1.2. The parties requested a ruling.

2. The facts

2.1. Brein promotes the interests of holders of copyrights to audio, video and interactive products. Brein was founded with the object of combating unlawful exploitation of information carriers and information, and of promoting the interests of the copyright owners in respect of such information and of the lawful proprietors, and specifically those affiliated with Brein, in particular by maintaining, promoting and obtaining adequate legal protection of rights and interests of those copyrights holders and proprietors, all this in the broadest sense.

2.2. The Bureau of Musical Copyright Buma and the Mechanical Copyright Organization Stemra (hereinafter jointly: Buma/Stemra) promote, stated concisely, the material and immaterial interests of composers and lyricists of musical works, copyright holding publishing companies and their successors in title. Pursuant to agreements with authors, copyright holding publishing companies and foreign sister organizations, Buma/Stemra exercise the rights of publication and reproduction accruing to the copyright holders in the Netherlands, including the mechanical reproduction rights, which includes making musical works available on-line, in relation to nearly the entire worldwide musical repertoire.

2.3. Stated concisely, pursuant to agreements concluded for this purpose with performing artists, the NVPI members produce sound recordings of performances given by the performing artists, with the object of reproducing these sound recordings in some way and publicizing them.

2.4. The defendants, as access providers, provide access to the internet to their subscribers via the cable (UPC/Chello, Essent/ @Home and Wanadoo) or via the telephone line (KPN/Planet, Tiscali and Wanadoo). The service providers have on record the names, addresses, places of residence, telephone numbers, account numbers and e-mail addresses of their subscribers. General terms and conditions apply to the agreements concluded by the service providers with their subscribers. Except for the general terms and conditions of UPC/Chello, these general terms and conditions all state, among other things, that the service providers may solely use the information on name, address and place of residence in the context of carrying out the agreements with their subscribers, and that they may not furnish these details to third parties, unless they are obliged to do so by law or by a ruling of a court of law.

2.5. For their actions on the internet, the service providers assign to their subscribers' computers (or servers) a so-called IP address, also referred to as IP number, every time that a subscriber surfs the internet. Based on the IP number, certain actions on the internet can be traced to the computer (or server) on which the actions in question were performed.

2.6. Various suppliers offer peer-to-peer (p2p) software on the internet. Using such a computer program, individual users can exchange files without the intermediary of third parties. By means of p2p networks, individual computer users can make available information on the internet to other users of the p2p network in question, who can then download this information. Characteristic of the p2p software is that as soon as a user has downloaded a file, he/she simultaneously makes this file available to other users. For this purpose the file is place in a so-called shared folder. The user can switch off this shared folder function.

2.7. Via p2p services such as Kazaa and Grokster, individual users of computers offer, among other things, music files on the internet. Furthermore, using p2p networks, music files belonging to the Buma/Stemra and/or NVPI repertoire are exchanged, for which the copyright holders have not given their permission.

2.8. Legal proceedings are conducted against offerers of p2p services all over the world, and in the Netherlands as well. Buma/Stemra tried to obtain a prohibition of the computer program of Kazaa, but its claim was rejected by the appellate court and again in cassation. The appellate court ruled that it was not unlawful for Kazaa to offer the computer program. Since then the music industry has focused on the individual users of the computer program.

2.9. In August 2004 Brein hired the American research agency MediaSentry Inc. (hereinafter: MediaSentry) to search on the FastTrack network (the network on which the Kazaa software is offered) for users who offer music files without authorization and who were on-line at the time of the search and for whom IP numbers are filed with the service providers who are a party to these preliminary relief proceedings. MediaSentry searched the network based on a list made available by Brein of executions of musical works that are part of the Buma/Stemra/NVPI repertoire. For purposes of the research, MediaSentry wrote a program which automatically follows and records the download process and which reveals the IP number.

2.10. At the request of Brein, starting in August 2004 MediaSentry sent to all FastTrack p2p users who offered unauthorized music files on-line a so-called instant message warning the users that offering music and other entertainment files without permission is an infringement of the intellectual property rights to those files. In the same message it referred to Brein's website (www.anti-piracy.nl), where there are instructions telling how the shared folder function can be switched off. Starting in February 2005 MediaSentry sent demand notices via instant messages to users who offered unauthorized music files; these notices also contained a reference to the possibility of switching off the shared folder. MediaSentry sent 359,194 instant messages, 123,608 of which were received.

