

ALAI 2007 – Punta del Este

The exclusive right to make
available to the public

Jacqueline Seignette

General report on the right of making available will be **made available** on the ALAI website and published in the ALAI 2007 book.

making available to the public

what does it mean?

Article 8 WCT:

*Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including **the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.***

Agreed Statements concerning Article 8:

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention (...).

making available to the public

two different approaches:

- technical
- functional

making available to the public

technical interpretation:

physically having the work available on
one's computer ready to be transmitted
upon demand by a member of the
public

making available to the public

functional interpretation:

- organizing, controlling and offering a service by which the work is made available and transmitted to members of the public on demand
- the technology behind the service is not determinative

making available to the public

an example:

P2P networks

P2P bit torrent technology

- website with links to torrent files
- tracker server
- internet users with pc's containing copyright content and bit torrent client software

downloading logistics

- user visits bit torrent website
- he selects a title of a work (e.g. motion picture)
- the website sends data to the user's PC
- the PC contacts the tracker server
- tracker server sends data back to the PC
- PC makes contact with PC's of other users of the network
- pieces of the work are uploaded from these other PC's to the downloading PC

downloading logistics

conclusion:

- the works are stored on the computers of network users
- the physical act of transmitting (uploading) takes place from these computers

so who makes available?

in a technical interpretation: the
users of the network

so what about the operator of the
torrent site and tracker?

In a technical interpretation, the operator probably does not itself make available:

- the work is not stored on the operator's computer
- the actual transmission of the work does not go through the operator's computer

unless: the acts of transmitting the torrent file and tracker data to the user's computer (necessary to initiate the downloading process) are considered (part of) the act of making available

now let's look at it from a functional perspective: who is really making the works available?

Demonoid.com - Microsoft Internet Explorer

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Adres <http://www.demonoid.com/> Ga naar Koppelingen

Google Uitvoeren Bladwijzers 2140 geblokkeerd Spelling controleren Verzendend naar Instellingen

NetCRAFT Services Since: Jan 1999 Rank: 779 Site Report [BR] DEMONOID

Demonoid.com



User log in
Username:
Password: [lost pass?](#)

User registration
Registrations are **closed**. If you have an invitation code, [click here](#)

Home Torrents Forums Chat Upload a torrent Member list FAQ



Newspost - Oct/09/2007

Istabraq

One of our members, [Istabraq](#), was seriously injured in a car accident on the morning of Saturday 6 October: She is now on a life support machine - by Tuesday morning Istabraq had developed septicemia and this has caused other major complications.

Please keep her, and her family, in your thoughts as we hope for a full recovery for her.

There is [a thread about the topic on the forum](#) for those members that are also registered there who wish to pass on their regards and/or get updates on Istabraq's progress.

Newspost - Sep/30/2007

Downtime

We received a letter from a lawyer representing the CRIA, they were threatening with legal action and we need to start blocking Canadian traffic because of this.

Thanks for your understanding, and sorry for any inconvenience.

Update:

We are still digging through all the hundreds of emails we received during the downtime. Our apologies to all the ones who have not received a reply yet.

Also, we take this opportunity to let you know that you can also access demonoid.com from the address <http://demonoid.cc>

We've been meaning to set up an alternate domain for accessing for a while now, and we finally got around to do it.

Newspost - Aug/17/2007

More music from the forums

Freudstein have been getting lots of success lately, they only recently returned from playing Holland. Among their many achievements, the band have also featured in Bizarre magazine and

IT'S THE PROFESSIONAL PLANNER'S LITTLE BLACK BOOK.



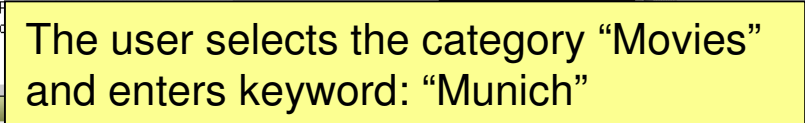
See what the buzz is about at www.elitemeetings.net

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Gereed Internet

Start ts.hrd.nl - Exter... Demonoid.co...

