

SWEDEN

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Sweden be placed on the Watch List in 2009.

Executive Summary: In 2008, IIPA sought a Watch List placement for Sweden for its failure to reform its underlying legal and enforcement infrastructure so that the government and rights holders could begin to take effective action against some of the highest levels of “source” and P2P file-sharing piracy in the world. A bill currently awaiting action in the Parliament would correct some of these deficiencies but its passage is not certain. If the owners of the notorious P2P BitTorrent site, ThePirateBay, are convicted in a trial to start on February 16, 2009, that could have a significant impact in deterring widespread Internet piracy. Sweden’s general societal attitude that online piracy is an acceptable cultural phenomenon complicates local rights holders efforts to improve intellectual property protections for their works. Sweden should adopt the necessary amendments to its copyright law that would provide for injunctive relief and the right of information and devote greater resources to criminal enforcement. While the direction is positive, until that happens, IIPA recommends again this year that Sweden be placed on the Watch List.

Priority Actions to be Taken in 2009: IIPA requests the following actions by the government of Sweden, which, if taken, would result in the most significant commercial benefits to the copyright industries:

- Adopt the copyright law amendments on injunctive relief against ISPs and a “right of information” to permit rights holders to obtain the identity of suspected infringers from ISPs in civil cases
- Prosecute to the fullest extent the owners of ThePirateBay
- Increase the prosecutorial and police manpower devoted to criminal Internet piracy enforcement
- Commence a national criminal enforcement campaign to target source piracy and large scale Internet pirates
- Ensure that rights holders may pursue the new civil remedies easily and quickly
- Take an active role fostering ISP-rights holder discussions to effectively prevent protected content from being distributed without authorization over the Internet

UPDATE ON PIRACY AND ENFORCEMENT IN SWEDEN

Internet Piracy: Sweden has become a notorious Internet piracy safe haven.¹ Source piracy and illegal file-sharing is widespread and growing, and a number of deficiencies in Sweden’s legal infrastructure and enforcement system make effective enforcement difficult to impossible. Insufficient police resources are available for Internet enforcement and as a consequence there are now estimated to be over 1.3 million and 2 million people uploading and downloading illegal movie and music files, respectively, throughout the country.²

Topsites, highly specialized pirate servers with massive storage capacities, high bandwidth and lightening speeds are used by Encoding/Release Groups for the first release of pirated content on the Internet (these same releases often fuel hard disc piracy in other countries). This source content is then passed down using a series of couriers from Topsites to IRC (Internet Relay Chat) channels, newsgroups and P2P (peer-to-peer) networks. Although the total number of Topsites in the world is difficult to determine due to their highly compartmentalized and secretive nature, it is estimated that there are approximately 300 and that an estimated 65 of them (22%) are located in Sweden, making it one of the most active countries in the world for organized release groups. The country ranks among the top three countries globally in the number of DirectConnect hubs (P2P facilitators) and the largest percent of DirectConnect users per inhabitants in the world. Sweden is

¹ Pirates have even established a political party, The Pirate Party (“Piratpartiet”), which had about 0.63 percent of the votes in the September 2006 elections (fortunately less than was expected) and they are campaigning heavily to get into the European Parliament in 2009..

² Mediavision Report for Q3 2008



home to *Rizon*, one of the world's largest IRC networks. Other forms of Internet piracy are also increasing in popularity in Sweden, with users increasingly streaming illicit content from leeching sites and downloading directly from cyberlockers.

Sweden is also host to *ThePirateBay.org*, one of the world's largest BitTorrent tracker sites and one of Sweden's largest web sites (it currently ranks 117 on the Alexa ranking). The site reportedly has over 25 million users and is financed through advertising revenues. It has been translated into over 34 languages, impacting legitimate markets around the world. The owners of the site boast that it is the biggest tracker of its kind and for years have mocked rights holders in their efforts to take actions against the site. The site was finally raided in mid-2006 by the Swedish police and servers were seized, but the site and its tracker were temporarily moved to the Netherlands and quickly up and running soon thereafter, but are now back in Sweden. MPA estimates that 95% of the material transmitted over ThePirateBay is infringing.

