

## **REVIEW 2019**

The BREIN Foundation sees to collective protection of copyrights and related rights for makers, performing artists and the creative media industry, such as producers, publishers, broadcasters, distributors and platforms. Affiliated with BREIN are about thirty industrial and collective management organizations and their members, together several thousands of companies and ten thousands of creators of music, films, series, books, writings, video and games.

BREIN's approach targets all forms of illegal offer, regardless of the technology used, such as bittorrent, cyberlockers, usenet and websites or social media linking to them. BREIN looks in the very first place at the providers and uploaders who operate as source and next also at intermediaries, such as hosting providers and access providers but also payment services, advertisers and search engines. Also in case intermediaries are neutral they should assist in fighting illegal use.

*"The value of copyright is worth protecting."*

The Platform Makers launched two educational videos and a booklet on the value of copyright, last year. The copyright sectors in the Netherlands represent no less but 6 percent of the gross national product and 7.4 percent of the overall employment in the Netherlands.

For more information, please visit the website renewed last year [www.stichtingbrein.nl](http://www.stichtingbrein.nl) or [www.breinfoundation.nl](http://www.breinfoundation.nl) and follow us on LinkedIn, Facebook, Instagram and/or Twitter.

## Figures

BREIN carried out the following numbers of enforcement actions in 2019. All actions concern music, films and series, books, other writings, images and games, save stated otherwise.

- 596 investigations completed, 243 ongoing
- 564<sup>1</sup> illegal sites/services (downloading or streaming) taken down
- 1 site (The Pirate Bay) and 258 TPB proxies/mirrors<sup>2</sup> dynamically blocked at IP and DNS; 333 proxies ceased their service
- 23 illegal dealers in IPTV/VOD subscriptions stopped
- 12 Facebook groups removed
- 1,184,614 search results removed and, upon request, 1,854 cyberlocker files and 1,107 YouTube files<sup>3</sup>
- 1,818 online offer ads removed<sup>4</sup>

Among the questions and notices BREIN received from authors, publishers and producers 130 concerned so-called scam websites. They are phishing websites that entice consumers with the newest content to cheat them out of data without eventually supplying the content, because in reality they don't have it. BREIN reports them to ScamAdviser.

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<sup>1</sup> This number is excluded 80% of the Russian illegal sites which had been rendered inoperative in the Moonwalk action, see also at 'Investigations (...)'.  
<sup>2</sup> A lot of the proxies refer to The Pirate Bay on the dark web.  
<sup>3</sup> For titles listed by the member rightholders, BREIN searches on Google for search results for Notice & Take Down. As to cyberlockers and YouTube, BREIN only sends notices on a case-by-case basis upon specific request of the rightholder.  
<sup>4</sup> Ads often regard dozens, hundreds or even thousands of titles.

## Highlights

- For the first time in his annual speech the King mentioned, within the context of European cooperation, the need for updating inter alia copyright protection.
- After the official announcement of the DSM Directive in the Official Journal of the EU on 22 May 2019, the Member States have 24 months to convert it into their national laws. To the work of BREIN it is important that Article 17 (formerly 13) cannot be used for illegal exploitation. The text of the article appears to be inspired in part by case law of the highest European Court (EUCJ) inter alia in court cases of BREIN.

## Investigations (IPTV, music, e-books)

- This last year BREIN carried out 596 investigations, 243 investigations are ongoing.
- The completed investigations resulted inter alia into taking down 564 websites/services (excluding the Moonwalk websites, see below), stopping 23 IPTV/VOD providers and 12 Facebook providers. Furthermore, 1818 ads for online offer were removed, mainly from eBay-owned Marktplaats and often regarding e-books, but other content as well. Some persistent providers took their business to 2dehands.be, but will be dealt with there as well.
- In cooperation with MPA, BREIN investigated the hosting of Russian streaming sites in the Netherlands. By simultaneously serving ex parte court orders upon some three Dutch providers, BREIN pulled the plug of the Moonwalk service which served over 80% of the illegal Russian streaming sites. The top 50 of them jointly had 90 million unique users a month, representing 395 million visits. Moonwalk operated inter alia a database with over 26,000 films and 10,000 series, including also Dutch content. Next to the providers taking down the service, BREIN also claims the identifying data of the customers behind Moonwalk, so they can be held liable. Providers who refuse will be summoned before the court.

