

Judgment: 4 September 2003

Roll number 99/1040

Roll number of court of first instance 96/1048

The Court of Appeal of The Hague, Chamber M C-5, has rendered the following judgment in the case of:

1. the religious community incorporated according to foreign law

CHURCH OF SPIRITUAL TECHNOLOGY,

established in Los Angeles, United States of America,

2. the religious community incorporated according to foreign law

RELIGIOUS TECHNOLOGY CENTER,

established in Los Angeles, United States of America,

3. the body incorporated according to foreign law

NEW ERA PUBLICATIONS INTERNATIONAL ApS,

established in Copenhagen, Denmark,

hereinafter also to be called: Scientology, RTC and NEPI, or also jointly Scientology et al.,

appellants, and respondents in the cross appeal,

attorney of record: E. Grabandt,

attorney-at-law: R. Hermans (Amsterdam),

versus:

1 . the close corporation DATAWEB B.V.,

established in The Hague,

2. the foundation STICHTING TEMPORARY,

(formerly the foundation Stichting XS4ALL)

established in Amsterdam,

3. the foundation STICHTING DE DIGITALE STAD,

established in Amsterdam,

4. the close corporation CISTRON INTERNET SERVICES B.V.,

established in Alphen aan den Rijn,

5. the close corporation INTERNET ACCESS EINDHOVEN B.V.,

- established in Eindhoven,
6. the close corporation according to foreign law  
EURONET INTERNET INC.,  
established in Wilmington, United States of America,
  7. the close corporation WIREHUB! INTERNET B.V.,  
established in Rotterdam,
  8. the foundation STICHTING INTERNET ACCESS,  
established in Slochteren,
  9. [A],  
(trading under the name of B-ART MIDDEN NEDERLAND),  
resident in Leidschendam,
  10. the close corporation in the process of formation LUNATECH RESEARCH B.V. in  
formation,  
(formerly the general partnership Lunatech Research),  
established in Rotterdam,
  11. [B], partner in the close corporation named as respondent under 10,  
resident in Rotterdam,
  
  12. [C], partner in the close corporation named as respondent under 10,  
resident in Wokingham, United Kingdom
  13. [D], partner in the close corporation named as respondent under 10,  
resident in Schagen,
  14. [E], partner in the close corporation named as respondent under 10,  
resident in Odijk, district of Bunnik,
  15. the general partnership SPIRIT INTERACTIEVE DIENSTEN B.V. in formation,  
established in Rotterdam,
  16. the corporation N.V. ENECO, partner in the general partnership named as respondent  
under 15,  
established in Rotterdam,
  17. the close corporation ROTTERDAMS DAGBLAD B.V., partner in the close corporation in  
formation named as respondent under 15,  
established in Rotterdam,
  18. the city of ROTTERDAM (ONTWIKKELINGSBEDRIJF ROTTERDAM),  
partner in the close corporation in formation named as respondent under 15,  
having its registered offices in Rotterdam,
  19. the close corporation METROPOLIS INTERNET B.V.,  
established in Dordrecht,

20. [F],

resident in Amsterdam,

21. the close corporation B-ART NOORD NEDERLAND B.V.,

established in The Hague,

22. the foundation STICHTING TELEBYTE,

established in Nijmegen,

hereinafter also to be called: [F] (respondent named under 20) and the Providers (the respondents named under numbers 1 to 5, 7 to 19, 21 and 22),

respondents, [F] and the Providers also appellants in the cross appeal,

attorney of record: W. Taekema

attorneys-at-law: P.H. Bakker Schut and J.C.H. van Manen (both of Amsterdam).

#### The proceedings

By writs of summons dated 8 and 9 September 1999, Scientology et al. instituted appeal proceedings against the judgment handed down by the District Court of The Hague of 9 June 1999 in the case of Scientology et al. as plaintiffs on the one hand and on the other hand (among others) the respondents as defendants. Against this judgment they put forward three unconditional and three conditional grounds for appeal.

The proceedings between Scientology et al. and the respondent named under 6 were cancelled on 27 April 2000. The Providers and [F] contested the grounds for appeal. In a cross appeal, they put forward eight grounds for appeal against the judgment, which grounds for appeal were contested by Scientology et al.

The parties then had their standpoints pleaded by their aforementioned attorneys on the basis of memoranda of oral pleading, after which they requested judgment, having submitted their pleadings and other documents.

