

Court of Justice EU, 14 June 2017, Brein v Ziggo-XS4ALL



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The making available and management of an online sharing platform such as The Pirate Bay that offers an index classifying protected works and a search engine that allows users of that platform to locate those works and to share them in the context of a peer-to-peer network is a “communication to the public”

- [The concept of ‘communication to the public’, within the meaning of 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, 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, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.](#)

- [communication](#)

36. Second, it is true, as noted by the referring court, that the works thus made available to the users of the online sharing platform TPB have been placed online on that platform not by the platform operators but by its users. However, the fact remains that those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. In this respect, as the Advocate General stated, in essence, in point 50 of his Opinion, without the aforementioned operators making such a platform available and managing it, the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex.

37. The view must therefore be taken that the operators of the online sharing platform TPB, by making that platform available and managing it, provide their users

with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.

38. Finally, the operators of the online sharing platform TPB cannot be considered to be making a ‘mere provision’ of physical facilities for enabling or making a communication, within the meaning of recital 27 of Directive 2001/29. It is clear from the order for reference that that platform indexes torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform. Moreover, it is clear from the observations submitted to the Court that, in addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform’s operators checking to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content.

- [to the public](#)

42. In the present case, it is apparent from the order for reference that a large number of subscribers to Ziggo and XS4ALL have downloaded media files using the online sharing platform TPB. It is also clear from the observations submitted to the Court that this platform is used by a considerable number of persons, the operators of TPB claiming, on their online sharing platform, to have several dozens of millions of ‘peers’. In this respect, the communication at issue in the main proceedings covers, at the very least, all of the platform’s users. These users can access, at any time and simultaneously, the protected works which are shared by means of the platform. Thus, that communication is aimed at an indeterminate number of potential recipients and involves a large number of persons (see, to this effect, [judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 45 and the case-law cited](#)).

- [new public: the operators of The Pirate Bay were informed that this platform provides access to works published without authorisation of the rightholders](#)

45. In the present case, it is apparent from the observations submitted to the Court, first, that the operators of the online sharing platform TPB were informed that this platform, which they make available to users and manage, provides access to works published without authorisation of the rightholders and, second, that the same operators expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works. In any event, it is clear from the order for reference that the operators of the online sharing platform TPB could not be unaware that this platform provides access to works published without the consent of the rightholders, given that, as expressly highlighted by the referring court, a very large number of torrent files on

the online sharing platform TPB relate to works published without the consent of the rightholders. In those circumstances, it must be held that there is communication to a ‘new public’ (see, to that effect, [judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 50](#)).

• [sharing platform such as The Pirate Bay is carried out with the purpose of obtaining profit](#)

46. Furthermore, there can be no dispute that the making available and management of an online sharing platform, such as that at issue in the main proceedings, is carried out with the purpose of obtaining profit therefrom, it being clear from the observations submitted to the Court that that platform generates considerable advertising revenues.

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Court of Justice EU, 14 June 2017

(...)

JUDGMENT OF THE COURT (Second Chamber)

14 June 2017 (*)

(Reference for a preliminary ruling — Intellectual and industrial property — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights — Article 3(1) — Communication to the public — Definition — Online sharing platform — Sharing of protected files, without the consent of the rightholder)

In Case C-610/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 13 November 2015, received at the Court on 18 November 2015, in the proceedings

Stichting Brein

v

Ziggo BV,

XS4ALL Internet BV,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas, Judges,

Advocate General: M. Szpunar,

Registrar: M. Ferreira, Principal Administrator, having regard to the written procedure and further to the hearing on 27 October 2016, after considering the observations submitted on behalf of:

- Stichting Brein, by J.C.H. van Manen, advocaat,
- Ziggo BV, by F.E. Vermeulen and E.A. de Groot, advocaten,
- XS4ALL Internet BV, by C. Alberdingk Thijm and C.F.M. de Vries, advocaten,
- the Spanish Government, by V. Ester Casas and A. Gavela Llopis, acting as Agents,
- the French Government, by D. Segoin, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Di Matteo, avvocato dello Stato,

– the Portuguese Government, by L. Inez Fernandes and M. Figueiredo, acting as Agents, assisted by T. Rendas, Legal Adviser,

– the United Kingdom Government, by G. Brown and J. Kraehling, acting as Agents, and by N. Saunders, Barrister,

– the European Commission, by J. Samnadda, T. Scharf and F. Wilman, acting as Agents,

after hearing [the Opinion of the Advocate General](#) at the sitting on 8 February 2017,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Articles 3(1) and 8(3) 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), and of Article 11 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum in OJ 2004 L 195, p. 16).

2. The request has been made in proceedings between, on the one hand, Stichting Brein, a foundation which safeguards the interests of copyright holders, and, on the other hand, Ziggo BV and XS4ALL Internet BV (‘XS4ALL’), internet access providers, concerning requests made by Stichting Brein for an order requiring Ziggo BV and XS4ALL to block the domain names and IP addresses of the online sharing platform ‘The Pirate Bay’ (‘online sharing platform TPB’).

Legal context

3. Recitals 9, 10, 23 and 27 of Directive 2001/29 state: ‘(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

...

(23) This Directive should harmonise further the author’s right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including

broadcasting. This right should not cover any other acts.

...

(27) *The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.*'

4. Article 3 of that directive, entitled 'Right of communication to the public of works and right of making available to the public other subject matter', provides in paragraph 1:

'Member States shall provide authors with the exclusive right to authorise 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.'

5. Article 8 of that directive, entitled 'Sanctions and remedies', provides in paragraph 3:

'Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

6. Recital 23 of Directive 2004/48 is worded as follows:

'Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States. As far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in Directive 2001/29/EC. Article 8(3) of Directive 2001/29/EC should therefore not be affected by this Directive.'

7. Article 11 of Directive 2004/48, entitled 'Injunctions', provides:

'Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

8. Stichting Brein is a Netherlands foundation which safeguards the interests of copyright holders.

9. Ziggo and XS4ALL are internet access providers. A significant number of their subscribers use the online

sharing platform TPB, an indexer of BitTorrent files. BitTorrent is a protocol through which users (known as 'peers') can share files. The essential characteristic of BitTorrent is that it divides files for sharing into segments, thus removing the need to rely on a central server to store those files, which lessens the burden on individual servers during the sharing process. In order to be able to share files, users must first download specific software called 'BitTorrent Client', which is not provided by the online sharing platform TPB. 'BitTorrent Client' is software which allows the creation of torrent files.