## Knock & Talk / Settlements; a selection

- In a number of cases BREIN chooses to knock on the door of an illegal provider, usually through a bailiff. Last year, this was done in ten cases. It concerned an uploader of torrents, a torrent site operator, an IPTV provider, a radio streamer, a Facebook provider of e-books and also Marktplaats providers of CDs, DVDs and e-books respectively. In general, this approach results more readily into settlements.

- Most parties that are summoned by BREIN prefer to settle the matter out of court. Next to a cease-and-desist declaration including civil fine, usually a compensation is paid the sum of which is also subject to financial capacity.
- However, agreements can also be reached online. Media365.com from the US is oriented internationally and has Dutch books as well. Users can upload books in epub or pdf format which can immediately be read by everybody. BREIN scrutinized the Dutch offer and sent a take down & stay down notice for over 300 works which are commercially available. Media365 next committed itself not to accept any new uploads of books of the authors in question anymore, save authorization of the rightholders themselves. Since then BREIN did not find any uploads of its members.
- BREIN warned the three operators of a Facebook group in which orchestra tapes were exchanged on a large scale. They signed a cease & desist declaration with penalty clause and paid 1,500 Euro as compensation to BREIN.
- Following an anonymous notice, BREIN infiltrated two closed and secret Facebook groups having 3,000 members for illegal uploading and downloading of over 8,000 e-books. After a warning, the operators signed a cease & desist declaration with penalty clause and paid 6,000 Euro as compensation to BREIN.
- BREIN retrieved the operator of a WhatsApp group in which e-books were shared. After a warning, he signed a cease & desist declaration with penalty clause and paid 250 Euro as compensation to BREIN.
- The District Court in Eindhoven ordered an illegal e-book seller who did not comply with his settlement with BREIN to pay 1,500 Euro.
- A seller of R4 memory cards carrying each 25 to 100 illegal copies of games reached a settlement with BREIN by signing a cease & desist declaration with penalty clause of 500 Euro.
- At the request of the rightsholder, BREIN removed the ads of a Russian provider of CDs of songfestival winner Duncan Laurence from Marktplaats. The illegal vendor was summoned by the rightsholder himself.
- BREIN discovered that several media-players were auctioned from the estate of a bankrupt wholesaler in regard of which the CJEU had ruled that their sale and use infringe. The offer was immediately removed after the warning. The liquidator has confirmed that the players are destroyed.
- By order of BREIN, the owner of a Plex media-server carrying many thousands of films and episodes of television series removed this from the internet. These media-players are for personal use, but the content on this server was made available to (paying) customers who could also make requests. The service was advertised on Reddit.com and through the chatapp Discord. The owner of the

server declared he downloaded everything through Torrents and Usenet. He has signed a cease & desist declaration with penalty clause and paid a compensation.

- The domain Subfilms.nl has been closed down by the Dutch domain name registrar SIDN, after having carried out a verification procedure of the data of the domain name owner at the request of BREIN.
- A provider who sold pre-installed set-top boxes with IPTV through Marktplaats has reached a settlement with BREIN. Next to delivery of profit, he signed a cease & desist declaration with penalty clause. Any future infringements will cost him 500 Euro each.
- A Dutch usenet uploader settled, after a warning of BREIN, by signing a cease & desist declaration with penalty clause and payment of 1000 Euro as compensation.
- Several payment plans are effective at BREIN agreed with infringers. Upon non-payment, collection is transferred to the bailiff.
- A repeat e-book offender continued her illegal offer despite a previously ex parte court order and a signed cease & desist declaration. After confirmation by a bailiff, BREIN has seized her house and movables. Meanwhile, the payments have been resumed.
- A major illegal uploader of a release team did not comply with his settlement and was summoned before the court by BREIN. At the interlocutory hearing, he decided to comply as yet, raised with legal and collection cost.

