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Question B: “To what extent should on-line intermediaries (such as ISPs and operators of online market places) be responsible for the control or prohibition of unfair competitive practices (in particular sales of products contrary to the law) carried out on their systems?”

Dutch National Report

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Basis of Liability

1) In your jurisdiction on what legal theories can on-line intermediaries be held liable for infringement under intellectual property and unfair competition laws? Please distinguish in your answer between:

- a) different types of on-line intermediary
- b) copyright, trademarks and unfair competition
- c) civil law and criminal law
- d) direct and accessorial liability

1. Introduction

This chapter will assess on what grounds internet intermediaries can be held liable for infringing intellectual property, unfair competition and related laws in the Netherlands. The conclusion will be that the main ground is the breach of the obligation to respect the duty of care under the general tort law. In order to reach this conclusion, first, the main sources for obligations imposed on internet intermediaries are distinguished. Secondly, a general typology of different internet intermediaries and their status under the Dutch legal system is presented. Thirdly, an outline is given of the main obligations. Finally, the main indications and contraindications for the existence of a duty of a care and liability for negligence of this duty are presented.

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2. Ground and sources

There are several possible grounds for the liability of internet intermediaries. In principle, internet intermediaries may be held responsible under penal law for breaches of the rights of others over their network. This may be so in case of a criminal copyright infringement, a criminal trademark infringement or other criminal offences. However, this has never led to an actual conviction.² Secondly, in principle, internet intermediaries may be held direct liable under civil law for infringements over their network. However, this will only be the case if the internet intermediary has active involvement with the publication of the material on its website and thus no longer acts as an intermediary but as a content provider. Active involvement with the publication of infringing material by the internet intermediary is seldom constituted.³ For example, if a website scans and publishes photographs that have been sent to it via mail, without checking the copyright of the material, it may be held liable when there was reason to believe that publishing the material was infringing on the copyright of others.⁴ Or if a website takes a photo that was uploaded by a user on the member's area and publishes it on its own initiative on the front page of the website, it may be held liable if the material was infringing.⁵

The main source for the liability of internet intermediaries in the Netherlands is the general tort law under the Dutch Civil Code.⁶ This provision applies when someone has breached his duty of care by either acting or omission in breach with a provision in the law or with an unwritten moral standard. The legal provisions under the Copyright Act,⁷ the Neighbouring Rights Act,⁸ the Trademark Act⁹ and other laws¹⁰ seldom constitute a form of primary or direct liability of internet intermediaries, nor are they often taken into account with regard to a breach of the duty of care under the tort law. More often, internet intermediaries are held liable for a breach of their duty of care with regard to preventing or terminating illegal actions by their users via their network on the basis of unwritten moral standards.

These duties of care are linked to moral conduct and societal norms. They are based on the general concepts of 'reasonableness' and 'fairness'.¹¹ Since these concepts are

² LJN: BB0268 & LJN: B99218

³ LJN: BK7383, LJN: BJ6008, LJN: AZ5678 & LJN: AX7579.

⁴ LJN: AU9504

⁵ LJN: AT8373

⁶ Article 6:162 BW

⁷ WET van 23 september 1912, houdende nieuwe regeling van het auteursrecht.

⁸ WET van 18 maart 1993, houdende regelen inzake de bescherming van uitvoerende kunstenaars, producenten van fonogrammen en van eerste vastleggingen van films en omroeporganisaties en wijziging van de Auteurswet 1912

⁹ <http://www.boip.int/nl/pdf/regulations/beneluxverdrag.pdf>

¹⁰ Such as WET van 8 juli 1999, houdende aanpassing van de Nederlandse wetgeving aan richtlijn 96/9/EG van het Europees Parlement en de Raad van 11 maart 1996 betreffende de rechtsbescherming van databanken.

¹¹ 6:2 BW.

general and broad, there is not a standard way of applying them in specific cases. Rather, the facts and circumstances of the specific case weigh heavily when applying them. This being so, a general theory with regard to the duty of care of internet intermediaries and their liability is hard to give. What can be said is that these duties must have something to do with the activities the business is involved. Over these activities, they have control and thus a certain amount of responsibility.¹²

In addition, self regulatory measures may constitute duties of care or concrete interpretations of them. This will not be the case when a provider or a group of providers has not made public its guidelines or Code of Conduct, but when these have been made public and are accessible by the general public, they may, since third parties have reason to believe a provider or a group of providers will act according to these self regulatory rules. The most important example of such regulation in the Netherlands is the Code of Conduct on the Notice and Takedown procedure, signed by most internet providers.¹³ Even though the code denies that duties of care or an interpretation of them may be derived from it, the text of the code may be taken into account when determining the obligation of an internet provider.

Finally, case law may stand as a source for duties of care on its own. First, a judge may determine a breach of the duty of care in a certain specific case. For example, if a provider has repeatedly received a request to remove certain manifest illegal material, the judge may grant damages to a right holder for the negligence under the duty of care. Secondly, the judge may impose an obligation as a consequence or an interpretation of the duty of care. For example, on request of the rights holder it may require a provider to remove certain material or provide for the contact details of certain internet users. Finally, a judicial decision may give rise to duties of care by its own account.¹⁴ Thus, duties of care may either refer to preventing certain damage before a judicial decision is in place, stopping certain damage on request of a judicial authority or both. Although the e-Commerce Directive holds that Member States shall not impose a general obligation on providers to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity,¹⁵ this does not undermine the competence of the judge to impose specific obligations on internet intermediaries in specific circumstances.

3. Types of internet intermediaries

It is important to notice that the duties of care grow as the internet intermediary becomes more actively or directly involved with the breach by its users constituted

¹² B. van der Sloot, 'De verantwoordelijkheid voorbij: de ISP als verlengstuk van de overheid', *mediaforum* 2010-5.

¹³ Gedragscode notice and takedown.

http://www.nederlandtegenterrorisme.nl/fileadmin/user_upload/Bedrijven/PDF_s/Gedragscode_Notice_and_Take_Down_tcm91-293746.pdf

¹⁴ *Stare decisis* adagium.

¹⁵ Article 15 e-Commerce directive.

over its network. The mere conduit provider is the intermediary that deals exclusively with passive services, such as the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network. Generally, these intermediaries are put under less strict rules and obligation than other internet intermediaries, since they only provide for passive services. However, mere conduit providers are not exempted from judicial injunctions and obligations.¹⁶ Furthermore, they have to fulfil fewer criterions to fall under the safe harbour provision of the e-commerce directive and its implementation in Dutch law than hosting providers and caching providers.

The position of Internet intermediary that deals with caching is of less importance in practice. Through caching, material is temporarily stored on the user's computer via an automatic process by the intermediary, without the material either being modified or controlled by the provider. Since these providers do not have direct control over the possible infringing material, only over the copy thereof, they are generally put under less strict obligations than the hosting providers. Furthermore, in order to apply for the safe harbour they are put under less strict obligations than hosting providers.

A hosting service consists of the storage of the service information provided by an internet user. These providers are generally put under more obligations than the previous one since their involvement with and control over the possible infringements is broader. Under the safe harbour, they have to fulfil more obligations than other kind of providers. A Dutch judge has claimed that the position of the hosting provider under both the e-Commerce Directive and the Dutch implementation was not intended for individual webhosters, who only host one or two platforms, but for large hosting providers who host thousands or millions of websites.¹⁷

Furthermore, there is discussion with regard to the so-called active hosting provider. These providers host a website on which the content is mainly provided for by the users, but on which the providers have a large influence over the organization, presentation and indexation of the material. Examples are providers of online marketplaces, providers of user generated content platforms, including discussion forums, providers of information location tools, including search engines and providers of file sharing platforms and/or software. Since they have an active control over and influence on the material on the site, they are generally put under more obligations with regard to preventing and terminating illegal material on their site.¹⁸ Furthermore, it is questionable whether they can invoke the safe harbour provision, since they are not intermediaries in strict sense, having active involvement with the material.¹⁹

¹⁶ LJN: BN1445

¹⁷ LJN: BJ6008

¹⁸ LJN: BH7529 & LJN: BB6926

¹⁹ Still, under Dutch doctrine, most of these sites are exempted from liability if they fulfill the Notice and Takedown procedure. CV 08-20893, LJN: BJ7440 & LJN: BK 1859

Finally, a special category of the 'Providers of mixed services' is the search engine. Although the Digital Millennium Copyright Act,²⁰ containing the American equivalent of the e-Commerce safe harbour, does contain a separate category for so-called Information Location Tools, the e-Commerce Directive and consequently the Dutch Civil Code lacks a category for search engine providers like Google and Yahoo.²¹ A search engine provider's activities focus primarily on indexing, organizing and linking to the material. Like caching providers, search engine providers do not have direct control over or a relationship with regard to the infringing materials. They only provide for a link to such material, hosted by another provider. However, under Dutch doctrine, these providers are not equalled with nor can they invoke the safe harbour of the caching provider.²² Like active hosting providers, they have an active influence and control over the links to certain material. If this material is mostly of a legal nature, then providers have no reason to suspect that they are supporting or facilitating illegal conduct. However, with regard to search engine platforms that provide for links to mp3 files on the internet, this may be different since the platform provider knows or should know that a large portion of the music files accessible on the internet are not legally provided for.²³

4. Obligations

The difficulty with regard to the 'pre-judicial' duties of care is that they may come into conflict with duties of care the provider has with regard to its user's right to the freedom of speech and privacy.²⁴ This problem will be taken into account in the next paragraph. First need to be determined which obligations exist. The duty of care of internet intermediaries with regard to third parties generally consists of the obligation to prevent damage happening and to terminate any illegal action as soon as possible. There are several concrete obligations which internet intermediaries can be asked to fulfil: distributing contact details of certain internet users suspected of illegal conduct, taking down certain material, taking down a website, terminating the account of a user and implementing some sort of filtering technique.

The obligation to distribute to a rights holder the contact details of certain internet users may exist both before a judicial decision and on the ground of a judicial authority. The obligation may be imposed both by a criminal and a civil judge.²⁵ Such measures may not only be imposed on hosting providers, but also on mere conduit

²⁰ <http://www.law.cornell.edu/uscode/17/512.html>

²¹ As a side note, a remarkable case in the Netherlands held a website owner liable for the way Google presented his site in the search engine. *Zwartepoorte/Schoonderwoerd en Soeters*.

²² LJN: BK1067. Still, in most cases, a Notice and Takedown procedure is considered enough for an exemption from liability. This also applies when the internet user is the one who provides for the link. *KG RK 09-1420*.

²³ LJN: AX7579. If so, they do not live up to the negative requirement under the safe harbor and may thus be held liable for infringements over their network.

²⁴ LJN: AT9073

²⁵ LJN: AT9073

providers.²⁶ Still, the request of the rights holder must be specific and identify conduct of specific users.²⁷ If a judge imposes an injunction to provide the contact information, this creates a duty of care for the internet provider. When ignoring this obligation, the provider may risk a penalty. The obligation to provide said information may also exist before such injunction is taken. In such situation, the provider must provide for such information on its own behalf and may risk a fine or the payment of compensation money to the rights holder on authority of the judge when it has breached the duty of care with regard to its subscribers. The problem is of course that by transmitting the contact details of subscribers, the provider may breach the right to privacy of its users. This being the case, under some foreign jurisdictions such as in Great-Britain, providers may only provide the contact details on the basis of a judicial injunction.²⁸ This is not the case in Holland, but the Court of Appeal, confirmed by the Supreme Court, has outlined some parameters for determining which way the balance between the two duties of care must be struck. Account should be taken of the possibility that the information is unlawful or harmful, the interests a third party has in acquiring the contact information, the existence of other, less intruding ways of gathering the contact information and the balance of interests by the third party, the service provider and suspected infringing person or website.²⁹ These criteria will be further explained in the part on remedies.