#### Assessment of the appeal

1. Since the proceedings against the respondent named under 6 have been cancelled, no decision needs to be taken in that respect.

2. Stated concisely, these proceedings are about the following. In 1991 Scientology instituted proceedings against [G], a former member of Scientology. In those proceedings, [G] submitted to the court a written statement (the so-called [G] Affidavit), with appendices,

including confidential parts of the works about the doctrine and organization of Scientology, which works are known by the names of Operating Thetan I to Operating Thetan VII (hereinafter also to be called OT I to OT VII)). In 1995, [F] placed on the web sites she had with (service providers formerly known as) XS4ALL and Planet Internet the [G] Affidavit with appendices, including confidential parts of the OT works. After she had removed them before 23 February 1996, [F] placed her own account about Scientology on her web sites (hereinafter to be referred to as: web site (singular)), which account includes a few quotations from, among others, OT II, OT III and Ability (exhibits 19a, 19b and 19c in interlocutory proceedings, submitted by Mr. Bakker Schut together with his statement of defence).

3. The facts that were established by the court of first instance, which are stated in section 1 of the judgment, have not been contested, so that the court of appeal will also take these facts as a basis.

This implies that it will also be assumed in these appeal proceedings that the quotations from OT II and OT III on [F]'s web site correspond to the texts in question in the original works OT II and OT III.

4. Summarized, Scientology et al. demand in these proceedings:

a) a declaratory judgment that the service providers (the defendants in first instance), by having on their computer systems or on computer systems controlled by them, in a form accessible to third parties, without permission (of Scientology et al.) as the direct or indirect holder of rights

1) a reproduction of works to which Scientology holds the copyright,

2) a link which, when activated, causes a reproduction of a work to which Scientology holds the copyright to appear on the user's screen,

are guilty of publication and/or reproduction as defined in the Copyright Act 1912 and/or are acting unlawfully towards them [Scientology et al.] if they [the service providers] are aware of the presence of the aforementioned documents or if they are aware of, or ought to have been aware of, the existence of the aforementioned link;

b) a declaratory judgment that the works known by the names of OT I to OT VII, or at least OT II and OT III, were not lawfully published in the sense as referred to in Article 15a, first subparagraph, of the Copyright Act ;

c) that [F] be ordered, on penalty of damages, to cease and desist from each and every infringement of the copyrights of Scientology, including each and every publication and/or reproduction of the documents Ability and OT I to OT VII, or at least of the documents Ability, OT II and OT III;

d) that the service providers be ordered, on penalty of damages, primarily: to cease and desist from each and every infringement of the copyright of Scientology, including each and every publication and/or reproduction of the documents Ability, OT I to OT VII , or at least of the documents Ability, OT II and OT III; subsidiarily: as soon as their attention is drawn to the presence of documents, including Ability and OT I to OT VII, or at least the documents Ability, OT II and OT III, on their computer system or on a computer system controlled by them, to ensure that they are removed immediately; more subsidiarily: as soon as their attention is drawn to the presence of the aforementioned infringing documents on their computer system or on a computer system controlled by them, to request the user in question to remove these immediately and in the event of failure to comply with this request, to deny that user any further access to their computer system;

e) that the service providers be ordered to inform Scientology et al. of the names and addresses of third parties who have published or reproduced infringing documents, or who publish or reproduce such documents in the future, via their computer system or a computer system controlled by them, on penalty of damages.

In the judgment against which an appeal has been lodged, the district court has rendered the declaratory judgments claimed under a) and the orders in respect of the service providers (with the exception of the general partnership Lunatech Research and its partners and Dutch Channel Ltd) claimed under d) subsidiarily and under e) as is stated in the judgment, and has dismissed all other claims.

5. In the appeal proceedings, it was no longer contested that (part of) the works OT II, OT III and Ability possess an individual, original character and bear the personal stamp of the author, and that they are therefore protected by copyright.

