Dr Strangelaw, or how Portugal learned to stop worrying and love P2P

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DOI
10.1093/jiplp/jps220
Publication date
2013
Document Version
Final published version
Published in
Journal of Intellectual Property Law & Practice

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Criminal Process 6135/11.7TDLSB, Decision by the Department of Investigation and Penal Action of Lisbon, 20 July 2012, Opinion from the Prosecutor General's Office, Proc. 411/2006, L 115, on 'Piracy on the Internet', 4 July 2011

A recent decision by a Public Prosecutor in a criminal case in Portugal, based on an Opinion by the Prosecutor General's Office, considers download acts by peer-to-peer (P2P) users to be covered by the private use limitation, raises the possibility that acts of upload are also covered by it and considers IP addresses insufficient evidence upon which to prosecute users.

Legal context

Under the Portuguese Copyright Act (PCA), crimes related to copyright are qualified as *public*, meaning that they do not depend upon the filing of a complaint by the injured party. It is therefore possible for a non-rights holder party to give notice of alleged criminal actions to the competent authorities.

Article 195 of the PCA provides that a crime of usurpation of authors' rights is committed by whoever uses a work protected under the PCA, without the rights holder's authorization. It is an umbrella crime, covering a wide array of criminal conduct connected to the economic content of copyright; here, it criminalizes actions that affect a rights holder's power to authorize certain uses. Under the PCA (Arts 68, 178 and 184), both download and upload can be qualified as restricted acts of reproduction and communication to the public/making available of works and related subject matter.

Article 197 of the PCA further states that the crime is punishable with a fine or prison for up to three years for first-time offenders. There is basis for criminal action for copyright infringement irrespective of intent or even the commercial scale of the infringing act.

In the present case, it was considered that neither the Portuguese Electronic Commerce Law nor the Cybercrime Law provide for measures clearly applicable to acts of alleged copyright infringement performed via a peer-to-peer (P2P) network.

Facts

In January and April 2011 representatives of ACAPOR (a Portuguese association representing commercial retailers of cultural and entertainment works), filed petitions with the Prosecutor General's Office (PGO) giving notice of the practice of 1970 acts of alleged usurpation of authors' rights via P2P networks by unknown individuals.

Following an Opinion by the PGO, the Department of Investigation and Penal Action (DIAP) of Lisbon decided not to file any criminal charges in connection with the notices ('the Decision'). Neither document has been officially published, although the Decision was made available online by a main Portuguese newspaper on 27 September 2012. This author has been able analyse the PGO Opinion.

Both documents frame ACAPOR's actions within a wider strategy of public awareness and pressure on the legislature and judiciary, aimed at the implementation in Portugal of an administrative graduated response type of system, the fight against widespread P2P piracy and the alleged lost revenues arising from it to its associates.

All notices refer to the first trimester of 2011, focus on the act of upload/making available (but not mentioning downloads) of cinematographic works via a P2P network with recourse to BitTorrent software, and follow a common template, changing only in specifics concerning the identification of the IP address, the location of the act and the work shared. ACAPOR accompanies the notices with a request that the PGO obtain the identity of the IP address owners from the competent electronic communications service provider.

On the basis of the notices, the DIAP was obliged to proceed to an investigation of the reported facts and ultimately decide on whether to file criminal charges against some or all of the alleged infringers.

Analysis

Investigation, technology and presumptions

The investigation consisted of an evaluation of the criminal implications of the facts, as well as meetings with the General Inspection of Cultural Activities, ACAPOR's representatives and the Portuguese Data Protection Authority. It was expressly stated that due to the number of notices, a decision was made not to identify the alleged infringers.

Analysing the technology, the prosecutor's broad understanding of a P2P network using BitTorrent software works was that all users engaged in a specific exchange of a protected work were simultaneously downloading and uploading a file. The PGO Opinion further noted that, due to the architecture of these networks and software, not all owners of the identified IP addresses were necessarily responsible for the initial act of making available a work, but merely allowed its computer to provide assistance to the 'collective sharing' of a specific work.

However, even assuming this technological architecture, the Decision noted that ACAPOR failed to establish key knowledge elements, such as the widespread public knowledge (i) that the rights holders of the shared works had not authorized their making available online, or (ii) that there is a need for such authorization to engage in acts of file-sharing; and (iii) the P2P user's knowledge of the system's automated upload features. Elements (i) and (ii) seem relate to the legal/illegal nature of the source of the P2P acts of download, while (iii) is apparently connected to the volitional element in the act of upload. The Decision qualifies ACAPOR's allegations on these points as 'inconsistent', 'lacking evidence' and thus no more than 'presumptions'. Despite not being expressly stated, the clear implication is that the above knowledge elements have legal relevance in determining (at least) the criminal liability of the individual user. This is noteworthy insofar as the PCA does not attach any legal relevance to the nature of the source of download acts.

