

Bittorrent Loses Again

A Recent Lithuanian BitTorrent Case and What It Means for the Construction of the E-commerce Directive

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Abstract: This article first discusses a recent Lithuanian BitTorrent case, Linkomanija, with its shortcomings and perspectives. It then compares the outcomes of the Lithuanian case with recent court practice in Scandinavian countries (the Swedish Pirate Bay and Finnish Finreactor cases). Finally, it poses some questions as to whether BitTorrent sites

should be qualified as hosting services under Article 14 of the EU E-commerce Directive (2000/31/EC) and whether the application of the limited liability standard, as developed by the Court of Justice of the European Union, would be reasonable for BitTorrent file-sharing services in general.

Keywords: BitTorrent, File Sharing, E-commerce Directive, Intermediary Liability, Internet Service Provider, Hosting, Lithuania, Sweden, Finland, Linkomanija, Pirate Bay, Finreactor

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A. Introduction: Copyright piracy and enforcement in Lithuania

- 1 Copyright enforcement in cyberspace (the Internet) is an important and difficult-to-tackle problem in Lithuania, as in the rest of the world. There are no reliable statistics on copyright violation rates in Lithuania in general. In regard to software, according to the survey conducted by the Business Software Alliance (BSA), software piracy in Lithuania accounted for 54 per cent of all software in 2011 (i.e. more than half of the software has been acquired and used illegally), whereas the commercial value of unlicensed software had reached around 44 million USD.¹ In the regional context, Lithuania is not unique, since the average piracy rate in Central and Eastern European countries is 62 per cent.² In the music and audio-visual sectors, online piracy levels are likely to be even higher.
- 2 The enforcement of online infringements in Lithuania is in its very first stages. The two main collecting societies in Lithuania (LATGA, representing authors, and AGATA, representing neighbouring rights

holders) have been individually consulting and assisting members who are trying to protect their online rights. Most disputes are solved through online notification systems and informal negotiation procedures; hardly any infringement cases reach the courts. The Lithuanian Anti-Piracy Association (LANVA), the association primarily focused on software piracy, has been more active and has initiated several – unsuccessful – court proceedings in the field. For example, in 2009 an individual user S. B. was accused of illegally downloading Microsoft Windows 7 and making this software publicly available on the Internet for non-commercial purposes using BitTorrent protocol. However, the case was dismissed due to procedural violations.³ As another example, in 2012 the German company Digiprotect Gesellschaft zum Schutz Digitaler Medien mbH requested the main Lithuanian telecommunications company TEO to disclose the identities of its customers for the purpose of starting proceedings against them for illegal file sharing. After TEO refused to disclose the information, Digiprotect approached the court. However, the Vilnius Regional Court rejected the request, stating that revealing

such data to a private company would be contrary to the personal data protection laws, and this data can only be collected by pre-trial investigation officers.⁴

- 3 The first successful result in online copyright enforcement was reached in the *Linkomanija* case. In November 2012, the Vilnius Regional Court issued a ruling that the company N5 and its manager, K.E., were fully liable for contributing to copyright infringement occurring over the BitTorrent <www.linkomanija.net> website.⁵ Although the process is not over (on 14 January 2013, defendants appealed the case to the Court of Appeal), this ruling may be a sign of a tougher stance towards online copyright protection in Lithuania.
- 4 This article will provide a more careful look at the weaknesses and perspectives of the *Linkomanija* case (part B). We will then briefly discuss what the *Linkomanija* case and other recent European BitTorrent cases (the Swedish *Pirate Bay* and Finnish *Finreactor* cases) mean in a broader European context, and whether the limited liability regime as provided under the EU E-commerce Directive should apply to such cases (part C).

B. Linkomanija case: a right or wrong solution?

- 5 The *Linkomanija* case is a typical example of cases dealing with BitTorrent file-sharing services. The <www.linkomanija.net> website enables users, with the help of BitTorrent protocol, to download various (mostly illegal) content, including illegal copies of computer programs. The website contains a database of torrent files and a search function that gives users the opportunity to connect with each other and exchange content they store on their computers. Using torrent files and the information of the central station, it is possible to copy and distribute illegal copies of music, video works or software. Microsoft Co., the right holder of various computer programs illegally shared by users, requested the court to stop the illegal dissemination of software by closing down the <www.linkomanija.net> website; it also requested the operators of the website to pay maximum statutory damages equivalent to 130,000 LTL (approximately 37,680 EUR). On 10 December 2012, after more than three years of trial, the Vilnius Regional Court decided to fully satisfy the claim. Attention should be drawn to the interpretation of several important issues in the case.

I. Unlawful activity

- 6 First, the court examined whether the defendants' actions should be considered illegal. The court found that the defendants themselves do not directly re-

produce or make copyrighted content publicly available. However, the defendants allow users to reproduce and share such content without the authorization of the right holder: "The defendants' unlawful actions consist of the fact that the defendants' file sharing service allows third parties to upload torrent files and provides a database of torrent files that allows third parties to search for and download torrent files...". It was also pointed out that the defendants support the functional operation of the *Linkomanija* website knowing that users are constantly infringing copyright and neighbouring rights, thus promoting such illegal activity and receiving a direct commercial benefit from it. Consequently, pursuant to Article 6.246(2) of the Civil Code of the Republic of Lithuania⁶ and case law of the Supreme Court of Lithuania,⁷ the court found that the defendants, by enabling reproduction and dissemination of illegal computer programs, indirectly made them publicly available. That is, the defendants are not accused of directly committing copyright infringement. Rather, they are responsible for contributing to the infringement based on the fact that they knew about the illegal activities occurring on their website and encouraged them.

