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Agency	Court of Justice, The Hague
Date of decision	28/01/2014
Date of publication	28/01/2014
Case number	200.105.418.01
Formal relationships	First instance: ECLI:NL:RBSGR:2012:BV0549 , (Partially) null and void and matter dismissed
Area of law	Civil law
Particular characteristics	Appeal
Indication of content	IE; copyright; article 26d of the Copyright Act/ article 15e of the Neighbouring Rights Act; action by Brein for an order against an intermediary (access provider) to block The Pirate Bay refused on the basis that the requirement for effectiveness/proportionality had not been met. On this point the burden of proof rests on Brein, not on the providers. The Pirate Bay does not itself make any statements to the public within the meaning of article 3 of the Copyright Directive.
Legislative references	Copyright Act Copyright Act 26d
Cites	Rechtspraak.nl [Case Law.nl] JHG 2014/48

Decision

Court of Justice, The Hague

Civil Law Division

Case number: 200.105.418/01

Case/Court Docket number: 374634/HA ZA 10-3184

Judgment dated 28 January 2014

concerning

1. **ZIGGO B.V.**,

having its registered office in Groningen,

hereinafter referred to as: Ziggo,

Barrister: J.J. Allen LLB in Amsterdam

2. **XS4ALL INTERNET B.V.,**

having its registered office in Amsterdam,

hereinafter referred to as: XS4All,

Barrister: W.P. den Hartog LLB in The Hague,

Appellants,

hereinafter jointly referred to as: Ziggo c.s.

against

the **BREIN Foundation** [Association for the Protection of the Rights of the Entertainment Industry in the Netherlands],

having its registered office in Amsterdam,

Respondent,

hereinafter referred to as: Brein,

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

The course of the proceedings

By writ dated 16 February 2012, Ziggo c.s. lodged an appeal against the judgments between parties handed down by the Court of Justice in The Hague dated 8 December 2010 (provisional judgment) and 11 January 2012 (final judgment). By Statement of Appeal (hereinafter Statement of Appeal Z), Ziggo has advanced 14 objections against the final judgment. By a separate Statement of Appeal (hereinafter Statement of Appeal X) XS4All has formulated 23 objections against the final judgment. Subsequently, a consolidation incident took place which resulted in a judgment of this court dated 13 November 2012, whereby the claims of Tele2 Nederland B.V., Tele2 Internetdiensten B.V., T-Mobile Netherlands B.V., Koninklijke KPN N.V. and KPN B.V. to be allowed to join Ziggo c.s. in the appeal were dismissed. After this, Brein issued a Statement of Reply which countered the objections of Ziggo c.s.

The parties had their positions argued at the sitting of this court on 19 September 2013, Ziggo by its barrister and his colleague E.A. de Groot LLB, XS4All by Chr. A. Alberdingk Thijm LLB and C.F.M. de Vries LLB, barristers in Amsterdam, and Brein by J.C.H. van Manen LLB and R. van Kleeff LLB, barristers in Amsterdam. Counsel have availed themselves of pleadings in this matter (hereinafter: PA = Pleadings in Appeal; the pleadings in the first instance will be referred to as: PF).

With a view to the closing arguments, the parties have sent a number of documents to the court and to the other party, namely:

- sent on 23 August 2013: from Ziggo documents 64 – 81;
- received on 4 September 2013: from XS4All documents 49 – 74;
- received by the court on 5 September 2013: from Ziggo document 82, containing the bill of costs of the appeal;
- received by the court on 5 September 2013: from Brein a change of claim and documents 126 – 147;
- received by the court on 10 September 2013: from XS4All document 75, containing the bill of costs of the appeal;
- received by the court on 18 September 2013: from Ziggo document 83, containing an updated bill of costs of the appeal.

On behalf of Brein an objection was raised against document 75 from XS4All on the grounds that it did not receive this document (on time).

Assessment of the appeal

The facts

1. The court takes the following facts as having been established.
 - a. The Pirate Bay (hereinafter TPB) is a BitTorrent website established by a group of three natural persons (hereinafter: the managers). BitTorrent is a protocol with which internet users can exchange files ('file sharing'). The users of a BitTorrent protocol are called 'peers', which is why a BitTorrent protocol is also referred to as a 'peer to peer' or P2P protocol. The essence of BitTorrent is that the files to be shared are cut up into small pieces, which means it is not necessary to maintain a central server to store those files. When 'file sharing' with the assistance of TPB the following are of significance:
 - In order to be able to share files the 'peers' first have to download specific software (a BitTorrent *client*). This software is not offered by TPB.
 - Torrents are files which contain meta-information about files located on the computers of the 'peers', such as media files (audio, video, games, software or e-books). This meta-information specifically concerns information about how the media files have been divided up and where they can be found. In the torrents, references are also made to the so-called tracker, a server which keeps up to date which 'peers' are available for a specific torrent/a specific media file. Apart from this central tracker system which uses a server, there is also a decentralised system, the

Distributed Hash Table (DHT), where all participating 'peers' operate as trackers themselves.

- The so-called 'initial seeders', who want to make available to their 'peers' a media file stored on their computer (for example, a music track or a film), make a torrent file with the help of their BitTorrent *client*.
- These days, magnet links are generally used rather than torrents. These are links which do not refer to a specific media file, but which – on the basis of a hash (finger print) – identify the content of a torrent file.
- The torrents/magnet links created by the 'initial seeders' are uploaded by them to a site such as TPB, which subsequently indexes these torrents/magnet links.
- The uploaded torrents/magnet links can then be found by the 'peers' as a result of the indexing applied by TPB. In this way the 'peers' can search on TPB for the media files they want. They can then download these files in a number of sections with the help of BitTorrent *client*. It is this *client* which begins the downloading. TPB plays no role in this.

b. A proportion of the torrents/media links offered on TPB refer to copyright and/or neighbouring rights protected material. The rights holders have (generally) not given approval to the managers and users of TPB to carry out any reserved actions.

c. Ziggo and XS4All are internet access providers. There are subscribers of these providers who make/have made use of TPB.

d. Brein is a foundation, to which the vast majority of the rights holders of music and film works and computer games in the Dutch market belong. By virtue of its articles of association, the foundation aims to resist unlawful exploitation of information carriers and of information, and also to promote to that end the interests of the right holders in respect of information and of those who exploit it legally, namely its members.

