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Supreme Court of Denmark

Handed down on Thursday 27 May 2010

*1¹ Case 153/2009²

(First Chamber)

Telenor (formerly DMT2 A / S Sonofon A / S)

(Lawyer Per Håkon Schmidt)

v

1) IFPI Denmark as agent for

Aller International A / S

Artpeople A / S

Bellevue Entertainment A / S

Bonnier Amigo Music Denmark A / S

Circle Records Ltd

COPE Records Ltd.

Crunchy Frog Ltd

Da Capo Records Egmont Serieforlaget A / S

EMI Music Denmark A / S

Exlibris Music Gyldendal A / S

Flex Records Ltd.

People School Music Teachers' Society Publishers

Publishers GUF v / Jan Østergaard Nielsen

Kick Music A / S

Lifted House Ltd.

MBA Group Ltd

Music For Dreams v / Kenneth Bager

Now Music I / S

OH Music ApS

Olga Musik ApS

Playground Music Denmark A / S

Recart Music ApS

Rigel ApS

Sand ApS

SonyBMG A / S

Spin Entertainment ApS

SteepleChase Productions ApS

Sundance Limited

Tuba Entertainment v / Jerry R Blom

Tutl

Universal Music Group A / S

Warner Music Denmark A / S

Voices Music & Entertainment Denmark ApS

2) The Association of Danish Videogramdistributører
as agent for

Buena Vista A / S

Nordisk Film Video A / S

Paramount International A / S

SF FILM A / S

Sandrew Metronome Video Denmark A / S

Scanbox Entertainment A / S

Universal Pictures Denmark A / S

Warner Bros, Entertainment

3) Bookstore Gyldendal Nordisk Forlag A / S and

4) JP / Politiken Hus A / S

(Lawyer Johan Schlüter for all)

¹ Number after a bold “*” state the page of the original decision.

² Original decision in Danish at <http://www.domstol.dk/hojesteret/Documents/Domme/153-09.pdf>.

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Intervener:
KODA Danish Musicians' Union and
Danish Artist Union

(Lawyer Erik Nyborg for all)

any facts or circumstances – for example that
biintervention would inappropriately delay
proceedings - which gives grounds to depart
from the starting point, see Civil Code § 252
by analogy. "

In lower courts are made decisions by the Bailiff's
Court of Frederiksberg on 29 January 2008,³ and by
the Courts of Appeal, Eastern District's 11th Chamber
on 26 November 2008.⁴

In the decision has participated the following five
judges: Asbjørn Jensen, Lene Covenants Kristensen,
Marianne Højgaard Pedersen, Vibeke Ronne and
Jens Peter Christensen.

This appeal has been orally proceeded.

There have during the hearing been played a DVD
with a download from Pirate Bay.

Permission to biintervention was granted by the
Supreme Court's appeal Committee by resolution of
19 October 2009. This resolution stated:

"The Supreme Court has thus emphasized
that biintervention can not be ruled out
because of the lack of reference in the Civil
Code's § 646, paragraph. 2, to § 252, and with
reason that biintervention should be assumed
to be incompatible with the nature of the
remedy. There has not in this case been given

Claims

Appellant, Telenor A / S, claims the lower courts'
prohibition and injunction should be lifted.

The Appellees, IFPI Denmark as agent for Aller
International A / S et. al., Association of Danish
Videogramdistributører as agent for Buena Vista A / S
et. al., Gyldendal Boghandel Nordisk Publishing A / S
and JP / Politiken Hus A / S, claim the decisions
should be affirmed.

Intervener, KODA, Danish Musicians' Union and the
Danish Artist Union, has spoken out in support of the
Appellees' claim.

Additional facts

Stockholm District Court⁵ has in a sentence of 17 April
2009⁶ found that the website www.thepiratebay.org is

³ Translator: Unofficial translation into English at
www.hssph.net/misc.html#Cases or
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093246. Original decision *IFPI Danmark v. DMT2 A/S*
(Frederiksberg Fogedrets Kendelse, 5 February 2008 -
FS 14324/2007) in Danish can be found through
Computerworld DK at
<http://www.computerworld.dk/art/44102?a=newsletter&i=1592>
or
<http://www.computerworld.dk/modules/davinci/getfile.php?id=18886&attachment>.

⁴ Translator: citation . Unofficial translation into
English at www.hssph.net/misc.html#Cases or
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649682. Original decision in Danish *SONOFON A/S*
(*tidligere DMT2 A/S*) v. *IFPI Danmark* (Østre Landsrets
11. afdelings kendelse af 26 november 2008 - Kæresag
B-530-08) can be found through Computerworld DK at
<http://www.computerworld.dk/art/49101> or
<http://www.computerworld.dk/modules/davinci/getfile.php?id=26993&attachment>.

