

Search engine may link to illegal music files, court finds

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The District Court of Haarlem has ruled that Zoekmp3.nl (www.zoekmp3.nl), a search engine for MP3 digital music files, may link to illegal music files available elsewhere on the Internet. The case was launched by BREIN (www.anti-piracy.nl), the Dutch entertainment industry's anti-piracy group. This is the first court decision on a global scale to decide on the legitimacy of search engines that specialize in searching for digital music files. It is expected that the decision will be appealed.

The court held that Techno Design (www.techno-design.com), the company that operates Zoekmp3.nl, does not infringe any copyrights because no illegal MP3 files are stored on its servers and it is not responsible for transferring said files to users. Techno Design merely refers its users to other websites where MP3 files can be found and downloaded through its database of links. Making available technical facilities to enable copyright infringement is not an infringement in itself. This is in line with the EU InfoSoc Copyright Harmonization Directive and the corresponding Dutch legislative proposal to implement the directive. The court also ruled that Techno Design is not acting unlawfully, as providing technical facilities, which can be used for legitimate as well as illegitimate purposes, is insufficient to constitute a tortious act.

This reasoning is the same as that used in the *KaZaA Case*, in which the court found that KaZaA (www.kazaa.com) does not infringe any copyrights nor act unlawfully by providing software that technically facilitates peer-to-peer uploading and downloading by its users of, among other things, copyright-protected works (see Wolter Wefers Bettink and Frédérique Wentholt, 'KaZaA victory still leaves legality of P2P uncertain', in: *World eBusiness Law Report*, 10 February 2004).

However, the court declared that Techno Design *will* be considered to be acting unlawfully if it is reliably notified that one of its links refers to infringing MP3s and it subsequently fails to cooperate with the copyright owners or take adequate measures to take down the links. This declaration is in line with future amending legislation to the EU E-commerce Directive and existing Dutch case law regarding the liability of internet service providers, specifically the *Scientology* and *XS4ALL Cases* (see Wolter Wefers Bettink, 'Right to freedom of expression trumps Scientology copyright claim', in: *World eBusiness Law Report*, 22 October 2003, and Wolter Wefers Bettink and Frédérique Wentholt, 'Dutch ISP blocks access to railway sabotage material', in: *World eBusiness Law Report*, 24 May 2002).

For a general discussion of the liability of service providers for illegal content, see Mike Conradi and Annette Honan, 'Are ISPs liable for P2P copyright infringement?', in: *World eBusiness Law Report*, 5 June 2003.
