

New route to conviction against sellers of pre-loaded equipment (Stichting Brein v Jack Frederik Wullems)

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IP & IT analysis: Discussing the Court of Justice's judgment in *Stichting Brein, Ari Alibhai*, a barrister at QEB Hollis Whiteman Chambers, points out that while it is highly significant in terms of strengthening a prosecutor's hand in prosecuting illicit IPTV, it is not a panacea for rights holders in this rapidly escalating area of internet piracy.

Original news

Stichting Brein v Jack Frederik Wullems, Case [C-527/15](#)

Briefly, what was the background to this case?

This case concerned a Dutch national, Mr Wullems, who sold via the Internet a multimedia player which, when connected to a television, allowed his customers to access and watch various broadcasters' output. Wullems sold his devices through his own Filmspeler website and on other sites. The equipment he sold was advertised as enabling access to subscription television content without payment to the relevant rights' owners. In order to achieve this capability, Wullems 'flushed' (programmed) the equipment with freely available software that enabled access to channels via an easy-to-operate electronic programme guide (EPG). The software used by Wullems also integrated 'add-ons' accessible on the Internet, which linked to websites on which infringing copies of copyright works were made available. Users could access such content easily via the device's remote control.

An action was brought against Wullems by the Dutch anti-piracy organisation Stichting Brein (Brein). Brein argued that the sale of the player constituted a 'communication to the public' of copyright works and therefore directly infringed copyright law. Wullems disputed that such a communication had been effected by his equipment, and further argued that streaming in the manner enabled by his device would fall within the 'lawful use' exception under Article 13a of the Netherlands Law on copyright (Auteurswet).

What questions were referred to the Court of Justice?

To quote from the judgment (at para [22]), the questions referred to the court were as follows:

- '(1) Must [Article 3\(1\)](#) of Directive 2001/29 be interpreted as meaning that there is "a communication to the public" within the meaning of that provision, when someone sells a product (multimedia player) in which he has installed add-ons containing hyperlinks to websites on which copyright-protected works, such as films, series and live broadcasts are made directly accessible, without the authorisation of the right holders?
- (2) Does it make any difference
 - —whether the copyright-protected works as a whole have not previously been published on the internet or have only been published through subscriptions with the authorisation of the right holder?
 - —whether the add-ons containing hyperlinks to websites on which copyright-protected works are made directly accessible without the authorisation of the right holders are freely available and can also be installed in the multimedia player by the users themselves?
 - —whether the websites and thus the copyright-protected works made accessible thereon—without the authorisation of the right holders—can also be accessed by the public without the multimedia player?
- (3) Should [Article 5](#) of Directive 2001/29 be interpreted as meaning that there is no 'lawful use' within the meaning of Article 5(1)(b) of that directive if a temporary reproduction is made by an end user during the streaming of a copyright-protected work from a third-party website where that copyright-protected work is offered without the authorisation of the right holder(s)?
- (4) If the answer to the third question is in the negative, is the making of a temporary reproduction by an end user

during the streaming of a copyright-protected work from a website where that copyright-protected work is offered without the authorisation of the right holder(s) then contrary to the “three-step test” referred to in [Article 5\(5\)](#) of Directive 2001/29?’

What were the findings of the court?

The court held that the sale of pre-configured devices which contain hyperlinks to third party sites on which infringing copies of copyright works are made available in itself constitutes a communication to the public of a copyright work.

The court further held that the ‘lawful use’ exception under [Article 5](#) of Directive 2001/29/EC does not apply to the present scenario since the purpose of Wullems’s devices, as he himself advertised, was to enable unauthorised access to copyright works. Since acts of reproduction of copyright works are only exempted from the reproduction right in [Article 2](#) of Directive 2001/29/EC if they satisfy each condition under [Article 5](#) Directive 2001/29/EC, it follows that the process engaged by the multimedia player fails to satisfy the limited exemption available.

What are the practical implications of the court’s decision? Does it potentially have wider ramifications for the ‘multimedia’ platform?

There are significant consequences of this judgment in terms of the sale and supply of devices that enable unlawful access to premium television content through IPTV (Internet protocol television). The Digital Economy Act 2017 increases the maximum penalty for communication of a copyright work under [section 107\(2A\)](#) of the Copyright, Designs and Patents Act 1988 ([CDPA 1988](#)) from two to ten years, meaning that sellers of pre-configured IPTV devices now risk real sanctions for copyright infringement. Equally, since such devices copy a copyright work, end users may themselves be liable for copyright infringement under [CDPA 1988, s 17](#).

What should IP and IT practitioners take away from this case?

This judgment opens a new route to conviction against sellers of pre-loaded equipment that enables access to infringing content via third party sites, such as through the Kodi platform. It does not assist with actions taken against those who sell such devices in a ‘vanilla’ state, ie unflashed. On its own it is not capable of providing a means of combating pirate IPTV since the judgment will inevitably lead to dealers selling devices without the required software, but providing the means to end users whereby they can adapt the equipment themselves. While therefore this is a highly significant decision in terms of strengthening a prosecutor’s hand in prosecuting illicit IPTV, it is not a panacea for rights holders in this rapidly escalating area of internet piracy.

Ari Alibhai specialises in private prosecution in criminal intellectual property infringement. He is instructed in the first UK prosecution of an IPTV provider, whose operators allegedly defrauded UK and international broadcasters. Ari acts for corporate clients in music, film, sport and broadcast media, including the Football Association Premier League, Sky and Satellite Information Services. He advises on designing and implementing private prosecution systems to reduce exposure to intellectual property theft.

Interviewed by Kate Beaumont.

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