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### (Paper on Internet Piracy and Copyright from the International Immersion Program 2019)

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## I. Introduction

In 2017, The European Court of Justice (“CJEU”), in the landmark copyright infringement case *Stichting Brein v. Ziggo*, analogized The Pirate Bay (“TPB”), an online BitTorrent index, to that of a treasure hunt:

“...the file being shared in the swarm is the treasure, the BitTorrent client is the ship, the .torrent file is the treasure map, The Pirate Bay provides treasure maps free of charge and the tracker is the wise old man that needs to be consulted to understand the treasure map.”<sup>1</sup>

Opponents of copyright infringement—largely comprised of media and entertainment companies (“MEs”) that create the pirated content TPB lets users search for—would re-characterize this treasure hunt as being a treasure heist where individuals—enabled by sophisticated online software—steal treasure consisting of videos, music, and other entertainment without paying for it. To make matters even worse, MEs and anti-piracy lobbying groups have spent the last two decades trying to hold the proper parties liable for copyright infringement violations but, despite many favorable court decisions and a robust set of intellectual property statutes and directives on the books in the US and the EU, have been unsuccessful in reducing online piracy.

Over the past two decades, MEs have attempted a variety of strategies to take the wind out of pirates’ sails. First, MEs tried to hold individuals who committed copyright infringement personally liable. “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>2</sup> However, suing individuals carries high “legal costs, consumes vast amounts of time, produces bad publicity, and...court

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<sup>1</sup> Case C-610/15 *Stichting Brein v. Ziggo BV, XS4ALL Internet DV* [2017] ECR, 99, para. 1.

<sup>2</sup> J. E. Bassett IV, *Unanswered Arrrguments after the Pirate Bay Trial: Dropping Sail in the Safe Harbors of the EU Electronic Commerce Directive*, 12 N.C. J.L. & TECH. 67, 76 (2010).

decisions have made it more difficult to show that individual users are liable for copyright infringement.”<sup>3</sup>

Then, MEs began “focusing on suing BitTorrent web sites and not individual torrent users.”<sup>4</sup> The MEs theory is that, despite not necessarily housing the pirated material on the website or their servers, torrenting sites are enabling users to gain access to pirated material and are therefore culpable and directly in violation of existing US and EU copyright law. However, finding torrenting sites liable has served difficult as well. One may credit the tenacity and technological savvy of those running the torrenting sites for escaping liability. And, even when individuals have been civilly and criminally liable—as is the case with the founders of The Pirate Bay—they remain largely undeterred and may have even become emboldened to carry on pirating in spite of these unfavorable court decisions.

Despite over a decade of litigation and multiple criminal convictions resulting in year-long prison sentences, TPB is still online and attracting millions of patrons daily. During the famous Pirate Bay Trial in 2008 and 2009, “The Pirate Bay had grown from 2.5 million peers to 12 million peers”<sup>5</sup> and “more than two million people per day logged into The Pirate Bay to download ‘movies, music, television shows, and other media files.’”<sup>6</sup>

As a result, in recent years MEs have begun targeting Internet Service Providers (“ISPs”) and asking courts to force ISPs to block internet access to BitTorrent websites from their own paying customers. In 2017, the European Court of Justice ruled in *Stichting Brein v. Ziggo* that ISPs could be blocked from granting access to BitTorrent websites such as The Pirate Bay since the BitTorrent site knowingly aids individuals in downloading illegally accessed media and the ISPs

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<sup>3</sup> *Id.* at 76-77.

<sup>4</sup> *Id.* at 76-77.

<sup>5</sup> *Id.* at 70.

<sup>6</sup> *Id.* at 76.

benefit from users who pay for internet access to the torrenting site. Despite worries from anti-intellectual property rights proponents that the ruling in *Stichting Brein* would be the cannonball that finally sunk The Pirate Bay, as of October 2019, the website is still up and running and has remained wildly popular. In 2019, TPB's Worldwide Global Rank in internet traffic reached 260, their rank in the United States was 213, and the total visits on desktop and mobile web in the last six months was approximately 114 million.<sup>7</sup>

One reason that the decision in *Stichting Brein* will likely fail to shut down TPB is that virtually all European Member States handed down court decisions barring ISPs from granting access to The Pirate Bay long before the 2017 decision in *Stichting Brein*. Since the 2009 trial of The Pirate Bay's co-founders, the European Union on the whole garners virtually zero online traffic to TPB because of these blockages and yet TPB remains online with millions of visits per month. The reason: Virtual Private Networks (VPNs). By using VPNs, pirates are able to disguise their location, bypass their ISPs that block TPB, and gain access through internet providers in countries that have not yet blocked the torrenting site. Getting a VPN is so easy that a quick Google search yields website after website that provide simple instructions on how to get a VPN.<sup>8</sup> Further, individuals and corporations use VPNs for completely legitimate purposes and so targeting those individuals who use VPNs for illicit purposes can be a difficult task. Additionally, by changing strategies to sue VPN providers, MEs are once again attempting to hold individuals personally liable which is just a return to the legal tactics that largely failed early on.

It is clear that pirates are one, two, or three steps ahead of the current litigation surrounding this debate. The fact that media conglomerations and anti-piracy lobbying groups have consistently

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<sup>7</sup> *Thepiratebay.org July 2019 Overview*, SIMILAR WEB, <https://www.similarweb.com/website/thepiratebay.org> (last visited September 22, 2019).

<sup>8</sup> Guy Fawkes, *How to Unblock The Pirate Bay & Access It Everywhere in 2019*, VPNMENTOR, <https://www.vpnmentor.com/blog/how-to-unblock-the-pirate-bay-in-any-country/> (last visited September 22, 2019).

failed to prevent pirating on a mass-scale for nearly twenty years is evidence that online piracy is being addressed in the wrong way, which begs the question: When MEs have the law on their side and still cannot deter pirating despite decades of favorable legal decisions, is it time to switch strategies and attempt to curb copyright infringement through non-legal channels?

It is important to note that a study financed by the European Commission concluded that, in general, there is “no evidence that piracy affects copyrighted sales, and in the case of video games, might actually help them.”<sup>9</sup> Regardless, copyright infringement is an illegal act and MEs are clearly determined to reduce violations as much as they can. In general, studies show that individuals, if given the choice between pirating content or paying individually for songs or movies, they would rather pirate content. However, studies also show that, if given the choice between pirating and paying a subscription for a streaming service that gives individuals access to a massive database of movies or songs—such as Spotify or Netflix—most individuals would rather pay for a streaming service than pirate content.<sup>10</sup> Individuals are simply conducting a cost-benefit analysis when determining how they access media, not that they have a particular penchant for breaking the law.

In fact, online piracy is committed by large swaths of the population. A 2018 study conducted by Muso,<sup>11</sup> an anti-piracy organization, found that in the UK alone, approximately “60% of consumers admit they have streamed or downloaded illegally shared movies, TV shows, or music.”<sup>12</sup> A 2017 study conducted by another anti-piracy firm, Irdeto,<sup>13</sup> concluded that in the US,

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<sup>9</sup> Steve Dent, *EU Withheld a Study that Shows Piracy Doesn't Hurt Sales*, ENGADGET (September 22, 2017), <https://www.engadget.com/2017/09/22/eu-suppressed-study-piracy-no-sales-impact/>.

<sup>10</sup> Andy, *Piracy Is Driven By Availability & Price, People Prefer Not to Break the Law, ISP Study Says*, TORRENTFREAK (February 26, 2019), <https://torrentfreak.com/piracy-is-driven-by-availability-price-isp-says-190226/>; *Netflix is Killing Content Piracy*, SCOOP INDEPENDENT NEWS (February 26, 2019), <http://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm>.

<sup>11</sup> Muso Website, <https://www.muso.com> (last visited September 30, 2019).

<sup>12</sup> Todd Spangler, *53% of People Who Access Pirated Content Agree It's Wrong to Do So (Survey)*, VARIETY (June 6, 2018), <https://variety.com/2018/digital/news/piracy-survey-illegal-content-muso-1202829757/>.

<sup>13</sup> Irdeto Website, <https://irdeto.com>, (last visited September 30, 2019).

“32 percent of all US adults admit to streaming or downloading pirated video content.”<sup>14</sup> In light of this information, MEs need to realize—and some already have—that the legal channels are not working to deter online piracy. Yet, there are viable non-legal alternatives—such as streaming services and subscriptions—which are much more effective at reducing online piracy than navigating the existing, and ultimately ineffective, legal channels.

## II. The History of Online Piracy

Despite ranking 4th in the World Justice Project’s global Rule of Law Index,<sup>15</sup> Sweden has, at the same time, maintained the reputation of being a haven for individuals engaged in online piracy.<sup>16</sup> There are a multitude of explanations for why Sweden, in particular, became the bastion for peer-to-peer file-sharing.

### A. Why Sweden?

First, piracy could be a product of the Swedish mentality. “Secular belief in rationality and self-fulfillment...are more extreme in Sweden than in virtually any other country.”<sup>17</sup> Sweden also “ranks extremely high in surveys of so called ‘postmaterialist values’ (e.g. public concern for issues such as political participation, freedom of speech, environmental protection and beautiful cities)” which, in turn, corresponds to an increase in the value placed on “personal autonomy (relative to income) as a source of subjective well-being.”<sup>18</sup> In addition to a strong desire for personal autonomy

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<sup>14</sup> Ernesto Van der Sar, *32% of All US Adults Watch Pirated Content*, TORRENTFREAK (January 19, 2017), <https://torrentfreak.com/32-of-all-us-adults-watch-pirated-content-170119/>.

<sup>15</sup> *WJP Rule of Law Index*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/> (last visited September 22, 2019).

<sup>16</sup> Stephen Heyman, *Sweden’s Notorious Distinction as a Haven for Online Pirates*, THE NEW YORK TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/arts/international/swedens-notorious-distinction-as-a-haven-for-online-pirates.html>.

<sup>17</sup> Jonas Andersson, *The Origins and Impacts of the Swedish File-Sharing Movement: A Case Study*, 1 CRITICAL STUDIES IN PEER PRODUCTION (CSPP) 1, 2 (2011).

