

## XS Networks and liability for copyright infringement

District Court The Hague 24 October 2012 (Brein/XS Networks)

The Court of The Hague confirmed that web hosts should promptly respond to notices of infringing content. The ruling marks a landmark victory for rights group Brein, making a file-sharing site's former host, XS Networks, liable for damages.

On 4 October 2012 the District Court of The Hague ruled on the liability of an internet hosting provider for the activities of torrent website Sumotorrent<sup>1</sup>. The decision introduces an interesting novelty in Dutch intermediary case law for internet hosting providers being liable for compensating the right holders' damage as a result of particular uncooperative behaviour. These case-notes aim to provide a brief overview of the special circumstances that lead to this remarkable precedent and interpretation thereof in light of the current position of Dutch online intermediaries. The case shows that hosting providers have a duty to show a prompt and adequate response to the notification of unlawful behaviour on their services. At the same time they do not have a duty to verify and investigate the personal registration information provided by their customers.

### The EU and Dutch safe harbours

Although the E-commerce Directive 2000/31/EC ('Directive') was implemented over a decade ago, The Netherlands has only seen a handful of cases that pertain to the question of how much responsibility online intermediaries have for the (unlawful) behaviour of their customers. The Directive introduced three separate safe harbours in articles 12 through 14 for different types of internet intermediaries: mere conduits (also known as access providers), caches and hosts. All three safe harbours have been implemented by the Dutch legislator in article 6:196c of the Civil Code ('CC'). Within the norms of these safe harbours, an intermediary cannot be held liable for the acts of its customers. These norms are more stringent if the intermediary has more control over the information it processes.

Therefore, the law expects hosts to exercise more prudence than access providers, because hosts control data for a longer amount of time, whereas online access providers process data that merely passes through their systems for a short instance<sup>2</sup>. Furthermore, the Directive included a ban to impose general monitoring and filtering obligations on all three internet intermediaries (article 15). This ban was not transposed, because the government considered that Dutch law does not provide for the imposition of such a ban<sup>3</sup>.

### Sumotorrent and XS Networks

The current online intermediary case involves the host of torrent website Sumotorrent. For those unfamiliar with the concept of (bit)torrent: this is a popular peer-to-peer file-sharing network, which does not require a central server to facilitate the - mostly unauthorised - exchange of media content (such as the early Napster and Kazaa networks did). The peers (often internet consumers) go to a website that lists small files or even smaller links, called magnet links, which provide the details of the torrent they seek. The details can be used by the peer's client software to set up a download and upload chain within the peer-to-peer network, ultimately resulting in the exchange of media content such as music and movies. During the actual exchange the torrent website plays no role. Therefore, under Dutch law such websites do not infringe copyright. Their behaviour of facilitating the infringement of the peers that occurs during the exchange is nonetheless considered wrongful on the basis of the Dutch legal concept called 'unlawful act,' codified in article 6:162 CC. This concept is comparable to common tort law and provides a civil law

action against anyone that has acted contrary to a general rule, which results in material or immaterial damage for which that person is accountable. These general rules are always judged on a case-by-case basis and include acts such as hazardous negligence and facilitating third parties in breaching a law. Sumotorrent is considered to have done the latter, i.e. it facilitated copyright violations. The Dutch right holder's organisation Brein, assigned with the task to fight copyright piracy, tried to make Sumotorrent cease operations for several years, but was unable to locate and pursue the persons operating the websites. These persons had used false names and identification to register for their domains and to purchase hosting services. Brein then turned to the website's hosting provider.

At the time of Brein's first action, Sumotorrent was hosted by a different Dutch provider, which stopped its hosting activities after Brein sent a cease and desist letter. Sumotorrent then moved to Canada, but quickly returned to The Netherlands and found XS Networks to host its website. Soon after, in 2008, Brein contacted XS Networks to ask for the names of the persons behind Sumotorrent and to cease hosting the website. In the following three years of further unspecified negotiations, XS Networks failed to disclose personal information that allowed Brein to identify the organisation controlling Sumotorrent. Neither did XS Networks cease hosting the website. It was not until Brein sent formal cease and desist letters in December 2011 and January 2012 that XS Networks conceded to the request and stopped hosting the website. XS Network could however not provide true information identifying the persons behind Sumotorrent. Brein

then sought legal action and sued for a permanent injunction, and to obtain correct information (of the persons behind Sumotorrent) and damages.

