

---

# Hughes Hubbard & Reed

## Pirates Walking the Plank? – Entertainment Industry Awaits P2P Trial Verdict

### Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership  
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit <https://www.hugheshubbard.com/legal-notices-methodologies>.

---

UPDATE (4/14/09, 12:14 pm): The court found the [Pirate Bay defendants](#) guilty and sentenced them to 1 year in prison and ordered them to pay \$3.6 million in damages to several record labels. Tomorrow a Swedish court is expected to announce its ruling in a criminal case that has been closely watched by nearly everyone with a stake-financial or otherwise-in the free-wheeling world of [P2P file swapping](#). At its core, the ruling will determine whether the operators of the Pirate Bay, the popular torrent johnnydeppgeoffreyrushsearch and indexing site, are guilty of violating Sweden's copyright law. A conviction-which many observers expect-could lead to imprisonment and a possible fine, as well as a shut-down of the site. However, despite the potential immediate impact on the Pirate Bay and its operators, the broader implications of a guilty verdict, including whether or not it will serve as a deterrent against [unauthorized file-sharing](#), are a little less certain. For the uninitiated, a little background: the Pirate Bay is a Swedish web site that bills itself as the world's largest BitTorrent tracker. According to various measurements, [the site ranked 105th for daily traffic](#) over the past three months and an estimated 2.7 million people from the US visit every month. [BitTorrent is a peer-to-peer file sharing](#) protocol used to transfer files, which accounts for approximately 35% of all traffic on the Internet according to one study. BitTorrent differs from traditional P2P file-sharing in that a single file may be downloaded from numerous sources, each providing small packets of data, rather than from a single source. A client implementing the protocol creates a small file called a "torrent" which contains metadata about the files to be shared and about a tracker computer that coordinates file distribution. A user seeking to download the file must first obtain the torrent file associated with it and connect to the tracker computer, which then tells the user's computer which other computers on the network have pieces of the file to be downloaded. The defendants in the Pirate Bay case are relying on the underlying nature of the BitTorrent protocol to serve as the basis for their defense. Specifically, they claim that since the Pirate Bay website only serves as an index for torrent files, and does not actually store any copyrighted materials, the site's operations cannot be deemed to be infringing. Taking the argument a bit further, they claim that because many sites and services on the Web point to or link to infringing content or allow users to upload such content-including Google-the infrastructure and inherent nature of the Internet are at issue in the case. The defendants used the analogy of roads and telephones that sometimes are used for illegal activities: no one suggests destroying the

road network or hauling phone companies into court due to offenses committed by one or more individuals using such roads or telephones. Prosecutors countered that search services like Google, and the roads and telephone lines, were established to foster legal activities. In contrast, the Pirate Bay's entire *raison d'être* appears to be to foster primarily illegal activity in the form of infringing file-sharing. The trial itself, which was held over three weeks in February and March, was a bit of circus. The defendants and their supporters posted daily accounts of the trial on the Web. And, after the web site of the International Federation of the Phonographic Industry, the trade group for the music industry, was hacked during the trial, one of the defendants posted a note on his Twitter account saying, "Whoever is hacking the IFPI websites, please stop doing that. It only makes us look bad!" In many ways, the Pirate Bay's notoriety is an "only in Sweden" affair. Until recent amendments, the Swedish copyright law did not prohibit downloading copyrighted material for personal use. Nearly every Swedish household has a cheap broadband connection, and polls have found that over 10% of the population engaged in some sort of P2P file-sharing and downloading. A political party dedicated to legalizing P2P file sharing-regardless of copyright issues-was formed and has made credible efforts to gain seats in the Swedish Parliament. However, in response to international pressure, the Swedish government has begun to take a tougher stance against illegal file-sharing. Earlier this month, a law came into effect allowing content owners to obtain from Swedish ISPs the names and addresses of people suspected of sharing copyrighted materials without authorization. The law, which brings to Sweden an investigation and enforcement tool available throughout the EU, had an immediate impact. On the day the law went into effect, total Internet usage decreased by 40% and has remained suppressed since such time. During the trial, the head of the IFPI testified that 30% of the losses suffered by the global music industry were a result of illegal file sharing, citing several academic papers. He also testified that, following successful court actions in recent years which led to the shut-down of P2P file-sharing sites Grokster and Kazaa, the Pirate Bay had become the No. 1 source for illegal music on the Web. Despite the fact that early in the trial prosecutors dropped charges alleging that the operators were "assisting copyright infringement"-leaving the primary allegation based on "assisting in making available" copyrighted material-it appears that the prosecution will ultimately prevail. However, it is unclear what impact, if any, shutting down the Pirate Bay will have on illegal file-sharing as a whole. As has been seen numerous times over the past decade, every time a prominent P2P site or service has been successfully challenged and shut down (see Napster, Kazaa, Grokster, etc.), downloaders have simply found other sites to use. Moreover, the Pirate Bay is merely one of many BitTorrent search and tracking services currently available to end users, including Mininova, isoHunt and btjunkie. (Ironically, while none of these sites have become a high-profile target of the entertainment industry, Mininova actually has a higher traffic ranking than the Pirate Bay (86th v. 105th). And the others aren't shy about self-promotion: isoHunt says it is the "most comprehensive BitTorrent search engine"; and btjunkie bills itself as "the largest and most advanced BitTorrent search engine" with over 1.5 million active torrents.) [As an aside, in researching the information above and merely visiting the home pages of those sites via Google links, the PC we were using was apparently infected with a virus (notwithstanding the fairly extensive systems in place here). Perhaps the media industry's strategy vis a vis these sites is based on its awareness of this "deterrent" we unwittingly and regretfully stumbled upon.] However, in light of the brazen attitude that the Pirate Bay's operators have taken toward illegal file-sharing, a conviction will enable the entertainment industry to claim a major victory in its fight against Internet piracy. Regardless of the outcome, the trial-and similar enforcement efforts-should not be viewed by the entertainment and media industry as a substitute for a viable P2P business strategy. Current and future technologies are making the digital distribution of music, video and book files faster, simpler and more ubiquitous. Initiatives such as collective licensing-under which ISPs would pay an independent agency a fee based on its user base (presumably passed on as a fee to the users), which would in turn be pooled by the agency and used to pay royalties to content owners-are being considered viable alternatives that may effectively compensate content owners, foster the wide distribution of entertainment assets and move the digital space to a less adversarial environment.

## **Related Areas of Focus**

Media, Technology & Commercial Transactions