

THE PIRATE BAY LIABILITY



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Abstract

The thesis discusses about peer-to-peer technology and easy availability of an Internet access which are prerequisites to a rapid growth of sharing data online. File sharing activities are managing without the copyright holder's permission and so there is a great opportunity of infringing exclusive rights. The popular pee-to-peer website which is enabling immediate file sharing is for example www.thepiratebay.org – the object of this thesis. The copyright law is obviously breaching by end users who are committing these acts. However, on the following pages we are dealing with the third party liability – liability of online intermediaries for unlawful acts committed by their users.

A file sharing through the pee-to-peer networks brings benefits for the Internet users. They need no special knowledge in order to learn how to use the technology. The service of www.thepiratebay.org website is offering simultaneously users an access to a broad spectrum of legal content and a copyright protected works. The service is mainly free of charge and the users can find a data they are interested in quickly and in a users' friendly format.

The aim of the thesis is to compare the actual jurisprudential status of liability of intermediary information society service providers for the file sharing activities on www.thepiratebay.org.

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In Trnava, 10.11.2011

Angela Sobolciakova

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Table of Abbreviations

ECD	the Electronic Commerce Directive
ECJ	the European Court of Justice
EU	European Union
Infosoc Directive	the Directive on the harmonization of certain aspects of copyright and related rights in the information society
ISPs	Internet service provider
TPB	The Pirate Bay

1 Introduction

1.1 Background

“In order to effect a change in attitude, I believe that we need to re-formulate the question that most people see or hear about copyright and the Internet. People do not respond to being called pirates. Indeed, some, as we have seen, even make a pride of it. They would respond, I believe, to a challenge to sharing responsibility for cultural policy. We need to speak less in terms of piracy and more in terms of the threat to the financial viability of culture in the 21st Century, because it is this which is at risk if we do not have an effective, properly balanced copyright policy.”¹

This thesis studies the judicial assessment of the technological innovation of peer-to-peer networks (hereinafter p2p). It is essential that p2p technology enables file sharing and other applications. It is a viable, easy and almost immediate way that allows users to download the newest content which they are looking for. File sharing websites (e.g. warez, Napster, etc.) and torrent search engines become popular tools among Internet users. People have got used to the services that are offered by the file sharing websites.

Within p2p networks technology, we are dealing with two aspects of an innovation. Michael A. Carrier² has termed this as “dual use technologies” because according to the author these innovative technologies not only create forms of interaction but also facilitate infringement. On one hand there are a number of reasons in favouring of both sides for the further development of these technologies and on the other hand those for determining the borders of their development.

¹ Gurry Francis, Director General, World Intellectual Property Organization. *Blue Sky Conference: Future Direction in Copyright law*. Sydney. 2011, available http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html [Accessed 2.November 2011];

² Cf Michael A. Carrier. *Innovation for the 21st century*. Harnessing the power of intellectual property and antitrust law. Oxford University press. 2009

The current state of the Internet is offering p2p file sharing technology through the famous and most visited Swedish website - The Pirate Bay (hereinafter TPB). The website, as the Internet link indicates - www.thepiratebay.org - has a high level of controversy and implies a number of legal issues. The international entertainment industries are suing the website and others connected with it for copyright infringement. They wish for a court order to shut the website down.

“The Pirate Bay cases” is the term that describes the court’s decisions concerning the sharing of through p2p networks via the Internet. The purpose of why we are only dealing with the Pirate Bay service is due to its popularity and the cultural movement which was started by users and those behind this website.

We can simplify the potential of TPB into three separate dimensions:

1. technical (see chapter 3);
2. political (the website creators initiate a foundation of pirate parties);
3. legal – with the legislative and judicial approaches. The following texts will deal with the third dimension. The technical and political aspects of the TPB are clearly influencing the legislative and judicial authorities. A political and a technical lobbying background is an integral part of court decisions across Europe and will also encompass the outcomes of this thesis.

1.2 Purpose

The purpose of this thesis is to compare four TPB cases. The crucial subject in all of them is the online intermediary. The aim of the thesis is to analyze how the judicial authorities in different European countries determine the liability of online intermediaries that are directly or indirectly connected to the TPB website.

The liability of the online intermediaries has not yet been simply addressed. This will depend on the court and legislator’s interests depending on state policy, the justice system, the extent of online freedom and also the lobbying of anti-piracy unions. In the next chapters

we would like to summarize the terminology, possible approaches and the distinctions in the court verdicts regarding third party liability of the online intermediaries.

The key questions of the thesis are:

- **Do all online intermediaries posse the same level of freedom from liability?**
- **Is it legal to impose ongoing filtering obligations on online intermediaries?**
- **Will TPB survive the current legal challenges?**

In relation to above key questions, the aim of the thesis is to determine the common aspects in the analyzed TPB cases; consequently it will be possible to sum up the framework of online intermediaries' liability in Europe. Under the ideal circumstances the framework should objectively cover all online intermediaries without any differentiation

1.3 Method

The central focus of the thesis is directed at the pee-to-peer technology used for file sharing activities. This thesis compares case law that originated from a legal uncertainty connected to the technology. The best examples that facilitate the pee-to-peer file sharing activities will be analyzed on the TPB website.

In order to reach the objective of the thesis and to compare the so called 'the pirate bay' cases, we have chosen some examples of the national court decision that originated in the following countries: **Sweden, Denmark, Norway and Italy**. The fifth court decision is a **Belgian case**, *Sabam v. Tiscali*, this is mentioned in the conclusion.

The Belgian case chosen for comparison is not related directly to the Pirate Bay, it deals with more general unauthorized sharing by means of peer-to-peer software and the Internet service provider's (hereinafter ISP) liability. This case is useful for comparative analysis, due to the Pirate Bay cases; the Belgian court has asked the Court of Justice of the European Union (hereinafter ECJ) for a preliminary ruling. During the time of this writing, the opinion of the Advocate General Cruz Villalón is published but his opinion is not binding in the Court of Justice.

Hypothetically, when the Court of Justice system decides to follow an Advocate General's argumentation, the current p2p file sharing status quo will change the liability of TPB and essentially other online intermediaries.

The core issue of TPB litigation is copyright infringement.³ Each of the five national court decisions is an example of an effort to apply the traditional copyright protection legislative in cyberspace and to enforce it with sanctions under the national legal system. The comparison of five different legal systems will not analyze the details of national copyright, criminal or civil law provisions. The thesis is therefore based on the specific provision of relevant European Union (hereinafter EU) directives and does not fully analyze a national legal system. For reaching the purpose of the thesis, a primary national legislation of *de lege lata* is not analyzed in detail and is marginally mentioned.

The thesis is divided into two parts, comparing litigations against the so called platform providers and access providers. Thus, two independent comparative studies will be presented. Presenting and comparing the court's decisions regarding both the intermediaries with different functionality, based on the same legislative aspects it will prove whether the current ISPs liability is the same or differs from case to case.

The method used for presenting the subject matter of the thesis is based on case law, European legislation, legal literature and articles. The secondary sources support a legal position and help to maintain the information about the development of the technology, i.e. scientific books and articles, Internet blogs and other Internet sources.

The final concluding part of the thesis will also offer a *de lege ferenda* approach. The discussion will be based on the outcomes of comparative studies and the technologies' development.

³ Copyright infringement is the main issue why the entertainment companies are suing TPB, on the other hand pirate bay cases are interesting for the human rights law issues such as: privacy and data protection, freedom of information. TPB cases opens also debate about online intermediary liability issues;

1.4 Delimitation

The object of the thesis is www.thepiratebay.org. The legal aspects associated to the website are described on the basis of national case law. The website is obviously falling under the term of an online intermediary; therefore the issues of assessing third party liability are mainly discussed on the following pages.

A brief summary of the comparative study analysis is as follows:

- The same service provider – TPB (characterized as a platform provider), was sued in different European countries (we have chosen as an example Sweden and Italy) and facing litigation because a third party used the services of intermediary (TPB) to perpetrate an infringement of an intellectual property right.
- The service provider – Telenor (a telecommunication operator providing internet access) is being brought in front of the courts (as an example we have chosen Denmark and Norway) for contributing to illegal file sharing and the copyright holders required the blocking of access to the TPB website, they were calling for imposing a preventive injunction.

Due to a number of case laws concerning the TPB website in Europe, the thesis only deals with four of them. The specification of the relevant TPB cases is summed up in Figure 1. **Figure 1** illustrates an overview of the basic facts of cases with the online links where the cases are available. The online availability of the cases is emphasized and separately marked in the footnotes in this introductory chapter of the thesis; this is because all compared cases are originally written in different languages. The link will direct readers to an unofficial English translation of the cases which are also used for the purposes of the thesis.

The primary legal sources used in the thesis are those of the European Union Law. The thesis is analyzing the issue on the basis of the national court decisions that originated in different countries that the authors are not from. The legal analysis will be based on the procedural law that the authors are familiar with. The authors are from civil law countries.

Four out of five countries analyzed in the thesis are members of the EU. The Norwegian court's decision was also included into the comparison of the court verdicts; this also included a country which is not a member of the EU. Norway is closely associated with the EU through its membership in European Economic Area. So, the EU law is also implemented into Norwegian national law. Moreover, the Norwegian TPB case is expressly mentioned in the court argumentation which is relevant to the EU directives. For the purpose of the thesis there are no relevant distinctions between EU member states and Norway.

Due to the limited scope of the words in the thesis, the thesis is does not elaborate on the details that are relevant to copyright law. The main issue is online intermediary liability, the infringement of copyright law by the Internet users is assumed.

The researched liability of the online intermediaries does not deal with the "notice and takedown" procedure in detail. This procedure is being adopted into a national legislation on a voluntary basis and for this comparative study these procedures are of a little importance.

The terminology delimitation: the term "right holder" is used for describing a copyright holder – the author or his exclusive licensee. The term "work" is used as a general description for literary, drama, music, artistic, film, broadcasts, sound recording, photographs, computer software and databases etc., which are protected under copyright (including also sui generis database rights). The phrase "third party liability" is used as a synonym to a contributory liability. The second liability is that of vicarious liability under the US legal system.

Finally, the author's research for the thesis purposes ended on the 10th of November 2011. On the 24th of November 2011, the ECJ passed judgment on *Sabam v. Tiscali* case n. C-70/10, in the text below referred to as an expected and core decision at issue. This decision is not covered in the text bellow. Hopefully, in the near future the author would gain possibility to analyse this ECJ decision on the basis of conclusions deriving from this research.

Figure 1: Table of details about TPB cases analyzed in the thesis

	Court jurisdiction	Handed down on	Procedure	Parties		Ruled in favor of	Unofficial English translation of the decisions	Notes
				Plaintiffs	Defendants			
Sweden (S)	Stockholm District Court – appealed	17 April 2009	Criminal	Nordic, Swedish and American music and film companies	Hans Frederik Neij, Per Gottfried, Svartholm Warg, Peter Sunde Kolmisoppi, Carl Ulf Sture Lundström	Plaintiffs	4	The Svea Court of Appeal issued litigation on 26.11.2010, basically confirmed previous decision and increased defendant’s penalties.
Italy (I)	Supreme Court of Appeals	23 December 2009	Criminal/injunction	Prosecutor of the Republic	Hans Frederik Neij, Per Gottfried, Svartholm Warg, Peter Sunde Kolmisoppi, Carl Ulf Sture Lundström	Plaintiffs	5	
Belgium (B)	District Court of Brussels - appealed	29 June 2007	Civil/injunction	Belgian Society of Authors, Composers and Publishers (SABAM)	The Corporation Scarlet (previously known as Tiscali)	Plaintiffs	6	The Brussels court of Appeal in the decision of 28 January 2010 has referred questions to the Court of Justice of the European Union. The Advocate General’s Opinion published 14 April 2011.
Denmark (D)	Supreme Court of Denmark	27 May 2010	Civil/injunction	Telenor	International, Danish and Nordic music and film industry	Defendant	7	Supreme Court of Denmark confirmed decisions of lower Courts – Bailiff’s Court of Frederiksberg from 29 January 2008 and the Courts of Appeal from 26 November 2008
Norway (N)	Court of Appeals	9 February 2010	Criminal/injunction	Nordic music and film industry	Telenor ASA	Defendants	8	

⁴ http://www.wired.com/images_blogs/threatlevel/2009/04/piratebayverdicts.pdf [Accessed 15 September 2011].