- 7 Generally, the position of the court regarding the defendants' unlawful conduct looks reasonable. The "Linkomanija Project" was broadly known in Lithuanian society as basically designed for the illegal sharing of copyrighted content. On the other hand, the court's reasoning is weak (or non-existent) on certain aspects. First of all, it is not clear how concrete the knowledge about illegal activities of users should be. The court does not specify whether general knowledge about continuing violations is sufficient or whether the defendant must be aware of concrete infringing cases. Second, although the court notes that the defendant was commercially benefiting from this conduct, it remains unclear whether this is a mandatory condition of intermediary liability or a complementary one. Will the Internet service provider still be considered liable if s/he does not acquire commercial benefit from illegal activities? Third, the content of "promotion" of infringing conduct is not revealed either. Does a mere creation of a virtual platform intended for file sharing qualify as "promotion" of illegal conduct by end users? Or, rather, do more specific acts of promotion need to be proven? Also, there is no explanation as to what actions could be deemed "discouraging" (as opposed to promotion) of the illegal conduct (warning on liability for sharing of illegal content, content filtering, disclaimers, etc.). The court's reasoning regarding these aspects remains somewhere "between the lines". At the same time, these issues may be important for future cases of a similar nature. Other service providers who may be willing to develop legitimate online services are facing a difficulty in understanding what kind of actions should (or should not) be taken in order not to be held con-

tributorily liable for infringements carried out by the website users.

II. Limited liability rules

- 8 Second, the defendants argued that illegal conduct was carried out by third parties and, therefore, the defendants' conduct should be subject to limited liability rules. According to Article 14 (1) and (2) of the Information Society Services Law (ISSL)⁸ (corresponding to Article 14 of the EU E-commerce Directive⁹), a service provider is not responsible for information s/he stores if s/he is not aware of the on-going unlawful activity or, upon acquiring such knowledge, expediently takes action to terminate access to such information. The court declined the application of this provision, stating that the defendants

...initiated the copyright infringements done by the users of the "Linkomanija Project", had absolutely all possibilities to control the users of the project and the content submitted by them, knew about specific copyright infringements and, if needed, had all possibilities to eliminate them. Consequently, the exemption provided in Article 14 of the Law cannot be applied in this case.

1. Active vs. passive

- 9 As a first important aspect, the court states that the defendants were "initiating" and had "absolutely all possibilities" to control the users. Meanwhile, Article 14 of the Directive (as well as Article 14 of the ISSL) covers intermediary service providers that merely host information provided by end users (are passive) and do not initiate, select, modify or in any other way control the information (do not play an active role).¹⁰ The court, unfortunately, did not specify what actions indicate that the service provider initiated illegal reproduction and distribution of copyrighted content or what means it had to control the users.
- 10 On the one hand, one could argue that the "Linkomanija Project" acts as an intermediary, a certain data "bridge" between users who exchange content. Defendants merely provide a platform where end users can upload torrent files (referring to any kind of information, both legal and illegal), search them, and, after identifying, download from computers of other end users. As already noted above, there was no evidence in the decision that the defendants in any way promoted (or initiated) the exchange of illegal files in particular. Creation of a virtual platform designed for file sharing does not necessarily mean that it was done on purpose to initiate copyright infringements, as such a platform can be used for an exchange of both legal as well as illegal content. On the other hand, the court's brief argumen-

tation on this issue can be justified by the fact that the <www.linkomanija.net> website has been widely known as one of the main sites in Lithuania whose *intent and purpose* is to facilitate the sharing of *illegal* content, and there is no evidence that the service provider denied it. There is also no evidence that the service provider had taken steps to promote the exchange of lawful content or restrict the sharing of illegal content.

- 11 Still, a brief statement that the service provider has initiated the infringement (without additional explanations of which conduct leads to that assumption) can lead to serious consequences for the Internet services market. Namely, one could argue that any website containing a search engine that enables users to search and download any (legal or illegal) information is actively promoting (the initiation of) illegal conduct by users. For example, with the help of the search engine Google Search, it is easy to locate illegal computer programs and download them. Would the mere fact that Google provides a search engine function be sufficient to claim that Google plays an active role in promoting infringements done by end users using the search engine? Here again one should refer to the founding goal and primary purpose of the particular Internet service. Google Search is a service which to a large extent is used for legitimate purposes (users search for a variety of information). Meanwhile the ultimate goal of the "Linkomanija Project", as was stated above, was the exchange of illegal copyrighted content. For this reason it can be said that the court was correct in stating that the defendants were not mere passive intermediaries but rather played an active role ("initiated" the infringements). Nevertheless, the argumentation and explanation could have been more detailed.

2. Actual knowledge

- 12 A second important issue is whether the defendants had actual knowledge about the infringements occurring through their website. Under Article 14 of the E-commerce Directive, the provider is not liable if s/he does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the activity or information is apparent. When applying this provision, the court states that the defendants "knew about specific copyright infringements". However, again, the court does not provide any evidence to support this statement.
- 13 On the one hand, when the main purpose of a particular website is facilitating the exchange of illegal content, the service provider cannot deny s/he knew about the illegal activities of end users. In the case at stake, the defendants did not dispute that they knew about the on-going infringements either. Therefore,

there is no need in this case to discuss in detail the “actual knowledge” or “awareness” requirement.