The Swedish police, after an 18 month investigation following the 2006 raid, charged the four owners of ThePirateBay for criminal copyright infringement. The trial is scheduled to begin on February 16, 2009, but will only cover infringements before the date of the raid itself. The four individuals are alleged to have committed the crime of aiding and abetting "preparation" for copyright infringement. The plaintiffs, music and movie companies, have claimed damages of over 10 million euros (US\$12.89 million). The owners do not profess to be worried at all; the site continues to operate today.

Swedish ISPs have become well known for their lack of cooperation with rights holders in taking down infringing content upon receiving cease and desist letters. Although most ISPs had been forwarding these letters to alleged infringers whose sites they hosted, all ceased doing even this after the public debate about peer-to-peer (P2P) piracy arose, claiming that they are not obligated by law to do so against P2P infringers. The Government has initiated discussions between rights holders and ISPs and several meetings have been held but, to date, these discussions have not yielded any forward movement. Unfortunately, the Government has chosen not to participate in these meetings. It is imperative that stakeholders collaborate in good faith and expeditiously to effectively prevent protected content from being distributed without authorization over the Internet. This effort should include, at a minimum, the immediate and effective implementation of graduated response procedures and effective notice and takedown procedures.

MPA reported in 2008 that, according to two market research studies, there are approximately 15-24 million movies illegally downloaded every year in Sweden. The entertainment software industry reports that Sweden is typically among the top ten countries for which online infringements are consistently high, on a number of protocols (be it BitTorrent, other P2P networks, or websites). For example, in industry monitoring of file-sharing activity via BitTorrent and eDonkey of 13 member-selected titles during a one-month period, Sweden accounted for more than 63,000 downloads, placing it number 8 on the industry's list of countries with the highest ratio of completed game downloads relative to population. Industry studies confirmed an unusually high ratio of console game downloads (69%) to PC game downloads (19%), which circumstantially confirms an extraordinarily high prevalence of console circumvention devices in the Swedish market. In additional monitoring performed by member companies of four top game titles over an 8-10 week period, Sweden accounted for 2% of the total number of global downloads monitored on the BitTorrent network.

AAP joins its fellow copyright industries in reporting that piracy has deteriorated in the book and journal publishing market due to the continued activity of ThePirateBay. Industry representatives estimate that 85% of all newly published Swedish fiction is freely available from this site and it impacts international publishers greatly in all sectors. Publishers report also that a copycat site has been set up to target academic materials particularly.

Internet Enforcement: Although movie rights holders have brought around 170 cases to the police, only ten cases have been pursued and the convictions received have resulted in a severe public backlash. IFPI Sweden has brought 10 cases against Direct Connect hubs but none of these have been tried yet. Some of these cases were brought to the police as early as November 2005 and April 2006. Out of all pending cases from previous years, only four convictions have resulted. Another case was dismissed this fall due to evidentiary problems. Slow procedures at the police and prosecutor levels seem to be the main reason for the delays in moving these cases ahead. In June 2007, the Swedish Court of Appeals upheld the very first conviction for Internet piracy which, however, only involved four songs and a total fine of about \$2000.

Law enforcement officials do not undertake *ex officio* actions even though they have the power to do so. In 2005, the Ministry of Justice tasked the Swedish Prosecution Authority, the Swedish Economic Crime Bureau and the National Police Board to review enforcement against Internet piracy. Its report, published in September 2005, recommended the establishment of specialized units of prosecutors and police officers with information technology knowledge. The copyright industries have

continuously pressed for the creation of this unit, which finally occurred in Spring 2008 when just two prosecutors were named. Moreover, investigators are not tied to particular cases which complicates their ability to get investigative support.

Rights holders contemplating legal action against Internet pirates in Sweden face grave difficulties in identifying infringers due to restrictions imposed by the Electronic Communication Act. Rights holders cannot obtain from Internet service providers (ISPs), via a civil procedure, the identity of an infringing end user upon communication to the ISP of an IP address. Such information, which is critical to effective Internet enforcement, can only be obtained by a public prosecutor or the police in the course of a criminal investigation, although even this procedure is unavailable unless the offense being charged carries the possibility of a sentence of imprisonment.

COPYRIGHT AND ENFORCEMENT LEGISLATION

A number of legislative deficiencies have contributed to the growth of Internet piracy in Sweden and to the growth of this "lawless" attitude toward illegal file-sharing among the populace. This has also helped foster Sweden's reputation as a piracy safe haven.

