

Article

The Pirate Bay Ruling—When The Fun and Games End

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Introduction

On April 17, 2009, the District Court of Stockholm, Sweden announced its verdict in the so-called “Pirate Bay case”¹ against four individuals associated with a file-sharing website and service called The Pirate Bay, directed at the file-sharing community. The court found all four guilty of contributory copyright infringement, and each was sentenced to one year in prison. In addition to imprisonment, the defendants were ordered to pay damages in the amount of 30 million Swedish kronor (\$3.6 million, €2.7 million) to a handful of entertainment companies, including Sony Music Entertainment, Warner Bros, EMI and Columbia Pictures, for the infringement of 33 specific movie, music and gaming titles.

The formal proceedings were initiated on January 31, 2008 with Swedish prosecutors filing charges against four individuals they had discovered were intimately involved in the operations of Pirate Bay for, inter alia, contributory copyright infringement. The trial started on February 16, 2009 in the District Court of Stockholm, Sweden with unprecedented media hype for a Nordic copyright trial. The media coverage was extended by numerous bloggers that reported live from the court room and the hype was further emphasised by Pirate Bay supporters rallying in large numbers outside the court house, where they had set up temporary headquarters.

The hearings ended on March 3, 2009 and the verdict was announced one and half months later. In the judgment, the District Court responded, among other issues, to the following debated legal matters:

1. Stockholm District Court, docket no. B 13301-06, judgment April 17, 2009.

- the legality of running a torrent tracker search engine which contains torrents that point to unlicensed copyright-protected material,
- the scope of the safe harbour for service providers created by the e-Commerce Directive² and its Swedish implementation, and
- the applicable damages calculation mechanisms and principles.

The judgment, which is clearly written with the massive public interest in mind, is well-reasoned and runs for 107 pages, covering both the criminal law aspect of a copyright infringement offence and the civil law claims for damages.

This was, however, not the first time that the courts in the Nordic region had produced case law regarding BitTorrent services. The Finnish courts had reached a similar conclusion last year, when in the first European judgment against administrators of a BitTorrent service in June 2008, the Turku Court of Appeal affirmed the decision of the District Court of Turku which held the Finnish “Finreactor” BitTorrent-based peer-to-peer network illegal.³ Obviously, Pirate Bay operated a significantly more popular service and thus the Swedish case deservedly received more global media attention.

Around the world courts are currently addressing and analysing services that are much similar to Pirate Bay and Finreactor and it remains to be seen whether the Nordic conclusions will be further strengthened by the conclusions of those cases or do other courts consider the technology-based arguments sufficient to warrant a different outcome.⁴

2. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

3. See, e.g. Mikko Manner, “A Bittorrent P2P Network Shut Down and Its Operation Deemed Illegal in Finland” (2009) Ent. L.R. 20(1), 21–24.

4. See, e.g. an article in the Sydney Morning Herald on March 25, 2009 relating to an Australian case involving the ISP iiNet at <http://www.smh.com.au/news/technology/biztech/iiNet-faces-the-music-in-landmark-case/2009/03/25/1237656984092.html> [Accessed May 15, 2009].

The BitTorrent Protocol and Pirate Bay

To analyse the judgment and put it into a context, we must start with the technology involved, as especially the defendants apparently put a lot of faith in that the differences to earlier file-sharing solutions would lead to an acquittal. At the core of the technology analysis is the BitTorrent protocol, created by Bram Cohen⁵ and currently commercialised by BitTorrent Inc,⁶ which allows users to easily download large files, such as movies, over the internet by breaking up the files into many pieces. The key underlying technological idea is that the availability of pieces from numerous sources speeds up transfer as compared to retrieving the file from a single source.

Information on these pieces is provided by small so-called torrent files which are indexed, tracked and to some extent also stored on the Pirate Bay website. The torrent file also contains information about the trackers, i.e. the computers that coordinate the file distribution. Other computers wanting to download the same shared file must first obtain a torrent file for it, and connect to the specified tracker, which tells them from which other peers to download the pieces of the file. It is essential to note that the torrent files themselves do not contain any copyrighted material, and are instead simply pointers that tell which computers share parts of or the whole file.

In addition to "regular" BitTorrent downloading through trackers, the BitTorrent protocol also supports so-called DHT (Distributed Hash Table) downloading, in which the users' BitTorrent clients are in direct communication with each other, thus eliminating the need for a centralised tracker.

The Pirate Bay service provides, inter alia, an indexing and search functionality for torrent files, some of which are additionally stored on the website's own server. With some 3.5 million registered users, 22 million users in total and a self-proclaimed status of "the world's largest BitTorrent tracker",⁷ Pirate Bay was an obvious target for the entertainment industry. The service also took pride in the fact that it would not adhere to copyright proprietors' takedown demands and upheld a separate page where the administrators posted the copyright holders' takedown letters and the administrators' answers, in which the copyright holders were ridiculed.⁸ Their cavalier attitude toward IP infringement notices (as evidenced by for example the following snippet from

an email exchange between Pirate Bay and Apple's counsel) has had an impact on perception of the service operators as knowing facilitators and accomplices in massive copyright infringement:

"We demand that you immediately disable the torrent and/or tracker and prevent further distribution of Apple's trade secret and copyrighted material." (Apple's counsel)

"We demand that you provide us with entertainment by sending more legal threats. Please?" (Pirate Bay administrators)⁹

Investigation and prosecution

As the events leading up to the trial have been thoroughly discussed in many fora,¹⁰ we will focus on the events inside the courtroom, the judgment and possible effects thereof. Nevertheless, a short run-through of the background is probably in order.

