

Protecting your Intellectual Property: Introduction and basis for seizure of evidence

Your IP rights are being infringed via certain online services. It appears that some of these services are hosted in datacentra in the Netherlands. What can you do about this?

The following procedural remedies may be available:

- Seizure of data via which we can preserve data that is connected to the infringement and can help determine the scope of the infringement. Following a seizure, a claim in the main proceedings must be initiated within a set time frame. These proceedings may be preliminary injunction proceedings, proceedings on the merits, or proceedings before a foreign court.
- Seizure of assets of the infringers if available in the Netherlands, such as bank accounts, cars, real estate, etc. This can be done within a week.
- Preliminary injunction proceedings in which we can claim an order to cease (block) any infringements, and request information regarding the scope of the infringement as well as information regarding the persons responsible. From writ until court decision this will roughly take a couple of months.
- Ex parte proceedings (if the urgency of the matter is acknowledged by the court). This can be achieved within a few days.
- Proceedings on the merits. This will take a year until the court decision is given.

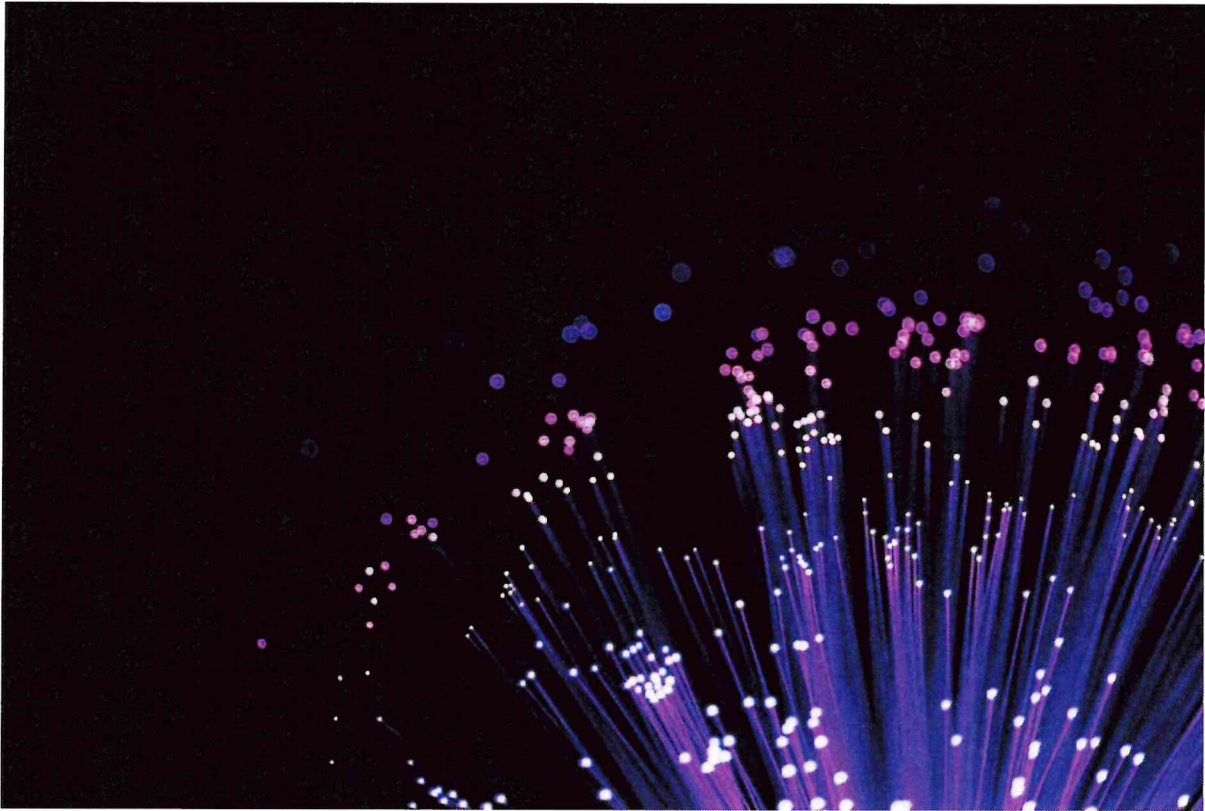
SEIZURE

In this blog we set out below a plan of action for the prejudgment seizure of evidence (*bewijsbeslag*) against or under a hostingprovider that is located in Amsterdam, The Netherlands.