- 14 On the other hand, stating that the service provider “knew about *specific* copyright infringements” (emphasis added) and had a possibility to eliminate them goes slightly too far. If upheld by courts of higher instance and followed in later court practice, such an interpretation may have negative effects on the businesses of legitimate online service providers. First, one should look at criteria showing how an intermediary could acquire actual knowledge about specific copyright infringement. Under Article 15 of the E-commerce Directive, an intermediary does not have a general obligation to monitor the hosted content. Following this provision, Article 14(3) of the Lithuanian ISSL indicates that the criteria which indicate that the service provider had acquired knowledge about the illegal conduct or illegal content should be defined in a special governmental order.¹¹ Under this order, the service provider is considered to have acquired the knowledge only upon receiving a notification about the illegal conduct of users or illegal content hosted on his/her servers.¹² That is, from the wording of the order it seems that, as long as the specific copyright infringement was not properly notified to the intermediary, no “actual knowledge” can be established. The second question would then be whether the intermediary was “aware of facts and circumstances” from which the illegal activity or information is “apparent”. Here the court has to specify the evidence which shows that defendants had such an awareness (e.g. email communication of intermediary managers, widely accessible and read press publications on this issue, etc.). The mere statement that the intermediary “had actual knowledge” or “was aware” of infringements occurring over his/her website should in no case be sufficient.

III. Defendant’s fault

- 15 Another important issue is the formation of fault. It is of special importance when determining the amount of damages. In the case at stake, the court stated that

...the defendants knew (and even encouraged) placement of the torrent files on the website www.linkomanija.net and its database. Using these files plaintiff’s programs were made publicly available online and users of the system downloaded and reproduced illegal copies of software, while the defendants knowingly allowed the damage to occur.

- 16 It concluded that the defendants acted intentionally. In particular, the court relied on Article 6.248(3) of the Civil Code and held that “the defendants failed to provide the required diligence, care and degree of caution which was necessary to ensure the legitimate use of the website owned by the defendants”.

- 17 The overall conclusion may seem reasonable. Since the founding purpose of the “Linkomanija Project” was to enable sharing of illegal copyrighted contents, one could assume that the defendants acted intentionally. At the same time, the court does not mention any evidence to support such a conclusion. Other intermediaries wishing to act legitimately may miss more elaborate explanations as to what should be the appropriate degree of diligence, care and caution in order to avoid liability. As has been repeatedly noted, the information service providers have neither a general obligation to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity. Since there is no such obligation, the degree of diligence, care and caution in each specific case could be measured by taking into account all circumstances of the case. When there is a risk that the website may be used for illegal purposes, the court may take into account e.g. whether the service provider is informing consumers that the exchange of files without the author’s consent is illegal, whether s/he is warning users against illegal use of the website, whether any filtering of legal and illegal content is applied, and whether the service provider has a notification system that enables reporting of infringing content and other applied measures. In the case at stake, there is no information whether any of these or other measures have been used by the defendant. At the same time certain guidance by the court as to required diligence criteria could be helpful for other service providers in deciding what actions they should take in order to ensure the appropriate level of diligence, care and caution when pursuing their online businesses.

IV. Remedies

- 18 The final question is the proportionality of the remedies granted by the court. In the *Linkomanija* case, the defendants were ordered to shut down the <www.linkomanija.net> website as well as to pay maximum statutory damages equal to 130,000 LTL (appr. 37,680 EUR). These are the most stringent and maximum remedies available for copyright infringement.
- 19 As far as the injunction is concerned, its purpose stated by the court is “... to prevent the plaintiff’s rights violations referred to and further illegal activities...”. At the same time, as has been mentioned earlier, the website at stake can be used to distribute both legal and illegal content. It is not specified in the court decision to which extent <www.linkomanija.net> was used to distribute legal content and which part of all its content was illegal. These questions are of crucial importance when determining the severity of the sanctions. The obligation to close down the website is a sufficiently robust remedy that should be used when other measures (such

as an obligation to filter the content or terminate access to illegal information) are not effective.

20 Even if such a measure were reasonable in the case of Linkomanija (due to its illegal purpose), this case should be clearly distinguished from other online business models where the exchange of both legal and illegal content is taking place. For example, the popular website YouTube allows users to upload video clips and share them with others. While there is myriad legal and socially valuable content available through the platform, there is also a great deal of unauthorized copyrighted material on the YouTube website. It is virtually impossible to ensure that only legal content is distributed (and if it were possible, the costs would be too high). To cope with this problem, YouTube takes measures to promote legitimate content, enables right holders to notify them about infringing content and promptly removes the notified illegal information. Therefore, there is a significant difference between the websites where predominantly illegal content is being exchanged (like Linkomanija) and primarily (or partly) legitimate websites (like YouTube). It could be useful if this difference were reflected in the *Linkomanija* decision. The court could emphasize that the overall closure of the website was ordered because the website was enabling the distribution of mainly illegal content (based on specific evidence) and there is no proof that the defendants took any measures to limit such unauthorized use or promote the exchange of legitimate content.

21 The last issue to be considered is the amount of damages. Lithuanian laws allow claiming actual damages or requesting statutory damages. The plaintiff chose the latter option and, on the basis of Article 83 (4) of the Law on Copyright and Related Rights,¹³ claimed the maximum statutory damages equal to 1,000 minimal living standards. According to this Article, statutory damages should take into account such criteria as the offender's fault, financial position, reasons for illegal conduct and other significant circumstances of the case, as well as criteria of fairness, justice and reasonableness. When applying this provision, the Vilnius Regional Court stated as follows:

[E]very time s/he downloads a torrent file the user also downloads a copy of the claimant's copyrighted program. The factual analysis on 28 May 2009 demonstrated how it is possible to download files using the system operated by the defendants. It is clear that a considerable number of users were able to download programs and then distribute or otherwise use them. For this reason, also considering the extent and duration of violations and the defendants' intent, bad faith and reasonableness criteria, the court decided that there are grounds to fulfil the plaintiff's request for the maximum statutory damages - 130,000 LTL (i.e. 1000 minimal living standards).

