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**UNANSWERED ARRRRGUMENTS AFTER THE PIRATE BAY TRIAL:  
DROPPING SAIL IN THE SAFE HARBORS OF THE EU ELECTRONIC  
COMMERCE DIRECTIVE**

*J.E. (Win) Bassett, IV\**

*Currently the most widely-used file-sharing technology, the BitTorrent protocol, enables its users to transmit and receive much larger digital files with even greater ease than its popular predecessors such as the centralized and decentralized peer-to-peer networks of Napster, Kazaa, and Grokster. It did not take long before BitTorrent Web sites hosted in the United States joined these companies, as they all fought the law, and the law won. Nonetheless, the largest and most popular BitTorrent Web site, The Pirate Bay, has continued to survive and serve its loyal community from its headquarters in Sweden with the latest releases of movies and music.*

*In June 2006, however, a spectacle of a raid by Swedish police on The Pirate Bay's headquarters, which included confiscating several rental trucks worth of servers and putting employees in handcuffs, sent that community into a temporary panic. After a nine-day trial in April 2009, four of The Pirate Bay's administrators were found guilty of aiding copyright infringement. Each was sentenced to a year in prison and ordered to pay approximately \$3.6 million in damages to the leading entertainment companies whose copyrights had been infringed.*

*This Article focuses on the defendants' appeal and more specifically, whether The Pirate Bay falls under the protection of the safe harbor protections of the European Union's Electronic Commerce Directive that formed the basis for its Swedish law counterpart. Though the Swedish appellate court, unlike the trial court, should defer to the European Court of Justice for an interpretation of the safe harbor provisions, The Pirate Bay and similar Web sites will likely continue to thrive regardless of the court's findings.*

## I. INTRODUCTION

It's Saturday night and [Wired reporter Quinn Norton is] lounging on a living room sofa surrounded by lanky twenty-somethings in shorts and deep tans. Across from [Norton], a wire emerges from a green Xbox—modified to stream movies from its hard drive—and snakes past two dusty turntables and into a video projector, which is displaying a menu of movies that would make Blockbuster jealous.

Peter, this living room's owner, selects a title, and the text "For Your Consideration" fades onto the screen, marking this movie as a leaked screener from the Academy Awards: Someone in Hollywood ripped their review DVD copy of the film and uploaded it to the internet, where it eventually found its way to this hacked game console. Peter chuckles, others cheer.<sup>1</sup>

There were no chuckles or cheers, however, about a month earlier. The offices of Peter's Web site, The Pirate Bay,<sup>2</sup> had been raided by Swedish police.<sup>3</sup> Not only did the police confiscate servers that hosted the Internet's largest torrent tracker Web site,<sup>4</sup> but they "carted two administrators and their legal help off in

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\* Associate, Alston & Bird LLP. The author thanks Michael L. Corrado, Joseph E. Kennedy, and the students in the International and Comparative Criminal Law class of Spring 2010 for serving as editors for this research and also the editors and staff of the North Carolina Journal of Law & Technology.

<sup>1</sup> Quinn Norton, *Secrets of the Pirate Bay*, WIRED (Aug. 16, 2006), <http://www.wired.com/science/discoveries/news/2006/08/71543>.

<sup>2</sup> THE PIRATE BAY, <http://www.thepiratebay.org> (last visited Apr. 7, 2010).

<sup>3</sup> Ulric M. Lewen, *Internet File-Sharing: Swedish Pirates Challenge the U.S.*, 16 CARDOZO J. INT'L & COMP. L. 173, 187 (2008); see also *Police Hit Major BitTorrent Site*, BBC NEWS (June 1, 2006, 10:33 GMT), <http://news.bbc.co.uk/2/hi/technology/5036268.stm> ("More than 50 law enforcement officials raided 10 locations, confiscating the computers and detaining three people.").

<sup>4</sup> Tudor Raiciu, *The Swedes Shut Down ThePirateBay.org*, SOFTPEDIA (June 1, 2006, 12:57 GMT), <http://news.softpedia.com/news/The-Swedes-Shut-Down-ThePirateBay-org-25357.shtml> ("The police officers were allowed access to the racks where the [The Pirate Bay] servers and other servers are hosted. All servers in the racks were clearly marked as to which sites run on each. The police took down all servers in the racks, including the non-commercial site Piratbyrå, the mission of which is to defend the rights of [The Pirate Bay] via public debate.").

handcuffs”<sup>5</sup> and even forced one of The Pirate Bay’s lawyers to give a DNA sample.<sup>6</sup>

After the Swedish police took “enough servers to fill three rental trucks,”<sup>7</sup> the Motion Picture Association of America (“MPAA”) issued a press release stating, “The actions today taken in Sweden serve as a reminder to pirates all over the world that there are no safe harbors for internet copyright thieves.”<sup>8</sup> Not even three days passed, however, before Peter, along with Fredrik Neij and Gottfrid Svartholm,<sup>9</sup> managed to get The Pirate Bay online again using a temporary hosting site in the Netherlands.<sup>10</sup> Further,

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<sup>5</sup> Norton, *supra* note 1.

<sup>6</sup> Mikael Viborg, *Operation Take Down*, THE TAKE DOWN OF THE PIRATE BAY BLOG (June 1, 2006, 17:45 EST), <http://viborginternational.blogspot.com/2006/06/operation-take-down.html> (“While talking the officer conducting the hearing suddenly enters the room only to inform me that an order has been issued by the prosecutor to collect a DNA-sample from me.”).

<sup>7</sup> Norton, *supra* note 1.

<sup>8</sup> Press Release, MPAA, Swedish Authorities Sink Pirate Bay, May 31, 2006 (on file with author) (“Intellectual property theft is a problem for film industries all over the world and we are glad that the local government in Sweden has helped stop The Pirate Bay from continuing to enable rampant copyright theft on the Internet.”).

<sup>9</sup> Norton, *supra* note 1. Frederik Neij, Gottfrid Svartholm Warg, Carl Lundstrom, and Peter Sunde are considered the operators of The Pirate Bay. *See Pirate Bay Hit with Legal Action*, BBC NEWS (Jan. 31, 2008, 18:22 GMT), <http://news.bbc.co.uk/2/hi/technology/7219802.stm> [hereinafter *Pirate Bay Hit with Legal Action*].

<sup>10</sup> Norton, *supra* note 1 (“Coordinating with volunteers around the world in an IRC chat room, the trio scrambled to relaunch the Bay at a new location. Peter—a slim, dark haired, dark eyed geek—didn’t sleep in those first few days, fielding a stream of phone calls from the press while confronting the technical challenge of resurrecting a high-traffic site with a partial database and all-new hardware. ‘They stole most of our backups as well,’ he says. ‘I managed to get some backups out of the servers while the police were in the building.’ (Peter wasn’t arrested with the others, and remains anonymous.”). *See also* Quinn Norton, *Pirate Bay Bloodied But Unbowed*, WIRED (June 6, 2006), <http://www.wired.com/news/culture/0,71089-0.html> (“The reborn site—newly relocated to servers in the Netherlands—appeared much as it was before the police action, but included a mocking message for the authorities, and a revamped logo that shows the site’s trademark pirate ship hurling a cannon ball at the Hollywood sign.”).

two years after the raid, The Pirate Bay had grown from 2.5 million peers to 12 million peers,<sup>11</sup> a fact that some commentators attribute to the publicity of the raid itself.<sup>12</sup> Nonetheless, the large growth of the torrent tracker's community did not come without a hiccup. On January 31, 2008, Peter and the other three operators of The Pirate Bay were "charged with conspiracy to break copyright law in Sweden,"<sup>13</sup> which carried a sentence of up to two years in prison if convicted.<sup>14</sup>

On April 17, 2009, after a nine-day trial, a Swedish court found the four men guilty of aiding copyright infringement and sentenced each to a year in prison.<sup>15</sup> The court also ordered The Pirate Bay operators "to pay 30 million kronor (about \$3.6 million) in damages to leading entertainment companies."<sup>16</sup> Still not backing down, "the defendants . . . vowed to continue running the [Web site] as they appeal[ed]."<sup>17</sup>

The appeal, which was scheduled for September 28, 2010,<sup>18</sup> may provide The Pirate Bay operators with an opportunity to help shape the meaning and scope of the very laws under which they were convicted.<sup>19</sup> More specifically, one of the key issues that is likely to be raised on appeal is whether The Pirate Bay falls under the protection of the safe harbor provisions of the European

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<sup>11</sup> *Two Years and Still Going*, THE PIRATE BAY BLOG (May 31, 2008), <http://thepiratebay.org/blog/111>.

