

isoHunt closes: the BitTorrent hunter is hunted down

THE CASE:

Columbia Pictures Industries and Ors v Gary Fung and Ors
The US Court of Appeals for the Ninth Circuit
March 2013

Retreating from its so-called “good fight” against the Motion Picture Association of America, isoHunt agrees to pay \$110m in infringement damages. Seward & Kissel’s **Jeffrey M Dine** reviews the case’s development following a previous March court ruling

On 17 October 2013, the Motion Picture Association of America (MPAA) announced that it had settled its long-running lawsuit against the BitTorrent website isoHunt.com and its operator, Gary Fung. Key to the settlement was isoHunt’s agreement to shut down five days later and have judgment entered against it for \$110m.¹ The site in fact closed early, on 21 October, in the face of a concerted effort by “rogue archivists” to copy the entire website. Fung replaced the site’s homepage with a rickrolling² link to a supposed *Terminator Salvation* trailer on YouTube. As of this writing, the archive site was up and running at a similar-sounding web address and is promising to offer new uploads soon.

isoHunt’s settlement came after a US federal appeals court, in a March 2013 decision, affirmed a lower court’s determination that isoHunt and related sites were liable for contributory copyright infringement.³ By settling, isoHunt averted a trial on damages in November 2013.

The role of BitTorrent websites in copyright infringement

There are three main types of video piracy websites: video streaming (including host sites and link sites); direct download cyberlockers; and BitTorrent portals.⁴ As examples, the now closed MegaUpload was a direct download cyberlocker, offering complete unitary files for download. The related website MegaVideo was a video streaming host site. The shuttered website TVShack.net was a video streaming linking site.⁵ These sites offered the download or streaming of a single file.

BitTorrent works differently. In general terms, BitTorrent is an open source peer-to-peer file-sharing protocol that allows users

to upload and download files efficiently, by breaking large files into many, much smaller (approximately 256 kilobyte) parts. A user with a file (which might be non-infringing, such as scientific data sets, or infringing, such as a movie) they wish to publish, uses BitTorrent client software to create a ‘torrent’ file identifying the file, the number of pieces, a cryptographic ‘hash’ code unique to the file to authenticate copies as complete and the address of a ‘tracker’ computer that maintains a list of all computers holding pieces of the file. The torrent file contains no copyrighted material, just the metadata for the torrent information. The publisher uploads the torrent file to a torrent site that hosts it, and which organises the torrent files it hosts so that users can find them. The publisher keeps his computer running and connected to the internet, and BitTorrent’s magic starts to happen.⁶

To download a file, a user running the BitTorrent client software downloads the torrent file. The client software contacts the tracker, which identifies computers (‘seeders’) that are online and hosting parts of the torrent file to the client (a ‘leecher’), which contacts the seeders and starts downloading directly from them. As the leecher downloads parts of the file, it becomes a seeder itself, making the parts it has downloaded available to other leechers. Because every computer that has downloaded the file is now a seeder, the demand on each seeder is small, and downloading is not dependent on the availability of a single (or even mirrored) file server. The universe of seeders and leechers for a given file is called a swarm. As rights owners recognise, “[a]s a file-sharing application, bittorrent [sic] has no equal on the internet”.⁷

BitTorrent file transfers (infringing and non-infringing) take up a substantial part of all

internet traffic worldwide. In Europe, BitTorrent is estimated to account for 22% of aggregate internet bandwidth, and in the Asia-Pacific region, 37%. North America is substantially lower, at 12%.⁸ Bandwidth for BitTorrent in North America has dropped from 19% in 2011. In North America, Netflix accounts for up to 32% of peak internet traffic, with YouTube also increasing.⁹ Thus, legitimate file streaming services now predominate over infringing uses in North America.

The MPAA’s struggle with isoHunt

isoHunt, which began in 2003, was a torrent site, collecting and organising torrent files. The website allowed users to browse files by type, search popularity and recency, as well as search. For a time, the homepage listed ‘Box Office Movies’ prominently. Clicking on a title brought the user to a webpage with information about the film, listing available torrents (if any) and inviting the submission of torrent files. isoHunt, however, did more than simply gather torrent files. Rather, isoHunt modified the torrent files it collected by adding additional trackers to them, giving the client software more options for finding seeders for the file and increasing the likelihood of a successful download.¹⁰ This greater likelihood of success was presumably a strongly appealing feature. Thus, isoHunt touted itself as “home to the most comprehensive BitTorrent search engine, with cross-referenced trackers data you can’t find anywhere else”.¹¹ Two other sites associated with isoHunt were both torrent sites and trackers.

The MPAA and major studios sued isoHunt for vicarious and contributory copyright infringement in 2006. In 2009, the district court granted plaintiffs summary judgment. It found isoHunt liable for contributory

infringement and entered a broad preliminary injunction. The standard for contributory infringement applied by the district court was (1) knowledge of another's infringement and (2) either (a) materially contributing to it or (b) inducing it.¹²

The court had no difficulty finding actual infringement by users in the US. That isoHunt's servers were located in Canada did not shield it from liability. As for inducement, the court applied the standard enunciated by the US Supreme Court, in a case involving the peer-to-peer service Grokster: "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."¹³ The district court rejected isoHunt's Digital Millennium Copyright Act (DMCA) statutory safe harbor defences (for providers of certain internet services), on the basis that isoHunt's liability for contributory infringement vitiated those defences.¹⁴

