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OPINION OF ADVOCATE GENERAL
SZPUNAR
Delivered on 8 February 2017 ¹

Case C-610/15

Stichting Brein
v
Ziggo BV,
XS4ALL Internet BV

(Reference for a preliminary ruling from the Hoge Raad der Nederlanden
(Netherlands Supreme Court))

(Copyright and related rights — Directive 2001/29/EC — Article 3(1) —
Communication to the public — Concept — Indexing site allowing the sharing of
protected works without the authorisation of the rightholders — Article 8(3) —
Use by a third party of the services of an intermediary in order to infringe a
copyright — Injunction)

¹ – Original language: French.

Introduction

1. ‘... the file being shared in the swarm is the treasure, the BitTorrent client is the ship, the .torrent file is the treasure map, The Pirate Bay provides treasure maps free of charge and the tracker is the wise old man that needs to be consulted to understand the treasure map’.²

2. It is by this analogy, worthy of copyright protection, that the Australian judge, Justice Cowdroy explained how file-sharing in breach of copyright by means of the BitTorrent protocol works.³ The Court is called upon in the present case to identify the legal bases and the scope of any liability in respect of such breaches committed by ‘card providers’, that is to say, sites such as The Pirate Bay (‘TPB’). TPB is in fact one of the biggest and best-known sites for sharing files containing musical and cinematographic works. Files are shared free of charge and, in the case of the majority of those works, in breach of copyright.

3. The European Commission, whose opinion appears to me to be shared by the United Kingdom of Great Britain and Northern Ireland, contends that liability for sites of this type is a matter of copyright application, which can be resolved not at the level of EU law but under the domestic legal systems of the Member States. Such an approach would, however, mean that liability, and ultimately the scope of the copyright holders’ rights, would depend on the very divergent solutions adopted under the different national legal systems. That would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightholders within the single market. That is why the answer to the problems raised in the present case must, in my view, be sought rather in EU law.

4. I should also like to make clear from the outset that the problems raised in the present case are in my view substantially different from those in two recent cases concerning the right to communicate works to the public via the internet, namely *Svensson and Others*⁴ and *GS Media*.⁵ Those cases concerned the secondary communication of works already accessible on the internet by a person providing the online content himself, whereas the present case concerns original communication, made on a peer-to-peer network. I do not therefore think that the Court’s reasoning in those cases can be directly applied to the case in the main proceedings.

² – The Advocate General provides a French translation of the English text.

³ – Judgment of the Federal Court of Australia of 4 February 2010 in *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24, paragraph 70. That passage was also cited by Mr van Peurseem, Advocate General at the Hoge Raad der Nederlanden (Netherlands Supreme Court) in the main proceedings.

⁴ – Judgment of 13 February 2014, C-466/12, EU:C:2014:76.

⁵ – Judgment of 8 September 2016, C-160/15, EU:C:2016:644.

Legal context

5. Article 12 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), entitled 'Mere conduit',⁶ provides:

'1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted ...

...

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.'

6. Article 14 of that directive, entitled 'Hosting', provides:

'1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

...

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.'

7. Paragraph 1 of Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain

⁶ – OJ 2000 L 178, p. 1.

aspects of copyright and related rights in the information society,⁷ entitled ‘Right of communication to the public of works and right of making available to the public other subject-matter’ provides:

‘Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.’

8. Paragraph 3 of Article 8 of that directive, entitled ‘Sanctions and remedies’, reads:

‘Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.’

9. Paragraph 2 of Article 2 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, entitled ‘Scope’,⁸ provides:

‘This Directive shall be without prejudice to the specific provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably ... in Directive 2001/29/EC and, in particular, ... Article 8 thereof.’

10. Article 11 of that directive, entitled ‘Injunctions’, provides:

‘...Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.’

Facts, procedure and questions referred

11. The applicant in the main proceedings, Stichting Brein, is a foundation governed by Netherlands Law, whose main purpose is to combat the illegal exploitation of subject matter protected by copyright and related rights, and to protect in that area the interests of the holders of those rights.

12. The defendants in the main proceedings, Ziggo BV and XS4ALL Internet BV (‘XS4ALL’), are companies governed by Netherlands law whose activity consists, inter alia, in providing consumers with an internet service. According to

⁷ – OJ 2001 L 167, p. 10.