22 Without questioning the amount of compensation awarded, it should be noted that it is not clear how

the court applied some of the above-mentioned criteria. In particular, the judgment mentions "extent and duration of violations" but does not provide any details on this (e.g. how many illegal copies of the software have been downloaded or the time frame during which the violation took place). Similarly, the criterion of reasonableness is merely mentioned without providing any comments on its application.

23 Overall, the above analysis demonstrates that the overall conclusions of the court in the *Linkomanija* case are reasonable; however, the reasoning behind many of the issues is weak or entirely absent. It does not give sufficient clarity or guidance for other Internet service providers wishing to develop legitimate online businesses and not to be held liable for the illegal conduct carried out by end users of the service.

C. The Linkomanija case in the European context

24 The next question is how the *Linkomanija* case looks in the European context and what questions it raises in relation to EU rules on intermediary liability.

I. European experience in fighting illegal content online

25 The Lithuanian *Linkomanija* case fits quite well into the recent European legal context. Since the appearance of BitTorrent technology,¹⁴ file-sharing websites based on it have been closed down in several EU member states (e.g. Slovenia,¹⁵ Netherlands,¹⁶ UK,¹⁷ Sweden¹⁸ and Finland¹⁹). The most famous is the Swedish *Pirate Bay* case.²⁰ Despite the protests of the online community all around the world, in 2010 the Stockholm Court of Appeal confirmed the judgment of the first instance court and found the administrators of the Pirate Bay website criminally liable (with only certain adjustments in punishments). In 2012 this example was followed in Finland. The Finnish Supreme Court confirmed that the administrators of the largest Finnish BitTorrent file-sharing website Finreactor could incur criminal liability for copyright violation.²¹ Therefore, the results in the *Linkomanija* case came to nobody's surprise. Although the Lithuanian *Linkomanija* case is weak in argumentation, the decision follows the recent European trends.

26 What should Lithuania (and other countries starting the fight against illegal online content) expect next? In a broader European context, the closure of obviously illegal file-sharing websites is just one of the (first) tactics that are used when fighting copyright infringements online. Right holders in Western European countries have been experimenting

with other legal measures as well. For instance, when a website is not easily reachable in a particular jurisdiction (e.g. it is established in another country), right holders can request the national Internet access service providers to block access to the website.²² In order to discourage private consumers from file sharing, right holders can request Internet service providers to disclose the identities of their consumers,²³ and afterwards can sue them for illegal downloading (reproduction) and sharing (making available) of the content.²⁴ In most cases these claims are brought through civil proceedings, but criminal prosecutions have also been successfully tried.²⁵ Finally, the websites that make available both legal and illegal content (the “semi-legal” websites) are requested not only to take down the notified illegal content but also to ensure that it will not appear again (i.e. apply monitoring or filtering technologies and even manual checking systems).²⁶

- 27 These legal battles have been more successful in some countries than in others, and there is no unified European practice in this field. Therefore, it will be even more interesting to see in which direction Lithuania and other countries with first enforcement experiences will move. Up to now, Lithuanian courts have rejected, for different reasons, both requests by private companies to disclose user identities and claims against private persons for file sharing.²⁷ As the pressure from right holders inside and outside the country gets higher and there is a chance to learn from more successful colleagues in other countries of the EU, upcoming enforcement attempts might be more successful. Therefore, closing down the illegal file-sharing websites such as Linkomanija is likely to be just a first step in right holders’ (long) fight against illegal copyrighted content online.

II. E-commerce Directive: issues that still need to be clarified

- 28 As more cases against online intermediaries running BitTorrent websites might be expected across Europe, it is worthwhile to highlight some of the issues of the EU law that may raise some questions, in particular limited liability rules under the E-commerce Directive.²⁸ The three most recent cases concerning BitTorrent websites – the Swedish *Pirate Bay*, the Finnish *Finreactor* and the Lithuanian *Linkomanija* cases – demonstrate that some rules of the E-commerce Directive may need some clarification in order to be unitarily applied for BitTorrent sites throughout the EU.

1. Do BitTorrent sites provide “information storage” services?

- 29 First of all, the Swedish court in the *Pirate Bay* case, the Finnish court in the *Finreactor* case and the Lithuanian court in the *Linkomanija* case (explicitly or implicitly) found that BitTorrent websites meet the definition of information society services. Moreover, without much argument the courts assumed that these services fall in the scope of national provisions on hosting (i.e. those transposed from Article 14 of the E-commerce Directive).²⁹ Such a conclusion is not as self-evident as it might seem at first glance.
- 30 A torrent metafile in itself does not store the copyrighted content. Rather, these files merely serve as links to the content that is stored in users’ computers. This also means that BitTorrent websites do not store copyrighted content but are merely (searchable) collections of “links” that refer to such content. With the help of these search engines, users identify the needed torrent file and then, by clicking on the one chosen, download the copyrighted content that is stored in the computers of private users. Here the question emerges whether such a website should be considered to provide hosting services. In particular, was Article 14 of the E-commerce Directive meant to provide limited liability for service providers that store the illegal content itself, or also service providers which store information that is not infringing itself but that may lead or facilitate access to illegal information stored somewhere else?
- 31 Article 14 of the Directive does not directly refer to *illegal* information,³⁰ and none of the recitals specifically address this issue either.³¹ The Court of Justice of the European Union (CJEU) case law interpreting Article 14 also does not directly specify on this. For instance, in the *Google v. Luis Vuitton* case,³² the CJEU finds that the fact that the advertiser “stores, that is to say, holds in memory on its server, certain data, such as the keywords selected by the advertiser, the advertising link and the accompanying commercial message, as well as the address of the advertiser’s site” is sufficient for the service to fall in the scope of Article 14.³³ Here the CJEU mentions not only content that is claimed to be illegal (keywords that contain a protected mark) but also other information which is not illegal *per se* (link and advertising message). Therefore, it may seem that Article 14 concerns not only websites that directly store illegal (and also legal) copyrighted content (e.g. YouTube or Rapidshare) but also those that store not-copyrighted information that facilitate access to copyrighted content stored elsewhere (e.g. file-sharing sites that store torrent files). Such an interpretation would mean that both kinds of websites fall under the limited liability regime offered by Article 14 of the E-commerce Directive.