<sup>12</sup> See Norton, *supra* note 1 ("Thanks to the press generated by the raid, the Pirate Bay instantly became more popular than ever.").

<sup>13</sup> *Pirate Bay Hit with Legal Action*, *supra* note 9.

<sup>14</sup> *Id.*

<sup>15</sup> Eric Pfanner, *Four Convicted in Sweden in Internet Piracy Case*, N.Y. TIMES, April 18, 2009, at B2, available at <http://www.nytimes.com/2009/04/18/business/global/18pirate.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Kelly Fiveash, *Pirate Bay Appeal Finally Drops Anchor in Court*, THE REGISTER (Sept. 24, 2010, 12:27 GMT), [http://www.theregister.co.uk/2010/09/24/the\\_pirate\\_bay\\_appeal/](http://www.theregister.co.uk/2010/09/24/the_pirate_bay_appeal/).

<sup>19</sup> See Dirk Lasater *The Pirate Bay as a Service Provider: Initial Interpretation of the E-Commerce Directive*, WAKE FOREST INTELL. PROP. L. BLOG (Jan. 5, 2010), <http://ipjournal.law.wfu.edu/2010/01/05/the-pirate-bay-as-a-service-provider-initial-interpretation-of-the-e-commerce-directive>.

Union's Electronic Commerce Directive that formed the basis for its Swedish law counterpart.<sup>20</sup> This Article takes a more detailed look into the Electronic Commerce Directive as applied in The Pirate Bay trial and discusses whether the torrent-tracking Web site should fall under the Directive's safe harbors. In Part II, this Article explains the technology and popularity of BitTorrenting and outlines the origins of The Pirate Bay Web site. In Part III, this Article provides a framework of the laws governing The Pirate Bay in Sweden and explains why the defendants have not found legal trouble in the United States. In Part IV, this Article discusses the Swedish trial court's treatment of the safe harbors of the Electronic Commerce Directive and the role of the European Court of Justice in providing an interpretation of such directives. This Article concludes that, though the Swedish appellate court should defer to the European Court of Justice for an interpretation of the safe harbor provisions of the Electronic Commerce Directive, The Pirate Bay and similar Web sites will likely continue to thrive regardless of the ruling.

## II. THE PIRATE BAY

### A. *BitTorrent Technology*

File-sharing technology has evolved, as a result of advances in the law and technology itself, in three distinct phases: (1) centralized peer-to-peer networks, (2) decentralized peer-to-peer networks, and (3) decentralized swarm networks.<sup>21</sup> In the first phase of file-sharing technology, which occurred in the late 1990s, users commonly used a service called Napster that allowed them to

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<sup>20</sup> *See id.* ("Potential confusion exists regarding the safe harbor provisions and under what circumstances they apply to these file sharing and search related sites.").

<sup>21</sup> Lewen, *supra* note 3, at 176–78; *see also* Seth Schiesel, *File Sharing's New Face*, N.Y. TIMES, Feb. 12, 2004, at G1, available at <http://query.nytimes.com/gst/fullpage.html?res=9805E2DE133AF931A25751C0A9629C8B63> ("If Napster started the first generation of file-sharing, and services like Kazaa represented the second, then the system developed by Mr. Cohen, known as BitTorrent, may well be leading the third.").

share MP3 files with each other.<sup>22</sup> When these users logged onto Napster using the service's software, the software would search the users' computers and send a list of all MP3 files on the users' computers to Napster's servers. Accordingly, these servers maintained "a complete list of every available song on every computer connected to Napster at any given time."<sup>23</sup> Users were then able to search this list and choose songs that they wanted to download to their own computers. "The Napster server would then communicate to the requesting user the Internet address of the 'host' user. The computer of the requesting user would use this information to connect to the 'host' user and download the song from that computer 'peer-to-peer.'"<sup>24</sup> Napster's reign effectively ended in 2001,<sup>25</sup> when the Ninth Circuit upheld a trial court's preliminary injunction that shut down the service in its original form.<sup>26</sup>

In the second file-sharing phase, decentralized peer-to-peer networks emerged online, including Kazaa, Grokster, and Morpheus.<sup>27</sup> "In these more decentralized systems, the user would send the request for files directly to other computers on the network and not to a centralized server."<sup>28</sup> Unlike Napster, these systems did not use "servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the

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<sup>22</sup> A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001) ("Napster facilitates the transmission of MP3 files between and among its users."); Lewen, *supra* note 3, at 176.

<sup>23</sup> Lewen, *supra* note 3, at 177. See also *Napster*, 239 F.3d at 1012; Marshall Brain, *How Gnutella Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/file-sharing1.htm> (last visited Apr. 7, 2010).

<sup>24</sup> Lewen, *supra* note 3, at 177.

<sup>25</sup> *Napster*, 239 F.3d at 1011; Bryan H. Choi, *The Grokster Dead-End*, 19 HARV. J. L. & TECH. 393, 393 (2006).

<sup>26</sup> A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1097 (9th Cir. 2002) ("[K]eep the file transferring service disabled until Napster satisfie[s] the court 'that when the new system goes back up it will be able to block out or screen out copyrighted works that have been noticed.'"); Choi, *supra* note 25, at 393.

<sup>27</sup> Lewen, *supra* note 3, at 177; Brad King, *Kazaa: A Copyright Conundrum*, WIRED (Mar. 4, 2002), <http://www.wired.com/news/business/1,50788-1.html>.

<sup>28</sup> Lewen, *supra* note 3, at 177 (quoting *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 921–22 (2005)).

software.”<sup>29</sup> Thus, there was “no central point through which the substance of the communications passes in either direction.”<sup>30</sup> It was not long after these services were created that they too found the same fate as Napster.<sup>31</sup>

The third and currently most widely-used file-sharing phase uses BitTorrent technology, which “mak[es] it easier than ever to share and distribute . . . huge files.”<sup>32</sup> While users in the previous phases were somewhat limited to sharing small MP3 audio files, BitTorrent enables its users to transmit and receive much larger files, making it perfect for movies, television shows, video games, books, and software.<sup>33</sup> The technology accomplishes this by allowing every person who is sharing a particular file to simultaneously upload and download pieces of the same file until the download is finished.<sup>34</sup> In other words, after a user chooses a file that he wants to download to his personal computer,

- BitTorrent client software communicates with a tracker to find other computers running BitTorrent that have the complete file (seed computers) and those with a portion of the file (peers that are usually in the process of downloading the file).

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<sup>29</sup> *Id.* (quoting *Grokster*, 545 U.S. at 922).

<sup>30</sup> *Id.*

<sup>31</sup> *Grokster*, 545 U.S. at 919 (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by the clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

<sup>32</sup> Schiesel, *supra* note 21; *see also* Lewen, *supra* note 3, at 177.

<sup>33</sup> Lewen, *supra* note 3, at 177; *see also* Clive Thompson, *The BitTorrent Effect*, WIRED (Jan. 2005), <http://www.wired.com/wired/archive/13.01/bittorrent.html> (“It takes hours to download a ripped episode of *Alias* or *Monk* off Kazaa, but BitTorrent can do it in minutes.”).

<sup>34</sup> Schiesel, *supra* note 21; *see also* Thompson, *supra* note 33 (“Users download and share at the same time; as soon as someone receives even a single piece of [*Meet the Fokkers*] [sic], his computer immediately begins offering it to others.”).



- The tracker identifies the swarm, which is the connected computers that have all of or a portion of the file and are in the process of sending or receiving it.
- The tracker helps the client software trade pieces of the file you want with other computers in the swarm. Your computer receives multiple pieces of the file simultaneously.
- If you continue to run the BitTorrent client software after your download is complete, others can receive .torrent files from your computer; your future download rates improve because you are ranked higher in the “tit-for-tat” system.<sup>35</sup>

Like the fall of Napster and Grokster, movie and music industry organizations were successful in shutting down BitTorrent Web sites hosted in the United States.<sup>36</sup> Nonetheless, the undoubtedly largest BitTorrent Web site, The Pirate Bay,<sup>37</sup> had managed to elude the legal reach of these organizations<sup>38</sup> and had yet to succumb to the final resting place of torrent tracker search engines—repositories of solely noninfringing content.<sup>39</sup>

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<sup>35</sup> Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/bittorrent2.htm> (last visited Apr. 7, 2010) (emphasis removed).