The distributing of contact details may not always be enough. Since it may take quite some time before an internet user is brought before court and ordered to delete certain material from the internet, the internet intermediary, specifically the hosting provider, may be under the obligation to delete certain material from its site.³⁰ Again, this obligation may be in place before a judge has so ordered, if certain material is manifestly illegal and the obligation might arise from a judicial injunction. Again, the difficulty with regard the first category is that it might unduly limit the right to freedom of speech of an internet user. The Dutch Notice and Takedown procedure differs from procedures such as in place in America under the DMCA. Under the later procedure, the provider must immediately remove the material upon notification. It may not be held liable if this is done upon a faulty notification. The provider subsequently informs the relevant internet user of the deletion of his material. The user may then either refrain from action, in case which the material remains removed, send a counter notification denying the allegation, on which the provider either restores the material if the rights holder does not take action or awaits to hear the judicial decision if he does. In the Netherlands, the internet intermediary must strike a careful balance on every request. Only if the allegations made by a right holder are without reasonable doubt, the provider is under the obligation to fulfil the request to

²⁶ LJN: BN1445

²⁷ Artikel 11 Enforcement Directive.

²⁸ Digital Economy Bill. Explanatory notes, p. 9. See also: <<http://www.ipso.gov.uk/ipcass/ipcass-alphabetical/ipcass-alphabetical-ko/ipcass-norwich.htm>>.

²⁹ LJN: AU4019

³⁰ LJN: BH7529

take down certain material. As a guideline, the period of 48 hours to fulfil such a request may be taken.³¹ Only in very specific circumstances may a procedure such as under the DMCA be implemented by the internet provider.³²

Sometimes, hosting providers may be under the obligations to delete an entire site. Since this is a quite a severe punishment, it will not be common that such an obligation will rest on a hosting provider without a judicial injunction. Even with a judicial injunction, high standards and requirements will have to be fulfilled for such a measure to be imposed.

Next to the deletion of certain sites, internet access providers may be asked to restrict the access of their subscribers to certain sites. Such an injunction may be useful especially in cases where a certain site is hosted from another country. Such an injunction was requested for by the stakeholder organization of the Dutch music industry with regard to the site Pirate Bay. Since most of the material that was uploaded³³ was infringing on the copyrights of others, the organization requested a judicial injunction to require one of the largest internet access providers to restrict their users from access to Pirate Bay. However, the judge ruled that this was an overly broad request, since not all material on the site was illegal and not all the users were involved in illegal conduct.³⁴

Dutch law does not entail any graduated response provision, such as the three strikes obligation either under the British Digital Economy Act³⁵ or the French HADOPI laws,³⁶ nor does it contain a provision like the DMCA that requires providers to adopt and reasonably implement, and inform subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.³⁷ Still, rights holders may request a judicial injunction to oblige an internet access provider to disconnect a certain subscriber. The judge may grant this request or may order the provider to grant the request if the relevant internet user is caught in illegal conduct after the judgment.³⁸

Finally, some internet intermediaries are placed under the obligation to implement certain monitoring or filtering tools. This is uncommon with regard to active hosting providers and non existing with regard to normal hosting providers.³⁹ This is because

³¹ LJN: BK7383

³² LJN: BJ6008

³³ Dutch copyright law provides for a private copy exception with regard to downloading.

³⁴ LJN: BN1445

³⁵ <http://www.opsi.gov.uk/acts/acts2010/pdf/ukpga_20100024_en.pdf

³⁶

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432&fastPos=3&fastReqId=1896908772&categorieLien=id&oldAction=rechTexte>

³⁷ DMCA 512 (i).

³⁸ LJN: AZ5678

³⁹ LJN: BK7383

ensorship is prohibited under the constitution of the Netherlands⁴⁰ and because the e-Commerce Directive discourages such restrictions. Only with regard to sites where illegal conduct and the uploading of illegal material by users and subscribers is to be suspected or encouraged, such measures may be imposed.⁴¹

5. Indications and contraindications

When determining whether an internet intermediary either has a duty of care or is liable for breaching it, certain indications and contraindications must be taken into account. The indications are: encouragement of the publication of illegal material either by incitement or by the way the site is organized, control over the material and knowledge of the fact that it is illegal and finally whether or not profit is made by the activities of the internet intermediary. Contraindications are: the rights of privacy and freedom of speech of the internet user, the right of the internet intermediary not to be held liable for the breach of foresaid rights and its own right under the freedom of speech and finally the illegal conduct of the requesting rights holder. In general, the obligation resting on the internet intermediary must be necessary to obtain a certain justified goal, it must be proportional to the goal and no other, less restrictive means to achieve that goal must exist.⁴²

Active involvement with the publication of infringing material by the internet intermediary is seldom constituted.⁴³ More commonly is the situation under which an internet intermediary incites users to upload illegal or infringing content on the website.⁴⁴ This was for example the case with a website consisting of photographs of celebrities, on which users were encouraged to upload photographs.⁴⁵ Another example might be found with regard to a site consisting mainly of music and video files, which privileged certain users who uploaded large quantities of data on the site. Under such circumstances, the site may be said to have breached its duty of care.⁴⁶ This thus differs from the doctrine under the American Communication Decency Act (CDA),⁴⁷ also providing for a safe harbour for internet intermediaries. A well known case is that of *Blumenthal v. Drudge*.⁴⁸ Drudge was a well known journalist, best known for his scoop with regard to the Monika Lewinski affair. Internet intermediary America Online (AOL) had attracted him to write in their monthly newsletter and paid him a monthly sum of \$ 3.000,- to do so. When Drudge spread false news in the newsletter regarding another assistant of Bill Clinton, AOL was acquitted from liability even though it had incited Drudge to write gossip stories.

⁴⁰ Article 7 GW

⁴¹ LJN: BB6926 & LJN: BH7529.

⁴² LJN: BN1445 & LJN: AU4019.

⁴³ LJN: BK7383, LJN: BJ6008, LJN: AZ5678 & LJN: AX7579.

⁴⁴ LJN: BH7529

⁴⁵ LJN: BG0972

⁴⁶ LJN: BJ6008

⁴⁷ http://www.law.cornell.edu/uscode/47/usc_sec_47_00000230----000-.html

⁴⁸ *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

Next to this, organizing a site in such a way that the sharing of infringing material is either encouraged or from it, knowledge of infringing activities may be derived, may constitute a breach of a duty of care. To refer again to the jurisprudence with regard to the CDA, one of the few times an internet intermediary could not claim immunity under the safe harbour was with regard to the case of Roommates. Roommates.com is a search service for finding housemates for which one could sign up for free. However, three questions were obligatory to answer: gender, sexual preferences and the number of children living at home. The complaint concerned the fact that the notification of gender and sexual preference, for example, male and gay, could lead to discrimination. Since Roommates.com had formulated these questions and obliged participants to answer them, it could not apply for the safe harbour under the CDA.⁴⁹ A similar case exists in the Netherlands with regard to a search site for music and video files. The site itself creates the possibility of labelling the material uploaded by their users under certain categories. Under it were the names of certain television series such as 'Desperate Housewives', 'CSI' and 'Days of Our Lives' of which the internet intermediary knew or had to know they were still copyrighted.⁵⁰

This leads automatically to the criteria of control over and knowledge of illegal or infringing material being hosted on the network of the internet intermediary. These concepts in a way refer to the doctrine of vicarious liability and contributory liability under US law.⁵¹ Vicarious liability is a form of secondary liability that arises when a third party has control over the actions of an infringer and receives financial benefit from the infringement. Contributory liability is a form of secondary liability that arises when a third party has knowledge of or contributes to an infringing activity. Both control over and knowledge of illegal or infringing material are taken into account in the Dutch legal doctrine. As shown in the paragraph above, the organization of a site may lead to knowledge of infringing activities, but also a notification of manifest infringing material may do so.⁵² Although a Dutch judge has acknowledged that a notice and takedown procedure may not be enough to fulfil the duty of care, since illegal material may be uploaded again,⁵³ it has not gone so far as some French judges have when they held that Google was deemed to have knowledge of the fact that it hosted illegal material on Youtube, when it had taken down certain material upon a notification, but that material then reappeared on the site.⁵⁴

⁴⁹ Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

⁵⁰ LJN: BJ6008

⁵¹ A. N. Dixon, 'Liability of users and third parties for copyright infringements on the Internet: overview of international developments'. In: A. Strowel, 'Peer-to-Peer file sharing and secondary liability in Copyright Law', Cheltenham 2009, p.15.

⁵² LJN: AF0091

⁵³ LJN: BJ6008

⁵⁴ Tribunal de grande instance de Paris, SARL Zadig Production, Jean-Robert V. et Mathieu V. v. Sté Google Inc, 19-10-2007. Tribunal de commerce de Paris, Flach Film et autres v. Google France, Google Inc., 20-02-2008.

Remarkable is that the involvement of an internet intermediary with the material on its network to prevent damage or harm being done, may constitute an indication for control over illegal material and consequently for a duty of care and liability. For example, a platform for music and video's actively monitored its site to keep it free from pornographic content, viruses etc. Since it did so, the judge held, it had active control over the material on its site and had thus a duty of care to delete copyright infringing material as well.⁵⁵ Dutch law does not contain a provision such as under the CDA holding that no internet intermediary shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected or any action taken to enable or make available to information content providers or others the technical means to restrict access to described material.⁵⁶ Consequently, this may entail complex situations when an active hosting provider of sites where illegal conduct and the uploading of illegal material by users and subscribers is to be suspected, are put under special obligations to either monitor or filter the material. Doing so, they get control over the material on their site and thus are under an even broader duty of care.⁵⁷

Cuius commoda eius et incommoda, is a well know Latin phrase and the principle of the connection between profit and burden has been widely established in European doctrine. Just recently, in a controversial case an Italian judge held Google accountable for a privacy violating video uploaded on its site, among other relying on this principle.⁵⁸ Moreover, it held that Google had an interest in having as many video's on its video service as possible, since that would attract the most visitors. Since its profits are derived from advertising and advertising revenues grow when the number of viewers grow, the judge held that Google had an interest not to filter videos.⁵⁹ Very similar cases have passed the Dutch judiciary with very similar outcomes.⁶⁰ Profit is taken into consideration when determining the scope of the duty of care the internet intermediary is under.

In general, the obligation resting on the internet intermediary under their duty of care must be necessary to obtain a certain legal goal, it must be proportional to the goal and no other, less restrictive means to achieve that goal must exist. If not, these obligations decay. There are however also a number of contraindications for the existence of an obligation under the duty of care. Mostly, these are linked to either the interests of the internet user with regard to his rights to privacy and freedom of speech and the right of the internet intermediary not to be held liable for the breach of foresaid rights and its own right under the freedom of speech. Finally, certain illegal

⁵⁵ LJN: BJ6008

⁵⁶ CDA 230, c (2).

⁵⁷ It thus seems like the lance of Achilles that heals the wounds its inflicts.

⁵⁸ http://speciali.espresso.repubblica.it//pdf/Motivazioni_sentenza_Google.pdf

⁵⁹ <http://ijlit.oxfordjournals.org/content/early/2010/08/25/ijlit.eaq010.full>

⁶⁰ LJN: BJ6008, LJN: AZ5678 & LJN: BK1067.

conduct of a rights owner trying to impose a duty of care on an internet intermediary may be taken into account as well.