In the appeal proceedings, [F] and the Providers have repeated the fact that they contest that the copyright to the OT works accrues to Scientology. The court in first instance took the grounds that [H] legated the copyrights to his works to the Trustee of Author's Family Trust B and that, according to the Deed of Assignment and the appended "Attachment B", which were submitted in the course of the proceedings (exhibit 10 to the statement of claim in first instance of Scientology et al.), the copyrights to OT I to OT III, which are mentioned in that deed, just as the copyright to Ability, have been transferred to Scientology, and that RTC or NEPI respectively have been granted a licence in relation to (amongst others) OT II and OT III and (amongst others) Ability. Since [F] and the Providers have not contradicted this with sufficient foundation, the court of appeal assumes that, to the extent relevant, Scientology

holds the copyright to the works OT II, OT III and Ability and that RTC and NEPI are licensees in relation to OT II and OT III and Ability respectively.

In relation to the other works, in section 19 of their statement of defence on appeal in the cross appeal Scientology et al. state that the fact that in these proceedings only the copyright of Scientology et al. to the works OT II, OT III and Ability has been established does not alter the obligation of the Service Providers to remove or to block "the reproduction of other works" to which Scientology holds the copyright after having received information to this effect about which there is no reasonable doubt as to its accuracy.

Since Scientology et al. failed to substantiate further in appeal proceedings that they are the copyright holder(s) to other works than OT II, OT III and Ability, the court of appeal has disregarded the alleged infringement on those "other works".

6. Scientology et al. base their claims (primarily) on their right to oppose the publication and reproduction without their permission of protected works to which they hold the copyright. Below it will be investigated whether in this present case any limitations to copyright apply, and specifically pursuant to Article 15a of the Copyright Act 1912 and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter also called ECHR), since [F] and the Service Providers have reasserted their invocation of these limitations in appeal.

The court of appeal remarks in this context that merely submitting pleadings and other documents (whether or not accompanied by exhibits) from interlocutory proceedings held earlier, and/or invoking them in a general sense, does not satisfy the requirement that a party wishing to put forward certain facts and circumstances must do so in such a way that it is sufficiently clear to the court what is being submitted as a foundation for the claim, and to the other party to what it should address its defence (cf. Supreme Court of the Netherlands, 31 December 1993, NJ 1994, 387 and Supreme Court of the Netherlands, 8 January 1999, NJ 1999, 342).

7.1. Ground for appeal I in the appeal on the main issue, directed against ground for the decision no. 13 in the judgment, concerns the non-pronouncement (and the reasons therefor) of the claimed declaratory judgment stating that the OT works in question were not published lawfully in the sense of Article 15a of the Copyright Act.

7.2. The parties do not dispute that the question of whether the OT works in question (appendices to the [G] Affidavit) from which [F] quotes on her web site were published lawfully (in the past) must (also) be judged according to Dutch law, being the law of the country where the copyright protection has been invoked.

According to Article 15a of the Copyright Act (which provision is based on Article 10, paragraph 1, of the Bern Convention), it is allowed to quote from a copyright protected work provided a number of conditions set forth in the law are satisfied, including the condition that the work being quoted has been lawfully published. Apparently the parties have no difference of opinion that the account of [F] on her web site satisfies the other conditions named in Article 15a of the Copyright Act.

7.3. It has not been contradicted that the work published by NEPI, Ability, was published lawfully. This implies that, pursuant to Article 15a of the Copyright Act, [F] is free to quote from Ability, provided the other statutory conditions are satisfied.

7.4. Scientology et al. take the position that the OT works were never lawfully published in the past and that [F] was not given permission to quote from those works. According to Scientology et al., these works are only given to selected members for their perusal in secured spaces, while in addition strict secrecy is imposed on them. According to Scientology, members are only selected "who have achieved a certain level of spirituality and who are invited by the Church to take part in religious meetings where limited use is made of the OT works."

7.5. [F] and the Providers state that the documents OT II and OT III, which have existed since the nineteen fifties, have been circulating within the Scientology community for quite some time and that members who have achieved the required "OT level" come into possession of the documents (memorandum for oral pleadings of Mr. Van Manen in first instance, 28). They invoke a statement by [I] (see Appendix p.115 ff., KS-28, to the Statement of Defence of [F] (exhibit 2c in interlocutory proceedings, submitted with the statement of defence on appeal by Mr. Bakker Schut) and the testimony of [J], vice-president of RTC (which can be read on pages 52 and 53 of the Swedish judgment of 14 September 1998 which was submitted by Scientology et al. as exhibit 47) to the effect that around 20,000 to 25,000 (and at the juncture of the oral pleadings in appeal: at least 25,000) people have read OT II and OT III, which is on pages 53 and 54 of that same judgment. In addition, [F] and the Service Providers state that the texts were made public in that they were open to public inspection for quite some time in the library of the District Court for the Central District of California and that copies thereof were available against payment (see Memorandum Opinion of 30 August 1995 in RTC vs. Lerma (exhibit 2c in interlocutory proceedings; Appendix, p. 33, KS-9, to the Statement of Defence of [F] and furthermore Memorandum Opinion and Order of the District Court of Colorado of 15 September 1995

concerning F.A.C.T. NET/RTC (exhibit 3 in interlocutory proceedings, submitted at the juncture of oral pleadings in first instance by Mr. Pors)).