10. Users (called 'seeders') who wish to make a file on their computer available to other users (called 'leechers') have to create a torrent file through their BitTorrent Client. Torrent files refer to a central server (called a 'tracker') which identifies the users available to share a particular torrent file as well as the underlying media file. These torrent files are uploaded by the seeders to an online sharing platform, such as TPB, which then proceeds to index them so that they can be found by the users of the online sharing platform and the works to which those torrent files refer can be downloaded onto the users' computers in several segments through their BitTorrent Client.

11. 'Magnet links' are often used in place of torrent files. These links identify the content of a torrent file and refer to it through a digital fingerprint.

12. The torrent files offered on the online sharing platform TPB relate mainly to copyright-protected works, without the rightholders having given their consent to the operators or users of that platform to carry out the sharing acts in question.

13. In the context of the main proceedings, Stichting Brein's principal request is that Ziggo and XS4ALL be ordered to block the domain names and IP addresses of the online sharing platform TPB in order to prevent the services of those internet access providers from being used to infringe the copyright and related rights of the rightholders, whose interests Stichting Brein protects.

14. The court of first instance upheld Stichting Brein's requests. However, these were rejected on appeal.

15. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) notes that, in the present case, it has been established that the actions of the online sharing platform TPB make protected works available to the public without the rightholders' consent. It has also been established that subscribers to Ziggo and XS4ALL, through this platform, make protected works available without the rightholders' consent and thus infringe the copyright and related rights of those rightholders.

16. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) notes, however, that the Court's case-law does not allow it to reply with any certainty to the question as to whether the online sharing platform TPB also communicates works to the public within the meaning of Article 3(1) of Directive 2001/29, in particular:

– by creating and maintaining a system in which internet users connect with each other in order to be

able to share, in segments, works present on their own computers;

– by operating a website from which users can download torrent files which refer to segments of those works; and

– by indexing the torrent files placed online on this website and by categorising them in such a way that the segments of those underlying works can be located and the users can download those works (as a whole) onto their computers.

17. Under those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'1. Is there a communication to the public within the meaning of Article 3(1) of Directive 2001/29 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 Question 1 is answered in the negative:

Do Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 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 Question 1?'

Consideration of the questions referred

The first question

18. By its first question, the referring court asks, in essence, whether the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, should 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, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

19. It follows from Article 3(1) of Directive 2001/29 that Member States are required to ensure that authors have the exclusive right to authorise 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.

20. Under that provision, authors thus have a right which is preventive in nature and allows them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication ([judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 25 and the case-law cited](#)).

21. As Article 3(1) of Directive 2001/29 does not define the concept of 'communication to the public', the meaning and scope of that concept must be determined in light of the objectives pursued by that directive and the context in which the provision being interpreted is set ([judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 26 and the case-law cited](#)).

22. In that regard, it should be borne in mind that it follows from recitals 9 and 10 of Directive 2001/29 that the latter's principal objective is to establish a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works, including on the occasion of communication to the public. It follows that the concept of 'communication to the public' must be interpreted broadly, as recital 23 of the directive indeed expressly states ([judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 27 and the case-law cited](#)).

23. The Court has also specified that the concept of 'communication to the public', within the meaning of Article 3(1) of Directive 2001/29, requires an individual assessment ([judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 28 and the case-law cited](#)).

24. It is clear from Article 3(1) of Directive 2001/29 that the concept of 'communication to the public' involves two cumulative criteria, namely an 'act of communication' of a work and the communication of that work to a 'public' ([judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 29 and the case-law cited](#)).

25. In order to determine whether a user is making a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29, it is necessary to take into account several complementary criteria, which are not autonomous and are interdependent. Consequently, those criteria must be applied both individually and in their interaction with one another, since they may, in different situations, be present to widely varying degrees ([judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 30 and the case-law cited](#)).

26. Amongst those criteria, the Court has emphasised, firstly, the indispensable role played by the user and the deliberate nature of his intervention. That user makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty (see, to that effect, [judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 31 and the case-law cited](#)).

27. Secondly, it has specified that the concept of the 'public' refers to an indeterminate number of potential viewers and implies, moreover, a fairly large number of people ([judgment of 26 April 2017, Stichting Brein,](#)

C-527/15, EU:C:2017:300, paragraph 32 and the case-law cited).

28. The Court has also noted that, according to a settled line of case-law, in order to be categorised as a ‘communication to the public’, a protected work must be communicated using specific technical means, different from those previously used or, failing that, to a ‘new public’, that is to say, to a public that was not already taken into account by the copyright holders when they authorised the initial communication of their work to the public (**judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 33 and the case-law cited).**

29. Finally, the Court has underlined, on numerous occasions, that the profit-making nature of a communication, within the meaning of Article 3(1) of Directive 2001/29, is not irrelevant (**judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 34 and the case-law cited).**

30. As regards, in the first place, the question of whether making available and managing an online sharing platform, such as that at issue in the main proceedings, is an ‘act of communication’ for the purposes of Article 3(1) of Directive 2001/29, it must be noted, as recital 23 of Directive 2001/29 states, that the author’s right of communication to the public, provided for in Article 3(1), covers any transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

31. Furthermore, as is apparent from Article 3(1) of Directive 2001/29, in order for there to be an ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons comprising that public may access it, from wherever and whenever they individually choose, irrespective of whether they avail themselves of that opportunity (see, to that effect, **judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 36 and the case-law cited).**

32. The Court has already held, in this regard, that the provision, on a website, of clickable links to protected works published without any access restrictions on another site, affords users of the first site direct access to those works (**judgment of 13 February 2014, Svensson and Others, C-466/12, EU:C:2014:76, paragraph 18**; see also, to that effect, **order of 21 October 2014, BestWater International, C-348/13, not published, EU:C:2014:2315, paragraph 15**, and **judgment of 8 September 2016, GS Media, C-160/15, EU:C:2016:644, paragraph 43).**

33. The Court has also held the same to be the case for the sale of a multimedia player on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites — that are freely accessible to the public — on which copyright-protected works have been made available without the consent of the rightholders (see, to that effect, **judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraphs 38 and 53).**

34. It can therefore be inferred from this 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’ for the purposes of Article 3(1) of Directive 2001/29.