### The Court's decision

In its decision the District Court of The Hague ruled for the first time on the question of whether a general hosting provider showed an adequate response to the notification of unlawful content on its services and, if not, whether a lacking response warrants damages for the loss suffered by rights holders. In this case the Court found that the host of an unlawful website, in certain circumstances, acts unlawfully. According to the Court: "This is certainly the case when a professional provider of hosting activities for websites is notified of Sumotorrent's unlawful behaviour several times."<sup>4</sup> The Court does not follow XS Networks's defence that Brein should have targeted the persons behind the Sumotorrent website. It reasoned that the contact information provided by XS Networks could not be used to that end and a hosting provider has a responsibility that is separate from the unlawful website it hosts. For these reasons the Court found that XS Networks has acted unlawfully by not promptly and adequately ending Sumotorrent's unlawful behaviour.<sup>5</sup> Without further reasoning the Court also found that XS Networks is liable to compensate the damage that resulted from this unlawful act.

On a separate issue the Court ruled on the fact that XS Networks could not provide true details of the individuals behind Sumotorrent. Brein argued that XS Networks should have verified the information, or at the very least now has a duty to investigate what the correct details are. The Court does not agree and concludes that

XS Networks has no duty to third parties to verify and disclose correct information of individuals to which it provides hosting services.

### Addition to the legal framework on online intermediaries

Ever since the case of *Lycos v. Pessers*<sup>5</sup>, Dutch online intermediaries know that they have a duty to help end unlawful behaviour that occurs on their services. That case dealt with the issue of providing details of the individual behind libellous statements. The Supreme Court set out a complex standard, balancing the rights of the intermediary, the individual behind the unlawful content and the interests of those suffering damage. Furthermore, the Directive has introduced to the safe harbours their own standards of conduct for the three types of online intermediaries; safe harbours are limited by the provision that specific injunctions can nonetheless be imposed, unless it would require an obligation of general monitor and filtering. This body of rules has led to many discussions on the responsibility of internet intermediaries, because the Dutch article 6:196c CC nor the Directive provide sufficient clarity on their position.

In The Netherlands the most recent and still on-going discussion can be found in the Pirate Bay filter cases, in which Brein demands internet access providers filter The Pirate Bay website (a notorious torrent website comparable to Sumotorrent)<sup>6</sup>. Unfortunately, although there has been a lot of discussion, most case law does not provide general standards that can be applied to ordinary intermediaries. There have been some decisions in relation to file-sharing platforms, such as *Kazaa*<sup>7</sup>, *FTD*<sup>8</sup>, *The Pirate*

*Bay*<sup>9</sup>, *MyP2P*<sup>10</sup>, *Mininova*<sup>11</sup> and several other torrent websites. The number of cases concerning general internet service providers is nonetheless limited, with the exception of several actions aimed at disclosing details of the individuals responsible for illegal content. In particular for hosts there was not much known about the practical standard of care that was implied in the relevant safe harbour provision. This statutory provision<sup>12</sup> states that a hosting provider is not liable for the information that is stored on its service, provided that it has no knowledge of the unlawful nature of the information and at the moment it becomes aware, promptly removes such unlawful information. In effect, this provision introduces a not further specified Notice and Takedown regime. Unfortunately this regime is rather vague and includes only open standards, just like the Directive. In comparison to the US intermediary rules, set forth in the Digital Millennium Copyright Act<sup>13</sup>, the EU scheme clearly lacks practical guidance. Therefore, it is up to the Member States to come up with basic rules that can be implemented by internet service providers. For instance, in France there was recently a case where a video hosting platform - also an internet service provider - was ordered to pay damages for not adequately responding to notices of copyright breaches (i.e. within four days)<sup>14</sup>. The downside to this approach is of course the ex post control that the courts exercise. They can only rule on which conduct does not meet the required standard of care. At least in The Netherlands it is not possible for courts to set a positive standard (e.g. hosting providers should remove infringing content within x days).