If there are factual indications that a hostingprovider has provided services to the parties who are guilty of infringing copyrights and trademark rights of the applicant without its permission, the applicant can seize data. The prejudgment seizure of evidence is a means to secure and collect (additional) evidence. The prejudgment seizure of evidence provides an opportunity to seize data and – after that data can be accessed and reviewed - to further substantiate the claim against the infringers on the basis of distribution and/or publishing without consent under the Dutch Copyright Act (*Auteurswet, Aw*), European Trademark law, and other intellectual property laws and tort.

The basis for evidence seizure is found in Articles 730 and 843a of the Dutch Code of Civil Procedure (*DCCoP*). In order to be able to seize evidence, permission from the court is required, known as the so-called 'leave' or 'order' (*beslagverlof*). For this purpose, we must first draft a petition and file it with the court. The judge of the district court where one or more of the objects of seizure (or documents) concerned are located is authorized to grant permission for the seizure.

Permission shall only be granted if the requirements of Article 843a DCCoP are met. This article provides that i) the documents must be sufficiently certain, ii) the applicant must have a legitimate interest in the issue of the documents and iii) the documents must relate to a legal relationship to which the applicant is also a party.



The application must set out the claim and indicate where and to whom the seizure is to be made. The applicant must also make sufficiently plausible his interest in the seizure, as well as the facts and circumstances from which it follows that the seizure is necessary to this end. The request is thus tested against the requirements of proportionality and subsidiarity.

The basis of the claim can be both copyright infringement, trademark infringement and possibly tort arising from the facilitation of copyright and trademark infringements by third parties, depending on the facts.

These claims may be directed against both a hostingprovider and certain connected infringers.

The documents and data to be seized must be described as precisely as possible. An explanation must also be given as to why it is likely that the documents are in the possession of the debtor. Furthermore, the request for seizure must contain a precise statement of the place where the seizure is to be made.

Phase 1 Judicial review of the application

At the stage of granting permission, the judge will examine whether the requirements of Article 843a DCCoP have been met. The judge will carry out a marginal review of the request for evidence seizure. In other words, the judge will not make a decision on the claims, but will only assess whether the conditions for the seizure have been fulfilled. In other words, the court will not consider the substance of the claim.

The seizure order can, in principle, be obtained without the judge hearing the parties first. The judge in preliminary injunction proceedings must exercise restraint when deciding on an application for the seizure of evidence. After all, there is a chance that evidence will disappear, especially if the parties are heard beforehand and thus warned of the possibility of seizure. The application must therefore request the judge in preliminary injunction proceedings to rule on the application without the parties being heard.

The court often makes its decision known within one or two days after receiving the application. If the court intends to reject the application, it will, in principle, inform the applicant of this (by telephone or letter) and give him the opportunity to amend the application once.

In the case of a seizure of evidence on a claim for inspection of documents pursuant to Article 843a DCCoP, it may, where appropriate, be possible to demarcate which documents meet the requirements of certainty and legitimate interest in inspection, as referred to in Article 843a DCCoP, partly on the basis of (a combination of) keywords.

Phase 1: Application for seizure permission (*beslagverlof*)

- 1) What are the likely costs (including court fees and any other disbursements) involved in the application for permission stage?

This depends on the facts of the case. A range of factors should be taken into account, but in general a cost range of EUR 8.000 to 25.000 including and court fees of approximately EUR 700 could be sufficient. If the amount of data that needs to be copied by the IT expert is large (> 10TB), the costs of the IT expert can be expected to be in the range of EUR 15.000 to 25.000. This is always an uncertain factor as it is hard to establish by OSINT research how much relevant data is hosted.

- 2) What is the likely timescale of the application for permission stage?

Usually it would take our team approximately a couple of days to a week to draft the petition, assuming we have all information required, and that the court would usually make a decision within a few days of the application being submitted.

We note that if the court intends to reject the application, the applicant would usually be informed and be allowed an opportunity to amend the application. The court often tends to request additional information, that may be dealt with within a few days

Sometimes it is necessary to file second and third amendments. We have dealt with seizures where we had to file two extra amendments on the day of the seizure.

The nature of the claim against an ISP.com could be in tort, in particular arising from the facilitation of copyright and trade mark infringements by third parties. In copyright and trademark law there are clauses that give a rightsholder the right to claim a cease and desist (or blocking) order against an ISP.

