
FILM PIRACY AND THE PIRATE BAY CASES

Indiana University School of Law-Bloomington, April 13, 2010

JOHN MALCOLM*: I thought I'd talk a little bit about the extent of movie piracy and something about what's going on in the fight against piracy. A lot of the action is now taking place internationally. But before doing that, I thought I'd talk a little bit about the movie industry and what's at stake here.

I hope we can all agree that movies are a tremendous cultural resource for this country. Movies profoundly affect the lives of people around the world. They make us laugh. They make us cry. They allow us to leave whatever it is we do during the day to be entertained for a while. And probably most importantly, they cause us to think about and rethink positions that we've taken on political and social issues.

In addition to being a very important cultural resource, filmed entertainment, which includes television too, is a very powerful economic engine for this country. There are over 2.5 million Americans employed in the movie business, and the overwhelming majority of these people are not Julia Roberts or Will Smith. They are grips and carpenters and set designers and animators and special effects designers. They're not mega-millionaires; they're just average citizens who happen to have a particular talent. They're trying to make a decent living for their families doing something that they enjoy, producing a product that we all get to enjoy as well.

In addition to that, making a motion picture is a very expensive and actually quite a risky undertaking. Everybody hears about the winners that make a lot of money, and certainly those films are there—*Dark Knight*, *Transformers*, *Avatar*, *Alice in Wonderland*—but for every one of those films, there's *Land of the Lost*, *Funny People*, *The Love Guru*, and *Speed Racer*, films that cost buckets of money, and the people who made them lost their shirts. In general, it costs over \$100 million to make and market a major motion picture, and some films cost way more than that. Most films, throughout the lifecycle of the movie across all windows, end up losing money. There are ominous signs out there. While box office revenue is way up and people hear about the big winners at box office, and while rental is way up too, those constitute only a relatively small portion of the business.

Home entertainment, which is a much bigger portion of the business, is way down. DVD sales were off nine percent in 2008, thirteen percent last year, and in some countries

** John Malcolm is General Counsel at the U.S. Commission on International Religious Freedom. He is a former executive vice president and director of Worldwide Anti-Piracy Operations for the Motion Picture Association of America. He served as a deputy assistant attorney general in the Criminal Division of the U.S. Department of Justice from 2001-2004. A Harvard Law School graduate, he clerked for federal judges in the Northern District of Georgia and on the Eleventh Circuit Court of Appeals.*

Mr. Malcolm made these remarks in a debate with Ms. Beth Cate, Associate General Counsel for Indiana University, at Indiana University School of Law-Bloomington on April 13, 2010. We are seeking to publish Ms. Cate's remarks in a future issue of Engage.

like South Korea, the home entertainment market is dead. Hollywood Video declared bankruptcy last year. Blockbuster lost \$483 million last year and has \$1 billion in debt. It recently announced that it's closing over 1000 of its 5000 stores (including the one in my neighborhood).

Piracy obviously has a tremendous impact on the movie business. In terms of the extent of the piracy problem, in 2005 the MPAA undertook a study, not perfect but by far the most assiduous study that had been undertaken, about the effects of piracy in the movie industry, and in 2005 it was estimated that piracy cost the movie business over \$18.2 billion. The situation since 2005 has undoubtedly gotten worse, in part because technologies have improved which create all sorts of opportunities but also create possibilities for abuse. Streaming piracy didn't exist in 2005. Cyberlockers and newsgroups are now used to commit piracy on a broad scale. And of course, broadband has proliferated, and where you have large broadband penetration, you're also going to get more piracy.

The greatest impact, I would posit, of piracy is on the kinds of films that I happen to love, those which have edgier content, mid-budget films in the \$15- to \$60-million range that are made by independent producers and that frequently feature new directors and new actors, people who are incredibly talented but we don't know about them yet and who have unproven box office appeal.

There's a lot happening on the piracy front, some of it taking place domestically. Two federal judges in California recently issued important rulings, one against a company called Real DVD, another against a major torrent site called isoHunt. However, the real action, it seems to me, is taking place, both legislatively and in terms of other negotiations and litigation, overseas. One case that got a lot of attention that I was asked to talk about was the *Pirate Bay* case. The *Pirate Bay* was a criminal prosecution in Sweden, a country that is not really known for robust criminal enforcement of IP rights.