<sup>36</sup> See Norton, *supra* note 1 (“BitTorrent tracker search engines fell next—sites like Suprnova.org and Elite Torrents crumbled under legal threats and raids.”).

<sup>37</sup> Norton, *supra* note 1.

<sup>38</sup> See *id.* (“Protected by weak Swedish copyright laws, the Bay survived and grew as movie studio lawyers felled competing BitTorrent trackers one-by-one. Today it boasts an international user base and easily clears 1 million unique visitors a day.”).

<sup>39</sup> See *id.* (“The remaining few, including Isohunt and TorrentSpy, now have policies of removing torrents for infringing content upon request. They’re being sued anyway.”).

### B. *Origins of The Pirate Bay*

In the summer of 2003, which was post-*Napster* and a time in which most knew the fall of *Grokster* was around the corner, “Gottfrid Svartholm was working as a programmer for a security consultancy on a one-year assignment in Mexico City when he volunteered to help a Swedish file-sharing advocacy group called Piratbyran set up its own BitTorrent tracker.”<sup>40</sup> Sweden so happens to be “home to a burgeoning anti-copyright movement and subculture. [The country] even has a political party, Piratpartiet, dedicated solely to the reform of intellectual property law.”<sup>41</sup> Accordingly, Svartholm named the BitTorrent Web site “The Pirate Bay” to illustrate, with no shame, what Piratbyran stood for—it “believed the existing copyright regime was a broken artifact of a pre-digital age, the gristle of a rotting business model that poisoned culture and creativity.”<sup>42</sup> As one commentator has noted, “The Pirate Bay didn’t respect intellectual property law, and they’d say it publicly.”<sup>43</sup>

In October 2004, The Pirate Bay separated from Piratbyran to form its own entity, and Fredrik Neij and Peter Sunde Kolmisoppi joined to help operate the Web site.<sup>44</sup> Mikael Viborg, a Swedish law student, also became legal advisor to The Pirate Bay and

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<sup>40</sup> *Id.*

<sup>41</sup> Tara Touloumis, Comment, *Buccaneers and Bucks From the Internet: Pirate Bay and the Entertainment Industry*, 19 SETON HALL J. SPORTS & ENT. L. 253, 259 (2009); see also The Pirate Party, [http://www2.piratpartiet.se/the\\_pirate\\_party](http://www2.piratpartiet.se/the_pirate_party) (last visited Apr. 7, 2010) (“The Pirate Party wants to fundamentally reform copyright law, get rid of the patent system, and ensure that citizens’ rights to privacy are respected. With this agenda, and only this, we are making a bid for representation in the European and Swedish parliaments. Not only do we think these are worthwhile goals. We also believe they are realistically achievable on a European basis. The sentiments that led to the formation of the Pirate Party in Sweden are present throughout Europe. There are already similar political initiatives under way in several other member states. Together, we will be able to set a new course for a Europe that is currently heading in a very dangerous direction.”).

<sup>42</sup> Touloumis, *supra* note 41, at 256.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 255–56; About Pirate Bay, THEPIRATEBAY.ORG, <http://thepiratebay.org/about> (last visited Apr. 7, 2010).

wanted to post all legal threats on the Web site “[i]n case any confusion remained about [The Pirate Bay’s] stance on intellectual property laws.”<sup>45</sup> Eventually, Carl Lundström, the CEO and the largest shareholder of Rix Telecom in Sweden, also became involved with The Pirate Bay when he financed servers and broadband bandwidth for the Web site.<sup>46</sup> As of 2008, more than two million people per day logged into The Pirate Bay to download “movies, music, television shows, and other media files.”<sup>47</sup>

### III. LAWS GOVERNING THE PIRATE BAY

#### A. *Why Not the United States?*

In the past, movie and music industry organizations in the United States have sued individual file-sharers for copyright infringement because direct infringement by one user was easier to prove than secondary infringement by a large company.<sup>48</sup> This practice of suing individuals, however, raises legal costs, consumes

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<sup>45</sup> Touloumis, *supra* note 41, at 256; *see, e.g.*, Legal Threats Against The Pirate Bay, THEPIRATEBAY.ORG, <http://thepiratebay.org/legal> (last visited Apr. 7, 2010).

<sup>46</sup> Jan Libbenga, *The Pirate Bay admits links with right-wing benefactor*, THE REGISTER (May 7, 2007), [http://www.theregister.co.uk/2007/05/07/pirate\\_bay\\_accepted\\_right\\_wing\\_money](http://www.theregister.co.uk/2007/05/07/pirate_bay_accepted_right_wing_money); *see also* Janko Roettgers, *Who is the Fourth Man in The Pirate Bay Case?*, NEWTEEVEE (Feb. 2, 2008), <http://newteevee.com/2008/02/02/who-is-the-fourth-man-in-the-pirate-bay-case> (“Lundstrom’s role in the history of The Pirate Bay has always been a point of contention. The Bay’s founders have admitted that Lundstrom initially helped them out with servers and bandwidth, but prosecutors now want to make the case that he has had a much closer relationship to the site. . . . The folks from The Pirate Bay have since shared their version of the story, stating that one of their co-founders, Fredrik Neij, used to work for a large Swedish ISP called Rix Telecom. Carl Lundstrom used to be Rix Telecom’s chairman and also owned a large stake in the company until it was acquired by the local telecom giant, Phonera, late last year.”).

<sup>47</sup> Touloumis, *supra* note 41, at 253.

<sup>48</sup> Lewen, *supra* note 3, at 181–82 (citing Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES, Sep. 9, 2003, at A1). Secondary infringement may be shown by, *inter alia*, the inducement of others to infringe. Lewen, *supra* note 3, at 181–82.

vast amounts of time, produces bad publicity, and has failed to substantially curb illegal file-sharing.<sup>49</sup> Further, changes in file-sharing technologies prompted by court decisions have made it more difficult to show that individual users are liable for copyright infringement.<sup>50</sup> As a result, industry organizations are again looking to companies and Web sites for liability.<sup>51</sup> For these reasons, industry organizations have begun largely focusing on suing BitTorrent Web sites and not individual torrent users.<sup>52</sup>

While millions of The Pirate Bay's users may reside in the United States, The Pirate Bay Web site is hosted in Sweden.<sup>53</sup> “[U]nder the Berne/TRIPs international copyright protection regime, the law of the country where the infringement allegedly

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<sup>49</sup> *Id.* at 182 (citing *In re Charter Commc'ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 782 (8th Cir. 2005)).

<sup>50</sup> Touloumis, *supra* note 41, at 265–66 (citing *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)) (“Although the Grokster Court found potential liability, it could not ignore the obvious tension between copyright protection and technological development. The Court sidestepped the issue, but it will inevitably be forced to once again balance copyright against technological innovation when yet another novel method of infringement is presented to it. At what point must copyright protection give way to technological development?”).

<sup>51</sup> *Id.* at 266.

<sup>52</sup> *Id.* at 266 (“Absent secondary liability, a direct infringement theory would have to focus on the original infringers—the individual downloaders. However, BitTorrent technology, due to its disaggregated, decentralized nature, is especially challenging to link back to the original offender. Unlike file sharing technologies of the past, there is no centralized server that houses the copyrighted content. Similarly, because files are broken into countless pieces and reassembled instantaneously from countless users, liability is no longer as obvious as it once was with peer-to-peer file sharing. In addition, even if copyright holders are somehow able to target individual infringers, an onslaught of lawsuits against individuals, especially if they are sympathetic, could turn public opinion against copyright efforts and even encourage greater infringement. Therefore, direct infringement liability for BitTorrent users is not only unrealistic but could also have the opposite effect of increasing infringement.”).

*Id.* (citing Bryan H. Choi, Note, *The Grokster Dead-End*, 19 HARV. J. L. & TECH. 393 (2006)).

