

2010 Student Prize

The Editors of Computers and Law Journal are pleased to announce that the winner of the 2010 Student Prize is Glenn Harwood for the article "Copyright in the wake of Pirate Bay". Glenn receives a prize of \$1,000. We are pleased to publish the winning entry below.

Details regarding the 2011 Student Prize are published on page 7.

Copyright in the wake of Pirate Bay

By Glenn Harwood

Glenn Harwood is a Bachelor of Commerce (finance major) and a Bachelor of Law student part-time, at Bond University.

In 2009, Glenn undertook a student exchange to Stockholm University studying the Swedish Legal System and European Intellectual Property Law. While studying in Sweden, he also attended the 2009 Stockholm Intellectual Property Law Conference hosted by Stockholm University where speakers from the defence team for *The Pirate Bay* spoke, as well as many leading IP law academics.

Glenn is due to graduate from Bond University late 2011.

From what started with Napster almost a decade ago, *The Pirate Bay* case can be seen as another turning point in the evolution of copyright law¹. Bit torrents have decentralised file sharing, leaving law enforcers with the task of pursuing individual users, or the networks and platforms that make this technology possible.

The trial against Fredrik Neij, Gottfrid Svartholm, Peter Sunde, and Carl Lundström commenced on the 16 February 2009 in the Stockholm District Court and ran over nine days. These self proclaimed "*Digital Libertarians*" that provided a "*Harbour of Free Speech*"², were found guilty of both criminal and civil charges, and sentenced to one year imprisonment with damages of 32 million SEK (approx AU\$4.7m). On 26 November 2010, the Svea Court of Appeal reduced their prison sentences to between four and ten months, however, damages were increased to 46 million SEK (approx AU\$6.8m).

The primary defence of *The Pirate Bay* has become popularly known as the *King Kong Defence*. Counsel was seeking to rely upon Article 12 and 14 of the European Union Electronic Commerce Directive. Article 12 gives protection to internet service providers

who function as intermediaries or mere conduits for information. Article 14 is a similar protection to hosting providers who store content on their networks, relinquishing them of liability for content where they don't have actual knowledge of its illegality. Similar provisions can be found under s112E of the *Copyright Act 1968* (Cth) and the recent case of *Roadshow Films & Ors v iiNet Ltd*³ sought to rely upon this provision.

Counsel argued that *The Pirate Bay* is a mere information service and is not responsible for the data being transferred on their service. Liability, falling outside Article 12 and 14, involves (a) actual knowledge of the illegal data; (b) initiation of the transmission; (c) selection of the recipient of the data; (d) modification of the data. In the case of *The Pirate Bay*, it is the users that initiate and conduct the transfers and they aren't physically identifiable people. It was submitted that to be held liable, Lundström must personally interact with these 'faceless users'. The example was given of a *Pirate Bay* user who goes by the screen name of 'King Kong'. Counsel hypothesised that he is located in the jungles of Cambodia, presumably with a laptop and high-speed internet connection. Internet newswires,

blogs and other news services quickly dubbed this the *King Kong Defence*.

Defence counsel went on to draw the analogy of *The Pirate Bay* being nothing more than a mere search engine, much the same as Google. *The Pirate Bay* provided a service where users could search for torrents and download them. The advantage of bit torrent technology is that the torrent file in itself does not contain copyrighted material. Rather, it can be likened to a treasure map, which then directs the user's computer to numerous different individual users on the internet, where individual pieces or fragments of the copyrighted material can be downloaded in an automated fashion. The puzzle is finally completed when the user's computer puts these pieces together to create the copyrighted material. Therefore, complete copyright material is not hosted by *The Pirate Bay*, or any other party. Fragments of copyright material are transmitted directly between internet users and *The Pirate Bay* provides a search engine for the torrent files, which direct users to the pieces.

Therefore, as *The Pirate Bay* is nothing more than a search engine for torrent files, it can be used for both legal and illegal purposes. As in the *Kazaa/Sharman Network Case*⁴, counsel submitted that users were also using the service to distribute material which did not infringe copyright – an argument which rarely gains traction. Counsel then likened this to the classic analogy of a car maker, who produces vehicles capable of exceeding the speed limit, but are not held liable when drivers speed.

Not surprisingly, the record and entertainment industries celebrated the court's guilty verdict of copyright infringement (although appealed the quantum of damages). The legal reasoning however, has left lawyers questioning the development of intellectual property law in Sweden, and the broader differences facing jurisdictions across the world. The verdict also failed to include an injunction or shut down order against the site.

