

[NL] Torrent Website Has to Remove All Torrents for Copyright Protected Works

IRIS 2009-9:1/23

*Joris van Hoboken
Institute for Information Law (IViR), University of Amsterdam*

The Dutch district court of Utrecht has ruled against the popular torrent website Mininova, in a case brought by anti-piracy organisation BREIN. The court concluded that Mininova had acted unlawfully by structurally providing the means for, encouraging and profiting from infringements of copyright and related rights and, moreover, that it is not protected under the hosting safe harbour of the E-Commerce Directive. Mininova was not held liable for direct copyright infringement. The website has been ordered to remove all torrents for protected works within 3 months and is considering an appeal.

The court held Mininova accountable for the actions of the (volunteer, but appointed) moderators of the website. These moderators, who, together with Mininova's administrators, police the website for torrents to pornographic material, viruses or fake files, were shown to have knowledge of the infringing nature of the target files in certain instances, without taking appropriate action. The court attached significant weight to the fact that Mininova did police its offering with regard to certain types of material, but failed to do so for copyright-protected works. It relied on a report commissioned by the plaintiff and conducted by TNO, according to which the website's offering in categories such as movies or TV shows, predominantly contained references to protected material. The court also found relevant the facilitative character of the directory of categories, with subcategories featuring names such as "Disney" or those of recent TV shows which everyone knows or should know cannot be distributed without permission.

The court did not grant Mininova's appeal for protection under the hosting safe harbour of Article 14 of the E-Commerce Directive and its implementation into Dutch law. Mininova was found to be too actively involved with the material on its website to be considered a host under Dutch law. In the court's eyes, the restriction of the safe harbour to mere passive technical intermediary activities in Dutch law is in line with the Directive, in particular because of recital 42, which refers to the "mere technical, automatic and passive nature" of the services that are exempted from liability in Articles 12-14. Notably, recital 42 on the one hand refers to mere conduit and caching activities only ("transmitted or temporarily stored"), but on the other hand to all the safe harbours in the Directive ("The exemptions from liability established in this Directive cover only cases where [...]"). The court's emphasis on passiveness seems to create an incentive for

intermediaries to do as little as possible to actively police their services for harmful or illegal material. The ruling does not discuss the status of information location tools under the Directive (Article 21.2 shows they are not included in the safe harbour provisions). As torrent websites like Mininova are functionally equivalent to information location tools, a discussion of Article 14 seems without merit.

Because Mininova could not claim protection under Article 14, it could not claim protection under Article 15 of the Directive either. The court finally elaborated on the implications of Mininova's preventive duty of care regarding the distribution of lawful material. It considered the duty of care proportional and not an infringement of the right to freedom of expression. In the court's view, Mininova could mitigate most of the negative implications for the lawful distribution of material by implementing put-back procedures for undeservedly removed files.

Rb. Utrecht 26 August 2009, BREIN v. Mininova, LJN BJ6008, 250077 / HA ZA 08-1124

<http://www.rechtspraak.nl/ljn.asp?ljn=BJ6008>