⁵ <http://www.futureofcopyright.com/knowledge-database.html>, search for 20 October 2010 – Italian Supreme Court ruling on TPB, [Accessed 15 September 2011].

⁶ <http://www.cardozoaj.net/issues/08/case001.pdf>; the Advocate General’s Opinion: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf> [Accessed 15 September 2011].

⁷ http://hssph.net/Sonofon_IFPI_DK_SupremeCourt_27May2010_PirateBay.pdf; Decision in Danish language: <http://domstol.dk/hojesteret/documents/domme/153-09.pdf>, Decision of the Courts of Appeal ordered 26 November 2008 is available here: http://hssph.net/Sonofon_IFPI_Cour_of_Appeals-E.Div26Nov2008_PirateBay.pdf, Decision of Bailiff’s Court of Frederiksberg ordered 29 January 2008 is available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093246 [Accessed 20 September 2011].

⁸ http://hssph.net/NordicRecords_Telenor_NorwegianCourtofAppeals9Feb2010.pdf; Decision in Norwegian language: http://it-retsforum.dk/uploads/media/Telenor_PB_dom_Borgarting_2010.pdf [Accessed 15 September 2011].

1.5 Outline

Chapter 2 gives the answers to the questions: who falls under the ECD definition of information society service; Are the intermediaries involved in p2p file sharing services exempted from liability under ECD?; are the third parties criminally liable for the perpetrators' act? The reader will gain a foundation on the subject matter and may read the relevant provisions of ECD. The substantive background of the case law is provided in this chapter.

Chapter 3 offers an overview of the technical aspects of TPB website. The technology behind the website is innovative and controversial at the same time. The chapter begins with the historical background of TPB website. The very technical operation and functionality is examined into the details in this chapter. The reader will learn the other forms of today's application of peer-to-peer technologies. And at the end, the chapter 3 is dealing with parties involved in the technical functionality of TPB website.

Chapter 4 and 5 carried out comparative analysis of the case law concerning the subject matter. Chapter 4 is discussing the Swedish and Italian TPB cases. Chapter 5 is comparing the Danish and the Norwegian TPB cases; relevant part from the Swedish decision is also included within this chapter in order to conclude the discussion concerning the third party liability evaluated all aspects of the court argumentation.

Chapter 6 is summarizing the findings from the previous chapters and provides the answers of the key questions of this thesis. It contains an analysis and a conclusion. In this chapter the reader will be also able to identify author's own opinion on the subject matter and *de lege ferenda* approach.

2 The legislative regime of Internet Intermediaries in the European Union

The issues facing of online intermediaries are expressly stated in the recital 5 ECD:

“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 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; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State” [emphasis added].

2.1 Online intermediaries

Q: *who falls under the ECD definition of information society service?*

In the view of E-commerce Directive the general term **online intermediaries** is sometimes called as ISPs or “ISSPs”⁹ (information society service providers) or “intermediary service providers”¹⁰.

An **Information society service** is defined in the Directive **98/34/EC** of the European Parliament and of the Council, 22 June 1998, laying down a procedure for the provision of

⁹ Art, 2 (b) ECD, defined as: *any natural or legal person providing an information society services;*

¹⁰ According to the title of Section 4 of ECD;

information in the field of technical standards and regulations and of rules on Information Society services Article 1 as:

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 [emphasize added].

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.'*

The above definition of Information Society service covers *inter alia* a vast number of economic activities taking place online. These online activities are facilitated by online intermediaries. The recital 18 of ECD states that the activity of service provider does not need to be remunerated by those who receive the service in order to form part of economic activity of a service provider. Lilian Edwards argued in favor of extensive interpretation of the online intermediaries' immunity regime stipulated in ECD, because the regime was introduced "to benefit rather than burden the service providers."¹¹ Thus, when online intermediary is providing a non-commercial service as its main business model and the economic profit is not coming from the main activity, e.g. from associated advertising services, the ECD immunity regime is applicable in favor of these online intermediaries.

The fundamental attribute of the online intermediary is that they do not themselves determine what happens online. Their role may be qualified as passive or neutral, as online intermediaries argue "they were mere messengers, not content providers..."¹² and ECD immunity regime is based on this approach in ECD Articles 12, 13 and 14.

¹¹ Edwards L., Waelde Ch. *Law and the Internet*. Hart Publishing. 2009 p. 63

¹² Edwards L., Waelde Ch. *Law and the Internet*. Hart Publishing. 2009 p. 60

For the purpose of this thesis, the distinction is made among the intermediaries:

1. ISPs – intermediaries providing the access to the Internet by the use of their technical facilities, labeled as **access providers** (in this case acting as “mere conduit” stipulating in the ECD Article 12);
2. other intermediaries – who providing additional services without the Internet access and so facilitating and encouraging the communication among the users. More specifically, popular intermediaries subsuming here are:
 - **platform providers or in other words software providers** (corresponds to ECD Article 14);
 - **user-generated content platforms;**
 - **hosting services;**
 - **search engines;**
 - **network providers** (stipulated in the ECD Article 13);
 - **comparison sites;**
 - **electronic bulletin boards, etc.**

Arguably, the actual situation within the legal framework of the online intermediary’s liability is more complicated. “Pure” telecommunication services, like mobile operators are providing further benefits for their clients such as hosting or network providing services. All these cause an extreme diversity and legal uncertainty concerning the role of the online intermediaries in the file-sharing scenario (unauthorized exchange of copyright protected works) formulated under the ECD regime.

2.2 The current state of freedom of liability under the ECD and Infosoc Directives

Q: Are intermediaries involved in p2p file sharing services exempted from liability under ECD?

Online intermediaries are exempted from liability in the context of:

- **Mere conduit** - Article 12

The service provider is not liable for the information **transmitted**, if the service consists of the transmission¹³ in a communication network of information provided by a recipient of the service, or the provision of access to a communication network. This exemption applies only if the service 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.

- **Caching** – Article 13

The service provider is not liable for the automatic, intermediate and temporary **storage** of that information, for the purpose of making more efficient the information's onward transmission to other recipients of the service upon their request. For the freedom from liability is required that the service provider: (a) does not modify the information; (b) 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 recognized and used by industry; (d) the provider does not interfere with the lawful use of technology, widely recognized 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.

- **Hosting** – Article 14

The service provider is not liable for the **information stored at the request of a recipient of the service**. The exemption provision is valid until (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.

In conclusion, the ECD Articles 12, 13 and 14 immunize online intermediaries under certain conditions.¹⁴

¹³ The transmission is exempted according recital 42 ECD only if *activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.*

¹⁴ While these conditions presents only **minimum requirements** for national legislators and immunity regime may differ within EU member states.

2.3 The liability

To complete the liability provisions concerning online intermediaries for the purpose of the thesis, it is inevitable to mention in the ECD Article 15 (1). This Article **does not impose a general obligation on providers**, when providing the services covered by Articles 12, 13 and 14, **to monitor the information** which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity.

On the other side, providers are obliged under Article 15 (2) *to inform promptly the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements*. Additionally to the former obligation, under the Articles 12 (3), 13 (2) and 14 (3) are courts and administrative authorities in accordance with national legal system, are allowed to require the service provider to terminate or prevent an infringement. These provisions are applicable as far as they are in accordance with national laws. They are creating further obligations for cooperation online intermediaries with national authorities.

2.3.1 Civil and administrative liability

The Article 14 (2) is providing freedom of liability for damages unless a host provider has actual knowledge (in other words known as constructed knowledge) or is aware of the facts and circumstances from which the illegal activity is apparent.

The Infosoc and ECD Directives ensure the application of injunctions against intermediaries when the service is used by the third party to infringe copyright or neighboring rights.¹⁵ But all in all, provisions of ECD **do not harmonize the substantive norms on liability**.

¹⁵ Cf ECD Article. 12 (3), 13 (2) and 14 (3) and Infosoc Directive Article 8(3);

Consequently, the case law within Europe concerning the liability of online intermediaries is twofold. On the one hand, there is possibility to claim civil or criminal liability and on the other hand, the Infosoc Directive in recital 45 ECD and recital 59 expressly offers injunctions of different kinds in order to prevent copyright law infringement:

(45) “The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such **injunctions** can in particular consist of orders by courts or administrative authorities **requiring the termination or prevention of any infringement**, including the removal of illegal information or the disabling of access to it [emphasize added].”

(59) “In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for **an injunction against an intermediary who carries a third party's infringement** of a protected work or other subject-matter in a network. **This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5.** The conditions and modalities relating to such injunctions should be left to the national law of the Member States [emphasize added].”

The ECD Article 20 kept the sanctions and their enforcement up to the member states. The only requirement stated in the Article is that sanctions should be “*effective, proportionate and dissuasive*”.

National legislators incorporated ECD immunity regimes conditions into the national Acts. Necessary investigation and imposing all measures in the case of online intermediaries liability are governed “either through specific norms in the field of communication law or general criminal law rules regarding aiding or abetting.”¹⁶

Whether the freedom of liability will apply also in cases concerning the TPB website is depending on the functionality of the p2p network and on the compliance of the online intermediaries with the above described exemption requirements.

¹⁶ Kioupis Dimitris, *Criminal Liability on the Internet*. In: Copyright enforcement and the Internet. (edited by Irini A. Stamatoudi). Wolters Kluwer, Law & Business. 2010 p. 244

2.3.2 Criminal Liability

According Dimitris Kioupis¹⁷ the rationale of the ECD is not to make ISPs criminal liable, and the author argues that criminal liability may arise mainly in case of hosting (criminal liability of the other two service providers is quite marginal).

The core requirement for claims concerning criminal liability is the provider does have **actual knowledge** (in other words known as *existing knowledge*) of illegal activity or information. Therefore, the host service provider will not be held criminally liable if it had only *constructed knowledge*¹⁸, In order to impose third party (secondary or contributory) criminal liability on online intermediaries in countries with Civil law tradition, where this kind of liability is “less” defined, the legislator in the ECD recital 48 applies **duties of care**, “which can reasonably be expected from service providers, who host information and which are specified by national law, in order to detect and prevent certain types of illegal activities [emphasize added].”

The third party criminal liability concept in civil law countries is based on general unlawful act (in TPB case copyright infringement of unauthorized transmission and reproduction of works). *So, the challenging question arises, are third parties criminally liable for the perpetrators’ acts?*

2.4 Concluding remarks

Finally, the law concerning intermediary liability differs from one European country to another. General answers to substantive liability and responsibility of online intermediaries are varying and are accompanied with legal uncertainty of disputed parties. The outcomes of litigation depend on the approach taken by the Member State during implementation of the Directives into the national legislation.

¹⁷ Kioupis Dimitris, *Criminal Liability on the Internet*. In: Copyright enforcement and the Internet. (edited by Irini A. Stamatoudi). Wolters Kluwer, Law & Business. 2010 p. 244

¹⁸ The term - *constructive knowledge* is applying in the context of what *a person could or should know*.

3 Subject Matter: The Pirate Bay

The website <http://thepiratebay.org/> is ranked as the 86th most popular website¹⁹ and has over five million registered users and more than 29 millions peers is using the site at the time of writing.²⁰ This numbers illustrate the need to acquire enough knowledge concerning its status, especially technical and legal development which TPB is rising nowadays.

3.1 Introduction

This chapter is a prerequisite to understand the argumentation of judges used in the TPB cases. In order to analyze a case law, first of all the historical development and technical aspects are discussed in sections 1 and 2. Section 3 deals with the parties involved in the file sharing service of TPB.