Brein's claims and the decision of the court

2.1. Claiming, primarily, that the subscribers to Ziggo c.s., when they consult TPB, and the managers of TPB are infringing copyright and neighbouring rights by using the services of Ziggo c.s. and that Ziggo c.s. (therefore) are intermediaries within the meaning of articles 26d of the Copyright Act (CA) and 15e of the Neighbouring Rights Act (NRA), and alternatively that Ziggo c.s. themselves are acting unlawfully because they are consciously and systematically facilitating infringements by their subscribers, Brein has demanded, to the extent it is still relevant:

I. an order to Ziggo c.s. to cease and desist from providing their services which are being used to infringe the copyright and neighbouring rights of rights holders, whose interests Brein looks after, by blocking and keeping blocked a number of specifically named domain names/(sub)domains and IP addresses through which TPB operates;

II. in the event that TPB should begin to operate through other IP addresses and/or domain names, an order to Ziggo c.s. to block and keep blocked access of their clients to these other IP addresses and/or domain names/(sub)domains within 24 hours of Brein's request to do so.

III. both on pain of a penalty payment.

- 2.2. In its final judgment of 11 January 2012, the court acceded to these demands, albeit with some modifications, such as replacing '24 hours' with 'ten working days' in demand II. This decision was based on the principle advanced by Brein in its primary claim in this connection, and the consideration that the subscribers to Ziggo c.s. commit infringements by using the services of Ziggo c.s. Because it had already determined that Brein's demands about this could be granted, the court did not consider Brein's contention that TPB had also used the services of Ziggo c.s. to commit infringements (cf. 4.51 of the final judgment). The proposition of Ziggo c.s. that the blockades demanded are not effective was rejected by the court on the basis that the blockades in any case mean an extra barrier, even if there undoubtedly are subscribers who will know how to by-pass them.

The appeal; preliminary considerations

- III.1. Ziggo c.s. have lodged an appeal against the court's decisions in good time. XS4All no longer refers to the provisional judgment in its Statement of Appeal X and has not raised any objection to it. Ziggo has raised one complaint which can be construed as an objection to the provisional judgment (see section 2 in the Statement of Appeal X). In its appeal, Brein has changed its demand to the extent that it has adjusted its list of IP addresses and domain names/(sub)domains included in demand I.
- III.2. On appeal – particularly with regard to section 796 of its Statement of Reply and sections 141 (at f), 148 and 149 PA – Brein has offered a number of pieces of evidence in support. In that context the word 'witnesses' is not referred to, nor has any reference been made to persons who would have been able to act as witnesses. In view of the facts that are in dispute in this matter, testimonial evidence – which has to relate to facts known to the witness from his own experience (article 163 of the Code of Civil Procedure – is not a readily available

source of evidence. Considering all these points, the evidence referred to cannot be regarded as extending to delivery of (counter-)proof by means of witnesses, but must be regarded as extending to delivery of documented (counter-)proof. Such evidence, such as the expert reports/messages referred to in section 148 of Brein's PA, Brein was able to present much earlier of their own accord and without prior approval from the court. The court sees no reason to offer Brein the opportunity to provide further documented evidence. It also needs to be noted that Brein has not made any request as specified in article 200 of the Code of Civil Procedure for the hearing of party experts.

- III.3. The court will first direct its examination on appeal to Brein's demands with regard to the primary principle. To that extent these demands are based on articles 26d of the Copyright Act and 15e of the Neighbouring Rights Act, which represent the implementation of article 11, 3rd sentence, of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 regarding the enforcement of intellectual property rights (the Enforcement Directive, hereinafter 'ED'), and/or the comparable article 8 paragraph 3 of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 concerning the harmonisation of certain aspects of copyright and neighbouring rights in the information society (the Copyright Directive, hereinafter 'CD'), which reads as follows:

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

- III.4. For the sake of brevity, only copyright will be discussed below. This, however, also refers to neighbouring rights.

Infringement through using the services of Ziggo c.s.

- 4.1 The court firstly states as follows: Section 42 in the preamble to Directive 2000/31 of the European Parliament and the Council of 8 June 2000 concerning certain legal aspects of services of the information society, namely electronic commerce, in the internal market ("Directive on electronic commerce") specifies that the activities of access providers such as Ziggo c.s. are restricted to the technical process of operation and the provision of access to a communication network in which information provided by third parties is passed on (*'mere conduit'*) or stored temporarily (*'caching'*). As emphasised in section 27 of the preamble of the Copyright Directive, the fact that Ziggo c.s. merely makes physical facilities available in order to make a communication possible does not form a communication to the public within the meaning of article 3 of this Directive. This means that Ziggo c.s. are not themselves committing

any copyright infringement, which all the parties in this dispute also take as their basic principle.

4.2 What is not in dispute is that the uploading of copyright protected works onto the internet is a communication to the public/a publication which is reserved to the copyright holders, so that performance of this action without approval constitutes an infringement. Any downloading of games from an illegal source is also a copyright infringement. The exemption in article 5 paragraph 2b of the Copyright Act does not apply to computer programs. Whether, in view of this exemption clause and the '3 steps test' in article 5 paragraph 5 of the Copyright Act, individuals who download music and films from illegal sources for their own use are making themselves guilty of copyright infringement is still an open question. The Supreme Court has put a preliminary question about this to the Court of Justice of the European Union; see Supreme Court 21 September 2012 '*Acı Adam c.s./Thuiskopie*' (LJN: BW5879). In the meantime, the Advocate General advised the Court of Justice of the European Union on 9 January 2014 in this preliminary procedure – which is registered under number C-435/12 – to interpret article 5 of the Copyright Directive in such a way that the exemption provided therein for copying for private use applies only to copying which is done from lawful sources. This opinion of the Advocate General means that any copying without approval from an unlawful source constitutes copyright infringement.

4.3 Together with Brein the court accepts that:

- a significant proportion of the subscribers to Ziggo c.s. have downloaded media files by using TPB as 'indexer' (hereinafter 'via TPB' in short);
- the subscribers to Ziggo c.s. who have downloaded via TPB have in most cases at the same time uploaded on behalf of their 'peers' sections of the media file which they had downloaded;
- a (very) large proportion of the magnet links/torrents which have been placed on TPB include references to illegal material, i.e. material that has been placed/uploaded on the internet without approval of the copyright holders.

From all this, viewed together with the facts reported in *rationes decidendi* 1 a-c, it follows that a not inconsiderable proportion of Ziggo c.s. subscribers have committed copyright infringement by uploading via TPB protected works without approval from the copyright holders. Since in this context uploading and downloading (almost) go hand in hand, it can remain unresolved whether downloading of itself of music, films and books/e-books by subscribers to Ziggo c.s. 'via TPB' (for their own use) also constitutes a copyright infringement, and

copyright infringements which are created by downloading games are no longer of any independent significance.

