

Server Copyright Liability

– Notes on the Swedish Act on Liability for Intermediaries and two Recent Decisions of the Swedish Supreme Court

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1 Introduction

Making information available on the World Wide Web surely involves a chain of intermediate service providers. There are, at a closer look, multiple types of actors participating in this process, being “providers” to some extent within the broadest meaning of this word. Accordingly, their individual contact with the information flowing through the servers may range from actual and very direct disposal over a distinct and individualized type of information, such as specific works protected by copyright, to a very abstract or “technical” contact with the information flowing through the system in which they possibly may, on a gliding scale, be said to be active as intermediaries. From this perspective it is obvious that the lately often raised question of liability for “online service providers” cannot be answered generally or in the same way for all those intermediaries located on the Internet, simply because they do different things.

However, along this line of thinking we may state, that the complexity of the basic question may not necessarily concern all actors on the Internet. Those involved in the communication process, whereby individual and protected works are de facto, possibly in an initial phase, made available on the Web, they are often called *content providers*, may as a matter of principle relatively easily be identified, according to copyright law in most countries, as *users* of copyright works, thus liable for their acts, such as reproduction, communication to the public or the like, within the frames of the sole rights of the copyright owner.¹ This may concern an ordinary home page owner’s supply to the public on his homepage of copyright material or any other act of a “posting” content provider,

¹ The necessity to confirm this in a coherent way was, however, stressed by the WIPO Treaty on Copyright (WTC) and the WIPO Treaty on Performances and Phonograms (WPPT), both from 1996.

who has the strongest control over the content of a web site.² There is basically nothing new in this situation, merely because it occurs in the Internet environment or in the digital world, as for example *upload* of protected works on a publicly accessible computer clearly demands acceptance from the owner of the rights concerned. This has been stated by courts all over the world for several years, and has also been confirmed by the Swedish Supreme Court.³

Actual problems from the rights owners' perspective may still prevail for other reasons, namely that content providers may be anonymous or individually unknown or acting in or from countries where legal instruments are not effective. Further, the Internet phenomenon of *linking* techniques may provoke the ordinary scheme for copyright protection, blurring the test whether the home page owner, providing links to servers with protected object, or the end users, who are visiting the homepage, or neither of them, or both, would be considered to abuse copyright in the objects linked to; the Supreme Court of Sweden has recently tried these matters, which will be dealt with below.

On the other hand, not everyone supporting the Web is necessarily a potential user of copyright works. Mere *network operators* in the sense of a telecom supplier, i.e. someone facilitating transmission of information by supplying the overall technology or network facilities for communication, without having anything to do with the specific information as such finding its way through those facilities, may not easily be said to dispose over or to *use* copyright. Someone facilitating the transmission of information from one place to the other on the instruction of the factual users, without having anything else to do with the *content* of the transmitted information, may accordingly be a simple case of activity, not at all related to disposal over the exclusive uses of copyright. But complexity is dynamically added to the liability issue when other actors on the Web than those who initially did upload it or those who are its potential end users subsequently handle one and the same informational content. The complexity of the liability issue is obviously vested in the variety of *intermediaries* related to the transmission of copyright information, as was already indicated above by the example concerning links between home pages.

Looking at intermediaries, focus may be laid on some archetypes of Internet actors. First we may identify the *access provider*, an intermediary whose main object may be to provide an end user's access to the Internet. Normally, the access provider has a contract with the end user, a subscription agreement, whereby the user is offered to have all his web traffic via the access provider's facilities. A problem that blurs the legal evaluation of this situation is, of course, that a clean cut Internet actor like the access provider, defined in the just mentioned way, not always is found. Moreover, such an access provider often offers also other services than merely an access to the Internet, such as access to news groups, possibilities to download software etc. Still, also within the narrow frames of the definition, the access provider obviously does something else than the network operator, for example by having a more individualized relation to end users.

² Cf. District Court of Stockholm, 1998.09.14, and Appeal Court of Stockholm (Svea Hovrätt), 2001.03.10, Religious Technology Centre (The Scientology Church).

³ Cf. Supreme Court of Sweden, NJA 1996 pp. 79 *et seq.*

Another figure is often called a *hosting service provider*, offering users the facilities of a computer connected to the Internet, hereby being the host for information stored and thus made available through the www. More than the access provider, the hosting service provider therefore has a profound connection to the stored or transmitted information. Still, in the individual case the great majority of guests and, accordingly, the often enormous multitude of works stored in the hosting service provider's device, may not easily clarify the provider's liability for an unauthorised performance of a restricted act. At least not in a criminal case, for example due to failure to prove the provider's *fault* or at least his *causation*, which may in turn presuppose *foreseeability*, *knowledge*, *negligence*, *intention* etcetera, due to the standards set by national law.⁴

2 The Swedish Act on Responsibility for Electronic Bulletin Boards

As from 1 May 1998 the new Act on Responsibility for Electronic Bulletin Boards [lag (1998:112) om ansvar för elektroniska anslagstavlor] – hereinafter called the BBSA – became effective in Sweden. Unlike the WIPO Copyright Treaty (WIPO), the DMCA⁵, the EU directives on E-commerce⁶ and on Copyright in the Information Society⁷, both yet to be implemented, all limiting or mitigating the otherwise more or less strict liability according to general penal law or copyright law for online intermediaries, the BBSA positively *broadens*

