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AG Szpunar in *Stichting Brein v Ziggo*: An Indirect Harmonisation of Indirect Liability

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On 8 February Advocate General Szpunar handed down his [Opinion](#) on *Stichting Brein v Ziggo*. The case is significant, as it represents the first time that the liability of an internet intermediary for copyright infringement will be considered by the CJEU. To date, all decisions handed down by that court on intermediary liability have instead concentrated on the related question of injunctions against intermediaries whose services are used by third parties to infringe.

Questions Referred

The case finds its origins in the Netherlands, where [Stichting Brein](#), a Dutch anti-piracy organisation, applied for an injunctive order against internet access providers Ziggo and XS4ALL that would require them to block access for their customers to the peer-to-peer file-sharing website The Pirate Bay (TPB).

That application was [upheld at first instance](#), but [dismissed on appeal](#), on the grounds that, first, it is the customers of Ziggo and XS4ALL, and not TPB itself, who are the originators of the copyright infringements and, secondly, that the blocking sought would not be proportionate to the aim pursued, i.e. the effective protection of copyright.

The case eventually made it before the Hoge Raad, the Dutch Supreme Court, which [decided to submit](#) two questions to the CJEU. Essentially, these ask the following:

1. Does TPB, by providing a system through which metadata on protected works that are present on its users' computers is indexed and categorised, thus enabling those users to trace, upload and download the works, engage in a communication to the public of those works for the purposes of EU copyright law?
2. If the answer to Question 1 is negative, may an injunction nevertheless be issued against Ziggo and XS4ALL, requiring them to block access for their customers to TPB?

It should be noted from the outset that these two questions are seen by the Dutch court as interconnected. The Hoge Raad is essentially querying whether TPB must be an infringer before access to it may be blocked.

Is The Pirate Bay Communicating Works to the Public?

The AG began his analysis with a brief overview of the right of communication to the public. He noted that this has been harmonised in the EU by Art. 3(1) of the InfoSoc Directive (2001/29). He further observed that, according to the case law of the CJEU, for a communication to the public to occur, two cumulative elements must exist: an 'act of communication' and the presence of a 'public' (para. [35]-[36]).

With regard to the first element, the AG explained that the 'essential role' played by the person engaging in the examined act and the 'deliberate nature' of their intervention are relevant. 'That player', he observed, 'makes an act of communication when it intervenes, in full knowledge of the consequences of its action.' (see para. 37).

With regard to the second element, a 'public', the AG noted that this requires an indeterminate, but fairly large number of potential recipients. It is also necessary to show either that the work was made available by the alleged infringer using technical means different from those employed in any previous communications made with the right-holder's permission or that the relevant public is a 'new' one, i.e. not a public taken into account by the copyright holder when they consented to previous communications (see para. 39-42).

Having thus laid out the theory underpinning the right of communication to the public, the AG then proceeded to apply it to the specific situation at issue. He concluded that there is no question that, where works are shared on a peer-to-peer network such as TPB, they are indeed being communicated to the public. As the AG noted, in such cases:

1. The works are being made available on the computers of the network's users, in such a way that other users can download them. As a result, an 'act of communication' is certainly taking place.
2. This communication reaches a 'public', given that the potential users of an open peer-to-peer network will comprise an indeterminate, but fairly large, number of people.
3. Finally, where the author of the work has not previously consented to that work being shared on a peer-to-peer network, not only are a different technical means being used to those previously employed by the right-holders, but the public reached will be a 'new' one.

Yet this analysis leaves unanswered the trickiest issue presented by cases of intermediary liability: although indubitably TPB is used for communications to the public of copyright-protected works, it does not follow that it is TPB that is the one performing those communications. Arguably, it is instead TPB's users that are engaging in those acts, with the website itself at best fulfilling the auxiliary role of an accessory (see para. 48). It is for this question that the AG reserves his most creative legal thinking.

In this regard, the AG first conceded that, in principle, TPB 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, but is only an intermediary that enables users to share the content on a peer-to-peer basis.