Internet intermediaries not only have a duty of care with regard to rights owners and their interest to protect their intellectual property, but they also have a duty of care with regard to their users and subscriber to protect their right to privacy and freedom of speech. The right to privacy of the internet user may be violated in cases where an internet intermediary monitors their behaviour or provides their contact details to rights holders. According to standing jurisprudence, the duty of care to protect this right to privacy must be considered carefully⁶¹ and a fair balance must be struck by the provider between this right and the right of the holder to protect his intellectual property.⁶² The same may be said with regard to the right to freedom of speech of the internet user. This right may either be violated when material he uploaded is removed, filtered or when his access to certain sites is restricted. Again, a fair and careful balance between the two interests of both parties must be struck by the internet intermediary.⁶³

Next to the interests of its users, internet intermediaries have a legitimate interest to protect their own rights as well. Most importantly, this involves the right to the freedom of speech and the right not to be held liable for violating its duty of care with regard to its subscribers. The split it has to make between its own interests, that of its subscribers and that of the right holders is sometimes a near impossible one.⁶⁴ Thus, if it's unclear what the outcome of the balance between these distinguished interests will be, internet intermediaries are not under any obligation before they receive a judicial injunction.⁶⁵ Finally, some sites are founded to serve a certain journalistic or societal cause. For example with regard to the detection of certain (internet related) crimes⁶⁶ or with regard to a discussion about illegal or immoral conduct.⁶⁷ Although this generally will not lead to a rejection of their duties with respect to the rights of third parties,⁶⁸ the interest of internet intermediaries may be taken into account when striking the right balance between different rights and obligations.

Finally, a contraindication for obligations under a duty of care is the fact that the requesting party, usually the rights holders or their representatives, has been involved in illegal conduct itself or has infringed the rights of either the internet intermediary or the alleged infringing subscriber. For example, when one business wrongfully violates the reputation of another business on its site, it cannot request the other business to

⁶¹ LJN: AF0091

⁶² LJN: AT9073

⁶³ LJN: BK7383, LJN: AF0091& LJN: BJ6008.

⁶⁴ LJN: AF0091

⁶⁵ LJN: BD1446

⁶⁶ LJN: BH7529

⁶⁷ LJN: BB6926

⁶⁸ LJN: AU4019 & LJN: BK1067.

take down certain material damaging its name from the website.⁶⁹ Or, an internet intermediary is not under the obligation to provide the stakeholder organization of the music industry with the contact details of its subscribers when that organization has illegally obtained or tried to obtain this information via a foreign detective bureau, thereby violating the data protection act.⁷⁰

6. Conclusion

This chapter assessed on what grounds internet intermediaries can be held liable for infringing intellectual property, unfair competition and related laws in the Netherlands. The conclusion is that the main ground is the breach of the obligation to respect the duty of care under the general tort law. In order to reach this conclusion, first, a general typology of different internet intermediaries and their status under the Dutch legal system was presented. Secondly, the main sources for obligations imposed on internet intermediaries were distinguished. Thirdly, an outline was given of the main obligations. Finally, the main indications and contraindications for the existence of a duty of care and liability for negligence of this duty were presented.

Dutch law does not differentiate between different internet intermediaries, other than as a consequence of the implementation of the European e-Commerce directive. The directive distinguishes between three kinds of internet intermediaries: mere conduit providers, caching providers and hosting providers. Next to these three categories, two others may be categorized: the search engine providers and the active hosting providers or the platform providers. Generally, mere conduit providers are put under less strict rules and obligation than other internet intermediaries, since they only provide for passive services. Hosting providers are generally put under more obligations than the previous one since their involvement with and control over the possible infringements is broader. Active hosting providers are put under even more strict obligations, since they have an active involvement with and control over the material on their site. Since caching providers do not have direct control over the possible infringing material, only over the copy thereof, they are generally put under less strict obligations than the hosting providers. Like caching providers, search engine providers do not have direct control over or a relationship with regard to the infringing materials. They only provide for a link to such material, hosted by another provider.

The main source for the liability of internet intermediaries in the Netherlands is the general tort law under the Dutch Civil Code. This provision applies when someone has breached his duty of care by either acting or omission in breach with a provision in the law or with an unwritten moral standard. The legal provisions under the Copyright Act, the Neighbouring Rights Act, the Trademark Act and other laws

⁶⁹ LJN: BK4876

⁷⁰ LJN: AT9073

seldom constitute a form of primary or direct liability of internet intermediaries, nor are they often taken into account with regard to a breach of the duty of care under the tort law. More often, internet intermediaries are held liable for a breach of their duty of care with regard to preventing or terminating illegal actions by their users via their network on the basis of unwritten moral standards. Jurisprudential decisions and self-regulatory measures may give rise to such standards or interpret them in concrete circumstances.

The duty of care of internet intermediaries with regard to third parties generally consists of the obligation to prevent damage happening and to terminate any illegal action as soon as possible. There are several concrete obligations which internet intermediaries can be asked to fulfil: distributing contact details of certain internet users suspected of illegal conduct, taking down certain material, taking down a website, terminating the account of a user and implementing some sort of filtering technique.

When determining whether an internet intermediary either has a duty of care or is liable for breaching it, certain indications and contraindications must be taken into account. The indications are: active involvement in the publication of illegal material, encouragement of the publication of illegal material either by incitement or by the way the site is organized, control over the material and knowledge of the fact that it is illegal and finally whether or not profit is made by the activities of the internet intermediary. Contraindications are: the rights of privacy and freedom of speech of the internet user, the right of the internet intermediary not to be held liable for the breach of foresaid rights and its own right under the freedom of speech and finally the illegal conduct of the requesting rights holder. In general, the obligation resting on the internet intermediary must be necessary to obtain a certain justified goal, it must be proportional to the goal and no other, less restrictive means to achieve that goal must exist.

Defences and “Safe Harbours”

2) In your jurisdiction are there any special liability defences available to on-line intermediaries for infringement of intellectual property rights? Please distinguish in your answer between:

- a) different types of on-line intermediary
- b) copyright, trademarks and unfair competition
- c) civil law and criminal law
- d) direct and accessorial liability

1. Introduction

The legal position of online intermediaries is constantly evolving. Although The Netherlands has a clear statutory safe harbour regime with regard to the liability of these intermediaries, it can be difficult to fit in the many different varieties of online intermediary services. The position of classic online intermediaries such as access providers and hosting providers is quite clear. Although it is subject of preliminary questions pending with the European Court of Justice ('ECJ')⁷¹, other online intermediaries such as operators of online marketplaces and social networks may, as a principle, benefit from the statutory safe harbour regime as well. Whether in a concrete case the online intermediary can actually rely on a safe harbour, will depend on the specific circumstances of the case. Years of case law by the lower Dutch courts give direction.

The main rule as to the liability of online intermediaries is laid down in Article 6:196c of the Dutch Civil Code ('DCC'). This provision forms the implementation of Articles 12 through 15 of the E-Commerce Directive.⁷² The directive has a horizontal scope, which means it is applicable to all types of liability, including liability for trademark or copyright infringement.⁷³ Therefore, although the Dutch counterpart concerns civil liability, the safe harbour regime of the E-Commerce Directive also applies to criminal liability.⁷⁴ The criminal safe harbour is laid down in Article 54a of the Dutch Penal Code ('DPC').

The safe harbour regime is categorized in three different services: mere conduit (Article 6:196c, section 1 and 2), caching (Article 6:196c, section 3) and hosting (Article 6:196c, section 4). The criminal pendant, Article 54a DPC, has the same scope.⁷⁵

The safe harbour regime of Article 6:196c DCC applies to certain types of online intermediary services, rather than to certain types of intermediaries.⁷⁶ Consequently, the provision may be applicable to more diffuse or 'mixed' services, such as online chat boxes,⁷⁷ newsgroups,⁷⁸ discussion groups,⁷⁹ hosting of hyperlinks and interactive

⁷¹ Case C-324/09 *L'oreal v eBay*. This case regards the legal position of eBay as an online marketplace. See also ECJ 23 March 2010, cases C-238/08, C-237/08 and C-238/08, *Google v Louis Vuitton c.s., Viaticum c.s. & CNRRH c.s.* with regard to the adwords service of Google.

⁷² Directive 2000/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market.

⁷³ Explanatory Memorandum for the implementation of the E-Commerce Directive in Dutch law, Parliamentary Documents II 2001-2002, 28197, no. 3, p. 9. See also Christiaan Alberdingk Thijm, *Het nieuwe informatierecht*, 2005, p. 173.

⁷⁴ The directive however is not aimed to harmonise the field of criminal law as such (Recital 8 of the preamble).

⁷⁵ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 63.

⁷⁶ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 25. See also the opinion of advocate general Jaaskinen in *L'oreal v eBay*, 9 December 2011, C-324/09, paragraph 147.

⁷⁷ Parliamentary Documents I 2003-2004, 28197 C, p. 4.

references,⁸⁰ and online marketplaces.⁸¹ In this chapter I make a distinction between the following services: the classic services of mere conduit, caching, and ‘classic’ hosting, and other services or ‘mixed’ services: online marketplaces, user generated content (video services, discussion groups), information location tools (hyperlinks, search engines) and file sharing (P2P, BitTorrent, Usenet).

If the online intermediary cannot benefit of the safe harbour - either because his service goes beyond the scope of the safeguarded services, or because he fails to meet the obligations – it does not necessarily mean the intermediary is liable. The question of liability should then be answered on basis of the principles of general tort (Article 6:162 DCC), or, in case of infringement of intellectual property, on basis of the specific applicable laws.⁸²

2. The safe harbours

2.1. Mere conduit

This safe harbour regime typically applies to access providers: the online intermediary who provides a service that consists of the transmission of information of someone else, or the provision of access to a communication network, is not liable for the information transmitted, on the condition that the provider

- (1) does not initiate the transmission;
- (2) does not select the receiver of the transmission; and
- (3) does not select or modify the information contained in the transmission.

This means that the activity of the online intermediary has to be limited to the technical process of the operation. The activity must be of a mere technical, automatic and passive nature, which implies that the online intermediary has neither knowledge nor control over the information which is transmitted or stored. But even if the online intermediary would have actual knowledge of the information, he is still not liable, if he meets the above conditions.⁸³ This also means that a notice and takedown policy is not relevant. In other words, if the online intermediary would be notified of certain illegal content transmitted by him, he is not obligated to act upon this notification in order to maintain his position under the safe harbour. This far stretching exemption of liability and absence of a duty to act seems to follow from the fact that a mere conduit provider has to take disproportional measures in acting against illegal information once aware it.⁸⁴

⁷⁸ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 25.

⁷⁹ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 50.

⁸⁰ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 47.

⁸¹ Prof. mr. R.E. van Esch, *Juridische Aspecten van elektronische handel*, Kluwer 2006, p. 92.

⁸² Parliamentary Documents II 2001-2002, 28197, no. 3, p. 47.

⁸³ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 47-48.

⁸⁴ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 48.

Although the safe harbour for mere conduit providers is far stretching, it is not without boundaries. If an online intermediary would deliberately collaborate with one of the recipients of his service in illegal activities, this would go beyond his mere conduit service. Consequently, he cannot benefit from the safe harbour regime for mere conduit services.⁸⁵

The condition that the involvement of the mere conduit provider with the information should be purely technical, and that the provider should not select or modify the information he is transmitting, leaves the provider in a somewhat difficult position. Most customers of an access provider will expect some form of filtering. Consequently, most access providers have implemented at least a spam filter. Although it can be argued this is a technical filter, there is no doubt that by this filter, the provider selects to a certain level the information he is transmitting. To my knowledge the commonly used spam filters have never led to liability of an access provider.⁸⁶

The fact that an online intermediary who provides mere conduit services, cannot be held liable for illegal content, unless he would deliberately collaborate in the illegal activities, does not mean that he can never be obligated to disable the access to certain information that is being transmitted by him.⁸⁷ There are remedies available. This will be discussed in the next chapter.

2.2. Caching

The safe harbour for the online intermediary that provides a caching service, typically concerns the liability toward the provider of the information which is automatic, intermediate and temporarily stored by him. This is different from the safe harbour for mere conduit and hosting services, which typically concerns the liability towards third parties.⁸⁸ Van Esch gives the following example: via a website certain products are being sold. Since it concerns a popular website, the cache provider has made a copy of the website on his server. The operator of the web shop increases his prices. After the modification though, the caching provider transmits an old copy of the website, with the old prices. If this would lead to liability of the web shop operator towards his clients, the caching host may be liable towards the web shop operator. However, the safe harbour regime laid down in Article 6:196c makes no distinction between liability toward the information provider, or liability towards a third party. So, once

⁸⁵ E-Commerce Directive, recital 44 of the preamble.