⁸ – OJ 2004 L 157, p. 45.

the information contained in Stichting Brein’s written observations, they are the two main internet service providers on the Netherlands market.

13. Stichting Brein has applied, under the provisions of Netherlands law transposing Article 8(3) of Directive 2001/29,⁹ for an order that Ziggo and XS4ALL block access by recipients of their services to the internet addresses of the website of TPB, an engine for peer-to-peer file-sharing. That application is based on the fact that it is by means of that file-sharing engine that recipients of the services of the defendants in the main proceedings, using those services, commit large-scale copyright infringements, by sharing files containing protected subject matter (mainly music and films) without the authorisation of the copyright holders.

14. That application, upheld at first instance, was dismissed on appeal, essentially on the grounds, first, that it is the recipients of the services of the defendants in the main proceedings, and not TPB, which are the originators of the copyright infringements and, secondly, that the blocking sought is not proportionate to the aim pursued, namely the effective protection of copyrights. Stichting Brein appealed on a point of law against the latter decision before the referring court.

15. It was in those circumstances that the Hoge Raad der Nederlanden (Netherlands Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is there a communication to the public within the meaning of Article 3(1) of Directive 2001/29 by the operator of a website, if no protected works are available on that website, but a system exists ... by means of which metadata on protected works which is present on the users’ computers is indexed and categorised for users, so that the users can trace and upload and download the protected works on the basis thereof?’

2. If the answer to Question 1 is negative:

Do Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48 offer any scope for obtaining an injunction against an intermediary as referred to in those provisions, if that intermediary facilitates the infringing acts of third parties in the way referred to in Question 1?’

16. The order for reference was received at the Court on 18 November 2015. Written observations were submitted by the parties in the main proceedings, the Spanish, Italian, Portuguese and United Kingdom Governments and by the Commission. The parties in the main proceedings, the Spanish and French

⁹ – Namely Article 26d of the Auteurswet (Netherlands Law on copyright) and Article 15 of the Wet op de naburige rechten (Law on related rights).

Governments and the Commission were represented at the hearing held on 27 October 2016.

Analysis

17. By its two questions referred for a preliminary ruling in the present case, the referring court raises in reality the matter of the liability of operators of indexing sites of peer-to-peer networks for copyright infringements committed in the context of the use of those networks. Can those operators themselves be regarded as being the originators of those infringements, which would mean they are directly liable (first question)? Or, even if they are not directly liable, can an order be made blocking access to their websites, which, as I shall explain below, requires a form of indirect liability (second question)?

18. I shall begin my analysis with a brief look at the way in which peer-to-peer networks operate and their role in the infringement of copyrights.

Preliminary remarks — peer-to-peer networks

19. Although the internet was designed as a network of computers operating independently, the most spectacular manifestation of the internet, the World Wide Web, operates according to a different model, namely a centralised architecture known as ‘client-server’. In that model, the content (usually a web page) is stored on a server and can be viewed by users by means of their computers, referred to as ‘clients’, and their client software (a web browser). It is easy to understand that such architecture of the World Wide Web makes it relatively easy to monitor the legality of content and to combat illegal content: it is sufficient to attach the server or get its administrator to remove the infringing content. It should also be noted that the legislation concerning information society services, mainly the internet, is particularly well-suited to that operating model, as it provides inter alia that intermediary providers are not liable for content but imposes on them certain obligations to cooperate in combating illegal content.

20. Peer-to-peer networks are organised according to a different principle. In that model, the computer of each user, that is to say each peer, is not only a client which receives information, but also a server which stores the information and makes it available to other peers. The network is therefore decentralised (no central servers) and has a ‘variable geometry’, since only connected peer-servers form the network at any given time (unlike a ‘traditional network’, in which servers are usually permanently connected and where only the clients connect and disconnect temporarily). A network configuration of this type offers many advantages, particularly as regards optimising the use of storage capacity and data transmission. Such a network is also, due to its decentralised architecture, more resistant to attacks and to intervention by the security forces or persons holding rights under a copyright. It is difficult inter alia to remove content from a peer-to-peer network, since it is on different servers belonging to different individuals in different countries.

21. Peer-to-peer networks lend themselves to different uses, such as online messaging, telephone calls, software distribution or even military applications. However, the most widespread use is for file-sharing.

