

*Illicit File Sharing and
Intermediary Services within the
Framework of the E-commerce
Directive*

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Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation.¹

... it would be really quite remarkable if the evolution of legal institutions concerning patents, copyrights, and trade secrets had somehow resulted in a set of instruments optimally designed to serve either public policy purposes or the private economic interests of individuals and firms seeking such protections.²

Now, back to Rome for a quick wedding and some slow executions!³

1. INTRODUCTION

The market for online access to music and movies in digital format is steadily growing. The form of services taking advantage of this growth is provoked and shaped by the existence of the diverse, and mostly illicit, ways that Internet users share these works of entertainment and culture

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p 10–19 recital (9).

² PA David, 'Intellectual Property Institutions and the Panda's Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History' in MB Wallerstein, ME Mogue, R A Schoen (eds), *Global Dimensions of Intellectual Property Rights in Science and Technology*, Office of International Affairs National Research Council (National Academy Press Washington 1993) p 21.

³ F Melvin and M Pertwee, *A Funny Thing Happened on the Way to the Forum* (Quadrangle Films, 1966).

amongst each other. The techniques for sharing files online are in constant flux and development, but one factor remains constant: there must be a point of initial contact between the users. To this end there is a need for a 'Forum': an intermediary service where the supply and demand of uncountable estranged users can be coordinated and managed. Like the fora of the ancient world, the new Internet forums are teeming meeting spaces where all sorts of transactions are initiated and agreed. Technology has made them diverse, specialized and ephemeral to the point of frustration for those who attempt to create taxonomies, but their essential meeting- and handshaking-function remains unchanged.

The Internet site, the 'The Pirate Bay', provides one such forum and four men holding various positions in the site's administration have recently appealed the judgment of the Stockholm district court of April 2009 wherein they were found jointly guilty of accessory copyright infringement through their actions, inactions and the user connectivity provided by the site. Such forum sites are a common and popular phenomenon, though their value-offerings differ in the details. Sometimes they merely offer the users the ability to share links, sometime also they share larger files, or even make content viewable through direct streaming. Regardless, the selling point of forum sites lies in the contact they provide with other users.

Copyright law grants to its rights holder a position of exclusivity. Though this exclusivity is not without its exceptions, it does confer a strong controlling position when it comes to the use, reproduction and distribution of created works of art and entertainment. In these days of online distribution, the most economically important right is becoming that which governs the act of making the work available to the public through digital networks. In this case, Internet users who congregated in The Pirate Bay shared works in such a way that they were held to have communicated those works to the public. But their role is not the direct issue here. Rather, the case revolves around the middleman function: the intermediary physical or juridical person.

The Pirate Bay case has three major points of interest. How should we treat technologies and services that facilitate or assist in copyright infringements?⁴ How should we calculate an equitable account of profits? And how do we estimate actual damage to the rights owners in the digital media landscape? To these three points was added a fourth one when the district court decided that the defendants should be considered joint perpetrators, thus fully sharing the responsibility for any secondary infringements.

When it came to the further issue of being an accessory to infringements the district court found that The Pirate Bay was an effective tool in sharing copyrighted material, that the defendants were aware that a large percentage of

⁴ The term 'secondary infringement' will be used as a wide concept throughout this paper to cover all those actions that an intermediary service can perform, since they provide a technical platform which can be used in various ways by the primary infringer, including making infringing copies, making works available to the public or illicitly performing works.

the site's users were committing illicit sharing of copyrighted material and that the defendants held positions within The Pirate Bay such that they should be held responsible. Regrettably this does not assist the framing of guiding principles when it comes to distinguishing one Internet service from another as any CEO of an Internet search engine or user-driven site can quite easily fulfil these criteria. This conundrum is highlighted in Directive 2000/31 on electronic commerce in Europe⁵ where the various services in the information society, such as search engines and data hosting-service are recognized as having a particularly important, but also complicated, role as mediators between the online users on the European common market. The directive tries to limit disincentives to the development of new Internet technologies having the potential for cross-border activity by providing a sort of safe harbour limitation on intermediary liability.

What needs exploring is that which is needed to allow differentiation between the different forms of middleman services that are used by users in committing intellectual property infringements. In the judgment of the district court, such things as the abrasive language and belligerent behaviour of The Pirate Bay are mentioned, as is the site's refusal to remove torrents despite being prompted to do so. Other factors in the case includes the absence of any notice and take down policy, the question of exactly how integral the service was to the principal infringements committed by the users, and certainly the level of knowledge of these principal acts that can be attributed to the middleman. While the focus lies on examining the liabilities of internet intermediary services under the E-Commerce Directive, this paper makes an effort to systematize criteria regarding both action and inaction as well as the technological capabilities that are relevant in accessory copyright piracy cases and, further, to come to terms with the idea of accessory infringement in an online, networked market. Finally, this paper notes a discrepancy of purpose between the e-commerce directive and the more recent IPR enforcement directive.

2. INFRINGING ACTS

2.1 The Primary Infringement

The typical primary copyright infringement takes place when two users illicitly share copyrighted material between themselves. Due to the nature of the technology they are most likely both illicitly copying the work and making it available to the public (see further below). Since the users on the network are typically strangers to each other and since the sharing is typically done in an open environment with hundreds of other users, the criteria of making the work

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. OJ L 178, 17.7.2000, p 1.

available to the public is quite easily fulfilled. In accordance with 2 § of the Swedish Copyright Act, an act of making a work available to the public entails making it available through with or without wires at a remote location where the public can take part of the work. This category of infringement was created in Swedish copyright legislation when the Act was updated in 1 July 2005. Typical examples include TV or radio transmissions, or making material accessible through the Internet.

