

Keeping pirates at bay

Sep 3rd 2009 From *The Economist* print edition

Policing the internet: The music industry has concluded that lawsuits alone are not the way to discourage online piracy

THREE big court cases this year—one in Europe and two in America—have pitted music-industry lawyers against people accused of online piracy. The industry prevailed in each case. But the three trials may mark the end of its efforts to use the courts to stop piracy, for they highlighted the limits of this approach.

The European case concerned the Pirate Bay, one of the world's largest and most notorious file-sharing hubs. The website does not actually store music, video and other files, but acts as a central directory that helps users locate particular files on BitTorrent, a popular file-sharing network. Swedish police began investigating the Pirate Bay in 2003, and charges were filed against four men involved in running it in 2008. When the trial began in February 2009, they claimed the site was merely a search engine, like Google, which also returns links to illegal material in some cases. One defendant, Peter Sunde, said a guilty verdict would "be a huge mistake for the future of the internet...it's quite obvious which side is the good side."

The court agreed that it was obvious and found the four men guilty, fining them a combined SKr30m (\$3.6m) and sentencing them each to a year in jail. Despite tough talk from the defendants, they appear to have tired of legal entanglements: in June another firm said it would buy the Pirate Bay's internet address for SKr60m and open a legal music site.

The Pirate Bay is the latest in a long list of file-sharing services, from Napster to Grokster to KaZaA, to have come under assault from the media giants. If it closes, some other site will emerge to take its place; the music industry's victories, in short, are never final. Cases like this also provoke a backlash against the music industry, though in Sweden it took an unusual form. In the European elections in June, the Pirate Party won 7.1% of the Swedish vote, making it the fifth-largest party in the country and earning it a seat in the European Parliament. "All non-commercial copying and use should be completely free," says its manifesto.

So much for that plan

The Recording Industry Association of America (RIAA) has pursued another legal avenue against online piracy, which is to pursue individual users of file-sharing hubs. Over the years it has accused 18,000 American internet users of engaging in illegal file-sharing and demanding settlements of \$4,000 on average. Facing the scary prospect of a federal copyright-infringement lawsuit, nearly everyone settled; but two cases have proceeded to trial. The first involved Jammie Thomas-Rasset, a single mother from Minnesota who was accused of sharing 24 songs using KaZaA in 2005. After a trial in 2007, a jury ruled against her and awarded the record companies almost \$10,000 per song in statutory damages.

Critics of the RIAA's campaign pointed out that if Ms Thomas-Rasset had stolen a handful of CDs from Wal-Mart, she would not have faced such severe penalties. The judge threw out the verdict, saying that he had erred by agreeing to a particular "jury instruction" (guidance to the jury on how they should decide a case) that had been backed by the RIAA. He then went further, calling the damages "wholly disproportionate" and asking Congress to change the law, on the basis that Ms Thomas-Rasset was an individual who had not sought to profit from piracy.

But at a second trial, which concluded in June 2009, Ms Thomas-Rasset was found guilty again. To gasps from the defendant and from other observers, the jury awarded even higher damages of \$80,000 per

song, or \$1.92m in total. One record label's lawyer admitted that even he was shocked. In July, in a separate case brought against Joel Tenenbaum, a student at Boston University, a jury ordered him to pay damages of \$675,000 for sharing 30 songs.

According to Steven Marks, general counsel for the RIAA, the main point of pursuing these sorts of cases is to make other internet users aware that file-sharing of copyrighted material is illegal. Mr Marks admits that the legal campaign has not done much to reduce file-sharing, but how much worse might things be, he wonders, if the industry had done nothing? This year's cases, and other examples (such as the RIAA's attempt in 2005 to sue a grandmother, who had just died, for file-sharing), certainly generate headlines—but those headlines can also make the industry look bad, even to people who agree that piracy is wrong.

That helps explain why, in late 2008, the RIAA abandoned the idea of suing individuals for file-sharing. Instead it is now backing another approach that seems to be gaining traction around the world, called "graduated response". This is an effort to get internet service-providers to play a greater role in the fight against piracy. As its name indicates, it involves ratcheting up the pressure on users of file-sharing software by sending them warnings by e-mail and letter and then restricting their internet access. In its strictest form, proposed in France, those accused three times of piracy would have their internet access cut off and their names placed on a national blacklist to prevent them signing up with another service provider. Other versions of the scheme propose throttling broadband-connection speeds.

All this would be much quicker and cheaper than going to court and does not involve absurd awards of damages and their attendant bad publicity. A British study found that most file-sharers will stop after receiving a warning—but only if it is backed up by the threat of sanctions.

It sounds promising, from the industry's perspective, but graduated response has drawbacks of its own. In New Zealand the government scrapped the idea before implementation, and in Britain the idea of cutting off access has been ruled out. In France the first draft of the law was savaged by the Constitutional Council over concerns that internet users would be presumed guilty rather than innocent. Internet service-providers are opposed to being forced to act as copyright police. Even the European Parliament has weighed in, criticising any sanctions imposed without judicial oversight. But the industry is optimistic that the scheme will be implemented in some form. It does not need to make piracy impossible—just less convenient than the legal alternatives.

But many existing sources of legal music have not offered what file-sharers want. "In my view, growing internet piracy is a vote of no confidence in existing business models," said Viviane Reding, the European commissioner for the information society, in July.

The industry is desperately searching for better business models, and is offering its catalogue at low rates to upstarts that could never have acquired such rights a decade ago. Services such as Pandora, Spotify and we7 that stream free music, supported by advertising, are becoming popular. Most innovative are the plans to offer unlimited downloads for a flat fee. British internet providers are keen to offer such a service, the cost of which would be rolled into the monthly bill. Similarly, Nokia's "Comes With Music" scheme includes a year's downloads in the price of a mobile phone. The music industry will not abandon legal measures against piracy altogether. But solving the problem will require carrots as well as sticks.