⁸⁶ See also Van Esch. He argues that a mere conduit provider cannot be withheld the exemption of liability for the mere fact it uses (spam)filters, because he does not select the information that is being transmitted by him. To the contrary, the information caught in the filter is *not* being transmitted.

⁸⁷ E-Commerce Directive, recital 45 of the preamble; Article 6:196c, section 5 DCC.

⁸⁸ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 48.

the caching provider meets the five conditions hereunder, he is not liable, irrespective of the injured party.⁸⁹

In order to benefit from the safe harbour regime, the caching provider has to meet five conditions:

- (1) the provider does not modify the information;
- (2) the provider complies with conditions on access to the information;
- (3) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (4) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (5) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

It is clear that conditions 1 through 4 are aimed to prevent a situation as described by Van Esch. For instance, the website operator can note in the meta-information of the website that it is not allowed to make a cache copy of the website, or that before transmitting a cache copy of the website, the accuracy of the information should first be checked at the source.⁹⁰

To our knowledge, liability of caching providers has never led to case law in The Netherlands.

2.3. Hosting

Without a doubt the position of the hosting provider, the online intermediary who stores information for others, is the most complex. Not only because many types of online services may fit the statutory definition of a hosting service, but also because the obligations of a hosting provider under the safe harbour regime leave the most room for argument.

First and foremost, the hosting provider can have no involvement with the information it hosts. If the customer of the service provider acts under the authority or control of the provider, the provider cannot qualify as an intermediary service provider, and consequently does not fall within the scope of the safe harbour for hosting services. I will go into this in further detail when discussing the different types of online intermediary services.

⁸⁹ Parliamentary Documents I 2003-2004, 28197 C, p. 4-5.

⁹⁰ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 48.

In order to benefit from the safe harbour regime under Article 6:196c, section 4, the hosting provider must comply with the following conditions:

- (1) the provider has no knowledge of the activity or information with an illegal character and, as regards claims for damages, is not aware of facts or circumstances from which he can reasonably know of the activity or information with an illegal character; or
- (2) the provider, when he knows, or reasonably should know about the activity or information with an illegal character, acts expeditiously to remove or to disable access to the information.

Before implementation of the E-Commerce Directive in Dutch law, a Dutch court ruled in what became a leading case with regard to the liability of hosting providers. This case concerned the alleged trademark infringement by Karin Spaink. Spaink had published a document of the Scientology church on her website that was hosted by X4ALL. The district court ruled that the hosting provider could only be liable if he fails to remove certain information after he is notified of the illegal character of it and where, within reason, it is impossible to doubt the accuracy of the notification.⁹¹ The court of appeal upheld this ruling.⁹² The Scientology Church later withdrew the cassation appeal.

It further follows from Article 14 of the E-Commerce Directive, that ‘knowledge’ means ‘actual knowledge’. This is the case when, as in *Scientology v XS4ALL*, the provider was notified and there can be no reasonable doubt about the accuracy of the notification (e.g. a court order), or if the illegal character of the information is ‘unmistakable’.⁹³ This means that a notification by, inter alia, a right holder is as such not sufficient.⁹⁴ Defamatory content will in most cases not be ‘unmistakably’ unlawful.⁹⁵

2.4. Criminal safe harbour

The criminal counterpart of the civil safe harbour is laid down in Article 54a DPC. It is quite a simple provision and regards all three types of services governed by Article 6:196c DCC. Article 54a DPC provides for an exemption of liability of an online intermediary if he complies with an order of the public prosecutor, after a written authorisation of the delegated judge upon request of the prosecutor, to take all

⁹¹ District Court of The Hague, 9 June 1999, *Computerrecht* 1999, p. 200-205.

⁹² Court of Appeal of The Hague, 4 September 2003, NJ 2003, 664.

⁹³ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 49, Amsterdam Court of Appeal, 7 November 2002, *Mediaforum* 2003-1, p. 38-41, *XS4ALL v Deutsche Bahn*.

⁹⁴ Parliamentary Documents II 2001-2002, 28197, no. 3, p. 49. Most recently: Vrzt. District Court of Dordrecht, 17 November 2010, LJN: BO4259.

⁹⁵ Supreme Court, 25 November 2005, NJ 2009, 550, IER 2006-1, *Mediaforum* 2006-1, *Pessers v Lycos*.

measures that can reasonably be expected of him in order to disable access to the information. The information itself has to be of a criminal nature (e.g. criminal copyright infringement).

It is noteworthy that Dutch government filed a draft bill in the summer of 2010 to amend the criminal free harbour regime in such a way that it allows the public prosecutor to demand the disabling of access to certain information in order to stop or prevent a criminal offence.⁹⁶ In the proposal, the authorisation of the delegated judge is not necessary anymore. This bill has been widely criticised, mainly due to constitutional objections (freedom of speech). It still needs to be approved by Dutch parliament.

3. Defences

3.1. General tort/unfair competition

Dutch law does not distinguish between primary and secondary liability, or direct or accessorial liability. The difference between direct or accessorial liability is therefore more theoretical. The first type of liability can, due to the safe harbour regime, only occur when the online intermediary service does not fall within the scope of one of the three exempted online services (mere conduit, caching, hosting), either because it involves a typically different service, or because the involvement of the online intermediary with the illegal information is too strong. Accessorial or secondary liability can occur when the online intermediary can, per definition, benefit from the safe harbour, but fails to remove or disable access to the illegal content when it should.

Liability outside the context of direct infringement of intellectual property rights, can only exist on basis of the principles of general tort as laid down in Article 6:162 DCC. Unfair competition falls within the scope of this general ground for civil liability. To my knowledge, there have been no cases that concerned the liability of an online intermediary on the specific basis of unfair competition.

The Netherlands has a closed system of strict liability which does not fit the liability of online intermediaries. This means that that the unlawful act should be imputable to the intermediary. So far, civil liability has only been assumed on basis of culpability of the online intermediary.⁹⁷ It follows from the extensive case law regarding online intermediary services that the implementation of an adequate notice and takedown system is important. In The Netherlands there is no statutory notice and takedown system. There is though a widely acknowledged and used self regulatory notice and

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http://www.internetconsultatie.nl/wetsvoorstel_versterking_bestrijding_computercriminaliteit

⁹⁷ M. de Cock Buning, *'Aansprakelijkheid van derden bij auteursrechtinbreuk'*, IER 2009, 54.

takedown policy: the Code of Conduct Notice-And-Take-Down.⁹⁸ The importance of the drawing-up and implementation of codes of conduct with regard to a notice and takedown policy is also stressed by recitals 40 and 49 of the E-Commerce Directive.

3.1.1. Classic online intermediaries:

a. Mere conduit

Provided that the mere conduit intermediary complies with the safe harbour conditions, he can only be liable if he purposely collaborates in the illegal activities. This would amount to direct liability. There can be no case of accessorial liability, not even when the provider would fail to meet a request to disable access to unmistakably illegal information.⁹⁹

If the mere conduit provider cannot benefit from the safe harbour, its liability is not necessary a fact. His liability has then to be assessed on basis of the principles of Article 6:162 DCC. Liability can only exist if the mere conduit provider does not comply with one or more of the three safe harbour conditions. If, for example, a mere conduit provider selects the information he is transmitting, he may be subject to liability. In such a case he can argue that he has no culpable involvement with the information. This argument is to my opinion less strong if the provider would have taken the initiative in transmitting the information. The principle of freedom of speech serves as a defence as well. Liability of a mere conduit provider for transmitting certain information, forms de facto a limitation of the freedom of speech and therefore should observe the conditions of Article 10, section 2 of European Convention on Human Rights ('ECHR') which governs the limitations to the principle of freedom of speech.

Safe from the cases that involved the questions whether a mere conduit provider can be held to disable access to certain information on basis of a duty of care (see the chapter 'Remedies'), there are only a few examples in which the plaintiff claimed that the mere conduit provider was directly liable. This has always been rejected.¹⁰⁰

b. Caching

To our knowledge there has been no case in The Netherlands with regard to the liability of a caching provider. If he meets the conditions of the safe harbour regime, he is not liable. If he does not comply with these conditions, there are grounds for liability on basis of general tort. If a caching provider for instance fails to comply with

⁹⁸ www.samentegencybercrime.nl/ntd.

⁹⁹ See also Vrzr. Court The Hague, 19 July 2010, LJN: BN1445, *BREIN v Ziggo and XS4ALL*.

¹⁰⁰ President District Court of The Hague, 12 March 1996, *Informatierecht/AMI 1996-5*, *Computerrecht 1996-2*, *Mediaforum 1996-4*, *Scientology v XS4ALL and other providers; Scientology v XS4ALL* (proceedings on the merits); *BREIN v Ziggo and XS4ALL*.

the conditions set forth by the information provider, damage suffered because of this failure will most likely be accountable to the caching provider. A general defence can be that there is no sufficient causal relation between the fault of the caching provider and the damage suffered.

c. Classic hosting

A classic hosting provider will not be liable, unless he fails to remove or disable access to unmistakably illegal information.¹⁰¹ Since such liability forms de facto a limitation of the principle of freedom of speech, liability can only be assumed if it is compliant with Article 10, section 2 ECHR'.¹⁰² This may be an important defence of the hosting provider.

There are a few examples in case law where the hosting provider was liable since the information that was hosted was considered unmistakably illegal. These concerned the hosting of BitTorrent platforms.¹⁰³ Strictly speaking these providers were subject to liability for the content they hosted since they failed to meet one of the safe harbour conditions (they refused to remove the information upon notification). However, their liability in these cases did not go beyond the obligation to yet remove the illegal websites. In one of the cases, the court even expressly limited the order for costs of the proceeding on basis of the fact that the hosting provider had no clear own interest in the matter (he is after all an intermediary), and he had to take into account the interest of the operator of the hosted BitTorrent platform as well.¹⁰⁴ This shows that the very limited involvement of classic hosting providers with the content they host, forms a strong defence against liability that would go further than an obligation to remove or disable the access to certain content.

3.1.2. Other intermediaries, providers of mixed services

a. Online market places

The operator of an online marketplace stores information (advertisements) of the recipient of the service upon his request. As such, these services fall within the scope of the safe harbour for hosting. However, since it might not qualify as 'classic' hosting, this has been subject to discussion. In the principle *Stokke v Marktplaats* case the court has left in the middle whether the operator of the online marketplace could

¹⁰¹ Hosting provider IS InterNed was not liable for certain unlawful content because, although being notified of the unlawful character of the content, this was not unmistakable. *Vrz.* District Court of Haarlem, 14 May 2008, LJN: BD1446.

¹⁰² E-Commerce Directive, recital 46 of the preamble.

¹⁰³ Court of Appeal of Amsterdam, 3 July 2008, IER 2008, 67, *Leaseweb v BREIN* and District Court of 's-Hertogenbosch, 8 July 2008, B9 6428, *BREIN v EuroAccess*.

¹⁰⁴ *Leaseweb v BREIN*.

benefit from the safe harbour hosting.¹⁰⁵ This matter has remained undecided yet, awaiting the decision of the ECJ following the referral of the British High Court of Justice in the *L'Oréal v eBay* case.¹⁰⁶

Meanwhile, advocate-general Jääskinen delivered his opinion in *L'Oréal v eBay*¹⁰⁷ which is in favour of the position that eBay as an online market place can be qualified as a hosting provider in the sense of Article 14 of the E-Commerce Directive. He argues that it is not recital 42 of the E-Commerce Directive that should be applied to the position of a hosting provider, but rather recital 46. In other words, the condition that the activity of the intermediary should be limited to a mere technical, automatic and passive nature, and that the provider should be strictly neutral, is not correct with regard to the position of a hosting provider.¹⁰⁸

With regard to the liability on basis of general tort, the court held in the *Stokke v Marktplaats* case that operators of online marketplaces have a duty of care. How far this duty goes depends on a great number of factors such as:¹⁰⁹

- awareness of the damage;
- size of the damage;
- the possibilities to act;
- the disadvantages of taking action (such as the costs and the degree of effort);
- the degree of involvement of the operator of the online marketplace in the existence of the damage;
- the benefit of the operator of the online marketplace from the acts causing the damage;
- specific applicable rules in the sector.