35. In the present case it must be found, first, as the Advocate General has noted, in essence, in point 45 of his Opinion, that it is not disputed that copyright-protected works are, by means of the online sharing platform TPB, 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.

36. Second, it is true, as noted by the referring court, that the works thus made available to the users of the online sharing platform TPB have been placed online on that platform not by the platform operators but by its users. However, the fact remains that those operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. In this respect, as the Advocate General stated, in essence, in point 50 of his Opinion, without the aforementioned operators making such a platform available and managing it, the works could not be shared by the users or, at the very least, sharing them on the internet would prove to be more complex.

37. The view must therefore be taken that the operators of the online sharing platform TPB, by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available.

38. Finally, the operators of the online sharing platform TPB cannot be considered to be making a ‘mere provision’ of physical facilities for enabling or making a communication, within the meaning of recital 27 of Directive 2001/29. It is clear from the order for reference that that platform indexes torrent files in such a way that the works to which the torrent files refer may be easily located and downloaded by the users of that sharing platform. Moreover, it is clear from the observations submitted to the Court that, in addition to a search engine, the online sharing platform TPB offers an index classifying the works under different categories, based on the type of the works, their genre or their popularity, within which the works made available are divided, with the platform’s operators checking to ensure that a work has been placed in the appropriate category. In addition, those operators delete obsolete or faulty torrent files and actively filter some content.

39. In the light of the foregoing, the making available and management of an online sharing platform, such as that at issue in the main proceedings, must be

considered to be an act of communication for the purposes of Article 3(1) of Directive 2001/29.

40. In the second place, in order to be categorised as a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, the protected works must also in fact be communicated to a ‘public’ (judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 43 and the case-law cited).

41. In that regard, the Court has stated, first, that the concept of ‘public’ involves a certain de minimis threshold, which excludes from that concept groups of persons concerned which are too small, or insignificant. Second, in order to determine that number, the cumulative effect of making the works available to potential recipients should be taken into account. Thus, it is necessary to know not only how many persons have access to the same work at the same time, but also how many of them have access to it in succession (see, to that effect, judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 44 and the case-law cited).

42. In the present case, it is apparent from the order for reference that a large number of subscribers to Ziggo and XS4ALL have downloaded media files using the online sharing platform TPB. It is also clear from the observations submitted to the Court that this platform is used by a considerable number of persons, the operators of TPB claiming, on their online sharing platform, to have several dozens of millions of ‘peers’. In this respect, the communication at issue in the main proceedings covers, at the very least, all of the platform’s users. These users can access, at any time and simultaneously, the protected works which are shared by means of the platform. Thus, that communication is aimed at an indeterminate number of potential recipients and involves a large number of persons (see, to this effect, judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 45 and the case-law cited).

43. It follows that, by a communication such as that at issue in the main proceedings, protected works are indeed communicated to a ‘public’ within the meaning of Article 3(1) of Directive 2001/29.

44. Furthermore, with regard to the question whether those works have been communicated to a ‘new’ public within the meaning of the case-law cited in paragraph 28 of the present judgment, the Court, in its judgment of 13 February 2014, Svensson and Others (C-466/12, EU:C:2014:76, paragraphs 24 and 31) as well as in its order of 21 October 2014, BestWater International (C-348/13, not published, EU:C:2014:2315, paragraph 14), has held that such a public is a public that was not taken into account by the copyright holders when they authorised the initial communication.

45. In the present case, it is apparent from the observations submitted to the Court, first, that the operators of the online sharing platform TPB were informed that this platform, which they make available

to users and manage, provides access to works published without authorisation of the rightholders and, second, that the same operators expressly display, on blogs and forums available on that platform, their purpose to make protected works available to the users, and encourage the latter to make copies of those works. In any event, it is clear from the order for reference that the operators of the online sharing platform TPB could not be unaware that this platform provides access to works published without the consent of the rightholders, given that, as expressly highlighted by the referring court, a very large number of torrent files on the online sharing platform TPB relate to works published without the consent of the rightholders. In those circumstances, it must be held that there is communication to a ‘new public’ (see, to that effect, judgment of 26 April 2017, Stichting Brein, C-527/15, EU:C:2017:300, paragraph 50).

46. Furthermore, there can be no dispute that the making available and management of an online sharing platform, such as that at issue in the main proceedings, is carried out with the purpose of obtaining profit therefrom, it being clear from the observations submitted to the Court that that platform generates considerable advertising revenues.

47. Therefore, it must be held that the making available and management of an online sharing platform, such as that at issue in the main proceedings, constitutes a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29.

48. In the light of all the foregoing considerations, the answer to the first question is that the concept of ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29, 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, by means of indexation of metadata referring to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

The second question

49. In the light of the answer to the first question, there is no need to answer the second question.

Costs

50. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

The concept of ‘communication to the public’, within the meaning of 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, 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, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.

[Signatures]

**OPINION OF ADVOCATE GENERAL
SZPUNAR**

delivered on 8 February 2017 (1)

Case C-610/15

Stichting Brein

v

Ziggo BV,

XS4ALL Internet BV

(Request for a preliminary ruling from the Hoge Raad der Nederlanden (Netherlands Supreme Court))

(Copyright and related rights — Directive 2001/29/EC — Article 3(1) — Communication to the public — Concept — Indexing site allowing the sharing of protected works without the authorisation of the rightholders — Article 8(3) — Use by a third party of the services of an intermediary in order to infringe a copyright — Injunction)

Introduction

1. ‘... *the file being shared in the swarm is the treasure, the BitTorrent client is the ship, the .torrent file is the treasure map, The Pirate Bay provides treasure maps free of charge and the tracker is the wise old man that needs to be consulted to understand the treasure map*’.

(2)

2. It is by this analogy, worthy of copyright protection, that the Australian judge, Justice Cowdroy explained how file-sharing in breach of copyright by means of the BitTorrent protocol works. (3) The Court is called upon in the present case to identify the legal bases and the scope of any liability in respect of such breaches committed by ‘card providers’, that is to say, sites such as The Pirate Bay (‘TPB’). TPB is in fact one of the biggest and best-known sites for sharing files containing musical and cinematographic works. Files are shared free of charge and, in the case of the majority of those works, in breach of copyright.