2.11. In April 2005 MediaSentry published reports in relation to ten IP addresses per service provider in respect of which it (MediaSentry) had established that somewhere between approximately 700 and 5000 unauthorized music files were made available per user (and per

IP address). MediaSentry issued these reports to Brein. In the reports, MediaSentry stated, per user, the date and time when and the IP address from which music files were made available on the internet.

2.12. Brein informed each service provider individually in e-mail messages of March 11 and 15, 2005 that ten subscribers had offered unauthorized music files. In its e-mail messages Brein stated dates and times as well as the IP address from which the unauthorized files were downloaded. Furthermore it requested each service provider individually to pass on a demand notice it enclosed (intended for the infringing user) to the e-mail address of the user in question which was known to the service provider on the basis of the IP number. Because Brein gave incorrect times for when downloading had taken place in its e-mail messages of March 11, 2005, it sent the same e-mail messages on March 15, 2005 but now stating the times that, according to Brein, were correct.

2.13. The service providers passed on the demand letters enclosed by Brein, which included a declaration or promise to abstain from this practice and an offer to make a financial arrangement in relation to the loss caused, to a total of 50 subscribers. In the demand notice Brein also informed the subscribers that, if they did not comply with the notice, Brein would demand that the service providers pass on their names, addresses and places of residence.

2.14. Initially eight subscribers responded to the demand notice sent by Brein via the service providers. After issue of the writ of summons, one more subscriber responded. They signed a statement saying they would refrain from this practice and made a financial settlement with Brein. The other 41 subscribers did not respond.

2.15. In a letter from its attorney of April 12, 2005 Brein ordered each of the service providers to provide the names and addresses of the subscribers who had not responded to the demands mentioned in section 2.13. The service providers did not do so.

2.16. On April 15, 2005 the service providers (with the exception of Tiscali) issued a writ of summons to Brein instituting proceedings on merits to be held before the District Court of Haarlem. In these proceedings the service providers requested, briefly summarized, that it be declared to be law that they had not acted unlawfully vis-à-vis Brein by not furnishing names and addresses of subscribers, and that they are not obliged to furnish the names and addresses to Brein pursuant to the Personal Data Protection Act, and further that a civil court is not competent to order the service providers to furnish names and addresses to Brein, or at least that a civil court cannot be deemed to be a “competent authority” in the sense referred to in Article 15(2) of Directive 2000/31/EC, and that the service providers are only obliged to furnish names and addresses of subscribers by order of a competent authority as referred to in Article 1(d) of the decree on making available telecommunication data.

3. The dispute

3.1. For the complete contents and the foundations of the claim, reference is made to the appended writ of summons. Briefly summarized, Brein, after amending its claim, asks that the service providers be ordered to send written notification to its counsel of the names and addresses of the 41 subscribers whose IP addresses on certain dates and times are appended to the writ of summons, under forfeiture of a penalty of € 5,000 per subscriber per day and ordering the service providers to pay the costs of the proceedings.

3.2. The defense of the service providers will be discussed in as far as is necessary in the following sections.

4. The assessment

Does Brein have cause of action

4.1. The service providers put forward that the case is not suited to be handled in preliminary relief proceedings, because it is too complicated both factually and in a legal sense and

cannot be assessed without thorough and detailed study. For this reason, the service providers say, they have initiated proceedings on the merits. With this standpoint the service providers fail to appreciate that the circumstance that a case is legally and factually complicated does not need to form an obstacle to a decision in preliminary relief proceedings. It is true that proceedings on the merits are pending between the service providers and Brein, but Brein has made it sufficiently plausible that it cannot be expected to await the outcome of these proceedings on the merits, since it has an urgent interest in putting an end to the infringements of p2p network users, and that this is the reason why it asks to be given the names and addresses. The fact that Brein has not been expeditious in its litigation – which, however, it has disputed – does not in itself justify the opinion that Brein does not have an urgent interest in its claim.

4.2. To the extent that the service providers state that Brein's claim is not admissible based on a weighing of interests as required by Article 254(1) of the Dutch Code of Civil Procedure, this assertion cannot be followed either. The mere circumstance that the relief claimed can cause irreparable harm to the subscribers involved does not lead to the opinion that Brein's claim cannot be called admissible. After all, the judge in preliminary relief proceedings can order relief the consequences of which cannot be repaired. The fact that the consequences of a decision in preliminary relief proceedings are irreversible is a circumstance that must be investigated in deciding whether the requested relief is capable of being allowed, and it will be weighed up in a consideration of the interests in that context. But the fact that preliminary relief is irreversible cannot in itself form a reason to say that a party has no cause of action.