⁴ Nuances of national Law actually decides liability of online intermediaries. Such services have been tried in the US in several well observed cases, whereby the courts obviously have stated different levels of liability, as it seems often on the basis of sheer reasonableness. *See e.g. Religious Technology Center v. Netcom Online Communication Services*, 907 F. Supp. 1361 (N.D. Cal. 1995), whereby it was found that temporary copies made while transmitting a work over the Internet did constitute reproductions for the purpose of copyright law, and that fault was not required under the US Copyright Act. However, mainly on grounds of public policy and reasonableness the Court required an additional element of “violation or causation” to hold the provider liable for direct infringement. This reasoning seems to have been followed in several other decisions where it was found that a BBS operator cannot be a direct infringer if he does not “directly cause” the infringement; *see Sega Enterprises v. Sabella*, LEXIS 20470 (N.D. Cal. 1996); *Sega Enterprises v. Maphia*, 948 F. Supp. 923 (N.D. Cal. 1996). According to these decisions, if an intermediary does not initiate the infringement nor create or control the content of its service, he cannot be considered to have caused the infringement. The notion of foreseeability seems to play a role in establishing a legal cause. Still the court in these cases indicated that an intermediary may still be held indirectly liable under the doctrine of contributory infringement, in which case fault on the part of the provider must be proven, i.e. the plaintiff must show that the provider knew or should have known of the direct infringer's conduct. However, still other US courts have held online intermediaries directly liable, even when the defendant acted as passively as Netcom; *Playboy Software Inc. v. Nugent*, 903 F. Supp. 1057 (E.D. Tex. 1996).

⁵ *See* the US Online Copyright Infringement Liability Limitation Act, enacted in October 1998 as a part of the Digital Millennium Copyright Act (DMCA).

⁶ *See* the European Parliament and Council Directive on Certain Legal Aspects of Electronic Commerce in the Internal Market, Brussels, 2001/31/EC.

⁷ *See* the European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001/29/EC.

the scope of liability otherwise given by a specific set of acts restricted by law, among them the Swedish Copyright Act.

Service providers, according to the BBSA, are those who *own* or *administer* an electronic bulletin board. The BBSA obliges under penalty such a provider in three different ways. First, the provider must *inform* those who send information to the Bulletin Board that the information will be available to other users. This may be obvious to the uploading party, but, still, it would be a criminal act of the BBS owner not to inform. Second, the owner must keep *custody* over the Bulletin Board and, finally, he is obliged to *remove* obviously illegal information, namely if the information as such infringe copyright or concerns a few other criminalized acts listed in Section 5 of the BBSA, like instigation and child pornography.

The general idea of the BBSA is that the owner of a BBS, in order to fulfil his obligations, must *supervise* the activities of his subscribers or those who otherwise upload information on the BBS, but possibly only in so far as can reasonably be expected in view of the size and the purpose of the service. In its explanatory memorandum to the Act the Swedish Government explains, that the BBS owner should “regularly go through the content of the BBS”. However, how often this should be done may vary from case to case depending on the content of the service. Commercial services, the Government indicates, must check more regularly than private services. It is not intended, though, that the activity of the supplier would be seriously hampered by the new Act. If a number of messages is so large, that it is too cumbersome to check them all, it may be acceptable, the Government concludes, to provide an abuse board, to which users can complain about the existence of illegal messages.⁸

Nevertheless, the BBSA must be said to be unique, from an international perspective, in that it imposes upon the intermediary a duty to monitor. As was indicated above, the BBSA does not limit the scope of intermediary liability, but broadens it. Moreover, its *raison d'être* is that for example copyright law may fail to provide adequate protection against uses of protected works without due authorisation in “intermediary” situations; see about the judgement of the Swedish Supreme Court on BBS liability below. The BBSA will only apply if the owner is not liable under the general provisions of the Penal Code or the Copyright Act. But this does not mean to say that a BBS owner could not be liable, directly or as a contributory infringement, for copyright uses accomplished on or via the BBS. In such a case the BBS operator shall not be tried upon the BBSA, but solely for copyright infringement, Section 7 BBSA.

Was this new Act a success? Well, so far it has never been tried by a Swedish court! An optimistic analysis would indicate that the mere existence of the Act has served its underlying purposes. But a more realistic statement is that the obvious reluctance to apply it may relate not only to problems already to define a BBS device according to the Act, but also to be able to focus on the owner/administrator. The Act decides, that a BBS must make possible for visitors to get information from other persons and that they may communicate with other visitors. The intermediary function is hereby distinguished by the fact that the owner must supply informational material from others, and not to be the

⁸ Cf. prop. 1997/98:15.

source or the initiator of the information stored in the BBS. Thus, it may seem clear that a homepage, solely supplying one-way information to visitors, would not be a BBS. Neither would a simple information database connected to the Internet, or ordinary e-mail from person to person – the BBSA expressly states those exceptions to its application – nor an access provider if he just provides an Internet (or intranet) connection. On the other hand a web hotel, holding homepages for its customers, is probably covered by the Act, just as news groups, interactive archives, suppliers of banner advertising and other hosting service providers.

