

Kluwer Copyright Blog

Stichting Brein versus Safe Harbour: The Ongoing Battle Between Intermediaries and Right Holders

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On 12 June 2019, the High Court of the Netherlands referred four questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The questions concern an ongoing battle



between Stichting Brein, a Dutch anti-piracy organisation representing movie and music industries, and NSE (News-Service.com), an online platform for Usenet services. Stichting Brein, concerned with the distribution and accessibility of infringing material on Usenet providers, claims that NSE is making a communication to the public according to Article 3(1) of the InfoSoc Directive and should therefore be held directly liable for copyright infringement. NSE, on the other hand, claims it makes no such communication to the public and instead benefits from the hosting safe harbour in Article 14(1) of the E-Commerce Directive.

The road to the CJEU

In 2011, the District Court of Amsterdam ruled in favour of Stichting Brein on the grounds that the material available on NSE was predominantly copyright protected material and NSE had failed to remove the infringing content. According to the Court, NSE was aware of the existence of the infringing content and did not take adequate steps to remove it. In fact, as the servers were permanently available and updated with infringing content, infringement could be seen as a structural aspect of the service. As a result, NSE could not invoke the safe harbour protection from Article 14 E-Commerce Directive. NSE claimed there was no technical means by which it was

possible to automatically remove such content, which led to them taking down the Usenet service altogether.

NSE appealed, and in 2016 the Court of Appeal [ruled](#) that the safe harbour provision was in fact applicable. In this ruling, NSE was treated similarly to a hosting provider, and held not liable for the content uploaded by its users. The Court of Appeal found that even though there was a communication to the public, Article 12 E-Commerce Directive was applicable as well as Article 14. Referring to the judgment in 2011, the Court of Appeal stated that the filtering obligation imposed on NSE was contrary to EU law. Nevertheless, the Court of Appeal still required NSE to establish an effective notice-and-takedown procedure, as required by Article 14 E-Commerce Directive. In order to be in line with the ban on general monitoring in Article 15 E-Commerce Directive, the user, and not NSE, must take the initiative to start the procedure.

Stichting Brein appealed this ruling to the High Court of the Netherlands. In his opinion for this Court, A-G Van Peursesem [agreed](#) with the District Court of Amsterdam and in favour of Stichting Brein, claiming that the intent of the European legislator was to limit the hosting safe harbour so as to encourage a high level of protection for right holders. To clarify the scope of intermediary liability, the High Court referred four preliminary questions to the CJEU, which can be summarized as follows:

1. Has NSE made a communication to the public according to Article 3(1) of the InfoSoc Directive?
2. If so, is NSE liable for this act, or are its activities covered by the safe harbour in Article 14 of the E-commerce Directive?
3. If the answer to question 1 is no, does NSE have an active nature that would make it liable for copyright infringement?
4. If NSE is protected from liability by the safe harbour, is another injunction available to rights holders?

The questions draw upon many areas of controversy in current copyright debates. Two aspects are addressed in the following section. First, the broad interpretation of the right of communication to the public. Second, the extent to which the hosting safe harbour provision applies to providers such as Usenet.

Will the Court reaffirm the broad notion of a communication to the public?

Following a long line of cases that features *Filmspeler* (Case C?527/15) and *The Pirate Bay* (Case C-610/15), the CJEU has established a broad notion of communication to the public under Article 3(1) of the InfoSoc Directive. In these cases, the CJEU ruled that a multimedia player as well as a peer-to-peer platform are capable of making a communication to the public, and can therefore be held directly liable for copyright infringement. According to the CJEU, this broad interpretation safeguards the high level of protection for right holders, the main principle of the copyright regime. Furthermore, in *The Pirate Bay*, the CJEU stated that rather than *actual knowledge*, *constructive knowledge* of unauthorized content made available by users is sufficient to engender direct liability. For the CJEU, such knowledge is achieved when the provider has the authority to organise and provide user content. The result is that a larger number of intermediaries may be susceptible to direct liability.

If the CJEU follows this reasoning in the present case, it may consider that Usenet platforms can still perform a communication to the public because they have constructive knowledge of the

infringing content. Due to the vast technological similarities between Usenet platforms and peer-to-peer platforms, the application of this reasoning from *The Pirate Bay* judgment may seem logical. However, as the A-G of the High Court of the Netherlands noted, while *Filmspeler* and *The Pirate Bay* encourage a broad interpretation of the notion of communication to the public in Article 3(1) of the InfoSoc Directive, the CJEU works on a case-by-case approach that may lead to a different outcome. The question therefore remains whether the CJEU will *extend* its previous broad interpretation to Usenet platforms, under the guise of further promoting a high level of protection for right holders, or whether it will *reject* that extension, thereby imposing or clarifying limits on the scope of Article 3(1) of the InfoSoc Directive.

Does the hosting safe harbour apply?

Inextricably linked to the previous question is whether the hosting safe harbour applies to Usenet platforms. The safe harbour regime has been put in place by the legislator in order to establish a liability regime suitable for the nature of platforms and providers in a digitally complex environment. However, given the provision's already strict requirements for applicability, further restrictions can work contrary to the intention of the European legislator. It may give rise to a passivity paradox for example, by suggesting the notice-and-take-down regime is insufficient for platforms to benefit from the safe harbour. This creates further tensions with the ban on general monitoring in Article 15 of the E-commerce Directive, making it difficult to make a clear distinction between intermediaries that are liable and those that are not.

The situation is further complicated by the new liability regime for online content-sharing service providers (OCSSPs) in Article 17 DSM Directive, which expressly excludes the application of the hosting safe harbour in the E-Commerce Directive to those platforms (see this [post by Miquel Peguera](#) for further details).

The case under analysis here predates the DSM Directive. It will therefore be interesting to see whether the Court explicitly or implicitly addresses the relationship between the E-commerce and DSM Directives, and whether it will clarify the scope of intermediary liability under the pre-DSM *acquis*. Nonetheless, it is safe to say that if the CJEU further extends the scope of Article 3 InfoSoc Directive and contracts the scope of the safe harbour in Article 14 E-Commerce Directive, rights holders and their representatives will have a greater ability to pressure non-OCSSP providers in the future.

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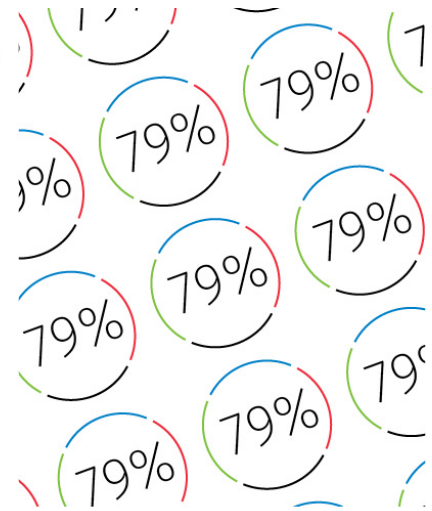
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