4.3. Subsequently – and also in the context of whether there is cause of action – the question will be discussed whether Brein's demand for the release of the names and addresses it requests should be made in civil proceedings. The service providers have argued that Brein could also have requested this information in criminal proceedings by making use of the possibilities offered by the Dutch Code of Criminal Procedure. The service providers thereby refer in particular to the competence of an investigating official to request names and addresses pursuant to Article 126na of the Code of Criminal Procedure. Brein countered this by asserting that this provision does not offer an alternative for the claim as it was instituted in these present proceedings. The judge in preliminary relief proceedings considers as follows in this respect.

4.4. It has been established that none of the plaintiffs can be deemed to be an investigative service. The decree instituting a special BUMA/STEMRA investigating official was repealed by a decision of the Minister of Justice of March 11, 2003. As a result, since January 1, 2003 infringements on intellectual property rights are no longer enforced by the Buma/Stemra Investigative Service but by the Fiscal Intelligence and Investigation Service-Economic Investigation Service (FIOD-ECD). This means that Brein cannot simply demand that the service providers furnish names and addresses on the basis of Article 126na of the Code of Criminal Procedure. Instead Brein must rely on the cooperation of the appropriate investigative services (in particular FIOD-ECD).

4.5. For the moment it cannot be assumed that such cooperation will be readily forthcoming, and in any case not to such an extent that would offer Brein an adequate alternative. Brein has made it sufficiently plausible that criminal offences such as are the subject of these present proceedings (specifically, infringements on copyrights and related rights) are not a priority for such investigation. In this context Brein quoted from a recent written communication from the Public Prosecutions Office stating that it is in fact preferable to approach such cases by means of civil law, and that criminal law is only a last resort. The service providers have not been able to disprove the correctness of this statement.

4.6. Furthermore it is important that the statutory regulation stated in Article 126na of the Code of Criminal Procedure includes stringent conditions for the application of the powers described therein, which implies that these powers must be used with reticence. It must be assumed that this will form an obstacle for the investigative service in question to start criminal investigations of the infringers on a large scale. Moreover, it is doubtful whether in every concrete case in which a criminal investigation does take place, Brein can successfully

require the investigative service to release the names and addresses of the clients involved. In this context the investigative service must give consideration to the right of privacy of the client of the service provider in question, and this right [to privacy] means that names and addresses may not simply be disclosed to Brein without any reservation, not to mention the question whether an investigative service will be willing to start an investigation with the sole intention of discovering the name and address of a suspect in order to pass this information to Brein.

4.7. Besides criminal proceedings, the court fails to see that there is an adequate alternative for Brein to requesting the release of names and addresses in civil proceedings. Brein must therefore rely on civil proceedings. Another important matter in this respect is that these proceedings serve to pave the way towards civil law actions against the infringing subscribers themselves. It must be assumed that Brein can only effectively force these infringers to cease their infringements and to compensate the losses they have caused by means of actions aimed at them directly. This is illustrated by the established fact that of the 50 subscribers to whom the service providers passed on the demand notices from Brein, only 9 responded. It is therefore certain that, generally speaking, it will only be possible to effectively institute an order or prohibition if the names and addresses of the infringers in question are known or have been made known to Brein. Lastly, the judge in preliminary relief proceedings remarks that Article 18 of EC Directive 2000/31 assumes that the national legislation provides in the possibility of preliminary relief to prevent the interests involved from being further damaged. The present preliminary relief proceedings might serve this purpose. From this point of view, too, Brein has cause for action.

Basis for the claim

Article 15(2) of EC Directive 2000/31

[Article 15(2) of EU Directive 2000/31: Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.]

4.8. The starting point in these proceedings is that each of the service providers in itself can be deemed to be an information society service provider, so that the provisions of EC Directive 2000/31 are applicable to the activities that they carry out, and then more specifically the provisions in relation to an access provider. The service providers state that they cannot be obliged at the request of an interested party or a civil court to furnish the names and addresses of their subscribers, because Article 15(2) of EC Directive 2000/31 (which has not been implemented in national legislation because the legislator felt it was not necessary) does not provide for such an obligation. The discussion between the parties focuses on the one hand on the question whether Article 15(2) of EC Directive 2000/31 merely relates to storage agreements, while on the other hand the parties differ in their opinion as to whether a civil court can be deemed to be a competent authority as referred to in this article. The judge in preliminary relief proceedings considers as follows in this respect.

