Ziggo not required to disclose customer data associated with IP address for potential copyright infringement

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On 5 November 2019, the Court of Appeal of Arnhem-Leeuwarden upheld a lower court judgment, finding that an Internet service provider (ISP) was not required to provide customer data associated with certain IP addresses that were identified as being used for potential copyright infringement.

The case involved Dutch Film Works (DFW), which is the largest independent film distributor in the Netherlands in the field of cinema, home entertainment, video-on-demand and television. It is also a co-distributor of the US film *The Hitman's Bodyguard* (the "film"), and is entitled to take action on behalf of the film's rightsholders for infringement of intellectual property rights. Ziggo is one of the largest telecommunications providers in the Netherlands and is an ISP.

In 2017, DFW commissioned a German company to monitor the unauthorised sharing of the film via BitTorrent networks, which allows peer-to-peer file sharing. Following the monitoring, in 2018, DFW requested that Ziggo provide the names and addresses of Ziggo customers associated with 174 IP addresses. These IP addresses had been recorded by the German company during its monitoring activities. Ziggo refused to release the data to DFW, and DFW initiated legal proceedings against Ziggo. On 8 February 2019, the Rechtbank Midden-Nederland (District Court of Midden-Nederland) rejected DFW's claim to order Ziggo to disclose the customer data. DFW appealed the lower court judgment, and on 5 November 2019, the Court of Appeal of Arnhem-Leeuwarden rejected the appeal, and upheld the district court's judgment.

The court of appeal began by stating that the question of whether there was a legal obligation on Ziggo to provide the customer data involved a balancing between the interest of DFW in protecting its intellectual property rights, and the interest of Ziggo in protecting the personal data of its customers. This balancing involved Ziggo customers' right to personal data under Article 8 of the EU Charter of Fundamental Rights (the Charter), and the right to respect for privacy under Article 8 of the European Convention on Human Rights (ECHR). It also involved DFW's right to property under Article 17 of the Charter and Article 1 of Protocol 1 ECHR. Next, the court recognised that DFW had a legitimate interest in the provision of certain personal data from Ziggo. In this regard, the court took into account that individuals who had downloaded the film via BitTorrent had thereby

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intentionally infringed the intellectual property rights of DFW. As such, DFW had a legitimate interest in identifying the potential infringers, and to recover damages, by making requests to ISPs to provide the name and address details of the potential infringers.

However, after balancing these interests, the court concluded that it would not issue an order for Ziggo to disclose the customer data. First, the court held that DFW had not made it sufficiently clear when it would use a certain action in relation to a Ziggo customer, which could range from sending a warning letter, to recovering costs and damages by issuing a summons. The court considered that Ziggo would be unable to adequately inform its customers in advance of the consequences of the provision of personal data to DFW. Secondly, the court considered that DFW was also not sufficiently transparent as to the amounts it would claim from these Ziggo customers, and the costs it would claim to have incurred to track down these Ziggo customers. As such, the consequences of the transfer of the Ziggo customers' personal data could not be properly estimated. Finally, the Court held that DFW had not made clear how the rights of the Ziggo customers involved would be effectively guaranteed. In light of these considerations, the court refused the relief sought by DFW.

Gerechtshof Arnhem-Leeuwarden, 5 november 2019, ECLI:NL:RBMNE:2019:423

https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2019:9352

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