Kluwer Copyright Blog

Dr. Strangelaw or: How Portugal Learned to Stop Worrying and Love P2P

João Pedro Quintais (Institute for Information Law (IViR)) · Thursday, October 25th, 2012

On January 5, 2011, representatives of ACAPOR (a Portuguese association representing commercial retailers of cultural and entertainment works), wearing t-shirts with the slogans “piracy is illegal” and “1000 complaints per month”, filed a petition with the Prosecutor General’s Office (“PGO”) giving notice of the practice of 1000 acts of alleged usurpation of authors’ rights via peer-to-peer (“p2p”) networks by unknown individuals. Said petition was supplemented in April 2011, with notice of a further 1.000 acts.

Following an Opinion by the PGO (“PGO Opinion”), the Department of Investigation and Penal Action (“DIAP”) of Lisbon decided not to file any criminal charges in relation to the notices; an integral copy of this decision was made available online by a main Portuguese newspaper on September 27, 2012 (“Decision”). The PGO Opinion has not been made available to the general public, but this blogger has been able to read it.

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. Furthermore, the PGO Opinion can be understood as setting forth the position 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.

Legal basis

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. Not being a collecting society, ACAPOR relied upon the this public nature to give notice of the alleged criminal actions to the competent authorities.

Art. 195 PCA provides that a crime of usurpation of authors’ rights is committed by whoever uses a protected work pursuant to the PCA, absent the right holders authorization. It is an umbrella crime, covering a wide array of criminal conducts connected to the economic or patrimonial

content of copyright; in casu, it criminalizes actions that affect a rights holder's power to authorize certain uses. Art. 197 PCA further states that the crime is punishable with a fine or prison up to 3 years for first time offenders. There is basis for criminal action for copyright infringement irrespective of intent or even commercial scale of the infringing act.

The PGO Opinion makes reference to the potential application of other legal provisions in the context of Internet "piracy" – such as the Electronic Commerce Law and the Cybercrime Law –, but it notes that neither piece of legislation provides for measures that are clearly applicable to acts of alleged copyright infringement performed via a p2p network.

Background

ACAPOR's actions in this case must be framed in a wider strategy of public awareness and pressure on the legislature and judiciary, aimed at the implementation of an administrative graduated response type of system, the fight against widespread use of p2p networks and software by consumers, as well as the alleged loss revenues arising therefrom to its associates. Going through the PGO Opinion and the Decision, it's hard not to get the impression that ACAPOR's belligerent and highly critical stance has been to cause of some weariness to the PGO (which goes so far as characterizing ACAPOR's associates as quasi "parasites" living off creators, being incapable of adjusting their business models to current disruptive technological changes).

Of the 2.000 notices delivered by ACAPOR, c.a. 1970 identify a like number of acts allegedly configuring crimes of usurpation of author's rights and 30 crimes of breach of correspondence or telecommunication. The latter refer to an alleged cyber-attack (named "Operation Payback") on ACAPOR's website as retaliation by hackers against the association's actions with the General Inspection of Cultural Activities ("IGAC"), aimed at closing down several websites primarily devoted to the p2p sharing of film and music.

All notices refer to the first trimester of 2011, focus on the act of upload/making available (not mentioning acts of download) 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 in Lisbon had the obligation to proceed to an investigation of the underlying facts and ultimately decide on whether or not 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, and meetings with the IGAC, ACAPOR's representatives and the Portuguese Data Protection Authority. In a demonstration of absolute institutional honesty, it is expressly stated that due to number of complaints, a decision was made not to identify the individuals that had allegedly downloaded the protected works.

Analysing the technology, the prosecutor's broad understanding of a p2p network using BitTorrent

software works is that all users engaged in a specific exchange of a protected work are simultaneously downloading and uploading a file. The PGO Opinion further notes that, due to the architecture of p2p networks using BitTorrent software, not all owners of the identified IP addresses are necessarily responsible for initial act of making available a work, but are merely allowing its computer to be used in (i.e. providing assistance to) the "collective sharing" of a specific work.