Reluctance to apply the BBSA may also reflect that the Act obviously contradicts, if not the WIPO Treaty on Copyright, WCT, or the new EU Directive on copyright and related rights, at least some expected effects of the *E-commerce* directive, as much as it provides a list of requisites under which, in a horizontal manner, online intermediary liability is excluded, mostly in the same way that the DMCA already does for copyright liability under US law. As for the WIPO Copyright Treaty of 1996 its “Agreed Statement” accompanying it, clarifies that “the mere provision of physical facilities for enabling or making a communication” does not in itself amount to an act of communicating the work to the public, at least not as a direct infringement insofar as the right of communication to the public is concerned. But the Treaty says nothing about liability for indirect infringement, neither does it exclude liability for reproduction of a transmission copy. The Copyright Directive, particularly Article 5(1), may rule out by-products by transmission, but not *reproduction* of hosting service providers or BBS operators. Such providers may not infringe the right of *communication to the public*, as the Agreed Statement to Article 8 of the WIPO Treaty is repeated in Article 3(4) of the Copyright Directive. Still, neither the WIPO Treaty nor the Copyright Directive contradicts the BBSA, but does not necessarily leave it as a nullity.

It may also be questioned whether the non-use of the BBSA reflects that copyright law, just as other laws on the arena of information, such as rules on freedom of speech, defamation, libel etc., in fact offers a satisfactory basis for protection of the interests concerned. However, court practise in Sweden indicates something else as copyright law is concerned. In a case on liability for a BBS operator, tried by the Supreme Court of Sweden in 1996, while the BBSA was a well observed but still just a proposed legislative project, the potential shortcomings of copyright law was exposed.

3 Is an Intermediary a User of Copyright Works?

The just indicated BBS case⁹ concerned the generally important issue of defining which rights from the copyright palette were involved in on-line transmissions on the Internet and by the hosting service provider, and, in particular, if the BBS operator would be considered as a user of such rights, if any, in order to be held potentially liable for such uses.

⁹ See NJA 1996 pp 79 *et seq.*

In short, the BBS case was about a database – the BBS – for attractive computer programs, most of them no doubt protected by copyright. It was connected to the Internet and not only accessible to the public but also open for upload as well as download activities by the public, and therefore functioned as a mart for free exchange of programs. After seizure of the police the BBS was found to hold copies of a large number of protected programmes, thus stored, i.e. copied, without due authorisation. The owner of the BBS, the only one facing an indictment in this case, claimed that he had actually not accomplished the copying – this had come about through upload of unknown third parties, interested in the exchange of programs. Neither had he made the programs available to the public merely by their existence on the hard disc of the BBS. In fact, he claimed that he was unaware of what programs were actually stored on his BBS.

The exclusive rights of uses under Swedish copyright law are, basically, a reproduction right and a right to make protected works available to the public, in both cases irrelevant by what means, i.e. those uses are media neutral. Accordingly, the Supreme Court of Sweden stated that both upload on and download from the BBS were acts, which needed clearance from the rights owners. The crucial question was whether the owner of the BBS could be liable for the factual reproduction or possibly a communication to the public in the light of his *passivity*. This was a criminal case, whereby the *principle of legality* would demand clarity and certainty of what is and what is not considered to be an offence. The Swedish Copyright Act, not stating what acts are forbidden, like common law systems often do, but positively reserving for the author an exclusive right of use, namely to *reproduce* copies and to *make a protected work available to the public*, would in a criminal case presuppose that the abuser of such a right actually did use the work in question in an active way. The Supreme Court found that the BBS owner had not actively (enough) done this. Accordingly, he did not abuse copyright.

The outcome of the case stresses that mere passivity does not indicate an infringement, neither that there would exist an obligation according to copyright law for a network actor of the said kind to keep custody over and, for example, to remove illicit products. Thus, the BBSA would have filled this gap had it existed at the time of the judgement, and the Supreme Court also mentioned this as a subsequent possibility. Further, the activity test of the BBS owner seems to be a very strict one. The prevailing circumstances might have led to another result, in my opinion, as the system operator as a matter of fact was, to a certain extent, active with some of the computer programs uploaded on his hard disc; he in fact had moved some program files from an upload area to a specific download area, only available for a selected number of outside visitors, however still being a “public” entity, hereby observing each programme as such and obviously making decisions for them. In this the BBS owner did more than for example the Netcom in the US case mentioned above.¹⁰

Another shortcoming of this case was that the BBS owner’s possible *indirect infringement* or his potential contributory violation were not tried at all. The Court itself was probably surprised that the attorneys’ indictment, which as

¹⁰ See note 3 *supra*.

always in criminal cases offers the frames of the case, did not comprise also indirect infringement, and in an obiter dictum the Supreme Court gave a faint understanding of this. Alas, had indirect infringement been part of the indictment, we may suspect that the BBS owner would have been found guilty at least on this point.

4 Deep Links as a Copyright Infringement of an Intermediary?

Another Swedish case, recently decided by the Supreme Court, tests an intermediary's, in this case an owner of a homepage, potential liability for copyright uses via hypertext links or so called deep linking to servers holding illicit MP3 files of recordings of musical works.¹¹

The background of the case – a criminal case, initially handled by a district prosecuting attorney – is the following. Tommy O, a boy of seventeen at the time of the potential violation, was alleged, via his homepage on the Internet, to have made available to the general public illegally produced sound files in MP3 format from CDs, and thereby wilfully or through gross negligence, to have taken action, or caused action to be taken, whereby he infringed, or in any case infringement took place, upon rights belonging among others to a number of record companies which produced the CDs in question, “or their representative, IFPI.”