32 On the other hand, such an extensive interpretation would mean that Article 14 applies not only to BitTorrent file-sharing sites, but also to websites containing any other information facilitating the access to illegal content, such as lists of links to illegal material or search engines (as a result of a requested search, search engines provide links to illegal material *inter alia*). From a technological point of view, BitTorrent websites are a mixture of links (BitTorrent files) and search engines (searchable databases that help to find the needed BitTorrent files) rather than information storage services. Therefore, if BitTorrent websites were subject to Article 14 of the E-Commerce Directive, the same legal treatment of linking services and search engines could be expected.

33 At the same time, information location tools (such as links and search engines) were intentionally not included in the E-Commerce Directive.³⁴ For good or bad reasons, EU legislators at that time decided to leave the question of liability for the provision of links and search engines to the discretion of the Member States. Up to now, cases concerning links and search engines have normally been solved under the national liability rules of the EU Member States.³⁵ Therefore, as BitTorrent sites function in a similar way to information location tools (they do not contain information themselves but rather facilitate the access to information stored elsewhere by providing a searchable database of links), it would be more logical to exclude them from the scope of Article 14 of the Directive. In that case, for good or for ill, BitTorrent websites would be subject to the national liability rules of EU Member States.

2. Torrent website – “passive” or “active” service?

34 If a limited liability regime as suggested under Article 14 of the E-commerce Directive were applied anyway to BitTorrent file-sharing services,³⁶ one of the main questions would be whether a BitTorrent service could be qualified as a mere (“passive”) intermediary or rather as an “active” participant in the illegal conduct of its end users.

35 According to the CJEU, a service provider should be “neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores”.³⁷ Otherwise, a service provider does not qualify for a limited liability regime under Article 14 of the E-commerce Directive. Which conduct is considered active involvement has to be decided on a case-by-case basis. For instance, in the *Google v. Vuitton* case, the CJEU points out that

the mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides

*general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31. Likewise, concordance between the keyword selected and the search term entered by an Internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server.*³⁸

36 On the other hand, “the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant”.³⁹ In the *eBay v. L’Oreal* case, the CJEU concluded that

*[w]here, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale.*⁴⁰

37 The courts in the analysed national cases concerning BitTorrent file-sharing services (*Pirate Bay*, *Finreactor* and *Linkomanija*) have established the active role of the service providers. For instance, in the Lithuanian *Linkomanija* case, the court merely stated that “from the case materials it could be seen that the defendants initiated the copyright infringements done by the users of the ‘Linkomanija Project’, they had absolutely all possibilities to control the users of the project and the content submitted by them (...)”.⁴¹ In the Finnish *Finreactor* case, the court was a bit more detailed and explained that

*[t]he Finreactor file-sharing network has come down to united action between the administrators and the users, aiming at and leading to the infringement of the economic rights of the copyright holders on a large scale. The defendants have been aware of this purpose of the network and through their administration they have participated in the copyright infringements carried out in the network together with the network users in a manner that constitutes liability as perpetrators or abettors, respectively.*⁴²

38 In the *Linkomanija* case, the court did not specify which conduct indicated that the service provider “initiated” and had “absolutely all possibilities to control the users [...] [and] all possibilities to eliminate [infringements]”. There is no information in the case that the intermediary did more than create a website infrastructure that allowed users to search and share torrent files. If this is all that was done, one could argue that evidence is lacking that could prove the intermediary’s sufficiently active role. Google or eBay have also created the websites and infrastructure for users that allowed not only uploading the link but also uploading the potentially infringing content itself, searching it and using (viewing, downloading, etc.) the identified material. Still, this was not considered sufficient by the CJEU to establish the active role by the service providers.

- 39 In regard to the *Finreactor* case, the court claims that Finreactor administrators played an active role mainly because they knew about the purpose of the website users to illegally share copyrighted material, and administrated the website knowing this purpose. Apart from knowledge, however, the court does not indicate what specific conduct shows that the intermediary's role was more than to create and administer the searchable database of torrent files that may lead to sharing of both legal and illegal content.
- 40 This demonstrates that in the analysed BitTorrent cases, national courts applied a much broader definition of "active". Namely, in the *Linkomanija* case, the mere creation of a website and its administration implied an active role. In the *Finreactor* case, the court mixed up this requirement with a knowledge requirement: as the service provider knew about illegal purposes of website users and still administrated it, its role was considered active. Although the final result of the court analysis – the non-application of limited liability rules – may be correct, such an extensive definition of "active" does not follow the more narrow approach proposed by the CJEU.⁴³ Meanwhile, as already mentioned earlier, a broad construction of an "active role", as applied by national courts, may cause problems for other websites (e.g. "semi-legal" websites where the website is used for sharing both legal and illegal content, such as YouTube or Daily Motion). If an "active role" is construed broadly, service providers will be excluded from the limited liability regime merely because they created and administer a website which, to a certain extent, is also used for illegal purposes. It is therefore suggested that courts, when determining the active role of the service provider, should more clearly indicate the conduct by which the service provider actively intervenes in the conduct of users (e.g. by checking or controlling their content, promoting certain content, etc.). Only if specific and significant intervention by the service provider into the activities of end users can be identified can the "active role" be considered proven.

