

Now the law acts

(or how to slander half of the country without moving a hair)

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«You wouldn't steal a car. You wouldn't steal someone's bag. You wouldn't steal a TV. You wouldn't steal a movie. Internet theft leaves a record. Stealing is illegal. Piracy is a crime. Now the law acts»

Text of the *Now the Law Acts* advertising campaign launched by the FAP, *Spain's Anti-Piracy Federation*

Now the law acts, blares out the FAP's advertisement from cinemas and bus shelters. This campaign, which is based on the spreading of a lie, is supported by the Ministries of Justice and Culture. For those who see fear as one of central tenets of their business model, it hardly matters that the seven-headed monsters they invoke don't actually exist.

It's not just this ad. Fear is the tactic most often used by those in power, who see citizens as wayward children who need reminding that the bogeyman won't overlook their misdeeds.

The fact that the Criminal Code requires a profit-making motive to exist before the downloading and public communication of works can be considered to be criminal acts is of little importance for those who want to change the Spanish language. The word-wizards have proposed the theory that any benefit, advantage or use arising from a download is, in itself, profit. And so the simple benefit arising from enjoying a movie would fulfil this requirement, and there would be a prison cell with your name on it for quite a while.

While the Director of Public Prosecutions, law text books, and the legislator himself say that *profit* cannot be interpreted in an expansive way, the idea spread by the media is just the opposite. And it's no surprise which of the two opinions becomes the accepted truth when the competition is the TV.

In his paper *The Ministry of Justice's position in relation to the Legal Protection of Copyright*, the Director of Public Prosecutions stated that «we must show ourselves to be against an *extensive* interpretation of the classifying element of a *profit-making motive*. This means excluding from the punitive context, in general terms, cases dealing simply with private use, which an orthodox industry is trying to include extensively in the criminal category by appealing to 'indirect profit'. We are dealing with socially acceptable forms of behaviour that don't justify criminal intervention».

The section of the *Criminal Law Defence of the Judiciary Program* manual that deals with intellectual property crimes refers to profit-making purposes as the intention to gain «financial interest».

The legislator himself reminds us that «art. 270 brings together an extensive list of protected forms of behaviour and objects, which require, in the first instance, a profit-making motive. This allows us to rule out the petty cases that make up a large *black* or undeclared figure, which the market will probably have to assume as unavoidable».

To think that jail is the fate of those who download music is to either forget or reject the most basic principles of Criminal Law.

The principle of classification

When a jail term is at stake, the behaviour being judged is required to be clearly defined as an offence. That is, the behaviour must be clearly criminal, and it must fully coincide with the description defined in the offence category.

Pedro Farré, a member of the Spanish authors' and publishers' association SGAE, doesn't usually say that downloads are illegal. He normally says that the criminal action is the public communication through the «making available» of the material. The objective is the same: based on Farré's apparent reasoning process, given that downloading from P2P networks necessarily and simultaneously implies «making available», then all downloading inevitably entails committing an illegal act. However, the idea that this «making available» is criminal, which arose from an expansive interpretation of a *profit-making motive*, cannot be said to unequivocally fit into the offence category. Particularly if we take into account the fact that Farré himself seems to have doubts on the issue, and his opinion changes depending on his mood on any particular day.

On the 2nd of May 2004, Pedro Farré stated that «the P2P phenomenon fits under article 270 of the Criminal Code», while barely three months later, at the *Campus Party*, he said that making material available on P2P networks «may not be covered by criminal law, it would be highly unlikely». On the 12th of January 2005, his doubts cleared and he again believed that «making available» on P2P networks fits under the Criminal Code, but then, three months later on the *Gomaspuma* radio program, Pedro gave internet users a bit of hope once more, saying that

the exchange of protected works «is bordering on the Criminal Code» and is «almost criminal». You are not a criminal, but only just.

The **principle of legal certainty** «requires that a citizen must be aware of exactly what circumstances will make him liable, and what the consequences will be». This certainty would break down if downloading protected files from the Internet were to be considered criminal. This is not only because it has to be forced to fit into the offence category, but also because even the minority who defend it as a criminal act seem to have their doubts, and quite unable to make up their minds.

The principle of minimum intervention

The principle of minimum intervention states exactly the opposite of what the media seem to declare. According to this principle, the Criminal Code is reserved for particularly serious cases. This subsidiary nature of Criminal Law is justified by the simple reason that the punishments involved are the most severe that can be imposed by a democratic state. In concrete terms, if we talk about a crime against intellectual property, we are talking about jail. And not just for a few weeks. The sentences are between six months and two years in prison for the basic and two to four years for the aggravated categories. When the State is given this kind of ammunition, it is required to use it only when strictly necessary. The function of the principle of minimum intervention is precisely to ensure that this is so.

The principle of proportionality

This principle requires that the severity of the sentence fit the actions it is punishing. As we mentioned above, if downloading a record were to be considered criminal, this kind of behaviour would be subject to a jail

term of 6 months to 2 years and a fine of 12 to 24 months. For most people who are not total intellectual property fanatics, this would seem to be a little out of proportion. It would also break the logic of our Criminal Law in two. Downloading a record would be a more serious offence than sexual harassment. And exchanging copies of records would also carry a substantially larger sentence than participating in a mass fight.

But the industry and its lawyers aren't familiar at all with the principle of proportionality. For Enrique Cerezo, film producer and president of the *Audiovisual Copyright Management Association* EGEDA, the solution is «for people to become aware that downloading a copy of a record or buying it from a sidewalk blanket is like stealing from a store or a bank. If the law were just as tough on both cases, irrespective of the amounts involved, something would get fixed».

It seems clear that believing in the illegality of downloading from the Internet as stated in the *Now the Law Acts* campaign would not only go against the opinion of the Director of Public Prosecutions, the legislators themselves and legal doctrine, but it would also knock down practically all of the basic principles on which Criminal Law in this country is based. This would be enough to stop us worrying in this regard, if it weren't that the same organisations making wild interpretations of our laws are also organising training courses for the judges who will later pass sentence.

The *Anti-Piracy Federation* (FAP) doesn't just allocate its resources to making videos that confuse the Criminal Code and criminalise a large part of society, it also organises seminars targeted at training judges. As stated on its web page, FAP «has been systematically developing and holding seminars and conferences aimed at judges, magistrates and prosecutors, making special efforts to

provide information in those areas where the attitude of judges and prosecutors is less inclined to consider piracy practices to be criminal».

If the FAP identifies areas in which there is a tendency not to convict those they want convicted, they quickly go into pedagogical mode. It is obviously not true that some judges are not «inclined to consider piracy practices to be criminal». All judges consider piracy criminal, but not all of them consider piracy to be what the FAP is determined to brand as such. In order to change this, the FAP has all the financial resources it needs to raise judges' awareness.

It's not just the FAP, management bodies such as EGEDA also do everything within their means to organise *Intellectual Property courses* for judges. It's not necessary to explain where the danger lies when dozens of courses targeted at judges are organised by the same groups that consider downloading a song from the internet to be «like robbing a bank».

Other organisations like the SGAE, CEDRO, and the BSA all organise similar courses.

This may be why EGEDA's José Antonio Suárez, when talking about downloading from the internet, said that he believed the legislation «is adequate, it's just a matter of being aware of it and acting accordingly [...] Before there were few specialists outside of the SGAE; now there is a group of judges which is sufficient».

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