Nowadays, there are a number of bigger torrent search engines indexing torrent engines (including TPB) all around the world.

3.2 The historical Background

The history of the Pirate Bay (TPB) as a company started in the 2003 and is connected with the Swedish anti-copyright organization *Piratebyrå*²¹. In 2004 TPB separated its services from the anti-copyright organization and in 2005 the company started to

¹⁹ Cf <http://most-popular.org/> [25 July 2011]

²⁰ Cf <http://thepiratebay.org/> [25 July 2011]

²¹ Cf <http://thepiratebay.org/about> [25 July 2011]

administer the world wide accessible website. This means the website was rewritten into other languages, the computing power was increased, trackers functions were improved and the website changed its commercial site into more advertising-friendly environment In order to run operations of TPB, a new company was set up called Random Media.²²

The servers of TPB were first located in Sweden, Stockholm, but after the police entered TPB computer center in May 2006, website's operators moved the servers from Sweden to Argentina or Russia and current location of servers is unknown. Nowadays, the Pirate Bay is officially registered in the Seychelles as a non-profit organization.²³

In case of the lawsuits against TPB, four Swedish men are being sued as representing the website: **Peter Sunde, Fredrik Neij, Gottfrid Svartholm** and **Carl Lundström**.

3.3 Technology utilized by TPB files sharing service

3.3.1 Computer Network

A computer network enables communication and interconnection among computers. Computers connected to the Internet are simultaneously logically interconnected. A logical aspects of computer interconnection mean that each computer can be directly connected with another. This complicated system of computers interconnection is called the Architecture of the Computer network. Computer networks are characterized on the different grounds. The basic distinction of computer network is based on geographical scale:

- **LAN** - Local Area Network (e.g. company networks, home networks),
- **WAN** – Wide Area Network (e.g. university networks, towns networks).

Figure 2 shows a simplified picture of the LAN and WAN interconnection over the Internet. The white squares are LANs and WANs network which are composed by: personal computers, servers, routers etc.

²² Verdict B 13301-06, Stockholm District Court, 17 April 2009, p. 24-25; see also supranote 3.

²³ Ibid.

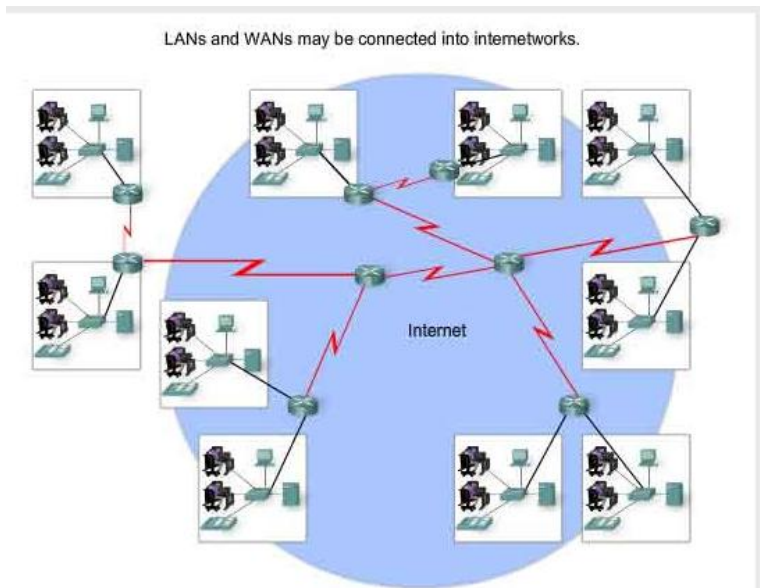


Figure 2: Computer LAN and WAN interconnection, source: http://www.highteck.net/EN/Communicating/Communicating_over_the_Network.html [Accessed 18 September 2011]

The squares on the Figure 2 are connected with nodes. The node is for example a server, a hub, a router, an ISP etc. The function of the node is to divide the network. Each interconnection is directed into another WAN/LAN and this global interconnection can be called the Internet network.

Nowadays, the Internet network overcomes WAN/LAN networks characteristics. The actual distinction is based on the nodes position:

- **Client-Server model,**
- **Peer-to-Peer model.**

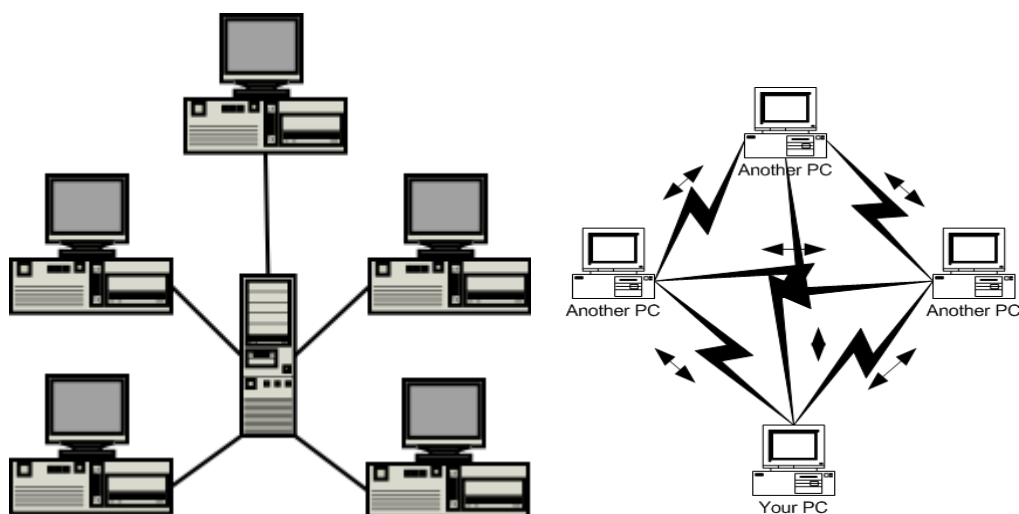


Figure 3, source <http://www.wifinotes.com/computer-networks/network-types.html> and http://ask-leo.com/will_bittorrent_harm_my_computer.html [Accessed 18 September 2011].

The client-server model (see the left picture, Figure 3) is composed by a central server and other clients such as Internet users. Clients are communicating through central server which responds by sending the requested information. All connections are routed through central server or a cluster of servers and clients have no direct access to data located on other client computer.

The peer-to-peer model (see the right picture, Figure 3) is characterized according to the Novell Dictionary as: “an architecture of the computer network, in which two and more nodes can communicate directly with each other without any data saving tools (for example: a cluster of servers). In these networks everyone can be a node, a client or a server [Author’s translation from Czech original].”²⁴ P2P networks link together computers connected over the Internet. The p2p network architecture is commonly utilized over the Internet.

Following applications are examples of an online use of p2p network technology.²⁵

- distribution of data over the Internet – e.g. Gnutella, BitTorrent
- streaming media, Spotify
- p2p lending and p2p loans
- instant messaging – e.g. Skype, ICQ, Yahoo! Messenger, Jabber,
- generating Bitcoin.²⁶

As we demonstrated above, the p2p technology is widely used over the Internet network. It can be used for lawful purposes as well as vice versa. The same is applied in connection with the application of distribution of data, where sharing data might be legally purchased or not copyright protected, or on the other hand acquired from pirated copies and shared illegally. The conclusion concerning the source of digital data is often difficult to determine in the cyber space and this is the strategy TPB is built on.

²⁴ Dyson, P. *Novellovský slovník síti*. GRADA Publishing, 1995. p. 233 ISBN 80-7169-143-7, Authors own translation from the Czech original).

²⁵ For the detail functionality of p2p technologies see: <http://en.wikipedia.org/wiki/Peer-to-peer> [Accessed 18 September 2011].

²⁶ For more information see <http://bitcoin.org/> [Accessed 12 October 2011].

3.3.2 Peer-to-peer network as TPB file sharing tool

TPB case law is based on assessing possible breach of laws with making copyrightable works available over the Internet. This is possible due to exploration of p2p network, using p2p software and a specific p2p protocol.

Personal computers are linked over the Internet in the form of the p2p computer network architecture. The computers use **software** (in the p2p networks terminology called client such as. uTorrent²⁷) which enables them to interconnect with other computers running the same protocol. The software enables users to ‘share’ files – upload, download, search for materials saved on the other users’ computer hard disk without any need of an intermediary (so called host). The users of the p2p network are called generally “peers”²⁸.

The latest p2p network version is called **hybrid or decentralized** network. The TPB is based on this decentralized system. Some users within the network are acting as central mediators, who are pointing users to other users, providing searching and supporting functions. The most utilized example within p2p protocols is BitTorrent. BitTorrent is breaking up large files into smaller pieces, where users connected to each other directly and send or receive (usually simultaneously) parts of the file that is shared. This protocol is allowing uploading and downloading files at the same time and exchanging of the parts of files.

The short technical overview of file sharing procedure over the Internet is as follows:

Firstly, users run a program to find or create **.torrent files**. The .torrent files are describing which users’ computer is offering the required data and this description is in a metadata format. It means, that the .torrent file generates metadata about searched/requested data (the name of transferring file, size, URL - address of an Internet servers known as a tracker).

²⁷ For more information see: <http://www.utorrent.com/> [Accessed 30 September 2011]

²⁸ BitTorrent protocol has developed special terminology for peers: **seed** is the user who is storing on the computers hard disk the whole file available for other peers to download; peer who is only downloading the file is called **leech**.

Secondly, the information about the peers who are having parts of the file is gathered on the **trackers**. Tracker is functioning as a central server obtaining actual IP addresses of peers connected into network. It is important to emphasize here, that in the trackers are no data or .torrent files saved.

Finally, once the torrent file is created, users send the file to another person who can open it in a BitTorrent client program as uTorrent. This program will then connect to the tracker and begin to download and upload downloading parts of the file from swarm²⁹. Swarm is a name of peers who are jointly sharing the same file. The uTorrent software is enabling searching, downloading and uploading torrent files function.

To sum up, users downloading files can not identify from whom they are receiving parts of the files (BitTorrent protocol technology is fragmenting the data, which caused that the data is not traceable to a single user). Moreover downloaded part of the file is immediately shared with others who are looking for the same file. More peers sharing parts of the data, means better accessibility of the files and quicker downloading function, a consequence of sophisticated technology involved in the p2p file sharing.

²⁹Cf Carrier, Michael A. *The Pirate Bay, Grokster, and Google*. Camden, Rutgers School of Law, 2009. In *Journal of Intellectual Property Rights*. Vol. 15 (2010), pp. 7-18
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481854 [Accessed 1 October 2011].

3.3.3 The functionality of the Pirate Bay website



Figure 4: The well known Image of the website with the searching function

The website is operating as a **torrent indexing website** (simply as a database of .torrent files) and **the tracker**. TPB is saving torrent files on the indexing servers, which possess the database of torrent files and trackers. Maria Mercedes Frabboni describes TPB website as a **platform provider**, providing ‘a **portal** that allows Internet users to search a database of files, called ‘Torrent’ files’ (emphasis added)³⁰. The Swedish court found that TPB website provides:

- advanced search features,
- easy uploading and downloading facilities and
- service which is putting individual file sharers in touch with one another through the tracker linked to the site³¹.

Internet users may search for the torrent files on TPB website directly; specifying only desired keywords, there is no need to be registered. In order to upload .torrent files into TPB’s search index, users must have a registered account on the website.

³⁰ Frabboni, Maria Mercedes. *File-Sharing and the Role of Intermediaries in the Marketplace: National, European Union and International Developments*. In: Copyright enforcement and the Internet. Edited by Irini A. Stamatoudi, (Wolters Kluwer, Law & Business) 2010. p. 142.

³¹ Verdict B 13301-06, Stockholm District Court, 17 April 2009; In: Carrier, Michael A. *The Pirate Bay, Grokster, and Google*. Camden, Rutgers School of Law, 2009. In Journal of Intellectual Property Rights. Vol. 15 (2010), p.9, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481854 [Accessed 1 October 2011].