Because the seizure is aimed to obtain evidence against which (at the moment unknown) persons and/or entities any claims may be brought for trademark and copyright infringement, the opposing party for the seizure can initially only be the ISP.

Phase 2: Seizure

After the judge has granted leave, the granted leave for seizure will be sent to the bailiff who will then proceed with the seizure with the help of an IT expert.

The IT expert works under the responsibility of the bailiff. The IT expert will carefully log and photograph several stages of the seizure.

The seizure order often stipulates (upon request) that the debtor must cooperate with the bailiff in providing the documents for which the seizure order is requested, on pain of a penalty. If such penalty is denied in first instance and the ISP does not cooperate with the instructions of the bailiff, we can request the court to impose periodic penalty payments.

If the bailiff has seized (copies of) the evidence, the documents will be given to an independent custodian (this may also be the bailiff) for safekeeping. The items of evidence will remain there until the judge in the Article 843a DCCoP proceedings has given permission to release the attached documents, or until a settlement has been reached.

Planning the seizure might take about a week, depending on availability of the IT expert, bailiff and – if necessary – police. If a seizure should be coordinated with another international seizure in another country extra time should be added.

The seizure itself usually takes one to three days. Copying of the data could be done on another location, depending on the configuration of the data.

The bailiff and the IT expert will charge costs for the levying of the seizure, the checking of back-ups and making the files readable.

Furthermore there will be other costs for safeguarding the data. These will be moderate.

Phase 3: claiming access pursuant to Article 843a of the Dutch Code of Civil Procedure

1. After the judge in preliminary injunction proceedings has granted leave to proceed, the bailiff has levied the seizure and the documents have been placed in judicial custody pursuant to Article 709 DCCoP, a claim for inspection of the seized documents must be submitted in Article 843a DCCoP. This claim must be made against the person who has the documents in his possession.
2. Proceedings under Article 843a DCCoP can be instituted in the form of proceedings on the merits, preliminary injunction proceedings and an incidental claim in proceedings on the merits that are already pending.
3. The court order authorizing the seizure shall specify a period within which the claim in the main action must be brought. In principle, this is set at 14 days after the seizure. A well-founded request to set a longer period than 14 days within which the claim in the main action must be instituted may be granted. The seizure will lapse if the claim for release is not brought within the period set by the judge in preliminary injunction proceedings.
4. The judge will assess, inter alia, on the basis of the requirements that follow from Article 843a DCCoP, whether there is an interest in obtaining the evidence. If there are compelling reasons against it, the claim for the furnishing of evidence can be dismissed on the basis of Article 843a paragraph 4 DCCoP.
5. After the court has given its permission by way of a judgment, the garnishee will be given the opportunity to check whether the files selected by the bailiff fall within the scope of the inspection granted by the court. Subsequently, the files will be inspected. An Article 843a DCCoP procedure in preliminary injunction proceedings is the most obvious option in this case. On average, preliminary injunction proceedings take three months.

Dissolution of evidence seizure

It should be taken into account that any interested party may, in preliminary injunction proceedings, claim the lifting of the prejudgment seizure from the judge (Article 705 paragraph 2 DCCoP). The debtor or interested party will have to make it plausible that the claim for which the seizure was made is unsound or that certain rules have not been observed.

Phase 4: Analysis after inspection of the evidence

If the seizure documents are inspected and we are able to obtain documents / data that further support the presumption that a party has infringed IP rights, we can decide whether this evidence is sufficient as a basis for proceedings on the merits and against which entity.

Phase 5: Substantive proceedings on the merits

If the rightsholder succeeds in his applications and the evidence sought is disclosed to him, there is a specified time period within which proceedings on the merits (eg. claims for trademark/copyright infringement) need to be brought. This will be set by the court and is usually a couple of months.

Once infringing activities in the Netherlands have been assessed, the rightsholder may claim a pan-European ban to infringe the EU Trademarks. As the copyright protected work is harmonized, it's possible to request a pan-European remedy as well.

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A quite usual argument is that the seizure is a fishing expedition. Most of the time several arguments against every condition of Article 843a DCCoP (and other relevant articles) are put forward. Such proceedings could be initiated within weeks after the seizure. In such proceedings the rightsholder could initiate counterclaims such as a right to review the documents and a cease and desist order.

Usually, if the infringers are cybercriminals we never hear from them or their lawyers. In that case, a default judgment will follow.

Should you have any questions on the above, do not hesitate to reach out to Fulco Blokhuis (blokhuis@boekx.com)

