the majority in the House of Lords, and Lord Neuberger all got to the same result, via respectively *Oxley v Hiscock* [2004] EWCA Civ 546; [2005] Fam. 211, explicit focus on common intention, and the presumption of resulting trust: fairness, respect for the parties' intentions, and orthodox property law all point in the same direction.

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COMMUNICATION TO THE PUBLIC AND ACCESSORY COPYRIGHT INFRINGEMENT

In recent judgments, the Court of Justice of the European Union (CJEU) has been developing its interpretation of the notion of "communication to the public". This forms one of the exclusive rights of copyright holders that have been harmonised by the InfoSoc Directive (Directive 2001/29/EC (OJ 2001 L 167 p.1)). As was established in 2006 (Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE*) *v Rafael Hoteles*, ECLI:EU:C:2006:764, at [31]), despite the lack of an explicit definition in that directive, the notion of a "communication to the public" must be given "an autonomous and uniform interpretation" throughout the EU. This finding initially resulted in the creation of a considerable amount of uncertainty for national courts. The gradual accumulation of information through subsequent CJEU judgments has begun to bring some clarity, while also raising new questions.

The most recent of these is *Stichting Brein v Ziggo* (Case C-610/15, ECLI:EU:C:2017:456). The case arose in the Netherlands, where Stichting Brein, an anti-piracy organisation, applied to the Dutch courts for an injunction against Internet service providers Ziggo and XS4ALL that would order them to block access for their customers to the peer-to-peer file-indexer The Pirate Bay (TPB). When the case came before it, the Dutch Supreme Court noted that the permissibility of injunctions of this kind depends on Article 8(3) of the InfoSoc Directive. According to that provision, Member States must ensure that copyright holders are in a position to apply for an injunction against intermediaries whose services are used by third parties to infringe copyright.

The Dutch Supreme Court questioned whether the relevant "third party" – in this case TPB – must be found to have committed an infringement itself before it may be targeted by a blocking injunction. The question before the court therefore became whether TPB engages in acts of communication to the public of protected works. The case represents the first time that the liability proper (i.e. for financial remedies, as opposed to

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injunctions) of an Internet intermediary for copyright infringement has been considered at the European level.

The CJEU approached the issue through its usual formula for communication to the public. According to this, it is first necessary to show that there has been an "act of communication". As previous case law has indicated, this will depend on whether the user has played an "indispensable role" through a "deliberate intervention". Applying this principle to the facts of the case, the Court first noted that there was no doubt that works were, by means of TPB's website, being made available to the public. The pertinent issue was instead who was responsible for this act. The Court acknowledged that the work was placed on the platform not by TPB itself, but by its users. Nevertheless, it concluded that the management of an online sharing platform amounts to a "deliberate intervention". In support of this, the Court mentioned that, absent TPB, it would be either impossible or more difficult for users to share the work online. It also stressed that the platform indexes torrent files in such a way that the works may be easily located and downloaded and classifies the works under different categories. The platform's operators additionally check to ensure that a work has been placed in the appropriate category, delete obsolete or faulty torrent files and actively filter some content.

The analysis then moved on to the second element of "a public". As in earlier case law, the Court explained that this refers to a group of people of an indeterminate number that is of a certain, not insignificant size. It is not necessary that the relevant audience be reached simultaneously. Instead, the cumulative effect of making works available to a large number of people in succession must be taken into account. Given that TPB is used by a considerable number of "peers", this criterion was easily met.

Finally, it was also necessary to show either that the relevant "public" is a "new" one, i.e. one that was not already taken into account by the copyright holder when she authorised the initial communication to the public of the work, or that the communication takes place through technical means different from those which she employed. According to the Court, in this case the first of these two possibilities was established.

In reaching this conclusion, the CJEU relied heavily on its earlier judgment in *GS Media* (Case C-160/15, ECLI:EU:C:2016:644). Here, the Court had noted that the Internet is of particular importance to freedom of expression and information. As a result, it found that, in enforcing copyright online, "the right balance" between that freedom and the interests of copyright holders must be struck. Applying this principle to the facts of that case, the Court found that a hyperlinker may only be held liable for linking to copyright infringing material, if she "knew or ought to have known" that the hyperlink she created provides access to a work unlawfully posted online (at [49]). The Court also introduced a presumption of knowledge

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for cases where the posting of a hyperlink is carried out for profit (at [51]). A fault element was thus introduced to copyright.

