

THE ACT

- CTP is complicated. More than a dozen CJEU cases in recent years.
- CTP potentially covers:
 - Streaming
 - Offering downloads
 - Linking
 - Retransmission
 - Packaging subscriptions
 - Hosting UGC

THE LAW

- InfoSoc Directive Art3(1) :
 - Rights holders controls CTP
 - Via wire or wireless means
 - Includes the making available right (on demand access)
 - Must be interpreted broadly, but must strike a balance between rights holders and users
 - Mere provision of facilities for a communication to occur is not enough to qualify
 - Deeming provision in SatCab Directive for satellite broadcasts



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Annual IP Seminar

COMMUNICATION TO THE PUBLIC: NAVIGATING THE LABYRINTH

1. ACT OF COMMUNICATION?

- Transmission of a work itself (e.g. streaming of a film)
- Intervening to provide access to a work (e.g. a hotel making available films to all of its guests)
- Using a different technical means than the one authorised by a rights holder (e.g. over the internet vs terrestrial television)

- Linking to a work
- Packaging a work with others in a subscription

2. TO A PUBLIC?

- An indeterminate and large number of people
- A 'new' public to that initially contemplated by the rights holder

1. REFRESHER

1. KNOWLEDGE

- Now relevant when linking
- Do you know if the work you are providing access to is not authorised? Should you?
- Consistent with Berne?

- Rebuttable
- Consistent with Berne?

3. RETRANSMISSION

- *AKM v Zurs* seemingly inconsistent with *ITV v TVC1* - is a different technical means no longer determinative?

2. FINANCIAL GAIN

- Now relevant when linking
- Knowledge is presumed if you act for financial gain

2. RECENT DEVELOPMENTS

3. MORE CHANGE ON THE HORIZON

1. SET TOP BOXES PRE-LOADED WITH LINKS TO INFRINGING STREAMING SITES/SERVERS

- *Filmspeler* case
- AG opinion says it is a CTP
- Expands upon *GS Media*, but does not strictly follow it

2. TORRENT SERVICE – CONNECTING P2P USERS TO DOWNLOAD INFRINGING MATERIAL

- *The Pirate Bay* case
- AG opinion says it is a CTP
- Very broad (and potentially worrying) approach to 'indispensable intervention' to provide access to works

WHAT IS THE IMPACT OF ALL OF THIS?

- CTP is broad and getting more complex
- It is now highly fact dependent: linking, retransmission, subscriptions, public places and UGC all require nuanced analyses
- "Indispensable Intervention" approach by the AGs in *Filmspeler* and *The Pirate Bay* suggests a further move away from 'actual carriage' being a key component of the restricted act
- Very hard to definitively predict the outcome - if it's important, roll the dice