Nevertheless, according to the AG, this situation is dramatically changed where the operator has *knowledge* of the fact that acts of making available took place in breach of copyright using the peer-to-peer network and does not take action to render access to the work in question impossible. In such cases, the AG claims, the operator's conduct may be regarded as being intended to allow the continuation of the illegal making available of the work. It accordingly must be interpreted as an intentional action and thus one that opens it up to liability for the communication to the public of protected works. It is only where the operator is unaware that the work has been made available illegally or where, once it has been made aware of the illegality, it acts in good faith to rectify the matter, that a decisive role in the communication to the public of a given work cannot be attributed to it (see para. 51). In this way, the AG appears to render the performance of an act of copyright infringement - traditionally thought of as being a strict liability tort - dependent on the subjective element of the intermediary's intention to engage in it.

Can Ziggo and XS4ALL be Ordered to Block Access to TPB?

The analysis espoused by the AG would effortlessly lead to the conclusion that injunctions against internet access providers Ziggo and XS4ALL may be handed down by the Dutch courts ordering them to block access to TPB. Art. 8(3) of the InfoSoc Directive requires that Member States ensure that right-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or a related right. As Ziggo and XS4ALL are intermediaries, if it is concluded that TPB uses their services to perform communications to the public of copyright-protected work, it logically follows that Ziggo and XS4ALL can be ordered to take action to stop those infringements.

The Dutch Supreme Court however was doubtful as to whether this same reasoning could apply if TPB itself was not found to be committing copyright infringement (see para. 5.10 of [that decision](#)). The Hoge Raad contrasted the situation under consideration in this case with that addressed by the CJEU in its 2014 judgment in *Telekabel Wien*. That case also concerned a blocking injunction against an internet access provider. However, the blocking was of a website which streamed and made available for download protected material, i.e. a website which was itself communicating works to the public. If TPB were not to be found by the CJEU to be in a similar position, the Hoge Raad questioned whether it may be said to be a third party using the services of Ziggo and XS4ALL to infringe and, therefore, whether an injunction blocking its website could be ordered against Ziggo and XS4ALL.

The AG appears to endorse these misgivings by stating that the circumstances envisaged in Art. 8(3) of the InfoSoc Directive presuppose the existence of a link between the subject of the injunction and the copyright infringement. As a result, according to the AG, injunctions against intermediaries may only require the blocking of websites that are themselves engaged in copyright infringement (para. 64). Yet, this does not necessarily exclude the possibility of blocking orders targeted at TPB.

Instead, the AG argues that injunctions under Art. 8(3) of the InfoSoc Directive should also be permissible against those who perform indirect, as well as direct, acts of infringement. The AG admits that the issue of indirect liability is an unharmonised one and thus dependant on the national law of the Member States. At the same time, he does make clear that, under EU law, TPB would at least not benefit from the protection of the hosting safe harbour of Art. 14 of the [E-Commerce Directive \(2000/31\)](#). The application of this provision requires that the host service provider either has no knowledge of the infringing content or takes expeditious action to remove it, a condition TPB cannot claim to have respected (para. 69).

Finally, the AG considered the issue under the lens of the EU's law of fundamental rights. For this purpose, he applied the same reasoning developed by the CJEU in *Telekabel Wien*. He accordingly concluded that three conditions must be met:

1. The provider's own interests must not be disproportionately affected.
2. The measures taken by the intermediary in compliance with the injunction must not unnecessarily prevent end-users from lawfully accessing available information.
3. The measures taken must prevent the unauthorised viewing of protected subject matter or at least make such viewing difficult and seriously deter end-users from engaging in it.

With regard to the first of these conditions, the AG noted that the provider must be able to choose the technical means it will use in order to comply with the injunction. It must also be discharged of its obligations where it can demonstrate that it has taken all reasonable measures to do this (para. 72).

With regard to the second condition, the AG stated that the rights of end-users may not be said to be disproportionately affected by a blocking order against a site such as TPB, through which over 90% of files shared are infringing and which has expressly refused to take action against those infringements. He clarified that the situation would be very different in the case of a website on which illegal content is only marginal and whose operators cooperate in good faith to remove that content (see para. 73-77).