For those of you who don't know what it is, the Pirate Bay is one of the most notorious and outspoken facilitators of peer-to-peer piracy in the world. It was set up to facilitate and profit from the illegal distribution of copyrighted material over peer-to-peer networks, and they have a staggering volume of material—movies, music, games, software, books, TV shows—that have been produced by creative artists around the world. To give you an indication as to how big and popular it is, the last time I checked, Pirate Bay was available in thirty-four languages. It touted that it had well over twenty million simultaneous users. They have well over a million torrents on that site, and at one point, the University of Delft estimated that fifty percent of the BitTorrent traffic around the world is handled by Pirate Bay's trackers.

In January 2008, the four owners and operators of the site, Fredrik Neij, Gottfrid Svartholm, Peter Sunde, and Carl Lundström, were charged with copyright infringement. The trial took place in February 2009. The evidence presented at trial showed that these individuals made a lot of money. Although

they testified that they made just a pittance, in fact, they got a lot of money from banner ads and contributions and had bragged in e-mails that they were making over \$3 million a year that they were splitting amongst themselves.

They argued at trial that the copyright-infringing files were not “hosted” on Pirate Bay. That was certainly true. They also argued that they didn’t have any idea about whether the torrents posted on their site actually linked to infringing material, which was laughably untrue. They set up sites on the Pirate Bay, which is very well-designed with a user-friendly interface, for things like Academy Award films, many of which had only had a very limited release in the theater, and also for ripped Blu-rays. They said that the Pirate Bay would only remove torrents if the name associated with the torrent isn’t in accordance with the content. They went on to say, and the site still says this, that any complaints from copyright and/or lobby organizations will be ridiculed and published at the site. That’s an understatement.

At a conference in Malaysia in 2008 called Hack-in-the-Box, Sunde and Neij gave a keynote speech titled *How to Dismantle a \$1 Billion Industry as a Hobby*. In 2008, Swedish book publishers complained that eighty-five percent of the bestselling books in Sweden were on the Pirate Bay site, to which Peter Sunde said that he was a bit sad that it wasn’t a hundred percent. In response to a takedown request from Apple’s lawyers, they sent back a reply suggesting that they use a particular model of a retractable baton in order to sodomize themselves.

Last April, the owners and operators of the Pirate Bay were convicted. They were sentenced to a year’s imprisonment, which is practically unheard of in the Swedish justice system, and a \$4 million fine, less than the victims wanted but still a pretty hefty fine. Not surprisingly, they are appealing that judgment, and only time will tell whether or not they are going to get their just desserts. The site remains up.

There are other developments going on, some of them favorable to rights holders, some of them not so favorable. The potential liability of ISPs and other online service providers is being tested out there in a variety of fora. Copyrights holders lost a big case in Australia recently against an ISP called iiNet. The year before, they won similar litigation against a Belgian ISP called Belgacom. The iiNet decision is going to be appealed.

Another big event that happened—there’s a large cyberlocker, the most popular cyberlocker in the world, called RapidShare. There’s a lot of legitimate material on RapidShare, but there’s also a lot of pirated material on RapidShare—RapidShare has been sued successfully four times by the German Music Association. They just announced that they’ve entered into a deal with Warner Brothers, and they’re going to test a site called RapidMovies that has the potential, if it works out, of offering, for a fee, premium content on the RapidShare site for Warner Brothers.

Rights holders won an important victory against a large indexing site in the Netherlands called Mininova. Some of you may have heard that. Mininova is still popular, but they have now yanked or are continuing to try and yank the copyrighted material from the site, and the site is not nearly as popular as it used to be. A lot of that traffic is moving to other sites. Rights holders also won a big case against a UK-based newsgroup

indexer called NewzBin. So you’re starting to see that kind of litigation going on.