22. Are these only files containing illegal data, such as works shared in breach of copyright? That is not the case. Peer-to-peer networks may be used for sharing files of different types, inter alia files containing data which are not copyright-protected, works made available with the consent of rightholders, even by the authors themselves, works for which protection (in any event as regards substantive rights) has already expired or works available under a free licence.

23. However, according to the data submitted by Stichting Brein and not challenged in the main proceedings, if I understand correctly, 90% to 95% of the files shared on the TPB network contain protected works distributed without the consent of the rightholders. This figure would seem to hold true for most of the popular peer-to-peer networks. The reason for this is that legal content has its own distribution channels, whether professional or amateur (traditional websites, online shops, social networks, etc.). Peer-to-peer networks on the other hand are frequently used in order to share content which would otherwise not be available free of charge to the public. Administrators of those networks often make no effort to conceal that purpose, some of those networks having been set up with the stated objective of circumventing copyrights, regarded as being unfair.¹⁰ For that reason, peer-to-peer networks have, since they first appeared, been the subject of the anti-pirating campaign, waged especially in the United States, where these networks have very quickly grown in popularity. Napster was the first major peer-to-peer network to be shut down for copyright infringements.¹¹

24. After Napster, new generations of peer-to-peer networks appeared. Currently, the most popular, at any rate on the European market, are networks based on the BitTorrent protocol. That technology makes it possible, by means of software freely accessible online (so-called ‘BitTorrent client’), to download the same file, divided into small pieces, from several peer computers. As a result of that fragmentation of the downloaded file, the computers of the peers originating the download (called ‘seeders’), operating as servers, and their internet connections, are not saturated, which allows for fast downloading of relatively large files. Given that the number of peers having and sharing the same file is crucial for the speed of downloading, in BitTorrent technology each piece of the downloaded file is simultaneously offered for downloading to other peers looking for the same file (‘leechers’). In other words, every client computer which downloads the file automatically becomes a server, and then makes it available to other peers.

¹⁰ – For example, TPB was set up by members of Piratbyrån, a Swedish anti-copyright organisation.

¹¹ – Judgment of the United States Court of Appeals for the Ninth Circuit of 12 February 2001, *A&M Records, Inc. v. Napster, Inc.* (239 F.3d 1004).

25. I shall not elaborate further on the technical operation of peer-to-peer networks, detailed descriptions of which are readily available.¹² As in all the cases relating to information technology, technical development far outstrips legislative or judicial procedures, at the risk of rendering obsolete, even before they have been adopted, legal solutions based on a given technological status quo.¹³ What, in my view, one should look for in order to resolve a case like that in the main proceedings, is the legal substance of certain acts, irrespective of the technical background to those acts. What is important from that point of view is the role played by websites such as TPB in file-sharing on peer-to-peer networks.

26. That role is crucial. The use of any peer-to-peer network depends on the possibility of finding peers available to share the desired file. The information, whether it is technically in the form of torrent files, ‘magnet links’ or some other form, is found on websites such as TPB. Those sites provide not only a search engine but also, as in the case of TPB, indexes of the works contained in those files, classified in various categories, for example, ‘100 best’ or ‘the latest’. So it is not even necessary to look for a particular work, it is sufficient to choose from those on offer, as in the catalogue of a library (or rather an audio or video collection, since it is mainly music and films). Those sites also often provide additional information, inter alia on the estimated download time and the number of active ‘seeders’ and ‘leechers’ for a particular file.

27. Although, as the defendants in the main proceedings contend, it is therefore theoretically possible to find files offered for sharing on a peer-to-peer network without using a site like TPB, in practice, the search for such files generally leads to such a site or a site aggregating data from several peer-to-peer networks. The role of websites such as TPB is therefore practically unavoidable in the operation of those networks, in any event for the average internet user.

First question

28. By the first question it refers for a preliminary ruling, the national court asks, in essence, whether the fact that the operator of a website makes it possible to find files containing copyright-protected works, which are offered for sharing on a peer-to-peer network, by indexing the metadata relating to those files and by providing a search engine, constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29.

¹² – Wikipedia may be cited as a primary reference source, which is very relevant as regards the internet (entries on ‘peer-to-peer’, ‘BitTorrent’, ‘The Pirate Bay’). See also the Australian court’s judgment cited in footnote 3, paragraphs 43 to 78, and L. Edwards, *The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*, a document prepared for the World Intellectual Property Organisation, available on its website under reference WIPO-ISOC/GE/11/REF/01/EDWARDS.