The Italian Court was assessing the contribution of TPB website to the processing of illegal file sharing. The Court concluded that “it provides users with information which is constantly updated. At this point, the file transfer activity is no longer “passive”, but may be characterized as the quasi-active transfer of data containing material covered by copyright. At this point it is true, although the file exchange occurs “pee-to-peer”, the activity of the web site (to which data transfer protocol indexing of essential data must refer) is the sine qua non which permits the said exchange, there is, therefore, a causal contribution to the unlawful conducts [...]”³²

Despite the above Italian court’s conclusion, according to which the TPB website is inevitable part of illegal file sharing activities, we would like to disagree. It is important to emphasize at this stage of thesis, that the TPB tracker and torrent files do not possess any copyrightable content. The tracker helps users to connect together (the tracker is only a tool which enable illegal material to be made available to the public. Some authors compare this tracker function to cars or knives. These tools are also possible to cause illegal consequences e.g. murder but are not because of this functionality considering as generally illegal) and the website is offering torrent files search function by keywords, the same as for example Google search engine.

The technology involved in the website overcame traditional copyright law principles. The conclusion that the website as such and its functionality is breaching the copyright law being sine qua non to the exchange of copyrightable works is insufficient according our opinion. The IT professionals are still working on technical improvements which will decentralized the service of the website and it will become untraceable.

Moreover, after the negative court verdicts, directed against TPB website, the new decentralized version of p2p network was created. The network is called *Distributed Hash Table* (DHT), where **no single tracker** is needed in order to find users who are offering the required data. The network use a distributed tracker, where peers have information about torrent files directly form other peers. The DHT network is using another new application called PEX (Peer Exchange).

³² Verdict 49437/09, The Italian Supreme Court, 29 September 2009, p. 6-7.

The PEX in connection with BitTorrent protocol is creating the list of peers offering the data within network directly from other peers.

Next significant development was reached when previous torrent files were overridden with so called *magnet links*. This new source of links refers to users possessing required data, based on searching according to content of data rather than the name or location of the file as it was in case of torrent files. The searching content is located on the users' hard disks, so there is no longer need for the hosts trackers or servers.

Finally, as we have discussed above, today the website reached the function of passive intermediary with the pure technical searching function. There are no torrent files or trackers needed today and the p2p file sharing functionality of the TPB website is maintained. The role of the website in the file sharing service is the same, but the technology of the platform changed significantly.

3.4 Parties connect with TPB website

The Pirate Bay website is online, accessible all around the world via the Internet. Parties involved in TPB are not easily identifiable. We are using more general point of view and for this thesis purposes we are distinguishing between four categories of parties connected with TPB:

1. website owners – according to Swedish and Italian Court these are: Hans Frederik Neij, Per Gottfried, Svartholm Warg, Peter Sunde Kolmisoppi, Carl Ulf Sture Lundström;
2. users / file sharers – each person having the Internet access;
3. copyleft³³ / copyright holders – right holders;
4. Internet service providers – defined in the chapter 2.

Right holders are initiating the claims for injunctions and the actions directed against one of the parties marked above under numbers 1, 2 and 4. The decision of right holders against whom to sue depends on what they demand from courts to be decided and enforced. The outcomes of TPB litigations are analyzed and compared on the following pages.

³³ For more information see <http://www.gnu.org/copyleft/> [Accessed 29 October 2011];

4 Swedish v. Italian TPB case

4.1 Introduction

The battle over copyright infringement, private file sharing exception and dissemination of links directed to works proliferates on the Internet. The legal framework is based on the copyright and criminal Codes which judges must accommodate to the new online developments. The legal suits for claims of copyright infringement are connected with lack of evidence, problems with pointing the possible infringers and the territorial principle applying in the copyright law.

On the other hand, the issue of liability of platform providers is according to opinion of Dimitris Kioupis³⁴, easier to prosecute, since the site owners (people managing the site) are easier identifiable.

This chapter outlines the legal consequences of the TPB file sharing service, as we noted in the previous chapter, the TPB website originated in Sweden. The Swedish TPB court decision from 2009 is famous due to a large amount of interest from the press and the public. Scholars writing about TPB cases called the litigations “a saga”³⁵ or “the Peer-to-Peer Dilemma”³⁶. The court processes has activated many discussions and when the final verdict against the defendants was stated, the enforcement of the decision brought further legal and technical issues. Legislators are trying to regulate the file sharing websites whilst IT scholars are creating more sophisticated technical backgrounds enabling the same file sharing function with applications that are more legally friendly.

The purpose of this chapter is to compare the Swedish TPB case with its Italian Supreme Court counterpart decision. The Swedish and Italian decisions possess a number of common features, both rests on the application of national criminal law, the same persons are sued as defendants in the position of software/platform providers and they were found guilty of committing a criminal copyright offence.

During this period, it is important to note the line of argumentation in each verdict. This may serve as an example and precedent for other states in their combat against copyright infringement.

³⁴ Kioupis Dimitris, *Criminal Liability on the Internet*. In: Copyright enforcement and the Internet. (edited by Irini A. Stamatoudi). Wolters Kluwer, Law & Business. 2010 p. 244

³⁵ Clark, Birgit. In another news article: Denic softens its rules, Pirate Bay and a handbag war. 2009. <http://ipkitten.blogspot.com/2009/10/in-other-news-denic-softens-its-rules.html>. [Accessed 6 October 2011].

³⁶ Hugenholtz, P. Bernt. Class 6. The Peer-to-Peer Dilemma. Bergen, University of Bergen 2009.

4.2 The Analysis

The courts must examine the existence of the principles or elements of an alleged crime.

The Swedish and Italian courts in TPB cases interrogated:

1. the existence of the principal offence;
2. commitment of the crime;
3. objective liability of the defendants;
4. subjective liability of the defendants

4.2.1 Making available of work over the Internet

The plaintiffs assert that defendants allegedly ‘furthered’ the infringement of the exclusive right of communication to the publishing of the works. The Swedish and Italian court must prove that the **right of communication to the publishing of works and the right of making them available to the public** has been breached or is likely to be breached in the case of TPB services.

For illustration of minimum regulation of the right in national legislative art. 3(1) of the Information Society Directive stated:

“Member States shall provide authors with the exclusive right to authorize or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

The Swedish Court examines the file sharing function of the website in order to prove the breach of the right of making available to the public. The court described the process of making the works available to the public as: “the process of downloading a principal file via the Pirate Bay involved a computer user searching for the torrent file he was interested in. Normally, the name of the torrent file would correspond to the name of the principal file. The torrent file selected by the user could be opened using BitTorrent software. The tracker would then be contacted and would inform the user of which other users were, at that moment, involved in file sharing of the principal file the torrent referred to. A “handshake” would be performed and the user would be accepted into the swarm of users involved in file sharing. Once the “handshake” had been performed, file sharing with the

other users in the swarm would commence [...].The segments of a principal file a user downloaded were made available to other individuals in the swarm. The file sharing service did, consequently, make copyrighted material available to the general public and this was carried out by computer users and by an indeterminate number of individuals and not, therefore, a closed circle.”³⁷

In other words, users of TPB website can gain access to work at any time and from any place of one’s own choice, which according to a court’s view, is being made available to the general public.

The right of communication to the public, according to recital 23 of the Information society Directive should be interpreted in a broad sense covering all communication to the public not only the place where the communication originates. The Swedish court’s interpretation of the right described above is then clearly in accordance with the Directive preamble.

In the Swedish court’s extensive interpretation of the right of communication to the public in the case of TPB; the argumentation is missing one important technological *nuance*. **The Stockholm court decision did not cover the above description of the BitTorrent’s principal function** – fragmentation of the work into small pieces. These fragments did not constitute in many cases copyright-protected works because peers are exchanging disjointed “puzzles” of works.³⁸ The Swedish TPB decision was issued in April 2009, in September 2009 Italian court took also into consideration the BitTorrent’s sophisticated technology and the Italian Court ruled that from the legal point of view “in reality, this fragmentation is irrelevant.”³⁹

The Italian court described the acts in question and moreover the argumentation based on an extreme⁴⁰ interpretation of an unauthorized dissemination of works. The Italian Court admitted that fragmentation, even when uploading or downloading activity of the work, is

³⁷ Verdict B 13301-06, Stockholm District Court, 17 April 2009; p. 38-39;

³⁸ Cf Edström J., Nilsson H. *The Pirate Bay Verdict – Predictable, and Yet...*, In European Intellectual Property Review. Thomson Reuters (Legal) Limited, 100 Avenue Road, London 2009. p. 484

³⁹ Verdict 49437/09, The Italian Supreme Court, 29 September 2009, p. 7 4

⁴⁰ As we concluded in chapter 2, the extreme hypotheses of decentralized dissemination of works over the Internet described in the Italian Court Verdict, is nowadays the reality and common functionality of many Internet applications.

no longer traceable to a single user, but rather, to a plurality of users that are participating in the file sharing. When, an individual user disseminates a fragment of the work, the fragment is not from a strictly legal point of view considered as copyright protected work. To sum this, the Italian court stated that the copyright protected work “is never downloaded from an individual user, but only by the joint acts of communicated pieces of works by numerous users simultaneously.”⁴¹

The fragmentation and decentralization of file sharing activities is irrelevant from a legal point of view, because there is still a possibility “to reconstruct fragments according to the tracing instructions which appear on the website results in the transfer of the entire work (or parts of it), the dissemination of which is then attributable , above all, to the individual users.”⁴²

The Italian jurisprudence metaphorically concluded that the fragmentation and consequent decentralization of the “uploading” activities (in other words unauthorized making available of the works over the Internet), “does not have the added effect, of “decentralizing” the illegality of the unauthorized dissemination of copyrighted works.”⁴³

Finally, the existence of the first element of the criminal offence in both TPB cases was confirmed. Both Courts found that the exclusive right of publishing copyright protected works was infringed according to Articles in their national Criminal Codes.

4.2.2 Commitment of the crime

The second factor of the criminal liability pointed to TPB and questions the activities of defendants that led to the commitment of the illegal publishing of copyright protected works. The courts must assess the casual relations between the activity and infringement that TPB poses for plaintiffs.

⁴¹ Edström J., Nilsson H. *The Pirate Bay Verdict – Predictable, and Yet...*, In European Intellectual Property Review. Thomson Reuters (Legal) Limited, 100 Avenue Road, London 2009. p. 484

⁴²Verdict 49437/09, The Italian Supreme Court, 29 September 2009, p. 7-8

⁴³ Ibid.

The Swedish court was examined over this part of the decision and the question of complicity whether the defendants have aided and abetted the principal offence.

The TPB liability for this activity was derived from one of three TPB website functions:

- a) the tracker function of the website,
- b) the searching function of the website and
- c) the website provided a database linked to a catalogue of torrent files.

According to the court's findings, defendants were constantly purchasing the new hardware from the website and thus improving the tracker and search functions. Defendants were doing this with the aim to provide better access and transfer of materials. The Swedish Court also said that during the time of the court's investigation of TPB "was a popular website with large number of users around the world. The purpose of the Pirate Bay was to create a meeting place for file sharers."⁴⁴ Subsequently, the Court stated that users that had used the TPB website in a way that was identified as a breach of the Copyright Act in a manner of committing the principal offences.

The Italian court described the activity of the website owners as acting in accordance with the Swedish court's findings.

The Italian judges determined the acts taking place on the website as "a some aiding and abetting between the activity at the centre (or the website manager) and the activity at the periphery (where the computer users download the copyright works by means of information made available over the Internet), a contribution which, in our legal system, constitutes an offence under the Criminal Code."⁴⁵ The court subsumed the criminal liability of the website owners under the heading of aiding and abetting. The criminal liability of the website was built up on the fact that "**the 'keys' to access the archives of the users possessing any particular copyright work are made available on the website www.thepiratebay.org; both the indexing activity and indexing results (so called file tracing) are therefore on site**[emphasis added]."⁴⁶

⁴⁴ Verdict B 13301-06, Stockholm District Court, 17 April 2009; p. 47

⁴⁵ Verdict 49437/09, The Italian Supreme Court, 29 September 2009, p. 7, see also supranote 4

⁴⁶ Ibid.