O's actions, to be precise, consisted of supplying information on his homepage relating to music titles, link symbols etc., in fact a quite neat menu of hundreds of contemporary hit songs, with the intention of making the files available for downloading from external servers, where the files had been stored from the CDs. The information was linked via “deep links” set up by O to various servers where the recordings were actually stored as sound files, which made it possible for visitors to O's homepage, solely by clicking once on the homepage's link designation, without switching to anyone else's homepage, to receive the files directly into their computers, without any “intermediate landing” with O.

The links accomplished that the visitors did not themselves have to search for and enter the addresses from which the files could be downloaded. It had not been alleged that O himself copied any files – no MP3 files were stored on O's hard disc. In those concrete instances, to which the case refers, it was a precondition for the orderers' acquisition of the files that they were reached by means of O's links, insofar as his actions were a precondition for the production of a copy which took place on the computers of those who utilised O's offer of links. According to the decision of the Court of Appeal, O understood “that the music files were illegal, but did not imagine that the links could also be illegal”.

In the court of first instance the attorney's indictment focused only on O's acts of linking as illicit *distribution* of protected recordings. Not to anyone's surprise the court upon this could laconically state that electronical transmission of works and recordings on the Internet does not amount to an act of distribution (but possibly to other kinds of copyright uses) according to the Swedish

¹¹ See Supreme Court of Sweden, decision 2001.06.15, NJA 2000 p. 292.

Copyright Act. This is something which really should not be debated, due to the quite distinct copyright terminology of today in Sweden as well as in many other countries,¹² thus letting the notion of distribution cover acts relative only to physical objects, copies, being sold, hired out etc.¹³ Accordingly, the court could quite easily dismiss the action on this basis.

By appealing to the Gota Court of Appeal the attorney had changed the indictment, naturally not the description of the alleged acts as such, making it a core issue whether Olson had, pro primo, made the recordings *available to the public* or if he had, pro secundo, *contributed to illicit copying*, which, it was claimed, took place on the computers of those who had visited O's homepage, used his links and subsequently had a copy on their hard disc. The prosecuting attorney used the following phrasing:

“During the period autumn 1998 – July 1999, O, in his home in Stenstorp, through making illegally-produced sound files in MP3 format from CDs available to the general public via his own homepage on the Internet, wilfully or through gross negligence has taken action, or caused action to be taken, whereby he infringed, or alternatively aided and abetted infringement, upon rights belonging to the individual record companies – 11 in total – which produced the CDs in question, or their representative, the IFPI.”¹⁴

Firstly, the Gota Appeal Court stated, as regards hypertext links, that the specimen, the MP3 files, might be incorporated in a database without it being physically stored therein. This was said to apply even if the link directs visitors to the specimen. In this case O did not copy the files on the server, to which the link goes. There was simply not a question of O's direct copying of any files.¹⁵

About direct infringement the Gota Court of Appeal may be said to have diminished the spectre of the claim by stating that no other right were concerned than those “phonogram producers” are afforded as such by the Copyright Act. According to Section 46 of the Swedish Copyright Act, a gramophone record or any other device on which sound has been recorded may not, without the consent of the producer, be copied or made available to the general public until the expiry of a certain period of time. In this the rights of the sound producers matches those of the authors. However, under Section 47 of the Swedish Copyright Act, sound recordings may be used for *public performance* without permission of the producer or the performing artist (but by the author). When

¹² Not so a few years ago. Cf. for example some much observed US cases, such as *Playboy Enterprises Inc. v. Frena*, 839 FSupp 1552, 29 USPQ2d 1828 (DC Mfla 1993), 47 PTCJ 202, which shows a sliding terminology use of the word distribution in a copyright context.

¹³ Cf. Article 6 of the WIPO Copyright Treaty and Article 3 of the EU Copyright Directive; note 7 *supra*.

¹⁴ English translation by the Swedish Group of the IFPI.

¹⁵ Cf. the decision of U.S. District Court, Central District of California, March 27, 2000, *Ticketmaster Corp. et al. v. Tickets.Com, Inc.* In this case the defendant, Tickets.com, allegedly was copying the interior of web pages. The court stated that by the use of deep links or hyper links, the customer was transferred directly to the Ticketmaster interior event page, bypassing its home page, but that the defendant actually had, unlike the situation in the O case, transferred copies from Ticketmaster's event pages to Ticket.com's own computer to facilitate extraction of facts from them. As the information itself was found unprotectable, the claim was denied.

this happens, Section 47 only provides for a right to *remuneration* to the phonogram producer as well as the performing artist of the recording. This simply meant, that O could very well be liable to pay such remuneration to those rights owners, but he could not be held criminally responsible if his actions were regarded as constituting a *performance* of the said kind.

By limiting the case to the rights of phonogram producers, not an absolute necessity due to the above cited indictment, and by equating public performance in Section 47 to the much broader basic right to make a recording available to the public in Article 46, the Appeal Court found that O could not be liable for a direct infringement; O's actions in directing visitors via links to sound files already stored on the Internet, could not be regarded as if he had made them available to the public, the Court concluded.

As regards the assertion that O *aided* and *abetted* unlawful actions, indeed a very central theme in this context, the Appeal Court came to the following judgement, which should be quoted literally as it contains so many intrinsic aspects (to be dealt with further on in this text):

“The first question is whether Tommy O may be regarded as having been guilty of aiding and abetting the distribution of unlawful copies of sound recordings made by any person who placed the MP3 files on the Internet. This would be the case if it was demonstrated that the person who placed the copies was guilty of an offence. It has not, however, been demonstrated that this action took place in Sweden or in another country in which this procedure is a criminal offence, nor has it been shown whose rights would in that case have been infringed. Accordingly, it has not been sufficiently proven that Tommy O aided and abetted criminal activities in the case now stated.