<sup>18</sup> *Id.*

and freedom, Swedes may also choose to engage in piracy because they view a globally “unrestricted file exchange” as being an inevitable or “unstoppable” phenomenon.<sup>19</sup>

Second, the Swedish government facilitated online piracy by providing the necessary technological infrastructure much earlier than most countries. The Swedish government made an early commitment to invest in telecom and internet bandwidth infrastructure which allowed torrenting websites—which generate a massive amount of online traffic—to operate effectively.<sup>20</sup> In the early 2000s, Sweden invested “more in IT and telecom in relation to its GDP than any other nation....As a result, Sweden has become one of the world’s most wired nations.”<sup>21</sup> By 2003, “almost 70 percent of the Swedish population ha[d] a PC with Internet access at home, and over 60 percent own[ed] a cellular phone.”<sup>22</sup> Further, by 2001, 33% of Swedish households had broadband internet compared to only 9% of UK households.<sup>23</sup> “The percentage of Swedish firms using Internet (93 percent), e-mail (94 percent)...[was] consistently higher than for firms in the European Union.”<sup>24</sup> Further, from 2008 to 2019, Sweden has been consistently ranked among the top four countries with the fastest internet connection and bandwidth rates around the world.<sup>25</sup>

Third, the Swedish Copyright Act of 1960 allowed individuals to freely make copies of copyrighted material for personal use.<sup>26</sup> Despite the rapid rise of the internet in the late 1990s and early 2000s—of which Sweden was a formidable participant—it was also the only European country

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<sup>19</sup> *Id.* at 4, 9.

<sup>20</sup> Arne Granholm, *The Swedish Commitment to Broadband Both in the Cities and in the Countryside*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) (August 2000), <http://www.oecd.org/internet/ieconomy/2736714.pdf>.

<sup>21</sup> Bruce Kogut, *The Global Internet Economy*, MIT PRESS, 125 (2003).

<sup>22</sup> *Id.*

<sup>23</sup> Kate Youde, *Broadband: The First Decade*, THE INDEPENDENT (March 28, 2010), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/broadband-the-first-decade-1929515.html>.

<sup>24</sup> Kogut, *supra* note 21, at 126.

<sup>25</sup> *State of the Internet Quarterly Connectivity Report*, AKAMAI, <https://www.akamai.com/us/en/resources/our-thinking/state-of-the-internet-report/global-state-of-the-internet-connectivity-reports.jsp> (last visited September 22, 2019).

<sup>26</sup> Act (No. 729 of 1960) Respecting Copyright for Literary and Artistic Works, as amended to 1998, *available at* [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=52482](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=52482).

to allow individuals to download copyrighted material from the internet for private use.<sup>27</sup> With no law on the books until July 2005,<sup>28</sup> Sweden stood as one of the only viable domains for the legal downloading of copyrighted material for much of the early 2000s.

As a result, piracy became rampant at a level disproportionate to its population size suggesting that Sweden, in the early 2000s, served as the best geographical location for torrent and file-sharing websites which quickly attracted millions of users around the globe.<sup>29</sup>

### 1. **Kopimi<sup>30</sup> and Kopimism<sup>31</sup>**

Although, in practicality, pirating is about accessing online content for free, online piracy, and the open-source movement in general, are also the products of those with the deeply held belief that information should be accessible to everyone for free. This is evidenced by the fact that the founders of the BitTorrent website The Pirate Bay were willing to go to prison before they would willingly shut down the torrenting site. The piracy movement has even spawned its own philosophy and religion: Kopimi and Kopimism. It is unclear who exactly coined the term “kopimi,” but regardless, the sign is an essential tenant and marker of those associated with the free-culture and open-source movements. “Kopimi” (“Copy Me”) is the belief “that all information ought to be freely distributed and that no monopoly on knowledge should ever persist.”<sup>32</sup> Followers of Kopimi are identifiable by their use of the movement’s logo—usually a triangle with the signature “K” made out of building blocks—which is available in various forms on their website.<sup>33</sup> Kopimi encourages creators to place the logo on their work-product to signal to others that copying of their work is not only allowed but encouraged.

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<sup>27</sup> *Swedes Curb Rampant Downloading*, BBC (July 1, 2005), <http://news.bbc.co.uk/2/hi/technology/4642373.stm>.

<sup>28</sup> Graham J. H. Smith, *Internet Law and Regulation*, SWEET & MAXWELL 657 (2007).

<sup>29</sup> Heyman, *supra* note 16.

<sup>30</sup> Kopimi Website, <https://www.kopimi.com> (last visited September 22, 2019).

<sup>31</sup> Missionary Church of Kopimism Website (English Version), <https://kopimistsamfundet.se/english/> (last visited September 22, 2019).

<sup>32</sup> *Supra* note 30.

<sup>33</sup> *Id.*

Kopimi has become so central to the file-sharing community's belief system that it generated its own religion: Kopimism. Kopimism, has been formally recognized by Sweden and has followers around the globe. According to the Freedom of Worship provision of the Swedish Constitution, individuals have "the freedom to practice one's religion alone or in the company of others."<sup>34</sup> As such, the religion was founded in 2010, and in 2012 after three attempts, the Kammarkollegiet (Swedish Legal, Financial, and Administrative Services Agency), recognized Missionerande Kopimistsamfundet (Missionary Church of Kopimism) as an official religion.<sup>35</sup>

The religion was founded by two university students: Isak Gerson,<sup>36</sup> now an accountant in Stockholm, Sweden, and Gustav Nipe, now a co-founder of multiple startups.<sup>37</sup> The religion's headquarters are based in Uppsala, Sweden, but Kopimism has gained followers in the thousands in eighteen different countries around the world, including the United States.<sup>38</sup> Their website states their central mission as the following:

- Copying of information is ethically right.
- Dissemination of information is ethically right.
- Copymixing is a sacred kind of copying, moreso than the perfect, digital copying, because it expands and enhances the existing wealth of information.
- Copying or remixing information communicated by another person is seen as an act of respect and a strong expression of acceptance and Kopimistic faith.
- The internet is holy.
- Code is law.<sup>39</sup>

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<sup>34</sup> *Sweden's Constitution of 1974 with Amendments through 2012*, CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Sweden\\_2012.pdf?lang=en](https://www.constituteproject.org/constitution/Sweden_2012.pdf?lang=en) (last visited September 22, 2019).

<sup>35</sup> *Sweden Recognises New File-Sharing Religion Kopimism*, BBC (March 8, 2012), <https://www.bbc.com/news/technology-16424659>.

<sup>36</sup> LinkedIn Profile of Isak Gerson, LINKEDIN, <https://www.linkedin.com/in/isak-gerson-07695117/?originalSubdomain=se> (last visited September 22, 2019).

<sup>37</sup> LinkedIn Profile of Gustav Nipe, LINKEDIN, <https://www.linkedin.com/in/gustav-nipe-a61ab0102/> (last visited September 22, 2019).

<sup>38</sup> Alex Fitzpatrick, *Kopimism: File-Sharing Religion Takes Root in the U.S.*, MASHABLE (May 9, 2012), <https://mashable.com/2012/05/09/kopimism-file-sharing/>.

<sup>39</sup> Kopimist Constitution (English Version), FIRST UNITED CHURCH OF KOPIMISM US <https://kopimistsamfundetus.wordpress.com/kopimist-constitution-english/> (last visited September 22, 2019).

The group elects a board of directors and their priests' (known as "Ops") identities are protected and kept anonymous according to Swedish law. Their sacred symbols include "Ctrl-V and Ctrl-C," shortcut computer keys for "copy" and "paste," drawn in a Yin Yang circle to signal their belief that all information should be copied and shared. They also use the Kopimi logo.<sup>40</sup>

Rick Falkvinge, the founder of Sweden's Pirate Party—a political group now comprised of over forty national parties around the world who aim, *inter alia*, to abolish intellectual property laws<sup>41</sup>—suggested that allowing Kopimists to be recognized as a religion may exempt them from some Swedish copyright laws.<sup>42</sup> However, Gerson maintains that his intention to formally incorporate was solely to gain exposure for the free-culture movement.<sup>43</sup>

## 2. Svenska Antipiratbyrån (Swedish Anti-Piracy Bureau)

In 2001, a group of media and entertainment companies formed Svenska Antipiratbyrån (Swedish Anti-Piracy Bureau or "APB") to combat the growing trend of illegal file-sharing.<sup>44</sup> APB actively litigated anti-piracy cases, attempted to influence the passing of anti-piracy legislation, and used tactics, such as warning letters, to deter illegal file-sharing.<sup>45</sup> In 2005 alone, APB "reported 200 people to the police for breaking copyright laws by exchanging music, games and films online...and issued over 400,000 warning letters to suspected file-sharers."<sup>46</sup> The organization was eventually acquired by Rattighetsalliansen (Rights Alliance)<sup>47</sup> which continues to act as an anti-piracy lobbying organization in Sweden.

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<sup>40</sup> Alison George, *Kopimism: The World's Newest Religion Explained*, NEW SCIENTIST (January 6, 2012), <https://www.newscientist.com/article/dn21334-kopimism-the-worlds-newest-religion-explained/>.

<sup>41</sup> Pirate Parties, PIRATE PARTIES INTERNATIONAL (PPI), <https://pp-international.net/pirate-parties/> (last visited September 22, 2019).

<sup>42</sup> Rollo Romig, *The First Church of Pirate Bay*, THE NEW YORKER (January 12, 2012), <https://www.newyorker.com/culture/culture-desk/the-first-church-of-pirate-bay>.

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

<sup>44</sup> S. Lindgren & J. Linde, *The Subpolitics of Online Piracy: A Swedish Case Study*, CONVERGENCE: THE INTERNATIONAL JOURNAL OF RESEARCH INTO NEW MEDIA TECHNOLOGIES 4 (2011).

<sup>45</sup> Jan Libbenga, *Sweden Takes Big Stick to File-Sharers*, THE REGISTER (June 6, 2005), [https://www.theregister.co.uk/2005/06/06/swedish\\_file\\_sharers/](https://www.theregister.co.uk/2005/06/06/swedish_file_sharers/).

<sup>46</sup> *Id.*

<sup>47</sup> Rights Alliance Website, <http://www.rattighetsalliansen.se/en/> (last visited September 30, 2019).

### 3. Piratbyrån

In 2003, as a response to the formation of APB, a group of file-sharing activists created Piratbyrån (The Piracy Bureau or “PB”),<sup>48</sup> an NGO which advocated for abolishing intellectual property laws in hopes of creating an open-source world.<sup>49</sup> Though the group officially disbanded in 2010 after the death of Ibrahim Botani,<sup>50</sup> Piratbyrån’s co-founder, their mission continues to thrive among a growing number of followers around the world.