The court held that *Marktplaats*, the operator of the online market place, can be required to take measures aimed at preventing or limiting the damage as a result of the infringing advertisements. These measures should be proportional, in particular taking into account the business model, and the attractiveness of the service in comparison to the competitors. The court concluded that *Marktplaats* had taken sufficient care. The following circumstances were vital in this decision:

- the fact that *Marktplaats* has an adequate notice and takedown policy;
- the fact that *Marktplaats* does not itself cause damage, but is merely instrumental to the secondary infringement;

¹⁰⁵ District Court of Zwolle-Lelystad, 3 May 2006 (interim judgment), *Computerrecht* 2006-101, AMI 2006-5. Final judgment in first instance: District Court of Zwolle-Lelystad, 14 March 2007, IER 2007, no. 73, BIE 2007, no. 140. Both parties appealed. In the interim judgment of the Court of Appeal of Leeuwarden, the court postponed a ruling on this matter (judgment of 8 June 2010, B9 8900).

¹⁰⁶ Petition of 12 August 2009, case C-327/09, Official Journal C-267/40.

¹⁰⁷ Case C-324/09, delivered on 9 December 2010.

¹⁰⁸ Sub 142 and 146 of the opinion of Jääskinen.

¹⁰⁹ It seems that the court has based these circumstances on the standard judgment of the Supreme Court with regard to liability as a consequence of a duty of care: Supreme Court 5 November 1965, NJ 1966, 136, *Kelderluik*.

- the fact that *Marktplaats*, at most, has some indirect advantage of the infringing actions;
- the fact the infringement took place in the field of e-commerce, and that far reaching measures in order to prevent infringement in this field is not obvious.

b. User Generated Content

In the generation of Web 2.0 online platforms that contain user generated content are abundant. Some of them are vastly popular, such as YouTube and Flickr. Also the social networks, such as Facebook, mainly exist of user generated content. On a smaller scale there are many online discussion groups. The question whether these online services fall within the scope of the safe harbour for hosting providers, has not been answered yet by a higher Dutch court. However, following the parliamentary documents with regard to the implementation of Article 14 of the E-Commerce Directive, it is likely that such services as a principle do fall within the scope of the safe harbour for hosting providers (which does not say they necessary always meet all the conditions in order to benefit from the safe harbour regime).¹¹⁰

The following case law by lower Dutch courts shows a varied picture with regard to the liability of intermediaries hosting user generated content.

The operator of a website that hosts information about certain companies which information is added by third parties, is in principle not liable for the information if it observes the notice and takedown rules as laid down in the *Scientology v XS4ALL* case. He is allowed to take a reasonable period of time to take down the illegal content after the notification.¹¹¹

The operator of a website on which grand parents could upload photos of their grand children with whom they lost contact, is liable for the privacy infringement. The safe harbour regime is not applicable since it does not concern privacy issues.¹¹² Since the website operator had invited grandparents to upload the photos, and he had sufficient knowledge of the privacy regulations at place, his defence that he did not upload the photos himself, was rejected. The argument of freedom of speech was rejected as well. The privacy of the grand children outweighed the freedom of speech.¹¹³ This seems to point at a direct liability of the online intermediary (the website operator).

The operator of a discussion forum is not liable for the illegal uploading of photos if he removes the content upon first notification and he facilitates the possibility to make

¹¹⁰ See also Christiaan Alberdingk Thijm, 'Wat is de zorgplicht van Hyves, XS4ALL en Marktplaats?', *Ars Aequi*, July/August 2008, p. 575.

¹¹¹ District Court of Dordrecht, 17 November 2010, LJN: BO4259. Article 6:169c was not invoked.

¹¹² Article 1, section 5, sub b and recital 14 of the E-Commerce Directive.

¹¹³ District Court of Utrecht, 9 July 2009, *Tijdschrift voor Internetrecht*, 2009, no. 4, *Kleinkinderenonline*.

such a notification, and if he collaborates upon request to discover the identity of the uploaded of the infringing material.¹¹⁴

The operator of a discussion forum who uses moderators is directly liable for the unlawful comments of these moderators. According to the court, the safe harbour for hosting providers applies, therefore the operator is not liable for the unlawful comments of the website users. In a second case, between the same parties and on basis of the same circumstances, the court came to the opposite conclusion: the fact there are active moderators means the service is not of a mere technical, automatic and passive nature, and therefore article 6:169c, section 4 is not applicable, thus the court. Consequently, the operator is subject to “full liability” for the comments posted on its website, whether by the moderators or other visitors of the website. The court then ruled that the right to protection of reputation outweighed the right to freedom of speech. The measures taken by the website operator (such as the renaming of the topic, and handing over contact details of the website visitors who posted unlawful comments), was not sufficient according to the court.¹¹⁵

Hyves, the most popular social network in The Netherlands, can benefit from the safe harbour for hosting providers, and consequently cannot be obligated to remove certain content since this was not unmistakably unlawful.¹¹⁶

The operator of a discussion forum is subject to direct liability since it has a special duty of care with regard to the content of its website. This implies direct liability. Applicability of Article 6:169c, section 4 is rejected, but on the wrong ground, according to Koelman.¹¹⁷

c. Information location tools

¹¹⁴ Subdistrict Court of Amsterdam, 21 January 2009, B9 9017, *Maroc.nl*.

¹¹⁵ District Court of Amsterdam, 12 February 2009 and 12 March 2009, *Tijdschrift voor Internetrecht* 2009, no. 3, *Trendylaarzen v Internetoplichting.nl*. These judgments have been widely criticized, e.g. N.M.N Voogd in her annotation, *Tijdschrift voor Internetrecht* 2009, no. 3, and A.R. Lodder, ‘*Trendylaarzen vs. Internetoplichting: 4 weken, 2 tegenstrijdige vonnissen van V.zr. Amsterdam, allebei onjuist*’, www.jurel.nl. Also, according to advocate general Jääskinen in his opinion in *L’Oréal v eBay*, the criterion ‘mere technical, automatic and passive’ is incorrect with regard to hosting providers. In yet another case between the same parties, the court held that it was shown that the website operator had any authority over the moderators. This judgement followed the other judgements and had a highly factual character. The court did not answer the principle question of the applicability of Article 6:169c, section 4. District Court of Amsterdam, 2 June 2009, LJN: BJ 1669.

¹¹⁶ District Court of Arnhem, 10 January 2008. LJN: BC 2736.

¹¹⁷ District Court of Amsterdam, 1 November 2007, *Mediaforum 2008-1, Willem Alexander v Martijn*. In his annotation, K.J. Koelman concludes that the court rejected applicability of Article 6:196c, section 4 (hosting), since the court referred to the criterion of Article 6:196c, section 2 (mere conduit).

As a general rule, providers of information location tools such as hyperlinks or search engines¹¹⁸, do not fall within the scope of the safe harbour regime for online intermediaries. Where the provider actually hosts the information location tools for others, this can be different. In the *Google Ad Words* case¹¹⁹, the ECJ held that Google may fall within the scope of the safe harbour for hosting providers with respect to the system of sponsored links operated by Google. Whether Google indeed meets the criteria of Article 14 of the E-Commerce Directive, is left to the national judge, but not without a few pointers by the ECJ. The following circumstances are not sufficient to deny Google a position as hosting provider:

- 1) The fact that Google determines the sequence of the advertisements (based on the amount paid by the advertiser);
- 2) The fact that payment is required for the Ad Words service;
- 3) The fact that Google determines the method of payment;
- 4) The fact that Google supplies general information to its customers;
- 5) The fact that the selected keyword and the search term input by an internet user are identical.

According to the ECJ a factor that *can* be detrimental to the position of Google as a hosting provider is the level of involvement of Google with writing the advertisement text or with determining or selecting the keywords.

In most cases, using hyperlinks will not be unlawful, even if they refer to illegal content. Only under special circumstances this can be different.¹²⁰ In the *NVM v Telegraaf* case the Supreme Court held that deep links, created by a search engine, linking to a protected database, constituted an infringement. Consequently, the operator of the search engine was found directly liable.¹²¹ In a more recent case however, the Court of Appeal of Arnhem confirmed that deep linking is *per se* not unlawful. This is consistent with the general opinion in literature and case law.¹²²

¹¹⁸ Some argue that YouTube qualifies as a provider of an information location tool as well, since it provides an index as well. Video's placed on the YouTube platform are being indexed by YouTube and are searchable with the YouTube internal search engine. Since the video's are not uploaded by YouTube but are merely stored on the servers of YouTube upon request of the uploaders of the video's, we have categorized the YouTube service (and similar video platforms) under 'user generated content'. It shows however that YouTube is in fact a mixed service.

¹¹⁹ Cases C-238/08, C-237/08 and C-238/08, *Google v Louis Vuitton c.s., Viaticum c.s. & CNRRH c.s.* For an elaborate review see M.J. Heerma van Voss and V.A. Zwaan, '*Google AdWords: het Hof maakt veel duidelijk, maar we zijn er nog niet*', NtEr July 2010/6. .

¹²⁰ P.B. Hugenholtz, '*Het internet: Het auteursrecht voorbij?*', Pre-advice NJV, in: A.W. Koers a.o., '*Recht en internet*', Deventer, W.E.J. Tjeenk Willink 1998; Christiaan Alberdingk Thijm, '*Het nieuwe informatierecht*', 2005, p. 182; District Court Rotterdam 22 August 2000, *Informatierecht/AMI 2000/10*, p. 207, *Kranten.com*.

¹²¹ Supreme Court, 22 March 2002, LjN: AD 9138.

¹²² Court of Appeal Arnhem, 4 July 2006, AMI 2006-3, *NVM v Zoekalhuizen.nl*. See annotation Chr. A. Alberdingk Thijm.

This can be different if the operator of a search engine for hyperlinks systematically and structurally refers to unlawful content, the operator knows this, and his business model is substantially based on the availability of illegal content.¹²³ These are special circumstances. Absence of these circumstances should mean there are no grounds for liability.¹²⁴

Also, if a website operator hosts links posted by third parties, whereas he knows that these lead to illegal information, he is subject to accessory liability if he fails to take adequate action. This case law rule is very similar to the test of liability of hosting providers under the safe harbour regime.¹²⁵

In general, with respect to the position of operators of search engines, a defence can be found in the *Scientology/XS4ALL* case. Although this concerned hosting and access services, there is no reason why the principles of liability of online intermediaries set forth in this judgment, cannot apply to operators of search engines. These operators, although not covered by the safe harbour regime, are online intermediaries, and they provide ‘information society services’. In other words, an adequate notice and takedown policy and the removal of unmistakably illegal content upon notification, may be a sufficient defence against liability claims.

d. File sharing

Dutch case law is quite consistent with respect to the liability of providers of BitTorrent or User net platforms, and file sharing software. These providers are intermediaries in the sense that they are not the ones who upload and/or download content. They play a facilitating role.

The first case in the Netherlands regarded the provider of the file sharing program KaZaA. The Court of Appeal of Amsterdam held that the mere fact that certain techniques can be used for unlawful activities, is not sufficient to assume liability of the provider. Since the software provider by KaZaA was not exclusively used to share infringing material, KaZaA was not liable.¹²⁶

In all other cases (concerned providers of BitTorrent platforms, and a Usenet platform), (direct) liability on basis of general tort is assumed. This is due to the large involvement of the provider with the file sharing activities. Decisive circumstances are whether the provider purposely plays a facilitating and stimulating role in a large

¹²³ District Court Haarlem, 12 May 2004, AMI 2004/5, 185 (*Techno Design/Brein*).