3. Did BitTorrent service operators "know" about the infringements?

- 41 Finally, national courts in intermediary liability cases often find it difficult to determine whether a service provider had (sufficient) knowledge about the illegal information stored in their websites. Under Article 14 of the E-commerce Directive, the provider is not liable if it does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the activity or information is apparent; or upon acquiring knowledge or awareness expediently acts to remove the illegal content. From
- the context of the Directive it is clear that a general awareness of the service provider about the possibility (or certainty) of some illegal content on the website does not automatically exclude the provider from the limited liability regime. However, it has been disputed how specific the knowledge should be. Service providers normally want exact information and proof of which file is illegal and where it could be found. Meanwhile, if right holders cannot expect service providers to monitor their contents (such a general duty is prohibited by the E-commerce Directive), then at least they expect them to take measures to check for illegal information and remove or block it upon obtaining any kind of warning or information.
- 42 In all the national cases analysed (*Pirate Bay*, *Finreactor* and *Linkomanija*), the courts found that the service providers had knowledge about the infringing conduct of end users, even if service providers were not specifically notified and did not know about the specific infringing files. For instance, in the *Pirate Bay* case, the court explained that
- [i]t has not been demonstrated that the defendants knew that the specific works listed in the indictment had been made available via The Pirate Bay. The defendant's intent does not, however, have to cover the specific works which it is alleged have been made available. It is, rather, sufficient for them to have had the intent to bring about the existence of copyright-protected material on the website (...). The examination of the defendants, the letters from rights holders published on the website, The Pirate Bay, and the e-mail correspondence indicating that the operation involved pirate copying make it clear that the defendants have been aware that copyright protected works were available via the website, and were shared via the tracker embedded within the framework of The Pirate Bay's operation. Despite this knowledge, they have elected to take no action to prevent the infringement of copyright.*⁴⁴
- 43 The court also pointed out that "[i]t must have been obvious to the defendants that the website contained torrent files which related to protected works".⁴⁵ In comparison, in the *Linkomanija* case, the court was very short on this and just stated, without additional argument, that the defendants "knew about specific copyright infringements and in case of need had all possibilities to remove them".⁴⁶ Unfortunately, no more proof or discussion on the extent of knowledge was provided by the court.
- 44 It is questionable whether the knowledge standard set in these national BitTorrent cases is compatible with the interpretation of knowledge requirement under the E-commerce Directive as defined by the CJEU. In the *eBay v. L'Oréal* case, the CJEU pointed out that "it is for the referring court to consider whether eBay has, in relation to the offers for sale at issue and to the extent that the latter have infringed L'Oréal's trade marks, been aware of facts or circumstances from which the illegal activity or information is apparent"⁴⁷ (emphasis added). This implies that it is not sufficient for the service provider to generally be

aware that there is some illegal content on the website at stake. Rather, s/he has to be aware of facts and circumstances from which it is clear that the specific object of the dispute (here L'Oreal trademarks used on eBay) is illegal. Furthermore, the court specifies the situations in which awareness could be acquired, in particular (but not exclusively?), when “the operator of an online marketplace uncovers, as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information”.⁴⁸ This implies that, in order to acquire awareness of the violations, certain procedures (such as own investigation or notification by any person) are normally needed that lead to certain facts or information that make it apparent for the intermediary that the disputed content is illegal.

- 45 In all three BitTorrent cases, national courts found that it was obvious for the service providers that their websites are used for illegal file sharing. Since the intent or founding purpose of the websites was to enable illegal file sharing, the courts found no need to more specifically prove that the service provider knew that the website contained torrent files referring to specific illegal content (e.g. Microsoft's programmes in the *Linkomanija* case). The courts also did not request an indication of the facts and circumstances from which it should have been apparent to the service provider that his/her service hosted the disputed illegal content. This means that the courts have applied a much more “loose” knowledge requirement than the one adopted by the CJEU.
- 46 At the same time, it is questionable whether the rather strict knowledge standard adopted by the CJEU would be suitable to the BitTorrent cases at stake. In all three cases it was found that the founding purpose essentially was to enable predominantly illegal file sharing. In such cases, the requirement to prove the specific knowledge or awareness of specific infringements may seem unnecessary or even an excessive requirement. When the obviously illegal file-sharing website is at stake, it would be unreasonable to require right holders to prove that service providers had knowledge of each specific infringement. And if sufficient evidence on specific knowledge or awareness is not provided, it would be unfair to apply limited liability rules to such obviously illegal websites.
- 47 At the same time, as has been noted earlier, such predominantly illegal file-sharing services should be clearly separated from the services which are to a significant extent used for legal purposes (e.g. YouTube, Dailymotion or Rapidshare websites). Here, the tougher CJEU knowledge standard is reasonable. In the case of such “primarily legal” services, the application of the limited liability regime could be rejected only if it is proven that the service provider

had actual knowledge of a specific infringement or, for example, due to its own investigation or other notifications, was aware of facts and circumstances from which it was obvious that the specific information or conduct is illegal. The difficult question in such cases is how active the service provider should be in seeking knowledge about potential infringements and preventing them. For instance, the German Supreme Court has set rather high monitoring requirements. In a case concerning a file-hosting website Rapidshare,⁴⁹ the court found that when the service provider is informed about the infringing content hosted on the website, it not only has to prevent the access to this content but also check link collections on other websites in order to identify and block links referring to the notified illegal content hosted on its servers. One may question whether such a monitoring duty is compatible with the prohibition of a general monitoring duty under Article 15 of the E-commerce directive and as recently confirmed by the CJEU.⁵⁰

