
European Union: Making Available And Managing Online Sharing Platform Is “Communication To The Public

Stichting Brein v. Ziggo BV, XS4ALL Internet BV, Case C-610/15, Judgment of 14 June 2017
(Court of Justice of the European Union)

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In June 2017, the Court of Justice of the European Union handed down a major decision ordering certain Dutch Internet access providers to block access to the well-known file-sharing platform The Pirate Bay.

The Pirate Bay is notorious for facilitating the unauthorized distribution of copyrighted works, although The Pirate Bay’s website does not host the works themselves. Visitors to The Pirate Bay use the BitTorrent communications protocol to break down into segments and distribute among themselves data and electronic files over the Internet, including large digital video and audio files. BitTorrent operates by dividing files into segments, doing away with the need for a central server and easing the burden on individual servers in the file-sharing process. To utilize the BitTorrent protocol and to create shareable “torrent” files, users must download independent software called “BitTorrent Client.” Once created, torrent files may be uploaded to an online sharing platform such as The Pirate Bay, which indexes the files so that they can be more easily located by and shared with other users (“peers”) for download. No protected works are actually stored on The Pirate Bay website, but the website provides

a system in which metadata regarding protected works are present on users' computers, and are indexed, categorized, and made searchable for users by The Pirate Bay.

Importantly, many of the torrent files available on The Pirate Bay's platform correspond to copyright-protected works, and many of these works are without rightholder consent for distribution via this channel.

The plaintiff in this case, Stichting BREIN, is a Dutch anti-piracy foundation that seeks to protect the interests of copyright holders. The defendants, Ziggo BV and XS4All, are internet access providers. Stichting BREIN brought suit in the Netherlands seeking an order requiring the defendants to block the domain names and IP addresses of The Pirate Bay. The Supreme Court of the Netherlands sought direction from the Court of Justice of the European Union as to whether the actions of The Pirate Bay amount to a "communication to the public" within the meaning of the relevant EU copyright law (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, hereinafter the "Copyright Directive").

In considering the case, the Court of Justice observed that, under the Copyright Directive, it is authors' exclusive right to "authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them." The purpose of the Copyright Directive is, in part, to "harmonise...the author's right of communication to the public."

The Court of Justice noted that whether there is a "communication to the public" under the Copyright Directive rests on two points, namely, whether there is (i) an "act of communication" of a work; and (ii) a communication of that work to a "public." In evaluating whether there has been a "communication to the public," the Court held as axiomatic "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'" under the Copyright Directive.

Critically for this case, the Court acknowledged that the operators of The Pirate Bay platform "play an essential role in making the works available" to their website's users. The operators of The Pirate Bay index the torrent files, enabling them to be more easily found and downloaded. In addition to offering a search engine, The Pirate Bay categorizes the works based on genre, popularity, and type of

work. The Pirate Bay also manages the content available on its platform, deleting faulty torrent files and actively screening certain content. Given these activities, The Pirate Bay knew that protected works were being communicated by its users, to its users, and its active facilitation of this activity therefore also amounted to an “act of communication” under the law. This decision is a welcome boost to the position of right-holders as they continue to battle infringement on the Internet. As for Internet access providers who do not have knowledge, or reason to know, of their users’ illicit activities, they may continue to avail themselves of relevant safe harbor provisions under EU law.

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