Pirate Bay, founded in November 2003, was first raided by the Swedish police in May 2006. The raids were followed by a broad and in-depth investigation, which ended with the prosecutor pressing charges in January 2008. The charges consisted of two separate crimes, namely *aiding and abetting a copyright offence* and *preparation of a copyright offence*. The charges related specifically to alleged infringement of copyrights in music, movies and computer games during a period of time running from July 1, 2005 to May 31, 2006 with three groups of civil plaintiffs, including several multinational media companies, concurring with the official charges. It should be noted that the actual copyright infringement, i.e. the unlicensed public offering of copyrighted works, was committed by users of Pirate Bay who downloaded (and, due to the BitTorrent protocol, also uploaded) the unlicensed copyrighted material over the internet. However, no users were identified or prosecuted.

The defendants, three of which were administrators or otherwise closely linked to the website and one of which was alleged to be the financier of the service, were prosecuted under the Swedish Penal Code¹¹ and Copyright Act.¹² The prosecutor demanded together with the plaintiffs that the defendants should be sentenced for their contributions to criminal copyright infringement and held liable for damages, covering the financial loss suffered by the plaintiffs.

To establish criminal liability under the Swedish law, the prosecution needed to demonstrate that the defendants had been aware of the infringements, had with their actions contributed to the copyright infringements and that they had intended to earn and gain financial benefit from the file sharing service. All these prerequisites were naturally disputed by the defence attorneys.

Primarily, the prosecutor's and the plaintiffs' case on contributory infringement was built on three grounds: the prosecutor claimed that the defendants had contributed to copyright infringement:

9. See http://static.thepiratebay.org/apple_response.txt [Accessed May 15, 2009]; with much more inappropriate responses included as well.

10. See, e.g. per Eric Alvsing, "The Pirate Bay" (2008) Ent. L.R. 62.

11. Swedish Penal Code Ds 1999:36, as amended.

12. Swedish Copyright Act SFS 1960:729, as amended.

5. In an article in the San Francisco Chronicle on August 6, 2006 his background is discussed as follows: "Cohen introduced BitTorrent in 2002 and it quickly found a following. Silicon Valley companies like Sun Microsystems, for instance, use it to distribute large software files. But it also was put to not-so-acceptable uses, through sites such as Torrentspy, which let users search and find .torrent files, many of them pirated television shows and movies." I was very annoyed because from the beginning I was interested in creating a technology that was good, that did something good, but I ended up finding myself in this very strange situation," Cohen said." See <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/06/BUG6OKAUQ71.DTL> [Accessed May 15, 2009].

6. See <http://www.bittorrent.com> [Accessed May 15, 2009]; currently claiming over 150 million users.

7. Also, Pirate Bay is one of the most visited websites in the world, ranking at 107th according to Alexa Internet.

8. These can be found at <http://thepiratebay.org/legal> [Accessed May 15, 2009].

- by offering a database that was linked to a catalogue of torrent files pointing to infringing content,
- by enabling the users to search and download the torrent files, and
- by offering a tracker functionality through which the file-sharing users could contact each other.¹³

The charges also stated that the majority of the files found via Pirate Bay contain unlicensed copyrighted works and that the service is financed by advertisements, thus fulfilling the prerequisite for commercial exploitation of copyrighted works.

During the trial itself there were still some changes to the charges and how the prosecution eventually tried the case. For one, according to the original description of the alleged offence presented as part of the charges, Pirate Bay consisted of three components; an index portal, a database and a tracker function, described as follows:

"The Pirate Bay consists of three sub-components: an index portal in the form of a website with search functionality, a database with related directory containing the torrent files, and a tracker feature.

The tracker feature creates a 'peer-to-peer' network of users who want to share the same file. All components are necessary for the users of the service to share files between them."

However, during the trial, the prosecution changed its position by removing the last sentence (requiring that all three components be present for copyright infringement). It would appear that this amendment facilitated in part the guilty verdict.

Secondly, the charges initially also contained a section, accusing the defendants of aiding and abetting a copyright offence by contributing to making copies of copyrighted works. However, the prosecutor was unable to show that the illegal material had been passed through the Pirate Bay website or tracker—as the defendants successfully argued that DHT sharing and multiple trackers could be used instead of "regular" downloading. In response, the prosecutor actually amended the contributory infringement charge to cover only making the works available to the public. Such abandoning of one of the main lines of prosecution on only the second day of trial caused some confusion and the amendment was also contested by the defendants, who claimed that it was under the Swedish criminal law a prohibited alteration of the original indictment. However, this claim was found by the court to be without merit.

Infringing material on Pirate Bay?

