Conclusion

There is no doubt that the cloud computing model is stretching the mechanics of the European data protection regime. The restriction on international transfers and the model of linear data controller-to-processor contracts is at odds with cloud computing and the increasingly globalised IT industry. Fortunately, the European Commission now appears to be recognising the need for change. In an ongoing consultation and at the accompanying conference in May 2009, the Commission is seeking the opinions of stakeholders on the new challenges for data protection and the need for an effective information management strategy in the European Union. Unfortunately, as with any fundamental change of law or policy, the results of this process will not be seen for some time as the basic principles are firmly enshrined within the Directive and the national law that implements it. However, the issues of security and privacy of data within the cloud are current issues and demand an effective solution quickly. Therefore, while the law makers debate the issues there is substantial opportunity for an industry-led solution of a European cloud environment with data protection at its heart.

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The Pirate Bay case: repercussions beyond Sweden?

As has been widely reported, on 17 April 2009, the Stockholm District Court found four people connected with the notorious BitTorrent index site, The Pirate Bay (TPB), guilty of assisting a form of copyright infringement. The four were ordered to pay SKr30m (US$3.7m) in compensation and damages and were each sentenced to a year in jail. The judgment was a welcome development for rights holders who have been thwarted by TPB over the years: not only did it check the swagger of their Swedish antagonists, but it also sent a strong message to the illegal downloading community that, contrary to widespread belief, these kinds of index sites are not immune from liability. But now that the media fanfare has by and large calmed down – at least until the appeal, and notwithstanding one of the defendant's recent calls for a retrial on the basis that the judge is a member of Swedish copyright and intellectual property associations – what is the significance of this decision, and what, if any, are the repercussions beyond Sweden?

Liability of index sites?

The main issues in this case revolve around the technology that is used to distribute unauthorised copies of files, and the role that administrators of the site play in the process. As many readers will be aware, by making more efficient use of bandwidth and network resources, BitTorrent enables faster downloads than other peer-to-peer systems and is now one of the most widely used protocols to distribute both legitimate and unauthorised copies of content. Because BitTorrent is merely a protocol without any built-in search capacity for content, however, it is up to users to find .torrent files. Torrent index sites such as Mininova.org, Isohunt.com and TPB make this job easier by listing available torrents and organising them under different categories (eg, games, music, e-books, etc). Many of these sites, including TPB, also run 'tracker' servers that coordinate the retrieval of files from multiple peer sources.

TPB and many other BitTorrent index sites maintain that they are not directly infringing copyright because they are not copying copyright works or otherwise making available such works without authorisation. Instead, many claim they are merely providing a service that allows users to search for .torrent files and are essentially no different to a search engine. TPB is the most extreme advocate of this argument, and unlike many popular index sites that comply (at least in our experience) with take-down notices and will remove infringing content, TPB has historically taken great satisfaction in publicly refusing to remove content at the request of rights holders.

Whether such index sites are in any way liable for copyright infringement has been disputed across Europe. For example, the Provincial Court of Madrid held in September 2008 that an index site (Sharemula.com) and its administrators had not infringed any laws as the website had no commercial purpose and only linked to sources of illegal content rather than hosting it. By contrast, the Logroño (La Rioja) Criminal Court held in April 2009 that the site administrator of another torrent-indexing site (infopsp.com) had profited from copyright infringement via advertising and SMS services, and sentenced him to six months' imprisonment and a fine.

The court's findings

In the present case, the defendants were found guilty of assisting in making copyright works available without authorisation from the owners of the rights in the content. The court made three key findings.

First, the court established primary infringement by holding that users of TPB infringe copyright holders' exclusive rights, including that of copying and making a work available to the public, (paras 2 and 46 of Sweden's copyright law, *upphovsrättslagen* (1960:729)). This finding might limit the viability of future defence arguments that transferring many small parts of a work via BitTorrent does not amount to infringement of a copyright work (for example, under s16(3) of the UK CDPA 1988, an infringement must be in relation to the work as a whole or a substantial part of it).

Second, the court found the defendants guilty of assisting the primary infringement, which is an offence under chapter 23, para 4 of the Swedish Criminal Code (*brottsbalken*). Relevant factors included enabling uploading and storing of .torrent files, providing a developed search function, facilitating the distribution of files via the tracker service, consistently showing lack of concern for copyright infringement (for example, by posting takedown notices from rights holders on the site and ignoring associated email correspondence), and buying hardware to make the site more efficient.

Third, considering liability and sentencing, and in response to submissions by defence counsel, the court found that although TPB was an 'information society services' provider for the purposes of the e-Commerce Directive (2000/31/EC) – and thus eligible in principle for the Directive's safe harbours – it did not qualify for such protections. Not only was it neither a 'mere conduit' nor 'caching', the court also held TPB could not take advantage of the hosting exemption because it must have been obvious to the defendants that .torrent files on the site related to protected works, and the defendants failed to take action to remove such files despite requests from rights holders to do so.

Significance of the decision

Ultimately, the legal significance of the decision is likely to be fairly limited, as the case was decided under local criminal law (and criminal law doctrines are not harmonised across Europe). In practice, TPB continues to operate, allowing and encouraging users from around the world to access .torrent files and share unauthorised copies of protected works. That said, rights holders worldwide, many of whose works were offered via TPB, are right to welcome the judgment.

By establishing a ground of liability against TPB, the judgment is an important first step in redressing the balance against recalcitrant index sites. It also goes some way to expose the disingenuous arguments of self-styled 'Robin Hood' copyright rebels, who apparently see no contradiction in emphasising the importance of cultural works while promoting widespread infringement. And, taken in the context of the various legislative developments in France, the UK and in Brussels, regarding the responsibility of ISPs to cooperate with rights holders to prevent copyright infringement, the verdict can be regarded as a significant development in this ongoing battle.

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