3. The European Commission, whose opinion appears to me to be shared by the United Kingdom of Great Britain and Northern Ireland, contends that liability for sites of this type is a matter of copyright application, which can be resolved not at the level of EU law but under the domestic legal systems of the Member States. Such an approach would, however, mean that liability, and ultimately the scope of the copyright holders’ rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why the answer to the problems raised in the present case must, in my view, be sought rather in EU law.

4. I should also like to make clear from the outset that the problems raised in the present case are in my view substantially different from those in two recent cases concerning the right to communicate works to the public via the internet, namely *Svensson and Others* (4) and *GS Media*. (5) Those cases concerned the secondary communication of works already accessible on the internet by a person providing the online content himself, whereas the present case concerns original communication, made on a peer-to-peer network. I do not therefore think that the Court’s reasoning in those cases can be directly applied to the case in the main proceedings.

Legal context

5. Article 12 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), entitled ‘*Mere conduit*’, (6) provides:

‘1. *Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted ...*

...

3. *This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement.*’

6. Article 14 of that directive, entitled ‘*Hosting*’, provides:

‘1. *Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*

(a) *the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;*

or

(b) *the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*

...

3. *This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.*’

7. Paragraph 1 of Article 3 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, (7) entitled ‘*Right of communication to the public of*

works and right of making available to the public other subject-matter' provides:

'Member States shall provide authors with the exclusive right to authorise 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.'

8. Paragraph 3 of Article 8 of that directive, entitled 'Sanctions and remedies', reads:

'Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.'

9. Paragraph 2 of Article 2 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, entitled 'Scope', (8) provides:

'This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably ... in Directive 2001/29/EC and, in particular, ... Article 8 thereof.'

10. Article 11 of that directive, entitled 'Injunctions', provides:

'...Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.'

Facts, procedure and questions referred

11. The applicant in the main proceedings, Stichting Brein, is a foundation governed by Netherlands Law, whose main purpose is to combat the illegal exploitation of subject matter protected by copyright and related rights, and to protect in that area the interests of the holders of those rights.

12. The defendants in the main proceedings, Ziggo BV and XS4ALL Internet BV ('XS4ALL'), are companies governed by Netherlands law whose activity consists, inter alia, in providing consumers with an internet service. According to the information contained in Stichting Brein's written observations, they are the two main internet service providers on the Netherlands market.

13. Stichting Brein has applied, under the provisions of Netherlands law transposing Article 8(3) of Directive 2001/29, (9) for an order that Ziggo and XS4ALL block access by recipients of their services to the internet addresses of the website of TPB, an engine for peer-to-peer file-sharing. That application is based on the fact that it is by means of that file-sharing engine that recipients of the services of the defendants in the main proceedings, using those services, commit large-scale copyright infringements, by sharing files containing protected subject matter (mainly music and films) without the authorisation of the copyright holders.

14. That application, upheld at first instance, was dismissed on appeal, essentially on the grounds, first, that it is the recipients of the services of the defendants in the main proceedings, and not TPB, which are the originators of the copyright infringements and, secondly, that the blocking sought is not proportionate to the aim pursued, namely the effective protection of copyrights. Stichting Brein appealed on a point of law against the latter decision before the referring court.

15. It was in those circumstances that the Hoge Raad der Nederlanden (Netherlands Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is there a communication to the public within the meaning of Article 3(1) of Directive 2001/29 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 is present on the users' computers is indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof?

(2) If the answer to Question 1 is negative:

Do Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 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 Question 1?'

16. The order for reference was received at the Court on 18 November 2015. Written observations were submitted by the parties in the main proceedings, the Spanish, Italian, Portuguese and United Kingdom Governments and by the Commission. The parties in the main proceedings, the Spanish and French Governments and the Commission were represented at the hearing held on 27 October 2016.

Analysis

17. By its two questions referred for a preliminary ruling in the present case, the referring court raises in reality the matter of the liability of operators of indexing sites of peer-to-peer networks for copyright infringements committed in the context of the use of those networks. Can those operators themselves be regarded as being the originators of those infringements, which would mean they are directly liable (first question)? Or, even if they are not directly liable, can an order be made blocking access to their websites, which, as I shall explain below, requires a form of indirect liability (second question)?

18. I shall begin my analysis with a brief look at the way in which peer-to-peer networks operate and their role in the infringement of copyrights.

Preliminary remarks — peer-to-peer networks

19. Although the internet was designed as a network of computers operating independently, the most spectacular manifestation of the internet, the World Wide Web, operates according to a different model, namely a centralised architecture known as 'client-server'. In that model, the content (usually a web page) is stored on a server and can be viewed by users by

means of their computers, referred to as 'clients', and their client software (a web browser). It is easy to understand that such architecture of the World Wide Web makes it relatively easy to monitor the legality of content and to combat illegal content: it is sufficient to attach the server or get its administrator to remove the infringing content. It should also be noted that the legislation concerning information society services, mainly the internet, is particularly well-suited to that operating model, as it provides inter alia that intermediary providers are not liable for content but imposes on them certain obligations to cooperate in combating illegal content.

20. Peer-to-peer networks are organised according to a different principle. In that model, the computer of each user, that is to say each peer, is not only a client which receives information, but also a server which stores the information and makes it available to other peers. The network is therefore decentralised (no central servers) and has a 'variable geometry', since only connected peer-servers form the network at any given time (unlike a 'traditional network', in which servers are usually permanently connected and where only the clients connect and disconnect temporarily). A network configuration of this type offers many advantages, particularly as regards optimising the use of storage capacity and data transmission. Such a network is also, due to its decentralised architecture, more resistant to attacks and to intervention by the security forces or persons holding rights under a copyright. It is difficult inter alia to remove content from a peer-to-peer network, since it is on different servers belonging to different individuals in different countries.

21. Peer-to-peer networks lend themselves to different uses, such as online messaging, telephone calls, software distribution or even military applications. However, the most widespread use is for file-sharing.

22. Are these only files containing illegal data, such as works shared in breach of copyright? That is not the case. Peer-to-peer networks may be used for sharing files of different types, inter alia files containing data which are not copyright-protected, works made available with the consent of rightholders, even by the authors themselves, works for which protection (in any event as regards substantive rights) has already expired or works available under a free licence.