During the trial, the prosecutor provided evidence and witness testimonies that most of the torrent files indexed on Pirate Bay during the time period July 1, 2005 to May 31, 2006 pointed to copyrighted materials.¹⁴ The court concluded that Pirate Bay had indexed a very large amount of torrent files during 2005–2006.

¹³. See also Jan Rosen, "The Pirate Bay—en analys" article published in Pointlex (see <http://www.pointlex.se> [Accessed May 15, 2009]).

¹⁴. In fact, one witness testified that at one point in 2006, when he surveyed the situation, 96 movies on the website's "top 100" list were infringing copies.

Further, the court found that in order to prove that the majority of these torrent files pointed to actually infringing materials, a reliable study of every file, or at least a majority of them, would have to be conducted. However, the court found that the witness' statements and parts of the defendants' e-mail correspondence showed that the most popular torrent files pointed almost exclusively to infringing materials. Also, all 33 works that were at issue in this trial and the fact that they had been downloaded numerous times indicated that infringing material was very popular and generated a lot of traffic on the Pirate Bay website.

Consequently, the prosecutor was unable to prove his general claim that most of the torrent files distributed on Pirate Bay would point to copyright protected material. However, the court found that "a considerable amount" of the torrent files on the website did do so.¹⁵

During witness questioning, one of the defendants presented the results of studies he had conducted concerning the nature of the files shared on the website. The results of the studies were startling—70 to 80 per cent of all torrent files on Pirate Bay pointed to material that was legally shared online. The results were, however, not verified by any further data and the District Court did not take them into account as the studies were conducted in 2008, i.e. some two years after the time of the prosecuted crimes.

Whether true or false, this percentage is surely indicative of the amount of torrents pointing to non-infringing material on Pirate Bay, and this figure was also put into perspective by the defendants, who argued that, e.g. YouTube actually *hosts* percentage-wise much more infringing material than Pirate Bay torrents *point* to.

What was the actual offence?

One of the main legal questions in this case was whether someone can be found guilty of contribution to an offence that he/she is unaware of? According to the prosecutor, the defendants should be held liable for assisting in offering (infringing) copyright-protected works to the public. However, the defendants claimed that they were totally unaware that any of the 33 works at issue were illegally distributed via Pirate Bay between July 2005 and May 2006 and no contribution could, thus, have taken place.

In response to this, the prosecutor acknowledged that no infringing material was technically stored on or passed through Pirate Bay servers, but he compared the case to past prosecutions of criminal accomplices. In a Swedish Supreme Court decision from

¹⁵. With regard to the terminology used by the court, it is noteworthy that the judgment actually does not expressly differentiate between "copyrighted works" and unlicensed, i.e. infringing materials. Obviously there should be nothing illegal or questionable in the fact that the materials available are copyright protected, which they for the most part naturally are, only where the copyright holder has not authorised the public dissemination of their work should the legality of making available such material come into play. Therefore we must make the assumption that it is implied by the court that the copyrighted materials are in the court's parlance equated with unlicensed, infringing materials. Be as it may, these types of details may be overlooked by overworked courts, yet have significance in the broader applicability of any case law.

1963, he noted, a defendant who had held a friend's coat while the friend assaulted a third person was considered an accomplice. Further, the prosecutor cited a ruling from 1996 in a case where copyrighted material was illegally stored on a Bulletin Board System,¹⁶ whose owner was found liable and a case from year 2000 involving mp3 files linked from a web page.¹⁷ The prosecutor argued that the cases showed that mere linking to infringing material was enough to find the defendants guilty.

According to Swedish legal literature, contributory liability arises when a person either physically or mentally has had an influence on the coming into being or the committing of a crime. Contributory liability does, thus, not require that the contribution is such that the criminal act would not have been undertaken without it. Liability for contribution can therefore arise even for persons who have only marginally contributed to the crime being committed.¹⁸ Consequently, in order for a person to be liable for contribution, a main offence must exist.

In assessing the intent, the court further found that it must have been obvious to the defendants that there were torrent files that pointed to copyright-protected works on the website's directory. The court noted that it had become clear from the witness statements and the evidence presented in the case (such as the takedown notices of copyright owners and responses thereto) that the defendants had been aware of the existence of copyright infringing material on the website and that such material was shared via Pirate Bay's tracker.

The defendants argued that contributory liability could not arise, as the main offences were not sufficiently specified, inter alia, as the actual offenders' identities were unknown. In this regard, the court went into detailed analysis of necessary intent and held that the contributor's awareness of the course of events does not need to completely match the actual events that took place. The court found that the prosecutor had proven that the claimed main offences had occurred, and that it is not a requirement for contributory liability that the actual offender should be known. It is sufficient that the objective prerequisites of the main offence are fulfilled. Thus, it was not necessary that the defendants' intent would cover the **specific works or the specific main offenders** that were at issue, but it is instead sufficient that the defendants have intentionally contributed to the distribution of (infringing) copyrighted material by third parties in general. Finally, the fact that copyright-protected works were available to the public on other websites prior to their release on Pirate Bay was irrelevant as to the contributory liability of the defendants.

Consequently, the court found that while it had not been shown that the defendants would have been aware of the public offering of the specific works named in connection with the damages claims, it was clear that the defendants were aware of the existence of copyright infringing material on Pirate Bay. As the defendants had not taken any measures to prevent immediate

copyright infringements, their intent to contributory copyright infringement offence had been proven.