The primary infringers were not heard in the case, being only known by their IP-addresses and their *forum nom de plumes*. No one contested the charge that these nameless individuals had illicitly made copyrighted material available to the public. Though the users making the work available were, to a large extent, not Swedish, or at least not located in Sweden at the time of making the material available, the district court deemed the infringement to have taken place in Sweden because the recipients of the work made available could be located in Sweden, due to the fact that the material was made available through the Internet.⁶

The other primary infringement charge was however dropped during the proceedings.⁷ Though making an illicit copy of the work that has come via an open file sharing network is in principle an infringement, the documented copies that had been made in the process had been prepared by a person working for the prosecutor, and could not therefore have been made illicitly. Other copies made by other users were not documented.

2.2 Secondary Infringement

As a general rule, those who aid or abet the primary perpetrator of a crime can be found equally guilty. The main rule found in chapter 23, 4 § of the Swedish penal code is equally applicable to crimes outside of the penal code itself, where the penalty includes imprisonment; this includes copyright infringements. As with the primary offence, the secondary one has both an objective and a subjective requirement, both of which must be present in order for there to be an offence. The objective component requires the facilitation of the primary infringement to actually be effective. However, the level of effectiveness required is very low. For example in penal law, it suffices to hold someone's coat when that person is beating up a third party in order to be guilty of facilitating the assault.⁸ The aiding, abetting or general facilitation of the primary act can be physical (by providing tools or assistance) or mental (by providing advice or encouragement). It is not required that the facilitation be a necessary

⁶ The District Court Judgment, March 17, 2009 (B 13301-06) (the 'TPB Judgement'), at para 61.

⁷ 2 § of the Swedish copyright act prohibits the illicit copying of the protected work in whole or in part. This is the action committed by the users who download, even if the copies are unfinished.

⁸ See Swedish Supreme Court, case NJA 1963 s 574.

requirement for the primary infringement. All Internet intermediaries, such as search engines, hosting services, web hotels and Internet access providers are facilitating users' copyright infringements and fulfil the objective component.

The subjective requirement is twofold. First it requires secondary infringers to have some form of awareness of the primary infringement. Obviously, the intentionality of the secondary perpetrators must cover their own actions, meaning an awareness of the functionality of the service provided and how it can be put to use by their users. This – the first part of the subjective requirement – is also likely to be fulfilled by all the types of Internet intermediaries exemplified above.

But the intent must also extend to cover the acts of the primary crime.⁹ This is the second part of the subjective requirement, entailing intent with respect to the concrete deed that constitutes the primary crime. Though it is necessary that the accessory be aware of there being an actual and concrete chain of events in which the facilitating actions constitute a part, it is not required that the facilitator's intent cover the course of actual events in precise detail, nor that he or she is aware of the identity of the primary perpetrators, nor is it even required that he or she understands that the primary deed is criminal in nature.¹⁰ The second part of the subjective requirement therefore requires some degree of awareness on the part of the intermediary concerning the concrete deed whereby the primary infringers are illicitly making a copyrighted work available to the public. Here then stands revealed the rational watershed at which forums guilty of secondary infringements can be separated from those that are not.

As an aside, if one wants to make a better approach to secondary infringement, it is possible that a future interpretation of the second subjective requirement should focus not on the awareness of the concrete act, but rather on factors such as collusion and encouragement, as was done in the US *Grokster* case.

The US Grokster Case

In these days of constantly new, innovative technologies for communication, it is easy to get lost in the fascinating capabilities of the technology rather than the actual acts of facilitation or encouragement engaged in. In the case of a company manufacturing a piece of software that enabled the users to share files among themselves, the highest US Court ruled that it was the

⁹ L Holmqvist, M Leijonhufvud, P-O Tråskman and S Wennberg, *Brottsbalken En Kommentar Supplement 20* (Norstedts juridik 2008) ('Holmqvist') paras 23:57–58.

¹⁰ See Swedish Supreme Court, case NJA 2007 s. 929, pp 939–940. The case concerned an individual who had withdrawn and deposited money as part of a tax evasion scheme. It was not shown that he was explicitly aware of being party to this crime, but he was obviously aware of withdrawing and handing over the money as well as being aware that his actions were a part of a larger deed and he must have been aware of the likelihood that this cash management was part of an activity intended to deprive the Swedish state of taxes and levies, a result as to which he showed indifference. See also Holmqvist at para 23:58.

behaviour of the company itself that amounted to an inducement to commit copyright infringement. The technology could have both infringing and non-infringing uses, and as such it was not in itself relevant to the rationale and outcome. The court held that: 'One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties'.¹¹

Predictable Application of Law

The legal uncertainty surrounding secondary copyright infringement by intermediary services on the Internet raises the issue of legal predictability. Reading the 2004 correspondence between The Pirate Bay administrator and legal counsel representing a rights owner whose work had been linked to, it shows quite clearly that they were convinced that their activity was not illegal under Swedish Law. The uncertainty about the extent to which forums that do not in themselves post copyrighted material but do assist their users to infringe are liable certainly raises doubts on how far a court can go in applying penalties when it comes to precedent-setting cases in situations such as these. Law is a social construction, and its inherent mutability is most clearly displayed in cases where a court is asked to interpret old concepts so as to apply them in a new setting where technology has made deeds possible that were unthinkable at the time when the concepts were originally conceived. But this mutability also makes it difficult to predict decisions and outcomes under these novel circumstances.¹²

This uncertainty in itself poses a danger to technological innovation by providing potential legal troubles for entrepreneurs who wish to explore technology-based new businesses. Even entrepreneurs are averse to risk when it becomes too high. This leads us, after an initial review of how the Pirate Bay worked as a forum site, to the EC E-Commerce Directive, which aims to do away with (at least some of) this uncertainty for intermediary technologies and services.