### III. The Pirate Bay

That same year, some members of Piratbyrån founded The Pirate Bay (“TPB”),<sup>51</sup> a BitTorrent tracker and file-sharing website.<sup>52</sup> One of TPB’s founders, Gottfrid 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>53</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>54</sup>

#### A. The Pirate Bay: How It Works

David Sarno of the Los Angeles Times put it best when he said:

“The group’s website is a database of 500,000 copied movies, TV shows, songs, games and software titles. Instead of pointing you directly to a downloadable song or movie—like Napster used to—the Pirate Bay provides a kind of digital treasure map. The map, called a torrent file, points your computer toward all the little fragments of the booty that are hidden around the Internet. Feed the torrent file to your downloading software, wait a couple of hours, and ta-da! You now

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<sup>48</sup> Lindgren, *supra* note 44, at 4; Ann Harrison, *The Pirate Bay: Here to Stay?*, WIRED (March 13, 2016), <http://www.wired.com/science/discoveries/news/2006/03/70358>.

<sup>49</sup> Patrick Burkart, *Pirate Politics: The New Information Policy Contests*, MIT Press 17 (2014).

<sup>50</sup> *Pirate Bay Founding Group Disbands*, BBC (June 28, 2010), <https://www.bbc.com/news/10433195>.

<sup>51</sup> *About, THE PIRATE BAY*, <https://www.thepiratebay.org/about> (last visited September 22, 2019).

<sup>52</sup> The Pirate Bay Website, <https://www.thepiratebay.org> (last visited September 22, 2019).

<sup>53</sup> Bassett, *supra* note 2, at 75.

<sup>54</sup> *Id.*

have a shiny new copy of ‘The Bourne Supremacy’....Also, you have become a criminal.”<sup>55</sup>

The Pirate Bay uses BitTorrent technology which allows individuals to share and download large files.<sup>56</sup> BitTorrent technology works by using swarm technology. Torrenting allows “every person who is sharing a particular file to simultaneously upload and download pieces of the same file until the download is finished.”<sup>57</sup> Once a user locates the file on the torrenting website that they wish to download, the “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).”<sup>58</sup> Once the seed computers are identified, the tracker then connects the user’s computer with those other computers in 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.”<sup>59</sup> Thus, the user’s 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>60</sup>

Ultimately, this means that “none of the information downloaded by users is directly located on The Pirate Bay—The Pirate Bay simply tells users where to find the files to download.”<sup>61</sup> This fact, TPB claims, is what allows them to exist without violating any international copyright laws. By not having the actual file located on TPB’s servers, they claim that they are not, in fact, violating

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<sup>55</sup> David Sarno, *The Internet Sure Loves Its Outlaws*, LOS ANGELES TIMES (April 29, 2007), <https://www.latimes.com/la-ca-webscout29apr29-story.html>.

<sup>56</sup> Sara K. Morgan, *The International Reach of Criminal Copyright Infringement Laws – Can the Founders of the Pirate Bay Be Held Criminally Responsible in the United States for Copyright Infringement Abroad*, 49 VAND. J. TRANSNAT’L L. 553, 559 (2016).

<sup>57</sup> Bassett, *supra* note 2, at 73-74.

<sup>58</sup> Bassett, *supra* note 2, at 73-74.

<sup>59</sup> Bassett, *supra* note 2, at 73-74.

<sup>60</sup> Bassett, *supra* note 2, at 73-74.

<sup>61</sup> Morgan, *supra* note 56, at 559.

existing international copyright law themselves and therefore cannot be held liable for the actions of users on their website. TPB claims on their website that:

“Bit-torrent is a filesharing protocol that in a reliable way enables big and fast file transfers. No torrent files are saved at the server. That means no copyrighted and/or illegal material are stored by us. It is therefore not possible to hold the people behind The Pirate Bay responsible for the material that is being spread using the site.”<sup>62</sup>

However, despite their website disclaimer, TPB has been battling an unrelenting storm of litigation for almost sixteen years. “For years ThePirateBay.org has been public enemy number one for the music business and Hollywood....The site proudly displays its amassed correspondence from corporate lawyers who have written by the dozen to give notice of copyright infringement.”<sup>63</sup> Their responses include:

“Hello and thank you for contacting us. We have shut down the website in question. Oh wait, just kidding. We haven’t, since the site in question is fully legal. Unlike certain other countries, such as the one you’re in, we have sane copyright laws here. But we also have polar bears roaming the streets and attacking people :-((”<sup>64</sup>

Despite those “sane” copyright laws, after years of lobbying by MEs, Swedish authorities and media and entertainment companies have successfully won in civil court and multiple individuals associated with TPB have been convicted of criminal charges and sentenced to prison.

#### **IV. International Copyright Law**

Before discussing the litigation surrounding The Pirate Bay, it is important to note the relevant intellectual property laws that govern torrenting sites, including TPB, in the EU and abroad. This essay will focus on the existing IP law in the European Union and its member states since—for most of TPB’s existence—it was based in Sweden and controlled by individuals with Swedish

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<sup>62</sup> *Supra* note 52.

<sup>63</sup> Michael A. Lindenberger, *Internet Pirates Face Walking the Plank in Sweden*, TIME (February 20, 2009), <http://content.time.com/time/business/article/0,8599,1880981-2,00.html>.

<sup>64</sup> *Id.*

citizenship. Because of this, personal and corporate liability have largely been governed by European IP law. However, as of now, TPB's leadership and their servers have gone underground; those who run the site remain anonymous and the servers that host TPB are now scattered throughout the globe.<sup>65</sup> Additionally, the site is functioning on a cloud-based format. Thus, even if multiple servers are compromised, TPB will still be able to operate. This switch to anonymity and cloud-based operation occurred in 2012 and, as will be discussed later on, has led MEs, once again, to shift their legal strategies. After 2012, many MEs have chosen to sue for injunctions against Internet Service Providers ("ISPs") to stop the ISPs from granting their consumers access to TPB. The MEs have been quite successful in getting courts in various jurisdictions around the globe to grant these injunctions against ISPs. However, holding ISPs liable has not deterred TPB as there are a multitude of ways to easily get around the internet blockades. MEs are now faced with the decision to continue fighting it out in court—which has yet to deter piracy—or choose an alternative, and possibly non-legal, method.

### **A. Jurisdictional Issues**

Although “millions of The Pirate Bay’s users may reside in the United States, The Pirate Bay website was hosted in Sweden”<sup>66</sup> from its founding in 2003 until 2012 when the site moved to a cloud-based and decentralized server format. The Berne Convention<sup>67</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)<sup>68</sup>—treaties administered by the World Intellectual Property Organization and World Trade Organization, respectively—govern those websites based in EU Member States. Under these legal regimes, “the law of the country where the

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<sup>65</sup> Eddie Kim, *After 15 Years, The Pirate Bay Still Can't Be Killed*, MEL MAGAZINE (2019), <https://melmagazine.com/en-us/story/after-15-years-the-pirate-bay-still-cant-be-killed>.

<sup>66</sup> Bassett, *supra* note 2, at 77.

<sup>67</sup> Berne Convention for the Protection of Literary and Artistic Works as amended on September 28, 1979, *available at* <https://wipolex.wipo.int/en/treaties/textdetails/12214>.

<sup>68</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, WORLD TRADE ORGANIZATION, *available at* [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

infringement allegedly takes place applies. 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>69</sup>

However, “[t]his was not the route taken with The Pirate Bay litigation. Instead, the MPAA wanted to take down The Pirate Bay Web site—not simply scare its users. 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. Thus, Swedish law would apply.”<sup>70</sup>

## **B. European Court of Justice<sup>71</sup>**

Although each European Union Member State drafts its own legislation, much of that legislation must be in accordance with the binding laws of the Court of Justice of the European Union (“CJEU”) and those laws are subject to review and interpretation by the CJEU. The CJEU interprets EU law—including directives—“to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.”<sup>72</sup> It is important to note however, that the “Court of Justice’s reply is not merely an opinion, but takes the form of a judgment or order.”<sup>73</sup> The judgment is also binding on all other member states.<sup>74</sup> In many cases, when there is an issue regarding the interpretation of EU law, a party will file an appeal during a trial held in a Member State to the European Court of Justice for interpretation of a provision that

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<sup>69</sup> Bassett, *supra* note 2, at 77-78.

<sup>70</sup> *Id.* at 77-78.

<sup>71</sup> The Court of Justice of the European Union Website, EUROPEAN UNION, [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/) (last visited September 22, 2019).

<sup>72</sup> *About the EU*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited September 22, 2019).

<sup>73</sup> Bassett, *supra* note 2, at 80 (internal quotation marks and citation omitted).

<sup>74</sup> Bassett, *supra* note 2, at 80.

bears on the outcome of the trial. Additionally, it is customary that an entity must exhaust all legal remedies in their Member State before appealing their case to the CJEU for a final judgment.

### **C. EU Directives and “Safe Harbor” Provisions**

The European Union is made up of 28 Member States.<sup>75</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) take precedence over national law and are binding on national authorities.’”<sup>76</sup> “A ‘directive’ is a legislative act that sets out a goal that all EU countries must achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals.”<sup>77</sup> Three directives bear particular significance to the issue of copyright infringement and the role The Pirate Bay plays in making pirated content available.

#### **1. 2001 EU Copyright Directive<sup>78</sup>**

In 2001, the EU passed the Copyright Directive 2001/29/EC (also known as the Information Society Directive). Its purpose was to harmonize “certain aspects of copyright and related rights in the information society” from the Berne Convention, TRIPs, among others.<sup>79</sup> According to Paragraph 1 of Article 3 of the Directive entitled “Right of Communication to the Public of Works and Right of Making Available to the Public Other Subject-Matter,” all Member States in the EU “shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works...including the making available to the public of their works in such a way that members of the public may access them from a place and at a time

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<sup>75</sup> *The EU in Brief*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en) (last visited September 22, 2019).

<sup>76</sup> Bassett, *supra* note 2, at 79-80.

<sup>77</sup> *Regulations, Directives and Other Acts*, EUROPEAN UNION, [https://europa.eu/european-union/eu-law/legal-acts\\_en#directives](https://europa.eu/european-union/eu-law/legal-acts_en#directives) (last visited September 22, 2019).

<sup>78</sup> *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*, available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> (last visited September 22, 2019).