That being so, the question is whether Tommy O can be regarded as having aided and abetted infringements of the record companies' rights through *visitors* to his homepage *copying* the sound files. As the Court of Appeal previously observed, copying of sound recordings is permitted if the copying is done for private use. This exception is not restricted, but may in the opinion of the Court of Appeal also be regarded as covering copies of specimens produced without the consent of the phonogram producer. In this case it has not been proved that visitors copied the files for purposes other than private use, and that they have therefore infringed the rights of the record companies. In the circumstances stated, Tommy O cannot be pronounced guilty of aiding and abetting such infringements.

All in all, the Court of Appeal is of the opinion that the actions Tommy O took in using links to refer visitors to sound files on servers connected to the Internet do not constitute breach of the Copyright Act. Aiding and abetting the infringement by others of the rights of the record companies may be a criminal act if it is demonstrated that the person who placed the copies on the Internet can be prosecuted under Swedish law. In the opinion of the Court of Appeal, the prosecutor has not shown this to be the case. Nor can it be regarded as a criminal act to copy files for private use. Accordingly, Tommy O cannot be pronounced guilty neither of breach of the Copyright Act nor of aiding and abetting such a breach. The action is, therefore, dismissed in its entirety.”¹⁶

¹⁶ English translation by the Swedish Group of the IFPI.

A number of phonogram producers appealed to the *Supreme Court of Sweden*. They adjusted their description of the offence by adding that infringement had taken place “of the rights of the rights owners, including the individual record companies – 11 in total – which produced the records in question”. The intention of this adjustment to the charge was, among other things, to more clearly include offences committed against all rights owners whose interests the music recordings in question could affect. But as only a few record companies had appealed and as they had not proved that they had acquired the rights of other rights owners, such as authors of the songs, the appellants had no right of action as far as rights of others were concerned. For this reason the adjustment of the description of the offence was rejected by the Supreme Court.

With regard to this the Supreme Court found that it had only to decide whether Tommy O should be held responsible for taking, or participating in, actions through which the sound files in question were *made available to the public*, without the consent of the phonogram producers or their rights owners. In doing so, the Supreme Court firstly stated that, even if the broad notion of the authority to make a work available to the public involves all acts of display, performance and distribution, O’s actions were neither covered by the term “display” nor “distribution” under the Copyrights Act.

Secondly, and this is the stone pillar of this case, the court stated the following: A hypertext link worked in such a way that a visitor to O’s home page, who clicked on a link, immediately was moved on to a music file which, through this action, was made available to the visitor’s computer, which was accomplished by O individually or in collaboration with anyone else through the utilisation of his homepage, indicated that the files were made available for transfer via the Internet. The making available of the music files referred to in the case was therefore to be regarded as *public performance*.

As the regulations under Section 47 of the Copyright Act on public performance of sound recordings exempts the exclusive rights otherwise enjoyed by performing artists and phonogram producers, the case was dismissed. Further, the Court stated that O had in no case produced copies himself, individually or in collaboration with anyone else, whereas it was irrelevant whether the performance had involved an illegal copy of a recording or if there was an illicit production of copies of those who may have downloaded the sound files by using O’s links.

5 A Critical Analysis of the Hyperlink Case

5.1 Receiving Stolen Goods?

Independent of the definitions of responsibility in copyright law, it can be asserted that the contents of the files in question constitute the “property” of the rights owners in the meaning of the Penal Code. If so, it may be claimed, under the Swedish Penal Code Chapter 9 Section 6 Para 3, concerning *receiving stolen goods*, that O, with the intention improperly to promote the opportunity for visitors to his homepage to assimilate property (the files stored on the server)

originating from criminal acquisition, or the value of such property. Alas, this would be a criminal act, although not tried by the courts neither in this case or in any other case, knowingly, where the Internet is the arena. However, parallels do exist, for example with the instance where someone informs a third party about where someone else has hidden stolen property, and does so with the intention that those listening shall go and recover it for their own purposes and that the person making the announcement will benefit from being considered e.g. to be generous with what others recover for themselves. Obviously, the definition of the criminal act of reception of stolen goods, the Swedish term is "häleri", causes no principal trouble to apply on actions with a focus on products illicitly stored in networks.

5.2 Making Sound Files Available to the Public?

The court of first instance and the appeal court did not clearly deny hyper-linking to protected works, stored on servers, as something amounting to communication to the public, to performance or, to use the broader phrase of the Swedish Copyright Act, to make a work available to the public. It was merely the statutory exceptions to the sound producer's exclusive right of making a recording available to the public, one of the so-called neighbouring or related rights to authors' rights, which led to an exit for the alleged perpetrator. But the Supreme Court clearly announced, after a thorough analysis, that the hyper linking techniques used was public performance of the music files in question, thus an act clearly within the frames of the fundamental right of making a work available to the public.

At a closer look every digital copy of a sound file, which existed on any server, and to which copy O arranged a link, represented a "device on which sound has been recorded" (the server's digital copies). O had in fact made such devices available to the general public through taking action to arrange "deep links" to the sites on the Net environment, where he found the MP3 files, so that members of the general public did not need to search for the source, but were able to confine themselves to clicking on the title of the work from the compilation presented by O on his homepage. O's arranging of this availability has led visitors to O's homepage to copy the recordings in the meaning referred to in Section 46 CA. O's making the files available must then have been contrary to the law. There seems to be no need in this case to interpret "to make available to the general public" in Section 46 as dependent on the definition of what it means that a work is "made available to the general public" in accordance with the basic "author's copyright" distinction in Section 2 para 3 CA.