### **Consultation with Authorities**

- The Public Prosecution Office and the FIOD, responsible for the criminal enforcement against horizontal fraud, are willing, in principle, to consider criminal investigation and prosecution in cases in which the organization level above the direct sale to consumers can be held responsible and estimated annual sales of 100,000 Euro or more are concerned.
- BREIN assisted in the preparation of a meeting requested by Elsevier at Europol concerning the illegal bittorrent sites Schihub and Libgen on which large-scale scientific publications are offered.
- BREIN discussed problems with so-called 'bad hosters' with the Dutch law enforcement authorities.
- There was consultation with Belgian parties on prosecution in a criminal law file against two Dutch operators of a Twitter account which involved a data volume of about 35Tb of Flemish and Dutch television shows. Through the account links to illegal offer on bittorrent websites were distributed.

## Consultation with Market Parties

- Consultation with one of the market leaders among (hosting) providers focused inter alia on the reliability of customer data and its disclosure, as also taking down or rendering inaccessible illegal websites. Seeing that providers target b2b, i.e. become a provider of hosting providers, cooperation of its customers must be solicited or compelled.
- The anchoring of a 'Know-Your-(Business)-Customer' obligation for (hosting) providers in law has already been suggested for a long time by BREIN and has become, in the meantime, a focal point in the consultation of international rightsholder organizations with the European Commission. This is essential as after take down, popular -and thus profitable- illegale services just carry on anonymously elsewhere.
- Consultation with Marktplaats focused on the disclosure of IP addresses in case of repeat offenders. This is essential for investigation of repeat offenders.

## IPTV

- According to EUIPO research 1,1 million Dutch citizens paid in average, in 2018, 6.82 Euro a month to IPTV criminals. This is 8.9% of the population and 93 million Euro a year.
- BREIN has a file on illegal IPTV providers to report to the FIOD early 2020.
- BREIN itself took down 23 illegal IPTV sellers, last year, by means of summons or court orders. Several civil law proceedings are being held in which providers are held liable, including directors' personal liability. The total of sellers taken down has meanwhile exceeded the number 300. Settlements run into ten thousands of Euros.
- BREIN summoned before the court two directors of a network of companies in proceedings on the merits to have their directors' personal liability established for the infringing sale of media-players with IPTV. The set-top boxes represented about 100,000 Euro in annual sales.
- Eurojust and Europol coordinated the performance of a request for legal aid from the Italian fiscal police and on this basis the Dutch police took down 93 servers at a major Dutch hosting provider. These ran the program Xstream Codes which ensured IPTV streaming for over 5,000 customers having 50 million users. Although the reason of the request concerned unauthorized streaming of Italian football in La Liga, a lot more illegal services were hit, also in the Netherlands.

- In a mini-conference on illegal IPTV organized by the trade association NLconnect in which the Public Prosecution Office also participated, BREIN once more stressed the important role played by Dutch (hosting) providers in the global spread of illegal IPTV. The Netherlands is next to France and the US one of the top three hosting countries for this well-organized crime.
- A lot of illegal IPTV services use Dutch (hosting) providers. Apart from taking down such illegal services, it is important to be able to identify the parties concerned. This requires verification of customer data by the chain of (hosting) providers to become common practice.
- Exploratory talks took place with the Custom authorities on the role they could play in the import of infringing media-players in particular from China.
- A dialogue with Aliexpress (Alibaba) has been established regarding ads targeting the Netherlands.

### **Access Blocking of Illegal Websites**

- Next to the blocking of IP addresses and domain names of The Pirate Bay, monitored by BREIN, also about 200 proxies and mirrors for The Pirate Bay are blocked, many of which refer to the TPB addresses on the dark web.
- Although BREIN is the architect of the step-by-step take down of illegal websites by hosting and access providers if the website itself does not respond, blocking by Dutch access providers still is limited to a provisional order against The Pirate Bay. The opposition to blocking by the access providers did, however, result into a ground breaking decision of the CJEU having effect throughout the entire EU, ruling that The Pirate Bay and its operators infringe themselves by the organized facilitation of illegal sharing by users.
- On 16 December, the long awaited hearing took place in the proceedings on the merits regarding access blocking to the illegal website TPB by Ziggo and XS4ALL. After the decision of the CJEU and the Dutch Supreme Court, the case was referred back to the Appeal Court in Amsterdam for assessment of proportionality and effectiveness of the measure. The ruling is expected before the summer of 2020.
- A Kantar Media survey into the effect of The Pirate Bay blocking concluded that 80% of the users stopped after the blocking. Technical research by INCOPRO into the effectiveness of the blocking in the Netherlands concluded that 'Alexa estimated usage decreased 90% compared to the pre-blocking situation'. In particular dynamic blocking enhances effectiveness.
- The ISPs, however, tried to obtain dismissal of the blocking. If it is allowed, then it should only apply to domain names in their view, and not also to IP addresses,

nor should it be dynamic, as is presently the case for the provisional blocking. They also believe that BREIN should pay all cost.