For the first time the XS

Networks case gives some guidance to Dutch hosts regarding their minimum duty upon notification of unlawful content. It confirms that a hosting provider should cease its services within reasonable time upon notification. Four years is - not surprisingly - not a reasonable time. Unfortunately the decision does not mention what exactly happened in the four years following Brein's first notification. In particular, the decision does not specify what Brein and XS Networks discussed. It is therefore difficult to deduce from this case what specifically made the Court conclude that XS Networks' response was not prompt and adequate. Of course the long time-span of four years must have been an important factor in this respect and the Court does find that XS Networks should have 'acted sooner.' Nevertheless, it would have been interesting to know if there were other circumstances that played a part in this decision.

This case also confirms that if the bar for a safe harbour is not met and the unlawful content is not removed promptly and adequately, the hosting provider can be liable for damages. There have not been any published cases in The Netherlands where a general internet service provider was found liable and ordered to pay monetary relief. As such, the case introduces a novelty, which is not necessarily surprising given the existence of the safe harbour.

It is, however, important to note that Brein only requested a declaratory judgment that XS Networks was liable for damages. These are later to be quantified in bifurcated proceedings. The Court in this case only ruled that XS Networks is liable for damages 'that are a result of the unlawful conduct.'<sup>15</sup> At the moment we do not know how much this damage is. Dutch law has strict standards

on damage attribution (causality) and quantification. We may learn to what extent XS Networks is accountable for the unauthorised file-sharing, based on Sumotorrents' torrents. For one thing the question might be how many peers would have actually refrained from file-sharing media if Sumotorrent was unavailable, when many more torrent websites likely provided the same offer of torrents.

On a closing side note, Brein is bound to be pleased that it succeeded in obtaining the decision that XS Networks is, in principle, liable for damages. In a previous decision, concerning a Usenet access provider, Brein was denied such a request, because Dutch law does not allow damage claims in collective actions<sup>16</sup>. The legislator reasoned that damage quantification requires a case-by-case calculation of the actual damage, for which collective cases do not allow sufficient room. Brein apparently pre-empted this defence and contested that all damage claims from the right holders it represents had been assigned to Brein so that the case was not formally a collective claim but a bundle of individual claims.

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1. Case has not yet been published, but can be found on <http://www.ieforum.nl/> by reference number. IEF 11916. Most cases referenced in these casenotes can be found (in Dutch) on <http://www.rechtspraak.nl> by their LjN reference number.
2. Explanatory Note of the legislator on the Act implementing the E-Commerce Directive, TK 2001-2002, 28197, no. 3.
3. Explanatory Note of the legislator on the Act implementing the E-Commerce Directive, TK 2001-2002, 28197, no. 3, paragraph 16.
4. Paragraph 4.8 of the decision.
5. Dutch Supreme Court 25 November 2005, LjN AU4019 (Lycos/Pessers).
6. District Court The Hague 11 January 2012, LjN BV0549 (BREIN/Ziggo and

- XS4All) and District Court The Hague 10 May 2012, LjN BW5387 (Brein/UPC e.a.).
7. Dutch Supreme Court 19 December 2004, NJ 2009, 548 (Kazaa).
8. Court of Appeal Den Haag 15 November 2010, LjN BO3980 (Eyeworks/FTD) and District Court Haarlem 9 February 2011, LjN BP3757 (FTD/Brein).
9. District Court Amsterdam 22 October 2009, LjN BK1067 (Brein/The Pirate Bay).
10. Court of Appeal Den Bosch 12 January 2012, IER 2012, 34 (C More/MyP2P).
11. District Court Utrecht 26 August 2009, LjN BJ6008 (Mininova).
12. Article 6:196c (4) CC.
13. 17 USC § 512.
14. Tribunal de Grande Instance (Paris), 13 September 2012 (TF1 e.a. v. Dailymotion).
15. Paragraph 4.21 of the decision.
16. District Court Amsterdam 28 September 2011, LjN BU6271 (Brein/NSE).