Kluwer Copyright Blog

Belgian court asks CJEU whether seeding is communicating to the public

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On 6 August 2019 the Ondernemingsrechtbank Antwerpen (the court) submitted a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) on a dispute between Mircom, a company registered under Cypriot law, and Telenet, a Belgian internet service provider whose users presumably shared copyright protected works via Bit-torrent.

This case presents another opportunity for the CJEU to rule on the application of the right of communication to the public (Art. 3 InfoSoc Directive) to the file-sharing of protected content through Bit-torrent technology, following the judgment in *Stichting Brein v Ziggo* ("The Pirate Bay").

Facts

The applicant is an undertaking retaining limited economic rights over pornographic films produced by US and Canadian companies. In particular, its activities consist of claiming damages from copyright infringers, part of which is then returned to producers and distributors. After discovering that users of Telenet's services had been sharing those films on a Bit-torrent peer-to-peer network, Mircom requested that the court order the disclosure of information identifying the allegedly infringing customers. Upon Telenet's objection, the court decided to stay proceedings and refer four questions to the CJEU:

1. Whether downloading and "seeding" on a peer-to-peer file sharing network constitutes an act of communication to the public, even where the seeded fragments of a file are individually useless, and whether a *de minimis* threshold and the automatic nature of seeding should be taken into account.
2. Whether rightsholders not exploiting their rights in protected works are entitled to the same protection under the Enforcement Directive (2004/38) as authors and licence holders who do, and, if answered in the affirmative, how their interests are prejudiced.
3. How to strike a balance between the conflicting fundamental rights at stake in light of the first two questions.
4. Whether Mircom's registration and systematisation of IP addresses fulfills the requirements of lawful processing under the GDPR.

This blogpost focuses exclusively on the **first question**, and in particular the act of seeding, due to its centrality to the case and its potential to impact the future of online peer-to-peer file sharing.

From the Pirate Bay to the swarm's torrent

When the CJEU ruled in *The Pirate Bay* that the managerial activities of the operators of a peer-to-peer network that allowed the sharing of infringing material amounted to an act of communication to the public, no specific attention was paid to the acts of its users. In fact, the Court observed that a communication to the public must be taking place merely because works could be accessed and downloaded by any peer, disregarding the intermediate technical stages. To better grasp why this assumption is controversial, a quick recap of basic Bit-torrent functionalities is useful.

A Bit-torrent protocol relies on a network of users ("the swarm") which connect with each other through a tracking server to share files in a decentralised manner, meaning that each downloader ("leecher") also becomes an uploader ("seeder") as soon as it acquires the downloaded content. This is made possible by the segmentation of the originally seeded file into small fragments that seeders keep sharing, without requiring a link between the original seeder and new leechers. Such segments are useless when individually downloaded, and can only lead to fragmented and qualitatively bad file previews after a certain download percentage has been reached.

In the present preliminary reference, the spotlight is put directly on the swarm, inviting the CJEU to take a step back from the *The Pirate Bay* case, and dip its toes into the (bit)torrent.

Who seeds wind, shall harvest storm

First, the CJEU will have to establish what is the subject matter actually being communicated. Should the answer be the individual unusable segments, it will have to dust off its case law defining protectable subject matter. Hence, provided these segments fulfill the conditions of being original in the sense of being the "author's own intellectual creation" (C-5/08 Infopaq and progeny), and "identifiable with sufficient precision and objectivity" (C-310/17 Levola Hengelo), the fact that the fragmented files are unusable might not be of relevance.

The second, more interesting question relates to the application of a *de minimis* threshold to the segments for a communication to the public to take place. The InfoSoc Directive remains silent on whether the right to communicate to the public encompasses the making available of part of the work, in contrast to the right of reproduction (Art. 2 InfoSoc Directive), which explicitly recognises such a possibility. Following AG Szpunar's opinion in The Pirate Bay case, the CJEU could dodge this issue by claiming that it is not the works being cut up and downloaded in pieces, as these are uploaded and sent to users in their entirety, but rather the files containing them. However, if it were to decide not to ignore the technicalities of the process there is still room to argue for the application of the right, considering that Recital 23 of the InfoSoc Directive demands that the right be "understood in a broad sense, covering all communication to the public". The CJEU will then have to take into account not only quantitative factors (what download percentage will suffice) but also qualitative ones, namely what minimum quality standards the file preview obtained during the downloading should guarantee.

Finally, the Belgian court indirectly points out that not all peers may be willingly seeding during and after the process of downloading, considering that this is an automatic function which can only be actively switched off in their personal network settings. In addition, although swarms encourage their members to attain a 1:1 ratio between seeding and leeching, it is still likely that some users are unaware of the protocol's functionalities. It remains to be seen how the CJEU will factor this into its assessment, in particular against the mental elements introduced in *GS Media* relating to the platform's knowledge of infringing content. As explained in a previous post, with *The Pirate Bay* the CJEU has in fact departed from the *GS Media* presumption of knowledge for platforms who operate for commercial ends, and one should not rule out that in the event of direct infringements it might disregard it for the purpose of the communication to the public test.

Conclusion

If the management of a peer-to-peer network where works are shared without authorisation constitutes a violation of the right of communication to the public, it would seem logical to also hold the allegedly direct infringers responsible. However, as shown in the case at hand, there might still be a few hurdles to overcome before this could be concluded in relation to the Bit-torrent swarm. The main issue remains one of law and technology and the power balance between them: will the CJEU paint with a broad brush and tackle the sharing process as a whole or will it try to adapt the evolving communication to the public test to its individual technical aspects?

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