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

individually chosen by them.”<sup>80</sup> If works are accessed in a way not chosen by the authors, Paragraph 3 of Article 8 entitled “Sanctions and Remedies” provides authors with an option to apply for an injunction. Specifically, the Directive ensures “that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.”<sup>81</sup>

## 2. 2004 EU Directive on the Enforcement of Intellectual Property Rights

The 2004 EU Directive on the Enforcement of Intellectual Property Rights built upon the 2001 Directive but also included liability for third-party intermediaries that enable users to commit copyright infringement. Under Article 11 of the Directive entitled “Injunctions” Member States may allow rightholders of copyrighted material “to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.”<sup>82</sup>

## 3. 2000 EU Directive on Electronic Commerce<sup>83</sup>

Despite enacting robust legislation that protects rightholders against individuals and third-parties who are engaged in or enable copyright infringement, the EU also carved out multiple exceptions which aim to protect some entities from being liable for copyright infringement. On June 8, 2000, the EU issued the Electronic Commerce Directive which “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>84</sup> The Directive governs information society services (ISSs) which are defined as:

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<sup>80</sup> Case C-610/15 *Stichting Brein*, ECR 99 at para. 7.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031> (last visited September 22, 2019).*

<sup>84</sup> Bassett, *supra* note 2, at 82.

“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>

The Directive also “contains three safe harbor provisions that relieve [ISSs] of criminal liability, including liability for copyright infringement, and for the information that they transmit. These safe harbors are for activities that constitute only the ‘mere conduit’ of information, caching of information, or hosting of information.”<sup>86</sup> Article 12 of the Directive entitled “Mere conduit,” allows an ISS to escape liability if the service provided by the ISS consists of only a “transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network.”<sup>87</sup> Article 14 of the Directive, entitled “Hosting,” provides that where an ISS “consists of the storage of information provided by a recipient of the service” that ISS will not be liable for copyright infringement on the condition that either a) “the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent” or b) “the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.”<sup>88</sup>

#### **D. Swedish Copyright Act<sup>89</sup>**

The Swedish Copyright Act of 1960 governs issues of intellectual property law specifically related to entities in Sweden. Although, the EU issued the Copyright Directive in 2001, “Sweden did not enact its own national copyright laws to satisfy the EU Copyright Directive until July 1, 2005.”<sup>90</sup>

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<sup>85</sup> Bassett, *supra* note 2, at 82.

<sup>86</sup> Bassett, *supra* note 2, at 83.

<sup>87</sup> Case C-610/15 *Stichting Brein*, ECR 99 at para. 5.

<sup>88</sup> *Id.*

<sup>89</sup> *Act on Copyright in Literary and Artistic Works Swedish Statute Book*, SFS, 1960:729, as amended up to April 1, 2011, available at <https://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf> (last visited September 22, 2019).

<sup>90</sup> Bassett, *supra* note 2, at 81.

Known as the Intellectual Property Rights Enforcement Directive (“IPRED”),<sup>91</sup> Sweden’s Directive served as an extension of the European Parliament’s Directive on intellectual property.<sup>92</sup> Thus, prior to mid-2005, the Swedish Copyright Act of 1960 did not make it “explicitly illegal in Sweden to download copyrighted material for private use.”<sup>93</sup> The new Directive, which essentially amended the 1960 Act, “narrowed the expression ‘Private use’<sup>94</sup> to the point where “download[ing] pirated material or any other material that has been posted on the Internet without the owner’s permission” became illegal.<sup>95</sup>

Further “[u]nder 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>96</sup> Additionally, “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>97</sup>

## V. The Pirate Bay Legal Proceedings

Since its inception, The Pirate Bay has caught the ire of media and entertainment groups throughout the world who see online piracy as a direct threat to their bottom line. This has led TPB to defend its existence against years of lawsuits from MEs in Europe and abroad. Further, the intellectual property laws on the books in the US and the EU are generally favorable to MEs and therefore the courts have been the domain for MEs to try and stamp out torrenting sites that they blame for enabling individuals to easily download copyrighted material. TPB’s legal troubles began

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<sup>91</sup> *New Swedish Anti-Piracy Laws Triggers a Thirty Three Percent Drop in Internet Use and Legal Downloads Might Have Doubled*, MUSIC LAW UPDATES (May 2009), <http://www.musiclawupdates.com/?p=1775>.

<sup>92</sup> *Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29> (last visited September 22, 2019).

<sup>93</sup> Bassett, *supra* note 2, at 81 (internal quotations omitted).

<sup>94</sup> Graham, *supra* note 22, at 657.

<sup>95</sup> Bassett, *supra* note 2, at 81 (internal quotations omitted).

<sup>96</sup> *Id.* (internal quotation marks and citations omitted).

<sup>97</sup> *Id.* at 82 (internal quotation marks and citations omitted).

in 2006 when their offices were raided in Sweden. Since then, TPB has been targeted by countless MEs. However, despite unfavorable lawsuits—including multiple criminal convictions of TPB’s founders—the site is still active and thriving suggesting that the judiciary has been an ineffective avenue for curbing online piracy.

#### **A. 2006 Raid**

In 2006, The Pirate Bay’s offices were raided by Swedish police.<sup>98</sup> “Not only did the police confiscate servers that hosted the Internet’s largest torrent tracker Web site, but they carted two administrators and their legal help off in handcuffs and even forced one of The Pirate Bay’s lawyers to give a DNA sample.”<sup>99</sup> But “[n]ot even three days passed, however, before Peter, along with Fredrik Neij and Gottfrid Svartholm, managed to get The Pirate Bay online again using a temporary hosting site in the Netherlands.”<sup>100</sup>

#### **B. 2009 Trial**

Two years later, “[o]n January 31, 2008, Peter and the other three operators of The Pirate Bay were charged with conspiracy to break copyright law in Sweden, which carried a sentence of up to two years in prison if convicted.”<sup>101</sup> In 2009, the four arrested TPB founders, Gottfrid Svartholm, Fredrik Neik, Svartholm Warg, and Peter Sundeon, went to trial.<sup>102</sup> The trial was covered extensively by the media and protests were held in Sweden in opposition to the founders’ detainment.<sup>103</sup> On April 17th, 2009, after nine days of trial, “the District Court in Stockholm (Stockholms tingsrätt), composed of a professional presiding judge and three elected lay judges, in the case no. B13301-06

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<sup>98</sup> *Id.* at 68.

<sup>99</sup> *Id.* at 68-69 (internal quotation marks and citations omitted).

<sup>100</sup> *Id.* at 69.

<sup>101</sup> *Id.* at 70 (internal quotation marks and citations omitted).

<sup>102</sup> *Id.*; Ben Sheffner, *The Five Legal Cases that Defined the Year in Music*, REUTERS (December 18, 2009), <https://www.reuters.com/article/us-2009-lawsuits/the-five-legal-cases-that-defined-the-year-in-music-idUSTRE5BH5ET20091218>.

<sup>103</sup> David Kravets, *Pirate Bay Future Uncertain After Operators Busted*, WIRED (January 31, 2008), <https://www.wired.com/2008/01/pirate-bay-futu/>.

unanimously found” the four accused guilty of aiding copyright infringement by users on The Pirate Bay.<sup>104</sup> “The court also ordered The Pirate Bay operators to pay 30 million kronor (about \$3.6 million) in damages to leading entertainment companies.” Still not backing down, “the defendants...vowed to continue running the [Web site] as they appeal[ed].”<sup>105</sup>

The four men appealed their sentences “with the Svea Court of Appeal ruling in November [2011] to uphold the convictions, with the exception of Svartholm Warg who was absent due to illness.”<sup>106</sup> “The three remaining pirates then petitioned Sweden’s Supreme Court (Högsta Domstolen) for leave to appeal.”<sup>107</sup> In February 2012, “the court announced that the defendants’ request had been denied and that the appeal’s court sentence therefore will stand.”<sup>108</sup> Ultimately, the founders served the entirety of their sentences. During this time however, The Pirate Bay remained online.

### **C. 2012: The Pirate Bay Moves Site to the Cloud**

In 2012, after the trial, TPB “decided to serve its users from several cloud hosting providers scattered around the world.”<sup>109</sup> According to TPB, “[m]oving to the cloud lets TPB move from country to country, crossing borders seamlessly without downtime. All the servers don’t even have to be hosted with the same provider, or even on the same continent[.]”<sup>110</sup>

The choice also “saved costs, guaranteed better uptime, and made the site more portable and thus harder to take down.”<sup>111</sup> As of 2014, TPB uses 21 “virtual machines” (VMs) hosted by

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<sup>104</sup> Michael Bogdan, *Cyberspace Pirates Walk the Plank - Some Comments on the Swedish Judgment in the Pirate Bay Case*, 4 MASARYK U. J.L. & TECH. 113 (2010).

<sup>105</sup> Basset, *supra* note 2, at 71 (internal quotations omitted).

<sup>106</sup> Rebecca Martin, *Supreme Court Denies Pirate Bay Right to Appeal*, THE LOCAL (February 1, 2012), <https://www.thelocal.se/20120201/38844>.

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

<sup>108</sup> *Id.*

<sup>109</sup> Ernesto Van der Sar, *The Pirate Bay Runs on 21 'Raid-Proof' Virtual Machines*, TORRENTFREAK (September 21, 2014), <https://torrentfreak.com/the-pirate-bay-runs-on-21-raid-proof-virtual-machines-140921/>.

<sup>110</sup> Ernesto Van der Sar, *Pirate Bay Moves to The Cloud, Becomes Raid-Proof*, TORRENTFREAK (October 17, 2012), <https://torrentfreak.com/pirate-bay-moves-to-the-cloud-becomes-raid-proof-121017/>.

<sup>111</sup> Van der Sar, *supra* note 109.

different providers. “This is up four machines from two years ago, in part due to the steady increase in traffic.”<sup>112</sup> Further, “[m]ost of the VMs, eight in total, are used for serving the web pages. The searches take up another six machines, and the site’s database currently runs on two VMs.”<sup>113</sup>

TPB’s VMs are also entirely anonymous. The cloud hosting providers “have no clue that The Pirate Bay is among their customers. All traffic goes through the load balancer, which masks what the other VMs are doing. This also means that none of the IP-addresses of the cloud hosting providers are publicly linked to TPB.”<sup>114</sup> Further “[i]f the police come knocking in the future the cloud servers can of course be disconnected. However, with the site’s current setup it would be fairly easy to continue operating from another provider in a relatively short time.”<sup>115</sup>

One of the largest issues TPB still faces is the site’s domain name. In 2013 alone, the “site burnt through five separate domain names due to takedown threats from registrars.”<sup>116</sup> In 2014, TPB even relocated its domain name to a “remote British volcanic isle called Ascension Island, located in the South Atlantic” after its domain in Sint Maarten was “seized by authorities.”<sup>117</sup> Luckily, there are “dozens of alternative domain names standing by” if and when TPB needs to relocate.<sup>118</sup>

#### **D. MEs sue ISPs to Block Access to The Pirate Bay**

As a response to The Pirate Bay’s tenacity and the jurisdictional challenges MEs face when trying to sue a cloud-based site where the location of the TPB’s physical servers are largely unknown, MEs, once again, shifted strategies and started suing ISPs for providing access to TPB to

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

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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

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

<sup>117</sup> Patrick O’Rourke, *The Pirate Bay’s Domain is Now Hosted on a Volcanic Island*, CANADA.COM (July 21, 2014), <https://o.canada.com/technology/internet/the-pirate-bays-domain-is-now-located-on-a-volcanic-island>.