3. THE PIRATE BAY DECONSTRUCTED

The capability of The Pirate Bay site on the Internet can be characterized by using a taxonomy of three types of capabilities: the technical capabilities, actions made by the users and actions committed by one or more of the

¹¹ *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.*, 545 U.S. 913,918 (2005). See also Olsson, H. *Copyright Svensk och internationell upphovsrätt* (Norstedts juridik 2006) p 319.

¹² U Petrusson, *Intellectual Property & Entrepreneurship: Creation of Wealth in an Intellectual Economy* (Center for Intellectual Property Studies 2004) pp 199–201. Petrusson stresses the extreme complexity that comes to light when legal concepts are to be honestly applied in new settings. When judges validate and accept intellectual claims, it may open matters up for the assertion of new interests.

principals of The Pirate Bay. Making these distinctions is necessary if one is to judge an intermediary's position within the framework of the E-commerce Directive below.

3.1 Technical Capabilities of BitTorrent in General

BitTorrent was developed in the United States and released for the first time in 2001. It is a free standard maintained by Bittorrent Incorporated, explaining a technical protocol for information-sharing via the Internet. Its model is of the peer-to-peer type, differentiated from the client-server type. The main difference between these types is that the information-sharing is a flow directly between the users (the peers), rather than through a central storage.

The efficiency advantage to BitTorrent is that it is not vulnerable to bottlenecks in distribution, something that normally occurs when a piece of popular information is only available through central storage. To avoid this, BitTorrent creates a distributed networking logic. It uses the other users who are also downloading the file to effectively act as servers to one another, simultaneously uploading the parts of the file received to others requesting the file. Hence, when downloading a file through BitTorrent, several connections will be made to allow reception of 'segments' of the file that combine to create the entire file. Meanwhile, as you are downloading these segments you are also uploading them to anyone else that needs the parts you are receiving. Once the entire file is received it is considered polite to keep your client connected to act as a seed. A 'seeder' refers to a user that has the entire file available.

Since each new user add storage and bandwidth of his or her own when they connect to the other users, the bottleneck problem is practically eliminated. This has made the protocol popular for large information-pushes, such as simultaneous global software updates of popular products. The protocol is also used by global communication services such as Skype, by public service broadcasting corporations such as Canadian CBC¹³ or Norwegian NRK¹⁴, or by private companies such as CBS, Fox, Viacom or New York Times.

Torrent Links

In order to download a primary file¹⁵ from another user, a file called 'a torrent' or 'a torrent link' is needed. This file provides a link to all the other users that

¹³ See Canadian Broadcasting Corporation, *CBC to BitTorrent Canada's Next Great Prime Minister*. Available at www.cbc.ca/nextprimeminister/blog/2008/03/canadas_next_great_prime_minis.html, last visited July 23, 2009.

¹⁴ See NRK – Norwegian Public Service Corporation, *Norsk Rikskringkasting, On BitTorrent*. Available at <http://nrkbeta.no/bittorrent> last visited July 23, 2009.

¹⁵ The term primary file or primary work will be used to signify the material shared by the user so as to distinguish it from the torrent link files that are available through the intermediary Forum site.

have a copy of the same. Activating the link allows the user to participate in the sharing by connecting directly to other users. The torrent link is a very small file, easy to send by e-mail. It takes less than a second to download if the user has a standard Swedish broadband connection.

A group of users that have activated the same torrent is known as a 'swarm'. Users that only have the link and no part of the primary file yet cannot initially properly 'share', since they are only downloading. But once they have parts of the primary files downloaded, these parts will be shared with the other users.¹⁶

The Forum's Database

Any Internet user could (and still can) create a user identity on The Pirate Bay and upload a torrent link. The user can index the file by choosing from a number of headings, including 'movies', 'music' or 'TV-series'.

Any other Internet user can, without needing to create an identity, search the database by browsing it, or by entering keywords. As mentioned, downloading the torrent is a matter of seconds.

The Tracker Function

In order for a torrent file to successfully link up to other users, a tracker function is employed. The tracker in this case is an Internet computer on which the activation of a torrent is announced. As long as the torrent is active and the user is connected to the Internet, the tracker computer will show his or her address to other users who activate their copy of that torrent. Once the users find each other's addresses through the tracker service, their subsequent communication is done directly.

A torrent often makes its activation known on a variety of tracker services. The addresses for these are included inside the torrent itself.

3.2 Actions Taken by the Users

Creating Torrents

A user having access to the primary work in digital form creates a torrent file at his or her home computer. The process takes a matter of minutes, but can increase if the primary work is large, like an entire season of a TV series. The user also enters the addresses of one or more trackers. A torrent does in itself not contain any copyrightable matter. As explained above, it is a link to other users.