<sup>53</sup> Norton, *supra* note 1.

takes place applies.”<sup>54</sup> Thus, if a Pirate Bay user, who resided in the United States, downloaded a copyrighted movie using The Pirate Bay’s Web site, an industry organization, such as the Motion Picture Association of America (“MPAA”) or the Recording Industry Association of America (“RIAA”), could sue that user for copyright infringement under the *civil* laws of the United States.<sup>55</sup> This was not the route taken with The Pirate Bay litigation.<sup>56</sup> Instead, the MPAA wanted to take down The Pirate Bay Web site—not simply scare its users.<sup>57</sup> Because the Web site and its headquarters are hosted in Sweden, any alleged copyright infringement activities performed by The Pirate Bay would have taken place in Sweden.<sup>58</sup> Thus, Swedish law would apply.<sup>59</sup>

This dispute arose on March 16, 2006, when John Malcom, Executive Vice President and Director of Worldwide Anti-Piracy for the MPAA, wrote a letter to Swedish State Secretary Dan Eliasson that stated:

Clearly the complaints that we filed on behalf of our neighbors in 2004 and 2005 with the police in Stockholm and Gothenburg against the operators of The Pirate Bay have resulted in no action. As I am sure you are aware, the American Embassy has sent entreaties to the Swedish government urging it to take action against The Pirate Bay and other organizations operating within Sweden that facilitate copyright theft. As we discussed during our meeting, it is certainly not in Sweden’s best interests to earn a reputation among other nations and trading partners as a place where utter lawlessness with respect to intellectual property is tolerated. I would urge you once again to exercise your influence to urge law enforcement authorities in Sweden to take much-needed action against The Pirate Bay.<sup>60</sup>

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<sup>54</sup> Touloumis, *supra* note 41, at 262 (citing PAUL EDWARD GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 3 [1][a][i] (Matthew Bender & Company, Inc. 2007)).

<sup>55</sup> *See id.*

<sup>56</sup> *See* Thomas Mennecke, *Sweden Pressured to take Pirate Bay Action*, SLYCK.COM (June 20, 2006), <http://www.slyck.com/story1227.html>.

<sup>57</sup> *Id.*

<sup>58</sup> *See* Touloumis, *supra* note 41, at 262.

<sup>59</sup> *Id.*

<sup>60</sup> Mennecke, *supra* note 56; *see also* Letter from John G. Malcom, Executive Vice-President and Director of Worldwide Piracy, MPAA, to Dan Eliasson,

In other words, the MPAA and the United States government “threatened to blacklist the Swedes within the WTO (World Trade Organization).”<sup>61</sup> The threat worked, and two years after a raid on The Pirate Bay’s offices, the Swedish government brought *criminal* charges of copyright infringement against The Pirate Bay’s operators.<sup>62</sup>

## B. Sweden

### 1. European Union Directives

The European Union (“EU”) is made up of twenty-seven member states, including Sweden.<sup>63</sup> The EU’s member states are governed, in part, by “treaties which empower the EU institutions to adopt laws. These laws (regulations, directives[,] and decisions)

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Secretary of Ministry of Justice, Sweden, Mar. 17, 2006, *available at* [http://www.slyck.com/misc/pirate\\_mpa.pdf](http://www.slyck.com/misc/pirate_mpa.pdf).

<sup>61</sup> *Sweden threatened with Trade Sanctions by the US over the Piratebay*, TORRENTFREAK (June 22, 2006), <http://torrentfreak.com/sweden-threatened-with-trade-sanctions-by-the-us-over-the-piratebay>.

<sup>62</sup> *In Re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 55 (Swed.). In the United States, however:

Traditionally, U.S. copyright laws have been enforced by private lawsuits. Some statutes, such as the No Electronic Theft Law Act, provide for criminal liability for infringement; however most enforcement tends to be through civil suits rather than criminal prosecutions. Perhaps more critically, copyright law enforcement depends on “gatekeeper” liability. Due to the costs associated with pursuing individual infringers, copyright holders tend to sue those who provide the product on a larger scale (the “gatekeepers”), such as book publishers, record manufacturers, and film studios.

Touloumis, *supra* note 41, at 262–63 (citing No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified at 17 U.S.C. §§ 101, 506, 507 (2006); 18 U.S.C. §§ 2319, 2319A, 2320 (2006)); Karen H. Bernstein, *The No Electronic Theft Act: The Music Industry’s New Instrument in the Fight Against Internet Piracy*, 7 UCLA ENT. L. REV. 325 (2000); Jane C. Ginsburg, *Putting Cars on the “Information Superhighway”: Authors, Exploiters, and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1488 (1995); Xiaomin Huang, Peter Radkowski III & Peter Roman, *Computer Crimes*, 44 AM. CRIM. L. REV. 285 (2007); Tim Wu, *When Code Isn’t Law*, 89 VA. L. REV. 679, 711 (2003)).

<sup>63</sup> *The Member Countries of the European Union*, EUROPEAN COMMISSION, [http://europa.eu/about-eu/27-member-countries/index\\_en.htm](http://europa.eu/about-eu/27-member-countries/index_en.htm) (last visited Apr. 7, 2010).

take precedence over national law and are binding on national authorities.”<sup>64</sup> In particular, provisions labeled “directives” define the member states’ end results that must be achieved.<sup>65</sup> “National authorities have to adapt their laws to meet these goals, but are free to decide how to do so. . . . Directives are used to bring different national laws into line with each other. . . .”<sup>66</sup>

## 2. *European Court of Justice*

When Member State courts need clarification of an EU directive that called for the enactment of the particular national law at issue in a case, they ask the European Court of Justice (“ECJ”) for an interpretation.<sup>67</sup> In other words:

[t]o ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.<sup>68</sup>

It is important to note however, that “[t]he Court of Justice’s reply is not merely an opinion, but takes the form of a judgment or . . . order.”<sup>69</sup> The national court to which it is addressed is . . . bound by the interpretation given.”<sup>70</sup> Further, this judgment or order “binds other national courts before which the same problem is raised.”<sup>71</sup> Accordingly:

[i]t is thus through references for preliminary rulings that any European citizen can seek clarification of the European Union rules which affect him. Although such a reference can be made only by a national court,

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<sup>64</sup> *What is EU Law?*, EUROPEAN COMMISSION, [http://ec.europa.eu/community\\_law/introduction/treaty\\_en.htm](http://ec.europa.eu/community_law/introduction/treaty_en.htm) (last visited Apr. 7, 2010).

<sup>65</sup> *What are EU Directives?*, EUROPEAN COMMISSION, [http://ec.europa.eu/community\\_law/introduction/what\\_directive\\_en.htm](http://ec.europa.eu/community_law/introduction/what_directive_en.htm) (last visited Apr. 7, 2010).

<sup>66</sup> *Id.*

<sup>67</sup> *The Institution—General Presentation*, EUROPEAN COMMISSION, [http://curia.europa.eu/jcms/jcms/Jo2\\_6999](http://curia.europa.eu/jcms/jcms/Jo2_6999) (last visited Apr. 7, 2010).

<sup>68</sup> *Court of Justice—Presentation*, EUROPEAN COMMISSION, [http://curia.europa.eu/jcms/jcms/Jo2\\_7024](http://curia.europa.eu/jcms/jcms/Jo2_7024) (last visited Apr. 7, 2010).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

all the parties to the proceedings before that court, the Member States[,] and the institutions of the European Union may take part in the proceedings before the Court of Justice. In that way, several important principles of EU law have been laid down by preliminary rulings, sometimes in reply to questions referred by national courts of first instance.<sup>72</sup>

### 3. *Swedish Copyright Act*

On June 22, 2001, the EU issued the Copyright Directive that, *inter alia*, “implement[ed] a unified copyright protection regime.”<sup>73</sup> Sweden did not enact its own national copyright laws to satisfy the EU Copyright Directive until July 1, 2005.<sup>74</sup> Thus, prior to this date, “it was not explicitly illegal in Sweden to download copyrighted material for private use.”<sup>75</sup> When Sweden finally did enact its own laws—the Swedish Copyright Act—the act of “download[ing] pirated material or any other material that has been posted on the Internet without the owner’s permission” became illegal.<sup>76</sup>

Under sections 2 and 46 of the Swedish Copyright Act, a copyright owner has the exclusive right “to dispose of the work or produce copies and so make the work or right available to the general public.”<sup>77</sup> A court has stated that:

Under the [Swedish] Copyright Act, a work or a right is made available to the general public when, *inter alia*, it is broadcast to the general public. . . . Such a making available occurs when a work or a right, either by way of a wired or wireless connection, is made available to

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<sup>72</sup> *Id.*

<sup>73</sup> Touloumis, *supra* note 41, at 257–58 (citing Council Directive 2001/29, 2001 O.J. (L 167) (EC)).