4.9. It must be conceded to the service providers that Article 15(2) of EC Directive 2000/31 explicitly refers to storage agreements. This is a fundamentally different type of service than the conclusion of transmission agreements as they are under discussion in these preliminary relief proceedings. The conclusion of storage agreements therefore must be distinguished from the mere transmission of information as is done by access providers. For access providers (to which the service providers can be reckoned in the present case) specific provisions apply, including Articles 12 to 14 of EC Directive 2000/31 and Article 6:196c(1 and 2) of the Dutch Civil Code. However this does not rule out the possibility that, under certain circumstances, Article 15(2) of EC Directive 2000/31 can be considered to apply to the services of access providers. This possibility is explicitly named in the Explanatory Notes to Article 6:196c of the Civil Code, which in this context means in so many words that, under certain circumstances, an intermediary service provider that has concluded transmission

agreements may also come under the scope of application of Article 15(2) of EC Directive 2000/31.

4.10. It cannot be assumed without reservation that the Explanatory Notes are incorrect on this point, as asserted by the service providers. For the time being the preliminary relief judge therefore assumes that the legislator did not wish to rule out the possibility that Article 15(2) of EC Directive 2000/31 would also apply to transmission agreements.

4.11. The next question to arise is which bodies are referred to by the words “competent authorities”. It has been established in this context that Brein cannot be deemed to be one, while as appears from the foregoing the criminal authorities in any case do come under the scope of this designation.

4.12. The service providers state that the European legislator made a deliberate distinction between the various organizations named in the directive, and that it follows from the system of provisions in EC Directive 2000/31 that the competent authority as referred to in Article 15(2) of EC Directive 2000/31 cannot be a civil court. To the extent that the service providers thus wish to argue that it must be deduced from the provisions in question that pursuant to EC Directive 2000/31 only a criminal authority is competent to order a service provider to relinquish names and addresses, the court cannot agree with this argument.

4.13. The fact that this competence accrues not only to a criminal authority can be deduced from Articles 12 to 15 of EC Directive 2000/31 taken in conjunction. In the provisional opinion of the preliminary relief judge, the regulation in Article 15(2) is intended to offer Member States an opportunity to make arrangements for the release of names and addresses to a competent authority upon request, without the intermediary of a court. It has been established that in the Netherlands, this in any case refers to a criminal authority, or at least to an authority with investigative powers. But the opportunity offered to Member States in Article 15(2) does not form an obstacle to the possibility for a civil court to order the release of names and addresses. Article 12(3) (in respect of which more will be said in section 4.20) provides, stated concisely, among other things, that the provisions in paragraphs (1) and (2) are not an obstacle to the possibility for a court to require that a service provider terminates or prevents an infringement. In that light, the provision of names and addresses may be regarded as a measure to terminate or prevent an infringement, and to that extent it may be imposed on a service provider by a civil court as injunctive relief. This competence of a civil court can exist alongside the arrangement as referred to in Article 15(2).

4.14. The premise that, pursuant to the provisions in Article 15(2) EC Directive 2000/31, a civil court is not competent to order the release of names and addresses is also not compatible with point 25 of the preamble to EC Directive 2000/31 which states: *National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.* Nor is the premise compatible with the fact that in the administration of justice by lower courts in the Netherlands, the civil judge has already ordered internet service providers to make known names and addresses to injured parties.

4.15. Finally, it is in agreement with the foregoing that in the so-called IPR Enforcement Directive (EC Directive 2004/48) the term competent judicial authorities also refers to the civil court (cf. in this context Article 8(1) of the Directive which states that in response to a request of the claimant, the competent judicial authorities may order that under certain circumstances the names and addresses are made known to the claimant).

Article 12 of EC Directive 2000/31 – Article 6:196c of the Dutch Civil Code

[Article 12 of EC Directive 2000/31, implemented in Article 6:196c(1, 2, and 5) of the Dutch Civil Code:
1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision

of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:
a) does not initiate the transmission;
b) does not select the receiver of the transmission; and
c) does not select or modify the information contained in the transmission.
2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.
3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.]