9:57



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NetCRAFT Services Risk Rating Since: Jan 1999 Rank: 779 Site Report [BR] DEMONOID

Language: All Quality: All

State: Seeded Tracked by: Both

Keywords: munich Apply filters Reset filters

RSS feed - Movies

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Torrent listing

Sort by: Date Apply

<< Prev Next >>

| 1 - 19 | 19 items total

Category	Name	Owner	Download	Size	Seeds	Peers	Health
Added on Sunday, Oct 07, 2007							
Movies	Die Sehnsucht der Veronika Voss (Fassbinder, 1982) (DEU, s. ub-ENG, SRB) WROOM	WROOM7	Download	695.76 MB	2	0	1 21
Added on Friday, Oct 05, 2007							
Movies	Munich 2005 DVDSCR XviD	saedag	Download	1.37 GB	0	41	8 6
Added on Saturday, Sep 08, 2007							
Movies	Doctor Who - The Movie - German	thedoctor05	Download	1.11 GB	1	24	1 3
Added on Saturday, Jul 21, 2007							
Movies	Munich	SonySage	Download	899.21 MB	4	183	2 2
Added on Tuesday, Jun 12, 2007							
Movies	Munich [2005] Subs: English Spanish [DXO] (external)	Delixioso	Download	899.21 MB	14	192805	100 137
Added on Wednesday, May 30, 2007							
Movies	Munich	allex321	Download	899.25 MB	6	6650	39 27
Added on Wednesday, May 16, 2007							
Movies	JACQUES LOUSSIER TRIO PLAY BACH - THE 1989 MUNICH CONCERT	sskain	Download	4.03 GB	2	55	2 0
Added on Monday, May 14, 2007							
Movies	Michael Jackson & Friends - Live in Munich-Germany 27 June 1999 INTSC DVD [IMLand .ro]	MJLandro	Download	2.15 GB	2	5694	7 97
Added on Sunday, May 13, 2007							
Movies	Der amerikanische Soldat - (The American Soldier - Reiner Werner Fassbinder-1970)	jilaiaa	Download	696.84 MB	3	486	2 3
Added on Sunday, Apr 15, 2007							

<http://www.demonoid.com/files/download/1207648/14127072/>

Internet

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10:00

Results for "Munich"

PLANNER'S
LITTLE BLACK BOOK.



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Keywords: munich Apply filters Reset filters

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Torrent listing

Category	Name	Size	Seeds	Peers	Health
Added on Sunday, Oct 07, 2007	Die Sehnsucht der Veronika Voss (Fassbinder, 1982) IDEU.s ub-B	76 MB	2	0	1 21
Added on Friday, Oct 05, 2007	Munich 2005 DVDSCR XviD	37 GB	0	41	8 6
Added on Saturday, Sep 08, 2007	Doctor Who - The Movie - German	11 GB	1	24	1 3
Added on Saturday, Jul 21, 2007	Munich	899.21 MB	4	183	2 2
Added on Tuesday, Jun 12, 2007	Munich [2005] Subs: English Spanish [DXQ] (external)	899.21 MB	14	192805	100 137
Added on Wednesday, May 30, 2007	Munich	899.25 MB	6	6650	39 27
Added on Wednesday, May 16, 2007	JACQUES LOUSSIER TRIO PLAY BACH - THE 1989 MUNICH CONCERT	4.03 GB	2	55	2 0
Added on Monday, May 14, 2007	Michael Jackson & Friends - Live in Munich-Germany 27 June 1999 INTSC DVD [MJLand - ro]	2.15 GB	2	5694	7 97
Added on Sunday, May 13, 2007	Der amerikanische Soldat - (The American Soldier - Reiner Werner Fassbinder-1970)	696.84 MB	3	486	2 3
Added on Sunday, Apr 15, 2007					

Sort by: Date Apply

Size Seeds Peers Health

Azureus

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Torrent Laden 1 van 1 : C:\Documents and Settings\Rb\Application Data

SonySage Download 899.21 MB 4 183 2 2

Delixioso Download 899.21 MB 14 192805 100 137

allex321 Download 899.25 MB 6 6650 39 27

sskain Download 4.03 GB 2 55 2 0


MJLandro Download 2.15 GB 2 5694 7 97

jilaiaa Download 696.84 MB 3 486 2 3

Start ts.hrd.nl - Exter... Demonoid.com ... Azureus Internet 10:05

The user's BitTorrent client Azureus starts automatically.

LITTLE BLACK BOOK.



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		Added on Sunday, Apr 15, 2007				

Bestand downloaden

Sommige bestanden kunnen schade aan uw computer toebrengen. Sla het onderstaande bestand niet op en open het niet als u van mening bent dat de bestandsinformatie er verdacht uitziet of als u twijfels over de oorsprong van het bestand hebt.

Bestandsnaam: ...com-o_2514971.9928.torrent

Bestandstype: Azureus Torrent

Locatie: www.demonoid.com

Wilt u het bestand openen of op uw computer opslaan?

☒ Altijd waarschuwen alvorens bestanden van dit type te openen

Sort by: Date Apply

Size Health

Internet

Start ts.hrd.nl - Exter... Demonoid.co...