- 4.4 The uploading subscribers to Ziggo c.s. can be characterised as third parties who provide Ziggo c.s. with the information passed on and stored by Ziggo c.s. (see *ratio decidendi* 4.1 about this). As the court also considered in *ratio decidendi* 4.14 of its final judgment, these subscribers, therefore, are making use of the services of Ziggo c.s. for the copyright infringements committed by them, and these services consist of providing internet access to their subscribers, and Ziggo c.s. can, therefore, be characterised as intermediaries within the meaning of articles 8 paragraph 3 of the Copyright Directive, 11, third sentence of the Enforcement Directive and 26d of the Copyright Act. Ziggo's objection No. 5 and XS4All's objection VII, which defend a different opinion, are without merit.
- 4.5 On appeal, Brein has once more argued that the managers of TPB are also committing copyright infringement. This has been contested by Ziggo c.s. The court has not considered this point at issue (see *ratio decidendi* 2.2).
- 4.6 The managers of TPB make available to the public, through magnet links or otherwise, the meta-information incorporated in torrent files (see *ratio decidendi* 1.a). They offer access, therefore, to the information necessary to gain access to the works uploaded by the 'seeders'. In the opinion of the court, this action by the TPB managers does not constitute a communication of those works to the public within the meaning of article 3 of the Copyright Directive. The access offered to these works is too indirect for this. The fact that, as Brein argues under 344 and 378 of its Statement of Reply, TPB creates the magnet links and adds the trackers to the torrents/magnet links, does not change this, since magnet links and trackers only refer to meta-information or contain meta-information. Nor can one deduce from the other facts which Brein has mentioned in sections 335-390 of their Statement of Reply that TPB does more than provide access to information necessary to be able to gain access to uploaded works. There is, therefore, no question of any intervention as intended in the decision of the Court of Justice of the European Union about the concept 'communication to the public' (see *inter alia* its decisions of 13 October 2011, C-432/09 in the matter of '*Airfield*', and of 15 March 2012, C-135/10 in the matter of '*Marco del Corso*'), so that it does not matter whether the TPB managers act from a profit motive and whether perhaps a new public was being tapped for the works in question. Brein's propositions (Statement of Reply under 306-409) based on this cannot help it either. In any case, this does not affect the possibility that the managers of TPB are acting unlawfully with regard to the copyright owners because they are facilitating/promoting

copyright infringements by others (including in any event the uploaders). However, this does not fall within the scope of article 3 of the Copyright Directive.

4.7 In support of its proposition that the managers of TPB are themselves infringing copyright, Brein has also argued that on TPB's server there are hundreds of thousands of covers of film and game DVDs, music CDs, books, film posters and other 'art work'. This has not been (specifically enough) denied by Ziggo c.s. In this case, it must, therefore, be accepted that there is a question of copyright infringement by the managers of TPB because they are communicating to the public the 'art work' referred to (such as CD covers). The court will find, moreover, that the managers of TPB, even if they have no contractual relationship with Ziggo c.s., are making use for these infringements of the (access provider) services of (*inter alia*) Ziggo c.s. since that 'art work' is being communicated to the subscribers of Ziggo c.s. through those services. Reference can also be made here to the Advocate General's conclusion of 26 November 2013 in the matter of 'UPC-Constantin/Wega' (the *Kino* case), in which the Austrian Oberste Gerichtshof [Supreme Court] has submitted preliminary questions, registered under case number C-314/12, to the Court of Justice of the European Union about the explanation of article 8 paragraph 3 of the Copyright Directive. The Advocate General proposed an affirmative answer to question 1, which read: whether the operators of the kino.to website, on which films were being made available to the public (including the clients of access provider UPC) without the consent of the copyright owners (Constantin and Wega), were making use of the services of UPC, although the latter was not the provider of these operators.

4.8 The conclusion to the foregoing is that by using the services of Ziggo c.s. 'via TPB' copyright infringement is being committed by:

- a relevant proportion of Ziggo c.s. subscribers;
- the managers of TPB, but only in relation to the 'art work'.

(Exclusively) with regard to these actions, article 26d of the Copyright Act applies. This article, and the underlying articles 8 paragraph 3 of the Copyright Directive and 11, third sentence, of the Enforcement Directive which support it, do not look at the situation where a third party by using the services of intermediaries such as Ziggo c.s. facilitates/promotes (unlawful) infringement of copyright by others, but does not commit such infringement itself (compare *ratio decidendi* 4.6 *in fine*).

The appeal by Ziggo c.s. to the principle of proportionality and non-effectiveness.

5.1 Ziggo's objection 12 (in connection with sections 5.1-5.6 of Statement of Appeal Z) and XS4All's objection XIII are aimed at the rejection by the court of their defence that the measures sought do not satisfy the proportionality requirement, *inter alia* because they are not effective. On appeal, Ziggo c.s. have clarified this defence as follows. The blockade of TPB sought by Brein can be very easily circumvented, not only by the internet user (by means of a proxy, through which TPB's site can be reached in a roundabout way), but also by TPB itself (for example, by using new IP addresses). Besides this, even if the blockade was not circumvented, there are many comparable alternative torrent sites available, to which up- and downloaders can resort. According to Ziggo c.s., it is not the case, therefore, that the imposition of a blockade of TPB on access providers will lead to a reduction in the number of copyright infringements. In this connection, Ziggo c.s. have also pointed out that the measures sought constitute a violation of their freedom of enterprise (section 318 of Statement of Appeal Z; objection XIV of XS4All). In support of their 'non-effectiveness defence', Ziggo c.s. have *inter alia* brought the following documents into the proceedings:

- a report from TNO [Netherlands Organisation for Applied Scientific Research] of 7 June 2010 ('TNO I');
- a report from TNO of 11 April 2012 ('TNO II');
- a report from the Institute for Information Law (IVIR) of 16 October 2012, entitled 'File sharing 2©12' (hereinafter: the 'File sharing 2©12' report);
- a 'working paper' by J. Poort and others from the IVIR of 22 August 2013, with the title 'Baywatch' (hereinafter: the Baywatch report);
- a report from TNO of 2 September 2013 ('TNO III').

5.2 According to Brein, the proportionality requirement has been satisfied. In its view, effectiveness forms no part of this test and furthermore the measures sought are certainly effective.

