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SGAE v Jesús Guerra Calderón

Case No. 261/09, Barcelona Commercial Court No. 7, 9 March 2010

The Barcelona Mercantile Court ruled, amidst much criticism, that websites offering links to peer-to-peer file sharing networks do not, in themselves, infringe any rights and are, therefore, to be considered as legal.

Are peer-to-peer (P2P) systems legal in Spain? Many people thought this question was answered in a recent judgment from Barcelona's Mercantile Court No. 7. However, as we shall discuss throughout this article, the question is still awaiting a proper judicial response. The Spanish courts of the criminal jurisdiction have repeatedly stated - for five years now - that P2P networks and websites offering free content downloads protected by copyright are not committing a criminal offence. Although we have recently seen some exceptional decisions - saying the opposite, in most cases - criminal judges have found this type of behaviour does not meet one of the requirements of the Criminal Code: the existence of a profit-making activity, which must be direct and actively linked to the actions of the accused.

As we all know, most web pages for downloads and P2P systems are free and do not require paying a price for the content.

Public prosecutors were instructed years ago by the General Public Prosecutor's Office not to take action against P2P websites offering copyrighted content for free. Therefore, most cases brought in front of the criminal jurisdiction have systematically been rejected.

The case

This situation has forced copyright owners and their collecting societies to focus their legal claims on civil proceedings. One of the first civil lawsuits was brought in October 2007 by the *Sociedad General de Autores y Editores* (SGAE) - the largest collecting society in Spain, representing many authors and publishers - against Mr. Jesús Guerra Calderón ('the Defendant'), an individual owning the website www.elrincondejesus.com ('Jesús' corner'). The lawsuit was based on

the request for closure of the site as well as compensation for damages. This website provided access to musical works for free and without any restriction (the rights associated with these works were managed by the SGAE). Users also had access, among other things, to files with movies, documentaries and TV series. However, the Defendant alleged that the content was not hosted on his website as he simply offered links to 'P2P eDonkey 2000', a platform using 'eMule' software. In his defence, the defendant also insisted on the free nature of his website.

In the opinion of the SGAE, the fact that the website did not host information protected by copyright was not relevant because the links were also a form of unauthorised reproduction, distribution and public communication which still violated the rights of some of SGAE's members. At the same time, the fact that the website was free did not preclude a civil infraction from taking place as the profit motive is a requirement for criminal proceedings only.

Since 2005, all intellectual property (IP)-related litigation has been handled by newly created courts, the 'mercantile courts'. As a consequence, the competent court for this lawsuit is a specialised court, expert (in theory) in IP law. The Judge considered as proven all facts alleged by both parties. However, it seems to have been of paramount importance that the website did not store the works themselves but just facilitated access to them by way of a linking system (this was done free of charge). By mentioning these circumstances and without any further comment, the Judge concluded that a link cannot be considered as a web page. He also held that there could not be any act of distribution, reproduction or public display of a copyrighted

work through such a link. In conclusion, the Defendant's behaviour - creating an index which facilitated and guided users to access P2P networks, even if it added the covers for the linked movies or musical works - could not be regarded from the perspective of Spanish law or that of EC law, as a prohibited act. For the Judge, linking systems and search engines 'like Google' [sic], are the essence of the internet and could therefore not be prohibited. With this very unfortunate comparison, the Judge ended the second section of the judgment. In the opinion of all experts, this was a very poor decision, empty of any legal basis or reasoning: it appeared to carry the Judge's personal opinion rather than a grounded judicial decision.

The decision did not surprise the SGAE or its members since the same Judge rejected the preliminary injunction petition several months before. More surprisingly, however, was what came next: Sections three to five of the judgment comprised of a detailed justification of the legality of P2P file sharing systems. This was really surprising for everyone, as there was no justification for the Judge to go into such legal details on this aspect.

All experts have unanimously confirmed that the Judge, in this case, went beyond his duties. The problem is that although he was not empowered to do so, the Judge ruled extensively on the legality of P2P systems. More than this, he declared them legal as a matter of principle.

The question now is if this decision creates a civil judicial precedent in further cases where a real P2P network is prosecuted. For now, the decision has been appealed to the Superior Court, the *Audiencia Provincial de Barcelona*, whose Section 15 also specialises in

IP. Until such a decision is made on appeal, there is no doubt that the precedent is not binding.

Analysis

The reasoning of the Barcelona Mercantile Court on P2P networks contains certain statements that are absolutely certain - for example, the fact that data transmission system between individual internet users does not, in itself, infringe any IP right. This statement only serves to state an obvious fact: similarly, owning a motor vehicle is not illegal in itself but driving it at 200km/h is a criminal offence.

This comparison is equally applicable to P2P systems. If the existence of such systems is not illegal when used to exchange copyright-protected content, the question will then focus on when these file sharing systems are allowed by law or protected by a third party right, like in most cases. There is no mistake as to the Judge's reference when he held that the content exchanged had, at least once, had a lawful origin because someone had to purchase it before uploading it. Upon purchase, this consumer also acquired the right to make a private copy.

Privately copying copyrighted content - after it has been purchased by a consumer - is legal in Spain (i.e. a backup copy of a software program, for example). The copyright owner is paid by his collecting society for this copy because the collecting societies levy a certain amount of money from CD and DVD manufacturers, as well as from those who create similar devices where the private copy can be stored.

However, what about the second copy and the following ones made by third party users? The Judge did not comment on this particular aspect. As for making the content available to the public, the Barcelona Mercantile Court ruled

that EC Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society was not infringed by P2P systems. Indeed, the Judge said that, because the first user uploads the content onto the network, he cannot possibly know if the file will be downloaded only by a single user or by many. This reasoning is, in our opinion, very poor and even naive.

In a country like Spain, where piracy through P2P systems is common, and where the resounding majority of the population finds no reason to consider it illegal to download files from sharing networks - despite what the law says - this ruling has been hailed as the 'judicial confirmation' of something that was natural and that 'we all did'... How could it be illegal to use something that is freely available on the internet?

Whatever the reasoning behind, the truth is that these socially accepted acts are sending the entertainment sector to ruin. Many companies, video game producers and music labels have considered Spain a lost market.

The Spanish Government is aware of the situation and of the courts' apparent reluctance - in any jurisdiction - to restrict the socially accepted custom of free access to content protected by IP law. Therefore, a few weeks ago, a legal amendment was passed that established a special 'Administrative Commission' within the Ministry of Culture. This Administrative Commission was given the authority to shut down, in a timeframe of four days, those websites that are found to be infringing IP rights.

Any new rule on file sharing is dependant on the development of the case at issue. We do not know the details of any future proceedings. In any event, the case

has already been criticised by many sectors - the entertainment industry and relevant associations of copyright holders would have preferred a judicial reform effectively tackling illegal file sharing instead of a new Administrative Commission.

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