10:03

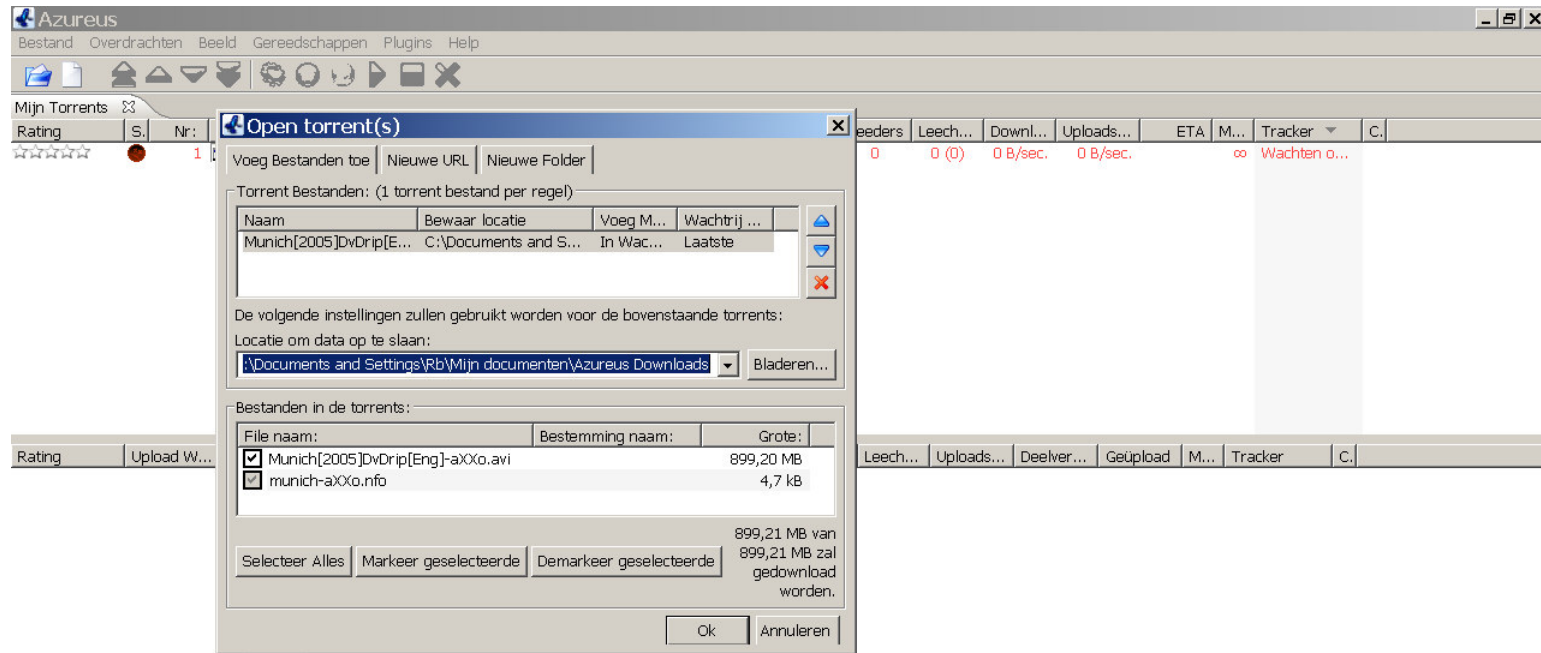
The user is asked if he wants to open the torrent file. User clicks "OK".



See what the buzz is about at www.elitemeetings.net

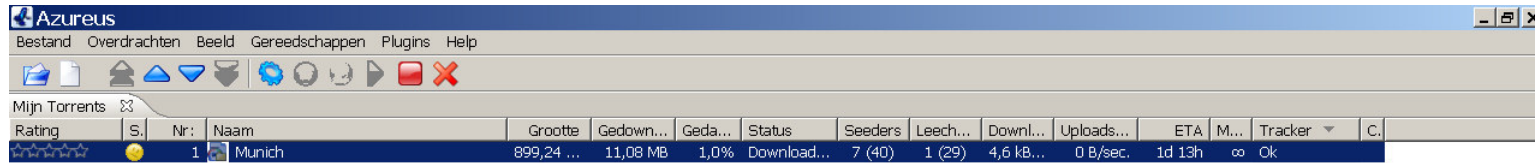
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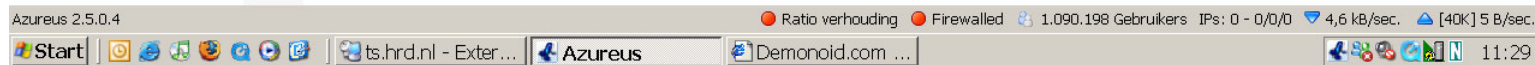


The BitTorrent client opens the torrent file and asks if the content file “Munich” should be downloaded. User clicks “Ok”.