However, even assuming this technologic architecture, the Decision notes that ACAPOR failed to establish key knowledge elements, such as: (a) the widespread public knowledge that the rights holders of the shared works had not authorized their making available online; (b) the widespread public knowledge of the need of such authorization to engage in acts of p2p file-sharing; and (c) the knowledge by the p2p user of the technologic architecture of the network and software in a way sufficient to be aware of its automatic upload features.

Elements (a) and (b) seem relate to the legal/illegal nature of the source of the p2p acts of download, while element (c) 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.

Acts of Download and Upload (and IP addresses are not people)

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 videograms) requiring the rights holder´s authorization.

In what concerns the **acts of download**, 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) Information Society Directive), even if the user is simultaneously uploading, thus engaging in acts of making available of the work. This position follows some Portuguese legal scholarship, which considers all downloads by individual users on p2p networks 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 notes that it is "erroneous" to attribute a criminal conduct to the owner of an IP address, as said (formal) 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 its sheer number, the high costs and the unlikely success of the endeavour in light of widespread wireless use and ease of access to the Internet (e.g. via cybercafés). Importantly, the Decision does not expressly state that acts of upload in a p2p network are permitted, but merely concludes that, in this case, it is impossible to criminalize acts of upload with sole basis on the relevant IP address.

The PGO Opinion goes a step further, by entertaining the notion that certain acts of upload can be privileged under the private copying exception. According to this argument, acts of upload that (i) are not directly and immediately aimed at making the work available, but solely (ii) at facilitating the simultaneous act of download of that work occurring within a p2p network using a specific program, should be deemed private copying, **provided that** the individual downloading 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 exception, as long as the upload does not extend beyond the action of downloading. This interpretation would be justified so as to make possible the operation of the private copying exception vis-à-vis p2p software with automatic upload features. In such a scenario, only the original uploader would be criminally liable for acts of making available.

The PGO Opinion shies away from concluding this argument applies to the present case, but observes that the mere possibility that most uploaders are covered by an exception makes the case for criminalization of their uses that much harder. Presumably, it will also impact negatively on the possibility of obtaining the identification of owners of IP addresses engaging in the underlying practices.

Underlying the conclusions as to the download and upload acts seems to be the lack of evidence as to the above-mentioned knowledge elements. However, the Decision does 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.

Finally, the Decision concludes 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 is directed at the practice of non-commercial acts. On a curious closing paragraph, it is referred that "if unanimity of opinions existed in relation to the binomial digital freedom / infringement of copyright SOPA…, PIPA… and… ACTA had been immediately signed by countries" [sic].

Reactions

As expected, the Decision was met with mixed reactions. While some commentators (here and here) praised it has a balanced interpretation of the law, ACAPOR immediately held a press conference under the heading "Public Prosecutor decides that hunting pirates is too much work". It later released a press statement accusing the public prosecutor of turning Portugal into the only EU member state where sharing movies online is legal. It criticizes the prosecutor for deciding not to investigate the case due to the excessive amount of costs and work, for defending 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 said acts, that all downloads are covered by the private copying exception irrespective of the source, and that said exception can be extended to acts of upload.

Meanwhile, ACAPOR has already filed a petition to be considered an interested party in the process and for the Decision to be declared null, on the basis that the DIAP did not comply with its legal obligation to investigate. The Portuguese Author's Society ("SPA") – an author's collecting society – has manifested its disagreement with the decision, noting its apparent contradiction with a recent decision where an individual p2p user has been convicted for the practice of p2p acts regarding musical works. Both the SPA and ACAPOR have threatened to file a complaint against Portugal with the EU Commission in connection with this case.

Not to dwell exclusively on a glass half empty perspective, ACAPOR notes that the Decision has the merit of recognizing the need for a "legislative revolution" along the lines of the implementation of an administrative graduated response system, which it states has been

"promised by the Secretary of State of Culture until the end of 2012" (press releases on said meetings here and here).

It will be interesting to see if such initiative ever takes off, given the recent failure of the proposal to revamp and extend the Portuguese private copying law, as well the Communist Party's proposal for a statutory "sharing license" currently under appreciation in Parliament (brief summary here), against which ACAPOR has already expressed its opposition.

JPQ

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