23. However, according to the data submitted by Stichting Brein and not challenged in the main proceedings, if I understand correctly, 90% to 95% of the files shared on the TPB network contain protected works distributed without the consent of the rightholders. This figure would seem to hold true for most of the popular peer-to-peer networks. The reason for this is that legal content has its own distribution channels, whether professional or amateur (traditional websites, online shops, social networks, etc.). Peer-to-peer networks on the other hand are frequently used in order to share content which would otherwise not be available free of charge to the public. Administrators of those networks often make no effort to conceal that purpose, some of those networks having been set up

with the stated objective of circumventing copyrights, regarded as being unfair. (10) For that reason, peer-to-peer networks have, since they first appeared, been the subject of the anti-pirating campaign, waged especially in the United States, where these networks have very quickly grown in popularity. Napster was the first major peer-to-peer network to be shut down for copyright infringements. (11)

24. After Napster, new generations of peer-to-peer networks appeared. Currently, the most popular, at any rate on the European market, are networks based on the BitTorrent protocol. That technology makes it possible, by means of software freely accessible online (so-called 'BitTorrent client'), to download the same file, divided into small pieces, from several peer computers. As a result of that fragmentation of the downloaded file, the computers of the peers originating the download (called 'seeders'), operating as servers, and their internet connections, are not saturated, which allows for fast downloading of relatively large files. Given that the number of peers having and sharing the same file is crucial for the speed of downloading, in BitTorrent technology each piece of the downloaded file is simultaneously offered for downloading to other peers looking for the same file ('leechers'). In other words, every client computer which downloads the file automatically becomes a server, and then makes it available to other peers.

25. I shall not elaborate further on the technical operation of peer-to-peer networks, detailed descriptions of which are readily available. (12) As in all the cases relating to information technology, technical development far outstrips legislative or judicial procedures, at the risk of rendering obsolete, even before they have been adopted, legal solutions based on a given technological status quo. (13) What, in my view, one should look for in order to resolve a case like that in the main proceedings, is the legal substance of certain acts, irrespective of the technical background to those acts. What is important from that point of view is the role played by websites such as TPB in file-sharing on peer-to-peer networks.

26. That role is crucial. The use of any peer-to-peer network depends on the possibility of finding peers available to share the desired file. The information, whether it is technically in the form of torrent files, 'magnet links' or some other form, is found on websites such as TPB. Those sites provide not only a search engine but also, as in the case of TPB, indexes of the works contained in those files, classified in various categories, for example, '100 best' or 'the latest'. So it is not even necessary to look for a particular work, it is sufficient to choose from those on offer, as in the catalogue of a library (or rather an audio or video collection, since it is mainly music and films). Those sites also often provide additional information, inter alia on the estimated download time and the number of active 'seeders' and 'leechers' for a particular file.

27. Although, as the defendants in the main proceedings contend, it is therefore theoretically

possible to find files offered for sharing on a peer-to-peer network without using a site like TPB, in practice, the search for such files generally leads to such a site or a site aggregating data from several peer-to-peer networks. The role of websites such as TPB is therefore practically unavoidable in the operation of those networks, in any event for the average internet user.

First question

28. By the first question it refers for a preliminary ruling, the national court asks, in essence, whether the fact that the operator of a website makes it possible to find files containing copyright-protected works, which are offered for sharing on a peer-to-peer network, by indexing the metadata relating to those files and by providing a search engine, constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

29. I shall start my analysis of this question with a brief overview of the legislation and case-law on the right of communication to the public.

The right of communication to the public

30. Traditionally, with regard to the dissemination of their works, authors have the exclusive right to authorise or prohibit both the distribution of copies of those works and the performance of them to a public present at the place of performance. Typical examples of this are concerts and theatrical productions.

31. The appearance of technical means of communication, the first being sound through the medium of radio broadcasting, made it necessary to protect the rights of the authors with regard to that possibility of exploiting their works. That right was introduced for the first time into international law in Article 11bis of the revised Berne Convention for the Protection of Literary and Artistic Works ('the Berne Convention'). (14) Currently, Article 11bis of the Berne Convention, in the version resulting from the Paris Act of 24 July 1971, as amended on 28 September 1979, grants authors the exclusive right of authorising the broadcasting, or any other wireless communication to the public, of their works, and the 'secondary' communication of the broadcast work, when this communication is made by an organisation other than the original one. (15)

32. That regulation of the right of communication to the public was designed for, and is particularly suited to, 'linear' communication, to use the terminology of Directive 2010/13/EU. (16) In that communication model, the signal is 'pushed' to the recipient, who can only receive it (or not) at the time it is broadcast. It is therefore relatively easy to determine when the communication took place, from whom it originates and who are its recipients, that is to say, the public. That is the traditional model according to which radio and television broadcasting operate.

33. With the arrival of television on demand ('video on demand') and then, especially, the internet, a new method of communication appeared, whereby the content of the communication is merely made available to potential users, who can receive it when and where they wish. In that model, it is only when the user

decides to receive the content that the signal is actually communicated to him ('pulled'). There was some doubt as to whether that process corresponded to the concept of 'communication to the public' within the meaning of the Berne Convention. (17)

34. The Berne Convention was supplemented, *inter alia* in order to adapt its provisions to technical progress, by the World Intellectual Property Organisation Copyright Treaty, adopted at Geneva on 20 December 1996 ('the WCT'). (18) The concept of 'making available to the public' was expressly introduced by that treaty. Article 8 of the WCT provides for the exclusive right of authors to authorise 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 these works from a place and at a time individually chosen by them*'. That provision is not limited therefore to communication by radio or television, but includes any technical means of communication. Nor is it limited to linear communication, but extends to making content available for reception over a period of time. It is the latter method of communication to the public which is especially relevant in the case of the internet, in particular in the case of peer-to-peer networks.

35. Article 8 of the WCT was transposed into EU law in Article 3(1) of Directive 2001/29, a provision whose interpretation is sought in the present case. That provision contains almost the same wording as that used in the WCT.