4.16. The basic assumption is that, in the event of violation of rights of third parties, no specific legal obligation rests on service providers to provide the names and addresses of the infringing parties in question to those third parties or to an interest organization formed by those third parties. The Copyright Act and the Act on Related Rights do not include a special provision pursuant to which service providers are obliged to furnish names and addresses to third parties or their interest organizations. Nor is there a provision of national law that obliges service providers to actively furnish such data. Nor do the Personal Data Protection Act, EC Directive 2000/31 or Article 6:196c of the Dutch Civil Code entail any obligation on the part of services providers to make known these details of their own accord or at the request of third parties or their interest organizations. As has been established, none of the plaintiffs can be considered a competent authority in the sense referred to in Article 15(2) of EC Directive 2000/31 that could order the release of these details.

4.17. The fact that no specific statutory obligation rests on the service providers to make known the names and addresses of their clients if so requested does not preclude the possibility that under special circumstances it may be unlawful vis-à-vis Brein to refuse to make known these details because it constitutes a violation of a social obligation to exhibit due care that a service provider must bear in mind in respect of that information when dealing with an interested party such as Brein.

4.18. The service providers put forward that they cannot be liable under those circumstances either, because the liability of access providers is limited pursuant to EC Directive 2000/31 if certain conditions are met. They say this is an obstacle to the claim instituted by Brein, because this claim implies that they are nevertheless liable, even in the cases in which liability is ruled out. The court cannot follow this argument. The judge in preliminary relief proceedings considers as follows in this respect.

4.19. First and foremost it must be stated that the manner in which service is provided by the service providers in the present case is one to which Articles 12 to 14 of EC Directive 2000/31 apply. The portions of that directive that are relevant for these preliminary relief proceedings have been implemented in Article 6:196c of the Civil Code.
Article 12 (1 and 2) of EC Directive 2000/31 and 6:196c(1 and 2) of the Civil Code indemnify access providers from liability for the information they transmit if the conditions named in those articles are satisfied (both articles, paragraphs 1a to c). This means that the service providers, acting as access providers in this present case, cannot be made liable by third parties such as Brein for losses resulting from the content of the information transmitted by the access provider (in this case: unauthorized music files).

4.20. However, this exclusion from liability on the grounds of Article 12 of EC Directive 2000/31 / 6:196c of the Civil Code must be viewed as separate from the obligation of the service providers to exhibit due care, meaning that – once it has been established that a subscriber is infringing upon rights of third parties – in certain circumstances it will take measures to terminate and to prevent further infringement and loss. It is apparent in Article 12(3) of EC Directive 2000/31 and Article 6:196c (5) of the Civil Code respectively that the indemnification does not alter the fact that an access provider can be ordered to do so by a

judicial authority. According to the Explanatory Notes to Article 6:196c of the Civil Code, it is possible in civil law proceedings to request such an order in preliminary relief proceedings. This may include, under certain circumstances, an injunction to release names and addresses. After all, with the names and addresses in question, the party who has sustained a loss as a result of infringements by a user can forbid this user to infringe on his/her rights any longer and can make this user liable for the loss sustained by him/her. In respect of the release of names and address in this context, the Explanatory Notes state: *"For the sake of completeness it should be remarked that there is also a possibility of a civil court ordering the service provider to make known the source of the information".*

4.21. The foregoing therefore means that an order to release names and addresses does not create any liability on the part of the service providers for the content of the files to be transmitted (or actually transmitted) by them. The provisions in Article 12 of EC Directive 2000/31 and Article 6:196c of the Civil Code are not an obstacle to issuing such an order.

Personal Data Protection Act

4.22. All the foregoing leads to the conclusion that in principle there are no legal obstacles to the institution of a claim such as the present one. Upon further specifying the conditions under which the claim can be allowed, due observance must be given to the fact that, as follows from point 14 of the preamble to EC Directive 2000/31, this directive does not alter the principles of personal data protection, to which the provisions of the Personal Data Protection Act can be reckoned. The protection this Act aims to offer extends to the IP addresses in respect of which Brein is asking for the release of the corresponding names and addresses. The service providers have stated, and it has not been contradicted, that the IP addresses can be viewed as personal data in the sense referred to in Article 1(a) of the Personal Data Protection Act. An IP address is personal data in relation to an identifiable person according to the Personal Data Protection Board (hereinafter: CBP) as well. The service providers are correct in stating that if Brein has IP addresses collected, it is processing personal data in the sense referred to in Article 1(b) of the Personal Data Protection Act. Brein did not dispute this as such.