- ISPs also object to expansion of the dynamic aspect in regard of mirrors and proxies. Seeing that the original judgment did not say so, this is not be allowed, so the ISPs allege, whereas blocking without such allowance would not be effective, also according to BREIN. However changed circumstances allow such expansion. At the time of the judgment in the first instance of 2010, proxies and mirrors were incidental, whereas currently they are structural.
- BREIN stands ready to obtain further court orders for blocking other popular illegal websites.

### **Illegal Offer by Commercial Usenet providers**

- The Dutch Supreme Court asks the CJEU for a preliminary ruling in the proceedings of BREIN versus the commercial usenet provider NSE. Said provider granted access, against payment, to a substantial amount of files uploaded by users containing copyrighted works which it copied to its own servers and kept available there for its customers. All this without the authorization of the rightsholders who did not receive any share of the significant proceeds.
- The Supreme Court ruled that “through the intervention of NSE, copyrighted works are made available to the public without authorization of the rightholders”. The question is whether NSE makes an infringing communication to the public and can be held liable for this.
- Another question is what kind of order can be imposed, if the statutory limitation of liability for hosting (passive storage at the request of users) applies.
- This case concerns the scope of the right to make available to the public and the interaction with the liability exemption.
- Originally, the Usenet was a bulletin board with newsgroups for the purposes of raising and answering questions, but this role has been taken over long since by forums on the internet and actually Usenet is only used for large-scale and structural infringement. Commercial providers sell subscriptions themselves or through resellers to users which grant them access to the server-park of the providers where they keep the illegal files available for years. It has also appeared from investigation by BREIN that commercial usenet providers and their resellers are involved in the funding and operation of so-called NZB sites which make it easier to find illegal offer.
- At the hearing of the YouTube and Uploaded (Cyando) case, the CJEU asked how the parties look at their case in the light of Article 17 DSM Directive. It seems



likely that this will be similar in this case. Hearing of the BREIN v NSE case has been postponed until after the ruling in YouTube and Uploaded.

### Uploaders

- The District Court in Utrecht rendered a judgment against one of the biggest Dutch illegal uploaders who was intensively involved in two websites where links to illegal files on usenet and bittorrent were offered. The uploader has been sentenced on the ground of uploading very large amounts of films and series. The websites were taken down by order of BREIN in 2018. The uploader has to desist from his illegal activities forever and give full transparency about the business and those involved on penalty of civil fines which may reach 150,000 Euro.
- The intended expansion of dealing with illegal uploaders meanwhile progresses. The software and the Privacy Impact Assessment for detection and selection of Dutch IP addresses where frequent or sustained infringement takes place has been completed. Such infringement operates as lubricant for the exchange on illegal p2p websites.
- The Appeal Court in Arnhem dismissed the appeal rightsholder DFW lodged against the dismissal of disclosure by internet access providers of personal data behind infringing accounts. DFW now appeals to the Supreme court. The DFW case concerns single infringement instead of -as in BREIN cases- multiple infringement.
- The Belgian court also asked the CJEU for a preliminary ruling regarding a similar kind of request. The court wants to know from the CJEU inter alia whether an exchange of sections of a copyrighted work by a user in a bittorrent network constitutes a communication to the public. Dutch courts dismissed such arguments. The Belgian case concerns a so-called 'copyright troll', a rightsholder of porn films who allegedly files claims against illegal downloaders as earning model.
- The dealing with frequent uploaders includes an awareness program of 6 months in which a maximum of 1000 accounts a month will receive an educational warning by email. For research into its effect subsidy has been obtained. The start of the education is planned mid-2020. Whether eventually enforcement will take place is subject to the effect of the awareness program.