The owners of the site were found guilty of contributory negligence. While they may not have been aware of individual cases of copyright infringement, their intent to contribute to copyright infringement had been proven. Copyright infringement is a criminal offence under the Swedish Copyright Act⁵. The Swedish Criminal Code sets out that contributory liability arises when a person has a physical or mental influence on the being or commission of a crime⁶. The prosecution referred to a case from 1963 where a defendant was found to be an accomplice by holding a friend's coat, while the friend assaulted a third party. However, while judges in *The Pirate Bay* case indicted no actual offender, all four were contributory negligent to a crime committed by 'faceless' third parties. It was stated that the actual offender's identity is not a requirement for contributory negligence.

The court also briefly dealt with the issue of intent, a requirement of the main offence under the Swedish Criminal Code. With regards to intent, the two contributing factors appeared to be the knowledge of the copyright material and the failure to take action to prevent infringement of the material. In this particular case, *The Pirate Bay* publicly taunted the copyright owners and publicised the fact they refused to take action against infringements occurring on their site. The court took this prima facie to constitute intent, which raises questions as to what level of action would be required by a similar service provider, to allow them to fall short of showing intent.

With regards to Article 12 and 14 of the Electronic Commerce Directive, the court found that the service fell under the Article 14 provisions regarding a web hosting service, rather than the Article 12 provisions for internet service providers. The court stated that in addition to providing a search engine for torrent files, the site also hosted certain torrent files, therefore must have had actual knowledge of their existence. However, the torrent files in themselves are not an illegal copyright work. Again, the court did not address this issue.

Another unsettled issue that the court failed to address was that the actual items being downloaded by end users do not constitute a copyright work – rather, disjointed fragments of one. This raises the question as to whether the individual users, transmitting only fragments of a work, are jointly responsible for the criminal act or committing separate criminal acts.

The Court of Appeal addressed the issue of a trial judge failing to disclose his membership in two legal associations devoted to the preservation of intellectual property rights. Defence argued that this caused an undue bias towards copyright holders and should have been disclosed before initial proceedings. However, those familiar with the traditional Nordic legal structure would see this as somewhat normal practice, where judges and adjudicators often come from union, trade or other professional bodies whose interests may not always be neutrally aligned. The Court of Appeal reasoned that the judge's membership cannot be held to be a conflict, as the Swedish Constitution protects intellectual property rights.

Solutions to file sharing and the protection of intellectual property rights are cause for much debate. Apple has slowly transformed music downloads with the iTunes store. Another Swedish innovation, Spotify, requires users to pay a monthly subscription to stream their choice of music over the internet, to their computer. The end user does not retain the music upon their device after listening to it. Artists and copyright holders are then remunerated in a similar way to other traditional broadcast technologies.

Other more systemic and philosophical solutions have also been raised. One may be for governments, or internet service providers, to compensate copyright owners or collecting agencies for usage. A similar

system was attempted in Australia in the late 1980's when the Government introduced the blank tape levy, later overturned as unconstitutional. Given the vast reach of the internet, such a system would require universal acceptance to be effective.

The judgements the court has formed in *The Pirate Bay* case raise as many questions as they answer. This case seems to have had a clear guilty agenda from the outset. Other commentators have referred to it as "cause and effect" reasoning where the perpetrators are punished for nothing more than their "bad attitude."⁷ Nonetheless, the standard of evidence and legal reasoning applied in the case seems superficial.

While the four people behind the site may be in jail and liable to compensate copyright owners, the site continues to operate and infringe upon those same copyrights. The case fails to answer many of the critical legal issues involved with bit torrent technology and does not

provide solid legal grounding for other similar cases in the future.

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

² Mikko Manner, Topi Siniketo and Ulrika Polland, 'The Pirate Bay Ruling – When the Fun and Games End' (2009) 6 *Entertainment Legal Review* 197

³ (No. 3) [2010] FCA 24

⁴ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) FCA 1242 Federal Court of Australia. 5 September 2005

⁵ Swedish Copyright Act SFS 1960:729

⁶ Swedish Penal Code Ds 1999:36, Section 23:4

^{viii}, Jerker Edstrom and Henrik Nillson 'The Pirate Bay verdict – predictable, and yet...' (2009) 31(9) *E.I.P.R* 483-487