



Are The Pirate Bay and Google basically the same?

Summary

Both technically and structurally, The Pirate Bay and Google are very different. The argument put forward by the defence that The Pirate Bay essentially provides the same services as Google is therefore not true. By calling upon this argument, The Pirate Bay hopes to be awarded the same kind of legal protection that the Electronic Commerce Directive offers to Internet Service Providers. Besides the fact that this legal protection probably does not apply to search engines in the first place, the fundamental differences in set-up between The Pirate Bay and Google make resorting to these provisions seem like a far stretch.

Introduction

The ruling in the court case against The Pirate Bay is due in a few days. The courts will decide whether the administrators of The Pirate Bay are complicit in copyright infringement. The key question is whether The Pirate Bay, as service provider, can be held liable for actions undertaken by its users.

According to The Pirate Bay, the answer is no: it cannot influence or be held liable for its users' activities. The defence backed up this argument during trial by claiming that The Pirate Bay is similar to search engines like Google: it is a service that allows users to search for files, some of which just happen to be illegal. The defence also argued that The Pirate Bay is merely a conduit for information: like Google, it does not store copyrighted material on its servers.

By positioning itself as a Google-esque service that cannot (hope to) influence its users, The Pirate Bay wishes to lay claim to the same kind of protection enjoyed by Internet Service Providers under European (and consequently Swedish) law. According to article 12 of the Electronic Commerce Directive, Internet Service Providers cannot be held liable if they function as intermediaries or *mere conduits* for information. Furthermore, article 14 protects hosting providers with a similar protection for content stored on their networks. With regards to the criminal court case against The Pirate Bay, this would mean The Pirate Bay cannot be deemed to be complicit in copyright infringements. Would the case against The Pirate Bay be a civil case, then the outcome would be that The Pirate Bay cannot be held liable for damages suffered by third parties (copyright owners).

But are The Pirate Bay and Google the same? And is The Pirate Bay really eligible for the same kind of legal protection? In order to find answers to these questions, we need to delve into the service's technical and structural set-up, as design is a crucial factor in making judgements about legitimacy.

Technology

Google and The Pirate Bay are both search engines, but the heart of the matter is that they focus on retrieving different kinds of information. Google searches the World Wide Web for every conceivable kind of information (web pages, PDF files, spreadsheets and so forth), whereas The Pirate Bay only retrieves .torrent files. These are small files that point the way to other files and contain the information required to start downloads via a P2P BitTorrent protocol. In effect, .torrent files act as links to other files whose names more or less correspond to their .torrent counterparts.

Index

In order to speed up the search process, Google and The Pirate Bay both employ indexes. Google



indexes large parts of the World Wide Web, The Pirate Bay only indexes .torrent files. In order to fill its index, TPB offers users the possibility to upload .torrent files unto its servers and provide them with comments. The Pirate Bay does not, however, moderate this process.

Google, on the other hand, does offer users the possibility to add an URL to the URLs it indexes, but provides no options for directly influencing or commenting on search results.

Tracker function

A major technical difference is that The Pirate Bay operates a so-called tracker. The tracker is an important part of the BitTorrent protocol. Pirate Bay trackers (and the third party trackers The Pirate Bay refers to) ensure that .torrent users are directed to the various users that offer fragments of the file they wish to download.

Google has no use for tracker functions because it only directs users to specific Internet pages on the basis of the keywords they entered. These pages contain the actual information. Google does put Internet pages in a cache in order to expedite the search process, but this is a purely technical procedure.

To summarise the technological side of the equation: Google is a service that makes the available information on the World Wide Web retrievable without interfering with the information as such, whereas the Pirate Bay provides a framework for file-sharers who use it to track down files uploaded by their peers (indexing, .torrent hosting, tracking).

The Pirate Bay and Google: service structure

Differences in set-up between Google and The Pirate Bay can be just as relevant for copyright infringement issues as technological differences. The reason for this is that the way in which Internet Service Providers organise their services plays a part in determining liability.

As mentioned above, the two search engines differ mainly in focus, with Google conducting 'neutral' searches in the sense that it indexes all kinds of information. To put it more strongly: Google's corporate mission is to make all available information on the Internet retrievable. This philosophy is reflected by Google users, who search the Internet for every conceivable kind of info. By contrast, The Pirate Bay only focusses on file-sharing in general and file-sharing of copyrighted material in particular. Even though the defence argued that many of the files retrieved via the Pirate Bay are in fact legal, TPB users are interested primarily in sharing copyrighted material. The Pirate Bay (indirectly) encourages this illegal behaviour by supplying the aforementioned framework for uploading, hosting and rating .torrents.

The Pirate Bay's attitude towards copyright law and copyright owners seems to promote large-scale illegal use of its file-sharing facilities. The search engine has been known to post and ridicule Notice and Takedown requests on its website, openly flaunting its refusal to remove the disputed .torrent files. Backed by this mindset and the relative anonymity provided by BitTorrent, downloaders may feel confident that they have entered a safe haven for illegally uploading and downloading files. It goes without saying that The Pirate Bay moniker was not chosen at random: it refers to a safe haven for pirates.