¹²⁴ See also Christiaan Alberdingk Thijm, ‘*Het nieuwe informatierecht*’, 2005, p. 187.

¹²⁵ District Court of Amsterdam, 20 June 2002, Computerrecht 2002, p. 311, *Deutsche Bahn/Indymedia*.

¹²⁶ Court of Appeal Amsterdam, 28 March 2002, Mediaforum 2002/5, no. 19. Upheld by the Supreme Court, 19 December 2003, LJN: AN7253, although the Supreme Court did not judge the question whether the distribution of filesharing software is legal. See P.B. Hugenholtz, ‘*Over KazAa is nog niet beslist*’, NRC Handelsblad 22 December 2003.

scale infringement of rights, or whether the provider structurally gives the opportunity to, incites to and profits of the infringing activities of its users. Also, the involvement of moderators is relevant. Under these circumstances the provider cannot benefit of the safe harbour for hosting providers.¹²⁷ Absence of once or more of these circumstances may serve as a liability defence.

4. Copyright infringement

As with respect to general tort, copyright infringement can only be direct. If the online intermediary does not make a copyright protected work available, or makes a reproduction, he cannot be liable for copyright infringement. And vice versa, if he does reproduce or makes available a copyright protected work, he infringes copyright (disregarding the statutory exemptions and defences). Dutch civil law does not know the principle of contributory or accessorial infringement. This is somewhat different in criminal law: one is guilty of incitement of a criminal copyright offence.

All online intermediaries may use as an argument that they only provide physical facilities for enabling or making a communication, and that, according to the Copyright Directive, this does not in itself amount to a copyright relevant communication.¹²⁸

The safe harbours apply to copyright infringement as well. The following therefore only applies the online intermediary who does not meet the criteria of this regime.

4.1. Classic online intermediaries

4.1.1. Mere conduit

As already mentioned with regard to the general tort liability, liability of mere conduit providers has so far always been rejected.

The activities of this intermediary are limited to the transmission of the information. He merely provides the technical facilities in order for others to make the information

¹²⁷ District Court of Haarlem, 9 February 2011, LJN: BP 3757, *FTD v BREIN*. District Court of Amsterdam, 22 September 2009, LJN: BK1067, *BREIN v The Pirate Bay*; Court of Appeal of Amsterdam, 16 March 2010, IER 2010, no. 78, *BREIN v ShareConnector*; District Court of Utrecht, 26 August 2009, IER 2009, no. 60, *BREIN v Mininova*; District Court of 's-Hertogenbosch, 8 July 2008, B9 6425, *BREIN v Euroaccas*; Court of Appeal of Amsterdam, 3 July 2008, IER 2008, no. 67, *Leaseweb v BREIN*; District Court of The Hague, 5 January 2007, AMI 2007, no. 2, *BREIN v KPN*.

¹²⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, recital 27,

available. Under these circumstances, it cannot be said that the mere conduit provider himself makes the information available, he only gives the opportunity to others.¹²⁹

Although it can be said that the mere conduit provider makes a temporary copy of the information he transmits, he is not liable for this. The intermediary can rely on Article 13a of the Dutch Copyright Act. This provision is the implementation of Article 5, section 1 of the Copyright Directive,¹³⁰ which exempts the temporary copy of the exclusive reproduction right of the author, if it is transient or incidental and an integral and essential¹³¹ part of a technological process and its sole purpose is to enable, e.g., a transmission in a network between third parties by an intermediary.

4.1.2. Classic hosting

The *Scientology v XS4ALL* ruling is paramount for the position of a hosting provider as well. There are no examples in Dutch case law where a hosting provider has been held directly liable for copyright infringement. At best he is (accessory) liable on basis of general tort for failing to meet the conditions of the safe harbour regime.

4.2. Other online intermediaries, providers of mixed services:

4.2.1. Online market places

In the *Stokke v Marktplaats* case, Stokke did not claim that Marktplaats was liable for direct infringement of its copyright. The case only concerned the (accessory) liability on basis of general tort (for making the infringement possible). In the light of this ruling (and the *L'Oreal v eBay* case), it is hard to imagine that online marketplaces can be held liable for copyright infringement which is in fact committed by third parties.

4.2.2. User generated content

There are examples of direct liability of providers that host user generated content with respect to the copyright infringement by these users. This can be the case if the provider sends a temporary copy of the copyright protected content, uploaded by a

¹²⁹ *Scientology v XS4ALL*. See also Christiaan Alberdingk Thijm, 'Het nieuwe informatierecht', 2005, p. 183, who qualifies this liability as secondary.

¹³⁰ District Court of The Hague, 9 June 1999, *Scientology v XS4ALL*, upheld by the Court of Appeal of The Hague with a reference to the Joint Statement with Article 8 of the WIPO Copyright Treaty.

¹³¹ 'Essential' does not only mean 'technically essential'. An economical necessity to make a temporary copy also falls within the scope of this exemption. Parliamentary Documents II 2001-2002, 28482, no. 3, p. 38. Chr. A. Alberdingk Thijm, 'Intellectuele eigendom en ICT', 2005, p. 183.

user, to another user, and if the provider is in other ways active (cleaning, ordering, converting),¹³² or if the provider uses the content uploaded by its users for its own purposes (reposting the content on the starting page).¹³³

In general, if the provider has no active role with regard to the content uploaded by its users, he cannot be held liable for copyright infringement since he is not the one who reproduces the copyright protected content, or makes it available.¹³⁴

4.2.3. Information location tools

There has much been said about the question whether a hyperlink constitutes a (direct) copyright infringement. The answer to this question, based on the case law and literature mentioned above, is no.

A hyperlink to copyright protected material is only a reference to the location of the work, and forms as such not a reproduction.¹³⁵ Neither makes a hyperlink the work available.¹³⁶

This is different when it concerns an inline or framed hyperlink. Such a link shows the content which is actually hosted on another location, in the website that contains the link. Under these circumstances, the provider of the link makes the copyright protected available, and therefore is directly liable for infringement.¹³⁷ As a defence might serve one of the copyright exemptions.¹³⁸

Also the operator of a search engine for links to copyright infringing material, is not directly liable for copyright infringement (*BREIN v ZoekMP3*).¹³⁹

4.2.4. File sharing

Case law is consistent in the position that providers of file sharing platforms do not directly infringe copyright. BitTorrent providers do not transmit content files, but only torrent files, comparable to hyperlinks.¹⁴⁰ The role of torrent providers is limited to the facilitation of storage of torrent files that refer to copyright protected content. Providers do not independently make copyright protected work available, they merely

¹³² District Court of Amsterdam, 24 November 2010, *Kim Holland v 123Video*.

¹³³ Subdistrict Court of Haarlem, 26 June 2005, LJN: AT8373, *Go2Web*.

¹³⁴ *Maroc.nl*

¹³⁵ Court of Appeal Arnhem, 4 July 2006, AMI 2006-3, *NVM v Zoekallehuizen.nl*.

¹³⁶ District Court Arnhem, 16 March 2006, LJN: AV5236, *NVM v Zoekallehuizen*. The court expressly refers to the German *Paperboy* case, BGH 17 July 2003, JAVI 2003/6.

¹³⁷ Subcourt of Rotterdam, 3 September 2004, AMI 2005-2, *Schlijper v Nieuw Rechts*; District Court of Leeuwarden, 30 October 2003, AMI 2004, p. 32-35, *Batavus v Vriend*.

¹³⁸ *Kranten.com*

¹³⁹ Court of Appeal of Amsterdam, 15 June 2006, AMI 2006-5.

¹⁴⁰ R.D. Chavannes, 'Hype of echt link? De hyperlinkaansprakelijkheid van informatieaanbieders, internetaanbieders en zoekmachines', JAVI 2003-1.

provider the technical facilities that make the communication of the copyright protected work available.¹⁴¹

5. Trademark infringement

5.1. Classic online intermediaries

In case of the classic online intermediaries (mere conduit, caching, classic hosting), the safe harbour apply straight forwardly. This means that in as far a service can be qualified as a hosting service in the sense of Article 6:196c, section 4 DCC, a notice and takedown policy and acting upon it is sufficient in order not to be held liable for trademark infringement of the recipient of the service.

5.2. Other online intermediaries, mixed services

Trademark infringement is probably most relevant with regard to online marketplaces. In *Stokke v Marktplaats* the plaintiff did not take the position that *Marktplaats* was directly liable for the trademark infringing advertisements. According to advocate general Jääskinen in *L'Oréal v eBay* there is not a single judgment where the operator of an online marketplace was held directly liable for trademark infringement.¹⁴² Jääskinen further takes the position that, as a principle, trademark infringement by the advertisers, cannot be attributed to the provider, unless this would follow from national rules and the principle of secondary liability for infringement.¹⁴³ As mentioned before, Dutch law does not have a system of secondary trademark infringement, so that liability on basis of facilitating can only be assumed on basis of general tort (see above).

With respect to primary infringement, Jääskinen concludes, referring to the *Google Ad Words* judgment, that the operator of an online marketplace does not use a sign in the sense of Article 5, section 1 of Directive 89/104 ('Trademark Directive').¹⁴⁴

The same line of argument can be followed with regard to user generated content providers.

With regard to content location tool providers, it follows from case law that framed linking may constitute a direct trademark infringement.¹⁴⁵

¹⁴¹ See for an elaborate analysis, District Court of Haarlem, LJN: PB 3757, *FTD v BREIN*. See further the case law supra 56.

¹⁴² Paragraph 58.

¹⁴³ Paragraph 119.

¹⁴⁴ Paragraph 120.

¹⁴⁵ District Court of Leeuwarden, 30 October 2003, AMI 2004, p. 32-35, *Batavus v Vriend*.

In the complex *Google Ad Words* case, the ECJ concluded that Google did not use the trademarks in the sense of Article 5, section 1 of the Trademark Directive, and therefore was not liable for trademark infringement.

6. Criminal law

The safe harbours apply to criminal liability as well. Consequently, the online intermediary cannot be subject to criminal liability if his service falls within the scope of Article 6:196c DCC, and he meets the applicable conditions. The following therefore only applies if the online intermediary cannot benefit from the safe harbour regime.

A criminal offence can exist in a criminal copyright infringement (Articles 31, 31a, 31b and 32 Dutch Copyright Act), a criminal trademark infringement (Article 337 DPC which concerns the production and trade of counterfeit trademarks), or other criminal offences.

It is per definition difficult to assess direct criminal liability with respect to the activities of an online intermediary. The criminal offence of incitement (Article 47 DPC), or an accessory criminal offence (Article 48 DPC) would be more obvious.

To my knowledge, there are no cases in which an online intermediary was prosecuted for inciting criminal copyright or trademark infringement or for being an accessory. Faced with such a charge, the most obvious defence would be that, as an intermediary, he had no knowledge of the criminal activities. Even if he had knowledge (e.g. the hosting provider who fails to expeditiously remove clearly infringing content), he can argue that he had no purpose in contributing to the infringement.

There is only one case in which online intermediaries were prosecuted for copyright infringement. It concerned the eDonkey platforms ShareConnector and Release4You. In 2007 this led to an acquittal on basis of the fact that the reproduction or making available of the copyright protected content took place outside the eDonkey network.¹⁴⁶ For the uploading of the content the services of the platforms were not necessary, and downloading falls within the scope of the home copy exemption of Article 16c Dutch Copyright Act.¹⁴⁷ Late 2010 the Court of Appeal of The Hague disallowed the prosecution.¹⁴⁸ There was no good reason to choose for criminal prosecution instead of civil proceedings. According to the guidelines of the Board of Prosecutor-Generals, action against infringement of intellectual property rights is

¹⁴⁶ District Court of Rotterdam, 24 July 2007, LJN: BBo268.

