Court of Justice of the European Union: The Pirate Bay makes a communication to the public

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On 14 June 2017, the Court of Justice of the European Union (CJEU) delivered its judgment in Stichting Brein v. Ziggo BV (Case C-610/15). The Court held that the making available and management of an online sharing platform (such as The Pirate Bay (TPB)) should be considered as an act of communication to the public for the purposes of Directive 2001/29 (the EU Copyright Directive).

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 TPB. Stichting Brein, a foundation protecting the interests of Dutch copyright holders, 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 Dutch Supreme Court. In November 2015, the Supreme Court referred two questions to the CJEU for a preliminary ruling (see IRIS 2016-1/22). Advocate-General Szpunar delivered his opinion on the questions in February 2017 (see IRIS 2017-3/5).

The Court began its judgment by deciding whether or not an “act of communication” for the purposes of Article 3(1) of the EU Copyright Directive occurs. The Court noted that based on previous case law, it can be inferred that as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute such an act of communication.

Applying this rule to the present case, the Court confirmed that copyright-protected works are made available to the users of that platform in such a way that they may access those works from wherever and whenever they individually choose. Whilst the Court accepted that the works in question are placed online by the users, the Court agreed with AG Szpunar that the operators of the platform play an essential role in making those works available. In that context, the Court noted that the operators of the platform index the torrent files so that the works to which those files refer can be easily located and downloaded by users. TPB also offers - in addition to a search engine - categories based on the type of the works, their genre or their popularity. Furthermore, the operators delete obsolete or faulty torrent files and actively filter some content.

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Having established that an act of communication occurs, the Court subsequently held that the protected works in question are in fact communicated to a public. Indeed, a large number of Ziggo's and XS4ALL's subscribers have downloaded media files using TPB, and the platform is used by a "significant" number ("several dozens of millions") of persons. The Dutch Supreme Court's decision was interpreted to have ascertained that the operators of TPB cannot be unaware that this platform provides access to works published without the consent of the rightsholders. Lastly, the Court noted that TPB has a profit-making purpose, which the Court held to be "not irrelevant", referencing previous case-law.

Judgment of the Court (Second Chamber), Stichting Brein v. Ziggo B.V., Case C-610/25, 15 June 2017

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6dbd97705936f47aeb37196f569082482.e34KaxiLc3qMb40Rch0SaxyLchb0?text=&docid=191707&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=496659

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