Downloads, uploads and relevance of IP addresses

As for downloads, it is stated that the act of reproduction must be considered lawful under the private use limitation (Arts 75(2)(a) and 81(b) PCA, similar to Art 5(2)(b) of Directive 2001/29), even if the user is simultaneously uploading, thus engaging in acts of making available the work. This position follows some Portuguese legal scholarship, which considers all downloads by individual P2P users as instances of private use.

On the other hand, while admitting that acts of upload can, in the abstract, be qualified as restricted acts of making available, the Decision noted that it is 'erroneous' to attribute a criminal conduct to the owner of an IP address, as that owner may not be the specific P2P user engaging in the restricted act. Moreover, the identification of the users of the 1970 IP addresses is considered impossible due to the sheer numbers, the high costs and the unlikely success of the endeavour in light of widespread wireless use and ease of access to the Internet (eg via cybercafés). The Decision did not expressly state that P2P acts of upload were permitted, but merely concluded that, in this case, it was impossible to criminalize those acts based solely on an IP address.

The PGO Opinion went further, by entertaining the notion that certain acts of upload can be privileged under the private use limitation. According to this argument, acts of upload that are not (i) directly and immediately aimed at making the work available, but (ii) solely at facilitating the simultaneous act of download of that work occurring within a P2P network using a specific program, should be deemed private use, provided that the individual downloader of the work ceases its intervention in the uploading upon conclusion of the download. In other words, if the P2P system contains an automated upload feature, any upload occurring simultaneously with the download would be covered by the limitation, as long as it does not extend beyond the action of downloading. This interpretation would be justified so as to make possible the operation of the private use limitation vis-à-vis P2P software with automated upload features. In such a scenario, only the original uploader would be criminally liable for acts of making available.

The PGO Opinion shied away from applying this argument to the present case, but observed that the mere possibility that most uploaders were covered by an exception or limitation made the case for criminalization of their uses that much more difficult. Presumably, it would also impact negatively on the possibility of obtaining the identification of owners of IP addresses engaging in P2P acts.

Underlying the conclusions as to the download and upload acts there seems to be a lack of evidence as to the knowledge elements mentioned above. However, the Decision did not expressly qualify either conclusion by introducing references to either the (il)legal nature of the source of download or the requirement of specific intention to make works available via upload.

The Decision concluded by emphasizing the need for a balancing exercise that adequately considers users' rights to education, culture and 'freedom of action in cyberspace', especially when such freedom was directed at the practice of non-commercial acts, seemingly a decisive factor in the outcome of the case.

Reactions

While some (mostly foreign) commentators have praised the decision as a balanced interpretation of the law, ACAPOR criticized the prosecutor's office for deciding not to investigate the case due to the excessive amount of cost and work, for defending the position that users have no knowledge that they are engaging in unauthorized acts, that only in limited cases will IP addresses be enough to identify the actual users engaged in such acts, that all downloads are covered by the private copying exception irrespective of the source and that this said exception can be extended to acts of upload.

Meanwhile, ACAPOR has seen the rejection of its petition to be considered an interested party in the process and has filed for a request that the Decision be annulled, on the basis that the DIAP did not comply with its legal obligation to investigate. Other stakeholders, such as the main Portuguese author's collecting society (SPA), have manifested their disagreement with the Decision, noting its apparent contradiction with a recent decision where an individual user has been convicted for the practice of P2P acts regarding musical works. Both SPA and ACAPOR have threatened to file a complaint against Portugal with the EU Commission in connection with this case.

Practical significance

Both the PGO Opinion and the Decision are significant insofar as they qualify all acts of download occurring in a P2P network using BitTorrent software as privileged under the private copying exception, raise the possibility that some acts of upload are covered by the same exception, seem to impose additional requirements for the criminalization of acts of upload within such networks, and state that IP addresses are insufficient as evidence to identify an alleged infringer. Neither of these aspects is sufficiently clear under the applicable laws, chiefly the PCA, or even in Portuguese legal scholarship.

In that sense, the PGO Opinion can be understood as setting forth the understanding of law enforcement authorities in Portugal for future similar cases of copyright infringement online, as well as regarding the scope of the private use exception, with a potential to influence the civil courts' position on these matters.

We await the impact of these events on forthcoming legislative initiatives, such as the Communist Party's proposal for a statutory 'sharing licence' currently under appreciation in Parliament (Proposal 228/XII), the so-far behind the scenes discussion regarding the implementation of an administrative graduated response system or even a *2.0 version* of the much debated proposal to extend the Portuguese private copying law to the digital realm (Proposal 118/XII). If in line with the PGO Opinion, a revival of the latter (which failed quite spectacularly in

early 2012), would probably need to encompass the payment of fair compensation for P2P download acts deemed private use.

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doi:10.1093/jiplp/jps220