**CJEU reaffirms that knowledge and intention are essential components of an act of communication to the public – 22 June 2017**

EDiMA welcomes the conclusion of the CJEU ruling in [Case C-610/15](http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d502e24a65a36e4da39a12cdaf33fb1570.e34KaxiLc3eQc40LaxqMbN4PaxqLe0?text=&docid=191707&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=796771) on the Pirate Bay (TPB), which allows the national court to take aim at operators which actively promotes piracy. While measures to fight piracy should be effective and proportionate, EDiMA and its members oppose all forms of piracy. We are committed to doing our share and to offer consumers legal, accessible and compelling alternatives to piracy.

The Court also 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***

In reaching its decision the CJEU took into consideration the fact that TPB operators were informed that its platform makes available to users and manage, provides access to works published without rightsholders’ authorisation, and that these same operators expressly display their purpose - on blogs and forums - to make protected works available to the users and encourage said users to make copies of those works (Para. 45) - thereby demonstrating the requisite knowledge and intent necessary to engage in an act of communication to the public.

Overtly promoting piracy on a platform is an infringement of EU copyright law and EDiMA’s members welcome strong enforcement against illicit actors in the online ecosystem. 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 takes place when an information society service provider (ISSP) stores and provides access to large amounts of content. The obligations outlined in Article 13 are then triggered when said ISSP plays an active role and therefore cannot avail of the limited liability exemption provided for in the e-Commerce Directive. **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 make any reference to the limited liability regime. It was possible to determine that TPB was aware of the infringing nature of its operations, and that it actively promoted said operations in order to make a profit, thereby automatically excluding it from any safe harbour exceptions.

By failing to incorporate the concepts of knowledge and intent, Recital 38 and Article 13 of the Commission’s proposed Copyright Directive will distort 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 the hyperlink. It is a poor and careless attempt to codify the balanced, well-reasoned jurisprudence of the CJEU.