The Ninth Circuit rules

isoHunt appealed and, four years later, the appeals court issued its decision. The appeals court affirmed the district court's finding of liability. It analysed the Supreme Court's holding in *Grokster*, finding that liability for infringement applies to those who supply a 'service' (such as a website), as well as to those who supply a device (such as software). As for promotion of infringing use, the appeals court found that (among other things) isoHunt's featured list of 'Box Office Movies' and related invitation to upload a torrent for listed movies, encouraged copyright infringement by users.¹⁵

The court also affirmed the rejection of isoHunt's DMCA safe harbor defences. In the appeals court's analysis, it was theoretically possible, if highly unlikely, for the safe harbor defences to apply in the face of a finding of contributory infringement. But in this case, where isoHunt actively encouraged infringement, isoHunt was at the very least "aware of facts and circumstances" – red flags – "from which infringing activity is apparent." Moreover, isoHunt received a direct financial benefit from the infringing activity, because it made money from advertising and had the ability to control infringement, also rendering the safe harbor unavailable.¹⁶

Comment

After six years of litigation, faced with massive damages, isoHunt folded. But for the rightsholders, the battle is Sisyphean. isoHunt has already been resurrected. The Pirate Bay (the most popular torrent site) has moved its servers to the cloud and introduced its own

branded web browser, designed to circumvent blocks to access. Even with the very active efforts of the entertainment industry, online infringement continues to increase in absolute terms.

On the other hand, the proportionate growth of Netflix (and YouTube) in North America offers a ray of hope, showing that users will seek reasonably priced legitimate sources. But Netflix is not yet a substitute source for current movies, likely leaving that demand unaffected. Content providers have not yet found a business model for current releases that will supplant online infringers and still satisfy their stakeholders.

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But, it is also true that the mindset that copying movies and music is somehow not wrong is the root of the problem, as people who would not shoplift a tube of toothpaste from a drug store will happily and knowingly download current movies from torrent sites. Steve Jobs, in an interview with *Rolling Stone* in 2003, called the internet an "amazingly efficient distribution system for stolen property".¹⁷ Fung, in a posting on isoHunt, commented, "This is the heart of the problem that companies need to understand. Although the term 'stolen property' isn't correct: downloading a 'copy'! = steal".¹⁸ Fung may well in his heart believe that, although it is a belief that aligned quite nicely with his economic interest in propagating infringement.

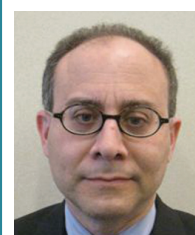
It took the movie industry's legion of lawyers six years to close isoHunt. Many other sites are still operating, still engaged in a technological and legal arms race with copyright owners. As has always been the case, the long-term solutions will not come from legal enforcement, but from continuing evolution in copyright owners' business models.

Footnotes

1. Press release, Motion Picture Association of America, 'isoHunt.com to shut down in lawsuit settlement' (17 Oct 2013), available at <http://www.mpa.org/resources/52c16680-37ab-4f0a-9756-b850fe37ca1c.pdf>.

2. To post a misleading link with a subject that promises to be exciting or interesting... but actually turns out to be the video for Rick Astley's debut single, "Never Gonna Give You Up." Urban Dictionary, available at <http://www.urbandictionary.com/define.php?term=rickroll>.
3. *Columbia Pictures Industries and Ors v Gary Fung and Ors*, 710 F 3d 1020 (9th Cir 2013).
4. David Price, 'Sizing the piracy universe', at (7 Sept 2013), available at <http://www.netnames.com/digital-piracy-sizing-piracy-universe>. The study, by NetNames, was commissioned by NBC Universal.
5. See Jeffrey Dine, 'Within reaching distance', *Intellectual Property Magazine*, November 2012, at p55.
6. The appeals court's description of the peer to peer networking generally and the BitTorrent protocol in particular is quite comprehensible. 710 F3d at 1025-28.
7. Price, *supra* n3, at 26.
8. *id.*
9. *id.* at 27; *Sandvine Global Internet Phenomena Report 1H2013*, at 5-6 (available at <https://www.sandvine.com/trends/global-internet-phenomena/>).
10. 710 F3d at 1028-29.
11. isoHunt.com, 25 Nov 2005, 23:35:51 (internet archive).
12. *Columbia Pictures Industries and Ors v Gary Fung and Ors*, No 06-cv-5578, 2009 US Dist LEXIS 122661, at *25 (CD Cal 21 Dec, 2009).
13. *Metro-Goldwyn-Mayer Studios, Inc v Grokster*, 545 US 913, 936-37 (2005).
14. 2009 US Dist Lexis 122661 at *67-68; see 17 USC § 512.
15. 710 F3d at 1035-36.
16. *id.* at 1039-46.
17. Jeff Goodell, Steve Jobs: *Rolling Stone's* 2003 interview, republished 6 October 2011 available at <http://www.rollingstone.com/music/news/steve-jobs-rolling-stones-2003-interview-20111006>.
18. isoHunt.com, 13 Dec 2003 14:33:50 (internet archive). "!=" is used in programming to mean "not equal" as there is no ASCII version of the ≠ symbol.

Author



Jeffrey M Dine is an associate in the litigation group at Seward & Kissel in New York. He counsels US and foreign clients in a wide range of matters, including copyright, trademark and trade secrets, as well as complex commercial, securities and maritime litigations, arbitrations and arbitration enforcement actions.