¹⁶ Some users do use software that only pretends to share, but does not actually allow any uploading of data to the swarm. Such 'leeching' behaviour is frowned upon within the filesharing community.

Posting Torrents

Users add and index torrent files to the central database. This is done by choosing what headers to add the file under and entering into the database a personal description of what the torrent links to, or just a nonsensical message.

Downloading and Activating Torrents

Users search and download torrents from the forum's database. Once the torrent is downloaded onto the user's computer, it can be activated. In the same manner that normal web-links require a web-browser in order to perform their function, activating a torrent requires a BitTorrent client program in order to work. The BitTorrent Client is a piece of software that the user runs from his computer. Since BitTorrent is a freely available protocol, there are hundreds of available BitTorrent clients. Popular ones include mTorrent, Vuze, BitComet and many more.

3.3 Actions taken by the Principals

The determination of who is or was a principal of The Pirate Bay seems, in practice, quite hard to apply. Over the course of years, many different individuals seem to have had access to posting in the name of The Pirate Bay and to have had access to the html- and database-code that made up the site. The details may prove a headache to the police- and prosecutor authorities, but the principles remain the same.

Running and Maintaining the Database

At least some of the principals of The Pirate Bay ran and maintained the open database for torrent link files. Doing without any notice- and takedown policy, there was deliberately no screening or filtering of the torrents whatsoever. In 2008, a user posted a torrent file linking to the preliminary investigation concerning the murder of two children in Arboga, Sweden. The material contained autopsy photos. Even though it was within their power, the principals refused to remove the torrent. During the trial, the principals testified that they would remove a torrent only on grounds of misleading labelling by the users.

The principals behind The Pirate Bay are responsible for designing the database in the concrete form and shape it takes, with the current headings and categorizations, focusing largely on different kinds of media, such as movies, TV-shows and handheld media.¹⁷ The system of categorization is updated sporadically.

¹⁷ The main headings available to a user who wishes to enter a torrent into the database are: audio, video, applications, games, porn and other. Each main heading has a choice of up to nine sub-categories. For example the video heading includes: movies, movies dvd, music videos, movie clips, TV shows, handheld, highres-movies, high res-TV shows, and other.

Running and Maintaining a Torrent Tracker

At least some of the principals of The Pirate Bay ran and maintained a tracker service that enabled torrent users to find each other in accordance with what was explained above.

Views and Opinions

The Pirate Bay posts texts regarding copyright, Internet and freedom of information. Often they have a very provocative attitude, quite critical of copyright and openly insulting to representatives of rights owners.¹⁸ The most eloquent of the principals, Peter Sunde, has also, on numerous occasions, expressed his opinions on the issues at hand in television and newspapers.

Signals to the Users

The decision to call the site the ‘The Pirate Bay’, and the use of the pirate-ship logotype, are not without importance. Doubtlessly these send certain signals to the user collective that are, at least to some extent, an encouragement to post links to illicit material? Exactly how the term ‘pirate’ and other such signals sent out by the principals are being interpreted by the user collective at large has not been very well documented or studied.

3.4 A Causal Effect of Lawsuits on Technology Design?

Just as it is hard to imagine an iTunes without a Napster¹⁹, it is difficult to imagine DRM-free downloads or all-you-can-eat services such as Spotify without the existence of illicit peer-to-peer activity (‘P2P’). While it is uncontroversial that unlawful services provide a powerful incentive to create new legal alternatives, the details of how this influence works are hard to research.²⁰ Even more

¹⁸ K Schollin, *Digital Rights Management –The Future of Copyright* (PhD Thesis 2008) pp 105–107.

¹⁹ Prior to the launch of Apple’s iTunes Store, the big record labels were finding it very hard to sell any significant amount of music online. At the same time, they were finding increasing numbers of users were growing accustomed to downloading music without having any concept of paying for it. These desperate circumstances led them back to negotiations with Apple. Napster and its various offspring file sharing services were used as leverage by Apple Computer in their licensing negotiations with Universal, Sony BMG, Warner and EMI. The result was the iTunes music store, which practically created the music downloads business. See R Levine, ‘Napster’s Ghost Rises’, *Fortune Magazine*, March 2006. Available at money.cnn.com/magazines/fortune/fortune_archive/2006/03/06/8370610/index.htm, last visited July 27, 2009. See also DE Dilger, ‘Rise of the iTunes Killers Myth’, *Roughly Drafted Magazine* (2007). Available at www.roughlydrafted.com/2007/10/13/rise-of-the-itunes-killers-myth, last visited June 30, 2009. for an overview of the climate for online music in the years 1998-2003.

²⁰ See L Barfe, *Where Have All the Good Times Gone? The Rise and Fall of the Record Industry* (Atlantic Books, 2005) pp 327–328.

intriguing, but possibly just as challenging to research, is how laws and legal actions directed at file sharing services are influencing the design of the next-generation file-sharing technologies. A project such as Washington University's OneSwarm²¹, builds on the existing BitTorrent legacy but does away with the central Forum site and also adds a layer of privacy by obscuring all sources outside of your own circle of friends. Such technologies, while not directly targeted at copyright owners, will make it much harder to detect and track infringements.²² In an interesting development regarding The Pirate Bay site, the brunt of the link collection was downloaded into one file, which was then itself shared through a torrent. In essence, each user could download their own archive of The Pirate Bay, or use the downloaded material to quickly set up an identical site on an internet server of their own choosing.²³ These centralization/decentralization effects seem to make for an exciting area of future research.