By targeting and catering to a specific niche, The Pirate Bay proves to be structurally different from Google. Google acts as an access provider, offering technical facilities to search the Internet without 'messing with the message', so to speak. The Pirate Bay seems to be an amalgam of a highly specialised search engine and a social platform, the actual use of which revolves mainly



around sharing copyrighted works.

The Pirate Bay and legal liability

On the aforementioned grounds, we may form a judgement on whether The Pirate Bay can be held liable for copyright infringement. It should be noted, however, that interpretations of the liability exemptions for internet service providers may differ from one EU Member State to the next, resulting in different assessments. This article focusses mainly on the situation in the Netherlands.

Criminal liability

The Pirate Bay's administrators are being prosecuted in Sweden for complicity in infringements of copyright law. Initially they were also charged with copyright infringement, but these charges were dropped for lack of evidence. Users often make use of third party trackers or Distributed Hash Tables (DHTs) for the direct exchange of files, without The Pirate Bay being involved. The public prosecutor was therefore unable to prove that the downloads brought as evidence were actually initiated through The Pirate Bay's trackers.

In order to secure a conviction for complicity in copyright infringement, the prosecutor will have to prove that The Pirate Bay's administrators had the intention of facilitating other people's breaches of copyright law. The following factors may come into play: the way The Pirate Bay is set up, whether or not its administrators are aware of copyright infringements by users and whether or not they are (or should be) able to combat these activities. According to the prosecutor, The Pirate Bay is indeed complicit in other people's infringements of copyright law on account of its set-up and the actions of its administrators.

According to the defence, however, The Pirate Bay falls under the protection of certain provisions in the Electronic Commerce Directive that would exempt them from criminal liability. These provisions are applicable to both civil and criminal procedures and can be found in articles 12 – 14 of the Electronic Commerce Directive.

The Pirate Bay called upon article 12 of the Electronic Commerce Directive as primary defence. This article states that internet service providers cannot be held liable for (the content of) the information transmitted through their networks if they 1) only provide the technical facilities for the transmission of information 2) do not initiate the transmission of information, and 3) have no involvement in the content of the transmissions. In such cases, ISPs basically act as 'mere conduits'. The Pirate Bay argued that it does not initiate transmissions, nor does it interfere with the content of transmissions. On these grounds, it could at least in theory be eligible for the same liability exemptions as ISPs. But the question is whether The Pirate Bay can indeed be regarded as a 'mere conduit'. Article 12 is primarily aimed at access providers rather than intermediary information society service providers like The Pirate Bay. Article 12 of the Electronic Commerce Directive only apply to situations in which information is being transmitted through the networks of the party concerned; The Pirate Bay revolves around the direct exchange of information between peers. One might also argue that The Pirate Bay's trackers actually help to bring about information exchanges between different parties, as a result of which the provisions of article 12 would no longer apply.

The Pirate Bay also called upon article 14 of the Directive, which deals with the legal protection enjoyed by hosting providers. Resorting to this argument seems a little odd, considering The Pirate Bay's earlier claimed that it does not host any content (apart from the .torrents). In any case, it seems unlikely that The Pirate Bay will be able to lay claim to article 14's exemptions, as The Pirate Bay is not in the habit of complying with Notice and Takedown requests. Hosting providers



may only call upon article 14 if they are unaware of the presence of copyrighted material. If they are, they should take appropriate measures to remove the disputed files. Since The Pirate Bay has been served with many Notice and Takedown requests over the years and has yet to remove a single .torrent, the chances of successfully mounting an article 14 defence seem slim. The argument that they merely provide links to copyrighted material is similarly feeble, as providing links to illegal material is generally viewed as an unlawful act in its own right.

Furthermore, provisions for ISPs may not apply to search engines in the first place. Article 21 of the Electronic Commerce Directive states that expanding ISP provisions to include search engines and providers of hyperlinks shall be a matter for consideration in future evaluation reports:

“In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services [...].”

Since the status of search engines and providers of hyperlinks has yet to be evaluated, The Pirate Bay seems ineligible for the liability exemptions as specified by the Electronic Commerce Directive.

With these considerations in mind, it is doubtful if The Pirate Bay will succeed in laying claim to the protective provisions in the Electronic Commerce Directive. In order to secure a conviction, however, the prosecutor will still have to convince the judge that The Pirate Bay promoted other people's infringements of copyright law. This requires proof that The Pirate Bay's administrators actually intended to facilitate copyright infringements. The following arguments come into play: 1) are the founders of The Pirate Bay aware of copyright infringements and 2) do they take measures to combat these unlawful activities?