Scientology et al. do not contest in itself the fact that over the years a large number of people have taken cognisance of OT II and OT III, but they state that this took place in strict secrecy. They deny that works were given or furnished to members, and they state that, if third parties (including former members) perused the writings, this took place in an unlawful manner.

7.6. Scientology et al. argue that the term "publish" in Article 15a of the Copyright Act relates to the first publication; this refers to works that come out, or that are made accessible to a general public.

In interpreting "publish" in Article 15a of the Copyright Act, [F] and the Service Providers invoke, amongst others, Article 12, paragraph 4, of the Copyright Act and, as the court of appeal understands, Article 12, paragraph 1, section 2o of the Copyright Act.

7.7. The court considers as follows in this respect.

Neither the Bern Convention nor the Copyright Act 1912 define the (primary) term "publish/communicate" (or "reproduce"). According to the legislator, the term publication should be taken to have its original meaning.

"What "communicate" should in the first place be taken to mean, the exclusive competence to which is an essential aspect of copyright, the law need not determine. In respect of any kind of literary, scientific or artistic work, the word clearly refers to its natural definition. In literary and scientific works, which exist in written form, it means to cause to appear in print and to make available to the public, to publish. Equally so for pieces of music. In paintings and sculptures one must take it to mean the submission to an exhibition that is accessible to the public...." (explanatory memorandum to the legislative proposal that ultimately led to the Copyright Act 1912).

Because, according to the legislator, the primary term publication (communication) was not enough in itself, in addition to that word, the legislation mentions a number of acts that are "also" deemed to be publication (see Article 12 of the Copyright Act).

The memorandum of reply to the act amending the Copyright Act 1912 to the Paris Convention of the Bern Convention, Bulletin of Acts and Decrees 1985, 307 (Lower Chamber of Dutch Parliament, 1982-83 session, 16740, no.7, p. 8) states:

" The requirement of lawful communication in the (current) Article 15a is derived from Article 10, first paragraph, of the Paris Convention of the Bern Convention concerning the right to



quote, and it is stated because the right to quote was not meant to apply to manuscripts or works for a limited audience, but only to works addressed to the public at large."

7.8. In the opinion of the court of appeal, "publish/communicate" in Article 15a, paragraph 1 of the Copyright Act must therefore be taken to mean publication in its original meaning. Furthermore, the publication must have been lawful.

Perhaps unnecessarily, in the event that it were to be assumed that "publish" in Article 15a of the Copyright Act includes the expansions pursuant to Article 12 of the Copyright Act, the court also considers as follows.

Article 12, paragraph 1, subsection 2o, of the Copyright Act does not apply because that provision concerns the distribution of works that – unlike the works OT II and OT III – have not yet been published in print (manuscripts).

The court of appeal also rejects the invocation of Article 12, paragraph 4 of the Copyright Act. This provision only relates to a speech/lecture, production, performance or showing, or an exhibition of a work. [F] and the Service Providers have not put forward (adequate) facts and circumstances, nor have they produced evidence, from which it follows that this was the case for the works OT II and OT III. For the rest, the cited provision gives a description of exploitation acts that are reserved for the author and therefore is not about the right of first publication (cf. memorandum of reply to the legislative proposal (Lower House of Dutch Parliament, 1964-65 session, no.3), which led to the Act of 27 October 1972 to revise the Copyright Act 1912, Bulletins of Acts and Decrees 1972, 579).

7.9. From the pleadings and other documents it appears that the [G] Affidavit with appendices was available for inspection in the library of the District Court for the Central District of California for a period of around two years, and that during this period copies of that document were freely available to third parties.

Although it appears from the pleadings and other documents that the [G] Affidavit (with appendices) was distributed via internet and became part of the public domain in this way, on the basis of the pleadings and other documents it must be assumed that neither Scientology nor Scientology et al. gave permission for this, so that the court of appeal will assume that this did not involve lawful publication of the documents.