<sup>74</sup> Lewen, *supra* note 3, at 183.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; 2 ch. 12 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK [ACT ON COPYRIGHT IN LITERARY AND ARTISTIC WORKS] (Svensk författningssamling [SFS] 1960:729) (Swed.), *translated in* Henry Olsson, *Swedish Copyright Legislation as amended up to July 1, 2005*, U.N. EDUC., SCI. AND CULTURAL ORG. (July 1, 2005), [http://portal.unesco.org/culture/en/files/30264/11418280643se\\_copyright\\_2005\\_en.pdf/se\\_copyright\\_2005\\_en.pdf](http://portal.unesco.org/culture/en/files/30264/11418280643se_copyright_2005_en.pdf/se_copyright_2005_en.pdf) [hereinafter SWEDISH COPYRIGHT ACT].

<sup>77</sup> SWEDISH COPYRIGHT ACT, *supra* note 76, § 2; *In re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 35 (Swed.).



the general public from a place other than where the public can enjoy the work.<sup>78</sup>

Thus, if someone other than the copyright owner were to exercise this exclusive right, that person is guilty of copyright infringement under the Swedish Copyright Act.<sup>79</sup> Under section 53, “anyone who takes actions which involve[] infringement of the copyright associated with the work can be sentenced to a fine or imprisonment for a maximum of two years, provided that the infringement was intentional or the result of gross negligence.”<sup>80</sup>

Further, under Chapter 23, section 4 of the Swedish Criminal Code, “not only the person who has committed the act (principal offence), but also other persons who have aided and abetted this person in word and deed (act of complicity), will be held liable for a specific act.”<sup>81</sup> In other words, complicity in copyright infringement was also now a crime in Sweden.<sup>82</sup>

#### 4. *Swedish Electronic Commerce Act*

One year prior to the EU Copyright Directive, on June 8, 2000, the EU issued the Electronic Commerce Directive (“ECD”)—that “seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.”<sup>83</sup> One way in which the directive accomplished this was through the regulation of information society services (“ISSs”),<sup>84</sup> which are defined as “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.”<sup>85</sup> For the providers of ISSs, the ECD

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<sup>78</sup> *In re Neij*, Case No. B 13301-06, at 35.

<sup>79</sup> *Id.*

<sup>80</sup> Swedish Copyright Act, *supra* note 76, § 2; *Neij*, Case No. B 13301-06, at 36.

<sup>81</sup> *In re Neij*, Case No. B 13301-06, at 47.

<sup>82</sup> *See id.*

<sup>83</sup> Council Directive 2000/31, art. 1(1) and recital 3, 2000 O.J. (L 178) 1, 8, 1 (EC) [hereinafter Electronic Commerce Directive], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:EN:HTML>.

<sup>84</sup> *Id.* at art. 1.

<sup>85</sup> *Id.* at recital 17.

contains three safe harbor provisions that relieve them of criminal liability, including liability for copyright infringement, and for the information that they transmit.<sup>86</sup> These safe harbors are for activities that constitute only the “mere conduit” of information, caching of information, or hosting of information.<sup>87</sup>

Adopted in Sweden in response to the ECD mandate, the Swedish Electronic Commerce and Other Information Society Services Act (“Swedish Electronic Commerce Act”)<sup>88</sup> “contains . . . provisions relating to freedom from liability for a service provider, with reference to issues of both a legal and compensatory nature.”<sup>89</sup> Accordingly, these provisions correspond to the three safe harbor provisions in the ECD.<sup>90</sup>

For example, to qualify for these provisions, the entity must be a provider of ISSs, which are defined in section 2 of the Swedish Electronic Commerce Act as “services which are normally provided against payment, and which are supplied at a distance, electronically[,] and at the individual request of a service receiver (the user of the services).”<sup>91</sup> Further, “[t]he grounds for freedom from liability for service providers are found in sections 16–19 of the [Swedish Electronic Commerce] Act. . . . The content of sections 16–19 of the [Swedish Electronic Commerce] Act correspond[s] to articles 12–14 of the [ECD].”<sup>92</sup> Therefore, the safe harbor provisions under the Swedish Electronic Commerce

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<sup>86</sup> Electronic Commerce Directive, *supra* note 83, art. 12, 13, & 14.

<sup>87</sup> *Id.*

<sup>88</sup> LAG OM ELEKTRONISK HANDEL OCH ANDRA INFORMATIONSSAMHÄLLETS TJÄNSTER (Svensk författningssamling [SFS] 2002:562) (Swed.) [hereinafter SWEDISH ELECTRONIC COMMERCE ACT], available at <http://www.notisum.se/rnp/sls/lag/20020562.htm>.

<sup>89</sup> *In Re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 55 (Swed.).

<sup>90</sup> *Id.*

<sup>91</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 2; *In re Neij*, No. B 13301-06, at 55.

<sup>92</sup> *In re Neij*, Case No. B 13301-06, at 55. This Article does not discuss § 19 of the Swedish Electronic Commerce Act, which simply states, “A service that transmits or stores information for another may be penalized for crimes relating to the content of information only if the crime was committed intentionally.” SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 19.

Act have the potential to relieve service providers of criminal liability for copyright infringement under the Swedish Copyright Act and the Swedish Criminal Code.<sup>93</sup>

#### IV. THE PIRATE BAY TRIAL

Almost two years after the police raided The Pirate Bay's offices, Swedish prosecutors charged the Web site's three founders and operators, along with their financier, with complicity in breaching the Swedish Copyright Act's criminal provisions.<sup>94</sup> Further, several Swedish entertainment companies sued The Pirate Bay for breaching the Swedish Copyright Act's civil provisions,<sup>95</sup> but discussion of these issues is beyond the scope of this Article.

On April 17, 2009, a Swedish trial court found all four defendants guilty of complicity in copyright infringement under the Swedish Copyright Act and liable for damages of 30 million kronor (about 3.6 million U.S. Dollars) to the entertainment companies.<sup>96</sup> Additionally, each defendant was sentenced to a year in prison.<sup>97</sup> In deciding the case, not only did the court have to analyze, *inter alia*, whether the defendants were guilty of the crime of complicity in copyright infringement, but it also had to determine whether the defendants could escape liability for this crime under the safe harbors of the Swedish Electronic Commerce Act.<sup>98</sup>

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<sup>93</sup> *Swedish Court Sends Four Operators of the Pirate Bay Website to Jail for One Year, Orders Damages for Violation of Swedish Copyright Laws*, BLOOMBERG IP REPORT, 5 (May 18, 2009), [http://www.iprights.com/document.aspx?fn=load&media\\_id=618](http://www.iprights.com/document.aspx?fn=load&media_id=618).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Pfanner, *supra* note 15.

<sup>97</sup> *Id.*

<sup>98</sup> *In Re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 54–57 (Swed.) (“The District Court’s assessment of the indictment for complicity in breach of the Copyright Act means that the defendants are liable for the offence. The question is then whether the freedom from liability provisions relating to punishment—but also to the liability to pay damages—of a ‘service provider’ contained in the Electronic Commerce Act are applicable.”).

## A. *Safe Harbor Analysis*

### 1. *Information Society Service Provider*

For the safe harbor provisions of the Swedish Electronic Commerce Act to apply to The Pirate Bay file-sharing Web site, the site must first constitute an information society service provider.<sup>99</sup> Such a service provider is defined, as previously discussed, as the provider of “services which are normally provided against payment, and which are supplied at a distance, electronically[,] and at the individual request of a service receiver (the user of the services).”<sup>100</sup>

The defendants never cited reasons why The Pirate Bay should be considered a service provider under the Swedish Electronic Commerce Act, but instead repeatedly asserted that the Web site constitutes such a provider.<sup>101</sup> For example, the defendants claimed that “The Pirate Bay must be regarded as a service provider in accordance with the Electronic Commerce Act, i.e. a ‘person’ who provides one of the services of the information society.”<sup>102</sup> Similarly, they stated that “[a]ccording to the Electronic Commerce Act[,] . . . a service provider who supplies information but who has not initiated the transfer, which The Pirate Bay has not done, cannot be held responsible for an offence, nor found liable to pay damages.”<sup>103</sup> Consequently, the status of The Pirate Bay as a service provider was not disputed by the prosecution or the plaintiffs, and the court held that:

[t]he service offered by the filesharing service The Pirate Bay includes enabling users to upload or download torrent files on The Pirate Bay’s website and, via The Pirate Bay’s tracker, establish contacts with other users who have/would like the file the torrent file relates to. In the opinion of the District Court, it is, therefore, clear that the services from The Pirate Bay website have been supplied at a distance, electronically and at the individual requests of the users. Even if the users have not paid for the services, the requirement for compensation has still been

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<sup>99</sup> See SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 2; see also *In re Neij*, Case No. B 13301-06, at 55.

