

The Pirate Bay Case: Time to Collect Stones

On 17 April 2009 the District Court of Stockholm in Sweden rendered its judgment in the renowned case concerning the file sharing related web-site Pirate Bay. The Court found four individuals convicted of complicity to intentional copyright infringement and sentenced them to imprisonment for one year and also found them liable to pay substantial damages. The District Court's judgment is an important victory for the music, TV and film industries fight against illegal sharing of copyrighted media.

Background

The Pirate Bay is considered to be the world's most frequented file-sharing website with 700 000 registered users and an estimated 22 million users.

The Pirate Bay website is based on BitTorrent technology and has since 2004 been operated by a limited partnership "PRQ Internet" with two partners, defendants Fredrik Neij and Gottfrid Swarholm Warg . These two have been directly responsible for the technical aspects of running the website (programming, admin services etc). The other two defendants Peter Sunde Kolmisoppi and Carl Lundström have had a more indirect involvement in the operation of the website, Sunde Kolmisoppi mainly as seller of advertisements on the website and Lundström mainly as financier and owner of the companies providing leasing of servers and Internet connection to the Pirate Bay.

In May 2006 the location of the Pirate Bay servers were raided by Swedish police investigating allegations of copyright violations and the servers were impounded. However, a few days after the raid the web site was again up and running. In January 2008 the prosecutor filed criminal charges which were joined with an action for damages from the concerned rights holders.

The prosecution was based on that the defendants jointly and in accord had organised, administrated, systemised, programmed, financed and operated the site and thereby had aided and abetted the copyright infringements committed by the users of the web site in the form of making copyrighted works available to the public via Internet in connection with the file sharing among the users.

The prosecution concerns 33 works, including albums, films, and computer games, which, according to the prosecutor, together were downloaded a total of 435,000 times during the period 1 July 2005 – 31 May 2006.

The defendants general position was that they could not be held responsible since the Bit Torrent technology in itself does not involve dealing with copyrighted material on the Pirate Bay servers. Technically, the Pirate Bay site stores, indexes and lists digital "Torrent" files in a searchable data base and contains a so called tracker, which finds users that are online and ready for upload. The Torrent files are created using the BitTorrent protocol and allow users to see what content is available and from which servers.

Thus, the Pirate Bay site does not host the copyrighted content itself, but allow users to advertise content for download and to search for information regarding content held for download by others. Users search the site to find the torrent files they want, and then download the actual music, video or software files directly from other users' computers. During download each user also contributes with up-loads of those pieces of the copyrighted material that he/she has downloaded.

The technology used is as such undisputed. Likewise it is undisputed that the defendants have financed the site partly with advertising.

Complicity in Copyright Infringement

Copyright belongs to someone who has created a literary or artistic production such as music, film or computer program. The so called neighboring rights are essentially the same but have a shorter term and protect performing artists involved in and producers of sound recordings and motion pictures. The prosecution for copyright infringement was based on both these types of rights.

In order to be held responsible for complicity in copyright infringement it is not required to establish the identity of the main criminal. It suffices to establish that the main crime, here an intentional copyright infringement, has been committed. In this respect the Court found that it was established that some Pirate Bay users had copyrighted material stored on their computers and that by placing the Torrent files concerning such copyrighted material on the Pirate Bay website said users made such material available to the public. According to the Court the sharing taking place by users during their download of further copies of the same material on the Internet involved making copyrighted material available to the public.

In respect of the possibility to apply Swedish criminal law the Court found that the main crime of intentional copyright infringement by users had been committed in Sweden since users could access and use the site from Sweden, the infringement affected the rights holders rights in Sweden, the language of the site was Swedish (among others) and that the Pirate Bay web site servers (computers) with Torrent files and tracker were located in Sweden.

Furthermore, the Court found that the defendants by providing a site, a search engine for simple up-load and download procedures and by administrating contacts between the users by its tracker of torrent files the defendants had aided and abetted the resulting violations of the Copyright Act. The Court also found that defendants, while having different roles and tasks, had co-operated and acted as a 'team' in the overall operation and development of the Pirate Bay website and they should therefore be considered to have contributed collectively to the infringements.