It can be further asserted, as pointed out above, that the server itself with a MP3 file must be seen as a "device on which sound has been recorded". For this case, O has not demonstrated that he had permission to establish the link which made the server available to the orderer/general public, quite irrespective of whether the storage of the MP3 file was in itself legal or not.

The concept of the right "to make available to the general public" under Section 2 para 3 CA, should, in contrast to the concept in Section 46, be clarified as referring to the case of public performance as well as distributing copies by

offering for sale, hiring out, lending, showing or otherwise. In my opinion, however, this clarification does not reduce the applicability of this concept to the case in question. The definition of the concept of *public performance* by the Supreme Court in the so-called Hotel Mornington case is relevant here.¹⁷ The parallel is striking between, on the one hand, the provision of the material connection to broadcast music, “eventually” heard through loudspeakers in a hotel room as well as via separate television sets in such rooms, which was considered to constitute the hotel’s own performance of the broadcast musical works, thus within the meaning of the distinction of the Copyright Act, and, on the other hand the digital connection between a certain homepage and MP3 files, stored by unknown persons on various servers, in the form of so-called deep links.¹⁸ The parallel is not disturbed by the fact that the music in the former case constituted the content of a completely legal transmission, in the latter case illegally stored files.

A clearly parallel situation is also provided by the fact that a network operators’ further transmissions in the cable network of others’ radio and TV transmissions under existing law is perceived as being subject to copyright, even if the transmission is simultaneous and unchanged, and irrespective of whether it was merely an alternative to another medium for transmitting the content, as follows from § 26 f CA. The equivalent situation applies for related rights; the technical definition of the transmission concept in, for example, § 48 CA places no requirements whatsoever on the receiving circle, but obliges every network owner or other person who installs or connects his network equipment to existing networks to respect the rights of the broadcasting company.¹⁹ In line with this, the installation of a normal set-up for a *central antenna*, as a service to those living in a number of homes connected to the central antenna, may be indisputably regarded as a method of making available to the general public the radio and TV material received by the central antenna, even though the transmissions could be received by any of the residents simultaneously on their own or somebody else’s receiver.

O’s actions in establishing a number of links to protected music files with the purpose of making others, who without doubt constitute a general public in the meaning of the Copyright Act, aware of the recordings, are no less acts aimed at making protected works available to the general public than (i) those brought about in the way demonstrated above by the Mornington Hotel, (ii) the operator of a cable network or (iii) the person who erects a central antenna. The sufficient extent of *active action*, which the Supreme Court in the Swedish BBS case, mentioned above, stated as a precondition for regarding someone in the criminal law meaning, and with reference to the principle of legality, as having “produced

¹⁷ See NJA 1980 p. 123, Mornington.

¹⁸ Cf. Rosén, *Mornington – automatik eller mänsklig gärning?* Rättsfall att minnas. [Mornington – automation or human action? Memorable cases.] To Jan Hellner 28 October 1997, p. 279 ff.

¹⁹ Cf. Olsson, *Upphovsrättslagstiftningen. En kommentar* [Copyright Legislation. A comment], 1996, p. 305 ff.

a copy” or “made” a work “available to the general public”, had clearly been fulfilled by O.²⁰

In the Mornington case, the Supreme Court also confirmed, as in subsequent Swedish cases, that the application of the CA, with respect to making material publicly available, was not at all dependent on the potential receiving public actually assimilating the protected work; the crucial point was that the perpetrator had taken measures to make it possible for the general public to gain access to the protected work.²¹ Against this background, it is totally irrelevant that interested individuals among the general public may be required to take certain actions themselves to gain access to the protected work, such as to switch on the television set or select a channel. Visitors to O’s homepage were, moreover, not required to carry out more than two or possibly three “clicks” for the music actually to be played on their equipment. One click on the deep link typically makes the music file available on the visitor’s computer, possibly the question appears on the visitor’s screen asking whether the visitor wishes to save the file on the hard disk, which is performed through another click, in addition to which one further click may be required for the file to be played audibly.

5.3 Complicity in the Duplication – Copying of MP3 Files by Others

A cause to dissatisfaction with the Supreme Court’s verdict is that this court did not try the impact of the MP3 files being in actual fact illicit copies where O found them, or his complicity in his visitors’ making of new copies originating from such illicit originals. O had accomplished nothing else than public performance, according to the Supreme Court. This should not pass undebated.

By considering whether O was complicit “through visitors to his homepage copying sound files”, the Court of Appeal was of the opinion that it had not been proved that the visitors “copied the sound files for purposes other than their own private use”. It is, however, incumbent on the person maintaining that a restriction of rights in accordance with Chapter 2 CA should constitute freedom of use, to demonstrate that the conditions for the application of the restrictions apply, and not upon the rights owner to demonstrate the opposite.

