

# The Pirate Bay in the EU: Torrents flowing into the Copyright Seas

Julien Cabay

Chargé de recherches au Fonds National de la Recherche Scientifique (F.R.S.-FNRS)  
Professeur à l'Université Libre de Bruxelles (ULB)  
Chargé de cours à l'Université de Liège (ULiège)

[icabay@ulb.ac.be](mailto:icabay@ulb.ac.be)



# Summary

- I. Basics of EU Copyright Law
- II. What is a Torrent ?
- III. Are Torrents Reproductions ?
- IV. Is The Pirate Bay Communicating to the Public ?
- V. Conclusion

# I. Basics of EU Copyright Law

- Copyright Law
  - Protection of « **literary and artistic works** » = every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression (Berne Convention, art. 2(1))
- National Protection
- Partial harmonisation in the EU
  - Directive 91/250/EEC (today 2009/24/EC) on the legal protection of computer programs
  - Directive 96/9/EC on the legal protection of databases
  - **Directive 2001/29/EC** on the harmonisation of certain aspects of copyright and related rights in the information society
  - (...)

# I. Basics of EU Copyright Law

- Directive 2001/29
  - Art. 2 : « Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent **reproduction** by any means and in any form in whole or in part : (a) for authors, of their works (...) »
  - CJEU, *Infopaq*, C-5/08 (2009) : autonomous and uniform interpretation throughout the EU

# I. Basics of EU Copyright Law

- Directive 2001/29
  - Art. 3(1) : « 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 »
  - CJEU, *SGAE*, C-306/05 (2006) : autonomous and uniform interpretation throughout the EU

## II. What is a Torrent ?



**BitTorrent™**

## II. What is a Torrent ?



## II. What is a Torrent ?

- *See* CJEU, Ziggo, C-160/15 (2017)
  - **BitTorrent is a protocol through which users (known as ‘peers’) can share files.** The essential characteristic of BitTorrent is that it **divides files for sharing into segments, thus removing the need to rely on a central server to store those files**, which lessens the burden on individual servers during the sharing process. In order to be able to share files, users must first download **specific software** called ‘BitTorrent Client’, which (...) allows the creation of torrent files. (§9)



## II. What is a Torrent ?

- See CJEU, Ziggo, C-160/15 (2017)
  - Users (called '**seeders**') who wish to make a file on their computer available to other users (called '**leechers**') have to create a **torrent file** through their BitTorrent Client. Torrent files refer to a central server (called a '**tracker**') which identifies the users available to share a particular torrent file as well as the underlying media file. These torrent files are **uploaded** by the seeders to an **online sharing platform** (...) which then proceeds to **index** them so that they can be found by the users of the online sharing platform and the works to which those torrent files refer can be **downloaded** onto the users' computers in several segments through their BitTorrent Client. (§10)

# III. Are Torrents Reproductions?

- No answer in CJEU case law, but see CJEU, *Football Association Premier League*, C-403/08 and C-429/08 (2011)
  - « (...) Article 2(a) of the Copyright Directive must be interpreted as meaning that the **reproduction right extends to transient fragments of the works within the memory of a satellite decoder and on a television screen**, provided that those fragments contain elements which are the expression of the authors' own intellectual creation, and the unit composed of the fragments reproduced simultaneously must be examined in order to determine whether it contains such elements. » (§159)



## IV. Is The Pirate Bay Communicating to the Public?



**The Pirate Bay**

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU Case law on communication to the public
  - 2 criteria :
    - Act of communication
    - (New) public
  - ‘Additional’ criteria
    - « profit making nature of a communication is not irrelevant »

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)




Search results: games of thrones

Displaying hits from 0 to 29 (approx 29 found)