¹⁴⁷ Parliamentary Documents II 2002-2003, 28482, no. 5, p. 32; Court of Appeal The Hague, 15 November 2010, B9 9217, *Stichting De Thuis kopie*; Court of Appeal The Hague, 15 November 2010, B9 9218, *FTD v BREIN*.

¹⁴⁸ Court of Appeal The Hague, 22 December 2010, LJN: BO8246.

primarily the responsibility of the right holder, civil proceedings is therefore the principle rule. Criminal prosecution in intellectual property cases is only opportune in case of large scale professional infringement, and there was no single indication that such was at hand.

This shows that criminal liability for intellectual property infringement of online intermediaries is highly unlikely.

Indirect liability may exist when the online intermediary ignores an order of the public prosecutor on basis of Article 54a DPC. So far this has not led to liability in The Netherlands.¹⁴⁹

If faced with prosecution, Article 10 ECHR may be an important defence.¹⁵⁰

Remedies

1. Introduction

This chapter addresses the different types of claims that can be lodged against online intermediaries whose liability has already been established. More specifically, this chapter answers the following question: Which remedies can be sought successfully against an online intermediary if it is liable for infringing on the rights of third parties? The method used in this chapter is descriptive and the purpose is to examine whether a single trend can be discerned in the remedies imposed by courts.

Two important assumptions underlie this chapter. First, the subject in respect of whom a remedy is sought, is an online intermediary. Second, the online intermediary was found guilty by a court.

2. The term "remedy"

If a party lodges a claim against another party, then this party petitions the court to compensate the damages it has suffered or to create a situation in which it will no longer suffer damages. This is the essence of the term "remedy". In this article we use the following definition of remedy:

*A remedy is an equitable relief to terminate or to compensate a situation that is considered to be wrong or undesirable.*¹⁵¹

¹⁴⁹ There was one case where an online intermediary was prosecuted for ignoring the an order of the public prosecutor to take down a certain website. Since the public prosecutor however did not obtain the prior authorization of the delegated judge, prosecution was disallowed. District Court of Assen, 24 November 2009, LJN BK4226, *Mediaforum* 2010, p. 170-172; Prior: District Court of Assen, 22 July 2008, LJN BD8451 and Court of Appeal of Leeuwarden, 20 April 2009, LJN BI1645.

¹⁵⁰ See also a report of the University of Tilburg with regard to Article 54a DPC: M.H.M. Schellekens, B.J. Koops and W.G. Teepe, 'Wat niet weg is, is gezien. Een analyse van art. 54a Sr. in het licht van een Notice-and-Take-Down-regime', november 2007, www.cycris.nl

As there are various forms of equitable relief that can lead to the termination or compensation of a situation that is considered to be wrong or undesirable, there are different types of remedies. As will be demonstrated in the conclusion, the type of remedy granted also depends on the type of infringement and the role of the online intermediary. The amount of damages suffered and the potential damages yet to be suffered determine the types of claims filed by a party. The role of the online intermediary also plays a role in this regard. If an online intermediary plays a more active or facilitating role in an infringement, it is more likely to be held personally liable for damages and more will be required of it in terms of preventing infringements in the future. If an online intermediary plays a more passive role, it will more likely be requested to cease and desist the existing unlawful situation.

The liability of online intermediaries can be based on various grounds. In the cases that are further discussed in this chapter, the claims in most cases were based on copyright infringement, in other words, it was asserted that the online intermediary had committed a tort.

In the next chapters the following remedies will be discussed: the injunction on linking to infringing information, the injunction to make infringing data inaccessible or to remove it, the injunction to provide the name and address details of an infringer, the order to cut an Internet connection, the order to gather name and address details and finally the compensation of damages.

3. Injunction on linking to infringing information

An injunction to do or refrain from doing something is one of the remedies that can be imposed, if a party's rights are actively or passively infringed. The power to order someone to do or not to do something is laid down in article 3:296 of the Dutch Civil Code. Often, a person whose rights are infringed does not have an interest in only bringing legal action against the infringer, as given the location of the infringer it might prove difficult to force the infringer by means of a court order to remove the unlawful information. That is why it is an option for parties whose rights are infringed to try to block access to the unlawful information or to make such access impossible. This can be achieved by holding the party offering the links to unlawful information liable and having it remove the links in question. Although Dutch law does not prescribe a general prohibition to link to infringing information, there is a strong tendency in case law to regard linking to unlawfully disclosed information as a tort on the grounds of article 6:162 of the Dutch Civil Code.

There are several judgments known in Dutch case law where linking to information was considered to be a tort.

In the *Deutsche Bahn/Indymedia* case, Deutsche Bahn requested platform provider Indymedia to remove and keep removed all information that was unlawful in respect of Deutsche Bahn, including hyperlinks and irrespective of the fact that they were

¹⁵¹ M.M. Stolp, "Ontbinding, schadevergoeding en nakoming, De remedies voor wanprestatie in het licht van de beginselen van subsidiariteit en proportionaliteit" ["Rescission, damages and performance, the remedies for default in light of the principles of subsidiarity and proportionality] Kluwer, Deventer: 2007, p. 4.

included in messages of visitors to the website.¹⁵² It had previously been established that the information was unlawful in respect of Deutsche Bahn.¹⁵³ The court held that since Indymedia knew that the hyperlinks on its website led to information that was unlawful in respect of Deutsche Bahn, it would be committing a tort if it did not remove these links. It did not matter whether the information was available on Indymedia's website or whether it was available on a website that could be accessed through a link on Indymedia's website. The form of the hyperlinks (hyperlink, deep link, framed link) was also irrelevant in this respect. The deciding factor was that Indymedia made it technically possible to access the information and allowed access to it.

In the *Brein/Techno Design* case also the Court of Appeal held that linking to copyrighted information was unlawful since it promoted copyright infringement and that as such a tort was committed.¹⁵⁴ Search engine provider Techno Design operated a number of search engines (e.g. zoekmp3.nl) and generated income from advertisements it presented to users of the search engine. Even though Techno Design itself was not infringing on copyrights, Techno Design had still committed a tort since it benefited from another party's infringement. Techno Design was therefore ordered by the court to remove and keep removed the links to the infringing information.

In the *Brein/Mininova* case, it was established that platform provider Mininova afforded the opportunity to structurally link to copyrighted material, supported infringements on copyrights and benefitted from such infringements.¹⁵⁵ Because Mininova systematically facilitated and promoted infringements on copyrights by users of Mininova, Mininova – given the contents of the data traffic on the forum website – knowingly actively contributed to the spreading of and accessibility to copyrighted material. On this basis Mininova could not invoke article 6:196c(4) of the Dutch Civil Code and the court ruled that Mininova had to take measures to ensure that no torrent links would be offered on the website that linked to files in respect of which there was reasonable doubt regarding the question of whether these did not contain copyrighted works or works protected by neighbouring rights, in respect of which the rights holders did not consent to their disclosure. In addition, a penalty was imposed for each automatic link to an infringing file.

The same issue as in the *Brein/Mininova* case was the subject of *The Pirate Bay/Brein* case.¹⁵⁶ In this case the court ruled that facilitating unauthorised file sharing did not constitute disclosure, but that it did qualify as a tort because platform provider The Pirate Bay afforded the opportunity to structurally link to copyrighted material and therefore promoted copyright infringement. Invocation of article 6:196c of the Dutch Civil Code was unsuccessful because The Pirate Bay could not be regarded as a caching provider as a consequence of which an injunction was imposed on it to refrain from linking to unlawful information.

¹⁵² Preliminary relief judge of the District Court of Amsterdam, 20 June 2002, LJN AE4427 (*Deutsche Bahn vs Indymedia*).

¹⁵³ District Court of Amsterdam, 15 April 2002, LJN AE1935, finding 9 (*Deutsche Bahn vs XS4ALL*).

¹⁵⁴ Amsterdam Court of Appeal, 15 June 2006, LJN AX7579 (*Brein vs Techno Design*).

¹⁵⁵ District Court of Utrecht, 26 August 2009, LJN BJ6008.

¹⁵⁶ Preliminary relief judge of the District Court of Amsterdam, 22 October 2009, LJN BK1067.

In the *C More/MyP2P* case links were offered to websites that transmitted Canal+ live broadcasts.¹⁵⁷ Although platform provider MyP2P itself did not commit an act of disclosure, the Court of Appeal held that by structurally and systematically linking to this information it was committing a tort. The Court of Appeal therefore ordered MyP2P to remove and keep removed the links in question.

Preliminary conclusion:

A consistent trend can be discerned in case law regarding the linking to information that is unlawfully disclosed to the public. In all cases it has been held that the party linking to information unlawfully disclosed to the public does not itself commit an act of disclosure and on that basis does not commit a tort, but that the linking to information unlawfully disclosed to the public in itself constitutes a tort. In all of the above-referenced cases it was therefore held that the links had to be and remain removed or that access to the information had to be made impossible.

4. Injunction to make infringing data inaccessible or to remove it

If infringing information is disclosed to the public, a party suffering damages as a consequence of this will have an interest in claiming that the infringer cease and desist from disclosing this information.

In the *Deutsche Bahn/XS4ALL* case, Deutsche Bahn demanded that hosting provider XS4ALL remove information hosted by XS4ALL because it contained information on how to disrupt the train traffic of Deutsche Bahn and this information was manifestly unlawful.¹⁵⁸ The Court of Appeal held based on article 6:196c(4) of the Dutch Civil Code that the information was manifestly unlawful and that XS4ALL should have removed it. Since XS4ALL failed to do so, it was liable in respect of Deutsche Bahn. Furthermore, there were no grounds based on which XS4ALL could require a written indemnification from Deutsche Bahn for rights of the website holder arising from XS4ALL's removing the information from its website.

In the previously discussed *Brein/Techno Design* judgment it was also held that search engine provider Techno Design had to make its websites, including www.zoekmp3.nl, inaccessible to its visitors.¹⁵⁹

If a provider is a hosting provider it can also be requested to remove infringing content.¹⁶⁰ In the *Brein/Leaseweb* case, Brein demanded that hosting provider Leaseweb remove the website www.everlasting.nu because it offered copyrighted information. Although Leaseweb itself as provider did not infringe on copyrights, the court held that it did facilitate the infringement by hosting www.everlasting.nu and as a consequence committed a tort in respect of Brein. As a result of this, the court ordered Leaseweb to remove the infringing content.

In the *Brein/Euroaccess* case, hosting provider Euroaccess hosted the website www.torrent.to, which made copyrighted files available without the consent of the

¹⁵⁷ Den Bosch Court of Appeal, 12 January 2010, IEPT20100112 (*C More vs MyP2P*).

¹⁵⁸ Amsterdam Court of Appeal, 7 November 2002, LJN AF0091 (*Deutsche Bahn vs XS4ALL*).

¹⁵⁹ Amsterdam Court of Appeal, 15 June 2006, LJN AX7579 (*Brein vs Techno Design*).

¹⁶⁰ District Court of Amsterdam, 21 June 2007, LJN BA7810 (*Brein vs Leaseweb*).

copyright holders.¹⁶¹ The court held that hosting this infringing information was unlawful. Euroaccess was ordered to remove the websites that infringed on copyrights of copyright holders affiliated with Brein.

In the *BrunoPress/IMT* case the preliminary relief judge held that by affording the opportunity to publish photographs copyrighted by third parties on a website, platform provider IMT had infringed on that copyright.¹⁶² The court therefore ordered IMT to remove and keep removed the photographs that infringed on copyrights.