D. Conclusions

- 48 The *Linkomanija* decision is a first successful attempt by right holders in fighting online copyright infringements in Lithuania. The outcome of the case is generally correct, though the argumentation of the court on many of the issues is weak (or entirely absent). It does not make it clear for other Internet service providers how they should meet the conditions of Article 14 of the Information Society Services Act (and Article 14 of the E-commerce Directive). A more careful and differentiated analysis of limited liability rules is needed, and specific evidence to prove or deny the existence of each condition of the limited liability regime should be identified.
- 49 In a broader European context, the Lithuanian *Linkomanija* decision does not suggest much that is new; instead, it shows that the wave of stronger copyright enforcement online is moving to smaller European markets. The comparison of the three most recent national cases on BitTorrent websites (the Swedish *Pirate Bay*, Finnish *Finreactor* and Lithuanian *Linkomanija* cases) raises some additional questions in regard to the applicability of the EU E-commerce Directive to BitTorrent services. First of all, it is questionable whether Article 14 of the E-commerce Directive is applicable to BitTorrent file-sharing services at all. BitTorrent sites do not *strictu sensu* provide hosting (storage) services (they do not host copyrighted content). They rather resemble information allocation tools (links and search engines) that were intentionally left outside the scope of the E-commerce Directive. Second, it is doubtful whether limited liability rules, as interpreted by the CJEU, are suitable and reasonable for the BitTorrent file-sharing cases analysed. For instance, BitTorrent service

providers could be potentially qualified as “passive” intermediaries as long as they merely create and administer the platform for sharing of any kind of content (and do not promote specific content, select it, modify it or in any other way intervene in the conduct of users). Also, as long as BitTorrent service providers are not notified about the specific illegal conduct, it may be difficult to prove that they have more than a general awareness about (possibly) illegal conduct occurring over their website. It may therefore happen that BitTorrent websites – “passive” and with no “actual knowledge” about the infringements – may meet the conditions of Article 14 of the E-Commerce Directive and in this way escape liability. At the same time it is highly doubtful whether websites widely known for their illegal purposes should be given a chance to “hide” in the “safe harbour” provided by the EU law.

- 1 BSA, Global Software Piracy Study: Shadow Market (9th ed., 2011), p. 8, <http://portal.bsa.org/globalpiracy2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf>.
- 2 In comparison, in Western Europe this figure is appr. 32 - 33 per cent, id, p. 8-9.
- 3 Supreme Administrative Court of Lithuania, administrative case No. N62-902/2011.
- 4 Vilnius District Court, civil case No. 2S-1416-302/2012.
- 5 Vilnius District Court, civil case No. 2-742-262/2012 - Linkomanija.
- 6 Civil Code of the Republic of Lithuania, 18 July 2000, No.VIII-1864.
- 7 Supreme Court of Lithuania, civil case No. 3K-3-270/2006.
- 8 Information Society Services Law of the Republic of Lithuania, 25 May 2006, No. X-614.
- 9 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ L 178 , 17/07/2000 p. 0001 - 0016.
- 10 For more about this requirement, see *infra* text.
- 11 This order was adopted by the Government of the Republic of Lithuania on 22 August 2007, No. 881.
- 12 See Order, id, Art. 22.
- 13 Law on Copyright and Related Rights of 18 May 1999, No. VIII-1185 (with subsequent amendments).
- 14 For a short description of emergence and functioning of BitTorrent protocol, see Vincents, “*Secondary Liability for Copyright Infringement in the Bit Torrent Platform: Placing the Blame Where It Belongs*”, 30/1 European Intellectual Property Review 4, 6 (2008).
- 15 In Slovenia, the website SuprNova was closed down after legal threats in 2004; see “*SuprNova - Back with a bang?*”, posted on 14 September 2005, available at: <http://www.slyck.com/story908_SuprNova_Back_with_a_bang>.
- 16 In the Netherlands, a BitTorrent site Leaseweb was said to be a “hybrid of links and file sharing” that “structurally facilitates the infringement of copyright and related rights”; see *Stichting Brein v. Leaseweb*, No. 369220/KG ZA 07-850 AB/MV (D.Ct. Amsterdam, Civ. Sector, 21 June 2007), *aff’d*, LJN: BD 6223, Amsterdam court, 106.007.074/01 KG (Amsterdam Ct. App. 3 July 2008).
- 17 In UK, the website OiNK was closed in 2007. In December 2008 four of the former OiNK members pleaded guilty at Teesside Crown Court, where they were charged with copyright infringement offences. Three were sentenced to a total of 330 hours of community service and court costs of £378 each, and the other was fined £500; see “Police shut down website after two-year music piracy inquiry”, *The Guardian*, 24 October 2007, available at: <<http://www.guardian.co.uk/technology/2007/oct/24/piracy.crime>>.
- 18 Stockholm District Court decision B 13301-06 of 17 April 2009 – *The Pirate Bay*, unofficial translation was available at: <www.ifpi.org> (2009-12-30); appeal was lost on 26 November 2010, see “Pirate Bay co-founders lose appeal”, *The Guardian*, 26 November 2010, available at: <<http://www.guardian.co.uk/technology/2010/nov/26/pirate-bay-founders-appeal>>.
- 19 Decision of the Supreme Court of Finland (Korkeinoikeus), 30 June 2010 - KKO 2010:47, translation available in IIC 2012, 43(6), 725-734, (Finreactor).
- 20 *Supra* note 18.
- 21 *Supra* note 19.
- 22 E.g. Sonofon, a Danish Internet access provider was ordered to terminate access in Denmark to the Swedish website the Pirate Bay (Supreme Court of Denmark, 27 May 2010, IFPI v. Sonofon (DMT2) (Denmark)); in Norway, an Internet service provider was held not responsible for blocking BitTorrent file-sharing services in Norway (*Bonnier Amigo Music Norway AS v. Telenor ASA*, Unreported, February 9, 2010 (Norway), translation and comment in 21(6) Ent. L.R. 237 (2010)).
- 23 Disclosure of user identities in civil enforcement cases was said to be compatible with EU law (CJEU decision C-461/10 of 19 April 2012 - *Bonnier Audio AB and Others v. Perfect Communication Sweden AB*); such disclosure is being applied in most countries, e.g. UK (*Golden Eye (International) Ltd v. Telefonica UK Ltd* [2012] EWHC 723 (Ch)), also Germany; but denied in others, e.g. Switzerland (*Bundesgericht Urteil vom 8. September 2010 1C_285/2009, EDÖB v. Logistep AG*), also Spain, Lithuania.
- 24 E.g. in Scotland, *Anne Muir*, 58, was convicted for distributing £54,000 worth of copyrighted music files by making them available to others via a peer-to-peer file sharing application (*Ayr Sheriff Court, Scotland*, 11 October 2011).
- 25 E.g. Swedish *Pirate Bay*, Finnish *Finreactor* case, see *supra* notes 18 and 19; for outside Europe, see e.g. Australian *Big Crook* case of 2005 as discussed in Steven Gething, “*Criminal Infringement of Copyright: The Big Crook Case*”, in: Fitzgerald et al. (eds), *Copyright law, digital content and the Internet in the Asia-Pacific* 367-380 (Sydney University Press 2008).
- 26 E.g. the German Supreme Court confirmed that the file-hosting website Rapidshare, after being notified, has to take all economically and technically feasible measures so that the notified illegal content does not reappear on the website (BGH of 12 July 2012 I ZR 18/11-*Alone in the Dark*); the CJEU confirmed that a broad general monitoring duty violates the EU law (CJEU decision C-70/10 of 24 November 2011 *Scarlet Extended SA v. SABAM*).
- 27 See *supra* notes 3 and 4.
- 28 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”), OJ L 178, 17.7.2000, p. 1-16.
- 29 See Stockholm District Court - *The Pirate Bay*, unofficial translation, p. 56: (“The fact that The Pirate Bay offered a service where the user could upload and store torrent files on the website means, instead, that it is a matter of the type of storage service covered by the provisions of § 18 of the Electronic Commerce Act” (Bill 2001/02:150, p. 21)). *Finreactor* case, para. 30 (“The Finreactor network involved, among other things, storing torrent files uploaded by network users to the server administered by the defendants. From this perspective, Sec. 15 of the E-Commerce Act, which provides for

