

## **The Pirate Bay:**

**“An European Case Law affecting our Economic and European Legal System”**

**6<sup>th</sup> GLOBAL JUSTICE FORUM**

**Columbia University Law School**

**New York City, NY, 17<sup>th</sup> October 2009**

## The Pirate Bay

- Nov 2003: established by the Swedish Anti Copyright Organization titled “The Pirat Byran”;
- Oct 2004: run separately by Gottfrid Svartholm and Fredrik Neij;
- May 2006: raided by Swedish police, causing website's servers in Stockholm to go offline;
- Nov 2008: announced that it had reached over 25 million unique peers;
- 2008 to 2009: billed as the world’s largest Bit.Torrent tracker. Calculated about 3,600,000 registered users (although registration is not necessary to download torrents);
- The Pirate Bay has been involved in a number of lawsuits, both as plaintiff and as defendant.

## How can TPB Case affect European economy and legal system?

- **It led national institutions and powers, such as**
  - national authorities,
  - lawyers,
  - judges and prosecutors
  - other public characters of the European arena**to re-think and re-shape**
  - contents
  - plus
  - limits**of the relation existing between copyright and IT**

*In other words..*

*TPB* caused the need to



1) clearly identify limits to protect copyright,

*But, on the other side*

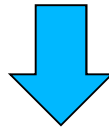
2) ensure:

- the openness of the internet,
- the freedom to share information and files

WHICH  
BALANCE ?

## THE PIRATE BAY TRIAL IN SWEDEN

### MAIN FEATURES:



- a joint *criminal* and *civil* prosecution in Sweden of four individuals charged for promoting the copyright infringement by others with the torrent tracking website TPB;
- The criminal charges were supported by a *consortium* of intellectual property rights holders led by the *International Federation of the Phonographic Industry (IFPI)*, that also filed individual civil compensation claims against the owners of TPB.

( follows)

## TPB's Trial in Sweden

- 31st January 2008: Charges filed by Swedish Prosecutors against
  - Fredrik Neij, Gottfrid Svartholm, and Peter Sunde, (who ran the site);
  - Carl Lundström, (a Swedish businessman who sold services to the site through his businesses);
- 16th February 2009: The Trial started in the district court (Tingsrätt) of Stockholm, Sweden;
- The prosecutor stated that:
  - the four accused people worked together to **administer, host, and develop** the site and
  - by performing such conducts, they concretely **facilitated** other people's **breach of copyright law**.

## INFRINGEMENTS AND CLAIMS FOR DAMAGES

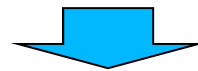
- 34 lawsuits related to copyright infringement were originally listed:
  - 21 were related to music files;
  - 9 to movies;
  - 4 to games.
- Claims for damages of *117 million kronor* (US\$13 million) were filed.
- The case was jointly decided by a judge who was a member of several pro-copyright organizations and three appointed laymen.

## DAY THREE:

### THE “KING KONG DEFENCE”

- On day three of the trial, defense attorney presented an argument later dubbed the "*King Kong defense*"

### BACKGROUND OF THE KING KONG DEFENCE:



#### EC Directive No. 2000/31 :

He who provides an information service is **not** responsible for the information that is being transferred. *In order to be responsible*, the **service provider must initiate the transfer**. TPB administrators never initiate transfers. **Users did, and they are physically identifiable people**. They call themselves names like “King Kong”. *According to legal procedure*, the accusations must be against an individual and there must be a **close tie** between the **perpetrators of a crime and those who are assisting**. This tie has not **been proved**. The prosecutor **must** give evidence that TPB administrators **personally interacted with the user “King Kong”**, otherwise no responsibility can be charged on TBP’s components.

(follows)

## The “King Kong” Defence

- With this evocative metaphore defence attorney is referring to **a real Pirate Bay user who posts via the username "King Kong"** who defence attorney hypothesizes could be in Cambodia.
- He used this scenario to illustrate that Lundström had **no control over the actions undertaken by Pirate Bay’s users.**
- His main objection was that although the prosecutor had said that the accused would be tried individually, he had not once referred to them individually, but always as "them", "they" or "Pirate Bay". **Samuelson said the persons behind The Pirate Bay could not be held collectively responsible for a crime committed by other identifiable individuals, such as “King Kong”.**