4.23. The applicability of the Personal Data Protection Act to the IP addresses collected by Brein is relevant for these present proceedings, since the service providers cannot be forced to make known the names and addresses if the conditions set by law for the release of such information have not been satisfied. The service providers must investigate the latter matter independently. In doing so they must also independently weigh the interest Brein has in obtaining this information against the interests of those to whom the data relate. According to the Personal Data Protection Act and the explanatory notes to this act (Parliamentary Documents II 1997/98, 25892, no. 3, p. 86), in the event that processing constitutes an infringement on the interests or the fundamental rights of third parties, this consideration or weighing up must also comprise a test of whether – considering the seriousness of the infringement – data processing ought to be dispensed with. However, it must also be remarked that if the requirements set by the Personal Data Protection Act are met, this does not yet create a legal obligation for the service providers in question to release the names and addresses to Brein. This legal obligation is only created if it would have to be judged that the service providers act unlawfully by refusing to make known these details.

4.24. The Personal Data Protection Act links the processing of personal data to stringent conditions. The service providers state that the manner in which Brein has collected IP addresses is unlawful in the sense as referred to in this Act, because it is not in accordance with the statement concerning the lawfulness of data processing as made by the CBP on April 16, 2004 in regard to Brein's report concerning the manner in which (among other things) it collected IP addresses and stored them in a data file (the so-called anti-piracy data file). In that respect it is important that the CBP has judged that the collection of IP addresses by Brein is lawful if done in accordance with the instructions given by the CBP. In formulating its instructions, CBP assumed that Brein would not enlist professional third parties (commercial information agencies or detective agencies) in collecting IP addresses. The service providers state that the fact that Brein enlisted an investigative agency implies that the way in which

data are processed is not lawful. Furthermore they state that Brein processes data in respect of other points as well in a way that does not have the approval of the CBP. The judge in preliminary relief proceedings considers as follows in this respect.

4.25. It has been established that, in collecting IP addresses, Brein made use of the services of MediaSentry. This organization can be regarded as a professional third party (a commercial information agency or detective agency) collecting IP addresses. Simply from this fact it follows that Brein does not satisfy the conditions under which the CBP has stated that the collection of IP addresses is lawful. After all, the CBP gave its opinion in the assumption that Brein collected the data itself. Although Brein has since stated that in the meantime it has informed the CBP of the fact that it enlisted MediaSentry to collect the IP addresses, it is not clear when this was done nor what the opinion of the CBP was in this respect. For the time being it must be assumed that the CBP's opinion that data processing carried out by Brein was lawful does not relate to a situation in which Brein did not collect the data itself. Moreover, on the grounds of the following, it is necessary to call into serious doubt whether the CBP will arrive at the opinion in the present situation as well that it involves the use of a lawful manner of data processing.

4.26. It has been established that MediaSentry is an American company and that the United States of America cannot be regarded as a country with an appropriate level of protection for personal data. It has been stated by the service providers, and has not been contested, that MediaSentry has not signed a Safe Harbor agreement pursuant to which it conforms to the European guarantees of privacy. Lastly, Brein has not stated, nor has it been made plausible, that this is an exceptional situation as referred to in Article 77(1) of the Personal Data Protection Act, nor can there be spoken of an authorization in the sense referred to in Article 77(2) of the Personal Data Protection Act. It therefore cannot be assumed that, in its data processing, MediaSentry took into account the same guarantees as Brein would have done if it had carried out the investigation itself. This is the more urgent since the service providers have made it sufficiently plausible that MediaSentry investigates the contents of the "shared folders" of the IP addresses involved with the help of the software it uses. The judge in preliminary relief proceedings understands that these are files located on the (hard disks of) computers of users (including subscribers of the service providers). In this way, MediaSentry can see all the files stored by users in these folders. This might well include files that are not an infringement on the rights of another party or that are of a personal nature.