36. Directive 2001/29 does not, however, include any definition of the concept of 'communication to the public', or of 'making available to the public'. It was the Court therefore which had to undertake to provide an outline of that definition. According to case-law, two criteria are essential in order for communication to the public to exist: the act of communication and the presence of a public. (19)

37. As regards the first criterion, the Court emphasises the essential role of the player originating the communication and the deliberate nature of its intervention. That player makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, and does so in particular where without that intervention its customers would not, in principle, be able to enjoy the broadcast work. (20)

38. It should be added, as I pointed out above, that, in the case of making a work available to the public so that it is received by recipients at the time of their choosing, the act of communication must be assessed taking into account the specific nature of that method of communication. Accordingly, unlike communication carried out on the initiative of the player originating that communication, in the case of making available, the actual transmission of the work takes place only potentially and on the initiative of the recipient. However, the ability of the copyright holder to prevent the communication arises at the actual time of making

available, irrespective of whether and when transmission actually takes place. (21)

39. As regards the second criterion, the presence of the public, according to the case-law of the Court, it involves two requirements. The first is that the communication must be intended for an indeterminate but fairly large number of potential recipients. That condition is normally met in the case of a website that is accessible, in principle, to all users of the internet. (22)

40. Under the second requirement, the public for which the communication in question is intended must be a 'new public'. In the view of the Court, so far as making available on the internet is concerned, the communication is not made to a new public when it relates to a work that has already been made freely available to the public on another website. In such a situation, the communication is targeted, at least potentially, at the same public as that targeted by the initial making available, namely all users of the internet. (23)

41. That freedom of internet users is limited, however. According to the Court, when applying the 'new public' condition, it is necessary to take into account not the public actually having access to the work, but only the public who were taken into account by the copyright holder at the time of the initial communication. On the other hand, if the work has been made available, but without the consent of the rightholder, no public was taken into account by the latter, and any new making available therefore targets a new public and must consequently be considered to be a communication to the public within the meaning of Article 3(1) of Directive 2001/29. (24)

42. However, there is no need to assess whether the communication is intended for a new public where it is made using a specific technical means, that is to say, a technical means different from that used for the initial communication. (25) In such a case, there is therefore still a communication to the public within the meaning of Directive 2001/29.

43. It is now appropriate to assess those criteria in the context of peer-to-peer networks.

Communication to the public on peer-to-peer networks

44. There is no question in my view that the making available to the public of copyright-protected works takes place where those works are shared on a peer-to-peer network.

45. First, the works are made available on the computers of the network users, so any other user can download them. The fact that, under the BitTorrent system, the files containing those works are cut up and downloaded in pieces from different computers is a particular technical feature of no importance. The subject matter of the copyright protection is not a file but the work. Works are made available in their entirety and sent to the users downloading them also in their entirety, barring a technical incident.

46. Secondly, there is no doubt that potential users of an open peer-to-peer network such as TPB's constitute an undefined and significant number of persons.

47. Thirdly and lastly, irrespective of the fact that it involves a specific technical means, the new public condition is also met, in any event so far as works shared without the consent of the authors is concerned. As I noted in point 41 of the present Opinion, the new public condition must be assessed in relation to the public taken into account by the author when he gave his consent. (26) If the author of the work has not consented to it being shared on a peer-to-peer network, the users of that network constitute by definition a new public. (27)

48. It remains to be decided who the persons are, on a peer-to-peer network, who originated the making available of the works which are shared on it: its users or the operator of an indexing site such as TPB.

49. Users, by installing on their computers and starting the sharing software (the BitTorrent client), and providing TPB with the torrents that allow the files present on their computers to be traced, and by leaving those computers on so that they can remain active on the network, are intentionally making the works in their possession available to other users of the network.

50. However, those works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB, which enable works to be found and accessed. The operators of those sites therefore arrange the system which enables users to access works that are made available by other users. Their role may therefore be regarded as necessary. (28)

51. It is true that such a site merely indexes the content that is present on the peer-to-peer network, that is to say the metadata relating to works that are offered for sharing by users of the network. The operator of the site therefore has, in principle, no influence over the appearance of a given work on that network. It is only an intermediary which enables users to share the content on a peer-to-peer basis. Therefore, the decisive role in the communication to the public of a given work cannot be attributed to it if it is unaware that the work has been made available illegally or if, once it has been made aware of the illegality, it acts in good faith to rectify the matter. However, from the moment that operator has knowledge of the fact that making available took place in breach of copyright and does not take action to render access to the work in question impossible, its conduct may be regarded as being intended to allow, expressly, the continuation of the illegal making available of that work and, hence, as an intentional action.

52. I should like to make clear that the site's operator must have actual knowledge of the facts. That is so, inter alia, in a situation where that operator has been expressly alerted by the rightholder of the illegal nature of the information appearing on the site. (29) It would not therefore be appropriate to apply to such a site a presumption of knowledge of the facts similar to that established by the Court in its judgment in *GS Media* in the case of persons who had posted a hyperlink for profit. (30) Such a presumption would amount to imposing on operators of indexing sites of peer-to-peer

networks, which normally operate for profit, a general obligation to monitor the indexed content.

53. The intervention of those operators therefore meets the conditions of being necessary and deliberate, laid down in the case-law of the Court. (31) Those operators should therefore in my view also be considered, simultaneously and jointly with the users of the network, as originating the making available to the public of works that are shared on the network without the consent of the copyright holders, if they are aware of that illegality and do not take action to make access to such works impossible.

54. The answer to the first question referred for a preliminary ruling should therefore be that the fact that the operator of a website makes it possible, by indexing them and providing a search engine, to find files containing works protected by copyright which are offered for sharing on a peer-to-peer network, constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29, if that operator is aware of the fact that a work is made available on the network without the consent of the copyright holders and does not take action in order to make access to that work impossible.

Second question

Preliminary remarks

55. The second question was raised by the national court in case the Court's answer to the first question, which I suggest should be answered in the affirmative, is negative. If the Court does not however share my assessment as set out above, analysis of the second question becomes necessary. I am therefore also going to suggest an answer to the second question.

56. The second question mentions both Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48. However, according to Article 2(2) of Directive 2004/48, and, more directly, according to the last sentence of Article 11 of that directive, its provisions apply without prejudice to the provisions of Directive 2001/29, in particular Article 8 thereof. It follows, in my view, that, so far as the matters covered by Article 8 of Directive 2001/29 are concerned, that provision takes precedence over Article 11 of Directive 2004/48. As a result, only Article 8(3) of Directive 2001/29 is relevant as regards the answer to the second question. In any event, those two provisions are similar in content.

57. By that second question, the referring court asks in essence whether Article 8(3) of Directive 2001/29 must be interpreted as offering scope for obtaining an injunction against an internet service provider ordering it to block access for its users to an indexing site of a peer-to-peer network by means of which copyright infringements have been committed, even if the operator of that site does not itself communicate to the public the works made available on that network.