<sup>118</sup> Van der Sar, *supra* note 109.

their consumers.<sup>119</sup> ISPs are usually incorporated in the country that they provide internet and therefore that country's IP laws apply.

### 1. *Stichting Brein v. Ziggo*<sup>120</sup>

In 2012,<sup>121</sup> “Stichting Brein,<sup>122</sup> an anti-piracy organization, applied to the Dutch courts for an injunction against [ISPs] Ziggo<sup>123</sup> and XS4ALL<sup>124</sup> that would order them to block access to TPB for their customers.”<sup>125</sup> After the Hague Court of Appeals<sup>126</sup> ruled against Stichting Brein, they appealed to the Dutch Supreme Court<sup>127</sup> which submitted two questions to the European Court of Justice<sup>128</sup> for review in 2016. Although The Pirate Bay was not a party to the legal proceedings, the outcome would have direct consequences on the site's ability to remain online. The case before the CJEU, *Stichting Brein v. Ziggo*, resulted in a judgment<sup>129</sup> in June 2017 which held that The Pirate Bay, the intermediary in question in the case, was “directly infringing copyright, in a move that could lead to ISPs and governments blocking access to other torrent sites across Europe.”<sup>130</sup> Further, the decision

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<sup>119</sup> Ernesto Van der Sar, *Music Companies Sue Internet Provider RCN For Enabling 'Massive' Piracy*, TORRENTFREAK (August 28, 2019), <https://torrentfreak.com/music-companies-sue-internet-provider-rcn-for-enabling-massive-piracy-190828/>; Jonathan Wilson, *US Record Labels Sue Broadband ISPs Over Copyright Piracy*, ENGINEERING AND TECHNOLOGY (March 26, 2019), <https://eandt.theiet.org/content/articles/2019/03/us-record-labels-sue-broadband-isps-over-copyright-piracy/>; Liam Tung, *Swedish TV And US Film Industries Sue ISP to Block Access to The Pirate Bay*, ZDNET (November 11, 2014), <https://www.zdnet.com/article/swedish-tv-and-us-film-industries-sue-isp-to-block-access-to-the-pirate-bay/>.

<sup>120</sup> Case C-610/15 *Stichting Brein*, ECR 99.

<sup>121</sup> Robert van Shaik, *Dutch Supreme Court Requests Ruling on Whether the Pirate Bay 'Makes a Communication to the Public'*, IRIS MERLIN (January 22, 2016), <http://merlin.obs.coe.int/iris/2016/1/article22.en.html>.

<sup>122</sup> Stichting Brein Website, <https://stichtingbrein.nl> (last visited September 23, 2019).

<sup>123</sup> Ziggo Website, <https://www.ziggo.nl> (last visited September 23, 2019).

<sup>124</sup> XS4ALL Website, <https://www.xs4all.nl> (last visited September 23, 2019).

<sup>125</sup> Christina Angelopoulous, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, WOLTERS KLUWER COPYRIGHT BLOG (June 30, 2017), <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>.

<sup>126</sup> Hoge Raad der Nederlanden, (November 2015), ECLI:NL:HR:2015:3307, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2014:88>.

<sup>127</sup> Gerechtshof Den Haag, (January 2014), ECLI:NL:GHDHA:2014:88, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:3307>.

<sup>128</sup> Alex Hern, *European Court of Justice Rules Pirate Bay is Infringing Copyright*, THE GUARDIAN (June 15, 2017), <https://www.theguardian.com/technology/2017/jun/15/pirate-bay-european-court-of-justice-rules-infringing-copyright-torrent-sites>.

<sup>129</sup> Case C-610/15 *Stichting Brein*, ECR 99; Case C-610/15 *Stichting Brein v. Ziggo BV, XS4ALL Internet DV* [2017] ECR, 456.

<sup>130</sup> Hern, *supra* note 128.

was “the first time that the liability proper (i.e. for damages, as opposed to mere injunctions) of an internet intermediary for copyright infringement has been considered at the European level.”<sup>131</sup>

**a) Choice of Law Analysis**

The CJEU recognized that normally “liability for sites of this type is a matter of copyright application” and is usually “resolved not at the level of EU law but under the domestic legal systems of the Member States.”<sup>132</sup> However, the court held that applying domestic law “would undermine the objective of EU legislation in the relatively abundant field of copyright, which is precisely to harmonise the scope of the rights enjoyed by authors and other rightsholders within the single market. That is why the answer to the problems raised in the present case must...be sought rather in EU law.”<sup>133</sup>

**b) Prior Precedent**

The court also stated that “the problems raised in the present case” were “substantially different from those in two recent cases concerning the right to communicate works to the public via the internet, namely *Svensson and Others* and *GS Media*” and therefore “the Court’s reasoning in those cases” cannot be “directly applied to the case in the main proceedings.”<sup>134</sup>

**c) Questions Presented**

The Hoge Raad der Nederlanden (Netherlands Supreme Court) submitted two questions to the CJEU which focused on whether TPB’s acts constituted a “communication to the public” which is the “exclusive right” of the author according to Paragraph 1 of Article 3 of Copyright Directive 2001/29/EC. In order to determine if TPB violated the 2001 Copyright Directive, “infringement of

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<sup>131</sup> Angelopoulos, *supra* note 125.

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

<sup>133</sup> *Id.*

<sup>134</sup> Case C-610/15 *Stichting Brein*, ECR 99 at para. 4.

this exclusive right requires two cumulative elements: a) an ‘act of communication’ of a work and b) the communication of that work to a ‘public.’”<sup>135</sup>

To be considered an “act of communication” The Pirate Bay has to have “played an ‘indispensable role’ through a ‘deliberate intervention.’ Specifically, the user must have intervened, in full knowledge of the consequences of her action, to give access to a protected work to persons who would not otherwise have been able to enjoy it.”<sup>136</sup> Further, the intermediary must have knowledge that their role constitutes a “communication to the public.” Further, because TPB knowingly provided the platform for others to upload and download copyrighted material, and they played a vital role in communicating copyrighted materials to others, the safe harbor provisions will not protect them from liability. And, although one may make the argument that users on TPB, not TPB itself, made the copyrighted material accessible, TPB still played an integral and “indispensable role” in making the material accessible by organizing the links and sifting through those links that are corrupted or do not match the title of the downloadable content. These facts led the court to conclude that TPB’s role constituted an “act of communication” according to the 2001 Electronic Commerce Directive.

Next, the act of communication by TPB must have been communicate to the “public” i.e. “a group of people of an indeterminate number that is of a certain, not insignificant, size.”<sup>137</sup> The public must also be “new” “i.e. one that was not already taken into account by the copyright holder when she authorised the initial communication to the public of the work, or that the communication take place through technical means different from those which she employed.”<sup>138</sup> The fact that TPB contains thousands of peers, the site easily met the “public” requirement. The CJEU also

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<sup>135</sup> Angelopoulos, *supra* note 125.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

determined that the “public” was “new” because the “copyright holders did not authorize[] such access to their works, nor was The Pirate Bay unaware of that fact.”<sup>139</sup> Finally, “[t]he fact that such activities were carried out with the purpose of obtaining a profit were also taken into consideration by the Court.”<sup>140</sup>

In summary, the CJEU “decided that making available and managing on the internet a sharing platform which by means of indexation of metadata relating to protected works and the provision of a search engine allows users of that platform to locate those works and to share them in the context of a peer-to-peer network constitutes a ‘communication to the public’, within the meaning of Article 3(1) of Directive 2001/29/EC.”<sup>141</sup>

## **VI. The Effects of Litigation on TPB and Online Piracy in General**

Despite the years of litigation with the culmination of the *Stichting Brein* case, The Pirate Bay is still online and generating millions of views every month. Further, spectators who saw the *Stichting Brein* case as the final blow to TPB neglect the fact that many countries—including many European Member States—already block access to TPB, some for over a decade. This information is so prevalent that Wikipedia.com has an entire page dedicated to all of the “[c]ountries blocking access to The Pirate Bay.”<sup>142</sup> They list thirty countries “where at least one internet service provider (ISP) previously or currently censors the popular file sharing website The Pirate Bay (TPB).”<sup>143</sup>

And, despite these blockages, The Pirate Bay is still hugely successful. While “[c]opyright cases brought down other legacy names like Kazaa and Limewire as well as two of the biggest

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<sup>139</sup> *Stichting Brein v. Ziggo BV and XS4ALL Internet BV – After All The Pirate Bay Does Communicate to the Public*, UNIO- EU LAW JOURNAL (April 9, 2018), <https://officialblogofunio.com/2018/04/09/sitchting-brein-v-ziggo-bv-and-xs4all-internet-bv-after-all-the-the-pirate-bay-does-communicate-to-the-public/>.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> “Countries Blocking Access to The Pirate Bay” WIKIPEDIA, [https://en.wikipedia.org/wiki/Countries\\_blocking\\_access\\_to\\_The\\_Pirate\\_Bay](https://en.wikipedia.org/wiki/Countries_blocking_access_to_The_Pirate_Bay) (last visited October 1, 2019).