4. THE E-COMMERCE DIRECTIVE²⁴

It is important ... [to establish] ... a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.²⁵

In order to do away with many of the uncertainties sketched above, the E-Commerce Directive has as one of its purposes the provision of additional clarity as to the accessorial position of Internet services acting as intermediaries.

4.1 Purpose: Free Movement of Information Services

Directive 2000/31/EC, also known as the EC E-commerce Directive, sets out to protect the growth potential of online trade and services. It is observed that the development of electronic commerce within the information society offers significant employment opportunities in the European Community, something that will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry.²⁶ The Directive recognizes the growth potential in the way information society

²¹ Oneswarm.cs.washington.edu.

²² See Oneswarm P2P Screencast, http://oneswarm.cs.washington.edu/screencasts_overview.html#screencast_overview.

²³ P Goss, 'Pirate Bay Clone Site Surfaces', *Techradar.com* Aug 20. Available at www.techradar.com/news/internet/pirate-bay-clone-site-surfaces-627692, last visited August 31, 2009.

²⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market OJ L 178 , 17/07/2000 P. 0001 – 0016.

²⁵ Directive 2000/31/EC, Recital (50).

²⁶ See Directive 2000/31/EC, Recital (2).

services makes it possible to commercialize goods and services through new business models and in new markets. However, the development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market, some of which make less attractive the exercise of the freedom of establishment and the freedom to provide services. These obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services.²⁷

Legal Predictability for Information Services

It is the purpose of the E-Commerce Directive to move towards a legal framework that is clear, simple, predictable and consistent with the rules applicable at international level. This is in order to allow the unhampered development of electronic commerce. Otherwise it is feared that the uncertainty provided by an unpredictable legal framework will adversely affect the competitiveness of European industry or impede innovation in that sector.²⁸

Definition of Information Society Services

The definition of information society services already exist in Community law in Directive 98/34/EC,²⁹ and in Directive 98/84/EC.³⁰ This definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.

Certain services, referred to in the indicative list in Annex V to Directive 98/34/EC that do not imply data processing and storage, are not covered by this definition. Excluded are such services as are not provided either at a distance, by electronic means, or not supplied at the individual request of a recipient of services.

Recital (18) contains a more in-depth definition of what these services entail. Information society services span a wide range of online economic activities.

²⁷ Ibid Recital (5).

²⁸ Ibid Recital (60).

²⁹ Directive 98/34/EC of the European Parliament and of the Council of 22 June of 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services. OJ L 204, 21.7.1998, p 37. Directive as amended by Directive 98/48/EC OJ L 320, 5.8.1998, p 18. See point 2, Art 1: 'service': any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition: 'at a distance': means that the service is provided without the parties being simultaneously present, 'by electronic means': means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, 'at the individual request of a recipient of services': means that the service is provided through the transmission of data on individual request.'

³⁰ Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.

These activities can, in particular, consist of selling goods on-line. Activities such as the delivery of goods as such or the provision of services off-line are not covered. Information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services that are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data. Information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service. Traditional television and radio broadcasting within the meaning of Directive EEC/89/552 are not information society services because they are not provided at the individual request of the recipient, though on-demand video services can be.

Recipients of these Services

The definition of ‘recipient of a service’ does cover all forms of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.³¹

Liability of Intermediary Service Providers

Providers of information services play an important role in the development of the information society, and by extension of the rationale of the 2001/31/EC Directive an equally important role in the growth and innovation of the European market. Information collation services such as Google have become invaluable for consumers and corporations alike, as well as providing a valuable tool for academic research. Price comparison services have provided a revolutionary tool for consumers and helped bolster cross-border trade within the Common Market. Predicting the value of innovative services is hard due to the unpredictability inherent in innovation itself. Even harder is to predict how the recipients will make use of a certain service, or what value they will find in it. To add to this, information services are tools for the users’ own purposes and as such they work as intermediary to a wide variety of activities. Additionally, these services invariably span multiple jurisdictions when the users are spread across different nations. ‘Both existing and emerging disparities in Member States’ legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition.’³² Thus we find the need for a clear, simple and

³¹ Ibid Recital (20).

³² Ibid Recital (40).

predictable legal framework that allows for the safeguarded development of information society services unhampered by the fear of unpredictable legal repercussions.³³ In particular this requires a safe harbour for service providers that act as intermediaries.

Section 4 of the 2001/32/EC Directive contains provisions to limit the liability of intermediary service providers for the information conducted or hosted for their customers. Articles 12 and 13 detail the situation where a service provides a 'mere conduit', a simple transmission of the information of its users with no residue or traces of the conduit. Internet service providers who simply furnish their users with an access to the Internet fall within this category. Temporary information storage, lasting no longer than what is reasonably necessary for the transmission, is considered as providing a mere conduit.³⁴ Article 13 regulates the situation of a service that is not a hosting service but may require pieces of information to be temporarily stored ('cached') for technical efficiency, though the purpose of this transient storage is to provide a transmission of information. The intermediate information storage in mind is automatic and temporary and covers such services provided by Internet service providers as well as information collation services, such as search engines. The latter case though is not entirely applicable since the cached information on a search engine's servers will very likely be modified by the service provider.³⁵

Mere Conduit Services

Where the intermediary does not host the exchanged subject matter itself but simply transmits it onwards, or merely provides the access to the communication network in which the matter is exchanged, the service is considered as a mere conduit. Article 12 states:

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:
 - (a) does not initiate the transmission;
 - (b) does not select the receiver of the transmission; and
 - (c) does not select or modify the information contained in the transmission.
2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

³³ Ibid Recital (60).