In spite of the defendants' argument that they did not know which files were actually shared and to what extent they were protected by copyright, other facts in the case provided sufficient evidences for proving that they were generally well aware of infringements taking place. The Court says that it is not necessary that the defendants had knowledge about each specific file and infringing activity, but sufficient that they knew that copyrighted material as such were shared in violation of copyright law. According to the Court the evidences (emails and letters to the defendants as well as witness-statements) in the prosecution show that it is obvious that the defendants have had such knowledge.

Having established that copyright infringements have taken place, that the infringements were illegal and punishable in Sweden and that the defendants wilfully contributed to the infringements the defendants were held liable for complicity in copyright infringement.

Sanctions

The defendants are sentenced for the copyright infringement. Due to the facts that (i) extensive copyright infringements have taken place and (ii) that the site was considered a commercial project the Court found that the defendants should be sentenced to one year imprisonment each.

The one year imprisonment sentence is the longest period of time ever awarded by a Swedish court for violation of the Copyright Act although the maximum sentence is two years.

The Court has further stated that since the defendants are guilty of a crime, they are obliged to pay compensation for damages caused by such crime. The entertainment industry claimed damages in the amount of SEK 117 millions (approximately EUR 10.5 millions). The court however awarded damages in the amount of SEK 30 millions (approximately EUR 2.7 millions), since some of the rights holders had calculated damages based on reproduction of copyrighted material and not communication to the public of the material and since the rights holders were not able to fully prove the damages that they claim. The statutory right to damages covers reasonable compensation for use of the protected material as well as compensation for further damages. Those rights holders that calculated the reasonable compensation as a hypothetical license fee for communicating copyrighted material via the Internet were awarded full compensation. Their claims were proved by i.a an expert witness. As regards further damages the Court made an estimation of the damages suffered since full proof was not available and found that considering all facts in the case damages are likely to equal half of the amount claimed as reasonable compensation.

In the judgment the Court also dismissed the defendants claim for protection under the safe harbour provisions of the Swedish legislation implementing the EU E-Commerce Directive (2000/31/EG). It was noted that the Pirate Bay per se qualified for protection under said legislation but that its services included storage of files for the users and that it had not fulfilled the requirement for actively taking action against infringement when put on notice by rights holders.

Finally it can be noted that the Court in an obiter dictum found that Torrent files could qualify as instrument specifically suitable for committing crime, meaning that the handling of such files with the intention of copyright infringement can be punishable as preparation to commit such infringement.

Matter of principle

The Swedish District Court evidently makes a clear statement that The Pirate Bay's activities are not accepted. Furthermore it should be noted that copyright legislation is not dependent upon specific techniques used to make the infringements or to contribute to these crimes. The essence of the District Court's judgement is clear in this aspect. Accordingly, the discussion on which technique that has been used in this case is only relevant to decide the defendants' degree of participation.

The case might also have potentially wide-reaching ramifications for all websites available in Sweden that publish hyperlinks to infringing material. Eventually, this might result in an increase of legal proceedings in Sweden, if the rights holders hereafter may view Sweden as a "preferred jurisdiction" for bringing action against international sites that include links to infringing material, such as search engines, which provide users with links to all areas of the web, and social networks, where users are free to post links to whichever online destinations they choose.

However, it is important to remember that the Pirate Bay judgment is based on an unusual set of facts in that the founders were actively involved in a political campaign to encourage copyright infringement in Sweden and set out to provoke copyright holders. Otherwise criminal liability and liability to damages could have been avoided by acting in accordance with the applicable safe harbour provisions for ISPs referred to above. The fact that the defendants complicity in the copyright infringements were considered to be extensive in this case was an important factor for

the outcome of case. Otherwise, where complicity in the crime is less, a different judgment might be expected. Therefore, The Pirate Bay decision may not yet be construed as a basis for the principle that by merely publishing a link to illegal content, you are liable for complicity in copyright infringement.

Jonas Westerberg, Henrik Wistam, Irina Svensson, Lindahl law firm.

Lindahl is Sweden's third-largest law firm. The firm has 300 employees in six offices, including approximately 210 lawyers, of which half are based in Stockholm. Lindahl offers business law expertise within strategic specialist areas, for example, M&A, the TMT-sector (Technology, Media, Telecommunications) and Dispute resolution. Top competence together with business law breadth has meant that during 2008 and 2009 Lindahl has been involved in some of Sweden's largest business deals.

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