<sup>100</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, Part B, § 4.

<sup>101</sup> See *In re Neij*, Case No. B 13301-06, at 28–29.

<sup>102</sup> *Id.* at 28.

<sup>103</sup> *Id.* at 29.

met since the operation of The Pirate Bay has, at least to some extent, been financed by advertising revenue. . . . The Electronic Commerce Act is, consequently, applicable to the filesharing services supplied from The Pirate Bay website.<sup>104</sup>

The questionable part of this finding by the court is the fulfillment of the payment prong, or the requirement that the services “are normally provided against payment.”<sup>105</sup> The court acknowledged that The Pirate Bay’s users do not pay for the services provided by the Web site, and the payments received are from advertising revenue.<sup>106</sup> Yet, it still believed that the Web site satisfies the payment criterion.<sup>107</sup> One could argue that the Web site’s file-sharing service is *not* provided against payment because the “service receiver”<sup>108</sup> is not paying. Instead, a third party is paying, and the third party is also purchasing advertising space. Thus, the file-sharing service is not being provided against payment—advertising space is being provided against payment. If either party had raised this argument, and the court had consequently found it persuasive, the court would not have even reached the arguments discussed below concerning the actual safe harbors, because The Pirate Bay would not have been covered by the Swedish Electronic Commerce Act.<sup>109</sup>

## 2. *Mere Conduit*

Because the court did find that The Pirate Bay constituted a service provider, it next considered the first safe harbor provision of the Swedish Electronic Commerce Act.<sup>110</sup> Section 16 of the Act, or the “mere conduit” provision, precludes liability when a service provider (1) does not initiate the transfer, (2) does not select the receiver of the information, and (3) does not select or modify the

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<sup>104</sup> *Id.* at 55.

<sup>105</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 2.

<sup>106</sup> *See In re Neij*, Case No. B 13301-06, at 55.

<sup>107</sup> *Id.*

<sup>108</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 2.

<sup>109</sup> *See id.*; *In re Neij*, Case No. B 13301-06, at 55 (“The initial issue on this point is whether The Pirate Bay is a service provider which provides any of the services of an information society?”).

<sup>110</sup> *In re Neij*, Case No. B 13301-06, at 55.

information.<sup>111</sup> Further, the transmission of the information must be (4) automatic, (5) intermediate, and (6) transient, with the “information not being stored longer than is reasonably necessary for the transmission.”<sup>112</sup>

The defendants provided the general argument that “[a] service provider who supplies information cannot . . . be held liable for an offence which relates to the content of the information.”<sup>113</sup> They claimed that the purpose of the Act is to place the burden of responsibility on the users who upload the torrents and not on the entity that “simply supplies a route by which the information can be transferred.”<sup>114</sup> Similarly, they also stated that “a service provider who [sic] supplies information but who [sic] has not initiated the transfer . . . cannot be held responsible for an offence, nor found liable to pay damages.”<sup>115</sup> Neither the prosecution nor the plaintiffs offered any arguments, and the court held that:

[t]he purpose of the Pirate Bay’s services was, *inter alia*, to provide server space so that users could upload and store torrent files on the website. This storage means that [section] 16—which covers only services where some form of automatic and temporary intermediate storage takes place as a result of a particular transfer— . . . do[es] not apply.<sup>116</sup>

The defendants correctly argued that a service provider that does not initiate the transfer of information cannot be held responsible under section 16, but they failed to address the other

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<sup>111</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 16 (“A service that transmits information provided by a recipient of a communication network, or providing access to such a network, is not, because of the content of the information, liable to pay any damages or penalties, provided that the provider does not 1. initiate the transfer, 2. select the receiver of the information, or 3. select or modify the information. The transfer and the provisions under the first paragraph includes such automatic, intermediate and temporary storage of information made only to affect a transfer, provided that the information not be stored longer than is reasonably necessary for the transmission.”).

<sup>112</sup> *Id.*

<sup>113</sup> *In re Neij*, Case No. B 13301-06, at 28.

<sup>114</sup> *See id.*

<sup>115</sup> *Id.* at 29.

<sup>116</sup> *Id.* at 55.

five requirements of the mere conduit provision.<sup>117</sup> Specifically, they did not address the three requirements that the transmission of the information be automatic, intermediate, and transient.<sup>118</sup> The court found that The Pirate Bay does not satisfy these requirements because the Web site allows users to upload and store files, a service which is not an “automatic and temporary intermediate storage” of information.<sup>119</sup> The court’s finding is correct but for the fact that the files being stored are not copyright-protected information or works.<sup>120</sup> Instead, they are user-created torrent files that simply direct Internet traffic.<sup>121</sup> In fact, the prosecutor even noted that The Pirate Bay Web site states, “[t]he server contains only torrent files. This means that no copyright-protected and/or illegal material is stored by us.”<sup>122</sup> In other words, the files on The Pirate Bay do not point directly to copyrighted movies, for example.<sup>123</sup> Rather, they point to torrent trackers, which connect users to swarms of other users who may have bits and pieces of copyrighted movies.<sup>124</sup> Thus, technically, the only information transmitted through The Pirate Bay is the location of other users who have bits and pieces of a particular file that a user wants to

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<sup>117</sup> *See id.* at 28–29.

<sup>118</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 16.

<sup>119</sup> *In re Neij*, Case No. B 13301-06, at 55.

<sup>120</sup> *See id.* at 15 (“According to the District Prosecutor, the aiding and abetting referred to the fact that the defendants, through the filesharing service, provided others with the opportunity to upload torrent files to the service, provided others with a database linked to a catalogue of torrent files, provided the opportunity for others to search for and download torrent files and also provided the functionality with the assistance of which individuals wishing to share files with each other could contact each other through the filesharing service’s tracker function.”).

<sup>121</sup> *See id.* at 14 (“A torrent file is a file which, in principle, contains only data which identifies the components the digital file has been divided into. To facilitate distribution of the digital file, an address for one or more trackers is, as a rule, specified in a torrent file.”).

<sup>122</sup> *Id.* at 23.

<sup>123</sup> *See id.*

<sup>124</sup> *See id.* at 14 (“The purpose of a tracker is to inform users of a specific torrent files which other users share precisely that digital file.”).

download.<sup>125</sup> There is no previous authority on whether this file-type distinction matters, but should an appellate court find the difference to be important, the mere conduit safe harbor may relieve The Pirate Bay of liability.<sup>126</sup>

### 3. *Caching Set*

The second safe harbor of the Swedish Electronic Commerce Act, or section 17, is the caching provision, which precludes liability for providers of services that operate only to “further streamline transmission to other recipients,”<sup>127</sup> or “mak[e] the transfer of information more efficient.”<sup>128</sup> Like section 16, the caching safe harbor requires the transmission to be (1) non-modifying, (2) automatic, (3) intermediate, and (4) transient, and it also requires (5) the provider to take down information upon learning that it is copyright-protected.<sup>129</sup>

The defendants made no arguments regarding the caching provision other than their general statements concerning liability discussed *supra*.<sup>130</sup> The prosecutor noted that The Pirate Bay Web site states that torrent files will be removed only “if the name does not reflect the content. Users should be aware of what they are downloading.”<sup>131</sup> Similarly, the defendants admitted that torrent

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<sup>125</sup> *See id.* (“The torrent file can be uploaded to a web server which stores the torrent file for downloading by users.”).

<sup>126</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 16.

<sup>127</sup> *Id.* § 17.

<sup>128</sup> *In re Neij*, Case No. B 13301-06, at 55.

<sup>129</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 17 (“A service that transmits information provided by a recipient of a communication network shall, for such automatic, intermediate and temporary storage that is only to further streamline transmission to other recipients, not be, because of the content of information, required to compensate or pay penalty, provided that the provider 1. not modify the information, 2. comply with the rules governing access to information, 3. follow industry codes of practice on updating of information, 4. not intervene in such industry recognized technology used to get information on the use of information, and 5. without delay, to prevent further dissemination of information, as soon as the provider is aware of the information originally downloaded, remove or make inaccessible such information, or when a court or authority has ordered such removal.”).