## VERDICT AND CONSEQUENCES IN SWEDEN

- On 3 March 2009: The hearings ended after 9 days and the verdict was therefore announced;
- On 17 April 2009: the four mentioned persons charged were
  - found guilty of **assistance to copyright infringement** ;
  - sentenced to **ONE YEAR of prison**;
  - payment of **30 Million SEK** ( approx 3,620,000 USD; 2,385,000 GBP; or 2,684,000 EUR).
- The defendants have appealed against the verdict and the judge was accused of bias.
- Despite the trial, **the website remained unaffected until 24 August 2009**

## ECONOMIC PROFILES

- On 30 June 2009 Swedish advertising company Global Gaming Factory X AB announced its intention to buy the site for SEK 60 million (approximately \$8,350,500 USD );
- TPB founders stated that the profits from the sale would be placed in an offshore account where it would be used to fund projects pertaining to “freedom of speech, freedom of information and the openness of the Internet”;
- The transaction between TPB’s owners and GGF took place on late September 2009 for 5.300.000 Euros.

## CONSEQUENCES ON ITALIAN SYSTEM

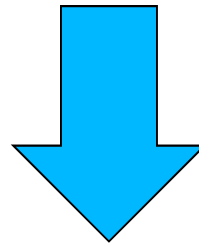
- **Mid 2008:** following the criminal charges raised in Sweden, the *Italian Federation against Musical Piracy* in Milan requested action in Italy, claiming *compensation of one million euros*.
- **THREE ITALIAN DECISIONS ruled on the case**
  - 1) imposing
  - 2) lifting
  - 3) imposing again

a **BAN** on the popular Swedish Bit Torrent tracker website The Pirate Bay.

(Follows)

## CONSEQUENCES ON ITALY

- ***On 1<sup>ST</sup> August 2008, Court for Preliminary Investigations:***



The Bergamo Court, under complaint of Deputy Public Prosecutor, **DECREED to block address** from Italian ISPs (Internet Services Providers) **to all Pirate Bay Addresses**. The Court posed TPB site under **PREVENTIVE SEIZURE** on the basis of **article 321** of the Italian Code of Criminal Procedure.

## CONTEXT, ADDRESSEES and RATIO of THIS MISURE

### ***This interim measure was adopted:***

- in the context of PRELIMINARY INVESTIGATIONS;
- against the owners of the Swedish website who were charged with AIDING AND ABETTING, on a PROFIT MAKING basis, the ILLEGAL sharing of copyrighted materials

*in VIOLATION OF Law No. 633/1941  
concerning COPYRIGHT and related rights*

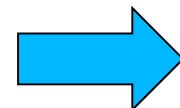
- the rule was based on prevention of copyright violations by the site's users on Italian Territory.

# THE VIOLATION OF LAW NO. 633/1941 ON COPYRIGHT AND OTHER RELATED RIGHTS

- Article 171-ter para 2 lett a) bis of Law No. 633:

*"It is punished with imprisonment from one to four years and a fine ranging from 2,500 to 15,000 euro anyone who: a-bis), **in violation of Article 16**, for profit purposes, communicates to the public an intellectual property, or part of it, protected by copyright, by entering it into a system of computer networks, through connections of any kind. "*

**Art 16 Law No. 633/1941 Right of Disclosure of Intellectual Properties:**



## Art 16 Law n. 633/1941

### Right of Disclosure of Intellectual Properties:

1. The exclusive right of communication to the public by wire or wireless of the protected intellectual good pertains to the use of means of communication at a distance, such as the telegraph, telephone, radio, television and other similar means and includes communication to the public via satellite, cable retransmission, as well as communications to the public encoded with special conditions of access; it includes also the provision of making the intellectual protected good to everyone's availability so that everyone can indeed access to it from a place and time individually/singularly chosen.

2. The right referred to in paragraph 1 shall not be exhausted by any act of communication to the public, including acts of making something available to the public.

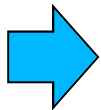
## THE CHARGE FORMULATED BY THE COURT OF PRELIMINARY INVESTIGATIONS

The charge was therefore formulated taking into consideration, cumulatively,

- both **article 110 of Italian Criminal Code**, which punishes association in committing a criminal offence

and

- **art 171-ter para 2 lett a) bis Law No. 633/1941**, which criminalizes those who, individually or in complicity, breaching article 16 of the above mentioned law (which recognizes the exclusivity of the right of communication to public), do perform conducts specifically described in article 171-ter Law No. 633/1941.