Finally, with regard to the third condition, the AG stressed that the complete effectiveness of the measures envisioned for the enforcement of copyright is not necessary. Thus, neither the fact that infringements occur on other websites nor the fact that the blocking order may be easily circumvented are relevant (para. 79-80). According to the AG, to hold otherwise would be to disallow all anti-infringement measures, as new infringements will always be committed by others. Instead, given that in *Scarlet Extended* the CJEU rejected as incompatible with a fair balance between all relevant fundamental rights the imposition for the purposes of copyright enforcement of an obligation to filter all internet traffic passing through an internet access provider, it would now be necessary to find the milder option of a blocking injunction permissible (para. 82). Otherwise, he suggested, internet access providers would be released of any duty to cooperate in the fight against copyright infringement.

The AG linked this reasoning to the protection offered to internet access providers by

means of the E-Commerce Directive's safe harbour system. According to the AG, the counterpart of the safe harbours is an obligation for the providers that benefit from their protection to cooperate in the prevention or avoidance of copyright infringements committed using their services (para. 83).

Assessment of the Opinion

The AG's Opinion is a mixed bag with lots on offer that is sensible and lots that seems slightly off-kilter. A few issues are worth mentioning:

- Indirect Liability in EU Copyright Law

The AG's analysis of the concept of communication to the public and its connection to an element of intention/knowledge is the most likely to raise eyebrows. This draws clear inspiration from last September's CJEU decision in *GS Media*. There, the Court developed the notion of an 'intervention in full knowledge of the consequences of the action' (first introduced as an aspect of the first element of an 'act of communication' of the right of communication to the public in 2006 in *Rafael Hoteles*) into a determinative condition for liability. While *GS Media*, however, had appeared to limit the relevance of knowledge only to cases of hyperlinking, the AG is now suggesting a more expansive application that would refer to knowledge in all cases of a potential communication to the public.

If this were to be accepted by the Court, the result would be a judge-made harmonisation of indirect (i.e. accessory) copyright liability and one, moreover, that engulfs it within primary liability. Significantly, the two have been traditionally understood as separate areas of copyright law in most European national copyright systems: as opposed to primary liability, which concerns the rules that govern a person's liability for their own infringements, accessory liability concentrates on the liability of one person for the infringements of others. While the first is therefore an area of strict liability, the second requires some element of knowledge of the infringement on the part of the alleged infringer.

Under the AG's solution, the same legal provision would govern both, so the harmonisation of the former can also be applied to the latter, despite the complete lack of reference to it in the EU directives. What is particularly curious about the AG's reasoning is that he seems to both understand the difference between direct and indirect liability and accept that, under current EU law, the second is an issue for the Member States. Instead of respecting this straightforward arrangement however, the AG is explicit in his disregard for it. At the very beginning of his Opinion, he declares that accepting the lack of CJEU jurisdiction in the area would base the scope of the exclusive rights of copyright holders on fragmented national solutions. As this would undermine copyright harmonisation, he concludes that a solution must be sought in EU law.

The AG's analysis puts the cart before the horse. Certainly, there is a strong case that a fragmentation of the rules of indirect copyright liability is undesirable in the modern, globalised world: copyright infringement is rampant online and the services of intermediaries often employed by end-users to achieve it. Given that the internet

does not respect borders, the AG is probably right that it is also time for copyright law – at least in the EU – to move beyond them. Yet, procedures must be respected. It is the job of the Court of Justice of the European Union to [interpret EU law](#), not to invent it. That is a privilege reserved for the EU legislator and one of which – however regrettably – that legislator has to date refused to avail itself.

This being said, the AG does appear to want to distance himself at least a little from *GS Media*. In his opening paragraphs, he describes that case as ‘substantially different’ from the one under consideration here (see para. 4). He later seems to locate this difference in the degree of knowledge required of the operator before liability can be imposed. So, while in *GS Media*, the Court had found that constructive, as well as actual knowledge would be sufficient to trigger liability, such that a hyperlinker will be liable where she either knew or ought to have known that the hyperlink she posted provides access to a work illegally placed on the internet, in this case, the AG is adamant that the relevant knowledge may only be actual. Moreover, while in *GS Media* the CJEU concluded that a presumption of knowledge could exist where a hyperlink to an illegally-posted work is created in the pursuit of financial gain, the AG explicitly rejects that option for the case at issue here. According to the AG, this conclusion is necessary, as any other reasoning would result in the imposition of a general obligation on the operators of indexing sites for peer-to-peer networks to monitor the indexed content.

