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The Pirate Bay: The CJEU finds torrent file sharing site does communicate to the public

Stichting Brein v. Ziggo, Court of Justice of the European Union, Case C-610/15, 14 June 2017

The scope of the 'communication to the public' right set out in Article 3(1) of the Copyright Directive, has been the subject of a number of references to the Court of Justice of the European Union ('CJEU') in recent years. The latest decision examining this right, *Stichting Brein v. Ziggo*, concerns The Pirate Bay platform. The CJEU has ruled that the peer-to-peer torrent file sharing site was communicating copyright protected works to the public. The decision might not be that surprising given that The Pirate Bay is perhaps the most notorious peer-to-peer piracy site, however it nonetheless provides further guidance as to when platforms might be held liable for 'communicating to the public' and also indicates that the CJEU will continue to interpret this right broadly.

The Pirate Bay is an online index of digital content, largely consisting of TV and film content. It allows visitors of the website to search, download and contribute content in the form of torrent files which provide access to copies of content using the BitTorrent protocol. BitTorrent divides files for sharing into segments, thus removing the need to rely on a central server to store the files. Torrent files can then be used to locate the various segments, and it is these torrent files which are uploaded to The Pirate Bay which then proceeds to index them so that the works to which those torrent files refer can be downloaded to the user's computer in several segments through their BitTorrent client. The torrent files available on The Pirate Bay relate mainly to copyright protected works which the rightsholders have not given their consent to the operators or users of that platform to share.

Stichting Brein, a foundation which helps to protect and enforce the rights of the creative industries, had succeeded in obtaining an injunction against The Pirate Bay. However, The Pirate Bay carried on the activities through a different web address. Stichting Brein then applied for an order against Ziggo and XS4ALL, two internet access providers in the Netherlands, that they block the domain names and IP addresses of The Pirate Bay to prevent their services from being used to infringe copyright and related rights. The Court of First Instance in the Netherlands granted this order. However, the Court of Appeal held that The Pirate Bay was not infringing copyright and there was no legal basis to require the internet service providers ('ISPs') to block The Pirate Bay if it was simply being used by third parties to infringe copyright. Stichting Brein appealed to the Dutch Supreme Court which referred the case to the CJEU.

The CJEU found that there was a communication to the public. The case will be looked at with interest by website operators, not only because it further defines their potential liability but also as an indication as to the interplay between this right and the 'safe harbour regime' under Article 14 of the E-Commerce Directive, as well as the scope of Article 13 of the proposed new Directive on Copyright in the Digital Single Market Directive.

Previous CJEU case law

The long line of case law from the CJEU on the act of 'communication to the public' has established that this

concept involves two cumulative criteria, namely an act of communication of a work and the communication of that work to a 'public.' Further that, in order to determine whether a user is making a communication to the public, it is necessary to take into account 'several complementary criteria.' Of these criteria, the CJEU has placed particular emphasis on the indispensable role played by the alleged infringer and the deliberate nature of their intervention. The CJEU explained that there would be an act of communication if the user 'intervenes' to give access to a protected work to their customers and does so in particular where, in the absence of that intervention, customers would not be able to access the work.

The emphasis on an 'indispensable intervention' was initially interpreted by some as meaning that the work could not be accessed but for the intervention. Some support for this interpretation was found in CJEU decisions that the communication had to be to a new public, if made through the same technical means, and its decision in *Svensson* (C-466/12) that hyperlinking to content that had already been made available on the internet with the permission of the rightsholder would not constitute a breach of the communication right. However, in *GS Media* (C-160/15), the CJEU was asked to consider whether hyperlinking to unauthorised content which had already been posted by a third party and was therefore already accessible was a 'communication to the public.' In its decision the CJEU ruled that it could be, unless the person posting the hyperlink did not know and could not have known the illegal nature of the content and that if the hyperlink was posted in pursuit of financial gain such knowledge would be presumed.

Act of communication

The first question was whether there was a communication to the public by The Pirate Bay if no protected works were available on that site but a system existed by which users can trace and upload and download the protected works?