A similar logic was followed in *Ziggo*. Although stopping short of repeating the "knew or ought to have known" construction used in *GS Media*, as well as avoiding the profit-based presumption that judgment introduced, the CJEU made reference to a variety of indications of both actual and constructive knowledge (at [45–46]). In particular, it noted that TPB's operators were informed that their platform provides access to works published without authorisation. They also made clear, on blogs and online forums, their purpose of making protected works available to the users and encouraged users to engage in infringement. The CJEU additionally observed that a very large number of torrent files on TPB relate to works published without authorisation, meaning that its operators "could not be unaware" that their platform was used to infringe. Finally, TPB's profit-making purpose, in the form of advertising revenues, was also found to be relevant.

On this basis, the Court concluded that TPB's operators were indeed communicating the works shared through their platform to the public. While previously it could have been assumed that the fault element mentioned in *GS Media* was relevant only to hyperlinking, *Ziggo* confirms that its applicability (albeit appropriately adjusted) is broader.

The decision represents a curious blending of the notions of primary and accessory liability in copyright. Traditionally, primary copyright infringement has been understood to be a strict liability tort. The state of mind of the defendant has consequently only been relevant in jurisdictions which recognise a doctrine of secondary or accessory liability (see e.g. Copyright, Designs and Patents Act 1998, ss. 22–26). Certainly, the rules of direct infringement have occasionally been relied upon by national courts in findings of liability for parties whose infringement was dependant on – i.e. secondary to – a prior infringement by another party (see e.g. in the UK, *Twentieth Century Fox Film Corporation v Newzbin* [2010] EWHC 608, at [125]). In these cases, however, this was done without consideration of matters such as encouragement or notification.

The CJEU's blended approach has the advantage of allowing for a European harmonisation of accessory copyright liability on the sole basis of the notion of a "balance" between fundamental rights. In this way, no new directive is necessary and the Charter of Fundamental Rights of the EU (OJ 2000 C 364 p.1) can be relied upon to fill in the gaps. Indeed, the Advocate General's Opinion (ECLI:EU:C:2017:99, at [3]) indicates that the goal of harmonisation was a strong motivation in adopting this interpretation. It should be noted, however, that the Court's solution can only have a limited effect. If a person cannot reasonably be found to be communicating to the public, assuming none of the immunities introduced by Articles 12–14 of the E-Commerce Directive (Directive 2000/31/EC (OJ

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2000 L 178 p.1)) apply, harmonisation will remain elusive: national rules on secondary liability might result in different outcomes for the same defendant in different countries.

The judgment also opens up a new vista of questions. Whether the fault threshold should be adjusted to the circumstances of the case is, for example, worth considering. As mentioned above, the type of fault demanded in *GS Media* and in *Ziggo* is not the same. Whether other cases will require a different standard therefore becomes the question. Presumably, primary infringement will remain a strict liability tort. Another issue that arises is whether the exceptions and limitations to copyright permitted by Article 5 of the InfoSoc Directive apply to parties whose communication to the public depends on a third-party infringement. Although in *Ziggo* no relevant information is provided, in *GS Media* the Court had suggested (at [53]) that that will not be the case for hyperlinkers.

In any case, the timing of the judgment might prove significant. Recital 38 of the Commission's new copyright proposal (COM(2016) 593 final) suggests that providers that host third-party infringements in a public manner by definition go beyond the mere provision of physical facilities and perform acts of communication to the public. Yet a consistent application of the *Ziggo* approach to hosting services would mean that, unless such providers can be shown to have knowledge that infringements are performed using their services, this will not be the case. As the proposal progresses through the co-decision procedure, it will have to be amended to address this issue.

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TESTAMENTARY FREEDOM REAFFIRMED IN THE SUPREME COURT

The case now known as *Ilott v The Blue Cross* [2017] UKSC 17 was the first time that the Inheritance (Provision for Family and Dependants) Act 1975 was considered at the highest judicial level. The Court of Appeal ([2015] EWCA Civ 797, noted in [2016] C.L.J. 31) had significantly enhanced the award given to an estranged and "disinherited" but needy daughter (Heather Ilott) at the expense of the charities (the Blue Cross, Royal Society for the Protection of Birds and Royal Society for the Prevention of Cruelty to Animals) who were the principal beneficiaries under the will of her mother, Melita Jackson, leaving her with £143,000 out of the £486,000 estate primarily to purchase the council house in which she and her family were living. The Supreme Court unanimously allowed the charities' appeal, restoring Judge Million's original £50,000

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