However, the criminal charges for preparing to commit a copyright offence were not successful. This charge was built on the fact that the defendants had, as partially responsible for the activities of Pirate Bay:

- offered the functionality of a special database,
- in which it was possible to upload and store torrent files,
- that pointed to the copyright protected works that were itemised in the description of the charges.

The torrent files were, according to the prosecution, suitable to be used as auxiliary means in the copyright offence. This line of argumentation was not in the end successful as the court found that since the actual main offence, i.e. the unlicensed public offering of copyrighted works, was committed, and the defendants' were found guilty of contributing thereto, they could not additionally and separately be held liable for preparing to commit said main offence.

Adjudication on the defence of the e-Commerce Directive

Based on the above discussion of the prerequisites for liability, it is clear that a service provider on the internet is more exposed to risks arising out of potential abuse of the service, and thus also to liability for the abuse, than a regular service provider, as the service provider on the internet seldom has the possibility to examine every work that passes his servers. However, these aspects were also taken into account by the District Court when it assessed the so-called safe harbour provisions.

The defendants raised the question whether the Swedish Act on Electronic Commerce and Other Information Society Services¹⁹ and the EC's e-Commerce Directive²⁰ "safe harbours" were applicable to Pirate Bay, as they claimed that the service was just an intermediary. According to the aforementioned provisions, service providers and intermediaries could not in principle and subject to specific conditions be held liable for any offences committed by their users.

The primary questions to be resolved in this respect were:

- whether Pirate Bay is a service provider as described in the Act on Electronic Commerce and the e-Commerce Directive, and
- whether the services it provided could be deemed to fall within the scope of the Act and the Directive.

The District Court answered both these questions in the affirmative. According to the court, the services provided by Pirate Bay clearly

16. Swedish Supreme Court case B363-95, judgment February 22, 1996. See NJA 1996:11.

17. Swedish Supreme Court case B413-00, judgment June 15, 2000. See NJA 2000:48.

18. See, e.g. Holmqvist, "Brottsbalken" En kommentar. Kap. 13–24 (Norstedts Juridik AB, 2007).

19. Electronic Commerce and Other Information Society Services Act SFS 2002:562, as amended.

20. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

fulfilled the criteria for information society services set forth in the Directive.²¹

The non-liability provisions are found in ss. 16 to 19 of the Act on Electronic Commerce, which correspond to arts 12 to 14 of the e-Commerce Directive. The court found that the services provided by Pirate Bay did not fall within the scope of ss. 16 or 17 of the Act.²² Instead, the District Court found that Pirate Bay provided a service where a user could upload and store torrent files on the website, and the service was, consequently, deemed to be a “hosting” service in accordance with s.18 of the Act and art.14 of the Directive. According to the provision, a service provider shall not be liable for the information stored at the request of a user, under the condition that the provider does not have actual knowledge of the illegal or infringing activity and, as regards damage claims, is not aware of facts or circumstances from which the activity is apparent. Further, in order to fulfil the prerequisites set out in the provision, the provider must, upon obtaining knowledge of such activity, act expeditiously to remove or disable access to the illegal or infringing material.

As pointed out above, the court found that it must have been obvious to the defendants that there were torrent files on the website that directed users to copyright-protected works made available without the owners’ authorisation. However, the defendants did not, in spite of several requests to do so, take any actions to remove infringing content, and could thus not be afforded the protection of the non-liability provisions. Further, according to s.19 of the Act on Electronic Commerce, criminal liability of an intermediary or a service provider as meant in ss. 16 to 18 of the Act can only occur if the unlawful act has been intentional. In this regard, the court concluded that the defendants had knowingly ignored that copyrighted material was made available through the website and found that their act was intentional. The fact that the defendants were unaware of the infringing nature of the specific works that were at issue was deemed irrelevant, as the defendants had shown total indifference to the fact that copyright infringing material was shared via Pirate Bay.

One of the defendants also demanded that the District Court requests a preliminary ruling from the European Court of Justice on the application of the e-Commerce Directive and its Swedish implementation. However, the court dismissed this demand by stating

21. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 defines “information society services” by a reference to Directive 1998/34 laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37, as amended by Directive 1998/48 [1998] OJ L217/18. The criteria for information society services are, according to art.1(2) of the amended Directive, that the service is normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services (i.e. the user). The court found, based on the *travaux préparatoires* of the Swedish Act, that although the users did not pay for their usage, the remuneration criterion was fulfilled as Pirate Bay was, at least partly, financed with advertising revenue.

22. Which correspond, respectively, to the “mere conduit” and “caching” provisions in arts 12 and 13 of Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

that the provisions in the Act on Electronic Commerce correspond to the rules in the e-Commerce Directive and that there exists no uncertainty on the interpretation of the Act or the Directive.