5.3 In section 128 of its decision of 12 July 2011 in the matter of *L'Oréal/eBay* (case C-324/09), the Court of Justice of the European Union emphasised that an order to an intermediary, as intended in article 11 of the Enforcement Directive, differs materially from an order against an infringer, because an order directed at the infringer consists logically of his being forbidden to continue the infringement, while the situation of the provider of the service with which the infringement is being committed is more complex and lends itself to a different kind of order. This has been developed in sections 136-138 of this decision by the Court of Justice of the European Union with the consideration that, in short, the rules of national law, on the one hand, should be

arranged in such a way that the objective of the Enforcement Directive, namely that the measures contained therein, including the measure of article 11, third sentence, should be effective and be a deterrent, can be attained; but, on the other hand, that these rules must respect the limitations which result from the Enforcement Directive and the sources of law to which this directive refers. In sections 139 and 140 of the *L'Oréal/eBay* decision, the Court of Justice of the European Union has considered this matter further, namely that as a result of article 3 of the Enforcement Directive the measures referred to in this Directive, including the measure of article 11, third sentence, have to be reasonable and proportional and should not be excessively costly, while it also follows from article 3 of the Directive that the measures specified in an order should not create any impediments to legitimate trade. The Dutch Court has to conform to this explanation and application of article 26d of the Copyright Act, and thereby ensure an appropriate balance between the rights and interests involved (section 143 of the *L'Oréal/eBay* decision).

- 5.4 The consideration just described must also take into account the fundamental rights of the Charter of Fundamental Rights of the European Union (hereinafter: Charter), which had not yet come into operation at the time of the facts involved in the *L'Oréal/eBay* case. The following provisions of the Charter in particular are of significance in this regard:

'Article 16 Freedom to conduct a business

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

Article 17 Right to property

(...)

2. Intellectual property shall be protected.

Article 52 Scope of guaranteed rights

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

- 5.5 Contrary to Brein's opinion, effectiveness forms part of the proportionality requirement specified in the *L'Oréal/eBay* decision and in article 52 paragraph 1 of the Charter, which means that the measures sought must be proportionate to the objective intended. In general, it can be said that the less effective a measure is, the less

easily the intended purpose can be achieved and the measure will, therefore, be slower to assume reasonable proportionality in respect of that goal. See also section 99 of the conclusion of the Advocate General in the '*Kino*' case, already raised in *ratio decidendi* 4.7.

- 5.6 From the foregoing, it follows that one of the conditions for allowing an order under article 26d of the Copyright Act is that the proportionality requirement has been satisfied as well as the effectiveness requirement forming a part of that. The appeal by Ziggo c.s. to the principle of proportionality/effectiveness can consequently not be regarded as a liberating defence, for which they have the burden of proof (compare *inter alia* supreme Court 15 December 2006, NJ 2007, 203 and Supreme Court 11 July 2008, LJN: BC8967). This means that Brein must argue and needs to prove by reasoned dispute that the measures sought by them are proportional/effective. Brein's observation under 141 of their PA, that the burden of proof lies with Ziggo c.s. in this matter, can, therefore, not be accepted as correct.
- 5.7 As a result of the final judgment – currently being contested – of 11 January 2012, Ziggo c.s. have set up a blockade of TPB on 1 February 2012 (hereinafter also: blockade A). TPB then began to make use of IP addresses other than those that were mentioned in that judgment. Because its claim II was sustained in the final judgment, Brein has requested Ziggo c.s. also to block these new addresses. Ziggo c.s. have proceeded to do that (hereinafter: blockade A1). On 10 May 2012, the judge hearing applications for interim relief in The Hague ordered the other large Dutch providers (UPC, KPN, Tele2 and T-Mobile, hereinafter simply: KPN c.s.) to block TPB. Since May 2012 these providers have also blocked access to this site (hereinafter also: Blockade B). During this period, Brein has also obtained court orders against a number of proxies to TPB and it has 'knocked down' a large number of such 'TPB dedicated' proxies.
- 5.8 With Brein, the court assumes that, in the Netherlands, visits to TPB have declined considerably after blockade A/A1, and certainly after blockade B came into effect, even though the site can still be reached by Dutch internet users through proxies (to the extent these have not yet been 'knocked down' by Brein), mirror sites and VPN connections. The correctness of this assumption has been confirmed by Ton Huibregts from XS4All, who wrote in a web log on 4 July 2012:
- 'Yesterday BREIN announced with great fanfare that visits to The Pirate Bay website have plummeted since the court obliged Dutch internet providers to block this site. Yes, pretty obvious. If you are going to block access the number of visitors diminishes; not many people will be surprised by that.'*

According to websites statistics such as Alexa and Google Trends, the decrease in visits to TPB is, moreover, greater than it would be in reality, in view of the fact that traffic to TPB through proxies is not counted in those statistics as traffic to TPB, but as traffic to the website of that proxy (compare section 45 of XS4All's PA and page 12, at the bottom, of TNO III). The precise extent of the decrease, however, does not need to be established in these proceedings.

- 5.9 In Brein's view, the 'dramatic' decrease in visits to TPB after the blockades is the only relevant fact in the context of the assessment of their effectiveness, and the increase or decrease in all the BitTorrent traffic and the existence of alternative possibilities for committing infringements are not of significance in this case (*inter alia* PA at 62, 79 and 91). As has also been expressed under 5.1, Ziggo c.s. see the number of copyright infringements as the measure.
- 5.10 The intended target of Brein's claims is the protection of copyright, an objective which is also guaranteed/protected by article 17 paragraph 2 of the Charter. One can speak of effective measures for the realisation of this goal within a context such as the current case (a) if the people who were infringing copyright will proceed to do that less often, so that the number of infringements committed by them decreases, or (b) if the impact of infringements is reduced, for example, because the public that notices the infringing activities becomes smaller.
- 5.11 The measures sought by Brein, which are aimed at Ziggo c.s. no longer providing their subscribers with access to the TPB website, can have an effect on the behaviour of only those subscribers and consequently on the number of infringements committed by them through TPB, but not on the behaviour of the managers of TPB and the number of infringements committed by them. These measures can, however, have an influence on the impact of the infringements committed by the managers of TPB.
- 5.12 Because of the reduction in visits to TPB as a result of the blockades, the number of infringements committed by subscribers to Ziggo c.s. through TPB has become less. However, if it were to be the case, as Ziggo c.s. argue, that these subscribers, if they are not already circumventing these blockades through proxies, are avoiding them by having recourse to alternative torrent sites, then - despite the blockades and the resulting decrease in visits to TPB - no reduction takes place in the number of infringements committed by those subscribers, and there is only a question of a change of the way (by circumvention through a proxy) or of the 'indexer' via which/with which they commit these infringements. In that case, the intended goal is not brought any closer and the blockade sought cannot be regarded as effective. To that extent, Brein's argument reported in

ratio decidendi 5.9 is not valid. With regard to the infringements by the manager of TPB, this is somewhat different since, to the extent that as a result of the blockades people have diverted to alternative torrent sites, not exploited by the TPB managers, these blockades have resulted in the communications made by the TPB managers reaching a smaller public than would have been the case without those blockades – after all, the ‘divergers’ have fallen away as TPB’s public – so that the impact of infringements by the TPB managers has decreased because of the blockades.