Within the context of the AG’s Opinion, this approach does make sense. Indeed, as opposed to hyperlinkers who themselves create the links they post, websites such as TPB merely provide infrastructure that is used by others to infringe. The greater distance between the provider and the infringement means that a different level of knowledge is appropriate before that provider can be found liable. Thus, instead of relying on the different legal classification of ‘direct’ and ‘indirect’ liability and devising different rules to govern each, the AG squeezes both under a single heading and then uses the prohibition on general monitoring (i.e. Article 15 of the E-Commerce Directive, supported by the law of fundamental rights through the case law of the CJEU) to achieve the same effect. At least a differentiation in the substance of the rules is thus salvaged, even while their structure is thrown into disarray.

- [Blocking Injunctions, the Copyright Directive and Fundamental Rights](#)

Why resort to this legal legerdemain? The urgency perceived by the AG for the harmonisation of indirect communication to the public appears to be derived from the way in which he – led by the Hoge Raad – connects it with the question of injunctions. In para. 64, the AG states that the ‘circumstances envisaged in Art. 8(3) of Directive 2001/29 presuppose the existence of a link between the subject of the injunction and the copyright infringement.’ Yet this presumption is questionable: there is nothing in the InfoSoc Directive to suggest that blocking injunctions should not in principle be possible regardless of whether or not the targeted website is itself an infringer. Instead, the question is one of proportionality and therefore best left to the law of fundamental rights.

Indeed, the wording of Art. 8(3) of the Copyright Directive is much more flexible than the AG suggests. It simply states that injunctions should be available against

intermediaries whose services are used by a third party to infringe a copyright or related right. It makes no suggestion that these injunctions should impact only those intermediaries or those third parties. Arguably therefore, in the present case, the relevant third parties could just as easily be the end-users of the services of TPB as TPB itself. Recital 59 of the Directive underlines EU law's hands-off attitude to the issue by explaining that the 'conditions and modalities relating to such injunctions should be left to the national law of the Member States'.

What does this mean for the AG's harmonising aspirations? The lackadaisical attitude of the Directive notwithstanding, limitations on the injunctions that can be imposed on the basis of Art. 8(3) of the Copyright Directive do exist in EU law. These however are not to be found in the directives, but in a different area: the law of fundamental rights. As Art. 51 of the Charter of Fundamental Rights of the EU states, Member States have an obligation to abide by the provisions of the Charter when interpreting and implementing EU law. It is on this basis that fundamental rights were first made relevant to intermediary liability law back in 2008 in *Case C-275/06, Promusicae* and it is fundamental rights which have since been relied upon by the CJEU to provide harmonised answers to questions on injunctions against intermediaries. With this in mind, a simpler solution would clearly be to locate the permissibility of blocking injunctions, as well as their harmonisation, where it has always been: directly within the fundamental rights analysis.

Through this lens, the questions asked by the AG and the Hoge Raad come into focus. Should injunctions be permissible against innocent intermediaries that order them to block the websites of other, potentially under national law, equally as innocent intermediaries? May one's website be blocked if others use it to infringe? The harmonised EU answer lies not in reading assumptions into the directives, but in the notion of a 'fair balance': if the imposition of a blocking injunction is in line with a fair balance between the fundamental rights of all stakeholders involved then it is acceptable. If not, it is not.

While the outcome of this approach would likely not be significantly different to that reached by the AG, the reasoning would be sounder. No ingenious judicial subterfuge is necessary to harmonise injunctions against intermediaries. The CJEU has been handing these questions for almost ten years now. The AG is crossing the river to get water.