Applicability of measures under Article 8(3) of Directive 2001/29 to sites such as TPB

58. It will be recalled that, under Article 8(3) of Directive 2001/29, holders of copyrights must be in a position to apply for an injunction against an

intermediary whose services are used by a third party to infringe their rights.

59. It is undisputed in the main proceedings that the defendants, being internet service providers, are intermediaries within the meaning of the abovementioned provision.

60. It is also clear in my view that the services of those intermediaries are used by third parties to infringe copyrights. It has been found that certain users of those services use the peer-to-peer network to share works on it without the authorisation of copyright holders. Such sharing constitutes making a work available to the public without the authorisation of the copyright holder and, consequently, an infringement of that right.

61. The particular feature of the case in the main proceedings is that the measure applied for, namely the blocking of access to the TPB site, will affect not only users who commit copyright infringements but also the TPB site, which will not be able to offer its services to users connected to the internet through the intermediary of the defendants in the main proceedings.

62. The possibility of such a measure was accepted by the Court in its judgment in *UPC Telekabel Wien*. (32) However, that case concerned the blocking of access to a website whose operator had been regarded as being itself the originator of the copyright infringement. The works illegally made available to the public were on the website in question and were downloaded by users from that site. It was in those circumstances that the Court could hold that the operator of that site was using the services of the internet service provider of the persons viewing the site in order to commit copyright infringements.

63. The situation is very different in the present case, since although it has been established that TPB is not itself making communication of works to the public without the consent of copyright holders, it cannot be concluded that it is using the services of the internet service providers of users of the peer-to-peer network in order to commit copyright infringements.

64. The circumstances envisaged in Article 8(3) of Directive 2001/29 presuppose the existence of a link between the subject of the injunction and the copyright infringement. A measure blocking a website implies that it has been established that the operator of that site has been held liable for copyright infringement using the services of the intermediary to which the injunction is addressed. In that case that operator constitutes a third party infringing copyrights within the meaning of Article 8(3) of Directive 2001/29.

65. If the operator in question does not itself carry out the act covered by the author's exclusive rights (for example, communication to the public), the infringement is only indirect. Given the fact that liability for that type of infringement is not harmonised at the level of EU law, express provision must be made for it under national law. It is for national courts to ascertain whether such liability exists in their domestic law.

66. If such liability can be established on the part of an operator of an indexing site within a peer-to-peer

network on which protected works are shared without the authorisation of the copyright holders, it must be considered that that operator is using the services of internet service providers whose customers share files on that network, by analogy with a person who himself directly commits a copyright infringement.

67. That finding is not altered by the fact that a site such as TPB might come into the category of providers of hosting services, whose liability for the information stored is, in principle, excluded under Article 14(1) of Directive 2000/31. That immunity is in effect conditional. It is granted only if the provider had no knowledge of the illegal nature of the information stored or of the activity being carried on using that information, and on condition that, once it has been alerted to that illegality, it acts expeditiously to remove the information in question or disable access to that information.

68. If the intermediary provider does not comply with those conditions, that is to say, if it had knowledge that the information stored was illegal but did not act to remove it or disable access to it, that provider may be held indirectly liable for that information.

69. This applies, inter alia, in the case of the operator of an indexing site of a peer-to-peer network which had knowledge or had been made aware that the torrent files supplied by users of the network made it possible to share works made available on that network without the authorisation of the copyright holders and did not act to remove those files. It is undisputed in the main proceedings that this applies in the case of TBP. Article 14 of Directive 2000/31 does not therefore preclude TBP's liability for copyright infringements resulting from making those files available.

70. It is also necessary to consider whether such a measure complies with fundamental rights.

Whether blocking access to a website complies with fundamental rights

71. Measures taken on the basis of Article 8(3) of Directive 2001/29 must comply with the applicable fundamental rights. (33) The question of such conformity with regard to a measure ordering that users of the services of an internet service provider must be prevented from viewing a site that has been found to have committed copyright infringements was analysed in depth by the Court in its judgment in *UPC Telekabel Wien*. (34) The Court accepted such a measure with regard to fundamental rights, laying down three conditions. (35)

72. First, the service provider to which the injunction is addressed must be able to choose which technical means to use in order to comply with the injunction, and to be discharged of its obligations, by demonstrating that it has taken all reasonable measures to do so. Those are conditions imposed under national law, compliance with which is to be reviewed by national courts.

73. Secondly, the measures taken must not unnecessarily deprive internet users of the possibility of lawfully accessing the information available. It is clear that a measure blocking a particular site deprives

internet users of access to the information available on that site, whether it is legal or not.

74. Assessment of the legality of such a measure must therefore, in my view, be done on a case-by-case basis, analysing the proportionality between, on the one hand, the measure and the resultant depriving of access to information and, on the other hand, the significance and seriousness of the copyright infringements committed by means of that site.

75. In the case of TPB, according to the information supplied by the applicant in the main proceedings, which of course needs to be verified by the national court, over 90% of files which can be accessed from that site contain works made available to the public without the authorisation of the copyright holders. Furthermore, the operators of TPB were alerted on several occasions of the unlawful nature of the content of their site and instructed to remove it, which they expressly refused to do.

76. In such circumstances, in my view, depriving internet users of access to information, by blocking the TPB site, would be proportionate to the significance and seriousness of the copyright infringements committed on that site. My assessment is based on both the proportion of illegal content and the behaviour of the operators of that site. That is so all the more since, if works are being lawfully shared on a peer-to-peer network it is very probable that they are also easily accessible free of charge by other means or that they can easily be made available. The situation is very different in the case of a website on which the illegal content is only marginal and whose operators cooperate in good faith to remove it.

77. Naturally, the final analysis of the proportionality of the proposed measure lies with the national courts.

78. Thirdly and lastly, the effect of the measure must be to prevent unauthorised viewing of protected subject matter or, at least to make it difficult to do so, and seriously deter internet users who are using the services of the addressee of the injunction from viewing the subject matter made available to them in breach of copyright. In other words, the objective of the measure must be to put a stop to and prevent copyright infringement and the measure must be reasonably effective in achieving that objective.

79. In the present case, the defendants in the main proceedings express serious doubts about the effectiveness of blocking access to the TPB site. In their view, first, that measure is ineffective since the same works can be found and exchanged on the internet by means other than TPB. Secondly, the blocking of a website address can easily be circumvented by any informed internet user.