7.10. It has appeared in the course of the proceedings that OT II and OT III were distributed within Scientology from the nineteen fifties onward. It has not been contradicted with sufficient foundation that in the course of the years a large number of members (the figure of 20,000 to 25,000 has been insufficiently contested) took cognisance of them. Furthermore, it has appeared that, now at any rate, the members of Scientology are bound by secrecy and

that there are stringent security measures on this point (as the court of appeal was able to observe itself in the video recording shown at the juncture of the counsel's speech). The correctness of the statement – disputed by Scientology et al. – of [F] and the Service Providers that members were not bound by secrecy in the past, and that the OT documents circulated freely inside and outside the Scientology organization, has not been established on the basis of the process documents. The statements by [I] and [J] are not concrete enough for this purpose. In addition it can also be concluded from their statements that members were bound by secrecy but that it was not observed, or insufficiently so. The latter cannot simply be equated to tacit permission to distribute the documents. Since [F] and the Service Providers have not made their argument sufficiently concrete and/or have not substantiated it sufficiently, and since in respect of taking cognisance of OT II and OT III, it has not been made plausible that members were not bound by secrecy, also not in respect of third parties (non-members), nor that the documents were available for inspection by third parties without any restrictions, the court of appeal rejects the offer to produce evidence on the part of [F] and the Service Providers as being insufficiently substantiated, and the court assumes that the members did not have permission to distribute those works without any restrictions, which would include to third parties.

7.11. The foregoing implies that the condition mentioned above in section 7.2, "lawfully published", as referred to in Article 15a of the Copyright Act, has not been satisfied.

7.12. In the ruling of the Supreme Court of the Netherlands of 20 October 1995, NJ 1996, 682, one of the grounds taken was the following:

"3.6.2. (...) However, paragraph 6 of Chapter I of the Copyright Act 1912 does state a number of limitations to copyright which, as a rule, are based on a consideration of the interests of the holder of the copyright as opposed to the social or economic interests of others or the public interest.

These explicit limitations, however, do not preclude that the limits of copyright must be more closely defined in other cases as well on the basis of a similar weighing of interests, and particularly when the need for the limitation in question was not recognized by the legislator and it fits within the system of the act, this in the light of the development of copyright as a means to protect commercial interests.

When making such a consideration, one or more limitations incorporated in the act can serve as the basis."

The aforementioned ruling stated that the statutory system of the limits to copyright in the Copyright Act 1912 was not limitative. However, the court of appeal is of the opinion that, in

this case, the system of the Copyright Act (and the Bern Convention) does not offer scope to broaden, or extend, the limits of the primary term "publication/communication" and the term "lawful" in Article 15a of the Copyright Act. Nor is it the case that there was an interest, which was not recognized, in making available copyright protected works in order to quote from them in an announcement, review, polemic or scientific treatise.

Ground for appeal I in the appeal on the main issue therefore succeeds, but in view of that which will follow, the result cannot be that the judgment is set aside.

8.1. [F] and the Service Providers further argue that the exercise (and enforcement) of copyright by Scientology et al. is contrary to Article 10 of the ECHR. They put forward that, by placing the disputed information on her web site, containing quotes from OT II, OT III (and Ability), [F] intended to provide information about the doctrine and organization of Scientology and at the same time to warn against abuse.

8.2. Pursuant to the second paragraph of Article 10 of the ECHR, the right to freedom of information may be subject to limitations that are necessary to protect (amongst other things) the rights of others in a democratic society. In principle, such rights include copyright, since this is provided for by law and serves to protect the rights of others.

It is conceivable that there are certain cases in which the enforcement of copyright, such as a prohibition of infringement, must yield to the freedom of information.

Below it will be investigated whether allowance of the claims of Scientology et al. in this present case – which would lead to a limitation of the freedom of information – is necessary in a democratic society – in other words, if this limitation responds to a “pressing social need” and is “proportionate to the legitimate aim pursued”, to which end – taking into consideration all circumstances of the case – a test of proportionality / a weighing of interests must take place and in which a certain “margin of appreciation” has been left to the national authorities (cf. ECHR 26 April 1979, NJ 1980, 146).