All factual elements led the Court to consider the criminal paradigm, drawn by the two above mentioned provisions, as

***FULLY REALIZED***

## THE DECISION OF THE JUDGE OF PRELIMINARY INVESTIGATIONS

TPB's owners were found **RESPONSIBLE** for having breached normative provisions deriving from Italian law on copyright (**article 171 para 2 lett a)bis and article 16 Law No. 633/1941**) and the criminal disposition ruling concurrence of people in crimes (**article 110 of the Criminal Code**).

The legal position of the TPB's members was also worsened by an aggravation constituted by **article 61 n.7** of the Italian Code of Criminal Procedure, being the group itself suspected to have provoked, through its illicit conduct, significant damages to royalties' holders.

The Bergamo Court, therefore, held that **TPB site** constituted either the *corpus delicti* or "a commodity pertaining to" the violation of copyright laws insofar as it made illegal file sharing possible. Since the operation of the website could, under the terms of **Article 321** of the Italian Code of Criminal Procedure, "worsen or extend in time the consequences" of the said criminal offence, the Court placed it **under preventive seizure**, thereby enjoining Internet Service Providers (ISPs) established in the Italian territory from granting their users access to [www.thepiratebay.org](http://www.thepiratebay.org), its aliases and its respective static IP address.

## WHAT THE COURT IN BERGAMO FORGOT TO CONSIDER

The main question the Judge deciding on the protective measure DID not take into consideration is whether:

- **There are sufficient legal elements to claim** TPB members' direct or indirect **responsibility** for the illicit tracking of files and documents covered by copy right under EC Directive No. **2000/31/CE** (implemented in Italy with **Legislative Decree No. 70/2003** ) **or not** .

- **Article 17 of Legislative Decree No. 70/2003:**

*“in the executions of the conducts described into articles 14, 15 and 16 of the same law (provider mere conduit, catching and hosting), **the provider is not subject to a general obligation to monitor the information which he transmits or stores, nor to a general obligation to seek facts or circumstances indicating illegal activity**”.*

**The Court might consider this provision in future as to better evaluate TPB members criminal responsibility !**

## THE DECISION OF THE COURT IN APPEAL

- TPB attorneys appealed and opened up the **Review procedure** of the preventive seizure of the website **under article 324 of Italian Code of Criminal Procedure code**;
- **Arguments of the defence** (aimed to obtain the lifting of the preventive seizure):
  - 1) **Exception of Nullity in proceeding**; 2) **Lack of jurisdiction** 3) **No *Fumus Delicti***;
  - 4) **Misapplication of article 321 of the Code of Criminal Procedure** (ruling preventive seizure), and **of articles 14-17 Leg. Decree No. 70/2003** (transposing **European Directive No. 31/2001**);
- By its order of 24 September the **Court of Bergamo**, sitting as an appeal instance, **quashed the decree** by the Court for Preliminary Investigations, thus **lifting the ban on Italian ISPs**.

**RATIO: THE DECREE ISSUED AT FIRST INSTANCE WAS CONCEDING AN ATYPICAL PREVENTIVE MEASURE, WHICH DOES NOT EXIST IN OUR CRIMINAL LEGAL SYSTEM.**

## THE SUPREME COURT'S DECISION

On the 30<sup>th</sup> Sept 2009 The Third Session of the Italian Criminal Supreme Court (Court of Cassation):

- **annulled** the previous **decision** undertaken by the **Court of Review** (Court of Liberty) to lift the ban on TPB website;
- **ordered the decision** of The Court of Review to withdraw the preventive seizure (issued by the first Decree and addressed to block the access to the site from Italy), **to be substantively reconsidered** (“cassazione con rinvio”).

Despite the decision by the Supreme Court, Internet users **are continuing** to **connect to the site!**

(follows)  
**THE SUPREME COURT'S DECISION**

- It will be recommendable to **deeply analyze**
  - the **content** of the **motivations** supporting the SC's decision
  - **once** they will be made **available to the public** (one month after the publication of the verdict by the Court, id est 30<sup>th</sup> Oct 2009)

*AS TO*

- understand** the **legal reasoning** followed by the Court **in**
  - **annulling the decision** undertaken by the Court of Liberties (while operating as Judge of the Review) qualifying the preventive seizure as illegal;
  - **imposing an order of substantive reconsideration of it** (the so called "annullamento con rinvio" – annulment with renvoi).



**Thank you very much  
for your attention!**

**avv. Enrica Senini**

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