It should be noted that the liability of intermediaries has been widely discussed in other cases in various jurisdictions as well,²³ e.g. *Viacom, Inc v Youtube, Inc*²⁴ in the United States and the recent French trial between eBay and LVMH.²⁵ In the latter case, the online auction website was found liable for providing a sales platform for counterfeit goods and ordered to pay damages to LVMH. The *Tribunal de Commerce* in Paris agreed that web hosts should have immunity on basis of the e-Commerce Directive,²⁶ but did not find eBay’s activities to fall within that category. However, an even more recent French court decision in *L’Oréal v eBay*²⁷ seems to rebut this line of reasoning, as eBay was found to fulfill the prerequisites set out for safe harbors in the e-Commerce Directive.²⁸ In the UK proceedings between eBay and L’Oréal²⁹ the question of safe harbor provisions has been forwarded to the European Court of Justice, whose preliminary ruling may clear the legal situation to some extent. Despite the controversy on the definition of an internet intermediary, it is clear these high-profile cases all involve a service provider, which, at least seemingly, tried to respond to takedown requests and did not openly insult the copyright holders, as was the case with Pirate Bay.

Calculation and amount of damages

In claiming damages, the plaintiffs were roughly divided into three groups: the Swedish music industry, the Nordic film industry and the international film industry. The total damages claim was 101.9 million Swedish kronor (\$13.0 million, €9.7 million) with interest, of which the international film industry’s claim was some 93 million kronor. In addition to claiming significantly different amounts of damages, the groups also presented differing methods of calculating the damages.

The defendants contested the damages claims in their entirety. As grounds for contesting the damages claims, the defendants presented, in addition to the grounds presented in their response to the criminal charges, that the plaintiffs have actually

23. For a thorough discussion on liability of online intermediaries, see, e.g. Ronald J. Mann and Seth R. Belzley, “The Promise of Internet Intermediary Liability” 47 *Wm. & Mary L. Rev.* 239.

24. *Viacom, Inc v YouTube, Inc* No. 1:07-cv-02103 (S.D.N.Y., April 30, 2008)

25. *LVMH v eBay* TC Paris, 1ère Ch B, June 30, 2008.

26. Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

27. *L’Oréal SA v eBay France SA*. Tribunal de Grande Instance de Paris, case RG 07/11365.

28. See, e.g. <http://ebayinkblog.com/2009/05/13/ebay-enjoys-le-victoire-in-france/>. The ruling is an interim ruling, which also proposed both parties to have recourse to legal mediation. The proceedings are part of an EU-wide campaign in which the French cosmetics giant L’Oréal has brought cases against eBay in France, Belgium, Germany, UK and Spain. The French decision mirrors essentially a decision given in Belgium. See Eileen McDermott and Eklavya Gupta, “eBay under fire from brand owners” *Managing Intellectual Property*, September 2008, 6-8.

29. *L’Oréal v eBay* [2009] EWHC 1094 (Ch).

not incurred any damages as their sales have not declined due to the alleged infringements. Downloading of a copyrighted work would in other words not have affected the downloader's willingness to purchase a corresponding legal copy. Further, the defendants claimed that there was no adequate causality between the alleged damages and the defendants' actions. However, the court found that there were sufficient grounds for the plaintiffs' claims for damages which rendered the defendants' reasoning moot.

The Nordic film industry had calculated their damages using a hypothetical licence fee, for which they would allow third parties to offer free downloading of the infringed movies. The Swedish record companies and the international film industry, however, used a *fee per download*—method, in which the number of downloaded copies of a copyrighted work (based on the website's own download counter) would be multiplied with the price of downloading the work legally.

The record companies argued that there was no way of obtaining a reasonable hypothetical licence fee, and pricing the individual items was, thus, the only way to go.³⁰ Further, in addition to the reasonable compensation for infringement, the record companies argued that the availability of free infringing material also reduced the sales of CDs and the hindered development of online services. Therefore, the cost for an album or a single track was to be multiplied by a factor from 2 to 10 depending on the online availability of a legal copy of the copyrighted work and how soon the infringing file was available via Pirate Bay.³¹

The international film industry had calculated fixed prices for all of the infringed titles, taking into account the facts that none of the titles were available for legal download when the infringing acts had occurred and that 90 per cent of the downloaders of the material were located in Europe and the United States.³² The international film companies also claimed compensation for other damages in a manner similar to the record companies.

The District Court found that the correct way to calculate damages in this case was to use a hypothetical licence fee, as the Nordic film industry had done. The court also confirmed that it is unacceptable that a right would be infringed without the proprietor being compensated and that the right to this compensation cannot depend on whether the proprietor has actually incurred economical or other damage due to the infringement. In accordance with the calculation model presented by the Nordic film companies, the District Court found that when calculating a hypothetical licence fee, one shall take into account that the movie would be offered without copy protection to a market of six million Swedish internet users and approximately as many users outside of Sweden. Further, it should be taken into

account that the revenues from video sales and rentals would be reduced as a result of the hypothetical licence, and that the legal online market for the movie would cease to exist. Finally, the amount of anticipated downloads via Pirate Bay should also be accounted for when calculating the hypothetical licence fee.³³

Even though the court found that the record companies and the international film industry employed incorrect methods of calculating damages, it found that it could not impose a hypothetical licence fee on them. Instead, the court used the mechanisms presented by the plaintiffs, but lowered the fixed costs so that the total amount of damages became reasonable.