¹³ – Accordingly, since the order for reference was lodged in the present case, TPB’s website has added, besides the possibility of downloading files, an option for streaming works shared on the peer-to-peer network by means of new software. That feature was announced at the hearing by the representative of Stichting Brein.

29. I shall start my analysis of this question with a brief overview of the legislation and case-law on the right of communication to the public.

The right of communication to the public

30. Traditionally, with regard to the dissemination of their works, authors have the exclusive right to authorise or prohibit both the distribution of copies of those works and the performance of them to a public present at the place of performance. Typical examples of this are concerts and theatrical productions.

31. The appearance of technical means of communication, the first being sound through the medium of radio broadcasting, made it necessary to protect the rights of the authors with regard to that possibility of exploiting their works. That right was introduced for the first time into international law in Article 11*bis* of the revised Berne Convention for the Protection of Literary and Artistic Works (‘the Berne Convention’).¹⁴ Currently, Article 11*bis* of the Berne Convention, in the version resulting from the Paris Act of 24 July 1971, as amended on 28 September 1979, grants authors the exclusive right of authorising the broadcasting, or any other wireless communication to the public, of their works, and the ‘secondary’ communication of the broadcast work, when this communication is made by an organisation other than the original one.¹⁵

32. That regulation of the right of communication to the public was designed for, and is particularly suited to, ‘linear’ communication, to use the terminology of Directive 2010/13/EU.¹⁶ In that communication model, the signal is ‘pushed’ to the recipient, who can only receive it (or not) at the time it is broadcast. It is therefore relatively easy to determine when the communication took place, from whom it originates and who are its recipients, that is to say, the public. That is the traditional model according to which radio and television broadcasting operate.

33. With the arrival of television on demand (‘video on demand’) and then, especially, the internet, a new method of communication appeared, whereby the content of the communication is merely made available to potential users, who can receive it when and where they wish. In that model, it is only when the user decides to receive the content that the signal is actually communicated to him (‘pulled’). There was some doubt as to whether that process corresponded to the

¹⁴ – Berlin Act (1908).

¹⁵ – The current wording of Article 11*bis* of the Berne Convention results from the Brussels Act of 26 June 1948.

¹⁶ – Directive of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (OJ 2010 L 95, p. 1). It is communication that is linear in time, that is to say, which can only be received at the time of the actual broadcast (see Article 1(1)(e) of Directive 2010/13).

concept of ‘communication to the public’ within the meaning of the Berne Convention.¹⁷

34. The Berne Convention was supplemented, inter alia in order to adapt its provisions to technical progress, by the World Intellectual Property Organisation Copyright Treaty, adopted at Geneva on 20 December 1996 (‘the WCT’).¹⁸ The concept of ‘making available to the public’ was expressly introduced by that treaty. Article 8 of the WCT provides for the exclusive right of authors to authorise any communication to the public of their works, by wire or wireless means, ‘including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them’. That provision is not limited therefore to communication by radio or television, but includes any technical means of communication. Nor is it limited to linear communication, but extends to making content available for reception over a period of time. It is the latter method of communication to the public which is especially relevant in the case of the internet, in particular in the case of peer-to-peer networks.

35. Article 8 of the WCT was transposed into EU law in Article 3(1) of Directive 2001/29, a provision whose interpretation is sought in the present case. That provision contains almost the same wording as that used in the WCT.

36. Directive 2001/29 does not, however, include any definition of the concept of ‘communication to the public’, or of ‘making available to the public’. It was the Court therefore which had to undertake to provide an outline of that definition. According to case-law, two criteria are essential in order for communication to the public to exist: the act of communication and the presence of a public.¹⁹

37. As regards the first criterion, the Court emphasises the essential role of the player originating the communication and the deliberate nature of its intervention. That player makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, and does so in particular where without that intervention its customers would not, in principle, be able to enjoy the broadcast work.²⁰

38. It should be added, as I pointed out above, that, in the case of making a work available to the public so that it is received by recipients at the time of their choosing, the act of communication must be assessed taking into account the

¹⁷ – See, inter alia, von Lewinski, S., Walter, M., *European Copyright Law. A Commentary*, Oxford University Press 2010, pp 973 to 980.

¹⁸ – Treaty approved on behalf of the European Community by Council Decision 2000/278/EC of 16 March 2000 (OJ 2000 L 89, p. 6).