exemption from liability in hosting services, could, as the defendants have argued in the appealed case, be applicable”).

- 30 Article 14 reads “Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service (...)”.
- 31 Recital 46 of the Directive specifically commenting on Article 14 does not mention this issue at all.
- 32 CJEU decision C-236/08 to C-238/08 of 23 March 2010, Google France SARL and Google Inc. v. Louis Vuitton Malletier SA and Others.
- 33 CJEU - Google v. Louis Vuitton, para. 111.
- 34 Even before the adoption of the EU Directive, such a special provision was included in the US Digital Millennium Copyright Act DMCA § 512(d); however, EU legislators decided to specifically leave it off in the case of the Directive; see also Verbiest, Spindler, Riccio, der Perre, “*Study on the liability of Internet intermediaries*”, 12 Nov 2007, available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf (2013 05 15), p. 17.
- 35 Some EU member states have adopted specific rules for search engines and linking services in their national laws (often similar to limited liability rules applied to host providers); some others apply in such cases general liability rules. For more, see Verbiest, Spindler, Riccio and der Perre, supra note 34, pp. 88-99.
- 36 EU Member State courts have often applied, on a different legal basis, the limited liability regime to search engines and linking websites; see Verbiest, Spindler, Riccio and der Perre, supra note 34, pp. 88-99.
- 37 See CJEU - Google v. Louis Vuitton, paras.114 and 120.
- 38 CJEU - Google v. Louis Vuitton, paras. 116-117.
- 39 CJEU - Google v. Louis Vuitton, para. 118.
- 40 CJEU decision C-324/09 of 12 July 2011- L’Oréal SA v. eBay Int., para. 116.
- 41 Vilnius District Court - Linkomanija, p. 4.
- 42 Supreme Court of Finland - Finreactor, paras. 31-32.
- 43 See also Bassett, “*Unanswered Arguments after the Pirate Bay Trial: Dropping Sail in the Safe Harbors of the EU Electronic Commerce Directive*”, 12 N.C. J.L. & Tech. 67 (2010-2011), pp. 94-95 (“the concordance between user-created torrent files and the search term entered by a user to find a particular file may not be sufficient of itself to justify the view that The Pirate Bay has knowledge of, or control over, the data entered into its system by users and stored in memory on its server.”).
- 44 Stockholm District Court - Pirate Bay, p. 52.
- 45 Stockholm District Court - Pirate Bay, p. 56.
- 46 Vilnius District Court - Linkomanija, p. 4.
- 47 CJEU – L’Oréal SA v. eBay Int, para. 120.
- 48 CJEU – L’Oréal SA v. eBay Int, para. 122.
- 49 German Supreme Court decision of 15 August 2013, I ZR 80/12.
- 50 CJEU decision C-360/10 of 16 February 2012 – SABAM v. Netlog NV.