80. It should be noted, however, in the first place that according to the case-law of the Court, it is not necessary that intellectual property should be absolutely protected, that is to say, that the proposed measure should result in a complete cessation of copyright infringements. It is sufficient that it should seriously deter internet users from committing such infringements by making infringement difficult. (36)

Given the role of websites such as TPB in the operation of peer-to-peer networks, there seems to me to be no question that blocking access to such a site would make it difficult or impossible for most users to find the works made available on such a network and therefore to download them in breach of copyright.

81. Secondly, the fact that websites other than TPB can fulfil the same role does not detract from the effectiveness of the measure applied for in the main proceedings, since similar measures may be applied for to block access to those sites also. Acceptance of the reasoning of the defendants in the main proceedings would amount to accepting that no measure to prevent infringement of the law can be effective because new infringements will always be committed by other persons.

82. Thirdly and lastly, it should be noted that a definitely more effective measure — the blocking of all internet traffic involving works illegally shared on peer-to-peer networks — has already been the subject of an assessment by the Court. The Court rejected such a measure, holding that it was too restrictive for internet service providers and intruded too far upon the rights of users. (37)

83. If a measure that is less restrictive for service providers and constitutes less of an intrusion upon the rights of users were now rejected on the ground that it is not sufficiently effective, internet service providers would ultimately be released de facto from their duty to cooperate in the fight against copyright infringement. The derogations in respect of the liability of intermediary providers contained in Directive 2000/31 constitute one of the factors in the balance between the different interests at stake, introduced by that directive according to recital 41 thereof. The counterpart of those derogations, in the context of that balance, is not only the absence of any complicity of intermediary providers in infringements of the law, but also their cooperation in order to avoid or prevent such infringements. They cannot escape that obligation by claiming, according to the circumstances, that the measures are either over-restrictive or ineffective.

84. Accordingly, I suggest to the Court, if the answer to the first question referred is negative, that the answer to the second question referred should be that Article 8(3) of Directive 2001/29 must be interpreted as permitting an injunction to be obtained against an intermediary ordering it to block access for its users to an indexing site of a peer-to-peer network, if the operator of that site can, under national law, be held liable for copyright infringements committed by users of that network, provided that measure is proportionate to the significance and seriousness of the copyright infringements committed, which is a matter for the national court to determine.

Conclusion

85. In the light of all the foregoing, I suggest that the Court should answer as follows the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden (Netherlands Supreme Court):

The fact that the operator of a website makes it possible, by indexing and providing a search engine, to find files containing works protected by copyright which are offered for sharing on a peer-to-peer network constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation certain aspects of copyright and related rights in the information society, if that operator was aware of the fact that a work was made available on the network without the consent of the copyright holders and did not take action in order to make access to that work impossible.

1 Original language: French.

2 The Advocate General provides a French translation of the English text.

3 Judgment of the Federal Court of Australia of 4 February 2010 in *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24, paragraph 70. That passage was also cited by Mr van Peurse, Advocate General at the Hoge Raad der Nederlanden (Netherlands Supreme Court) in the main proceedings.

4 Judgment of 13 February 2014, C-466/12, EU:C:2014:76.

5 Judgment of 8 September 2016, C-160/15, EU:C:2016:644.

6 OJ 2000 L 178, p. 1.

7 OJ 2001 L 167, p. 10.

8 OJ 2004 L 157, p. 45.

9 Namely Article 26d of the Auteurswet (Netherlands Law on copyright) and Article 15 of the Wet op de naburige rechten (Law on related rights).

10 For example, TPB was set up by members of Piratbyrå, a Swedish anti-copyright organisation.

11 Judgment of the United States Court of Appeals for the Ninth Circuit of 12 February 2001, *A&M Records, Inc. v. Napster, Inc.* (239 F.3d 1004).

12 Wikipedia may be cited as a primary reference source, which is very relevant as regards the internet (entries on ‘peer-to-peer’, ‘BitTorrent’, ‘The Pirate Bay’). See also the Australian court’s judgment cited in footnote 3, paragraphs 43 to 78, and L. Edwards, *The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, a document prepared for the World Intellectual Property Organisation, available on its website under reference WIPO-ISOC/GE/11/REF/01/EDWARDS.

13 Accordingly, since the order for reference was lodged in the present case, TPB’s website has added, besides the possibility of downloading files, an option for streaming works shared on the peer-to-peer network by means of new software. That feature was announced at the hearing by the representative of Stichting Brein.

14 Berlin Act (1908).

15 The current wording of Article 11bis of the Berne Convention results from the Brussels Act of 26 June 1948.

16 Directive of the European Parliament and of the Council of 10 March 2010 on the coordination of

certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1). It is communication that is linear in time, that is to say, which can only be received at the time of the actual broadcast (see Article 1(1)(e) of Directive 2010/13).

17 See, *inter alia*, von Lewinski, S., Walter, M., *European Copyright Law. A Commentary*, Oxford University Press 2010, pp 973 to 980.

18 Treaty approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

19 See, most recently, judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 32 and the case-law cited).

20 Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 35).

21 See, to that effect, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 19).

22 See, to that effect, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 22).

23 See judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 24 to 27).

24 Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 43).

25 Judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 39).

26 See *inter alia* judgments of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, EU:C:2014:76, paragraph 24), and of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraphs 37 and 42).

27 That is also clear, implicitly, from paragraph 43 of the judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644).

28 See also, on this subject, points 26 and 27 of the present Opinion.

29 That is the case, according to the information contained in the file, of the TPB site in the main proceedings.

30 Judgment of 8 September 2016 (C-160/15, EU:C:2016:644, paragraph 51).

31 Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 35 and the case-law cited).

32 Judgment of 2 March 2014 (C-314/12, EU:C:2014:192).

33 Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 45 and 46 and the case-law cited).

34 Judgment of 27 March 2014 (C-314/12, EU:C:2014:192, paragraphs 46 to 63).

35 Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 64).

36 Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 61 to 63). According to the Court, even a measure which does not directly prevent copyright infringements, but merely requires users to identify themselves in order to obtain internet access, meets those criteria (judgment of 15 September 2016, *Mc Fadden* (C-484/14, EU:C:2016:689, paragraphs 95 and 96)).

37 Judgment of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraphs 38 to 52).