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

torrent sites in the world, Kickass Torrents and ExtraTorrents. Meanwhile, despite widespread concern that the Swedish case would cripple the site, The Pirate Bay lives today, still hosting torrents that have survived for 15 years.”<sup>144</sup> As of July 2019, the website’s Worldwide Global Rank in internet traffic is 260, their rank in the United States is 213, and the total visits on desktop and mobile web in the last six months was approximately 114 million.<sup>145</sup>

After years of “widespread legal scrutiny, blockages in multiple countries, millions of dollars in fines and beyond, the site with the iconic mahogany pirate ship logo sails on, supported by an anonymous crowd of diehard pirates who revive the site every time it seems down for good.”<sup>146</sup> As one critic put it: “It’s absurd to me that this platform still works and it’s still so widely popular, given that it’s so...illegal. I’m really impressed by the longevity...I remember one time when they took down the original URL, the dot-org site, and the next day you could go on Google and find 100 identical Pirate Bay mirror sites with the same torrents.”<sup>147</sup>

Therefore, *Stichting Brein* will likely not have the impact critics fear since countries have already successfully blocked TPB since their trial in 2009. After years of litigation involving civil and criminal disputes resulting in prison sentences and the much anticipated involvement of the European Court of Justice, no legal remedy has yet to take the wind out of The Pirate Bay’s sails. Therefore, since The Pirate Bay continues to sail ahead despite fifteen tumultuous years since its founding, what should the path forward be now?

## **VII. The Pathway Forward: Target VPN Providers or Start Streaming?**

In terms of reducing piracy, MEs have two possible options going forward: (i) start suing Virtual Private Network (“VPN”) providers in hopes of holding individuals liable for downloading

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<sup>144</sup> Ernesto Van der Sar, *UK ISPs Must Censor The Pirate Bay, High Court Rules*, TORRENTFREAK (April 30, 2012), <https://torrentfreak.com/uk-isps-must-censor-the-pirates-bay-high-court-rules-120430/>.

<sup>145</sup> SIMILAR WEB, *supra* note 7.

<sup>146</sup> Kim, *supra* note 65.

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

copyrighted material or (ii) jump on the streaming and subscription bandwagon which has already been shown to reduce online piracy.

### **A. Targeting VPN Providers**

Some MEs have already begun to target VPN providers in hopes of finding out the personal information of individuals engaged in online piracy so they may be held liable.<sup>148</sup> Further, individuals and corporations use VPNs for completely legitimate purposes and so targeting those individuals who use VPNs for illicit purposes is a difficult task. Additionally, by changing strategies to sue VPN providers, MEs are once again attempting to hold individuals personally liable which is just a return to the legal tactics that largely failed early on. Just like in the early 2000s, this will likely be an ineffective, costly, and unpopular route for the MEs to take.

#### **1. VPNs: How It Works**

By using VPNs, pirates are able to disguise their location, bypass the ISPs in their country that block TPB, and gain access to TPB through internet providers in countries that have not yet blocked the torrenting site. Getting a VPN is so easy that a quick Google search yields website after website that provide simple instructions on how to get a VPN and remain anonymous while searching for and illegally downloading copyrighted material.<sup>149</sup> When registering for a VPN through one of various providers, the VPN allows individuals to disguise their actual IP address associated with their computer, internet network, and physical location.<sup>150</sup> Through a process known as encryption, the VPN provider “scramblers your data” and provides access to websites otherwise blocked by your ISP.<sup>151</sup>

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<sup>148</sup> Brad Reed, *How Hollywood is Waging War Against VPNs*, BGR (April 17, 2015), <https://bgr.com/2015/04/17/hollywood-studios-vs-netflix-vpns/>.

<sup>149</sup> Fawkes, *supra* note 8.

<sup>150</sup> TJ McCue, *How Does A VPN Work?*, FORBES (June 20, 2019), <https://www.forbes.com/sites/tjmccue/2019/06/20/how-does-a-vpn-work/#46aa500e70cd>.

<sup>151</sup> *Id.*

## **2. Sifting Out the Legal and Illegal VPN Users May Serve Difficult**

Using VPNs is a common practice by pirates, but VPNs are also used for completely legitimate purposes by corporations for internal privacy and security. For example, “[c]orporations have historically used them to grant employees remote access to the corporate server.”<sup>152</sup> Other users of VPNs may find themselves in a legal grey area as well. For example, streaming services such as Netflix are only accessible in certain countries. Further, Netflix may have a licensing agreement to show movies in one country but not another. Therefore, if a person who has a subscription from one country is trying to access their account abroad, they may not have access to the same movies they have at home. Using a VPN allows them to trick their ISP into thinking the computer is located back in the person’s home country allowing them to have access to the same movies they originally had access to. Access using a VPN in these cases may or may not be illegal, but when MEs sue VPN providers for the personal information of its users, these individuals may be sued even though they have not committed a flagrant act of copyright infringement and are not the individuals that MEs intend to hold liable. Thus, the act of suing VPN providers casts a wide net in which other individuals may be caught up even when the MEs themselves do not intend to litigate.

## **3. Reverting Back to an Unsuccessful Individual Liability Regime**

Further, the main issue with suing VPNs and trying to hold individual consumers liable is that this was the first way that media and entertainment companies tried to go about clamping down on piracy and it turned out poorly for them. Targeting VPN providers is not a new strategy but simply a return to the personal liability strategy—which was unsuccessful and unpopular—that MEs tried first when online piracy became a problem in the early 2000s. MEs are back at square one now and need to learn to change their actual corporate strategies to attract subscribers who would otherwise

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

pirate online media instead of trying to fight piracy using copyright infringement claims in court which has been largely unsuccessful for two decades.

## **B. Is Piracy Even A Problem?**

Before addressing the viable, non-legal, strategies for reducing online piracy, it is important to note the plethora of studies that show that piracy may not have such a negative impact on MEs' revenue stream at all. Most notably, the studies consistently show that pirates make up an overwhelmingly proportion of individuals that also purchase media legally. As one source puts it, pirates choose to pirate "as a preview, a kind of 'try before you buy.'"<sup>153</sup> Therefore, "[i]f piracy is a sampling and discovery tool for high spenders, then suppressing piracy could depress legal sales."<sup>154</sup>

One study showed that "7% of those surveyed spend over 100 euros per month on cultural goods on the Internet. Among these, 64% admit to 'illicit use' or filesharing."<sup>155</sup> Another study "reports that about 34 percent of veteran file swappers say they are spending more on music than they did before they started downloading files. About 14 percent of heavy file traders say they now spend less on music."<sup>156</sup> Another study found that pirates "spent four and a half times more on paid-for music downloads than average fans."<sup>157</sup> One study even claimed that "users who downloaded music illegally from P2P file-sharing sites like BitTorrent ultimately made ten times as many legit music purchases than the law abiding users."<sup>158</sup>

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<sup>153</sup> Enigmax, *Suppressed Report Found Busted Pirate Site Users Were Good Consumers*, TORRENTFREAK (July 19, 2011), <https://torrentfreak.com/suppressed-report-found-busted-pirate-site-users-were-good-consumers-110719/>.

<sup>154</sup> HADOPI Says: Let's Try Cutting off Nose to Spite Face, THE AMERICAN ASSEMBLY (July 26 2011), <http://piracy.americanassembly.org/hadopi-says-lets-try-cutting-off-nose-to-spite-face/>.

<sup>155</sup> *Id.*

<sup>156</sup> John Borland, *Study: File Sharing Boosts Music Sales*, CNET (August 15, 2002), <https://www.cnet.com/news/study-file-sharing-boosts-music-sales/>.

<sup>157</sup> *Downloading 'Myths' Challenged*, BBC (July 27, 2005), <http://news.bbc.co.uk/2/hi/technology/4718249.stm>.

<sup>158</sup> Terrence Russell, *Study Finds File-Sharers Buy Ten Times More Music*, VENTUREBEAT (April 21, 2009), <https://venturebeat.com/2009/04/21/study-finds-file-sharers-buy-ten-times-more-music/>.

Critics, however, “have speculated that people don’t always tell the truth to researchers on controversial issues such as this.”<sup>159</sup> One study by an opponent of file-sharing “said that 35 percent of people who download more than 20 songs a month say they buy less music as a result.”<sup>160</sup>

Despite these reports, MEs are still very concerned with litigating copyright infringers and those who enable the illegal downloading of copyrighted content. However, given that litigation has largely failed to deter pirates, one report included in its conclusions that “[r]ather than taking legal action against downloaders, the music industry needs to entice them to use legal alternatives[.]”<sup>161</sup>

### **C. Streaming and Subscription Services as Viable Alternative to Reducing Online Piracy**

One such non-legal alternative to clamping down on online piracy is the use of streaming services and subscriptions that are a low-cost alternative that gives users who would otherwise pirate access to a large database of online media content. Studies that have tested the ability for streaming services to reduce online piracy have consistently shown streaming services to be a viable way to reduce online piracy. However, now that many MEs have begun to offer such services in light of this evidence, individuals have become overwhelmed with the amount of subscription services available and, as such, may be returning to pirating. Once again, the inner-workings of the pirate psychology remains murky and MEs must tread lightly if they hope to ever reduce online piracy.

#### **1. Studies Provide Evidence for Streaming as Solution to Online Piracy**

Instead of tackling online piracy through the available—and yet seemingly unsuccessful—legal channels, “[s]tudy after study continues to show that the best approach to tackling internet

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<sup>159</sup> Borland, *supra* note 156.

<sup>160</sup> *Id.*

<sup>161</sup> BBC, *supra* note 157.

piracy is to provide these would-be customers with high quality, low cost alternatives.”<sup>162</sup> Once again, piracy is about access and affordability so “when you provide these users access to above-board options, they’ll usually take you up on the proposition” especially when the price is also right.<sup>163</sup> Recent research has confirmed that “piracy isn’t driven by law-breakers, it’s driven by people who can’t easily or affordably get the content they want.”<sup>164</sup>

Now, with the advent of streaming services, “[p]eople are watching less pirated material now than they used to, and they assume they’ll continue to watch less in the future. This is largely because of the cheap, easy access to free and paid material on the likes of Netflix and YouTube’....‘Compare that with pirating a show: piracy requires some technical ability and it is risky.”<sup>165</sup> Though it is unlikely that online piracy will be completely eradicated since there will always be a small percentage of people who are “averse to paying even a small access fee,”<sup>166</sup> if MEs switch to subscription and streaming services that appeal to consumers’ desire for convenience and access, online piracy could be greatly reduced.

However, considering that “subscription-based business models in content distribution is making piracy pointless” MEs have been slow to adopt the subscription-based business:<sup>167</sup>

“When it comes to video, copyright owners are less willing to release new and in-demand content to subscription services such as Netflix. They are eager to preserve their theater revenues during a movie’s first run...and they’re happier selling older movies to Apple and Amazon which offer them on a pay-per-view basis.”<sup>168</sup>

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<sup>162</sup> Karl Bode, *Studies Keep Showing That the Best Way to Stop Piracy Is to Offer Cheaper, Better Alternatives*, VICE (February 2019), [https://www.vice.com/en\\_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives](https://www.vice.com/en_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives).

