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## EU update



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### ABSTRACT

#### Keywords:

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This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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## 1. Copyright

### 1.1. Developments regarding the case of *Brein vs. The Pirate Bay*

Teun Burgers, Associate, DLA Piper Amsterdam

On 27 October 2016 the European Court of Justice (“ECJ”) heard the case of BREIN demanding Dutch internet service providers Ziggo and XS4ALL (the “ISPs”) to block access to The Pirate Bay (“TPB”) website. The Dutch Supreme Court requested the ECJ to provide a preliminary ruling in order for the Dutch Supreme Court to render a verdict.

#### 1.1.1. The parties involved

BREIN is a Dutch foundation aimed to safeguard the intellectual property right interests of authors, artists, publishers, producers and distributors of music, film, games, interactive software and books.

The ISP’s provide their customers with access to the internet.

TPB is a website on which a so-called BitTorrent index is published. BitTorrent is a peer-to-peer technology, which enables

users to download data in miniscule fragments from a multitude of sources (other BitTorrent users). Downloaded data is automatically re-assembled to the complete image, film, music or software program. By downloading fragments of data, a BitTorrent user automatically shares data fragments with the BitTorrent community. As such, TPB does not host the actual data but guides BitTorrent users to the data sources by offering a BitTorrent index. A (large) part of this BitTorrent index refers to copyright protected works for which the right holders generally did not grant rights to TPB and/or BitTorrent users to make public and/or copy the works.

#### 1.1.2. Brief history of the case

In 2010, BREIN initiated website-blocking actions against ISP Ziggo (later joined by XS4ALL as co-defendant). BREIN requested the Dutch Hague court to oblige the ISP’s to block the access to TPB on the grounds that TPB infringes copyrights by offering access to a BitTorrent index.

BREIN’s arguments for a blockade of TPB by the ISP’s are based on (the Dutch law implementation of) the Enforcement Directive<sup>1</sup> and the Copyright Directive.<sup>2</sup>

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<sup>1</sup> EU Directive 2004/48 on the enforcement of intellectual property rights.

Article 11 of the Enforcement Directive reads as follows:

“( . . . ) 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.”

Article 8 subsection 3 of the Copyright Directive reads as follows:

“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.”

BREIN emphasizes that the ECJ interpretation of ‘intermediate’ in ECJ case law extends to the internet service providers:

“Accordingly, given that the internet service provider is an inevitable actor in any transmission of an infringement over the internet between one of its customers and a third party, since, in granting access to the network, it makes that transmission possible ( . . . ), it must be held that an internet service provider, such as that at issue in the main proceedings, which allows its customers to access protected subject-matter made available to the public on the internet by a third party is an intermediary whose services are used to infringe a copyright or related right within the meaning of Article 8(3) of Directive 2001/29”.<sup>3</sup>

The ISP’s rely on ECJ case law stating that a blockade would fail effectiveness and proportionality measures<sup>4</sup> and would be an unjustified breach of their freedom to conduct their business contrary to the EU Charter.

In first instance, the court ruled in favor of BREIN obliging the internet access providers to block access to TPB.<sup>5</sup> The ISP’s appealed and in 2014 the Dutch Court of Appeals ruled in favor of the ISPs stating that, in short, the blockade was easily circumvented and ineffective and therefore in breach of the proportionality principle in respect of the internet access providers freedom to conduct their business.<sup>6</sup> Consequently, BREIN initiated Supreme Court proceedings.

### 1.1.3. Supreme Court proceedings

In the Supreme Court proceedings the Dutch Supreme Court looked into the concept of ‘communicating works to the public’ and the interpretation of ‘intermediary’. The Dutch Supreme Court raised the question (i) if TPB was strictly speaking ‘communicating works to the public’ as TPB does not host data themselves and, (ii) if TPB is not ‘communicating works to the public’

if an intermediary could nevertheless be obliged to block access to TPB as it facilitates infringing acts of third parties.

The Dutch Supreme Court requested the ECJ to provide a preliminary ruling in order to render a verdict. The questions referred to the ECJ are as follows:

1. “is there a communication to the public within the meaning of Article 3(1) of the Copyright Directive by the operator of a website, if no protected works are available on that website, but a system exist ( . . . ) 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?

If the answer to question 1 is negative:

2. do Article 8(3) of the Copyright Directive and Article 11 of the Enforcement Directive offer any scope for obtaining an injunction against an intermediary as referred to in those provisions, if that intermediary facilitates the infringing acts of third parties in the way referred to in Question 1?”

The ECJ heard the parties involved on 27 October 2016. The advocate general is expected to deliver its opinion on 19 January 2017. An ECJ decision generally follows three months thereafter.

While awaiting the ECJ decision BREIN might take confidence from the fact that in another recent ECJ case of Dutch origin, *Playboy vs. GeenStijl*,<sup>7</sup> the ECJ ruled that:

“Where it is established that ( . . . ) a person knew or ought to have known that the hyperlink he posted provides access to a work illegally published, for example owing to the fact that he was notified thereof by the copyright holders, the provision of that link constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29/EC. When the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work which was illegally placed on the internet constitutes a ‘communication to the public’ within the meaning of Article 3(1) of Directive 2001/29.”

The answers of the ECJ to these questions may affect other preliminary references before the ECJ that relate to interference in business freedom contrary to the EU Charter.<sup>8</sup>

<sup>2</sup> EU Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>3</sup> ECJ case C-314/12 – UPC Telekabel Wien.

<sup>4</sup> ECJ case C-324/09 – L’oreal/eBay.

<sup>5</sup> Court of ‘s-Gravenhage, 11 January 2012, ECLI:NL:RBSGR:2012:BV0549.

<sup>6</sup> Court of The Hague, 28 January 2014, ECLI:NL:GHDHA:2014:88.

<sup>7</sup> ECJ case C-160/15 – Geenstijl/Playboy.

<sup>8</sup> ECJ case C-526/15 – Uber/Belgium, ECJ case C-547/14 – Philips Morris Brands, ECJ case C-484/14 – McFadden, ECJ case C-134/15 – Lidl and ECJ case C-157/14 – Neptune.

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