¹⁹ – See, most recently, judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 32 and the case-law cited).

²⁰ – Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 35).

specific nature of that method of communication. Accordingly, unlike communication carried out on the initiative of the player originating that communication, in the case of making available, the actual transmission of the work takes place only potentially and on the initiative of the recipient. However, the ability of the copyright holder to prevent the communication arises at the actual time of making available, irrespective of whether and when transmission actually takes place.²¹

39. As regards the second criterion, the presence of the public, according to the case-law of the Court, it involves two requirements. The first is that the communication must be intended for an indeterminate but fairly large number of potential recipients. That condition is normally met in the case of a website that is accessible, in principle, to all users of the internet.²²

40. Under the second requirement, the public for which the communication in question is intended must be a ‘new public’. In the view of the Court, so far as making available on the internet is concerned, the communication is not made to a new public when it relates to a work that has already been made freely available to the public on another website. In such a situation, the communication is targeted, at least potentially, at the same public as that targeted by the initial making available, namely all users of the internet.²³

41. That freedom of internet users is limited, however. According to the Court, when applying the ‘new public’ condition, it is necessary to take into account not the public actually having access to the work, but only the public who were taken into account by the copyright holder at the time of the initial communication. On the other hand, if the work has been made available, but without the consent of the rightholder, no public was taken into account by the latter, and any new making available therefore targets a new public and must consequently be considered to be a communication to the public within the meaning of Article 3(1) of Directive 2001/29.²⁴

42. However, there is no need to assess whether the communication is intended for a new public where it is made using a specific technical means, that is to say, a technical means different from that used for the initial communication.²⁵ In such a

²¹ – See, to that effect, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 19).

²² – See, to that effect, judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraph 22).

²³ – See judgment of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, paragraphs 24 to 27).

²⁴ – Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 43).

²⁵ – Judgment of 7 March 2013, *ITV Broadcasting and Others* (C-607/11, EU:C:2013:147, paragraph 39).

case, there is therefore still a communication to the public within the meaning of Directive 2001/29.

43. It is now appropriate to assess those criteria in the context of peer-to-peer networks.

Communication to the public on peer-to-peer networks

44. There is no question in my view that the making available to the public of copyright-protected works takes place where those works are shared on a peer-to-peer network.

45. First, the works are made available on the computers of the network users, so any other user can download them. The fact that, under the BitTorrent system, the files containing those works are cut up and downloaded in pieces from different computers is a particular technical feature of no importance. The subject matter of the copyright protection is not a file but the work. Works are made available in their entirety and sent to the users downloading them also in their entirety, barring a technical incident.

46. Secondly, there is no doubt that potential users of an open peer-to-peer network such as TPB's constitute an undefined and significant number of persons.

47. Thirdly and lastly, irrespective of the fact that it involves a specific technical means, the new public condition is also met, in any event so far as works shared without the consent of the authors is concerned. As I noted in point 41 of the present Opinion, the new public condition must be assessed in relation to the public taken into account by the author when he gave his consent.²⁶ If the author of the work has not consented to it being shared on a peer-to-peer network, the users of that network constitute by definition a new public.²⁷

48. It remains to be decided who the persons are, on a peer-to-peer network, who originated the making available of the works which are shared on it: its users or the operator of an indexing site such as TPB.

49. Users, by installing on their computers and starting the sharing software (the BitTorrent client), and providing TPB with the torrents that allow the files present on their computers to be traced, and by leaving those computers on so that they can remain active on the network, are intentionally making the works in their possession available to other users of the network.

²⁶ – See inter alia judgments of 13 February 2014, *Svensson and Others* (C-466/12, EU:C:2014:76, EU:C:2014:76, paragraph 24), and of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraphs 37 and 42).

²⁷ – That is also clear, implicitly, from paragraph 43 of the judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644).

50. However, those works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as TPB, which enable works to be found and accessed. The operators of those sites therefore arrange the system which enables users to access works that are made available by other users. Their role may therefore be regarded as necessary.²⁸

51. It is true that such a site 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. It is only an intermediary which enables users to share the content on a peer-to-peer basis. Therefore, the decisive role in the communication to the public of a given work cannot be attributed to it if it is unaware that the work has been made available illegally or if, once it has been made aware of the illegality, it acts in good faith to rectify the matter. However, from the moment that operator has knowledge of the fact that making available took place in breach of copyright and does not take action to render access to the work in question impossible, its conduct may be regarded as being intended to allow, expressly, the continuation of the illegal making available of that work and, hence, as an intentional action.