<sup>163</sup> *Id.*

<sup>164</sup> The Mail Room, *Netflix is Killing Content Piracy*, SCOOP INDEPENDENT NEWS (February 2019), <http://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm>.

<sup>165</sup> *Id.*

<sup>166</sup> Leonid Bershidsky, *Why Netflix Is Winning the Online Piracy Wars*, BLOOMBERG (May 2017), <https://www.bloomberg.com/opinion/articles/2017-05-02/why-netflix-is-winning-the-online-piracy-wars>.

<sup>167</sup> *Id.*

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

One solution to MEs resistance to streaming is creating a “tiered, subscription price system to make more content available online.”<sup>169</sup>

## **2. Drawbacks of Streaming: “Subscription Fatigue” May Cause Streamers to Return to Pirating**

However, while some MEs are resisting the subscription-based business model, a host of other have begun to provide apps and streaming services which has created an entirely different problem in the industry: subscription fatigue. “A new study shows that after years of declines, BitTorrent usage and piracy is on the rise again. The culprit: an increase in exclusivity deals that force subscribers to hunt and peck among a myriad of streaming services to actually find the content they’re looking for.”<sup>170</sup>

The subscription-based business model has become so popular that it might be “*too* successful” to the point that individuals are so overwhelmed with what is available that they are returning to pirating.<sup>171</sup> The list of streaming services has grown far beyond industry titans such as Netflix and Spotify. Now there is “Hulu, HBO Now, ... Apple Music, Disney+, Apple TV+, Quibi, CrunchyRoll, the Criterion Channel, YouTube Red, Amazon Prime Video, Amazon Prime Music, Tidal, CBS All Access, Crackle, Sling, PlayStation Vue, ESPN+, DC Universe, Aereo (RIP), Seeso (RIP), VRV, Boomerang” to name a few.<sup>172</sup> On average, “[t]hese services generally cost between \$5 and \$15 a month, and if you were going to pay for all of them, you’d end up paying about as much as a monthly cable-TV subscription.”<sup>173</sup>

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<sup>169</sup> *Id.*

<sup>170</sup> Karl Bode, *The Rise of Netflix Competitors Has Pushed Consumers Back Toward Piracy*, VICE (October 2, 2018), [https://www.vice.com/en\\_us/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites](https://www.vice.com/en_us/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites).

<sup>171</sup> Brian Feldman, *Piracy is Back*, NEW YORK MAGAZINE (June 26, 2019), <http://nymag.com/intelligencer/2019/06/piracy-is-back.html>.

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

<sup>173</sup> *Id.*

“But the plethora of options has a downside: Nearly half (47%) of U.S. consumers say they’re frustrated by the growing number of subscriptions and services required to watch what they want, according to the 13th edition of Deloitte’s annual Digital Media Trends survey. An even bigger pet peeve: 57% said they’re frustrated when content vanishes because rights to their favorite TV shows or movies have expired.” In other words, “you could pay for a dozen different services to try and consume every new series and album and movie you’re interested in legally. Or you could pay for it on home video, if it’s even available (The Office is \$84.99 on Amazon right now). Or you could just pirate it.”<sup>174</sup> As the price continues to go up and the list of movies becomes decentralized and only available on one or two apps, piracy becomes an increasingly enticing option.

### **VIII. Conclusion**

The Pirate Bay litigation and the 2017 case *Stichting Brein v. Ziggo* both serve as examples of legal sagas that resulted in favorable judgements for media conglomerations and anti-piracy lobbying groups, however despite those decisions, there is yet to be substantial evidence that they alone reduce online piracy. In terms of copyright infringement, it seems that non-legal strategies are the more effective route when trying to deter individuals from breaking the law, even when that illegal act may not even cause the financial woes media and entertainment groups claim in the first place.

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<sup>174</sup> *Id.*

## Bibliography

1. About the EU, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited September 22, 2019).
2. About, THE PIRATE BAY, <https://www.thepiratebay.org/about> (last visited September 22, 2019).
3. Act (No. 729 of 1960) Respecting Copyright for Literary and Artistic Works, as amended to 1998, available at [https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=52482](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=52482).
4. Act on Copyright in Literary and Artistic Works Swedish Statute Book, SFS, 1960:729, as amended up to April 1, 2011, available at <https://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf> (last visited September 22, 2019).
5. Agreement on Trade-Related Aspects of Intellectual Property Rights, WORLD TRADE ORGANIZATION, available at [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf).
6. Alex Fitzpatrick, *Kopimism: File-Sharing Religion Takes Root in the U.S.*, MASHABLE (May 9, 2012), <https://mashable.com/2012/05/09/kopimism-file-sharing/>.
7. Alex Hern, *European Court of Justice Rules Pirate Bay is Infringing Copyright*, THE GUARDIAN (June 15, 2017), <https://www.theguardian.com/technology/2017/jun/15/pirate-bay-european-court-of-justice-rules-infringing-copyright-torrent-sites>.
8. Alison George, *Kopimism: The World's Newest Religion Explained*, NEW SCIENTIST (January 6, 2012), <https://www.newscientist.com/article/dn21334-kopimism-the-worlds-newest-religion-explained/>.
9. Andy, *Piracy Is Driven By Availability & Price, People Prefer Not to Break the Law, ISP Study Says*, TORRENTFREAK (February 26, 2019), <https://torrentfreak.com/piracy-is-driven-by-availability-price-isp-says-190226/>.
10. Ann Harrison, *The Pirate Bay: Here to Stay?*, WIRED (March 13, 2016), <http://www.wired.com/science/discoveries/news/2006/03/70358>.
11. Arne Granholm, *The Swedish Commitment to Broadband Both in the Cities and in the Countryside*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) (August 2000), <http://www.oecd.org/internet/ieconomy/2736714.pdf>.
12. Ben Sheffner, *The Five Legal Cases that Defined the Year in Music*, REUTERS (December 18, 2009), <https://www.reuters.com/article/us-2009-lawsuits/the-five-legal-cases-that-defined-the-year-in-music-idUSTRE5BH5ET20091218>.
13. Berne Convention for the Protection of Literary and Artistic Works as amended on September 28, 1979, available at <https://wipolex.wipo.int/en/treaties/textdetails/12214>.

14. Brad Reed, *How Hollywood is Waging War Against VPNs*, BGR (April 17, 2015), <https://bgr.com/2015/04/17/hollywood-studios-vs-netflix-vpns/>.
15. Brian Feldman, *Piracy is Back*, NEW YORK MAGAZINE (June 26, 2019), <http://nymag.com/intelligencer/2019/06/piracy-is-back.html>.
16. Bruce Kogut, *The Global Internet Economy*, MIT PRESS, 125 (2003).
17. Case C-610/15 *Stichting Brein v. Ziggo BV, XS4ALL Internet DV* [2017] ECR, 99, para. 1.
18. Christina Angelopoulous, *CJEU Decision on Ziggo: The Pirate Bay Communicates Works to the Public*, WOLTERS KLUWER COPYRIGHT BLOG (June 30, 2017), <http://copyrightblog.kluweriplaw.com/2017/06/30/cjeu-decision-ziggo-pirate-bay-communicates-works-public/>.
19. “Countries Blocking Access to The Pirate Bay” WIKIPEDIA, [https://en.wikipedia.org/wiki/Countries\\_blocking\\_access\\_to\\_The\\_Pirate\\_Bay](https://en.wikipedia.org/wiki/Countries_blocking_access_to_The_Pirate_Bay) (last visited October 1, 2019).
20. Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29> (last visited September 22, 2019).
21. David Kravets, *Pirate Bay Future Uncertain After Operators Busted*, WIRED (January 31, 2008), <https://www.wired.com/2008/01/pirate-bay-futu/>.
22. David Sarno, *The Internet Sure Loves Its Outlaws*, LOS ANGELES TIMES (April 29, 2007), <https://www.latimes.com/la-ca-webscout29apr29-story.html>.
23. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”), *available at* <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32000L0031> (last visited September 22, 2019).
24. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, *available at* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML> (last visited September 22, 2019).
25. *Downloading ‘Myths’ Challenged*, BBC (July 27, 2005), <http://news.bbc.co.uk/2/hi/technology/4718249.stm>.
26. Eddie Kim, *After 15 Years, The Pirate Bay Still Can’t Be Killed*, MEL MAGAZINE (2019), <https://melmagazine.com/en-us/story/after-15-years-the-pirate-bay-still-cant-be-killed>.

27. Enigmax, *Suppressed Report Found Busted Pirate Site Users Were Good Consumers*, TORRENTFREAK (July 19, 2011), <https://torrentfreak.com/suppressed-report-found-busted-pirate-site-users-were-good-consumers-110719/>.
28. Ernesto Van der Sar, *32% of All US Adults Watch Pirated Content*, TORRENTFREAK (January 19, 2017), <https://torrentfreak.com/32-of-all-us-adults-watch-pirated-content-170119/>.
29. Ernesto Van der Sar, *Music Companies Sue Internet Provider RCN For Enabling 'Massive' Piracy*, TORRENTFREAK (August 28, 2019), <https://torrentfreak.com/music-companies-sue-internet-provider-rcn-for-enabling-massive-piracy-190828/>.
30. Ernesto Van der Sar, *Pirate Bay Moves to The Cloud, Becomes Raid-Proof*, TORRENTFREAK (October 17, 2012), <https://torrentfreak.com/pirate-bay-moves-to-the-cloud-becomes-raid-proof-121017/>.
31. Ernesto Van der Sar, *The Pirate Bay Runs on 21 'Raid-Proof' Virtual Machines*, TORRENTFREAK (September 21, 2014), <https://torrentfreak.com/the-pirate-bay-runs-on-21-raid-proof-virtual-machines-140921/>.
32. Ernesto Van der Sar, *UK ISPs Must Censor The Pirate Bay, High Court Rules*, TORRENTFREAK (April 30, 2012), <https://torrentfreak.com/uk-isps-must-censor-the-pirates-bay-high-court-rules-120430/>.
33. Gerechtshof Den Haag, (January 2014), ECLI:NL:GHDHA:2014:88, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2015:3307>.
34. Graham J. H. Smith, *Internet Law and Regulation*, SWEET & MAXWELL 657 (2007).
35. Guy Fawkes, *How to Unblock The Pirate Bay & Access It Everywhere in 2019*, VPNMENTOR, <https://www.vpnmentor.com/blog/how-to-unblock-the-pirate-bay-in-any-country/> (last visited September 22, 2019).
36. *HADOPI Says: Let's Try Cutting off Nose to Spite Face*, THE AMERICAN ASSEMBLY (July 26 2011), <http://piracy.americanassembly.org/hadopi-says-lets-try-cutting-off-nose-to-spite-face/>.
37. Hoge Raad der Nederlanden, (November 2015), ECLI:NL:HR:2015:3307, <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2014:88>.
38. Irdeto Website, <https://irdeto.com>, (last visited September 30, 2019).
39. J. E. Bassett IV, *Unanswered Arrrguments after the Pirate Bay Trial: Dropping Sail in the Safe Harbors of the EU Electronic Commerce Directive*, 12 N.C. J.L. & TECH. 67, 76 (2010).
40. Jan Libbenga, *Sweden Takes Big Stick to File-Sharers*, THE REGISTER (June 6, 2005), [https://www.theregister.co.uk/2005/06/06/swedish\\_file\\_sharers/](https://www.theregister.co.uk/2005/06/06/swedish_file_sharers/).