All the statutory exemptions and restrictions in Chapter 2 CA which relate to a master in the form of a copy or another manifestation of a protected work should be based on the assumption that the restriction can only be applicable if the master itself is lawful. The provision in Section 12 CA on private use relates, accordingly, to “published works”. This not only prohibits the copying for private use of non-published works, but also the copying of works that have indeed been published, but without the consent of the author. In line with this, pirate copies and other illicit manifestations of a protected work cannot be

²⁰ See NJA 1996 p. 79; see comments by Rosén in SvJT 1996 p. 414 ff.

²¹ Cf. NJA 1967 p. 159 (NIR 1968 p. 125), Gammeldansförening; NJA 1986 p. 702 (NIR 1987 s. 89), Demonstrationsmusik; NJA 1988 p. 715 (NIR 1989 p. 225), Sjukhusmusik. Cf. Koktvedgaard/Levin, *Lärobok i immaterialrätt*, 5 u. [Textbook of Intellectual Property Law, 5th ed.] 1997, p. 122 f; Bernitz m fl, *Immaterialrätt*, 5 u. [Intellectual Property Law, 5th ed.] 1995, p. 42.

covered by a restriction on the author's rights in accordance with Chapter 2 CA.²² This is based on the construction on which the rules of Chapter 2 rest – the exemption as a departure in principle from an otherwise general sole right with reference to duplication or making available to the general public. Not until the author has issued, published or transferred his or her work or copies of it may others be granted a certain right to use the work without special permission. For the same reason, restrictions on related rights should be based on the same assumption. For example, the right for everyone to play sound recordings in public in accordance with Section 47, against payment, assumes that the copies of the sound recordings used are not as such illegal.

Furthermore, the provision on private use in Section 12 Paragraph 1 through Section 3 of the CA, carries the restriction that there is no right to make an independently produced copy of musical works for private use. In the *production process* for the duplication/copying, which took place, not only visitors to O's homepage but also outsiders participated in the creation of the visitors' copies. The MP3 files were not supplied by O's visitors but through the operation organised by O. This operation appears to have been run on a professional basis ("He put a great deal of work into seeking out music files and replacing dead links. For this purpose, he recruited the assistance of two people").²³ Attention should be brought to the Supreme Court's consideration in a case regarding Sveriges Radio's (The Swedish Broadcasting Corporation) copying of so-called ephemeral recordings, in which it was regarded as incompatible with the intention behind the restricting rule, that a copy produced on the basis of the restriction was used to produce copies for the orderer's private use.²⁴

In other respects also the provisions on private use justify objection against what has occurred in this case. Thus, Section 12 Paragraphs 2 no 3 does not give freedom to produce copies in digital form of compilations in digital form. To the extent that a file or a transferred file set has constituted such a compilation as referred to in the provision, no production for private use has been legal on the basis of the restriction. Against the opportunity for the correct application of Section 12 para 2 n:o 3 – depending on the concrete circumstances – the content of EU directive 96/9/EG, preface no. 19 could possibly be cited.

The complicity in an offence which in the first instance appears to have been laid against O is that he promoted the crime,²⁵ which can be specified as copying by an orderer, namely that there was no freedom to copy illegal masters for private use. All copying on order is covered by O's admitted intention. Should any part of the copying be shown to have been legal in accordance with Section 12 Para 1, any other copying, however, as having been done with intent. Copying by the orderer will largely have taken place in Sweden. Alas, there is

²² See Rosén, *Offentlighetsprincipen och ensamrätten*, Festskrift till Gunnar Karnell, 1999, p. 605 ff, especially p. 614. [The principle of public access to official records and sole rights, Essays in honour of Gunnar Karnell].

²³ See the decision of the Gota Court of Appeal, p. 3.

²⁴ See NJA 1984 pp 304 *et seq*, 310; comments by Rosén in *Juridisk Tidskrift* 2001-01 nr 4 pp. 987 *et seq*.

²⁵ Cf. The Swedish Penal Code Chapter 23 § 4 Section 1.

no reason here to touch upon the international criminal law aspects of O's responsibility.

5.4 Complicity in Making Available MP3 File Music by Others

The Court of Appeal queried whether O could be considered to have been guilty of complicity in the actions of the person who "placed MP3 files on the Internet". The answer was negative, as it had not been shown whose rights had been infringed. However, O had been complicit in a production process in which music went from the server to the orderer's computer. It can be established that what O arranged over his links was the further transmission of illegal files, wilfully or through gross negligence, to visitors to his homepage. On their way to the orderers, the files did not physically pass through O's homepage, but the order was placed with this homepage as the instrument and starting point. It can be assumed that all those involved were aware of the visitors' reception of illegally produced files.

The worldwide copyright network based on international conventions makes it impossible to imagine that everything O made available should have originated from countries where the production of the data files in question was legal. Whether it would have been possible to impose a sentence as a sanction or not, the production involved infringement of the rights referred to. Given this, the conditions for establishing responsibility for complicity have been fulfilled. O had in fact promoted the intentionally illegal distribution of files to visitors to his homepage by foreign infringers.

6 Some Conclusions

Swedish case law, although far from clarifying all intrinsic aspects of the intermediary liability complex, at least demonstrates the not so overt division between civil tort liability and liability under criminal law as violations of copyright are concerned.

A crucial question may be whether an intermediary could be liable for the factual reproduction or a communication to the public in the light of his *passivity*. In a criminal case, the *principle of legality* would demand clarity and certainty of what is and what is not considered to be an offence – it would have to be exposed in black and white. The Swedish Copyright Act, not stating what acts are forbidden, like common law systems often do, but positively reserving in general terms for the author exclusive rights of use, namely to *reproduce* copies and to *make protected works available to the public*, would in a criminal case presuppose that the abuser of such a right actually did use the work in question in an active way, as was demonstrated in the Swedish BBS case. Accordingly, respect for the actual wording of the law may then lead to the mentioned differences, also stressing that, generally, passivity is not a criminal "act" if it is not factually defined as such in specific instances of statutory law, for instance as a duty to monitor a web server.