8.3. From the documents of the case – to the extent that they have not been sufficiently contradicted – the following has appeared in relation to the doctrine and organization of Scientology et al. and the course of events at the Scientology organization:

- In respect of the Scientology doctrine, from OT III:

Millions of years ago, Xenu, the evil prince who reigned over the Galactic Universe, solved a problem of overpopulation by transporting people to earth and causing two atomic bombs to explode, one on Las Palmas and one on Hawaii. Their souls ("Thetans") are still wandering

the earth. We are those Thetans, but we are dazed and deadened; Scientology teaches us how people can regain their abilities and can achieve the status of "Operating Thetan". An Operating Thetan can control people with his thoughts, has above average intelligence and can communicate with animals and plants. Moreover, people have traumas ("engrams"), often acquired in previous lives, and Scientology can do away with them; finally, there are "Body Thetans", that also cause a great deal of trouble, and followers can learn how to get rid of those. Unfortunately, there are an infinite number (see the written pleadings of Mr. Bakker Schut in the interlocutory proceedings, section 1.a, to which reference is made in his written pleadings in these present proceedings).

- Moreover, it has been established since it was not adequately contradicted that the teachings of the Scientology doctrine go together with "auditing". It is a process in which, under the supervision of a teacher ("auditor"), members of Scientology must repeat a great many contradictory "notions" or imagine certain incidents while they hold a so-called E-meter, a sort of lie detector that is said to measure their reaction. Not until the E-meter shows the desired outcome may they move on to the following parts of the doctrine.

- A brochure published by the federal government of Germany (exhibit 18 of Mr. Bakker Schut in interlocutory proceedings) states:

the foreword by the German Minister of Family Affairs, Elderly, Women and Youth:

"Viele Bürgerinnen und Bürger, die sich von den bedenklichen Praktiken und Aktivitäten der Scientology-Organisation betroffen fühlen, wenden sich an mich mit der Bitte um Hilfe und Rat: junge Frauen und Männer, die durch Scientology ihre Berufsausbildung abgebrochen, ihren Beruf aufgegeben, ihre Familien verlassen haben und in materielle Schwierigkeiten geraten sind.( . ..) Diese Entwicklung erfüllt mich mit wachsender Sorge.

Die Scientology-Organisation ist keine Religions- oder Weltanschauungsgemeinschaft, sondern ein weltweit operierendes, hemmungslos auf Gewinn ausgerichtetes Unternehmen.

And the brochure goes on to state:

"Um die einzige "Wahrheit" zu bewahren, wird Kritik innerhalb des Systems nicht geduldet. Ein ausgeklügeltes Kontroll- und Überwachungssystem sorgt dafür, dass Abweichler erkannt und "gehandhabt" werden können.

(...)

Die Gefahren für die Gesellschaft liegen in der Zielsetzung Scientologys, die bestehende Ordnung scientologisch zu beherrschen. Eine scientologisch geprägte Gesellschaft kennt keine Freiheitsrecht im Sinne des Grundgesetzes.

(...) Denn: Scientology ist nicht harmlos. Es ist auch keine Religions- oder Glaubensgemeinschaft. Es ist vielmehr eine auf unbedingte Gewinnmaximierung ausgerichtete wirtschaftliche Organisation, deren Ideologie totalitäre Züge trägt und deren Weltbild das Bundesarbeitsgericht als menschenverachtend bezeichnet hat." (p. 7)

"Ziel der Scientology-Organisation ist die Erschaffung eines neuen Menschen scientologischer Prägung und einer neuen ausschliesslich nach scientologischen Richtlinien funktionierende Welt. Scientology strebt die Weltherrschaft an. Dies wird insbesondere aus [H]s Aussagen zur "bisherigen" Demokratie deutlich. Ohne zwischen den verschiedenen derzeit bekannten Demokratieformen zu unterscheiden, wird jedwede Demokratie als nutzlos beschrieben:

" Ich sehe nicht, dass populäre Massnahmen, Selbstverleugnung und Demokratie dem Menschen irgendetwas gebracht haben, ausser ihn weiter in den Schlamm zu stossen." Damit erhebt Scientology den Absolutanspruch auf den einzig wahren Heilsweg." (p. 15)  
(...) [H] lehnt Recht als "Anwendung des Gesetzes" ab. (...) Für ihn ist Recht nicht ein Normenkatalog zur Begründung von Rechten und Pflichten des Bürgers (...) Recht ist das, was Scientology weiterbringt."(p. 16).