Similar reasoning could also be found in the court's calculation of other damages (e.g. lost goodwill and reduction of market size). The total amount of damages to be paid, jointly and severally, by the defendants was ordered to be 27.6 million kronor (\$3.5 million, €2.3 million) with legal interest as of May 31, 2006, of which 23.7 million kronor is payable to representatives of the international film industry.

We do not believe that any strict guidelines on calculating and/or presenting damage claims can be deduced from this particular case. It is, however, noteworthy, that even within the entertainment industry there appears to be opposing views regarding how the damages should be calculated, which may in turn tell us something about the differences in the business methods underlying the current legal services.

The damage assessment will inevitably become more straightforward as the business models for the legally provided content services evolve and actual data of actual business cases can be required to be submitted by the copyright owners to the courts to assist them in damage calculation. Finally, obviously the jurisprudence of a particular jurisdiction has unquestionably significant impact on the outcome in this regard, as it would have on the criminal consequences, i.e. time to be served by the service administrators, and the Nordic region is relatively conservative in both respects. Especially in damage calculations the lack of statutory or punitive damages found in the United States lessens the amounts available.

Comparison with the *Finreactor* case

In the first European judgment against administrators of a peer-to-peer file sharing service in June 2008, Finnish Turku Court of Appeal affirmed the decision of the District Court of Turku which held the Finnish "Finreactor" BitTorrent-based peer-to-peer network illegal.³⁴ Even though there are some differences between the Finreactor network and Pirate Bay,³⁵ the reasoning of the two judgments bear a strong resemblance.

30. The reasonable compensation for an album was set at 6.5 euro and for a single track at 0.7 euro.

31. The amount of total damages for one downloaded copy of The Beatles' album *Let It Be* was, thus, 65 euros, as the artists had never approved online sales of their album, which lead to a multiplying factor of 10.

32. For instance, the reasonable compensation for one downloaded copy of the movie *Harry Potter and the Goblet of Fire* was calculated to be 261.47 kronor and the reasonable compensation for one downloaded copy of the movie *Walk the Line* 222.55 kronor.

33. Consequently, the court came to the conclusion that a hypothetical licence fee (and a reasonable compensation) for, e.g. a *Wallander* film would be 700,000 kr.

34. See, e.g. Mikko Manner, "A BitTorrent P2P Network Shut Down and Its Operation Deemed Illegal in Finland" (2009) Ent. L.R. 20(1), 21–24. The decision is not final.

35. The Finreactor network was, inter alia, actively moderated, whereas Pirate Bay prides itself in that it only moderates files that have misleading titles or contain or suggest child pornography.

In the *Finreactor* case, the defendants' defence was mainly based on two claims. Under the first claim, the defendants' asserted that the Finreactor website was not in fact a file sharing service but a database consisting of hyperlinks and, consequently, the administrators supposedly could not have directly or indirectly infringed the plaintiffs' copyrights. Under the second, alternate claim, it was argued the Finreactor service was an internet service provider (ISP), as defined in the Finnish Act on Provision of Information Society Services³⁶ (based on the e-Commerce Directive), and therefore it should enjoy a safe harbour provided for by the Act.

As regards the "mere linking" claim, the Finnish courts deemed that the activities of the administrators should be evaluated as a whole. The courts took a purpose-oriented stance and considered that the purpose of the Finreactor website was to provide a platform for distribution of copyright infringing material. Further, the courts took into account as an established fact that the administrators had specifically aimed to develop the service in order to ensure the provision of new (infringing) material to the users.

Under the "safe harbour" claim, the defendants argued that the plaintiffs should have made a takedown notice to the administrator of the website. The failure to file takedown notices was in turn argued to release the administrators of all financial liabilities regarding possible copyright infringements. The Court of Appeal rejected the argument noting that the Act on Provision of Information Society Services did not apply to the case since the defendants also participated in the provision of the content of the service as the administrators of the service and therefore the exemption from liability was not applicable.

According to the charges, Finreactor had more than 10,000 registered users and the combined value of the unauthorised copies acquired by the Finreactor users during the was estimated to several million euros, with the plaintiffs' claims for damages totalling some €4 million. The Court of Appeal, however, reduced the defendants' liability to one tenth of the plaintiffs' claims, adding up to €420,000 as damages and €142,000 as legal expenses. In addition, the defendants were sentenced to fines. From a comparative point of view it seems, thus, that the verdict in the Pirate Bay trial was stricter than the one in the *Finreactor* case (imprisonment instead of fines, one third of claimed damages awarded instead of one tenth etc.). However, at least in the determination of damages one should take into account the great difference in the user amounts of the websites, which goes some way in explaining the difference between the awarded damages.

It seems, therefore, that the judgment in the Pirate Bay trial is very much in line with the earlier Nordic case law on the subject. Even though the cases do have their own peculiarities, the main legal questions have been answered in a fairly uniform manner both in Finland and Sweden. However, it must be noted that in the *Finreactor* case both sides have applied for and been granted leave to appeal to the Supreme Court, which is expected to give its final and enforceable decision late 2009.