52. I should like to make clear that the site's operator must have actual knowledge of the facts. That is so, *inter alia*, in a situation where that operator has been expressly alerted by the rightholder of the illegal nature of the information appearing on the site.²⁹ It would not therefore be appropriate to apply to such a site a presumption of knowledge of the facts similar to that established by the Court in its judgment in *GS Media* in the case of persons who had posted a hyperlink for profit.³⁰ Such a presumption would amount to imposing on operators of indexing sites of peer-to-peer networks, which normally operate for profit, a general obligation to monitor the indexed content.

53. The intervention of those operators therefore meets the conditions of being necessary and deliberate, laid down in the case-law of the Court.³¹ Those operators should therefore in my view also be considered, simultaneously and jointly with the users of the network, as originating the making available to the public of works that are shared on the network without the consent of the copyright holders, if they are aware of that illegality and do not take action to make access to such works impossible.

²⁸ — See also, on this subject, points 26 and 27 of the present Opinion.

²⁹ — That is the case, according to the information contained in the file, of the TPB site in the main proceedings.

³⁰ — Judgment of 8 September 2016 (C-160/15, EU:C:2016:644, paragraph 51).

³¹ — Judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644, paragraph 35 and the case-law cited).

54. The answer to the first question referred for a preliminary ruling should therefore be that the fact that the operator of a website makes it possible, by indexing them and providing a search engine, to find files containing works protected by copyright which are offered for sharing on a peer-to-peer network, constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29, if that operator is aware of the fact that a work is made available on the network without the consent of the copyright holders and does not take action in order to make access to that work impossible.

Second question

Preliminary remarks

55. The second question was raised by the national court in case the Court's answer to the first question, which I suggest should be answered in the affirmative, is negative. If the Court does not however share my assessment as set out above, analysis of the second question becomes necessary. I am therefore also going to suggest an answer to the second question.

56. The second question mentions both Article 8(3) of Directive 2001/29 and Article 11 of Directive 2004/48. However, according to Article 2(2) of Directive 2004/48, and, more directly, according to the last sentence of Article 11 of that directive, its provisions apply without prejudice to the provisions of Directive 2001/29, in particular Article 8 thereof. It follows, in my view, that, so far as the matters covered by Article 8 of Directive 2001/29 are concerned, that provision takes precedence over Article 11 of Directive 2004/48. As a result, only Article 8(3) of Directive 2001/29 is relevant as regards the answer to the second question. In any event, those two provisions are similar in content.

57. By that second question, the referring court asks in essence whether Article 8(3) of Directive 2001/29 must be interpreted as offering scope for obtaining an injunction against an internet service provider ordering it to block access for its users to an indexing site of a peer-to-peer network by means of which copyright infringements have been committed, even if the operator of that site does not itself communicate to the public the works made available on that network.

Applicability of measures under Article 8(3) of Directive 2001/29 to sites such as TPB

58. It will be recalled that, under Article 8(3) of Directive 2001/29, holders of copyrights must be in a position to apply for an injunction against an intermediary whose services are used by a third party to infringe their rights.

59. It is undisputed in the main proceedings that the defendants, being internet service providers, are intermediaries within the meaning of the abovementioned provision.

60. It is also clear in my view that the services of those intermediaries are used by third parties to infringe copyrights. It has been found that certain users of those services use the peer-to-peer network to share works on it without the authorisation of copyright holders. Such sharing constitutes making a work available to the public without the authorisation of the copyright holder and, consequently, an infringement of that right.

61. The particular feature of the case in the main proceedings is that the measure applied for, namely the blocking of access to the TPB site, will affect not only users who commit copyright infringements but also the TPB site, which will not be able to offer its services to users connected to the internet through the intermediary of the defendants in the main proceedings.

62. The possibility of such a measure was accepted by the Court in its judgment in *UPC Telekabel Wien*.³² However, that case concerned the blocking of access to a website whose operator had been regarded as being itself the originator of the copyright infringement. The works illegally made available to the public were on the website in question and were downloaded by users from that site. It was in those circumstances that the Court could hold that the operator of that site was using the services of the internet service provider of the persons viewing the site in order to commit copyright infringements.