To summarize the second element of the criminal liability, TPB allows its users to upload and download copyright protected works. In other words, TPB assist users in making copyrighted works available to the public. According to the both courts, the operation of TPB fulfilled the definition of the copyright infringement.

4.2.3 Objective liability of the defendants

The third element of the criminal liability is the question of defendant's responsibility for what took place within TPB website operation. To find liability of defendants the court must examine the role of defendants in the operation of TPB and whether their roles objectively "furthered" the principal offence.

Short explanation, at this point analysis is needed. From the first two elements of crimes it is clear that both courts established the existence of a principal offence. The criminal liability under the Swedish and Italian Law could be established, not only with the persons who commit the principal offence (mainly carried out by those who downloaded works from TPB), with secondary persons – as in this case, persons who aided and abetted the first person to unauthorized uploading and downloading of works.

The authors Goldstein, Hugenholtz explains the role of "second" persons involved in the right of communication to the public as follows: "assumes an active role on the part of 'communicator', so that merely operating a telecommunications communications network does not amount to communication."⁴⁷ The authors concluded that the Internet service providers such as telecommunication operators cannot be held liable for "direct" infringement, but "indirect" infringement of the right of communication to the public is not excluded.

Interestingly, the Swedish prosecution was originally directed against defendants who were held liable for **direct** infringement of copyright acts. During the trial, the court moved to assess whether the principal crime had been furthered or in other words aided and abetted by defendants.

According to the Swedish court observation, two of the defendants were technically responsible for the operation of the website and the other defendants were directly or at least indirectly participating in the technical activities as well as being responsible for advertising and the financial activities of the website. The court found that defendants were

⁴⁷ Goldstein Paul, Hugenholtz Bernt. *International Copyright, Principle, Law, and Practice*. Oxford University Press 2010. p. 330

aware of the roles of the others, they acted as a team with a common purpose to expand technical and sales activities of TPB website and they expected to earn money from the website in the future.

The defendant's lawyers argued in front of the Italian Court that they had no involvement in the commission of the infringement; they had neither uploaded nor download copyrighted works. The Italian judges will accept this argumentation (in accordance with Articles 14-16 of the e-commerce Directive⁴⁸), if the role of the defendants was limited to the communication via a peer-to-peer protocol by indexing the information in a logical way and keeping this information updated as well as providing a search engine concerning such information used for the file sharing⁴⁹. However, the conduct of defendants was recognized as having another aim. The court regarded the acts of the defendants being committed for the purpose of profit because defendants received income from advertising on the website.

In the light of the above circumstances, both courts identically proved the defendants being collectively responsible for the main offence. Judges in both decisions found a relevant causal relationship between the illegal conduct of the website users and the activities of the defendants within the TPB website operations.

4.2.4 Subjective liability of the defendants

The fourth element of criminal liability is the existence of intentional behaviour of the defendants in relation to the main offence. The court must look for evidence that shows that the defendants knew or should have known about the rights of the works being made available for file sharing via TPB.

The Swedish court confirmed the defendant's knowledge about copyright protected materials on the website:

⁴⁸ We will deal with the provisions of the e-commerce Directive in detail in chapter 4. Discussing the role of 'pure' intermediaries within a peer-to-peer network.

⁴⁹ Cf Rinaldi Gian Marco. *Italian Supreme Court explains reasons for ordering blocking of Swedish Pirate Bay website*. 2010.

http://www.twobirds.com/English/News/Articles/Pages/Italian_Supreme_Court_blocking_Swedish_Pirate_Bay_website_050510.aspx [Accessed 20 October 2011].

1. with the letters from rightholders published on the website⁵⁰—these letters were answered with a sarcastic tone and made freely available on the TPB website,
2. with an email which was sent from one of the defendants, describing the purpose of the TPB website as ‘pirate copying’ and offering copyright protected works free of charge,
3. defendants were aware that the torrent files on the website related to a significant amount of copyright-protected material.

The author - Carrier who wrote the article comparing “The piratebay, grokster and google”⁵¹ commented that the Swedish decision concerning subjective liability of defendants is based on the ridiculed and published letters and TPB answers as being “quite plausible that the TPB comments convinced the court that any requirement of subjective intent was satisfied.”⁵²

According to the case law in question, it was obvious that defendants had actual knowledge of the fact that copyrightable material was accessible through <http://thepiratebay.org/> and was being shared by the tracker function. None of the defendants had chosen to take any measure in order to prevent copyright infringement; even when requests were sent by copyright holders.

⁵⁰ For more details see: <http://thepiratebay.org/legal> [Accessed 20 October 2011].

⁵¹ Carrier, Michael A. *The Pirate Bay, Grokster, and Google*. Camden, Rutgers School of Law, 2009. In *Journal of Intellectual Property Rights*. Vol. 15 (2010), pp. 7-18

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481854 [Accessed 1st of October 2011].

⁵² *Ibid* p.12

4.3 Territoriality in the TPB criminal proceeding context

Applicable law and jurisdiction of courts is another issue examined in the TPB cases. Swedish and Italian courts concluded that each state's national law is applicable and argumentation is based namely on the fact that a crime was committed within the national territory.

Traditional copyright and neighbouring rights have a territorial nature. The territorial principle required for application of domestic law for enforcement and penalization of unlawful conduct engaged within national territory⁵³.

The Swedish court based its argumentation on the earlier Swedish case⁵⁴ where it was stated that 'there is strong reason to regard an offence which involves the making available of something on the Internet as **having been committed in a country where the Internet user can obtain the information** which has been made available, provided that the making available has legal implications in the country [emphasis added].' The decisive factors for the Swedish court were: the language of the website, which was the same as that spoken in the country that the servers hosting the Pirate Bay's website and trackers were located, i.e. Sweden. The court therefore conclude that even if the offence was committed by persons located outside Sweden (where they made the works available to the general public), the offence is regarded as being committed in Sweden and Swedish criminal law is applicable.

The Italian court also confirmed its national criminal law application. The court stated that even the website hardware is not located in Italy, the website is registered in a foreign country and the Internet transmission of data is global and supranational, the crime of unauthorized dissemination of copyright work has been committed in the State of Italy, **"at least insofar as users in Italy are concerned."**⁵⁵ The court described its argumentation outline as: "Italian users can access the website www.thepiratebay.org through the provider, and then download copyright material from other users at unknown locations, it

⁵³ Cf Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others, European Court of Justice July 14, 2005, case C-192/04, para 46;

⁵⁴ Schønning, Ophavsretsloven with comementary, 3rd edition, p. 686 IN Verdict B 13301-06, Stockholm District Court, 17 April 2009, p. 46; see also supranote 3;

⁵⁵ Verdict 49437/09, The Italian Supreme Court, 29 September 2009, p. 9 see also supranote 4, the Italian court applied the same jurisdictional principle as the European Court of Human Rights in the Fiona Shevill case n. C-68/93 Fiona Shevill and Others v. Presse Alliance;

is still certain that the criminally unlawful conduct of making the said work available over the Internet is committed **when the user in Italy receives the file, or files**, containing the said work. [emphasis added].”⁵⁶

Both courts ordered the application of domestic criminal law based on the location of harm caused though the acts of the file sharers. Moreover, the Italian Court goes further in assessing jurisdiction based on “**some** aiding and abetting between the **activity at the centre** (or the website manager) and **the activity at the periphery** (where the computer users download the copyrighted works by means of information made available over the Internet)...[emphasis added]”⁵⁷

The criminal liability in a p2p context is based on the defendants’ *own* actions (i.e. international availability, advertising strategies, business plan and the like) *and* the actions of its file shares located elsewhere where access to the Internet is available⁵⁸.

The defendants in the Swedish and Italian case were Swedish nationals. The website was primarily managed from Sweden and it enabled untraceable file sharing activities. These sharing activities can be regarded as primary acts of criminal infringement. The Swedish and Italian Court did not analyze where the primary act of infringement occurred, or is likely to occur because defendants were convicted for complicity in a crime and in this circumstances the main perpetrators of the crime do not need to be identified, provided that an actual principal offence has **not** been committed.

The general conclusion from the court’s point of view is that primary infringers are presented in every nation with an Internet connection. Consequently, every national court has jurisdiction over the TPB website and all national criminal laws are applicable.

From the TPB’s point of view, its legal status is unmanageable. Defendants could be found guilty of complicity in copyright infringement at least in each of the 27 European Union member states due to the harmonization of copyright *acquis*.

⁵⁶ Ibid p.8

⁵⁷ Ibid p.7

⁵⁸ Austin, W. Graeme. *Global networks and domestic laws: some private international law issues arising from Australian and the US liability theories*. IN *Peer-to-peer file sharing and secondary liability in copyright law*. Edited by Strowel Alain. Edward Elgar Publishing Limited. Glos. 2009. p. 143

4.4 Concluding remarks

In the light of the above analysis, criminal liability for software or platform providers (or in other words, the proprietors of the TPB website) can arise from the acts of file sharers. Moreover, software providers can hypothetically be sued in every country around the world because the TPB website is accessible worldwide for the users who are obviously committing the principal offence. Of course, all this depends on the legal treatment of the operation of the website according to the national law.

Finally, from the legal point of view regarding the conduct of intermediaries in the position as software or platform providers it is not as “neutral” as the conduct of access providers (this is discussed in the next chapter).

Surprisingly, the outcomes of litigations in Sweden and Italy are different. The final effect of convicting the defendants in both decisions brought diverse consequences for the filesharers.

In Sweden, the defendants were sentenced to imprisonment and to pay damages and plaintiff’s legal costs.

The Italian court qualified the activities of the TPB website as that of committing criminal copyright infringement. The court confirmed the blocking injunction against the TPB website and ordered to block the access to the site by the Italian Internet Service Providers (hereinafter access providers).

5 Danish v. Norwegian TPB case

5.1 Introduction

Telecommunication operators are intermediaries providing the backbone, other intermediate services and proxy servers facilitate the transmission over the Internet. Simply said, telecommunication operators are “gatekeepers” to the Internet. Within the EU applied E-commerce Directive. The Directive regulates the immunity regime of telecommunication operators and stipulates a general non-liability regime for third party infringement. The Danish and Norwegian TPB cases are examples of the courts assessing the ISPs liability for its customer’s communication.

The ECD in Articles 12, 13 and 14 lays down rules establishing freedom of liability in certain cases for Internet Service Providers. The liability exemptions for ISPs are not absolute and depend on several conditions. Whether the requirements of non-liability for the content transmitted, stored or hosted by ISPs are fulfilled, depends from case to case.

The aim of this chapter is to compare the Danish and Norwegian court’s decisions, stipulating the liability of ISPs (telecommunications operators) for its negligent contribution to illegal activities of its customers. Simply said, this chapter is about the role, the control and responsibility of telecommunication operators who are in some countries obliged to block access to the TPB website even when the freedom of liability regime under the ECD is provided.

First of all, the judge’s arguments concerning liability of telecommunication operators in Denmark and Norway are compared. Then shortly after is a summary of why Swedish and Italian courts refused to apply ECD immunity on the acts of defendants which are also

needed in order to provide the whole picture of the current judicial approach regarding the scope of freedom from liability under the ECD regime.

Finally, a conclusion showing to what extent the activities of the same telecommunication operator may infringe copyright in one country and not in another due to the activities of a third party. Such a diversity of the court's positions invoked even more controversy to the legal definition of ISPs and legal uncertainty to all intermediaries as to whether they may be sued for the acts of Internet users.

5.2 Third party liability for telecommunications operators under ECD

5.2.1 Denmark

The Court at the beginning of its decision submitted undisputed facts that the TPB website is an index and search engine, allowing users to receive files from each other. On the basis of evidenced presented during the litigation, the court holds that material exchanged through the website is protected by copyright and the right holders do not give permission for the material's publication or accessibility. Moreover, another undisputed fact was that at the time of the trial the website was ranked as the 23rd most popular website in Denmark. Consequently from the exchange of works, which took place between users of the website without permission of the right holders, the court confirmed a violation of the Copyright Act.