³⁴ Ibid Art 12.2.

³⁵ Ibid Art 13.1. (a).

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.³⁶

Caching services

In the digital world, straight transmission is often not the case. What looks like a traditional transmission can be a series of briefly existing copies. Article 13 states:

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;
- (c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- (d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- (e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.³⁷

Mere Conduit and Caching: Non-involvement With Data or Users

A service provider can only benefit from the exemptions for 'mere conduit' and for 'caching' when he is not actually involved with the information transmitted. This entails, for example, that the information transmitted or provided access to be in no way modified. This requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.³⁸

An intermediary must not have contact or coordinate with any of its users regarding their use of the service for illegal acts, or they will forfeit the protection afforded by the Directive. A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of 'mere conduit' or 'caching' and as a result cannot benefit from the liability exemptions established for these activities.³⁹

³⁶ Ibid Art 12.

³⁷ Ibid Art 13.

³⁸ Ibid Recital (43).

³⁹ Ibid Recital (44).

It must be noted that, in a case from the District court of Brussels, these provisions have been interpreted as still allowing an Internet service provider to be seen as a secondary infringer and therefore required to filter their digital traffic. Whether this interpretation will last remains to be seen.⁴⁰

Hosting Services

Article 14 of section 4 provides for limited liability for those information society services that provide their users with some form of information storage.

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
 - (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
 - (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.
3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

The definition of hosting services includes many of the Internet services that engage in the business of so-called 'user generated content'. Contemporary examples include all kinds of Web-hosting services, portal services such as MSN and Myspace, forums for chat and media-sharing sites such as Youtube.

One common factor in all such services is the service provider's control of the digital storage space on which the information is being stored. This requires the physical control of computer servers, or the contractual control of computer servers provided by a third party.

The requirement in 14.1(a) that the provider should not have actual knowledge of illegal activity or information must reasonably be understood to indicate user activity taking place or information stored on this controlled digital space.

No General Obligation to Monitor

The Directive clarifies that intermediaries should not be given the burden of conducting general monitoring regarding the information flows through or via

⁴⁰ *SABAM v. s.a. Scarlet (anciennement Tiscali)*, Brussels Court of First Instance (TGI), 29 June 2007, N° 04/8975/A. Available at <http://www.juriscom.net/documents/tpibruxelles20070629.pdf>. The so-called SABAM v. Tiscali case. The court ordered the Internet access provider to block all p2p traffic through their servers in spite of the mere-conduit position that they held, referencing Recitals (40) and (45) to support its decision.

their service, since Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature. However, this does not concern monitoring obligations in specific cases.⁴¹

Analysis of Torrent-Sharing Forums

A provider of information society services can be a physical or juridical person in charge of providing any of the services within the wide swath of the information society. Even though these services can often be characterized as being provided for remuneration, the definition also extends to services that do not give rise to online contracting in so far as they represent an economic activity at all. Furthermore such services are provided at a distance, through electronic means and at the individual request of the recipient of the service. The service provided by torrent- and link-sharing sites such as The Pirate Bay is to be a forum for Internet users to upload their links to information, and through this uploading be able to link up with other users interested in that particular information. Even if the users do not pay for this service or enter into a contract with the owners of The Pirate Bay, such services cost resources to run and are paid for by on-site advertising or through otherwise leveraging its traffic for economic gain, and as a rule these kinds of sites are information society services.⁴²

The grounds for limitations on the liability of such service providers are found in articles 12-14 of Directive 2000/31/EC corresponding to §§16-19 of the Swedish implementation. §§16-18 deal with claims for compensation while §19 covers criminal culpability.⁴³

In technical detail, the services provided by the torrent-sharing sites such as The Pirate Bay include among other things making space available on computer servers for the users to upload, label and store torrent-links on. The services entailing the storing of such links do not commonly include the storing of the information linked to. In The Pirate Bay case, this was certainly not something that the service offered since it was a pure collection of torrent-links. The act for which a service provider could be liable as an intermediary is the copyright-infringement taking place when a recipient of the service unlawfully makes a copyrighted work available to the public. Since the infringed works that are the basis of liability are at no point stored on the server space provided by the torrent-sharing site, article 14, which describes hosting services, is the least appropriate label for this kind of service.⁴⁴

⁴¹ See Directive 2000/31/EC., Recital (47) and Art 15.

⁴² See *ibid* at Recital (18) and Prop 2001/02:150. Lag om elektronisk handel och andra informationssamhällets pp 56-58.

⁴³ *Lag om elektronisk handel och andra informationssamhällets tjänster*. (SFS 2002:562).

⁴⁴ Mistaking the mere torrent-link for the actual information transmitted between the users might have led the Stockholm district court in The Pirate Bay judgment to come to this conclusion at para 75. There are clear indications that this matter was not fully understood, such as the claim in para 69 that 'It suffices that the [defendants] were aware of the fact that copyrighted matter had occurred on the website.'

