[NL] Dutch Supreme Court requests ruling on whether The Pirate Bay “makes a communication to the public”

IRIS 2016-1:1/22

Robert van Schaik
Institute for Information Law (IViR), University of Amsterdam

In its judgment of 13 November 2015, the Dutch Supreme Court asked two preliminary questions to the Court of Justice of the European Union (CJEU), one of which concerning the “communication to the public”-criterion stated in Article 3 paragraph 1 of the EU’s Copyright Directive. The questions were formed in relation to pending proceedings between Stichting BREIN, a Dutch collective rights management organisation, and Ziggo and XS4ALL, two Dutch internet service providers (ISPs).

At first instance, Stichting BREIN had asked for an order directed at the ISPs, to block not only all IP addresses currently related to torrent website The Pirate Bay (TPB), but also all IP addresses related to TPB in the future (see IRIS 2012-2/31). After earlier proceedings in lower courts, the Hague Court of Appeals had ruled that copyright had been infringed by subscribers to the ISPs, as well as by TPB, by communicating “art work” (covers of movie-DVDs, game-DVDs, CDs, books etc.). However, TPB was considered to have offered only indirect access to other, “torrentable” works on other computers. In this sense, TPB’s conduct did not amount to copyright infringement, according to the Hague Court (see IRIS 2014-3/37).

BREIN appealed to the Supreme Court, disputing the indirectness assumed by the Hague Court. It argued that such access did actually amount to a communication to the public and thus an infringement of copyright. The Supreme Court restated the CJEU’s earlier Svensson ruling (see IRIS 2014-4/3), in the sense that offering hyperlinks constituted a communication to the public. Yet the Supreme Court proceeded by noting that this could not answer the question whether or not TPB made communications to the public. This was because, contrary to the facts of Svensson, TPB did not decide itself which content was placed on its website.

Finally, the following questions were asked: first, is there a communication to the public in the sense of Article 3 paragraph 1 of the Copyright Directive by the administrator of a website, if there are no protected works available on the website, but a system exists whereby meta-information about protected works situated on computers of users is indexed and categorised for users, in such a way that the users can trace, upload and download the protected works based on the meta-information? Second, in the case that the answer to question 1 is negative: do Articles 8 paragraph 3 of the Copyright Directive and 11 of the

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Enforcement Directive provide space for an order directed at an intermediary as intended in those provisions, in case these intermediaries facilitate infringing conduct of third parties as intended in question 1?

Hoge Raad der Nederlanden, 13 november 2015, ECLI:NL:HR:2015:3307

http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:3307

Supreme Court, 13 November 2015, ECLI:NL:HR:2015:3307

Gerechtshof Den Haag, 28 januari 2014, ECLI:NL:GHDHA:2014:88

http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2014:88

The Hague Court of Appeals, 28 January 2014, ECLI:NL:GHDHA:2014:88

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