<sup>130</sup> *See supra* notes 106–09 and accompanying text.

<sup>131</sup> *In re Neij*, Case No. B 13301-06, at 23.



files were taken down only “if someone complained that the description of a torrent file did not accurately reflect the content.”<sup>132</sup> The court, however, did not discuss the fact that The Pirate Bay does not take down information upon learning that it is copyright-protected but instead held that the caching safe harbor did not apply for the same reasons as the mere conduit safe harbor—the Web site’s transmission of information is not automatic, intermediate, and transient because users can upload and store torrent files for an indefinite amount of time.<sup>133</sup>

Considering the fact that The Pirate Bay deliberately publishes take-down notices on its Web site without taking action,<sup>134</sup> and the defendants admitted that they remove torrent files only if file names do not match the content,<sup>135</sup> there are not any remaining arguments to support The Pirate Bay falling under the caching safe harbor of section 17 except for the argument presented *supra*—that torrent files and not copyright-protected files are stored by the Web site.<sup>136</sup>

#### 4. *Hosting*

The third safe harbor of the Swedish Electronic Commerce Act—the hosting provision, or section 18—precludes liability of a service provider if it (1) does not have actual knowledge of the existence of the illegal information, it is (2) not obvious that the illegal information exists, and (3) the service provider acts expeditiously to remove the illegal information upon knowledge of its existence.<sup>137</sup>

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<sup>132</sup> *Id.* at 32.

<sup>133</sup> *See id.* at 56 (“This storage means that § 16 . . . and § 17—which covers only storage carried out for the explicit purpose of improving the efficiency of the transfer of certain information (caching)—do not apply.”).

<sup>134</sup> *See id.* at 33 (“He was aware of the e-mails and responses published on the web page entitled Juridisk korrespondens [Legal correspondence].”).

<sup>135</sup> *See id.* at 32.

<sup>136</sup> *See supra* notes 119–25 and accompanying text.

<sup>137</sup> SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, § 18 (“A service that stores information provided by a service is not, because of the content of the information, required to pay damages or pay the penalty, provided that the provider is 1. not aware of the illegal information, and in the case of liability for damage, is not aware of facts or circumstances that make it clear that the illegal

The defendants argued that The Pirate Bay was “an open search service. [They] could not, therefore, be responsible for the material referred to by the users via the torrent files and even less so if the material was protected by copyright. [They] ha[ve], therefore, had no knowledge of the principal offence.”<sup>138</sup> The prosecution claimed that the defendants did have knowledge of the illegal information and introduced an e-mail into evidence in which one defendant “wrote that the purpose of the Web site was pirate copying, and he stated, during the main hearing, that the purpose of the Web site was, *inter alia*, pirate copying.”<sup>139</sup> Further, as discussed *supra*, evidence was presented that the defendants ignored and posted take-down notices.<sup>140</sup> As a result, the court held that:

[t]he case has demonstrated that the filesharing service The Pirate Bay was, *inter alia*, used to provide the opportunity to make available copyright-protected works. It must have been obvious to the defendants that the website contained torrent files which related to protected works. None of them did, however, take any action to remove the torrent files in question, despite being urged to do so. The prerequisites for freedom from liability under [section] 18 have, consequently, not been fulfilled.<sup>141</sup>

Though the court stated that The Pirate Bay was “used to provide the opportunity to make available copyright-protected works,”<sup>142</sup> it also noted that the Web site “contained torrent files *related* to protected works.”<sup>143</sup> As discussed *supra*, these files are not copyright-protected works, and they do not point to copyright-protected works.<sup>144</sup> They simply point to torrent trackers.<sup>145</sup> These

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information or activity occurs, or 2. as soon as he gets such knowledge or awareness of, without delay, prevents further dissemination of information. Nothing in the first paragraph applies if the recipient has provided the information to the service provider acting under the authority or the supervision of a court.”).

<sup>138</sup> *In re Neij*, Case No. B 13301-06, at 28.

<sup>139</sup> *Id.* at 53.

<sup>140</sup> See *supra* notes 133–36 and accompanying text.

<sup>141</sup> *In re Neij*, Case No. B 13301-06, at 56.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* notes 120–25 and accompanying text.

<sup>145</sup> *Id.*

trackers, in turn, connect users to swarms of other users who may have bits and pieces of copyright-protected works, but The Pirate Bay hosts only torrent files that only direct Internet traffic to trackers.<sup>146</sup> Thus, one can make the argument that the hosting safe harbor should apply because The Pirate Bay operators believed that the Web site never contained illegal information in the first place, and it would not be obvious to one who understands the technology behind torrenting.<sup>147</sup>

### B. *European Court of Justice Interpretation*

As discussed in Part III.B.2., “national courts may, and sometimes must, refer to the [European] Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law.”<sup>148</sup> For example, if a party to a case asks a Swedish court to first obtain a preliminary ruling by the ECJ on an interpretation of an EU directive, the court can reject the request only if it “feel[s] that the application of the directive is so obvious as to leave no room for any reasonable doubt.”<sup>149</sup> Further, “the national court must believe the matter equally obvious to other national courts.”<sup>150</sup>

Here, without mentioning any particular language, the defendants, in fact, raised the argument that “the wording of the Act in comparison with the EU directive on which the Act is based is unclear and that the District Court has reason . . . to obtain a preliminary ruling by the European Court of Justice.”<sup>151</sup> Neither the prosecution nor the plaintiffs countered this argument. The court held, however, that:

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> See *supra* notes 68–72 and accompanying text.

<sup>149</sup> Lasater, *supra* note 19 (citing Case 283/81, CILFIT v. Ministry of Health, 1982 E.C.R. 3415, available at [http://iom.fi/elearning/files/european\\_law/case\\_law/european\\_union/CASE%20OF%20Cilfit%20vs%20Ministry%20of%20Health%20Italy.pdf](http://iom.fi/elearning/files/european_law/case_law/european_union/CASE%20OF%20Cilfit%20vs%20Ministry%20of%20Health%20Italy.pdf)).

<sup>150</sup> *Id.*

<sup>151</sup> *In Re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 21 (Swed.).

the provisions of the e-commerce directive correspond to the provisions in the Electronic Commerce Act, both with reference to the categorisation of various types of services and the scope of freedom from liability . . . . Considering that there is no ambiguity regarding how the text of the law or directive itself should be interpreted, the District Court does not find it necessary to obtain a preliminary ruling from the European Court of Justice.<sup>152</sup>

The language of the Swedish Electronic Commerce Act and the EU Electronic Commerce Directive is almost identical. What is at issue, however, is the interpretation of that language, which forms both the Act and the Directive. Because The Pirate Bay trial was a case of first impression concerning not only torrenting technology but also the application of the safe harbor provisions of the Swedish Electronic Commerce Act, many ambiguities remain regarding the interpretation of these provisions of the Act.<sup>153</sup> Some of these ambiguities, such as whether stored information has to point directly to illegal files or whether it can point indirectly to bits and pieces of these illegal files via trackers, have been discussed *supra*.<sup>154</sup> For these reasons, “reasonable doubt”<sup>155</sup> exists as to the application of the Act, and the Swedish trial court should have granted the defendants’ request for a preliminary ruling by the ECJ.

Though The Pirate Bay trial was a case of first impression of, *inter alia*, the safe harbors of the Swedish Electronic Commerce Act, the ECJ has issued one preliminary ruling regarding the interpretation of one of the safe harbors in the EU Directive that mandates the Act and contains the same language as the Act.<sup>156</sup> In *Google, Inc. v Louis Vuitton Malletier*,<sup>157</sup> Louis Vuitton “argued that Google was acting illegally by allowing other companies to bid for and use its brand names as keywords to trigger ads on its

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<sup>152</sup> *Id.* at 57.

<sup>153</sup> See SWEDISH ELECTRONIC COMMERCE ACT, *supra* note 88, §§ 16–18; ELECTRONIC COMMERCE DIRECTIVE, *supra* note 83, §§ 12–14.

<sup>154</sup> See *supra* notes 113–19 and accompanying text.

<sup>155</sup> Lasater, *supra* note 19 (citing *CILFIT*, Case 283/81).

