BREIN
copyright enforcement

Books
Films & TV
Music
Interactive software
• Websites (platforms)
  • Uploaders
  • Hosting Providers
  • Access Providers
  • Search Engines
• Payment Processors
  • Advertising
  • Consumers
The Dutch Trilogy

how good facts make good case law
Prologue
Svensson, Kino, Aci Adam
Trilogy
GS Media, Filmspeler, The Pirate Bay
Epilogue
Accountability with and without liability
Communication To The Public

- Hyperlinking to an illegal source
- Selling devices linking to illegal sources
- Streaming from an illegal source
- Facilitating linking to illegal sources
- Blocking access to (links to) illegal sources
Prologue

• Svensson
  Linking to authorised content on a site that is freely accessible to the public is not infringing

• Kino
  Blocking of infringing site allowed if it not unnecessarily block legal content and at least discourages access

• Aci Adam
  Downloading from an illegal source is illegal
Trilogy Part One
GS Media 8 Sept 2016 C-160/15

Linking to an unauthorized source

CJEU (confirms Svensson):
• CTTP requires ‘indispensable intervention’ with full knowledge of consequences
• Private linking – if knows or ought to know
• Commercial linking (for profit) – presumed knowledge, duty of care to verify legality
Selling devices with software linking to illegal sources

Infringing CTTP or ‘just’ facilitating?

(superfast harmonization)

CJEU (confirms GS Media):

• For profit – context sale of device
• With full knowledge - direct link, not mere technical facilities)
• Indispensable intervention – difficult to find
Bonus chapter on streaming (confirms ACI Adam)

- Temporary copy exception 5(1) InfoSoc ’to enable lawful use’ not applicable: Buyer deliberately and in full knowledge accessing unauthorised content
- Does not meet three step test
Online p2p platform making available third party uploaded links to unauthorised content

Is it an infringing site? If not, may it be blocked?

CJEU interpretation of CTTP 3(1) InfoSoc: various criteria; not autonomous but interdependent; applicable to widely varying degrees; to be interpreted individually and in their interaction with each other
CJEU (confirms GS Media andFilmspeler:

• Operators managing p2p site, indexing, categorizing, deleting and/or filtering, cannot be unaware of unlawful nature of content and are liable for infringement jointly with users
• Not passive – no reference to safe harbour 14 eCommerce
• For profit – context advertising on site
• Constructed/presumed knowledge – not actual knowledge (were informed; could not be unaware; very large number of links to unauthorized content
Epilogue

• More active role of ISPs required (responsibility with but also without liability)
• Growing group of facilitators liable for infringement
• Profit in context and constructive/presumed knowledge – ex ante duty of care and ex post NTD & stay down
• More case law, more licensing
Essential reading:

Eleonora Rosati: The CJEU Pirate Bay judgment and its impact on the liability of online platforms

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