In the *Brein/Ziggo* case, Brein demanded from mere conduit provider Ziggo that it make the website The Pirate Bay, which had previously been found to have committed a tort by facilitating copyright infringement by its users, inaccessible to its customers.¹⁶³ However, the preliminary relief judge held differently. It had not been established that all customers of Ziggo had committed infringing acts. A cease-and-desist order to deny all Ziggo customers access to the website of The Pirate Bay was such a far-reaching claim that it could not be granted pursuant to articles 26d and 15e of the Neighbouring Rights Act.

Preliminary conclusion:

Hosting providers, search engine providers and platform providers can be held to make infringing data inaccessible or to remove it. For hosting providers and search engine providers, it was ruled that these did not infringe on the rights of others themselves. In the only case in which a platform provider was ordered to remove and keep removed the infringing materials, it was ruled that the platform provider infringed on the rights of others itself.

5. Injunction to provide the name and address details of an infringer

Based on the freedom that parties have to decide the form of their claim, it is possible to request the name and address details of an infringer from an online intermediary.

In this respect, case law also provides possibilities to request the provision of name and address details from an online intermediary which itself is not infringing on the rights of others, but which does facilitate the infringer's infringing acts.

In the previously discussed *Deutsche Bahn/XS4ALL* case a claim for the provision of name and address details also played a role.¹⁶⁴ Given that a subscriber of hosting provider XS4ALL evidently committed a tort by publishing the challenged information on the Internet, it was plausible that the subscriber upon taking out his subscription would publish the information via other websites and given the interest that Deutsche Bahn had in being able to institute legal proceedings against the subscriber in order to prevent further damages, XS4ALL was obliged to provide the name and address details of the subscriber to Deutsche Bahn. It was explicitly held that the protection offered by the Personal Data Protection Act had to be disregarded,

¹⁶¹ District Court of Den Bosch, 8 July 2008, IEPT 20080708 (*Brein vs Euroaccess*).

¹⁶² Preliminary Relief Judge of the District Court of Amsterdam, 16 October 2008, IEPT20081016 (*Bruno Press vs IMT*).

¹⁶³ Preliminary Relief Judge of the District Court of The Hague, 19 September 2010, LJN BN1445 (*Brein vs Ziggo*).

¹⁶⁴ Amsterdam Court of Appeal, 7 November 2002, LJN AF0091 (*Deutsche Bahn vs XS4ALL*).

as there was a necessary interest as referred to in article 43 of the Personal Data Protection Act, i.e. the protection of the rights and freedoms of others and the prevention of criminal offences.

In the *Lycos/Pessers* case, a fourth criterion was applied by the Court of Appeal, entailing that there was not any less drastic manner in which to find out the name and address details.¹⁶⁵ In the case at hand, an unknown and anonymous party held a website that contained information that the claimant Pessers considered to be unlawful. Pessers asserted that it was suffering damages. The hosting provider Lycos that hosted the website, did not want to provide Pessers with the name and address details, which meant that it could not call the infringing party to account. Pessers therefore claimed before the Court of Appeal that Lycos be ordered to provide the name and address details of the website holder. The Court of Appeal ordered Lycos to provide the name and address details on the grounds of the fact that it was committing a tort by not providing the name and address details, even if the information published was not manifestly unlawful. The Court of Appeal formulated the following four circumstances that can lead to the issuance of name and address details:¹⁶⁶

- a) the possibility that the information, considered in its own right, is unlawful and damaging in respect of a third party, is sufficiently plausible;
- b) the third party has a real interest in obtaining the name and address details;
- c) it is plausible that in the specific case in question there are not any less drastic ways in which to find out the name and address details;
- d) weighing of the interests in question of the third party, the service provider and the website holder (insofar as known) shows that the interest of the third party should prevail.

The Supreme Court rejected Lycos's appeal and Lycos had to as yet provide the name and address details to Pessers.

In all of the cases discussed above, the issuance of the name and address details of the (assumed) infringer was granted. However, in the *Brein/UPC* case, the Court of Appeal dismissed Brein's claim in respect of mere conduit provider UPC for the issuance of name and address details of assumed infringers because the Court of Appeal did not have a clear picture of the lawfulness of the manner in which Brein had obtained the IP addresses of the assumed infringers and it could not investigate this in preliminary relief proceedings.¹⁶⁷ The Court of Appeal considered that such a major decision with significant societal implications could not be made dependent on the outcome of the procedural debate between the parties about the lawfulness of the manner in which Brein gathers and processes IP addresses.

The *Brein/Leaseweb* case addressed above and the *Brein/KPN* case that is addressed below also concerned a claim for issuance of name and address details, which were both honoured by the court.¹⁶⁸

¹⁶⁵ Supreme Court judgment dated 25 November 2005, LJN AU4019 (*Lycos vs Pessers*).

¹⁶⁶ Although the Court of Appeal does not specifically refer to article 6:162 of the Dutch Civil Code, the ruling was, given the wording in finding 4.10, based on article 6:162 of the Dutch Civil Code. In this respect, see also finding 5.4.3 in the appeal in cassation (Supreme Court judgment dated 25 November 2005; LJN: AU4019).

¹⁶⁷ Preliminary relief judge of the District Court of Utrecht, 12 July 2005, LJN AT9073 (*Brein vs UPC*).

¹⁶⁸ Preliminary relief judge of the District Court of The Hague, 5 January 2007, LJN AZ5678 (*Brein vs KPN*).

The criteria of the *Lycos/Pessers* case were applied in the previously discussed *Brein/Euroaccess* case.¹⁶⁹ The court held that (1) it was sufficiently plausible that the information of hosting provider Euroaccess was unlawful, (ii) Brein had a real interest in obtaining the name and address details to be able to take legal measures against *www.torrents.to*, (iii) Brein had made it sufficiently clear that there were not any less far-reaching means available to find out the name and address details of the person behind *www.torrents.to*, and (iv) the interests of Brein prevailed in the court's opinion. The court granted the claim regarding the issuance of the name and address details.

In the *Brein/UPC* case also the court held that mere conduit provider UPC had to provide the name and address details to Brein.¹⁷⁰ Three users of the website *www.dikkedonder.nl* disclosed copyrighted files and thus contravened the Copyright Act. These users had an Internet subscription from UPC. Given that (i) it was sufficiently plausible that the situation involved infringing (and unlawful) acts, and (ii) there was no reasonable doubt that the persons whose identifying data was provided were in fact the ones who were guilty of these acts, UPC had to provide the name and address details to Brein.

Preliminary conclusion:

The cases in which the court ordered an injunction to provide the name and address details of the alleged infringer concerns mere conduit providers and hosting providers. Since the Supreme Court judgement in *Lycos vs Pessers* the main criteria for a provider's obligation to provide name and address details were set. In almost all cases the court ordered the provider to disclose the names and addresses of the infringers.

6. Order to cut an Internet connection

In addition to the above-referenced claims, it is also possible to cut off an infringer's Internet connection.

In the *Brein/KPN* case, Brein claimed that the Internet connection of a subscriber of mere conduit provider KPN had to be cut.¹⁷¹ This subscriber had access to the Internet through KPN's network. This subscriber offered bit torrent files that linked to copyrighted information. The preliminary relief judge held that the subscriber itself was not infringing on copyrights, but that it did facilitate copyright infringement and therefore had committed a tort. The preliminary relief judge subsequently relied on article 6:162 of the Dutch Civil Code and concluded that the failure to cut the connection conflicted with the duty of care that KPN had in respect of those whose interests were being infringed on as a result of unlawful acts.

7. Order to gather name and address details

In the *Stokke/Marktplaats* case, Stokke required from platform provider Marktplaats that it had to request the name and address details of an advertiser in order to prevent

¹⁶⁹ District Court of Den Bosch, 8 July 2008, IEPT 20080708 (*Brein vs Euroaccess*).

¹⁷⁰ Preliminary relief judge of the District Court of Amsterdam, 24 August 2006, LJN AY6903 (*Brein vs UPC*).

¹⁷¹ Preliminary relief judge of the District Court of The Hague, 5 January 2007, LJN AZ5678 (*Brein vs KPN*).

infringement on Stokke's intellectual property rights.¹⁷² The District Court considered that measures could be required, if they were suitable. To answer the question of whether measures are suitable, the parties' interests must be weighed, in which regard the costs of those measures and the consequences of the measures for the company's operations must be taken into account. In this case the costs were too high and the measures so far-reaching for Marktplaats, that it could not be required of Marktplaats that it adjust its systems and business operations in such a manner that the name and address details of all its advertisers could be gathered.

8. Compensation of damages

In the *BrunoPress/IMT* judgment discussed above, platform provider IMT itself infringed on the copyrights of third parties by publishing copyrighted photographs.¹⁷³ In that connection BrunoPress made a plausible case that it had suffered damages. The court therefore awarded damages.

9. Summary

If the remedies granted in the cases discussed above are viewed in light of the various categories of providers, this results in the following table:

	Mere conduit provider	Caching provider	Hosting provider	Search engine provider	Platform provider
Damages					BrunoPress / Image Media
Providing name and address details	Brein / UPC (LJN AY6903) Brein / KPN		Deutsche Bahn / XS4ALL Lycos / Pessers Brein / Leaseweb Brein / Euroaccess		
Removing infringing content			Deutsche Bahn / XS4ALL Brein / Leaseweb Brein / Euroaccess	Brein / Techno Design	BrunoPress / Image Media
Injunction to refrain from linking to infringing content				Brein / Techno Design	Deutsche Bahn / Indymedia Brein / Mininova The Pirate Bay / Brein C More / MyP2P

¹⁷² District Court of Zwolle, 14 March 2007, LJN BA4950 (*Stokke vs Marktplaats*).

¹⁷³ Preliminary relief judge of the District Court of Amsterdam, 16 October 2008, IEPT20081016 (*Bruno Press vs IMT*).

Cut access to the Internet	Brein / KPN				
Adjusting systems so that data of users can be requested					Stokke / Marktplaats
Penalty	Brein / UPC (LJN AY6903)		Deutsche Bahn / XS4ALL	Brein / Techno Design	BrunoPress / Image Media
			Lycos / Pessers		Deutsche Bahn / Indymedia
	Brein / Leaseweb		Brein / Mininova		
	Brein / Euroaccess		The Pirate Bay / Brein		
	Brein / KPN				C More / MyP2P

The remedies in the case of a mere conduit provider primarily consist of providing name and address details and cutting off an infringer's access to the Internet. To press home these acts by the mere conduit provider against whom judgment has been given, the injunctions are given more weight by imposing a penalty.

The remedies in the case of hosting providers include the provision of name and address details of an infringer and removing the infringing content. What is noticeable is that no cases have been published in which the hosting provider was held liable simply because of the links on the hosted websites. In each case the hosting provider was held liable for all of the data and ordered to remove and keep removed this data or to make and keep this data inaccessible. In addition, a penalty was imposed in all of these cases.

Not much can be said about search engine providers, since only one case is included in the overview given above. With regard to the granting of remedies, there seem to be similarities with platform providers.

With respect to platform providers it is striking that no claims were filed in any of the cases regarding the provision of the name and address details of users. There are, however, claims to remove and keep removed data, as well as an order to refrain from linking to infringing content. The only case in which an online intermediary is held liable for damages also concerns a platform provider. It could be posited that it is no wonder that this case concerns a platform provider, since platform providers generally play a more active role in the selection of the data posted by users. It may be expected from a platform provider, precisely because it plays an active role, that it act as a prudent administrator of the platform. If a provider fails to do so, it runs the risks of being held liable for breaching its duty of care.

10. Conclusion

If an online intermediary is liable, it seems that the remedy imposed depends on the role it played in the tort. If an online intermediary plays a more active role in the case of infringing acts, the party whose rights are infringed on will have more of an interest in holding the online intermediary itself liable for the damages arising from the

infringing acts. However, if an online intermediary plays a more facilitating role and another party commits the infringing acts, then the party whose rights are infringed will have a greater interest in requesting the court to apply remedies that encourage the online intermediary to provide the name and address details of the infringer and to remove infringing data.