# Court of Justice of the European Union: Advocate General issues opinion on Stichting Brein v. Ziggo

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On 8 February 2016, Advocate General Szpunar delivered his opinion in Stichting Brein v. Ziggo BV (Case C-610/15) concerning the liability of operators of indexing sites of peer-to-peer networks for copyright infringement.

The proceedings began in January 2012, when the District Court of The Hague ordered two Dutch internet access providers (Ziggo and XS4ALL) to block access to The Pirate Bay (TPB). Stichting Brein, a foundation protecting the interests of the Dutch copyright industry, had been granted the right to request the order (see IRIS 2012-2/31). In January 2014, the Court of Appeal in The Hague overturned the judgment of the District Court, after which Stichting Brein appealed to the Supreme Court.

In November 2015, the Supreme Court referred two questions to the Court of Justice of the European Union for a preliminary ruling (see IRIS 2016-1/22). The first was whether there is “a communication to the public under Article 3(1) of Directive 2001/29 by the operator of a website, if no protected works are available on that website, but a system exists … by means of which metadata on protected works which is present on the users’ computers is indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof.”

AG Szpunar answered this question in the affirmative, provided that the operator “is aware of the fact that a work is made available on the network without the consent of the copyright holders and does not take action in order to make access to that work impossible." AG Szpunar noted the relevance of the role played by websites such as TPB in file-sharing on peer-to-peer networks, a role which was held to be “crucial” and “practically unavoidable”. The AG stated that “works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB”. Where an operator acts intentionally by allowing, expressly, the continuation of the illegal making available of protected works, it can be said to have made an act of communication to the public. The lack of an actual transmission by TPB was regarded to be irrelevant.

The second question posed by the Supreme Court was whether “Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 offer any scope for

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obtaining an injunction against an intermediary as referred to in those provisions, if that intermediary facilitates the infringing acts of third parties in the way referred to in Question 1". AG Szpunar focussed on article 8(3), as it was argued that it takes precedence over article 11. He said that even if the Court were to hold that an act of communication does not exist, an injunction should be permitted. Depriving internet users of access to information, by blocking the TPB site, was said to be proportionate to the significance and seriousness of the copyright infringements committed on that site.

*Opinion of Advocate General Szpunar, Case C-610/15, Stichting Brein v. Ziggo BV, XS4ALL Internet BV, 8 February 2017*

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