- An Affidavit of [K], the eldest son of [H] (exhibit 9 of Mr. Bakker Schut in interlocutory proceedings) says:

"5. (...)

In connection with each and every corporation which we created under [the] general heading of the "Church of Scientology", my father always required all of the Directors and Officers of all corporations to give him undated signed resignations in advance which he held. In that manner he always has retained complete control over every corporation including its bank accounts.

(...)

7. My father obtained the rights to the E-meter in 1952 from [M] ..... My father learned about the E-meter from [M] who developed it and my father fraudulently extracted those rights from [M] so that my father could use it in Scientology auditing.

8. My father has always used the confidential information extracted from people during auditing sessions to intimidate, threaten and coerce them to do what he wanted, which often meant getting them to give him money.....

10. My father's basic policies relating to "suppressive persons", "Fair Game", "attack the attacker", etc., have always been and will always be an integral part of Scientology. The

organizational structure of Scientology and the theories of Scientology cannot operate and Scientology would not be Scientology without such policies.

My father and I discussed the basic theories of dealing with suppressive persons, such as what eventually became designated as the "Fair Game Doctrine" on many occasions. These policies have never changed."

- The Declaration of [L] (former President van RTC) which was not contradicted by Scientology et al. (exhibit 9 in of Mr. Bakker Schut in interlocutory proceedings) states:

"(...)

22. The legal strategy of Scientology and the existence of numerous potential legal problems, some of which are set forth below, were known to me when I was a staff member in Scientology. Enemies of Scientology are deemed to be "suppressive persons" ("SPs"). One becomes a "suppressive person" by doing a suppressive act, such as suing Scientology as a litigant or lawyer. In the jargon of Scientology, when one is "declared" this means that one has been declared a "suppressive person" and, therefore, may be harassed, hurt, damaged or destroyed without regard to truth, honesty or legal rights. It is considered acceptable within Scientology to lie, cheat, steal and commit illegal acts in the name of dealing with a "suppressive person"

23. This practice or policy is sometimes referred to as the policy of "fair game"..... The fair game policy was issued in the 1960s. It was never cancelled. A document was issued for public relations reasons that purportedly cancelled "fair game"; however, that document stated that it did not change the manner of handling persons declared "SP"."

8.4. Exhibits 19a, 19b and 19c entered into the proceedings by Mr. Bakker Schut show that, in addition to quotations from third parties, the account of [F] also contains quotations from OT II and III. In the opinion of the court of appeal, the quotations from OT II and OT III should be seen in the context of her entire written account and it has been established that these quotations, though small in number, support her objective to provide information on the doctrine of Scientology and the course of events at the Scientology organization, lending it credibility. No submission has been made nor any evidence produced that she had (amongst others) a commercial object with this.

The texts quoted above in section 8.3 show that Scientology et al. have no scruples about rejecting democratic values in their doctrine and organization. It also follows from the texts that one of the objects of keeping OT II and OT III secret is to exercise power over members of the Scientology organization and to thwart discussion of the doctrine and the practices of the Scientology organization.

A concomitant circumstance is that the actions of the aforementioned District Court in California made the documents OT II and OT III temporarily available to the public; this caused them to come in the public domain, and they were placed on the internet during that period.

Furthermore, the court has given consideration to the fact that, in this case, forcing the Service Providers to remove [F]'s information or to make it inaccessible would be disproportionate.

In the opinion of the court, in these particular circumstances it cannot be said that a limitation to the freedom of information is necessary to uphold the copyright in the sense of Article 10 of the ECHR, nor that the interest of [F] and the Service Providers and the general interest in the freedom of information referred to in Article 10, paragraph 1, of the ECHR, in comparison to that of Scientology et al. in upholding their copyright, counts for less in this case.

Consequently, the former interest need not yield to the interest of Scientology et al., and the invocation of Article 10, paragraph 1, of the ECHR is successful.

9. To the extent that [F] and the Service Providers invoke Article 11 of the Copyright Act, it is not necessary to go into this in view of the foregoing.

10. In the opinion of the court, whether or not the requirement of proportionality has been met by placing the (entire) [G] Affidavit with appendices on the web site, or whether or not Article 10, paragraph 1, of the ECHR must yield to the limitation of the copyright can be disregarded on the basis of the following.