There is also a lot going on, on the legislative front. In New Zealand, in Taiwan, and in France, legislation has been passed, in varied forms, in which ISPs will have some role to play in terms of trying to clear up their networks, and people who use those accounts in order to engage in copyright infringement will receive various warnings. They’ll have many opportunities to stop the kind of activity, but if they continue to recidivate, they run the risk that they’re going to get their accounts suspended or possibly terminated. In the UK, the House of Commons just passed the Digital Economy Bill, which does the same thing, so we’ll see what happens when that goes to Parliament, but passages seems to be a foregone conclusion. And there a lot of discussions going on in the U.S. with Comcast, Time Warner Cable, Verizon about similar things. Congress has not poked its nose into this business yet, so we’ll see what happens.

None of this is a silver bullet. There are always going to be very tech savvy people out there who want to get cool stuff for free, and they’re going to find a way around whatever system is put in place, whether it’s through proxies, encryption, anonymizers, or other systems that copyright holders will have to contend with. There are also a lot of very important questions that have to be asked with respect to the systems that are put in place—overbreadth and censorship, due process rights—to deal with people who have allegedly engaged in infringing activity. All of these are implicated, and they need to be addressed from a moral perspective, a legal perspective, and a technological perspective.

Now, hopefully, these matters can be addressed in a sensible and civil way. Certainly, I have my doubts about the latter; I have some hope for the former. And if they’re addressed properly, then people are going to be able to take full advantage of all the wonderful opportunities that the Internet presents while at the same time leaving plenty of room for creativity and for the rights of artists who utilize their time and talents to enrich our lives.

Thank you.

Mr. Malcolm Response: With respect to the problems that we face and with respect to orphan works, I sympathize with you. I’m totally agnostic on orphan works. I do not care about the licensing of that. I’m also agnostic—since I no longer work with MPAA and the studios—with respect to the rightness of the length of the copyright terms. Probably the pendulum has swung too far.

I also agree with you that legislation, particularly when you’re dealing with these sorts of technologies that are changing practically monthly, is a very blunt instrument, and that, while it can do some good, it can also serve as a hindrance on a marketplace. And I agree with you that trying to figure out how to address consumer demand in terms of getting content to them in ways which they would like that are legitimate and that respect the artist is also very important part of this debate.

Now that having been said, there are a couple of points to make. You said you don’t want to be in a regime that brands quite possibly everybody in this room with being a criminal. I would say in that regard that the argument goes a little bit far,

in that there is a difference between an end-user lawsuit, which is a civil lawsuit, and a criminal prosecution, where somebody's going to become a misdemeanor or a felon, and that in terms of the types of criminal cases that have been taken by state and federal authorities (state for trademark; federal for copyright), they really have been judicious. If you look at the piracy prosecutions, they're targeting first uploaders of content, people who are running these pirate sites, the illegal camcorder thieves in the case of the movie industry. Those are the types of people who are going to be targeted for criminal prosecution.

I do hear your point about the fact that if you're a student and you're facing a very hefty fine, that could certainly seem very criminal to the person who is having this imposed upon him. I would say, one, any kind of settlement agreement that says, "pay a relatively small settlement amount, but if do this again, all bets are off," I wouldn't consider that particularly draconian. In fact, that's very common with respect to civil lawsuits of all kinds. It seems to be a fairly standard provision.

I would say, with respect to the large potential fines, two things. Again, you could quibble about whether it's the right amount or the wrong amount. One, it is an attempt to estimate an unknowable amount, which is the amount of harm to the rights holder that is caused by that particular act of infringement. Let's face it, we now live in a digital world where the Internet is borderless and seamless, and that one copy that you have can end up being duplicated thousands if not tens of thousands if not hundreds of thousands of times.

The other thing I would say is that everybody knows that the odds of your being sued are small. I mean, in a regime in which 30 million people around the world are engaging in infringement activity simultaneously as we speak, the odds of your getting plucked out are slim. But it is also the case, and it's case with many other laws such as antitrust penalties, which can result in treble damages, that Congress wants to have a big deterrent there so that if you're engaging in this sort of activity, the odds of your being caught are slim, but if you are engaging in this risky activity, and if you get caught, don't come crying about it, because you were warned ahead of time that the consequences could be great. Is the figure right? Who knows? But there is at least some methodology and thought behind that.