4.27. It follows from the foregoing that (it must be considered as having been established in these preliminary relief proceedings that) the manner in which Brein had IP addresses collected and processed has no lawful basis. The processing of the personal data took place in a way not covered by the opinion of the CBP stating that the data processing had been done lawfully, while it cannot be expected that the CBP will consider this manner of data processing to be lawful. Under these circumstances, the question whether other aspects of the way in which Brein collected IP addresses were lawful may remain undecided. After all, the foregoing implies in itself that the Personal Data Protection Act in this case cannot offer a justification for the service providers to release the names and addresses to Brein. Brein's premise that the Personal Data Protection Act, and more specifically Articles 8f and 9 of that Act, do not constitute an obstacle to the release of the names and addresses, must therefore be rejected as incorrect.

4.28. For the time being it must even be decided that, on the basis of the foregoing, the service providers must refuse to comply with the request to release the names and addresses. After all, service providers must guard against processing personal details of unlawful origin. Independently, the service providers also have an interest in preventing themselves from becoming liable toward their subscribers. This will be the case if they release the names and addresses of those subscribers without justification for this action being offered by the Personal Data Protection Act or by a ruling of a court of law. The service providers (with the exception of UPC/Chello) committed themselves towards their subscribers in their applicable general terms and conditions only to use names and addresses in the context of carrying out their agreements with those subscribers, and not to provide these data to third parties, unless they were to be obliged to do so by law or a ruling of a court of law.

Conclusion

4.29. Allowance of Brein's claim already fails on account of the fact that the manner in which Brein collected and processed the IP addresses cannot be deemed to be lawful. Moreover, the judge in preliminary relief proceedings remarks the following.

4.30. If a claim such as the present one is to be awarded, it must be beyond a reasonable doubt that the IP addresses relate to the users who actually illegally offer music or other files on their computer. In order to determine from which computer the unauthorized music files are offered, the date and the time of the infringement must be accurately determined. This implies that it must be indicated at what moment third parties downloaded files from the computer in question. The service providers called into doubt the accuracy of the data collected by Brein on the infringers and the infringement. Brein has been unable to remove this doubt to a sufficient degree.

4.31. The service providers have put forward that it cannot be stated with certainty that the IP numbers named by Brein can be traced to the specific infringing user. It has not been contradicted that, in the case of consumer agreements, the service providers in most cases assign a new IP address to the user in question at the beginning of every session on the internet. This means that, per session, a user can be assigned a different IP address, and this again implies that the date and the time on which the infringement took place must be determined with great accuracy in order to determine what user/subscriber made the infringement (under what IP address). According to the service providers, Brein at any rate made errors on this point in a number of cases. In this context Brein's e-mail of March 11, 2005 must be pointed out which in all cases stated an incorrect time at which a download was said to have taken place. Although Brein corrected these errors in its e-mail of March 15, 2005, at that point three of the five service providers had already passed on the enclosed demand notices to the subscribers in question. In addition the service providers appended to their pleadings a summary of cases in which they had observed errors in respect of individual infringements. According to their observations, in several cases, different times are stated in the report from MediaSentry, the letter from Brein's counsel of April 12, 2005 and the enclosure appended to the writ of summons in relation to the same infringement. In a number of cases Brein denied the observed errors; however, for the time being it cannot be ruled out that the service providers rightly put forward that errors were made in one or more of the cases mentioned.

4.32. Moreover, since the requested relief is irreversible (if the names and addresses are released, the identity of the subscribers/users is revealed and this cannot later be reversed), and since, in view of that which was considered in the foregoing under point 4.31, it cannot be ruled out that Brein made errors in assigning the IP addresses to infringements, then on this ground too the claim would not be capable of being allowed.

Costs of the proceedings

4.33. As the party that has been said to be predominantly in the wrong, Brein will be ordered to pay the costs of these preliminary relief proceedings. To the extent that the service providers request that Brein also be ordered to pay the costs of the expert enlisted, this claim cannot be awarded if only because the service providers have not specified these costs. However, the order to pay the costs will give consideration to the fact that the proceedings in question are complex, which justifies some deviation from the standard rates in preliminary relief proceedings.

5. <u>The decision</u>

The judge in preliminary relief proceedings:

5.1. refuses the relief requested;

5.2. orders Brein to pay the costs of these proceedings, which up to this decision are estimated at € 2,500 on the part of the service providers for counsel's fees and € 244 for out-of-pocket expenses;

5.3. declares that the order to pay the costs is provisionally enforceable.

This ruling was handed down by M. van Delft-Baas and was pronounced in open court on July 12, 2005.

signed by the clerk of court signed by the judge