- 5.13 The court will now first examine whether the avoidance behaviour of their subscribers as argued by Ziggo c.s. actually takes place. Here the court employs ‘avoidance’ as a general term which includes circumvention (for example, through proxies) and the use of alternative torrent sites.
- 5.14 The TNP III report, mentioned in *ratio decidendi* 5.1, refers to the network traffic at XS4All during the period from 31 October 2011 to 30 April 2012, i.e. during the period of three months before, and three months after, the commencement of blockade A. More particularly, TNO III contains the fallout of analyses carried out by TNO based on network information provided by XS4All over the period referred to:
- i. the total daily volume of internet traffic;
 - ii. the daily volume of BitTorrent classified internet traffic;
 - iii. the total daily volume of internet traffic divided by the daily volume of BitTorrent classified network traffic.

TNO III reports that in none of these analyses can any clear change be observed; that the volume of BitTorrent classified network traffic during the three months after blockade A was the same as during the three months before this, and that, because the use of BitTorrent is directly dependent on receiving torrent files and/or magnet links, the use of sources for these files is unmistakably unchanged despite the blockade. TNO mentions two possible causes for this, namely (a) that the share of TPB’s website in the availability and spread of torrent files and/or magnet links in the Netherlands was not as great as thought, or (b) that a great deal of use is being made of the possibilities of avoiding the blockade of TPB. Cause (a) can be discounted in the opinion of the court because, as Brein has noted without being contradicted, before blockade A TPB still stood high (namely, at number 26) in the Dutch top 200 of the most visited websites, so that cause (b) remains. The findings of TNO III, therefore, amount to this: that blockade A has been avoided on a large scale. With regard to this, TNO III refers to the possibilities described (*inter alia*) in TNO II of avoiding a blockade, including:

* using a torrent site/'indexer' other than TPB (having recourse to alternatives as mentioned in *rationes decidendi* 5.12 and 5.13);

* reaching TPB by means of another route, for example, through a proxy (the circumvention mentioned in *rationes decidendi* 5.12 and 5.13).

These are the simplest avoidance methods for which no extra software or adaptations in the user's computer are necessary. With Brein (PA at 146) it is accepted that the other avoidance methods are too complicated for the average 'lazy' internet user (the 'average' internet surfer). These other methods, will, therefore, not be considered.

5.15 According to Brein, no meaningful conclusions can be drawn from TNO III (see PA sections 168-194) either. In the first place, it has argued on this that it is not clear whether the traffic analysed by TNO actually 'all concerned BitTorrent traffic', since TNO III notes:

'Through this method of classification, a determination of the exact volume of BitTorrent traffic is not possible. After all, other network traffic could be classified as BitTorrent and vice versa.'

With this, Brein bypasses the fact, however, that following on from this passage TNO III notes (without contradiction) that:

'However, this method of classification can be used for an analysis of the relative volume of BitTorrent traffic, for example, an increase or decrease.'

Brein's argument just referred to falls apart here. Brein has also submitted the following:

i. Bit-Torrent traffic shows strong growth – according to Sandvine's report submitted by Brein as document 117, traffic has risen by some 40% in the US – and, in light of this trend, the fact that TNO does not perceive any change 'could possibly mean that the blockade is effective'.

ii. TNO III makes no distinction between legal and illegal BitTorrent traffic, while Facebook, for example, supplies a great deal of BitTorrent data traffic. The failure to make this distinction is not helpful, according to Brein, because: 'suppose that there is a decrease in illegal BitTorrent traffic which is nullified by a greater increase in legal BitTorrent traffic?'

These arguments have a (strongly) speculative streak which is also evident from the wording employed by Brein. According to TNO, it was not the situation in the Netherlands, as far as XS4All was concerned, that BitTorrent traffic increased during the three months before blockade A. Accordingly, there is no reason to accept that there would have been an increase after that which, however, as Brein appears to be wanting to suggest, has been prevented by this blockade. The

court also points out that in the Sandive [sic! it should be Sandvine - translator] report Facebook is counted as belonging to a category other than BitTorrent. In this light, the mention of Facebook in this argument is difficult to understand. The final argument that Brein has raised in this connection, namely, that the quantity of BitTorrent traffic fluctuates greatly and that it is not clear where the fluctuations come from, does not affect the fact that total internet traffic and BitTorrent traffic over the entire period examined did not change significantly. It follows from the preceding, therefore, that the arguments here discussed cannot negate the finding reported by TNO that blockade A has been avoided on a large scale. Here it is also significant that:

- Brein itself has emphasised that other torrent sites such as Kickass.to, Torrentz.eu and Isohunt have taken the place of TPB; that the 'lazy' internet surfer who cannot immediately go to TPB will go to one of their competitors; and that research indicates that users of TPB switch to alternatives (see *inter alia* PA under 80-82, 91, 146, 150 and 170);
- Brein has made no (counter-)offer of proof which would be eligible for remuneration (see *ratio decidendi* 3.2), although the burden of proof and the pleading rests on it (see *ratio decidendi* 5.6).

Insofar as Brein, in view of its arguments in sections 571 of its Statement of Reply and 132 and 140 of its PA, has adduced or would want to adduce against TNO III that the measurement period employed therein ended before a large number of 'TPB dedicated' proxies had been 'knocked down' (see *ratio decidendi* 5.7 *in fine*), it cannot derive a valid argument from that, since, because of the avoidance possibilities mentioned in *ratio decidendi* 5.13 (an alternative torrent site or another proxy), the withdrawal of a proxy can easily be taken care of. This applies also to blockade A1 which, therefore, can be put on a par with blockade A which preceded it.

