

CJEU reaffirms that knowledge and intention are essential components of an act of communication to the public – 26 June 2017

EDiMA welcomes the conclusion of the CJEU ruling in <u>Case C-610/15</u> on the Pirate Bay (TPB), which allows the national court to take aim at operators which actively promote piracy. While measures to fight piracy should be effective and proportionate, EDiMA and its members oppose all forms of piracy. Our members are committed to doing their share to fight piracy and to offer consumers legal, accessible and compelling alternatives to piracy.

The Court provides a welcome reminder that not all platforms are equivalent to the Pirate Bay, nor should they be automatically subject to immediate liability for their users' activities. Knowledge of the illegal nature of the content, as well as intent and promoting illegal activities, are essential to establishing whether a service is contributing to an act of communication to the public. Without these caveats, any service where a user has shared - in many cases, unwittingly - a link or content which partly infringes copyright could be the target of a site blocking injunction.

Yet in the context of Article 13 of the copyright proposal, the importance of knowledge and intent for establishing a communication to the public have all but been lost. We call for lawmakers to consider the entirety of the Court's reasoning in the context of Article 13.

The Decision in Case C-610/15

The CJEU (para. 45) hinges on the finding that TPB operators:

- were informed and aware that their platform allowed users to access works without the consent of rightholders;
- expressly exposed their goal, on public forums and blogs, to give access to works without the consent of rightholders;
- encouraged their users to copy works without the consent of rightholders;

In other words, this demonstrates to the Court the requisite knowledge and intent necessary to find that TPB is engaging in an act of communication to the public.

EDiMA's members condemn practices such as the promotion of piracy. Overtly promoting piracy on a platform is one of the circumstances that the Court takes into account to establish that a service contributes to an infringement of EU copyright law (contributory liability).

Yet we must also acknowledge that the timing of this ruling is significant when considered in light of ongoing institutional discussions on Article 13 of the proposed Directive on Copyright in the Digital Single Market (Copyright Directive), which would mandate ex ante "stay down" measures, through the use of content filtering technologies, to police the sharing of content online, including via hyperlinks.

How Does It Relate to Article 13 of the Copyright Directive?

According to the Commission's proposal (Recital 38) for a Copyright Directive, a communication to the public would take place when an information society service provider (ISSP) stores and provides access to large amounts of content. It omits to mention that in such cases, knowledge of the illegal nature of the content (or of the content linked to) is critical, and ignores circumstances such as intent. Instead, it removes knowledge of the illegal nature of the content as a cornerstone of the e-commerce Directive. Services that are "active" can not avail of the limited liability exemption provided for in the e-Commerce Directive, irrespective of whether they have knowledge.



The CJEU's ruling on TPB effectively demonstrates that Article 13 of the proposed Copyright Directive cannot be reconciled with the Court's jurisprudence because it does not incorporate the crucial elements of the CJEU's reasoning: knowledge and intention.

The Commission's proposal unfortunately does not take account of the difference between a service which openly promotes piracy like TPB and other UGC platforms which act expeditiously to remove copyright infringing content when they are made aware of any illegality, in accordance with the e-Commerce Directive. In Case C-610/15 the CJEU, through astute jurisprudence, was able to separate these two extremes - and it did so without having to undermine the limited liability regime of the e-commerce Directive.

By failing to incorporate the concepts of knowledge and intent, Recital 38 and Article 13 of the Commission's proposed Copyright Directive will distort the legislative framework that underpinned this ruling. It will place ISSPs in a position where the mere storing and providing access to content will constitute an act of communication to the public regardless of whether the operator is aware of any illegality behind a hyperlink.

Those who argue that are Recital 38 and Article 13 are codifying the case law of the course are carelessly misrepresenting attempts to codify a balanced and reasoned jurisprudence of the CJEU.