Judging by their attitude and the frequent ridiculing of Notice & Takedown requests on their website, it is safe to say that The Pirate Bay's administrators are indeed aware of unlawful activities taking place. Even though one should always be wary of making assumptions about other people's intentions, I personally feel they are at least guilty of oblique intent: the administrators should know they are enabling or even promoting breaches of copyright law, even if this is not their main objective. In view of this, there is a good chance that they will indeed be found guilty of promoting other people's infringements of copyright law.

Civil liability

Even though The Pirate Bay is now facing criminal charges, civil procedures should not be discounted: civil action has been brought against comparable services such as ISOHunt and MiniNova.

An answer to the question whether or not BitTorrent trackers are subject to the liability exemptions as specified by articles 12-14 of the E-commerce Directive is equally relevant in a civil case. As such the arguments listed above would apply to civil cases as well. However, in civil cases, the focus is not so much on establishing the administrators' guilt or intent as it is on establishing how services like The Pirate Bay relate to the interests of third parties, e.g. copyright holders. When the operation of a service infringes on the rights of third parties, the operator of the service might be held liable for damages suffered by third parties.

An answer to the question whether or not the Pirate Bay can be held liable for damages suffered by third parties may differ from member state to member state, depending on the how the courts have treated the issue of liability of intermediary information society service providers. For this article I will discuss the Dutch situation since there is extensive case law about this issue in the



Netherlands. Furthermore, the civil suit against MiniNova (a similar service to the Pirate Bay) is set to take place in the Netherlands next month.

Over the years, there have been a number of rulings in the Netherlands on the civil liability issue that may help to clarify the position of BitTorrent trackers like The Pirate Bay. The most relevant ruling in this respect concerns the case of BREIN (a Dutch anti-piracy authority) versus TechnoDesign¹, in which the courts ruled that search engine ZoekMP3 was not automatically eligible for the same liability exemptions as internet service providers.

While the courts stressed that search engines are not inherently unlawful, even if they do index illegal content, they ruled in this specific case that ZoekMP3 was liable for the behaviour of its users. Deciding factor was the fact that ZoekMP3 was enabling users to search primarily for copyrighted works. This convinced the judge that the search engine had indeed acted unlawfully towards copyright owners.

The stance taken by the judge in the ZoekMP3 case was later confirmed by the BREIN versus KPN case², which concerned a Dutch Telecom (KPN) customer who posted BitTorrent links. The courts ruled that while the customer in question did not make copyrighted works available to the public, he did fail to exercise due diligence with regard to copyright owners' rights by facilitating multiple acts of copyright infringement. Similarly, judges in the BREIN versus Leaseweb case ruled that Leaseweb (which hosted the BitTorrent website Everlasting.nu) was not guilty of making copyrighted works available to the public, but did fail to exercise due diligence with regard to copyright owners' rights.³

The law of torts

In Marktplaats versus Stokke, a case which by the way had nothing to do with BitTorrent or file-sharing, the courts formulated a number of criteria for determining whether service providers are acting unlawfully towards third parties.⁴ These criteria are:

- 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 & Takedown procedures

These criteria can be used to assess the liability of The Pirate Bay.

As we have established earlier in this article, The Pirate Bay far surpasses ZoekMP3 in terms of enabling the search for and exchange of copyrighted works. It is therefore safe to say that The Pirate Bay contributes to copyright infringements. As to the second criteria: evidence also suggests that The Pirate Bay benefits from these infringements. Even though the administrators vehemently deny they are making a profit from their website, it is likely they are garnering considerable amounts of revenue from selling ad space. Comparable services such as MiniNova show that a million euro turnover is well within the realm of possibility. As to number 3: The Pirate Bay clearly operates a policy of ignoring and even ridiculing Notice & Takedown requests, as it adamantly refuses to remove torrents files.

1 LJN: AX7579, Court of Amsterdam, 1157/04

2 LJN: AZ5678, Court of The Hague, 276747 / KG ZA 06-141

3 LJN: BA7810, Court of Amsterdam, 369220 / KG ZA 07-840 AB/MV

4 LJN: AW6288, Court of Zwolle, 106031 / HA ZA 05-211



In view of the outcomes of similar trials such as BREIN versus TechnoDesign, BREIN versus KPN and BREIN versus Leaseweb, as well as the criteria formulated in Marktplaats versus Stokke, it seems obvious that The Pirate Bay would stand little chance in a civil procedure under Dutch law.

Conclusion

Both technically and operationally, the services provided by The Pirate Bay differ from the services provided by search engines like Google. These differences are apparent in The Pirate Bay's primary focus on the illegal exchange of copyrighted works and the framework it provides for this very purpose.

It is unlikely that The Pirate Bay will be successful in its attempts to call upon the liability exemptions stipulated in articles 12 -14 of the Electronic Commerce Directive. And even if it were: due to its design and the actions of its administrators, The Pirate Bay has little hope of being a legitimate service in the eyes of the courts, particularly in civil cases.

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