It has been established that [F] placed the [G] Affidavit with appendices on her web site in 1995 and removed them before 23 February 1996. Scientology et al. have argued that this took place after having issued a demand to do so and under the pressure of interlocutory proceedings. Since [F] has not caused the [G] Affidavit with appendices to be published in any manner whatsoever since the judgment in interlocutory proceedings and since the judgment which is being appealed here (neither of which actions allowed a prohibition of infringement vis-à-vis her), the court is of the opinion that there is no longer anything to fear on this point. This implies that the claimed prohibition of infringement should not be allowed. Conditional ground for appeal I in the main issue, which now comes up since the condition has been met, therefore fails. Ground for appeal no. 6 in the cross appeal no longer needs to be considered.

11. Conditional ground for appeal II in the main issue states that the court erroneously took the grounds that the activities of the service providers do not constitute reproduction and/or publication that is relevant in the sense of the Copyright Act 1912.

12. In the opinion of the court, the service providers only provide the technical facilities to make possible publication of information by others. It would therefore not be correct to equate them with publishers, which, it is assumed, publish information themselves.

This opinion is also corresponds with the Agreed Statement to Article 8 of the WIPO Copyright Convention:

"It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the "Bern Convention."

Nor can the Service Providers be said to infringe on copyright by means of reproduction and publication, since the quotations of [F] do not constitute infringement of copyright in this case. For the rest, Scientology et al. have put forward insufficient facts and circumstances from which to draw the opposite conclusion. Conditional ground for appeal II in the main issue cannot lead to the judgment being reversed.

13. From the foregoing it follows that, by placing her own account and the disputed quotations on her web site and by keeping them there, [F] did not infringe any copyright. Nor has it appeared that this constituted an unlawful act on her part in the given circumstances. Facts or circumstances from which it would appear that she has conducted herself unlawfully in some other respect have been insufficiently substantiated.

Since there is no infringement of copyright or unlawful conduct on the part of [F] in this respect, nor did the Service Providers act unlawfully in relation to the information given by [F].

In view of that which was considered above in legal ground no. 10, there is also no reason to fear that the (complete) [G] Affidavit with appendices will be placed on the servers of the providers.

This implies that ground for appeal no. 1 in the cross appeal is successful, as are grounds for appeal 2, 3, 4 and 5 in the cross appeal to the extent that they are based on alleged unlawful conduct on the part of the Service Providers, so that the judgment cannot be upheld. For the rest, due to a lack of interest, the other grounds for appeal in the main issue and in the cross appeal no longer need to be considered, nor do the other statements and defences of the parties.

14. The court rejects the offer of the parties to produce evidence, since this is no longer pertinent, and/or it has been insufficiently substantiated and/or specified.



15. Conditional ground for appeal III in the main issue and ground for appeal VIII in the cross appeal relate to the manner of meeting costs as stated in that judgment. As a result of the foregoing, Scientology et al. as the party against which the judgment has (largely) been pronounced will be ordered to pay the costs of the proceedings in first instance and of the appeal in the main issue and the cross appeal. Conditional ground for appeal III in the main issue also fails, while ground for appeal VIII in the cross appeal is successful. The court will therefore decide as is stated hereinbelow.

## Decision

The Court of Appeal:

in the cross appeal:

- sets aside the judgment against which an appeal was lodged to the extent that said judgment allowed the claimed declaratory judgments and the claimed court orders (the claims stated under a, b, e subsidiarily and f in the initiatory writ of summons) vis-à-vis the Providers, and provided for the costs of the proceedings;

and once against rendering judgment in this matter:

rejects the claims vis-à-vis the Service Providers (the claims stated under a, b, e and f in the notice of appeal);

orders Scientology et al. to pay the costs of the proceedings in first instance and estimates these costs on the part of [F] and the service providers to be € 1,351.50;

confirms the rest of the judgment;

- orders Scientology et al. to pay the costs of the cross appeal and estimates them, up to the judgment, to be € 1,156.50 on the part of [F] and the Providers;

In the main appeal:

- rejects the appeal;

- orders Scientology et al. to pay the costs of the proceedings in the main appeal and estimates them, up to this judgment, to be € 2,528.50 on the part of [F] and the Service Providers.

This judgment was pronounced by the judges Fasseur-van Santen, Kiers-Becking and Ottevangers, and was handed down at the public session of the court held on 4 September 2003, in the presence of the clerk of court.