The role of the website in the unlawful file sharing activities of its users, the court found, on its construction and search engines function, what caused the accessibility of copyright protected works for the public. The arguments that the TPB website is not uploading copyright protected works on the net was not so important from the Danish court's point of view as the fact that "the website through its search-function is programmed **with direct links to copyright protected material hosted by the website's users** [emphasis added]."⁵⁹ It was also undisputed that customers of telecommunication operators have access to the TPB website and this access is constituted via the transmission of copyright protected works through the telecommunication operator Internet service.

⁵⁹ Case FS 14324/2007, Bailiff's Court of Frederiksberg (Copenhagen), 05 February 2008; p. 5

The justified court's argument is based on finding that the telecommunication operator “**by giving its customers access to www.thepiratebay.org contributes to violate the copyright** that is administrated by the claimants...the fact that www.thepiratebay.org to a certain extent – even though to a small degree- offers access to legally file-sharing between the websites users, cannot legitimize the wrongful acts [emphasis added].”⁶⁰ The purpose of the issued injunction according to the Supreme Court was to prohibit Telenor to help its customers to infringe copyright via the TPB website. The Supreme Court described the injunction as “**an obligation for Telenor** to abstain from contributing in order to allow Telenor's customers to have access to the site **by ensuring to hinder access for Telenor's customers** to the website [emphasis added].”⁶¹

The Danish courts imposed the injunction taking into consideration the extent of the piracy within the Internet on the one hand and protection of the exclusive rights of right holders on the other hand. The Appeal Court found it proportional to impose the sanction of terminating access to the TPB website before the final decision concerning Telenor's liability which took place, because further waiting would fail the purpose of copyright protection⁶².

The Danish Supreme Court at the end of its order declared the proportionality of its decision. The costs and disadvantages associated with blocking at a DNS level and the orders to Telenor were found adequate in connection with the extensive violation of copyright law and illicit dissemination of works through the TPB website. The Court stated, that “there is no reason to hold that prohibition imposed to Telenor will result damages or inconvenience that is manifestly disproportional to the right holders' interests.”⁶³ The duty to act in an obligatory way is imposed on Telenor and is within the limits of provisions in the Danish Code of Civil Procedure.

⁶⁰ Case FS 14324/2007, Bailiff's Court of Frederiksberg (Copenhagen), 05 February 2008; p. 5.

⁶¹ Case 153/2009, Supreme Court of Denmark, 27 May 2010, p. 4;

⁶² Cf. Case n. B-530/08, Court of Appeals Eastern Division, 26 November 2008, p. 8;

⁶³ ⁶³ Case 153/2009, Supreme Court of Denmark, 27 May 2010, p. 4

5.2.2 Norway

It is useful to compare the above Danish court's argumentation with the Norwegian court's position concerning the same issue. In order for Telenor to protect its interest (as a reaction to the right holders demand to block access to the TPB website) it published on its home webpage⁶⁴ a statement explaining an overall view on the matter. Telenor was accused of aiding and abetting illegal file sharing via the service offered by the TPB website. Telenor simply argued that because of its role as an ISP, the company can not be convicted. Otherwise, Telenor would not only be convicted of illegal file sharing activities, but also of contribution to any unlawful acts which are taking place on the Internet.

Right holders required the Norwegian court to impose an injunction to prevent Telenor's customers from accessing the TPB website.

The case rests on the facts:

- Telenor is not an ISP to TPB and possess no contractual relationship with the company or people behind the website;
- The court assumed that 90 % of materials exchanged through TPB are coming from illegal sources;
- The illegal file sharing on the website is not insignificant among Telenor's customers and that represents a serious issue for right holders;
- TPB website is one of the greatest facilities of illegal file sharing services.

According to the Norwegian Supreme Court view, Telenor has neutral and technical contribution to the actions of its customers who download and upload copyrighted material via the TPB website. The court based its argumentation on the fact that Telenor's participation in the form of making its network to be available to the TPB website did not constitute unlawful contribution from Telenor. On the other word, Telenor participated in illegal online activities by offering the physical infrastructure **but its actions are the same regardless of network access which are used for lawful or unlawful purposes;** its

⁶⁴ *The Pirate Bay case and the Telenor view on illegal file sharing*. 2009.
<http://www.telenor.com/en/news-and-media/press-releases/2009/the-pirate-bay-case-and-the-telenor-view-on-illegal-file-sharing.jsp> [Accessed 31 October 2011].

contribution to copyright infringement is not negligent or intentional but neutral. Consequently, when the participation of Telenor is not unlawful, the court found no reason to decide whether there is presented guilt, causality features or a secure argument for imposing a blocking injunction or condemnatory decision.

In accordance with above conclusion, the court considered interpretation of the obligation stated in ECD Article 20 [see chapter 2] and concluded that there is no basis to find Telenor, as a mere provider of technical infrastructure, as guilty of wilful and wrongful acts of complicity with its customers. The following quotation illustrates the line of the court's application of ECD Article 20 on the disputed case: "if the service provider can be said **to contribute to** unlawful acts ..., it will therefore be the basis for the prohibition and temporary deviation even if the rules of responsible freedom of commerce law applies and the terms of punishment or compensation of **that** reason are satisfied. Whether this is sufficient to ensure the fulfilment of the requirement in the Copyright Directive Article 8 (3) is another matter [emphasis added]."⁶⁵

Moreover, it is difficult to characterize, according to the court's view, contributions of Telenor infringing copyright as "inappropriate, irresponsible or download worthy."⁶⁶ Despite Telenor's factual knowledge that illegal activities took place, Telenor as a passive participator does not contribute to the copyright infringement and is exempt from bearing responsibility of unlawful acts of its customers. In other words, right holders have no claim against the telecommunication operator and no blocking injunction is justified here ⁶⁷. **The court further referred to seek compensation for the losses of right holders from those who are actually committing the unlawful file sharing.**

5.2.3 Comparing Court Orders

In both countries right holders asked the court to prohibit Telenor to contribute to the accessibility and copies of copyrighted materials via the TPB website. The courts were also

⁶⁵ Case n. 10-006543ASK-BORG/04, Court of Appeals, 9 February 2010, p. 20

⁶⁶ Case n. 10-006543ASK-BORG/04, Court of Appeals, 9 February 2010, p. 21

⁶⁷ The court is using an analogous interpretation of a real word example, in which those who have only participated in the technical production or distribution of the paper can not be punished for defamation (according to Article 254 Penal Code). This is generally an accepted modification of the complicity doctrine in order to make the participation in question reasonable.

assessing whether the ISPs, as the provider of access to a communication network, can be charged with a blocking injunction.

The Danish district court ordered the blocking injunction, so the access to the piratebay.org is filtered on the layer of the telecommunication operator. This was also confirmed by the Supreme Court of Denmark. The **telecommunication operator was ordered not to contribute to others' publication and copying through the TPB website regarding audio, film and literary work over which the right holders have copyright.**

In Norway, the Courts **stipulated that the telecommunication operator is enjoying immunity** from prosecution under the ECD. Consequently, the **telecommunication operator did not contribute to the illegal or liable activities performed by its users** by offering public access to the TPB website.

5.3 Third party liability for TPB software providers under ECD

The Swedish TPB case analyzed in the previous chapter also deals with the issue of freedom of liability contained in the ECD. The initial issue the court was assessing was whether TPB is a service provider which provides the services of an information society. The Swedish court established that the service offered by the file sharing service of TPB is enabling supplying at a distance, electronically and at the individual request of users. The last but not least element of the definition of information society service [see chapter 2] – the provision of a service for remuneration was met according to the court's opinion. Even if the users do not pay for the service, the operation of the TPB website was financed from advertising gain. This implies the applicability of the ECD provisions to the file sharing services available at the TPB website.

The above argumentation expressed that freedom of liability for service providers under the ECD is applicable to the TPB website and defendants involved in the operation of the website must be regarded as service providers. Consequently, TPB service should profit from the freedom of liability regime stipulated in ECD Articles 12-16.

TPB has offered services where users could upload or download and store torrent files with matters relating to the type of freedom of liability under ECD Article 14. The court discovered that defendants obtained knowledge about torrent files related to the copyright protected works which are stored at the website. Under the regime of the ECD, the service provider, after becoming aware of the existence of illegal work stored on their servers, they must take measures in order to prevent the spread of any alleged illegal content.

The facts and evidence of the case demonstrated that **defendants choose to ignore ECD provisions and so the prerequisite for freedom of liability is not fulfilled**. They were according to the courts findings “at least indifferent to the fact that it was copyright – protected works which were the subjects of file sharing activities via The Pirate Bay.”⁶⁸ These factual omissions of defendants caused the court to state that they do not enjoy civil or criminal immunity from prosecution even though defendants were regarded as providing an information society service in accordance to the ECD regime.

5.4 Concluding remarks

The service providers in Denmark were held liable for copyright infringement committed by its customers, however in Norway the service providers enjoy freedom of liability even though the same circumstances and background of the case is presented in both decisions. Based on this, the European national civil or criminal courts, when assessing the existence of liability of “pure” ISPs, did not evidently need to have reached the same conclusion⁶⁹. The accessibility of the website may differ from one country to the other.

However, TPB cases are revealing a further dimension of the third party liability. The Norwegian court at the district court level was assessing the current regime of the freedom of liability as being restrictive to the freedom and basic human rights of the Internet access provider’s customers. The courts’ argument is based on the requirements of Infosoc Directive Article 8 (3) and ECD Article 20: “*The court does, however, agree with the plaintiffs that, in principle, a necessary consequence of the exclusive right should be that the right holders should be able to demand that any infringements of the exclusive right*

⁶⁸ Verdict B 13301-06, Stockholm District Court, 17 April 2009; p. 56;

⁶⁹ This conclusion might be also influenced of different national legislation background in both countries.

*should be stopped or impeded. The court further agrees with the plaintiffs that this must apply to both for those directly infringing their rights and to those contributing to such infringement. In this case, however, the infringement by the end-users also constitutes a statement on a website, and consequently stopping the alleged contribution by Telenor to these acts will imply a restriction of Telenor's customers to seek and receive information on this website.”*⁷⁰

The court consequently asked the question as to whether the freedom of speech and freedom of information are affected, this renders a clear statutory basis for the claim as necessary. In other words, the court assesses whether the obligation to block access and in doing so imposing censoring duties on ISPs which possess the same value as protection of the exclusive rights of right holders. Unfortunately, the court does not elaborate on the question. While the claim of right holders was rejected on other grounds, the extent of equilibrium between the human rights of Internet users and exclusive rights of right holders is until now unresolved.

⁷⁰ Asker and Bærum tingrett, Sandvics, Case n.: 09-096202TVI-AHER/2. 2009;

6 Overview and Conclusion

6.1 Introduction

The aim in this final part of the thesis is to analyse the **future perspectives which TPB possess from the judicial and legislator's point of view**. The outcomes of compared court litigations in different European states are clearly limiting the file sharing activities. Moreover, the national Courts are creating conflicting case law; even the legislative of the EU is harmonized. Therefore the upcoming discussion is confronting the actual situation with *de lege ferenda* perspectives.

More generally, the future of the p2p file sharing is in the hands of the European Court of Justice. The Court is deciding on preliminary questions concerning, among others, also in this thesis. Hopefully, the outcome of the ECJ's decision will provide a satisfactory answer to the battle over copyright, surveillance, and filtering obligations for all parties concerned.

