CJEU rules on copyright protection in the online environment

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Recently the Court of Justice of the European Union (CJEU) issued an important ruling for copyright holders, providers of online platforms and intermediaries dealing with copyright protection in the online environment. In *Brein v. Ziggo and XS4ALL*, the CJEU ruled that – in certain circumstances – the making available and management on the internet of a platform, such as ‘The Pirate Bay’, which allows users of that platform (in the context of a peer-to-peer network) to locate and share protected works without the consent of the right holders, may constitute copyright infringement. This conclusion is remarkable, mainly because there are no protected works on the ‘The Pirate Bay’ (TPB) website, as these works are stored on the computers of the website’s users. The CJEU marks the TPB’s role in the filesharing process as being so essential that the mere making available and management of the platform falls under the acts that are reserved to the right holders in the Copyright Directive.

The question answered by the CJEU was raised by the Supreme Court of the Netherlands in a long-running dispute between the Dutch anti-piracy organisation Brein and two major internet service providers (ISPs): Ziggo and XS4ALL. To understand the relevance and importance of the CJEU answer, knowledge of the background of the case is indispensable.

Background of the referred questions

The EU Copyright Directive provides that member states shall ensure that right holders can apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright (or related right). It also provides that, in principle, authors have the exclusive right to authorise or prohibit any communication of their works to the public.

Relying on this Directive, Brein’s principal request in the main proceedings was that the ISPs be ordered to block the domain names and IP addresses of the online sharing platform TPB in order to prevent the services of those ISPs from being used to infringe the copyright of the right holders, whose interests Brein protects. The Supreme Court noted that it has been established that (i) the actions of TPB make protected works available to the public without the right holders’ consent, and (ii) ISP subscribers, through this platform, make protected works available without the right holders’ consent and therefore infringe the copyrights. It is however unclear whether TPB itself also infringes copyright in the sense that it communicates protected works to the public without consent, taking into account that TPB only provides a platform which is used by the users to share links or files that indirectly link to the copyright protected works (so-called magnet links or torrent files which refer or contain metadata enabling the users to find resources for downloading the file), while the works are not located on TPB, but on the users’ computers.

The Supreme Court therefore decided to stay proceedings and refer the following questions to the CJEU:

1. Is there a communication to the public 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 are present on the users’ computers are indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof?
2. If Q1 is answered in the negative: Do the EU Copyright and EU Enforcement Directive offer any scope for 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 Q1?

CJEU’s decision

As the CJEU answers Q1 in the affirmative, the Court does not answer Q2. According to the CJEU, TPB makes a communication to the public. Its reasoning is as follows.

The concept ‘communication of the public’ must be interpreted in light of the objective of the Copyright Directive: to establish a high level of protection for authors. The concept involves the criteria of ‘an act of communication’, and communication of the work to a ‘public’.

**TPB makes ‘act of communication’**

For the first criterion, the role and deliberate nature of the communicator are of relevance. In this respect, the CJEU considers that it can be inferred from its previous case law 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 an ‘act of communication’.

TPB performs such an act, because in the CJEU’s view, the operators of TPB play an essential role in making the works available, as (i) they provide access to protected works with full knowledge, by indexing the torrent files which allows users of the platform to locate those works and share them, and (ii) they do a lot more than making a ‘mere provision’ of physical facilities for enabling or making a communication; services such as indexing, providing a search engine, deleting obsolete or faulty torrent files and deleting and actively filtering certain content would be examples of this.

**TPB makes ‘act of communication’ to the ‘public’**

As the communication is aimed at an indeterminate number of potential recipients, and involves a large number of individuals, the works are communicated to a ‘public’. If the work is communicated using specific technical means which are the same as the means used for the initial communication of the work as consented by the right holder, the communication is only prohibited if it is to a ‘new public’, that is to say, to a public that was not already taken into account by the right holders when they authorised the initial communication. In the matter at hand, the CJEU considers that a ‘new public’ was concerned, as a very large number of torrent files on TPB relate to works published without the consent of the right holders, and the operators could not be unaware of this.
**Conclusion of the CJEU**

Lastly, the CJEU considered that TPB is carried out for the purpose of obtaining profit, and the platform generates considerable advertising revenues, which is not irrelevant. It also concluded that the concept of ‘communication to the public’ must be interpreted as covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which allows users of that platform to locate those works and to share them in the context of a peer-to-peer network, by means of indexation of metadata relating to protected works and the provision of a search engine.

**Consequences**

With this decision, the CJEU has further stretched the concept of ‘communication to the public’ in the online environment. On the one hand, the decision further clarifies the scope of online copyright protection, but on the other hand it brings legal uncertainty, as the interpretation seems to depend highly on the exact facts and circumstances of the case.

The crux of this case seems to be threefold:

- the nature of TPB: it was established that 90% of the magnet links/torrent files referred to protected works that were shared without the consent of the right holders;
- how essential the role of TPB was: it did not directly make the protected works available, but did facilitate the users in doing so in an attractive manner; and
- the fact that TPB intervened with full knowledge of the consequences of its conduct.

Extrapolating these criteria to other cases, it will be difficult to predict the outcome as the criteria are to a certain extent subjective (for example, what role qualifies as an essential role, and when does the intervener have full knowledge).

As a consequence of the outcome, chances are that the Supreme Court will rule that the ISPs can be ordered to block access to TPB in order to prevent copyright infringement on TPB. This shows the far-reaching implications of the CJEU’s decision; the intermediaries can be ordered to block a website even if their role is limited, as they only provide internet access in general and have no relationship with the website. The website itself is also, in a certain manner, only indirectly involved in the actual acts leading to infringement, but does play an essential role and has full knowledge of the infringement.

The decision will likely be warmly welcomed by copyright holders seeking something to hold on to in their constant battle against online infringement, but will at the same time bring legal uncertainty, especially to intermediaries such as ISPs which do not interfere with content.

It will be interesting to see how the CJEU decision will play out in the Dutch main proceedings. Will the ISPs be ordered to block the website and, if so, how will this practically work? Moreover, if the ISPs are ordered to block, how will that play out on a more general level? As the considerations in this case are very fact-driven, it will be a challenge for ISPs to respond in future situations in which right holders request other websites to be blocked. It will be difficult, if not impossible, for the ISP to determine whether the content in question is actually infringing. In addition, what should an ISP do if only part of the content on a website appears to be infringing? To what extent are the ISPs responsible for the reliability and practical effectiveness of blocking a website?

At the same time, it will be interesting to see if and how the CJEU judgment will encourage copyright holders to use ISPs in their battle against online infringement, and whether this leads to online content-driven business models (like legitimate websites that offer music files with the consent of the copyright holders) reaping the benefits in the long run, or online creativity to circumvent any ISP-enforced blocks on specific websites.