DOWNLOAD PLAY NOW

Type	Name (Order by: Uploaded, Size, Uled by, SE, LE)	View: Single / Double	SE	LE
Video (TV shows)	Games Of Thrones Season 1 Uploaded 12-16 2013, Size 8.26 GiB, Uled by nuki2		51	3
Video (TV shows)	Games Of Thrones Season 3 Uploaded 12-14 2013, Size 4.11 GiB, Uled by nuki2		29	0
Video (TV shows)	Games Of Thrones Season 2 Uploaded 12-14 2013, Size 3.78 GiB, Uled by nuki2		26	4
Games (PC)	Game of Thrones: Telltale Games Series (Episodes 1-5) - FR/GN Uploaded 08-07 2015, Size 4.38 GiB, Uled by rennie_88801		18	1
Video (TV shows)	Games of Thrones - Season 3 DVD Uploaded 03-28 2014, Size 7.9 GiB, Uled by POKH511		11	5
Video (Movies)	Games of Thrones - Season 2 DVD Uploaded 03-28 2014, Size 5.78 GiB, Uled by POKH511		8	3
Video (TV shows)	Games Of Thrones season 1-3 Uploaded 04-07 2014, Size 5.6 GiB, Uled by jaymoneychild		7	3
Video (TV shows)	Games of Thrones temporada 6 Latino Uploaded 09-15 2016, Size 6.74 GiB, Uled by levatanavero		7	3
Games (PC)	Game of Thrones: A Telltale Games Series Season Finale-GOG Uploaded 11-20 2015, Size 12.74 GiB, Uled by Yenguen		6	1
Video (TV shows)	Games of Thrones Spanish Subtitled Uploaded 04-13 2013, Size 11.34 GiB, Uled by emarcation		4	0
Games (PC)	Game of Thrones - A Telltale Games Series (2014) PC [RePack/ENG] Uploaded 12-02 2014, Size 1.42 GiB, Uled by asax318		3	0
Games (XBOX360)	Game of Thrones: A Telltale Games Series (XBOX360) ISO PAL-NTSC Uploaded 11-27 2015, Size 6.84 GiB, Uled by ricklog		3	2

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - Works made available to the users of the online sharing platform TPB have been placed online on that platform **not by the platform operators but by its users.**

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - Is the **making available and management**, on the internet, **of a sharing platform** which, by means of **indexation** of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network, a **communication to the public ???**

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU Case law on communication to the public
  - 2 criteria :
    - **Act of communication**
    - (New) public
  - ‘Additional’ criteria
    - « profit making nature of a communication is not irrelevant »



## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - « (...) the Court has emphasised, firstly, the **indispensable role played by the user and the deliberate nature of his intervention**. That user makes an act of communication when he intervenes, in full knowledge of the consequences of his action, to give his customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the broadcast work, or would be able to do so only with difficulty » (§26)

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - « (...) TPB, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with **full knowledge of the consequences of their conduct**, to provide access to protected works, **by indexing** on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network » (§36)

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU Case law on communication to the public
  - 2 criteria :
    - Act of communication
    - **(New) public**
  - ‘Additional’ criteria
    - « profit making nature of a communication is not irrelevant »

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - « (...) **public that was not taken into account by the copyright holders** when they authorised the initial communication » (§44)

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - « (...), first, that the operators of the online sharing platform TPB were **informed** that this platform, which they make available to users and manage, **provides access to works published without authorisation** of the rightholders and, second, that the same operators expressly display, on blogs and forums available on that platform, their **purpose to make protected works available to the users**, and encourage the latter to make copies of those works. In any event, it is clear from the order for reference that the operators of the online sharing platform TPB **could not be unaware that this platform provides access to works published without the consent of the rightholders**, given that, as expressly highlighted by the referring court, a **very large number** of torrent files on the online sharing platform TPB relate to works published without the consent of the rightholders. » (§ 45)

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU Case law on communication to the public
  - 2 criteria :
    - Act of communication
    - (New) public
  - ‘Additional’ criteria
    - « **profit making** nature of a communication is not irrelevant »

## IV. Is The Pirate Bay Communicating to the Public?

- CJEU, *Ziggo*, C-610/15 (2017)
  - « (...) the making available and management of an online sharing platform, such as that at issue in the main proceedings, is carried out with the **purpose of obtaining profit** therefrom, it being clear from the observations submitted to the Court that that platform generates **considerable advertising revenues** » (§46)

# V. Conclusion

- Indexing Torrents = communication to the public
  - Like Radio
  - Like TV
  - Like Streaming
  - (...)



=





## V. Conclusion

*« (...) le droit est la plus puissante des écoles de l'imagination. Jamais poète n'a interprété la nature aussi librement qu'un juriste la réalité (...) »*

Jean Giraudoux, *La guerre de Troie n'aura pas lieu*, 1935,  
Hector à Busiris, Acte 2, Scène V