- 5.16 In support of its argument that the measures sought are actually effective, Brein has also appealed to the Baywatch report and the 'File sharing 2©12' report (PA under 155, 160 and 164).
- 5.17 The Baywatch report investigated the question: what is the effect of the blockades on online copyright infringement 'as a whole'? The investigation was based *inter alia* on a consumer survey of a representative group of the Dutch population aged 16 years and above. This consumer survey (note 2 on page 8 and 2nd paragraph on page 11) reveals that approximately 25% of consumers had downloaded from an illegal source at least once during the previous six months and that of this group about 20%-30% (i.e. 4%-6% of all consumers) had started to download less from illegal sources as a result of the blockades or had even stopped altogether. On the other hand, the report also states that there were consumers who had

begun to download more from illegal sources after the blockades, but these are (far) fewer than the 20%-30% of the downloaders who stopped or reduced. This outcome is in keeping with the findings based on a consumer survey during the summer of 2012 in chapter 6 of the 'File sharing 2©12' report, that after blockade A of the clients of Ziggo c.s. – 23.7% of whom were downloading from illegal sources – 1.9% stopped downloading from illegal sources and 3.6% did less of it, while 1.1% started to download more after that.

- 5.18 On page 29 of its PA, Brein has calculated – on the assumption that Ziggo has 1,788,000 subscribers and XS4All has 338,000 connections – based on the percentages of 1.9% and 3.6% (together 5.5%) mentioned in the 'File sharing 2©12' report, that 'a mere 100,000' Ziggo subscribers and 'a mere 20,000' XS4All subscribers have started to download less since blockade A, or have stopped altogether. This calculation is correct in itself, even if Ziggo and XS4All have stated that they have somewhat fewer subscribers than Brein took as its starting point (Ziggo in section 93 Statement of Appeal Z: 1,500,000 subscribers, and XS4All in section 16 PA: 250,000 subscribers), and the outcomes are somewhat less (about 80,000 instead of 'a mere 100,000' for Ziggo, and about 14,000 instead of 'a mere 20,000' for XS4All). Based on these figures, it can be established that of the XS4All subscribers – to which TNO III related – after blockade A (1.9% of 338,000 or 250,000 =) about 6,500 or 4,750 persons stopped downloading, and about $(20,000 - 6,500/14,000 - 4,750 =)$ 13,500/9,250 persons began to download less. According to Brein, this demonstrates that the blockade certainly had an effect (PA under 160).
- 5.19 The effectiveness test to be applied here is not so much concerned with the number of subscribers that (still or no longer) commits infringements, but with the number of infringements that are (still or no longer) being committed by the subscribers of Ziggo c.s.; if there are two people X and Y who each commit 50,000 infringements, then a measure which leads exclusively to infringer Y dropping out is effective, but if X commits 50,000 infringements and Y only 2, then taking action against Y alone has hardly any effect. Since the findings in TNO III, that the use of BitTorrent among XS4All subscribers remained the same after blockade A, and that this was caused by large scale avoidance of this blockade, have not been negated as is evident from the consideration in *ratio decidendi* 5.15, and those findings can, therefore, be taken as starting points in this case, the conclusion must be drawn that the decrease in visits to TPB, accepted in *ratio decidendi* 5.8, has not led to a significant reduction in the number of copyright infringements by XS4All subscribers. This indicates that the approximately 6,500/4,750 XS4All subscribers, who stopped downloading after blockade A, were responsible for only a

(very) small proportion of the infringements prior to that, and that the approximately 13,500/9,750 XS4All subscribers, who began to reduce after blockade A, either committed few infringements in the past, or only very few of them have reduced infringing. Here it is relevant to point out that it is obvious that the blockade has had an effect precisely on those who were already committing few infringements. After all, this will generally be the inexperienced internet users, and, as described on page 11 of TNO I, a blockade will generally set up a certain obstacle for such internet users who are not very familiar with the various avoidance possibilities. Although the pleading and burden of proof rest on Brein (see *ratio decidendi* 5.6), it has not concretely argued/substantiated and in any case not demonstrated that the 'stoppers'/'reducers' were responsible in the past for more than a negligible proportion of the infringements, and that the 'reducers' began to reduce to any relevant degree after the blockade(s). Taking all this into account, the court comes to the conclusion that the Baywatch report and the 'File sharing 2©12' report do not negate the findings in TNO III.

- 5.20 It is plausible that the phenomenon reported in TNO III for the XS4All subscribers also occurs with the Ziggo subscribers. Although this – certainly in this light – fell within its sphere of interest (see also *ratio decidendi* 5.6), Brein has not argued that it is otherwise. In any case, it has made no (counter-)offer of proof which would be eligible for remuneration (see *ratio decidendi* 3.2). In this state of affairs, what was considered in 5.19 must be considered to be of similar application to the Ziggo subscribers.
- 5.21 The consumer survey used in the Baywatch report has also shown that after the blockades the number of consumers who were downloading from illegal sources had increased; for example: 3 months after blockade A, 22.5% of the Ziggo c.s. subscribers downloaded from illegal sources; 10 months after this blockade (therefore, on 1 December 2012) that percentage had risen to 25.2 (see page 9 and table 4 of that report). The fact that, in spite of a number of consumers having stopped downloading from illegal sources, there was an increase in the number of illegal downloaders, has been explained in the Baywatch report by the hypothesis that there are other consumers who had begun to download from illegal sources. The court will take this explanation as its starting point since it is difficult to think of another explanation, nor has any other explanation been defended by the parties. The fact that the number of illegal downloaders has increased despite a blockade points to newcomers, or at least a significant number of them, not being restrained by a blockade from starting to download from illegal sources.
- 5.22 The foregoing implies that in this case it cannot be assumed that blockade A/A1, ordered by the court at Brein's request, has been effective in relation to the Ziggo c.s. subscribers. Through the

requested blockade, the freedom of Ziggo c.s. to conduct business – the freedom to act at one’s own discretion - has been affected, and as Brein has argued in its Statement of Reply A (under 509, 544 ff and 609) and (after that) has not (any longer) been disputed by Ziggo c.s. in a reasoned response, the fact that the blockade has practically not cost Ziggo c.s. anything, is very simple, and does not cause them any difficulty, and that, as Brein has also argued without contradiction, Ziggo c.s. also block and disconnect their subscribers on a large scale, does not detract from this. After all, this blockade constitutes an infringement of their freedom to act at their own discretion, even if for Ziggo c.s. there are no, or hardly any, costs and difficulty attached to it. Seeing that the requested blockade must be regarded as not effective, and consequently – also taking into account that Ziggo c.s. themselves are not committing any infringements (see *ratio decidendi* 4.1) – does not contribute to the intended objective of such a blockade, namely the protection of intellectual property, also specified in the Charter, the proportionality principle entails that the infringement of the freedom of Ziggo c.s. to conduct a business, likewise guaranteed by the Charter, is not justified.