In the process of transmitting the information between the users, the recipients' access to the torrent-link performs an initial brief and purely transient role. The information is provided by the recipients of the service and passed onto other recipients without actually ever being stored on any space controlled by the service provider. The second role performed by the service happens at the very brief moment when two file sharing users locate each other through the service's tracker. This transient but necessary feature of the service in the file-sharing process needs to be considered in more detail.

Comparison with Search Engines

Similar to a link-sharing forum, Internet Search engines are frustratingly hard to place in any of the three categories of the E-Commerce Directive. Within the mere taxonomy of 'mere conduit', 'caching' and 'hosting', there is little assistance to be found. The only one that offers any tangible help is Article 12: 'mere conduit'. But whereas it would fit with the spirit of the Directive to include search engines under this heading the fit would be difficult under the precise wording. Certainly Recital 18 of the Directive specifically includes services that 'provides tools allowing for search, access and retrieval of data', but there are technical issues that makes the case a hard fit. Allgrove and Ganley point out that this is not a case of the transmission of information provided by the recipient of the service; although the search query is initiated by the recipient, the information against which the defence would need to apply is the search results transmitted from the search engine's servers – clearly not information provided by the recipient. Further, the content of the transmission is selected and arguably modified by the search engine, something that is contrary to the provisions of the mere conduit category of intermediaries.⁴⁵

Torrent Forums as Mere Conduits

It is quite evident that a site where users can connect and share torrent links is an information society service in the sense of the E-Commerce Directive.⁴⁶ But, just as with search engines, the drafters of the Directive did not foresee the details of technological development and the three main categories given do not seem to cover the array of services very convincingly. Within a forum site, at least, the infringing work does not pass through the intermediary itself, but instead circulates entirely within the swarm network created by the users.⁴⁷ If anything, the torrent forum and the tracker functionality appear most akin to a provision of access to a communication network, working as a gateway to the swarm. Both by the method of elimination, and by the wording of Article 12, this is the most fitting category for forum sites where users exchange torrent-links that link to works on the users' own computer or that of another user. This

⁴⁵ B Allgrove and P Ganley, 'Search Engines, Data Aggregators, and UK Copyright Law: A Proposal' (2007) p 17, available at SSRN: <http://ssrn.com/abstract=961797> last visited July 24, 2009.

⁴⁶ Compare with The Swedish Pirate Bay judgment at para 74.

⁴⁷ *Ibid.*

would put sites such as these in the same category as Internet access providers and other gateway services who do not in themselves host the material, but do instead provide an important way of gaining access to the network where the material is hosted, in this case the user swarm described above.

The Actions of the Pirate Bay Principals

Did the actions of the principals of The Pirate Bay cause them to forfeit the protection of the E-Commerce Directive? If a forum site such as this can be seen to in any way initiate the transmission between the users, then the exoneration provided by the Directive is forfeit. Are their database design, their site layout, their name or their provocative texts such as to provide a level of collaboration and encouragement that would make them party to the users' copyright infringements? There is certainly room for discussion, but on that issue this paper must suspend judgment. The relevant actions have been separated from the capabilities of the service itself and of its users. That a link-sharing forum site can, in principle, be within the protection of the E-Commerce Directive is uncontroversial.

Whether the principals in the particular case of The Pirate Bay forfeit this protection through their actions is a decision for the courts to make. Further, the E-Commerce Directive states that liability limitation under its Articles will not affect the possibility of a court or administrative authority requiring the service provider to terminate or prevent a particular infringement.⁴⁸

5. A BRIEF NOTE ON THE IPR ENFORCEMENT DIRECTIVE

EC Directive 2004/48 on the enforcement of intellectual property rights⁴⁹ (hereafter the Enforcement Directive) focuses on the fact that the modern information- and communication technologies have left intellectual property rights⁵⁰ without effective means of enforcement.⁵¹ Increasing use of the Internet enables illicitly copied works to be distributed instantly around the globe.⁵²

⁴⁸ Arts 12.3, 13.2, 14.3 and 15.2 of Directive 2000/31/EC.

⁴⁹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. OJ L 157, 30.4.2004, p 45. Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. OJ L195, 02.06.2004, p 16.

⁵⁰ According to Commission Statement 2005/295/EC. *Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights*. OJ L 94 13.4.2005, p 37. The Commission considers that at least the following intellectual property rights are covered by the scope of Directive EC/2004/48: copyright, rights related to copyright, *sui generis* right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, trade names, in so far as these are protected as exclusive property rights in the national law concerned.

⁵¹ See Directive EC/2004/48 Recital (3).

⁵² *Ibid* Recital (10).

Without ways of enforcement, innovation and creativity will be discouraged and investment diminished. It is therefore seen as necessary to ensure that the substantive law on intellectual property is applied affectively within the European Community. This effective protection is of importance not only to promote innovation and creativity, but also for developing employment and improving competitiveness.⁵³ The Enforcement Directive is without prejudice to national legislation that goes further in protecting the rights owner and to the specific provisions on the enforcement of rights and exceptions on copyright contained in Community legislation.⁵⁴

In order to effectively combat infringement on the Internet the judicial authorities may order that information on the origin and distribution networks of the infringing services or goods be provided by persons other than the infringer who provides services used in the infringement, ie any intermediary services.⁵⁵

5.1 Conflicting Values?

Despite the attempts to create a safe-harbour through the E-commerce Directive, the Internet intermediaries are still stuck in the middle between their users and copyrights-holders. Though Directive 2004/48 should likely yield when it comes into direct conflict with the older E-commerce Directive,⁵⁶ the conflict between the opposing interests of i) keeping the intermediary away from the conflict and ii) involving him just seem unlikely to be settled in such a facile way.

