# [NL] Supreme Court decision on disclosure of ISP customer data over illegal downloading

**IRIS 2021-8:1/25**

*Ronan Ó Fathaigh*
*Institute for Information Law (IViR)*

On 25 June 2021, the Supreme Court of the Netherlands (*Hoge Raad*) delivered an important decision on when an Internet service provider (ISP) is required to disclose customer data associated with IP addresses identified as being used for potential copyright infringement (see IRIS 2020-1/18 and IRIS 2020-7/16). Notably, the Supreme Court upheld a court of appeal ruling, concluding that an ISP (Internet Service Provider) was not required to provide customer data to a film distributor, that sought to pursue individuals for possible violation of intellectual property rights, as the privacy interests of the ISP customers were not sufficiently safeguarded.

The case involved Dutch FilmWorks (DFW), which is a large independent film distributor in the Netherlands in the field of cinema, 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 and ISPs in the Netherlands. 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, DFW requested that Ziggo provide the names and addresses of Ziggo customers associated with 174 IP addresses. Ziggo refused to release the data, and DFW initiated legal proceedings against Ziggo. On 8 February 2019, the District Court of Midden-Nederland rejected DFW's claim to order Ziggo to disclose the customer data; and on 5 November 2019 the Court of Appeal of Arnhem-Leeuwarden also rejected an appeal by DFW (see IRIS 2020-1/18).

Following the lower court rulings, DFW lodged an appeal with the Supreme Court, and in a significant decision on 25 June 2021, the Supreme Court upheld the Court of Appeal's judgment, without adopting its own reasons. As such, the Court of Appeal's judgment now becomes final. In this regard, the Court of Appeal had held that the case involved a balancing act between DFW's interest in protecting its intellectual property rights, and Ziggo's interest 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 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.

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Notably, the court recognised that DFW had a legitimate interest in the provision of certain personal data from Ziggo. Of note, the court took into account that individuals who had downloaded the film via BitTorrent had thereby 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. 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. Furthermore, the court held that DFW had not made it clear how the rights of the Ziggo customers involved would be effectively guaranteed.

Finally, having upheld the Court of Appeal's judgment, the Supreme Court also ordered DFW to pay the costs of the proceedings.

***Hoge Raad der Nederlanden, ECLI:NL:HR:2021:985, 25 juni 2021***

http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2021:985

*Supreme Court of the Netherlands, ECLI:NL:HR:2021:985, 25 June 2021*

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