36. Provision of Information Society Services Act 2002/458, as amended.

Impact of the case

With already pending appeals and exhaustive proceedings in at least one instance left, it is too early to tell what the impact of the Pirate Bay trial, no matter the final outcome, is going to be. However, it may well be that the impact is not going to be very drastic as most of the peer-to-peer service providers are scattered around the world and receive far less publicity than Pirate Bay and its administrators.

In the great file-sharing public, the verdict is unlikely to have an impact. This is aptly demonstrated by the fact that it seems that the majority of the file-sharing community, i.e. youths from 15 to 25 years old, at least in Sweden would not alter their file-sharing habits even if their actions were found illegal.³⁷

Some torrent tracking sites have, however, assessed the situation differently. According to online news sources, the Swedish *Antipiratbyrå*, a group formed to protect the copyrights of its film industry members, has already sent cease and desist letters to several torrent indexing sites.³⁸ As a result, several of the sites have shut down.³⁹ The ceased services, all of which were significantly smaller in size than Pirate Bay, were all based in Sweden and run by Swedish citizens. It seems, thus, that the judgment has had some deterrent effect at least on site administrators fearing an indictment for their activities, which has naturally received applause from the entertainment industry.

It seems that the judgment has not affected Pirate Bay significantly. Prior to the trial, the defendants vowed that the site would remain a "harbour of free speech" even if the court would find them guilty. According to the defendants, the site administration's flat organisation model and the fact that the servers are scattered all over the world allows Pirate Bay to operate normally even if the defendants would all face jail time. Further, the plaintiffs did not even demand an injunction against the site. However, four record companies have now filed for injunction and asked Stockholm District Court to impose a conditional fine on three of the four defendants barring them from operating the site.

If anything, the public interest in the trial together with Swedish legislative amendments have given enormous public exposure to Pirate Bay, which also recently launched its new IPREDator anonymising service, the first service on the website

37. In an article published February 23, 2009 on the website of the Swedish business daily *Dagens Nyheter*, three Swedish sociologists from the University of Lund, unveiled the results of their survey of some 1,100 Swedish youngsters between the ages 15 and 25. Of these, 75% found that even though downloading copyrighted material is illegal, it is not a reason not to download. Almost as many answered negatively to the question whether stricter copyright legislation would prevent them from file-sharing. Håkan Hydén, Stefan Larsson & Måns Svensson, "Tre av fyra struntar i lagen mot fildelning" (<http://www.dn.se/opinion/debatt/tre-av-fyra-struntar-i-lagen-mot-fildelning-1.804882>) [Accessed May 15, 2009].

38. See <http://www.torrentfreak.com/swedish-anti-pirates-threaten-bittorrent-trackers-090423> [Accessed May 15, 2009].

39. See <http://www.torrentfreak.com/bittorrent-trackers-close-en-masse-after-pirate-bay-verdict-090420> [Accessed May 15, 2009].

that is subject to a charge. The IPREDator is a response to the implementation of the Enforcement Directive⁴⁰ in Sweden (through an act that is commonly called "IPRED"), which allows law enforcement and copyright holders to request the personal details of suspected copyright infringers. The copyright holders will then be able to make direct contact with the accused users and eventually even threaten them with legal action. Also, some of the defendants have participated in the creation of a fund that is aimed at providing financial assistance to people who are prosecuted under the IPRED. It is clear that the media hype surrounding the trial and the new legislative amendment have brought attention to online privacy matters and are also bound to bring more revenue to the Pirate Bay website.

Concluding remarks

As noted above, the liability of online service providers and intermediaries for copyright infringement remains a highly debated topic even after this judgment. In the United States, s.512 "safe harbour" provisions of the Digital Millennium Copyright Act are widely disputed, most notably in the current litigation between Viacom and YouTube.⁴¹ Section 512, as well as the e-Commerce Directive, provides limited copyright immunity to service providers on the internet, but the definition of service provider is far from clear. The judgment in this case seems to indicate that Pirate Bay could have fallen under the scope of the liability exemption of art.14 of the e-Commerce Directive if it had implemented and enforced sufficient notice and takedown procedures. Pirate Bay's approach was entirely different, i.e. to ridicule copyright holders, which certainly did not strengthen their case.

However, the question still remains. Should services like YouTube and eBay be required to take action such as automatically filtering content and removing infringing content without notice? Or should the liability be even stricter, demanding that the service provider hosts only content that it has scrutinised and found non-infringing in advance? How specifically are these IP protection mechanisms to be implemented (what is a reasonable "cost" in terms of money, time, usability and resources in comparison to the protected interested; and does this even matter)? Should services providing BitTorrent directories, without actually hosting or acting as a transmitting intermediary of copyrighted works over the internet, be subject to the same requirements? If so, how far does this stretch, especially in terms of personal responsibility under criminal law? To Google?

And if so, how do we avoid problems with copyright exceptions, such as the fair use doctrine and, significantly in the global internet, freedom of speech?⁴² Even though it is clear that technological advances will always precede legislation, it is safe

40. Directive 2004/48 on the enforcement of intellectual property rights [2004] OJ L195/16.

41. *Viacom Inc v YouTube Inc* No.1:07-cv-02103 (S.D.N.Y. April 30, 2008).