Further, the same principle in criminal law would possibly set aside or add reservations to an argumentation more or less based on the “interest of protection” generally understood by, for example, the copyright legislation. In civil law cases concerning monetary relief for illicit use of copyright works, it is quite often claimed, when the tortfeasor’s acts are not indisputably covered by the exclusive rights of the author, their “unlawfulness” are not obvious, that the overall protection interest of the Copyright Act would suggest that the acts of the claimed tortfeasor must be considered to be covered by the Act. For example, the notions of *public performance, communication to the public and making available to the public* may not always be very clear in new media and by uses of new techniques. But interpreted by the courts, such rights have become clearly media or technique neutral and thus quite comprehensive in Sweden, obviously in order to cover subsequently emerging techniques for exploitation of protected works; the quite simple notion seems to be that copyright protection should basically, as its *raison d’être*, comprise all types of uses being of some economical importance to the authors.

Hereby, the courts have for example decided that public performance or other forms of communication to the public of protected works must not necessarily presuppose that the medium content, the protected works, *de facto* reaches an audience, although this may be expected on a literal analysis of the Copyright Act. The application of the law would therefore not at all depend on the potential receiving public actually assimilating the protected work – the crucial point would be that the perpetrator has *taken measures* to make it possible for the general public to receive the information. Such deliberations are often demonstrated in civil cases, leading to a tortfeasor’s liability for damages, as much as his knowledge of the infringing act, that it is unlawful, is not a necessity, as the Swedish Copyright Act also imposes such liability on acts in good faith.²⁶

In a criminal case, only acts covered by gross negligence or wilfulness may lead to conviction.²⁷ The outcome may be slightly different not only because of the subjective factors but by the principle of legality. This is possibly also demonstrated by the fact that until today not a single online service provider has in any country, knowingly²⁸, been convicted for criminal acts of copyright infringement or related conduct – the Swedish Hyperlink case may be the first judgement, at least it is the first case to reach the Supreme Court.²⁹ An example may be the application of *exemptions* to the basic rights of the authors, such as different forms of private copying and fair use. Not all Copyright Laws expressly state that private copying, or any other exemption to the basic right to reproduction, must presuppose that the copy used as a model or master for the

²⁶ See Section 54 para 1 of the Swedish Copyright Act.

²⁷ At least by the Swedish standards of Copyright Criminal Law; Section 53 CA.

²⁸ Cf. Koelman/Hugenholtz, *Online Server Provider Liability for Copyright Infringement*, WIPO Workshop on Service Provider Liability, November 22, 1999, OSP/LIA/Rev 1, p. 16.

²⁹ Private law cases are not so few, though, like the noteworthy decision of the Antwerp Civil Court on 21 December 1999, by which was granted an injunction ordering to take away from a website several thousands of *hyperlinks* giving access to and download of MP3 files stored on other sites.

private copy must itself be licit, thus not a pirate copy.³⁰ Some would surely claim that *all* exemptions to copyright are valid only inasmuch as they relate to lawfully published or distributed works or manifestations of works. In the Hyperlink case the Appeal Court nevertheless found that it could never be a criminal act, violating copyright, to produce copies for private purposes. Accordingly, this should have been clearly stated by statutory law, not to follow merely on an assuredly fair interpretation of the rationale of the Copyright Act, should the Appeal Court have found O guilty of (aiding or abetting) the criminal deed.

As for the question whether *direct or indirect infringement* is at hand, it may be that the courts' relative unaccustomedness to new phenomena like Internet servers, linking, smart browsing etcetera, make them look at direct actions as contributory to something already accomplished by someone else. This must not be a major problem for anyone claiming damages, as indirect infringement, just as aiding and abetting to a criminal act, may lead to liability for damages, but the matter of proof and investigation may of course differ substantially to the rights owners. To me it seems that anyone actively taking measures aiming at making protected works available to the general public on the Internet is a perpetrator and thus liable as a tortfeasor or a criminal, if due authorisation lacks, even if such acts may be said to merely *continue* something already begun by others. Internet "intermediaries" seem not always to be exactly that. A clearly parallel situation, until now more familiar, is provided by the generally accepted fact that network operators' further transmissions on the cable network of others' *radio and TV transmissions* under existing law are generally perceived as being subject to copyright, and, further, not as something contributory to what others have done, even if the transmission is simultaneous and unchanged, and irrespective of whether it was merely an alternative to another medium for transmitting the content.³¹ An equivalent situation may also apply for related rights. The technical definition of the transmission concept by cable distribution, for example, places no other requirements on the receiving circle but to be public. However, it obliges every network owner, or other person who installs or connects his network equipment to existing networks, to respect the rights of the broadcasting company, irrelevant if the potential receivers could also catch the broadcast by alternative means.³²

³⁰ As of June 2001 the Danish Copyright Act actually states, that a master must not be an illicit copy, *see* Rosén, J., JT n:o 4, 2000-01 p. 990.

³¹ This follows from Section 26 of the Swedish Copyright Act.

³² Stated in Section 48 of the Swedish Copyright Act.