5.23 Brein has also submitted (in sections 563-564 of its Statement of Reply) that it would be unwarranted to link to the conclusion that the measures it sought in this matter would not be effective the fact that there are other paths to illegality (the previously mentioned avoidance possibilities). As it happens, these other ways are also dealt with, or will be dealt with, by Brein as part of a ‘broader approach’ of illegal distribution of protected works. In view of its arguments in sections 597 and 598 of its Statement of Reply, the court understands that Brein (also) wants to prove with this that it is employing a ‘step-by-step approach’, which necessitates that it begin somewhere, in this case with blockade A, which Brein considered necessary because the order, pronounced at its request in 2010 in a Dutch proceeding on the merits against the managers of TPB to make this site inaccessible on pain of periodic penalty payments, proved not to be practicable (Statement of Reply under 208-210). The managers of TPB, who were sentenced in Sweden to long terms of imprisonment, are ‘elusive’ according to Brein. From Brein’s arguments, it can be deduced that, with its suggested ‘broader approach’/‘step-by-step approach’, it is aiming at the following (sequential) measures:

- a. to have the access providers ordered to block alternatives to TPB as well;
- b. the ‘knocking down’ of proxies;
- c. taking action against the managers of alternative torrent sites;

Under PA 147, Brein remarked that it is aiming at ‘the worst evils, such as The Pirate Bay, Kickass.to and Torrentz.eu’, because the

rights-holders have reconciled themselves to the fact that it is impossible to stop all the illegal traffic on the internet. Under PA 91, Brein remarked that 'at this moment there is only a handful of BitTorrent websites which are really capable of competing with The Pirate Bay. Under PA 237, Brein remarked that the cases against other illegal websites are being prepared, and that the current matter is a test case against TPB, with which it clearly means: a test case against providers regarding the blockade of TPB.

- 5.24 It is difficult to see – certainly without further clarification – why Brein in its proceedings against the providers (this procedure and the procedure against KPN c.s., see *ratio decidendi* 5.7) did not also immediately seek an order to block the mere 'handful' of BitTorrent sites in competition with TPB, which with TPB form the 'worst evils' (Kickass.to, Torrentz.eu and possibly Isohunt). Because this 'handful' of competing BitTorrent sites did not have to be summoned in the proceedings against the providers – just as it was not necessary to summon TPB in these proceedings – this would not have produced any particular procedural and factual complications. In any case, it is difficult to see why the matters concerning these few alternative BitTorrent sites are still only in the preparatory phase – more than one-and-a-half years/nearly two years after blockade A, which was created on the basis of the contested judgment. The argument evidently being employed by Brein for this, that it first wants to wait for the test case – which in its eyes this matter is – is not conclusive because the outcome of this 'test case' is determined to a significant extent precisely by the fact that alternative BitTorrent sites are active. In this state of affairs, with regard to measure (a), the court considers the appeal to a 'step-by-step approach' not justified. There was no good reason for Brein not to take the next step (a); at least, Brein has not made (sufficiently) clear that it had a good reason for this, although, in the light of what has just been considered and what was considered under 5.6, that was its responsibility. As already considered under 5.15 *in fine*, measure (b) can be simply avoided, while measure (c) also cannot be presumed to offer consolation. Since court orders/prohibitions against the managers of TPB have proved not to be feasible, it is not reasonable [to assume] – at least, not automatically – that court decisions against the managers of the websites of the other 'worst evils' would be feasible. If that were the case, then it is not (made) clear why Brein has (still) not taken any action against (the managers of) these other sites. Consequential measures (b) and (c), therefore, also fail to provide an adequate ground for Brein's appeal to a 'broader approach'/'step-by-step approach'. These approaches cannot in this case serve as compensation for the lack of (immediate) effectiveness. Brein's plea reproduced in *ratio decidendi* 5.23 fails on this account.

- 5.25 In view of what was considered under 5.12, it cannot be said that the blockade requested by Brein lacks effectiveness with respect to the infringements of the 'art work' committed by the managers of TPB. The blockade was not in fact sought by Brein with a view to protecting the copyright in the 'art work', but rather with a view to the protection of the copyright in music, film, games and (e-)books (see *inter alia* section 10 of the originating summons, section 3 of the Statement of Reply, section 7 of the Statement of Reply A and sections 15 and 47 of Brein's PA). Under PA 16-18, Brein again emphasised that what is involved here is the negative influence of 'file sharing' on the sales of the entertainment industry. File sharing has no relationship to the 'art work' that exists on TPB's server (see *ratio decidendi* 4.7), but to the music, films, games and books/e-books themselves, and the sales of the entertainment industry are also not generated by the 'art work', but by the music, films, games, books/e-books. The interests of the right-holders in relation to the termination/prevention of copyright infringements of the 'art work' are, therefore, not of sufficient weight to be able to justify the adverse effect on the freedom to conduct a business of Ziggo c.s. - who themselves do not infringe the copyright in the 'art work'. Although the non-effectiveness defence of Ziggo c.s. fails in this category of infringements, Brein's claims based on this are, therefore, frustrated by the proportionality principle to which Ziggo c.s. have also appealed in a more general sense, independently of their non-effectiveness defence.
- 5.26 All these things lead to the conclusion that the measures sought by Brein are in conflict with the proportionality requirement/effectiveness requirement. Ziggo's objection 12 and XS4All's objection XIII, in which the defences relating to this are set down, are, therefore, effective. This also means that, on the primary ground advanced, Brein's claims cannot be granted.

Brein's claims on the subsidiary ground

- 6.1 The subsidiary ground of Brein's claims – currently being examined – has been clarified by Brein as follows. Ziggo c.s. continued giving access to TPB even after they had pointed to its evidently illegal and damaging character and to the fact that the managers of TPB had been irrevocably ordered to cease their services in Dutch proceedings on the merits, even though this access could be easily blocked by Ziggo c.s. and at minimal cost, and even though they had specified furthermore in their general conditions that their subscribers are not allowed to infringe any intellectual property rights. By so doing, Ziggo c.s. make themselves guilty of consciously and structurally facilitating and thus promoting large-scale infringements by their subscribers. According to Ziggo – who also point out that they are acting only as a 'mere conduit' (Statement of Appeal Z under 33-36) – they are still

not acting unlawfully and they are not to be blamed. XS4All also disputes that it is acting unlawfully. It argues more particularly that it is providing a *mere conduit* service; that it follows from article 12 of the Directive on Electronic Commerce/6:196c of the Civil Code that it is not responsible for the information to which it gives its subscribers access; and that, therefore, it also cannot be bound to take certain measures on the basis of the principle of care (PF under 53-55, Statement of Appeal X under 12-15). The court also notes that the appeal by Ziggo and XS4All on the proportionality/effectiveness requirement must also be considered to have been made in this regard.