In answering the first question, the CJEU acknowledged that the torrent files that were available on The Pirate Bay and which gave access to unauthorised copies of protected works were not placed on the platform by the operators of The Pirate Bay themselves but by its users. However, pertinent to the case was the fact that the operators of The Pirate Bay indexed the torrent files on the platform which allowed users of The Pirate Bay to much more easily locate and share those files. The CJEU's view was that without this intervention by The Pirate Bay, the works in question could not be shared by the users or that sharing them on the internet would be a lot more complex. The CJEU therefore concluded that the operators of The Pirate Bay can be regarded as playing an essential role in making the works available. The Pirate Bay case has further clarified that this intervention does not have to be 'indispensable' in the sense that the communication of the works could not otherwise take place and that it can cover facilitation of the access to the protected works.

The Copyright Directive excludes the mere provision of physical facilities from constituting a communication to the public, but in Filmspeler (C-527/15), a case concerning the distribution of a media player which contained preinstalled add-ons with links to infringing content, the CJEU had found that such a device went beyond the mere provision of physical facilities as the intervention by the defendant's device was one "without which the purchasers would find it difficult to benefit from those protected works." The CJEU used similar reasoning to find that The Pirate Bay cannot be considered to be making a 'mere provision' of

physical facilities since it facilitates access to works by indexing files and in such a way that they can be more easily located and downloaded by the users of the platform. As a result of the above acts, the CJEU held that the operators of The Pirate Bay must be considered to be carrying out an act of communication under the Copyright Directive.

Communication to a (new) public

In respect of the requirement that the communication be to 'the public,' the CJEU has clarified that this must be to a 'new' public, which is a public not taken into account by the rightsholder when it authorised the initial communication.

In order to determine whether there had been a communication to a 'new' public, the CJEU looked at the following factors: (i) the operators of The Pirate Bay had been informed that the platform provides access to works published without the rightsholders permission, (ii) the operators of The Pirate Bay expressly displayed on blogs and forums available on the platform, their purpose to make protected works available to users and encouraged them to make copies. and (iii) in any event, it was clear from the evidence before the Court that the operators of The Pirate Bay could not be unaware that the platform provides access to works published without the consent of the rightsholders, given that as expressly highlighted by the referring Court, a very large number of torrent files on The Pirate Bay relate to works published without the consent of the rightsholders. On the basis of the above factors, the CJEU concluded that the acts carried out by The Pirate Bay constitute an act of communication to the public.

The implications of the decision

The Pirate Bay decision confirms the CJEU's broad interpretation of the communication right and that peer-topeer sites that are designed to facilitate access to unauthorised copies of copyright protected works will most likely infringe the communication right. The decision also has potential implications for platforms which are not primarily intended as means for the dissemination of illegal content but which will have users who post hyperlinks, torrent files or other means through which illegal content can be accessed. Article 14 of the E-Commerce Directive provides a 'safe harbour' regime for online platforms which are merely 'hosting' infringing content, provided they do not have knowledge of the same. As soon as they are made aware that they are hosting infringing content, they are

required to act expeditiously to remove the unauthorised content. However, CJEU case law (Google France and others) supports the view that such safe harbour provisions only cover activities that are "of a mere technical, automatic and passive nature" where the service provider "has neither knowledge of nor control over the information which is being transmitted or stored." This raises the possibility that many platforms would not be able to rely on the safe harbour provisions of the E-Commerce Directive and could be liable for infringing content or links and torrent files posted on their platform if they "could not be unaware" that their platform is being used in this manner.

The CJEU's decision also has implications for the interpretation of Article 13 of the EU Commission's proposed Directive on Copyright in the Digital Single Market which is intended to address the 'value gap' between the content hosted by platforms and the licence fees that paid to rightsholders and performers. Article 13, though the proposals are still in draft form, would require information society service providers that store and provide to the public access to large amounts of works uploaded by their users to take appropriate and effective measures to prevent the availability of unauthorised works on their platform or to ensure the proper functioning of licence agreements with rightsholders. Recital 38 of the proposed Copyright in the Digital Single Market Directive states that Article 13 will apply when information society service providers go beyond the mere provision of physical facilities and perform an act of communication to the public and that it will apply irrespective of whether or not the service provider falls within Article 14 of the E-Commerce Directive.

The Pirate Bay decision appears to confirm the Commission's approach that platforms that index and facilitate the communication of works will themselves perform an act of communication to the public and will therefore have to conclude licensing agreements unless it can be established that they can rely on the safe harbour provisions of Article 14 of the E-Commerce Directive. The Pirate Bay decision is yet another decision of the CJEU that provides a broad interpretation of the communication right and a high level of copyright protection. It will therefore be welcomed by rightsholders and be of some concern to platforms and other online service providers whose services could be used to communicate unauthorised copies of protected works.