Injunctive relief in civil cases -- EU Copyright Directive: The law implementing Sweden's obligations under the EU Copyright Directive entered into force on July 1, 2005 (Law 2005:360 amending the Act on Copyright in Literary and Artistic Works, Law 1960:729). Particularly disappointing has been the lack of a specific injunctive relief remedy against ISPs as required under Article 8.3 of the Copyright Directive (and Article 11 of the Enforcement Directive). Proposed legislation to provide such a remedy is now pending in the Swedish Parliament. If adopted by the Parliament, the amendment would go into effect on April 9, 2009. This will resolve one of the major deficiencies that rights holders have faced and which IIPA highlighted in its 2008 submission.³

The "right of information" -- EU Enforcement Directive: Also pending in Parliament is an amendment to provide for a "right of information" (Article 8 of the EU Enforcement Directive) or the right to obtain, upon court order in a civil case, the identity of a suspected infringer after providing the ISP that person's IP address. Without this right, bringing a civil case against P2P file-sharers had been, for all practical purposes, not possible in Sweden since only the ISP could match the IP address with the name of the actual person, whom the rights holder could then name in the civil complaint. While such names could be released in the context of a criminal investigation, as noted above, that is limited to only those cases where the alleged offense carries a sentence of imprisonment. The combination of these deficiencies meant that any person could regularly upload or download infringing files without fear of legal consequences so long as it was not done at a level that carried a jail term. Even then, it was well-known in Sweden that the enforcement authorities had little inclination, much less the manpower, to take action against such conduct. This helped to create the climate of "lawlessness" described above.

The path to finally providing a "right of information," which has been an ongoing obligation for Sweden under the 2001 EU Copyright Directive, was given a boost when, in September 2007, Chief Judge Cecilia Renfors issued a report ("Renfors Report") recommending that Sweden implement this obligation. However the government only decided to do so after the release of the European Court of Justice's *Telefonica* case holding that the "right of information" did not per se conflict with the Privacy Directive and that Member States were free to determine that the release of an alleged infringer's name would not violate that person's privacy rights.

The copyright industries strongly support passage of this legislation and its effective implementation thereafter.

The Renfors Report also contained a recommendation that a system be put in place for ISPs to suspend or, as necessary, ultimately terminate the accounts of repeat infringers. This suggestion was rejected by the government at the time the copyright bill was released by the government. IIPA is extremely disappointed in this decision but we urge the government to revisit that decision in the context of overseeing the discussions between rights holders and ISPs to work out a cooperative system for dealing with the scourge of P2P piracy. ISPs have an obligation not to let their facilities be taken over by illegal conduct, in the copyright or any other area. A balanced solution of cooperation and ISP responsibility must be sought by all parties. Progress, however, does not seem to have been made in these negotiations, and it remains to be seen whether the

³ <http://www.iipa.com/rbc/2008/2008SPEC301SWEDEN.pdf>

Swedish government will take a more active role in ensuring that some progress is made. Industry believes that absent progress in the near term, the government should explore options beyond private sector negotiations.

NEXT STEPS

IIPA looks forward to passage of the Bill now pending in Parliament to correct some of these major legal deficiencies in the country's enforcement regime. But this is only the beginning of the process, not the end, given the current culture and lack of enforcement that has pervaded the system until now. A conviction of ThePirateBay with deterrent penalties will start the process, but prosecutor and police resources must be strengthened to enable the commencement of a major follow-up campaign of criminal investigations and prosecutions to restore the rule of law in this sector in Sweden. Source piracy must be attacked aggressively by the enforcement authorities and major uploaders must also be targeted and deterrent penalties imposed. The implementation of the "right of information" must be smooth and allow rights holders to enforce their rights in civil cases effectively and quickly. Only by taking these actions -- and by overseeing and promoting the discussions between rights holders and ISPs and by demanding a result which will involve ISPs in responsible behavior in the P2P environment -- can the Swedish government reverse the climate of lawlessness that has taken over the country in this area. Such actions will be unpopular among some segments of the citizenry but this is the only way to restore the rule of law that has been so undermined to date in Sweden.