In 2009 the English High Court referred two questions to the CJEU concerning intermediary liability, ranging from Internet access providers, electronic billboard operators and newsgroup servers to companies such as eBay that are hosting third-party content. One question concerns Article 14 of the E-Commerce Directive and when an information society services provider qualifies as a 'host' exempt from liability within the meaning of that Article. Another question concerns the balance between Article 11 of the Enforcement Directive and Article 15 of the E-Commerce Directive – which kinds of injunctions can be imposed on an online intermediary in order to prevent trademark infringement, when Article 15 of the E-Commerce Directive explicitly prohibits any general obligation of surveillance or monitoring?⁵⁷

In a 2008 judgment, The European Court of Justice affirmed that Community law does not require Member States to oblige Internet service providers to

⁵³ Ibid Recital (1).

⁵⁴ Ibid Art 2.

⁵⁵ Ibid Art 8.

⁵⁶ Ibid Recital (16).

⁵⁷ English High Court of Justice: *L'Oréal SA & Ors v eBay International AG* [2009] EWHC 1094 (Ch). See pending Case 324/09 *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay (UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*. OJ C 267 of 07.11.2009, p 40.

disclose personal data of its subscribers in civil proceedings initiated by copyright holders.⁵⁸

It would seem likely that this war is just in its infancy. While the E-commerce Directive focuses on the values of leaving the middle-man alone, as noted above, the gist of the Enforcement Directive is that effective enforcement of intellectual property rights will not be practically possible unless the intermediaries, and especially the internet service providers, are made to cooperate and to provide assistance in the form of information-filtering and or information-monitoring. This matter bears deeper scrutiny, but will have to be the topic of another paper.⁵⁹

6. CONCLUSIONS

It is nearing ten years since the lawsuit against Napster.⁶⁰ What should have been a quick wedding between the culture/entertainment industry and the Internet has instead become a painfully slow execution. But it is an execution without any foreseeable end – as long as it is the forum that is being focused on rather than the users that frequent its digital cobblestones and colonnades. New forums will always spring up, whether in the form of services that mediate between users, or in the form of technologies that enable the users to do without a third party.

Professor of law and sociology, Håkan Hyden is part of a research project called ‘cyber norms’, aiming to research the social and juridical processes of creating norms that arise in the wake of the information society.⁶¹ He describes the tension between different norms and worldviews existing in what he terms ‘a transition society’: a time of unrest and upheaval between the overripe industrial society and the information society still in the making. The tensions between holders of the different worldviews are manifest. Eventually, new patterns in society are developed as a result of political groupings opposing the old norms, but this may take a very long time. The established systems can only be changed in part, and will linger on as obsolete constructs to eventually depart when their usefulness have long since passed.⁶² The very norms governing copyright are

⁵⁸ Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU*, [2008] ECR I-271).

⁵⁹ On the issue of balancing copyright interests and fundamental rights of an ISP’s users, see F Coudert and E Werkers, ‘In The Aftermath of the Promusicae Case: How to Strike the Balance?’ in *International Journal of Law and Information Technology Advance Access: 10.1093/ijlit/ean015* (Oxford University Press 2008). Available at ijlit.oxfordjournals.org/cgi/content/full/ean015 (last visited July 31, 2009).

⁶⁰ *A&M Records, Inc. v. Napster, Inc.* 284 F.3d 1091 (9th Cir. 2002) The first big lawsuit against a file sharing intermediary. As noted earlier, Napster was hugely popular, and the lawsuit caused waves in the media.

⁶¹ See www.cybernormer.se.

⁶² See H Hydén, *Från samhällsutveckling till samhällsförändring – om behovet av att tänka nytt* in Hydén, Töllborg, Larsson *Framtidsboken* Volym 1.0. (2008) p 89, pp 91-93 Available at www.soclaw.lu.se. Last visited July 30, 2009.

changing due to the way that young people are now being brought up in the midst of massive flows of information. This has created a true generational gap that is clearly felt by some of the generation raised with the ubiquitous presence of Internet access.⁶³

Thus the focus on the technologies providing the distribution or on the intermediary services providing the connection can be seen as nothing more than a distraction. Granted, the costly legal battles against such intermediaries provide great entertainment as they offer the same kind of recurring frisson as Heracles' battle against the Hydra, with new heads sprouting after old ones are lopped off. They also offer a wide space for analysis and musing by legal commentators and scholars. But it would be deeply tragic if all of this amounts to nothing more than benefitting legal counsel, academic commentators and sensationalist journalism. We risk avoiding facing that the real issue lies with the users of these technologies and services, not the intermediaries themselves. By taking the middleman out of the picture, we can focus properly on the rifts in the norms of the old and the new generations. Thus the question of what to do with the changed norms and expectations of young consumers should be laid bare so that it can beg for a concrete answer. In other words, what should the copyright holders do with the forum users?

As long as there are people to populate them, the forums are not going to cease to exist. Here's hoping for the peaceful and productive forums of a Better Tomorrow instead.

⁶³ E Claesson, *Normdelning – en rättsociologisk intervjuundersökning om fildelares normer och normskapande*. Master's thesis in law (2009) pp 53–57. Available at <https://gupea.ub.gu.se/dspace/handle/2077/20470> last visited July 21, 2009.