42. Some guidance may be taken, e.g. from *Stephanie Lenz v Universal Music Group*, (C 07-3783) Second Amended Complaint (N.D. Cal. April 18, 2008), where The Electronic Frontier Foundation filed suit against Universal Music, asking the court to protect the fair use and free speech rights of a mother who had

to say that defining just and balanced decisions in this arena poses one of the most challenging tasks the judiciary has seen to date.

One unanswered question is also on which level of the service provision chain copyright infringement should be dealt with. We have seen suits filed against end users⁴³, online services⁴⁴ and websites like Pirate Bay and also cases where ISPs have been demanded either to block access to certain sites or to deny internet access from some users altogether.⁴⁵ One of the recent, and probably most concerning, developments is to tackle these issues through legislation, as can be seen in the recently introduced French act called *loi Hadopi*, which imposes a three-strike system for internet offences.⁴⁶ It is clear that all these approaches have their pros and cons, but it remains to be seen whether any one of them proves to be more successful than the others.

As concerns the case at hand, both parties announced almost immediately after the trial that they will appeal the ruling to the Court of Appeal. It is expected that the proceedings in the Court of Appeal could take up to one year, after which a leave to appeal to the Supreme Court is almost certainly sought by either of the parties. If the Supreme Court grants a leave to appeal and finds that the matter concerns the interpretation of the e-Commerce Directive, the Supreme Court can request a preliminary ruling from the ECJ. This could mean that we will have to wait for up to even four years before a final judgment is reached.

uploaded a short video of her son dancing to a Prince song. In its ruling, the court emphasised that copyright owners must consider fair use and freedom of speech issues before issuing takedown notices to service providers.

43. For instance the Recording Industry Association of America (RIAA) has filed thousands of lawsuits against individual peer-to-peer users.

44. e.g. *A&M Records v Napster Inc* 239 F 3d 1004, 1015 (9th Cir. 2001) and *Metro-Goldwyn.Mayer Studio Inc v Grokster Ltd* (2005) 125 S.Ct., 2764 Sup Ct US.

45. Danish courts have, pursuant to demands from the entertainment industry, ordered the ISP Tele2 to block access to Pirate Bay. The case is, however, currently being handled by the Danish Supreme Court, whose decision will surely be scrutinized at least in the other Nordic countries. In Australia, the country's third largest ISP iiNet is currently facing copyright infringement charges in the Federal Court of Australia for failing to prevent its subscribers from downloading pirated material using the BitTorrent protocol, see *Roadshow Films Pty Ltd & Ors v. iiNet Ltd* (commonly known as *AFACT v. iiNet Ltd*), NSD 1802 OF 2008. See also an article in the Sydney Morning Herald on March 25, 2009 relating to the Australian case at <http://www.smh.com.au/news/technology/biztech/iiNet-faces-themusic-in-landmark-case/2009/03/25/11237656984092.html> [Accessed May 15, 2009].

46. *Projet de loi favorisant la diffusion et la protection de la création sur internet*, which was unexpectedly rejected by the *Assemblée Nationale* on April 9, 2009, but accepted in a slightly amended form on May 12, 2009. The *loi Hadopi* has been strongly criticized, inter alia, by several civic organizations, as it forces the ISP to block an offending user from the Internet for a maximum period of one year. Also the European Parliament has taken a negative stance towards the legislation, as it has categorized access to the internet as a civil right. A more lenient system will shortly be adopted in Taiwan, where the ISP can choose the imposed sanction to be, e.g., downgrading of the user's connection. The same amendments also include a new criminalization, which makes it an offence to use peer-to-peer technology to facilitate the distribution of copyrighted works online.

Further, in an interesting twist of events, controversy has surfaced over one of the two presiding judge's possible conflict of interests in the trial. It turns out that the judge is currently a member of the Swedish Copyright Association (*Svenska föreningen för upphovsrätt*) together with individuals who represented the recording industry in the Pirate Bay trial. The Swedish Copyright Association is an organisation that discusses copyright matters but does not comment on legal politics and is seen as a *forum* for anyone interested in copyright. Additionally, the judge also sits on the board of the Swedish Association for the Protection of Industrial Property (*Svenska föreningen för industriellt rättsskydd*), an advocacy group that pushes stricter copyright laws.

These facts have been confirmed by the judge, who personally thought that they would not be a problem or cause a conflict of interest. However, at least one of the defendants has

already demanded a retrial on this ground in his appeal. The demand will have to be handled by the appellate court before the actual appeal will be taken into consideration, thus slowing down the already lagging proceedings.⁴⁷

All in all, even though we now have a first instance ruling, the case is still far from finally resolved, and we should wait for a final ruling in the matter before determining the actual impact of the case. However, the first instance judgment in the Pirate Bay trial has at least, together with the earlier Finreactor case, put the Nordic countries in the limelight and the avant garde of case law on file-sharing globally. These two rulings show that although especially Sweden has been declared a "pirate wonderland", it seems that legal practice in the Nordic countries still protects copyright holders and frowns upon "the pirates".

47. In an ironic twist, even the appellate judge who was given the task of examining the bias claims was found to be biased on the same grounds as the presiding judge in the District Court.