6.2 Online intermediaries' liability in TPB cases

6.2.1 Holding TPB responsible for acts of file sharers

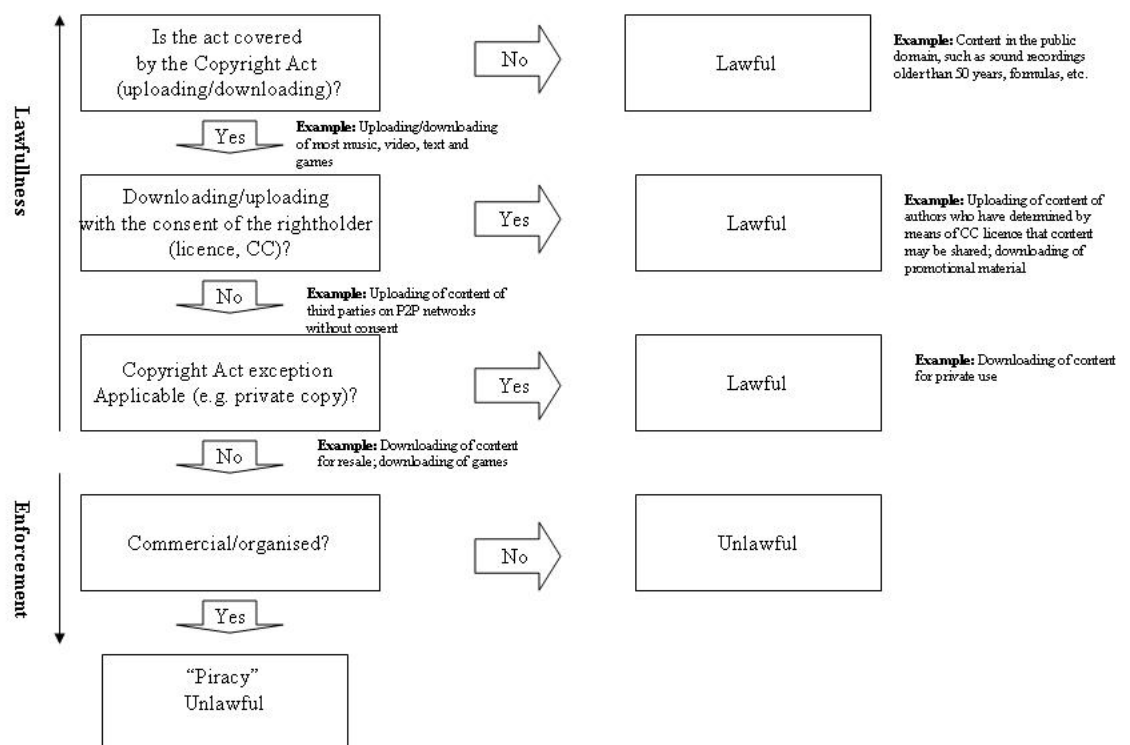
According to the findings of the courts and legal literature, it is undisputed that individuals, who are sharing copyright protected works online, are directly infringing exclusive rights of right holders under the copyright law in any jurisdictions. Such activities of users entail

reproduction, when they are downloading works and communication to the public, when they are uploading files to the p2p networks.

The act of reproduction is unlawful, unless the private or in other words, personal use exception is not applicable. It means that in some jurisdictions, downloading for personal use from copyright protected works from p2p networks is allowed. These exceptions might be generally applicable or in some countries one is not allowed to make private copies when the source of the work is illegal.

The picture bellow, under **Figure 4**, is a description of how users could determine whether they are sharing works legally or not. Figure 4 is presents an overview of the copyright law situation in the Netherlands, but a similar situation does exist within other EU member states.

Figure 4: the Netherlands' copyright law system of determining the infringing activities⁷¹



⁷¹ *Ups and Downs, Economic and Cultural effects of file sharing on music, film and games*. TNO-rapport. TNO Information and Communication Technology. Delft. 2009 p. 56 available: http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf [Accessed 5 November 2011]

The case law analyzed in chapter 4 and 5 is based on the same test as Figure 4 describes. In general, users are committing unlawful acts when they are sharing files without author authorization. Bernt Hugneholz points to the functionality of p2p software, and according to his advice the user is not committing any unlawful acts when “disabling the sharing of files, an option that is available in most P2P programs which is therefore a wise precaution⁷²”. To sum it up, copyright infringement is not always possible to claim based on the acts of file sharers when p2p file sharing software is at stake.

Moreover another important aspect of the file sharing liability is the existence of disproportional restrictions concerning Internet users’ human rights. The Norwegian TPB case rose up the issue (assuming whether the filtering injunction is proportional to the general public limitation of freedom of expression and freedom of information), but do not give any further guidance to resolve the debate.

Until now there is no answer, as to when the acts of the users can not be regarded as infringing copyright law (e.g. the private use exception applies when: the file sharer is not simultaneously uploading the works online, sharing files in the public domain, a disproportional intervention into human rights of users has taken place, etc.), **is it possible to litigate over indirect liability of online intermediaries when there is no direct infringer (or is not clearly defined)? The discussed Swedish, Italian and Danish cases constitute an affirmative answer.**

In addition, the civil enforcement of direct file sharers by right holders, under the current state of law, it is generally impossible, this is due to strong data protection laws. The courts do not allow the ISPs to release IP addresses of subscribers engaged in unlawful file sharing activities under the strict interpretation of privacy protection laws⁷³.

⁷² P. Bernt Hugneholz. *Copyright and P2P in Europe*. Univeritetet i Bergen (UIB). 2011;

⁷³ Cf Italy, International Intellectual Property Alliance. *2010 Special 301 Report on Copyright Protection and Enforcement*. 2010 available at: <http://www.iipa.com/rbc/2010/2010SPEC301ITALY.pdf> [Accessed 7 November 2011];

6.2.2 The approved secondary liability of online intermediaries in TPB cases

This thesis is resting on the broad concept of an online intermediary definition. TPB service provider (in other words, a platform provider) falls also under the definition of ISPs, this was confirmed by the Swedish court. The role of ISPs depends on their position within the Internet architecture. Obviously, the liability regime for different roles and duties of ISPs should differ from case to case. Moreover, the liability regime for the same online intermediary service in different countries (Danish and Norwegian TPB case) created a conflicting case law.

Thus, two independent comparative studies were presented in chapter 4 and 5.

The Swedish and Italian courts, illustrated in **chapter 4**, found that TPB website owners were liable for allowing its users to upload and download copyright protected works. In other words, the functionality of TPB assists users in making copyrighted works available to the public. The decisive factor of imposing liability on TPB was based on the evidence that the website is used mainly for illegal file sharing of files protected by copyright. The defendants were found guilty for complicity in the crime mainly on the presence of their subjective intent. It must be noted here that the Swedish criminal law does not require personally identifying the perpetrators of the principal offence; it is enough to show that an actual crime was committed. Therefore, other states may have different requirements for secondary copyright liability or complicity. The two discussed cases (Swedish v. Italian) that analyzed the liability of TPB owners are based on the same criminal law complicity requirements in national criminal law and the plaintiffs were found guilty.

This broad court's interpretation of the secondary copyright liability concerning the platform providers, enabling courts to order them to discontinue the services. The controversial findings may be seen when comparing TPB with Google. Google allowed its users to search for the same torrent files (nowadays magnet links) as the TPB website. So, it can be argued that Google also assists in making the work available to the public, and thus being viewed as secondary or complicity liable for copyright infringing activities based on the extensive interpretation used in the TPB cases. Both Google and TPB

websites are search engines, but according to Bart W. Schermer's opinion: "they differ mainly in focus, with Google conducting "neutral" searches in the sense that it indexes all kinds of information...By contrast, the Pirate Bay only focuses on file-sharing in general and file-sharing of copyright material in particular."⁷⁴

Furthermore Bart W. Schermer in his article suggests three criteria formulated in other case law, but also fitting in determining TPB liability toward third parties. The criteria are as follows:

1. "the contribution that service providers make to the infringements,
2. the extent to which service providers benefit from the infringements,
3. whether or not service providers implement Notice and Takedown procedure."⁷⁵

As it is established in chapter 4, the owners of the TPB website have been found liable and the above criteria are a summary of the main court findings and determining factors of the Swedish, Italian and Danish decisions.

The role of "pure" ISPs in the operation of the TPB website and file sharing networks was discussed in **chapter 5**. ISPs have generally benefited from the immunity regime under the ECD directive and their contributory role to the infringement activities was overlooked in past decades. The basic distinction between the platform providers and ISPs is, even under the current state of the ECD, the same. This *de jure* situation changed when the Danish court found the telecommunication operator contributing to others' infringement through the TPB website. In Norway, contrary to Denmark, the Courts stipulated that the telecommunication operator is enjoying immunity from prosecution under the ECD. Consequently, under the Norwegian law, the telecommunication operator did not contribute to the illegal or liable activities performed by its users by offering public access to the TPB website.

⁷⁴ Bart W. Schermer, *Why the Pirate Bay isn't like Google*. Future of the copyright, on copyright and content in the digital domain. 2009. available at: <http://www.futureofcopyright.com/nc/home/blog-post/2009/04/10/why-the-pirate-bay-isnt-like-google.html> [Accessed 1 November 2011];

⁷⁵ Bart W. Schermer, *Why the Pirate Bay isn't like Google*. Future of the copyright, on copyright and content in the digital domain. 2009. available at: <http://www.futureofcopyright.com/nc/home/blog-post/2009/04/10/why-the-pirate-bay-isnt-like-google.html> [Accessed 1 November 2011];

For the telecommunication operators who are offering Internet access in Denmark, the *de facto* situation is not the same when compared to Norway. Measures to combat unlawful practices in the cases of telecommunication operators possessing a preventive character – an injunction for blocking and filtering access to the www.piratebay.org website and its’ domain equivalents. The injunction was imposed within Danish and Italian territory. While in Norway, the telecommunication operator was not found liable and the requirement of imposing a blocking injunction was seen as a private censorship practice. The consequence of the Danish blocking injunction is imposing on the obligations of the Danish access providers to buy the technical filtering mechanisms from their own resources in order to fulfil the court’s order to pro-actively filtering Internet traffic. The disharmony, even between Nordic countries, is creating a different extent of the access provider’s immunity.

Moreover, when comparing the Danish and Italian outcomes of the court decisions with The ECD Article 15 (no general monitoring requirements shall be imposed on online intermediaries by the States) the proportionality principle is missing. In fact, on one hand, the obliged national ISPs are blocking and filtering the Internet traffic in order to prevent piracy, on the other hand under the current law they can not be forced to act like this. This is another aspect of controversy revealed in TPB case law.

6.3 The perspectives for online intermediaries

The *status quo* of one regime for all intermediaries under the ECD directive is bringing confusion into case law. The comparative studies demonstrate that TPB service provider’s interaction with file sharers is hardly comparable to the telecommunication operators control over the activities of the file sharers. The main argument of courts is based on the subjective aspect of criminal offence – **the subjective intent** of the subject matter to commit the crime. Online Intermediaries’ expected **neutrality** is used as a general criterion for evaluating the liability issue in question, but this is overwhelming when claiming the presence of the subjective element – the awareness of the possibility of illegal content of data transmitted by online intermediaries. The presence of the subjective element in the case of TPB service is possible to be deduced from the provocative name of the website “The Pirate Bay”.

The core controversy revealed in TPB case law is that it has been caused by the concurrent provisions of the Infosoc Directive and the ECD rules. The courts decision must apply when online intermediaries coincide with provisions from both the Directives at a national level, where moreover, the directives might be interpreted and implemented differently. Comparing the outcomes of Danish and Norwegian TPB cases have shown that those countries courts disagree on the interpretation of the Directives.

Measures to combat unlawful practices imposed upon online intermediaries are another mixture of confusion [as discussed above]. According to Robert Clark: “Add to this mixture of confusion at the level of national law and criminal and civil litigations, it is hard not to escape the conclusion that single marked harmonization of Intermediary Service Providers through the Electronic Commerce Directive **have been a complete failure** [emphasis added].”⁷⁶

The jurisprudential country-by-country approach to the ISPs liability interacts closely to technical aspects of the blocking injunctions and innovation as a whole within p2p networks. File sharers are overcoming the preventive measures terminating the access to the TPB website. The following text explains, in the terminology utilized by pirates, how to overcome such blocking and filtering measures. The writer is directly suggesting three different ways of getting access to the website, which is not available within the countries’ territory for users presented in a country due to a blocking injunction. From the text in the box below, the reader may also experience a strong revolt of conduct and vocabulary typical for the Pirate Bay supporters.