41. John Borland, *Study: File Sharing Boosts Music Sales*, CNET (August 15, 2002), <https://www.cnet.com/news/study-file-sharing-boosts-music-sales/>.
42. Jonas Andersson, *The Origins and Impacts of the Swedish File-Sharing Movement: A Case Study*, 1 CRITICAL STUDIES IN PEER PRODUCTION (CSPP) 1, 2 (2011).
43. Jonathan Wilson, *US Record Labels Sue Broadband ISPs Over Copyright Piracy*, ENGINEERING AND TECHNOLOGY (March 26, 2019), <https://eandt.theiet.org/content/articles/2019/03/us-record-labels-sue-broadband-isps-over-copyright-piracy/>.
44. Karl Bode, *Studies Keep Showing That the Best Way to Stop Piracy Is to Offer Cheaper, Better Alternatives*, VICE (February 2019), [https://www.vice.com/en\\_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives](https://www.vice.com/en_us/article/3kg7pv/studies-keep-showing-that-the-best-way-to-stop-piracy-is-to-offer-cheaper-better-alternatives).
45. Karl Bode, *The Rise of Netflix Competitors Has Pushed Consumers Back Toward Piracy*, VICE (October 2, 2018), [https://www.vice.com/en\\_us/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites](https://www.vice.com/en_us/article/d3q45v/bittorrent-usage-increases-netflix-streaming-sites).
46. Kate Youde, *Broadband: The First Decade*, THE INDEPENDENT (March 28, 2010), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/broadband-the-first-decade-1929515.html>.
47. Kopimi Website, <https://www.kopimi.com> (last visited September 22, 2019).
48. *Kopimist Constitution (English Version)*, FIRST UNITED CHURCH OF KOPIMISM US <https://kopimistsamfundetus.wordpress.com/kopimist-constitution-english/> (last visited September 22, 2019).
49. Leonid Bershidsky, *Why Netflix Is Winning the Online Piracy Wars*, BLOOMBERG (May 2017), <https://www.bloomberg.com/opinion/articles/2017-05-02/why-netflix-is-winning-the-online-piracy-wars>.
50. Liam Tung, *Swedish TV And US Film Industries Sue ISP to Block Access to The Pirate Bay*, ZDNET (November 11, 2014), <https://www.zdnet.com/article/swedish-tv-and-us-film-industries-sue-isp-to-block-access-to-the-pirate-bay/>.
51. LinkedIn Profile of Gustav Nipe, LINKEDIN, <https://www.linkedin.com/in/gustav-nipe-a61ab0102/> (last visited September 22, 2019).
52. LinkedIn Profile of Isak Gerson, LINKEDIN, <https://www.linkedin.com/in/isak-gerson-07695117/?originalSubdomain=se> (last visited September 22, 2019).
53. Michael A. Lindenberger, *Internet Pirates Face Walking the Plank in Sweden*, TIME (February 20, 2009), <http://content.time.com/time/business/article/0,8599,1880981-2,00.html>.

54. Michael Bogdan, *Cyberspace Pirates Walk the Plank - Some Comments on the Swedish Judgment in the Pirate Bay Case*, 4 MASARYK U. J.L. & TECH. 113 (2010).
55. Missionary Church of Kopimism Website (English Version), <https://kopimistsamfundet.se/english/> (last visited September 22, 2019).
56. Muso Website, <https://www.muso.com> (last visited September 30, 2019).
57. *Netflix is Killing Content Piracy*, SCOOP INDEPENDENT NEWS (February 26, 2019), <http://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm>.
58. *New Swedish Anti-Piracy Laws Triggers a Thirty Three Percent Drop in Internet Use and Legal Downloads Might Have Doubled*, MUSIC LAW UPDATES (May 2009), <http://www.musiclawupdates.com/?p=1775>.
59. Patrick Burkart, *Pirate Politics: The New Information Policy Contests*, MIT Press 17 (2014).
60. Patrick O'Rourke, *The Pirate Bay's Domain is Now Hosted on a Volcanic Island*, CANADA.COM (July 21, 2014), <https://o.canada.com/technology/internet/the-pirate-bays-domain-is-now-located-on-a-volcanic-island>.
61. *Pirate Bay Founding Group Disbands*, BBC (June 28, 2010), <https://www.bbc.com/news/10433195>.
62. *Pirate Parties*, PIRATE PARTIES INTERNATIONAL (PPI), <https://pp-international.net/pirate-parties/> (last visited September 22, 2019).
63. Rebecca Martin, *Supreme Court Denies Pirate Bay Right to Appeal*, THE LOCAL (February 1, 2012), <https://www.thelocal.se/20120201/38844>.
64. *Regulations, Directives and Other Acts*, EUROPEAN UNION, [https://europa.eu/european-union/eu-law/legal-acts\\_en#directives](https://europa.eu/european-union/eu-law/legal-acts_en#directives) (last visited September 22, 2019).
65. Rights Alliance Website, <http://www.rattighetsalliansen.se/en/> (last visited September 30, 2019).
66. Robert van Shaik, *Dutch Supreme Court Requests Ruling on Whether the Pirate Bay 'Makes a Communication to the Public'*, IRIS MERLIN (January 22, 2016), <http://merlin.obs.coe.int/iris/2016/1/article22.en.html>.
67. Rollo Romig, *The First Church of Pirate Bay*, THE NEW YORKER (January 12, 2012), <https://www.newyorker.com/culture/culture-desk/the-first-church-of-pirate-bay>.
68. S. Lindgren & J. Linde, *The Subpolitics of Online Piracy: A Swedish Case Study*, CONVERGENCE: THE INTERNATIONAL JOURNAL OF RESEARCH INTO NEW MEDIA TECHNOLOGIES 4 (2011).

69. Sara K. Morgan, *The International Reach of Criminal Copyright Infringement Laws – Can the Founders of the Pirate Bay Be Held Criminally Responsible in the United States for Copyright Infringement Abroad*, 49 VAND. J. TRANSNAT'L L. 553, 559 (2016).
70. *State of the Internet Quarterly Connectivity Report*, AKAMAI, <https://www.akamai.com/us/en/resources/our-thinking/state-of-the-internet-report/global-state-of-the-internet-connectivity-reports.jsp> (last visited September 22, 2019).
71. Stephen Heyman, *Sweden's Notorious Distinction as a Haven for Online Pirates*, THE NEW YORK TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/18/arts/international/swedens-notorious-distinction-as-a-haven-for-online-pirates.html>.
72. Steve Dent, *EU Withheld a Study that Shows Piracy Doesn't Hurt Sales*, ENGADGET (September 22, 2017), <https://www.engadget.com/2017/09/22/eu-suppressed-study-piracy-no-sales-impact/>.
73. *Stichting Brein v. Ziggo BV and XS4ALL Internet BV – After All The Pirate Bay Does Communicate to the Public*, UNIO- EU LAW JOURNAL (April 9, 2018), <https://officialblogofunio.com/2018/04/09/stichting-brein-v-ziggo-bv-and-xs4all-internet-bv-after-all-the-the-pirate-bay-does-communicate-to-the-public/>.
74. Stichting Brein Website, <https://stichtingbrein.nl> (last visited September 23, 2019).
75. *Sweden Recognises New File-Sharing Religion Kopimism*, BBC (March 8, 2012), <https://www.bbc.com/news/technology-16424659>.
76. Sweden's Constitution of 1974 with Amendments through 2012, CONSTITUTE PROJECT, [https://www.constituteproject.org/constitution/Sweden\\_2012.pdf?lang=en](https://www.constituteproject.org/constitution/Sweden_2012.pdf?lang=en) (last visited September 22, 2019).
77. *Swedes Curb Rampant Downloading*, BBC (July 1, 2005), <http://news.bbc.co.uk/2/hi/technology/4642373.stm>.
78. Terrence Russell, *Study Finds File-Sharers Buy Ten Times More Music*, VENTUREBEAT (April 21, 2009), <https://venturebeat.com/2009/04/21/study-finds-file-sharers-buy-ten-times-more-music/>.
79. The Court of Justice of the European Union Website, EUROPEAN UNION, [https://curia.europa.eu/jcms/jcms/j\\_6/en/](https://curia.europa.eu/jcms/jcms/j_6/en/) (last visited September 22, 2019).
80. *The EU in Brief*, EUROPEAN UNION, [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en) (last visited September 22, 2019).
81. The Mail Room, *Netflix is Killing Content Piracy*, SCOOP INDEPENDENT NEWS (February 2019), <http://www.scoop.co.nz/stories/BU1902/S00685/netflix-is-killing-content-piracy.htm>.

82. The Pirate Bay Website, <https://www.thepiratebay.org> (last visited September 22, 2019).
83. *Thepiratebay.org July 2019 Overview*, SIMILAR WEB, <https://www.similarweb.com/website/thepiratebay.org> (last visited September 22, 2019).
84. TJ McCue, *How Does A VPN Work?*, FORBES (June 20, 2019), <https://www.forbes.com/sites/tjmccue/2019/06/20/how-does-a-vpn-work/#46aa500e70cd>.
85. *WJP Rule of Law Index*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/> (last visited September 22, 2019).
86. XS4ALL Website, <https://www.xs4all.nl> (last visited September 23, 2019).
87. Ziggo Website, <https://www.ziggo.nl> (last visited September 23, 2019).