- How to Reach a Fair Balance

Of course, the AG does eventually meander down to the law of fundamental rights. Yet, because he has missed its real relevance to the question asked, his balancing analysis leaves something to be desired - fundamental rights, to the AG, are an add-on, not the main event. His oddly demure approach is indicative of this. Curiously, although it is the language through which the CJEU has approached these issues, the AG seems disinclined to use the term 'fair balance'. Indeed, he avoids even identifying the relevant fundamental rights, preferring instead of talk about 'conditions' for the imposition of a blocking injunction. Although not in itself incorrect (the respect of all relevant fundamental rights is a condition for the imposition of a blocking injunction), this diffidence does seem to rob the analysis of some of its normative potency.

For the rest, the AG reflexively applies the balancing approach developed by the CJEU in *Telekabel*. This certainly offers a good starting point. But the differences the AG had so adroitly identified between the two cases are at this point unaccountably dropped. This suggests that it was perhaps the desire to apply the *Telekabel* balancing test wholesale that led the AG to attempt to solve the question of whether or not injunctions against TPB are permissible on the basis of the Directive. Yet, a more flexible approach to the balancing process might have allowed for the consideration of the interests of the target of the injunction in a more appropriate manner. In *Telekabel*, the fundamental rights of the target of the injunction were not taken into account. Arguably, in that case, because they were direct infringers, not much was lost by that decision. In the case at hand however, their insertion into the balancing process is much more pressing, as it would do away with the need to introduce assumptions about the inherent limits to Art. 8(3) of the Copyright Directive: the AG could have simply explained that the freedom of TPB to conduct their business, as protected by Art. 16 of the Charter, should carry some weight within the balancing process. In view of TPB's high infringement rates, the ultimate balancing result would probably not have been different, but the fundamental rights analysis would have been allowed to fulfil its real purpose.

In any case, a final problem with the AG's approach to fair balance lies in his heavy reliance on the idea something must be due on the part of internet access providers. In particular, instead of merely examining – as requested by the referring court – whether EU law permits the imposition of an injunction on such providers, he implies that it *requires* a sacrifice on their part. So, as noted above, he declares that, because expansive filtering was dismissed as incompatible with a fair balance in *Scarlet Extended*, blocking injunctions should now be accepted in this case. Certainly, previous case law has confirmed that blocking injunctions are acceptable under EU law. There is no obvious reason why that conclusion should be challenged here. But it is one that should be made to stand on its own. After all, it is entirely possible for the courts to be asked to consider the legality of a number of different enforcement measures all of which may be incompatible with EU law. There is no rule that suggests that at least one of them must be found to be lawful.

Along the same vein, the AG also appears to misunderstand the E-Commerce Directive's safe harbours. He suggests that the safe harbours are concessions made towards intermediaries that relieve them of liability that would otherwise burden them. This is not necessarily true. Instead, the objective of the safe harbours was a minimum harmonisation of EU law. It does not follow that, absent the safe harbours, internet intermediaries would always be liable under national law. If they are not, then no accommodation of their interests has been made that requires that they in return take special account of the interests of others. Instead, any obligation imposed upon them must be justified on the basis of substantive law. The mere existence of the safe harbours is not enough to wrangle concessions that cannot otherwise be justified out of internet access providers. The AG's fair balancing analysis needs some more work.

Conclusion

Ultimately, it is unarguable that the practical outcome reached by the AG in this Opinion on this case is not in itself objectionable. Under EU law, as interpreted by

previous CJEU case law, injunctions may in fact be imposed on internet access providers ordering them to block access to a website used by others for the purposes of copyright infringement. Yet the AG has chosen a particularly circuitous route to confirming this fact. More problematically, it is a harmonising route, i.e. one that should by rights be viewed as locked off to the CJEU until the EU legislator gives it the go-ahead.

The Court should for these reasons resist the temptation of following in the AG's footsteps. Instead, there is useful work to be done elsewhere: although the AG treats the process of achieving a 'fair balance' between conflicting fundamental rights in cases of injunctive orders against internet access providers as an established one, his inflexible application of factors developed for a different case reveals the need for further substantive elaboration. *Telekabel* provided the first, not last word on how to reach a 'fair balance' in this area. The CJEU should use *Ziggo* to flesh the process out further. General criteria capable of application to all injunction cases - if not all intermediary liability cases - would be the best outcome.

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