The download (and upload) process starts.



When download is complete, user opens the file using media player and movie plays.



IS TEL AVIV JERUSALEM FRANKFURT LILLEHAMMER
AIFA BETHLEHEM HEBRON JAFFA GENEVA HOORN
N JAFFA GENEVA HOORNE BATTICE TARIFA NICOSIA
LONDON ROME NEW YORK MADRID BARCELONA
LONA **MUNICH** AMSTERDAM ATHENS LONDON
TEL AVIV JERUSALEM FRANKFURT LILLEHAMMER
BATTICE TARIFA CAIRO NICOSIA PARIS TEL AVIV
MADRID BARCELONA TRIPOLI LATINA HAIFA
BETHLEHEM HEBRON JAFFA GENEVA HOORN
ATHENS LONDON ROME NEW YORK

A blue-tinted photograph of a waterfront scene. In the foreground, there is a wooden pier or walkway extending into the water. A person is visible walking on the pier. In the background, a city skyline is visible across the water, with several tall buildings. The sky is overcast. The text is overlaid in the center of the image.

ULTIMATELY, NINE OF THE ELEVEN
PALESTINIAN MEN ORIGINALLY TARGETED
FOR ASSASSINATION WERE KILLED.



So what is Demonoid?

technically:

- website with links to torrent files
- tracker server
- no copyright content

So what is Demonoid?

functionally: a fully equipped online entertainment store offering free downloads:

- popular music
- latest movies, often pre-release
- popular TV shows
- latest video games
- audiobooks, etc.

P2P online entertainment store

perfect business model:

- cost-free supply guaranteed by offering free downloads in return for free uploads (the store engages the users as its suppliers)
- catalogue is fully tailored to the customers' needs: users upload the content they like. No risk of being left with stock nobody is interested in buying
- store may use download statistics to analyze and manipulate the content made available
- income through advertising

Is this making available to the public by the web site operator (*i.e.* the operator of the P2P entertainment store)?

from a technical perspective: no

from a functional perspective: yes

So who should the right holder sue?

most obvious: the operator(s) of the bit torrent website and tracker

or:

- the ISP hosting the bit torrent website and/or tracker?
- the individual users of the network?
- the ISPs providing internet access to users of the bit torrent network?

case law

courts tend to take a technical approach:

- allowing other users of the network to download from one's PC constitutes making available to the public
- uploading users directly liable for copyright infringement (e.g. *Brein v. UPC*, *SABAM v. Tiscali*)

case law

- operator of the website may be held liable as well, but:
- the question whether he is directly liable for copyright infringement is not explicitly discussed or direct liability is denied
- liability based on other theories: tort, vicarious or contributory liability, facilitation, inducement, authorization of infringement, etc. (*Grokster*, *Universal v. Cooper*, *Brein v. KPN*)

Indirect instead of direct liability:

does it matter?

Yes: the burden of proof for the right holder is higher

direct liability:

- evidence of making available of one single work may suffice to obtain an injunction or filtering order covering all of plaintiff's repertoire
- evidence of culpability and/or commercial intent not required in order to obtain an injunction

indirect liability theories may require proof of:

- substantial and systematic availability of infringing content
- culpable behaviour
 - knowledge of and/or intention to promote large-scale sharing of infringing content;
 - commercial intentions; relationship between large-scale downloading and (advertising) income
 - no measures to avoid infringement, such as filtering, etc.

rethinking the functional interpretation:

- making available: a functional term without reference to the technique applied
- if providing the facilities does not in itself constitute a communication to the public (Agreed Statements), anything else or in access of that may
- it makes sense: the party who offers, organizes and controls the online entertainment service should be responsible for what is made available through it

P2P technology diffuses the issue. In other cases we do take a functional approach:

- I-tunes: we would consider Apple to be responsible (directly liable) regardless of whether the files purchased are actually transmitted from Apple's server or from a server operated by a third party
- Amazon: responsible even though the books and CD's purchased are actually owned and shipped by a third party.

So what happened to Demonoid?

- used to be hosted in the Netherlands
- Dutch anti piracy organization BREIN sued the hosting ISP offering evidence of substantial infringement and culpability
- Demonoid moved to a Canadian ISP before the case went to court
- after threat of legal action Demonoid now says it has to block Canadian traffic and has set up server elsewhere. Still online..

To be continued..