<sup>156</sup> See *supra* notes 148–50 and accompanying text.

<sup>157</sup> Cases C-236/08–238/08, *Google France SARL v. Louis Vuitton Malletier* SA 2010 EUR-Lex 62008J0236.

Web site.”<sup>158</sup> Google argued, however, that it falls under the hosting safe harbor provision of the Directive.<sup>159</sup> The ECJ held that Google would, indeed, fall under this hosting provision if it “is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”<sup>160</sup> Further, “concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server.”<sup>161</sup> It would be up to the French court that deferred to the ECJ to “assess whether the role thus played by Google corresponds to . . . the present judgment.”<sup>162</sup>

Here, the ECJ’s interpretation of the hosting safe harbor may go either way for The Pirate Bay. On one hand, it may be difficult to show that The Pirate Bay is “neutral” and that its “conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.”<sup>163</sup> Not only have the defendants stated that the “purpose of the Web site was pirate copying,”<sup>164</sup> but they publish letters from copyright holders on the Web site as well.<sup>165</sup> Conversely, just as the ECJ held that the “concordance between the keyword selected and the search term

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<sup>158</sup> Mark Sweney, *Google wins Louis Vuitton trademark case*, THE GUARDIAN (Mar. 23, 2010 11:16 AM GMT), <http://www.guardian.co.uk/media/2010/mar/23/google-louis-vuitton-search-ads>.

<sup>159</sup> See *Google France*, cases C-236/08–238/08, at ¶¶ 106–20 (“[T]he Cour de cassation asks, in essence, whether Article 14 of Directive 2000/31 is to be interpreted as meaning that an internet referencing service constitutes an information society service consisting in the storage of information supplied by the advertiser, with the result that that information is the subject of ‘hosting’ within the meaning of that article and that the referencing service provider therefore cannot be held liable prior to its being informed of the unlawful conduct of that advertiser.”).

<sup>160</sup> *Id.* at ¶ 114.

<sup>161</sup> *Id.* at ¶ 117.

<sup>162</sup> *Id.* at ¶ 119.

<sup>163</sup> *Id.* at ¶ 114.

<sup>164</sup> *In Re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 34 (Swed.).

<sup>165</sup> See *id.* at 33.

entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server,<sup>166</sup> the concordance between user-created torrent files and the search term entered by a user to find a particular file may not be sufficient *of itself* to justify the view that The Pirate Bay has knowledge of, or control over, the data entered into its system by users and stored in memory on its server.<sup>167</sup> The key words here, however, are “of itself.”<sup>168</sup> It is more likely that an appellate court will find evidence in the record that points to The Pirate Bay’s operators having enough knowledge to float them out of the hosting safe harbor.<sup>169</sup>

## V. CONCLUSION

A Swedish appellate court heard The Pirate Bay’s appeal on September 28, 2010.<sup>170</sup> Since the initial trial in April 2009, the Web site has “gain[ed] more and more users month after month.”<sup>171</sup> When the appeal starts, “The Pirate Bay will have close to 5 million registered users, which is 4 million more than when the legal troubles began.”<sup>172</sup> As discussed in this Article, the defendants will likely rely on the decentralized, swarm-based technology behind torrenting to argue that they fall under one of the safe harbors of the Swedish Electronic Commerce Act.<sup>173</sup> A preliminary ruling from the ECJ on the language used in the EU Directive and the Act would likely make or break The Pirate Bay’s

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<sup>166</sup> *Google France*, cases C-236/08–238/08, at ¶ 117.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.*

<sup>169</sup> *In Re Neij*, [Stockholm District Court] 2009-04-17 Case No. B 13301-06, at 22–28; 31–35 (Swed.).

<sup>170</sup> Eamonn Forde, *Pirate Bay founders back in court*, MUSIC WEEK (Mar. 12, 2010 8:20 AM), <http://www.musicweek.com/story.asp?sectioncode=1&storycode=1040382&c=1>.

<sup>171</sup> Ernesto, *The Pirate Bay, A Year After The Verdict*, TORRENTFREAK.COM (Apr. 17, 2010), <http://torrentfreak.com/the-pirate-bay-a-year-after-the-verdict-100417>.

<sup>172</sup> *Id.*

<sup>173</sup> *See supra* Part III.

case and set the tone for future litigation concerning copyright infringement not only in Sweden but in the EU.<sup>174</sup> For example, one commentator has asked, “Will Google . . . fall foul of copyright laws simply for returning a search result that links to a site that does not have permission to host copyrighted material?”<sup>175</sup>

Regardless of the outcome of the appeal,<sup>176</sup> the fact remains that The Pirate Bay will likely continue to exist until a new technology replaces it in the sea of “a long line of filesharing Web sites against whom legal action has been taken.”<sup>177</sup> One commentator noted that:

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<sup>174</sup> See *supra* notes 149–62 and accompanying text.

<sup>175</sup> Claudine Beaumont, *What does The Pirate Bay ruling mean for the web?*, TELEGRAPH (Apr. 17, 2009 12:23 PM BST), <http://www.telegraph.co.uk/technology/news/5170684/What-does-The-Pirate-Bay-ruling-mean-for-the-web.html>. See also *Appeals Court: Pirate Bay Admins Still Guilty, Now With Higher Fines*, WIRED (Nov. 26, 2010 19:39 EST), <http://www.wired.com/threatlevel/2010/11/appeals-court-pirate-bay-admins-still-guilty-now-with-higher-fines>. For example, though the Appeals Court recently announced its ruling:

[t]he site itself has managed to stay up during all of this legal back and forth, despite numerous attempts to take it down. Recently, a German court issued an injunction against one of the Pirate Bay’s chief ISPs, Cyberbunker, demanding that service to the site be cut off, but the pirates have since shuffled around their ISP and hosting setup in order to remain online.

*Id.*

<sup>176</sup> The Svea Appeals Court announced its ruling at the time of the printing of this Article, and neither a Swedish nor English version of the Court’s opinion was yet available. Nonetheless, the Appeals Court upheld the convictions of Peter Sunde, Fredrik Neij, and Carl Lundstrom in aiding copyright infringement, and the fourth defendant, Gottfrid Svartholm Warg, did not participate in the trial due to illness. Straying from the trial court’s ruling, however, the Appeals Court “reduced their prison sentences from one year each to between four and 10 months . . . and raised the amount they have to pay in damages to the entertainment industry to 46 million kronor (\$6.5 million).” Despite the reduction in jail time, Neij’s attorney stated that he would likely appeal the case to the Swedish Supreme Court. *Swedish Court Upholds Convictions in File-Sharing Case*, N.Y. TIMES (Nov. 26, 2010), [http://www.nytimes.com/2010/11/27/technology/27pirate.html?ref=the\\_pirate\\_bay](http://www.nytimes.com/2010/11/27/technology/27pirate.html?ref=the_pirate_bay).

<sup>177</sup> *Id.*

[t]he prosecution of Napster almost a decade ago was supposed to nip piracy in the bud; instead, canny web users have simply found other ways to swap music and videos, be it through instant-messages or emails, or sharing hard drives and music libraries.

Given that such legal action does not appear to be producing the desired effect of stemming the tide of copyrighted material, it begs the question as to why the industry continues to fight these battles in court. . . . [T]he answer is quite simply because it has to be seen to be doing something.<sup>178</sup>

But “doing something”<sup>179</sup> may be all that is happening. Although piracy has been around since objects existed to be pirated, the current spotlight on The Pirate Bay sheds light on a revealing parallel—neither shows any sign of extinction.<sup>180</sup> In fact, it is perhaps telling that even “before the Swedish courts gave their official ruling on the trial [that] morning, the guilty verdict had already been leaked online.”<sup>181</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See Paul Douglas, *15 Memorable quotes from the Pirate Bay's Peter Sunde*, TECHRADAR (Mar. 14, 2010), <http://www.techradar.com/news/internet/15-memorable-quotes-from-the-pirate-bay-s-peter-sunde-676735>. Pirate Bay's Peter Sunde said:

On whether the Pirate Bay can be shut down:

“No—it's like HAL—it has its own life. It's probably impossible. You'd have to take down the domain or something and then someone will hack ICANN and give us our own top-level domain. Perhaps .peter [as opposed to .piratebay or .brokep]. Or maybe I'll just own the dot—that will be mine.”

*Id.*

<sup>181</sup> Beaumont, *supra* note 175.