TPB censored, again and again and again...⁷⁷

“Today we learned that we're being blocked - again! Yawn. When will they give up - we're still growing despite (or perhaps because) all their efforts.

So, if you live in Belgium (or maybe work at the European Union Parliament, we have thousands of visits from them every day) you should change your DNS in order to circumvent the blockage. You should do this anyhow - never trust your ISP.

⁷⁶ Robert Clark. *Sharing out online liability: sharing files, sharing risks and targeting ISPs.* . IN Peer-to-peer file sharing and secondary liability in copyright law. Edited by Strowel Alain. Edward Elgar Publishing Limited. Glos. 2009. p.228;

⁷⁷ *TPB censored, again and again and again...* .The article is published in the Blog section available at <http://thepiratebay.org/blog/195> [Accessed 1 November 2011];

There are some options! One is Googles DNS system. It is fast but run by an American company. Using this one is fun, because it probably makes Google semi-responsible for you accessing TPB in the future according to what we understand from this strange Belgian ruling!

You can also use OpenDNS, which is another great option! Click here for information on how to change DNS on your computer to OpenDNS, and here for info on how to change on your router.

And if you're tired of your ISP playing tricks on you, you can always just get a VPN. We're running our own VPN system and we never back down for idiocracy. This also lets you access the full internet freely where ever you are....”

It is important to mention here, that the initial quotation of the thesis, from the speech of the Director General of the World Intellectual Property Organization is valid. The progressive development of the technology may also be visible in the legislative amendments. The unfortunate and controversial legislative reaction on the technology’s development within online intermediaries’ applications has caused concurring court decisions deciding over Europe. The enforcement measures do not have enough power to stop the TPB website, which is still becoming more decentralized and technologically neutral and popular among the general public.

The previous pages demonstrated answers to the key queries of the thesis:

- Do all online intermediaries posse the same level of freedom from liability? **NO.**
- Will TPB survive the current legal challenges? **Probably YES.**
- Is it legal to impose ongoing filtering obligations on online intermediaries? **YES, but the answer is currently examined by ECJ (Sabam v. Tiscali case).**

6.4 Future of TPB service

The future of online intermediaries depends on the approach of the ECJ preliminary ruling concerning Belgian *Sabam v. Tiscali* case. The national court asked ECJ to basically decide whether measures ordering an internet service provider to install a system for filtering and blocking electronic communications (of third parties, which is infringing

copyright), in order to protect intellectual property rights, are proportional? The answer is expected to be based on the following EU Acts:

1. Directive 2004/48/EC of the European Parliament and of the Council of the 29th of April 2004 on the enforcement of intellectual property rights,
2. Directive 2001/29/EC of the European Parliament and of the Council of 22nd of May 2001 on the harmonization of certain aspects of copyright and related rights in the information society;
3. Directive 95/46/EC of the European Parliament and of the Council of 24th of October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
4. Directive 2002/58/EC of the European Parliament and of the Council of 12th of July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications);
5. Directive 2000/31/EC of the European Parliament and of the Council of 8th of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce);
6. with regard to Articles 8 and 10 of the European Convention on Human Rights.

To sum it up, the wide scale EU legislation is an issue and needs to be examined by the ECJ.

Until now, the opinion of the Advocate General is known. The Advocate General's opinion is that **in principle the fundamental rights are infringed** when an internet service provider must filter and block electronic communication. Moreover, the Advocate General proposed to the ECJ to declare that: **“EU law precludes a national court from making an order, on the basis of the Belgian statutory provision, requiring an internet service provider to install, in respect of all its customers, an *abstractor* and as a preventive measure...a system for filtering all electronic communications passing via its services (in particular, those involving the use of**

peer-to-peer software) in order to identify it on its network and the sharing of electronic files...”⁷⁸

According to the author’s opinion, the approach of the Advocate General is also a *de lege ferenda* approach over TPB case law. The filtering and blocking measures are disproportionately infringing the human rights of users, so it is not legal to prevent access to the TPB website through access providers. When the TPB website is found by court the secondary liable, right holders can start enforcement of the damages from the website itself. File sharer’s human rights and freedoms are significantly restricted under the current enforcement measures stipulated by the courts. Thus, the analyzed Italian and Danish court decisions, when the ECJ decision will follow the line of argumentation stated by the Advocate General, it must be changed and TPB website will also be freely available in these states.

The TPB liability issue is an example of when the jurisprudence does not have enough measures in order to enforce legality and therefore finds proportional solutions. The future of technical development will provide other innovative p2p applications and repressive blocking and filtering measures are even more encouraging to Internet users to share the files online. The appropriate solution for terminating illegal file sharing should come from the technical sphere, not as an obligation but as an advantage enabling Internet users to share all copyright protected works lawfully under a certain monthly or annual fee.

⁷⁸ Advocate General Cruz Villalon. Court of Justice of the European Union. Press Release No 37/11. Luxembourg, 2011, available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf> [Accessed 15 September 2011].

7 References

Legislation

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 (Directive on electronic commerce)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

Case Law

Case FS 14324/2007, Bailiff's Court of Frederiksberg (Copenhagen), 2008

Case 153/2009, Supreme Court of Denmark, 2010

Case n. B-530/08, Court of Appeals Eastern Division, 2008

Case n. 10-006543ASK-BORG/04, Court of Appeals, 2010

Casw B 13301-06, Stockholm District Court, 2009

Case 49437/09, The Italian Supreme Court, 2009

Case C-192/04, *Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others*, European Court of Justice, 2005

Case n. 04/8975/A, *Sabam v. S.A. Tiscali (Scarlet)*. District Court of Brussels, 2007

Case 68/93 *Fiona Shevill and Others v. Presse Alliance*, The European Court of Human Rights, 1993

Literature

Books

Akester P., *A Practical Guide to Digital Copyright Law*. Thomson Sweet&Maxwell. 2008

Bing J., *Copyright aspects of search engines, Oslo*. 2009

Carrier, M. A., *Innovation for the 21st Century. Hanessing the Power of Intellectual Property and Antitrust Law*. Oxford University Press 2009

Edwards L, Waelde Ch, *Law and the Internet*. Hart Publishing. 2009

Dyson P., *Novellovský slovník síti*. GRADA Publishing, 1995

Goldstein P. Hugenholtz B., *International Copyright, Principle, Law, and Practice*. Oxford University Press 2010

Kirchberger Ch., *Cyber Law in Sweden*. Wolters Kluwer. Netherlands. 2011

Macqueen H., Waelde Ch., Laurie G., Brown A., *Contemporary Intellectual Property Law and Policy*. Oxford University Press. 2011

Miller M., *Discovering P2P, Everything You Need to Know about P2P-to Understand It, to Use It, and to Benefit from It*. SYBEX, San Francisco, London 2001

Stamatoudi I., *A, Copyright enforcement and the Internet*. Wolters Kluwer, Law &Business 2010

Stokes S., *Digital Copyright Law and Practice*. Oxford and Portland, Oregon 2009

Strowel A., *Peer-to-peer file sharing and secondary liability in Copyright law*. Edward Elgar Publishing Limited. Glos. 2009

Articles

Barceló J.R., *Intermediaries. Liability for on-line intermediaries: comparing EU and US legal framework*. In *The European Intellectual Property Law Review*. Morrison & Foerster, LLP, Centre de Recherches Informatique et Droit (CRID), University of Namur

Carrier M. A., *The Pirate Bay, Grokster, and Google*. Camden, Rutgers School of Law, 2009. In *Journal of Intellectual Property Rights*. Vol. 15 (2010), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1481854

Clark B., *In other news: Denic softens its rules, Pirate Bay and a handbag war*. 2009. <http://ipkitten.blogspot.com/2009/10/in-other-news-denic-softens-its-rules.html>

Dinwoodie G.B., Dreyfuss R., Kur A., *The Law Applicable to Secondary Liability in Intellectual Property Cases*. In: *International Law and Politics*. Vol. 42:201, Max Planck Institute for Intellectual Property, Competition & Tax Law Research 2009

Edström J., Nilsson H. *The Pirate Bay Verdict – Predictable, and Yet...*, In *European Intellectual Property Review*. Thomson Reuters (Legal) Limited, 100 Avenue Road, London 2009

Edwards L., *Regime of Legal Liability for Online Intermediaries: an Overview*. OECD Workshop, *The role of Internet Intermediaries in advancing public policy objectives*.

Elkin-Koren Niva., *Making Technology Visible: Liability of Internet Service Providers for Peer-to-peer Traffic*. Making Technology Visible. 2006

European Intellectual Property Issue 3, Thomson Reuters (Legal) Limited and Contributors 2009

Hugenholtz. P.B., *Class 6. The Peer-to-Peer Dilemma*. Bergen, University of Bergen 2009

- Hugenholtz P. B., *Copyright and P2P in Europe*. Univeritetet i Bergen (UIB). 2011
- Lohmann F., *What Peer-to-Peer Developers Need to Know about Copyright Law*.
Electronic Frontier Foundation. 2006
- Rinaldi G. M., *Italian Supreme Court explains reasons for ordering blocking of Swedish Pirate Bay website*. 2010.
http://www.twobirds.com/English/News/Articles/Pages/Italian_Supreme_Court_blocking_Swedish_Pirate_Bay_website_050510.aspx
- Schermer B. W., *Why the Pirate Bay isn't like Google*. Future of the copyright, on copyright and content in the digital domain. 2009. available at:
<http://www.futureofcopyright.com/nc/home/blog-post/2009/04/10/why-the-pirate-bay-isnt-like-google.html>
- The Pirate Bay case and the Telenor view on illegal file sharing*. 2009.
<http://www.telenor.com/en/news-and-media/press-releases/2009/the-pirate-bay-case-and-the-telenor-view-on-illegal-file-sharing.jsp>
- White C., *The F Files*. Intellectual Property Magazine, November 2010
- Yen A. C., *Third-party Copyright Liability after Grokster*. Information&Communication Technology Law. Vol. 16, No. 3. 2007

Reports

- Advocate General Cruz Villalon. Court of Justice of the European Union. Press Release No 37/11. Luxembourg, 2011, available at:
<http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf>
- Edwards L., *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*. University of Strathclyde
- Edwards L., Waelde Charlotte, *Online Intermediaries and Liability for Copyright Infringement*.

Italy, International Intellectual Property Alliance. *2010 Special 301 Report on Copyright Protection and Enforcement*. 2010 available at:
<http://www.iipa.com/rbc/2010/2010SPEC301ITALY.pdf>

Ups and Downs, Economic and Cultural effects of file sharing on music, film and games. TNO-rapport. TNO Information and Communication Technology. Delft. 2009 available:
http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf

Internet Sources

<http://most-popular.org/>

<http://thepiratebay.org/>

http://www.highteck.net/EN/Communicating/Communicating_over_the_Network.html

<http://www.wifinotes.com/computer-networks/network-types.html>

http://ask-leo.com/will_bittorrent_harm_my_computer.html

<http://en.wikipedia.org/wiki/Peer-to-peer>

<http://bitcoin.org/>

<http://www.utorrent.com/>

<http://www.gnu.org/copyleft/>

Other Sources

Ebadi S., Johansson M., Humphreys E., *Music File Sharing. Genius Technology or Copyright Infringement?*, Jönköping University. Master thesis, Intellectual Property Law, 2009

Sobolciakova A., *The current development in the file sharing via peer-to-peer networks from the copyright law perspective*. Master thesis. University of Trnava. 2010

Yali T., *Copyright and Privacy: Their Interaction in the Context of Peer-to-peer Networks*. Leiden Univeristy, Master thesis European Law,