63. The situation is very different in the present case, since although it has been established that TPB is not itself making communication of works to the public without the consent of copyright holders, it cannot be concluded that it is using the services of the internet service providers of users of the peer-to-peer network in order to commit copyright infringements.

64. The circumstances envisaged in Article 8(3) of Directive 2001/29 presuppose the existence of a link between the subject of the injunction and the copyright infringement. A measure blocking a website implies that it has been established that the operator of that site has been held liable for copyright infringement using the services of the intermediary to which the injunction is addressed. In that case that operator constitutes a third party infringing copyrights within the meaning of Article 8(3) of Directive 2001/29.

65. If the operator in question does not itself carry out the act covered by the author's exclusive rights (for example, communication to the public), the infringement is only indirect. Given the fact that liability for that type of infringement is not harmonised at the level of EU law, express provision must be made for it under national law. It is for national courts to ascertain whether such liability exists in their domestic law.

66. If such liability can be established on the part of an operator of an indexing site within a peer-to-peer network on which protected works are shared without

³² – Judgment of 2 March 2014 (C-314/12, EU:C:2014:192).

the authorisation of the copyright holders, it must be considered that that operator is using the services of internet service providers whose customers share files on that network, by analogy with a person who himself directly commits a copyright infringement.

67. That finding is not altered by the fact that a site such as TPB might come into the category of providers of hosting services, whose liability for the information stored is, in principle, excluded under Article 14(1) of Directive 2000/31. That immunity is in effect conditional. It is granted only if the provider had no knowledge of the illegal nature of the information stored or of the activity being carried on using that information, and on condition that, once it has been alerted to that illegality, it acts expeditiously to remove the information in question or disable access to that information.

68. If the intermediary provider does not comply with those conditions, that is to say, if it had knowledge that the information stored was illegal but did not act to remove it or disable access to it, that provider may be held indirectly liable for that information.

69. This applies, *inter alia*, in the case of the operator of an indexing site of a peer-to-peer network which had knowledge or had been made aware that the torrent files supplied by users of the network made it possible to share works made available on that network without the authorisation of the copyright holders and did not act to remove those files. It is undisputed in the main proceedings that this applies in the case of TBP. Article 14 of Directive 2000/31 does not therefore preclude TBP's liability for copyright infringements resulting from making those files available.

70. It is also necessary to consider whether such a measure complies with fundamental rights.

Whether blocking access to a website complies with fundamental rights

71. Measures taken on the basis of Article 8(3) of Directive 2001/29 must comply with the applicable fundamental rights.³³ The question of such conformity with regard to a measure ordering that users of the services of an internet service provider must be prevented from viewing a site that has been found to have committed copyright infringements was analysed in depth by the Court in its judgment in *UPC Telekabel Wien*.³⁴ The Court accepted such a measure with regard to fundamental rights, laying down three conditions.³⁵

³³ – Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 45 and 46 and the case-law cited).

³⁴ – Judgment of 27 March 2014 (C-314/12, EU:C:2014:192, paragraphs 46 to 63).

³⁵ – Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraph 64).

72. First, the service provider to which the injunction is addressed must be able to choose which technical means to use in order to comply with the injunction, and to be discharged of its obligations, by demonstrating that it has taken all reasonable measures to do so. Those are conditions imposed under national law, compliance with which is to be reviewed by national courts.

73. Secondly, the measures taken must not unnecessarily deprive internet users of the possibility of lawfully accessing the information available. It is clear that a measure blocking a particular site deprives internet users of access to the information available on that site, whether it is legal or not.

74. Assessment of the legality of such a measure must therefore, in my view, be done on a case-by-case basis, analysing the proportionality between, on the one hand, the measure and the resultant depriving of access to information and, on the other hand, the significance and seriousness of the copyright infringements committed by means of that site.

75. In the case of TPB, according to the information supplied by the applicant in the main proceedings, which of course needs to be verified by the national court, over 90% of files which can be accessed from that site contain works made available to the public without the authorisation of the copyright holders. Furthermore, the operators of TPB were alerted on several occasions of the unlawful nature of the content of their site and instructed to remove it, which they expressly refused to do.