- 6.2 On appeal, it is not (any longer) disputed that Ziggo c.s. are access providers who also, as far as TPB is concerned, are only carrying out activities which can be characterised as *mere conduit*. Therefore, they do not themselves commit any copyright infringements, as has been set out under 4.1, and they are free from responsibility based on article 12 of the Directive on Electronic Commerce/6:196c paragraphs 1 and 2 of the Civil Code. As a rule, an access provider cannot be accused of acting carelessly if it has taken the measures necessary by virtue of these articles to become eligible for protection against liability, although this is not completely excluded. Under special circumstances, and considering specific interests, it may be possible to accept careless handling, on the basis of which an order or prohibition can be granted in accordance with article 3:296 of the Civil Code, even if compensation for damage may not be possible because of the indemnification guarantee. However, in the event that the conditions for indemnity have been satisfied, and in addition the obligation required of the provider is disproportionate and/or ineffective, the provider's failure to comply with this obligation can be regarded as not being in conflict with the principle of care – a provider cannot be held to what are to him disproportionately adverse or ineffective measures – so that in this case according to Dutch law no prohibition or order can be imposed (see also *ratio decidendi* 7.11 of the decision of the Leeuwarden Court of 22 May 2012 in the matter of '*Stokke/Marktplaats*', ECLI:NL:RBZLY:2007:BA4950). Since it has been decided before this that the measures sought by Brein are not proportional/effective, the subsidiary ground advanced cannot support Brein's claims. Therefore, on this ground also Brein's claims cannot be granted.

Conclusion and costs of the proceedings

- 7.1 The contested final judgment is set aside and Brein's claims are dismissed.

- 7.2 XS4All's appeal against the interlocutory judgment cannot be allowed, because it has not advanced any objections against it. It is difficult to see what interest Ziggo has in the setting aside of the interlocutory judgment, which was sought by it – even in its Statement of Appeal Z, – in which Ziggo's requests for an adjournment and the putting of preliminary questions were dismissed and in which no decisions were made that were capable of execution. Ziggo's appeal against the interlocutory judgment will, therefore, likewise not be declared admissible.
- 7.3 The costs of the appeal and of the first instance are awarded against Brein as the unsuccessful party. Article 1019h of the Code of Civil Procedure applies in this case. On the basis of this article, both Ziggo and XS4All, in their Statement of Appeal, have sought compensation of the 'full' costs in both instances.
- 7.4 For the first instance, Ziggo and XS4All have estimated their costs at €137,673.63 and €52,217.50 respectively. It is plausible that these costs have actually been incurred, taking into account the specifications supplied for them and in light of the fact that Brein itself had calculated a higher amount, namely €148,262.44, for the first instance. The defence advanced by Brein in the first instance (PF under 277), that the costs of Ziggo c.s. were not adequately specified, fails accordingly. In the meantime, the other defence advanced by Brein in the first instance (see section 276 PF), namely, that the cost estimates in the first instance were lodged too late, has become irrelevant. After all, on appeal, Brein still had the opportunity of reacting to those estimates, which is something it did not do (in a sufficiently recognisable manner). The costs of Ziggo c.s. for the first instance will be determined in accordance with its reported estimates.
- 7.5 XS4All has sent in a cost statement for the appeal as document 75, which amounts to €67,550 – including the correction mentioned in section 71 of its PA – for the 'hours already carried out', and €14,500 for the still 'anticipated hours' for the oral pleading. This document arrived at the court on 10 September 2013, i.e. after the last date for lodging documents referred to in article 2.17 of the national procedural rules for civil summons matters in the courts 2011 (hereinafter: the procedural rules), namely, at least two weeks before the plea hearing (compare The Hague Court 24/02/2009, '*Carmo/Reich*', IEPT20090224). The objection raised by Brein against the lodgement of document 75 is, therefore, effective with respect to the entry 'hours already carried out' during the period prior to 5 September 2013, so that this document will as a result be left out of consideration. The claim pursuant to article 1019h of the Code of Civil Procedure in respect of the amount of €67,550 lacks a specification as a result of this, and for this reason will be dismissed. For the costs

incurred during the last two weeks for the plea hearing, however, the aforementioned rule of the procedural rules does not apply. The court considers its specification adequate, also taking into account the cost specifications of the other parties. The claim pursuant to article 1019h of the Code of Civil Procedure which relates to this in the amount of €14,500 is, therefore, admissible. For the rest, XS4All's costs in the appeal will be estimated on the basis of the liquidation fee (1 point for the Statement of Appeal X).

- 7.6 Brein has – rightly – not raised any objection against the time of submission of Ziggo's cost statements in the appeal. The costs charged by Ziggo for the appeal amount to €170,722.24 (or €189,000.00 as it noted in the plea hearing). From Brein's point of view this amount is disproportionate, considering its own costs in the appeal of 'only' €113,878.15 (see document 147 from Brein on appeal), and considering that this amount has been inadequately specified with meaningless descriptions such as 'draft pleadings' and 'various activities'. Taking into account the quantum of costs which Brein claims (without being contradicted) to have incurred and taking into consideration that XS4All has estimated its costs for the appeal as even less than €100,000, the court will partially honour Brein's disproportionality defence and determine the reasonable and proportionate costs of the proceedings and other costs of Ziggo *ex aequo et bono* at €120,000. Contrary to Brein's opinion, there is no reason to determine Ziggo's costs in the appeal at a lesser amount.

Decision

The court:

- declares inadmissible the appeal of Ziggo c.s. against the interlocutory judgment of 8 December 2010 rendered between the parties by the court in The Hague;
- sets aside the final judgment of 11 January 2012 rendered between the parties by the court in The Hague, and pronouncing a new judgment:
- dismisses Brein's claims;
- awards costs against Brein of the procedure in first instance, estimated up until now at €137,673.63 on the part of Ziggo, and at €52,217.50 on the part of XS4All;
- awards costs against Brein of the procedure on appeal, estimated up until now at €120,000 on the part of Ziggo and at €16,030 on the part of XS4All, of which €666 is for outlays and €15,364 for salary;

- declares this judgment with regard to the costs of proceedings as provisionally enforceable.

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

CERTIFICATION

I, Robert Francis BRIAN, NAATI accredited translator (NAATI No: 1331), hereby certify that the above is a true and correct translation from the Dutch language of a judgment of the Court of Justice in The Hague.

3 December 2014, 28 Lancaster Road, Dover Heights, NSW, 2030, Australia.

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