

Jurius

## Online-Filesharing May Constitute Infringement of Copyright

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CJEU – Making available and managing an online platform for sharing copyright-protected works, such as «The Pirate Bay», may constitute an infringement of copyright. Even if the works in question are placed online by the users of the online sharing platform, the operators of that platform play an essential role in making those works available. (Judgement C-610/15)

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[Rz 1] Ziggo and XS4ALL are internet access providers. A significant number of their subscribers use the online sharing platform «The Pirate Bay». This platform allows users to share and upload, in segments («torrents»), works present on their computers<sup>1</sup>. The files in question are, for the most part, copyright-protected works in respect of which the rightholders have not given the operators or users of that platform consent to share those works.

[Rz 2] Stichting Brein, a Netherlands foundation which safeguards the interests of copyright holders, has brought proceedings before the courts in the Netherlands seeking an order that would require Ziggo and XS4ALL to block the domain names and IP addresses of «The Pirate Bay».

[Rz 3] The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which the dispute has been brought, has decided to refer questions to the Court of Justice on the interpretation of the EU Copyright Directive<sup>2</sup>. The Hoge Raad wishes, in essence, to ascertain whether a sharing platform such as «The Pirate Bay» is making a «communication to the public» within the meaning of the directive and may therefore be infringing copyright.

[Rz 4] In its judgment, the Court holds that the making available and management of an online sharing platform must be considered to be an act of communication for the purposes of the directive.

[Rz 5] The Court first draws attention to its previous case-law from which 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 an «act of communication» for the purposes of the directive.

[Rz 6] In the present case it is common ground that copyright-protected works are, through «The Pirate Bay», 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.

[Rz 7] Whilst it accepts that the works in question are placed online by the users, the Court highlights the fact that the operators of the platform play an essential role in making those works available. In that context, the Court notes 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. «The Pirate Bay» 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.

[Rz 8] The Court also highlights that the protected works in question are in fact communicated to a public.

[Rz 9] Indeed, a large number of Ziggo's and XS4ALL's subscribers have downloaded media files using «The Pirate Bay». It is also clear from the observations submitted to the Court that the platform is used by a significant number of persons (reference is made on the online sharing platform to several tens of millions of users).

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<sup>1</sup> BitTorrent is a protocol through which users can share files. The files to be shared are divided into segments, which reduces the burden on individual servers during the sharing process. In order to be able to share files, users must first download specific software which allows the creation of torrent files. Torrent files refer to a central server which identifies the users available to share a particular torrent file as well as the underlying media file. Those torrent files are uploaded to the online sharing platform, which then proceeds to index them so that they can be located by users of the online sharing platform and the works to which those torrent files refer can be downloaded onto the users' computers.

<sup>2</sup> Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

[Rz 10] Moreover, the operators of «The Pirate Bay» have been informed that their platform provides access to copyright-protected works published without the authorisation of the rightholders. In addition, the same operators expressly display, on blogs and forums accessible on that platform, their intention of making protected works available to users, and encourage the latter to make copies of those works. In any event, it is clear from the Hoge Raad's decision that the operators of «The Pirate Bay» cannot be unaware that this platform provides access to works published without the consent of the rightholders.

[Rz 11] Lastly, the making available and management of an online sharing platform, such as «The Pirate Bay», is carried out with the purpose of obtaining a profit, it being clear from the observations submitted to the Court that that platform generates considerable advertising revenues.

Judgement of the CJEU C-610/15 in the case Stichting Brein versus Ziggo BV and XS4ALL Internet BV of 14 June 2017

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