76. In such circumstances, in my view, depriving internet users of access to information, by blocking the TPB site, would be proportionate to the significance and seriousness of the copyright infringements committed on that site. My assessment is based on both the proportion of illegal content and the behaviour of the operators of that site. That is so all the more since, if works are being lawfully shared on a peer-to-peer network it is very probable that they are also easily accessible free of charge by other means or that they can easily be made available. The situation is very different in the case of a website on which the illegal content is only marginal and whose operators cooperate in good faith to remove it.

77. Naturally, the final analysis of the proportionality of the proposed measure lies with the national courts.

78. Thirdly and lastly, the effect of the measure must be to prevent unauthorised viewing of protected subject matter or, at least to make it difficult to do so, and seriously deter internet users who are using the services of the addressee of the injunction from viewing the subject matter made available to them in breach of copyright. In other words, the objective of the measure must be to put a stop to and prevent copyright infringement and the measure must be reasonably effective in achieving that objective.

79. In the present case, the defendants in the main proceedings express serious doubts about the effectiveness of blocking access to the TPB site. In their view,

first, that measure is ineffective since the same works can be found and exchanged on the internet by means other than TPB. Secondly, the blocking of a website address can easily be circumvented by any informed internet user.

80. It should be noted, however, in the first place that according to the case-law of the Court, it is not necessary that intellectual property should be absolutely protected, that is to say, that the proposed measure should result in a complete cessation of copyright infringements. It is sufficient that it should seriously deter internet users from committing such infringements by making infringement difficult.³⁶ Given the role of websites such as TPB in the operation of peer-to-peer networks, there seems to me to be no question that blocking access to such a site would make it difficult or impossible for most users to find the works made available on such a network and therefore to download them in breach of copyright.

81. Secondly, the fact that websites other than TPB can fulfil the same role does not detract from the effectiveness of the measure applied for in the main proceedings, since similar measures may be applied for to block access to those sites also. Acceptance of the reasoning of the defendants in the main proceedings would amount to accepting that no measure to prevent infringement of the law can be effective because new infringements will always be committed by other persons.

82. Thirdly and lastly, it should be noted that a definitely more effective measure — the blocking of all internet traffic involving works illegally shared on peer-to-peer networks — has already been the subject of an assessment by the Court. The Court rejected such a measure, holding that it was too restrictive for internet service providers and intruded too far upon the rights of users.³⁷

83. If a measure that is less restrictive for service providers and constitutes less of an intrusion upon the rights of users were now rejected on the ground that it is not sufficiently effective, internet service providers would ultimately be released de facto from their duty to cooperate in the fight against copyright infringement. The derogations in respect of the liability of intermediary providers contained in Directive 2000/31 constitute one of the factors in the balance between the different interests at stake, introduced by that directive according to recital 41 thereof. The counterpart of those derogations, in the context of that balance, is not only the absence of any complicity of intermediary providers in infringements of the law, but also their cooperation in order to avoid or prevent such infringements. They

³⁶ – Judgment of 27 March 2014, *UPC Telekabel Wien* (C-314/12, EU:C:2014:192, paragraphs 61 to 63). According to the Court, even a measure which does not directly prevent copyright infringements, but merely requires users to identify themselves in order to obtain internet access, meets those criteria (judgment of 15 September 2016, *Mc Fadden* (C-484/14, EU:C:2016:689, paragraphs 95 and 96)).

³⁷ – Judgment of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771, paragraphs 38 to 52).

cannot escape that obligation by claiming, according to the circumstances, that the measures are either over-restrictive or ineffective.

84. Accordingly, I suggest to the Court, if the answer to the first question referred is negative, that the answer to the second question referred should be that Article 8(3) of Directive 2001/29 must be interpreted as permitting an injunction to be obtained against an intermediary ordering it to block access for its users to an indexing site of a peer-to-peer network, if the operator of that site can, under national law, be held liable for copyright infringements committed by users of that network, provided that measure is proportionate to the significance and seriousness of the copyright infringements committed, which is a matter for the national court to determine.

Conclusion

85. In the light of all the foregoing, I suggest that the Court should answer as follows the questions referred for a preliminary ruling by the Hoge Raad der Nederlanden (Netherlands Supreme Court):

The fact that the operator of a website makes it possible, by indexing and providing a search engine, to find files containing works protected by copyright which are offered for sharing on a peer-to-peer network constitutes a communication to the public within the meaning of Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation certain aspects of copyright and related rights in the information society, if that operator was aware of the fact that a work was made available on the network without the consent of the copyright holders and did not take action in order to make access to that work impossible.