⁵ Translator: On 17 April 2009, the Stockholm District
Court's 5 Division [Stocholms Tingsrätt] decided case
no. B 13301-06, *Prosecutor (International Public
Prosecution Office in Stockholm) & Sony Music
Entertainment et. al v. (1) Hans Frederik Lennart Neij,*
(2) *Gottfrid Svartholm Warg,* (3) *Peter Sunde
Kolmisoppi,* and (4) *Carl Ulf Sture Lundström*. The
court found all defendants were found guilty and
sentenced to serve one year in prison and pay a fine of
30 million SEK (app. €2.7 million or USD 3.5 million).
All the defendants have appealed the verdict and the
appeal court trial is expected to begin late 2010.
Original decision in Swedish at
<http://svt.se/content/1/c8/01/52/30/79/Tingsr%20dom.pdf>.
Unofficial English translation
commissioned by IFPI at
<http://www.wired.com/images/blogs/threatlevel/2009/04/piratebayverdicts.pdf>. See further "The Pirate Bay
trial" at Wikipedia at
http://en.wikipedia.org/wiki/The_Pirate_Bay_trial.

⁶ Translator: The decision has been appealed and been
scheduled for 28 September 2010, Andre Paine, *Pirate
Bay Appeal In September*, Billboard.biz, 12 March 2010
at
http://www.billboard.biz/bbbiz/content_display/industry/e3i8c42c2e07eaa0e32f535663cba487ea7 (last visited
25 July 2010).

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illegal because it contributes to copyright violations. The four persons making the website were all sentenced to prison and ordered to pay damages.⁷

In June 2009, a Swedish party that wants to legalize Internet filesharing and beef up web privacy scored a big victory by winning one of Sweden's 18 seats in the European Parliament. The Pirate Party won 7.1 percent of votes, *Swedish Pirate Party enters EU parliament: partial results*, AFP, 7 June 2009 at <http://www.google.com/hostednews/afp/article/ALEqM5ibr-ao4NgG8fOxsXiyjTJBNDdpnw> (visited August 2009).

⁷ A Norwegian Court of Appeal on 9 February 2010 affirmed the decision of the lower court in Asker and Barum and rejected issue an injunction [US: a TRO (temporary restraining order)] against tele-company Telenor requested by the many appellants. The appellate court's decision is very descriptive. The appellate court rejected that Telenor had a role as passiv contributor by not blocking thePirateBay-website despite of several inquiries and it's knowledge that illegal acts were done through that website. The court held that the decisive was that the rightowners pursuant to the Norwegian Copyright Act did not have a right to require Telenor to block thePirateBay-website. In addition, the court held it was of importance that Article 16 of the e-commerce Act did not give Telenor any duty to act and remove or block for illegal content transmitted on the Internet. Such a duty to act is only given to those that offer storings-service pursuant to Articles 17 and 18 of the Act, cf. [Parliament records] Ot.prp.no.4 (2003-2004) page 33. Thus, the court held that Telenor did not in the sense of the law contribute to illegal or liability acts done by its users by offering its network accessible for the public without blocking thePirateBay. The rightowners had to seek compensation for loses from those persons that participated in the illegal file sharing. Case: *Nordic Records Norway et. al. v. Telenor ASA*, Borgating Lagmannsretts, 9 Feb 2010 (– the so-called Norwegian “thepiratebay.org” case) in Norwegian at www.it-retsforum.dk/uploads/media/Telenor_PB_dom_Borgating_2010.pdf (visited July 2010). Uofficial rough translation into English at www.hssph.net/misc.html#Cases. The original lover decision in Norwegian can be found in Lovdata's database under “tingrettsavgjørelser” under case-number TAHER-2009-96202, see also summary in Norwegian in Scandianvian IT-magazine Lov&Data no. 100, December 2009 pp. 24-25 & *Norway court snubs call to block The Pirate Bay*, AFP, 6 November 2010 at www.google.com/hostednews/afp/article/ALEqM5j8PR7Xf0rC4GgXuVpBJK_LhBqOw (visited July 2010).

On 11 February 2010, the Supreme Court of Iceland [Hæstirettur Íslands] in *Istorrent & Svavar Lúthersson v. Performing Rights Society of Iceland [Istorrent ehf. & Svavar Lúthersson v gegn Sambandi tónskálda og eigenda flutningsréttar]* (Case no. 214/2009) upheld an injunction against the torrent site Isotorrent. The original

The ISP Ansvarsgruppen (an Internet Service Provider group) in the telecommunications industry has provided a statement dated 28 January 2010 on the cost of deployment and management of different types of blockings whereby access to the website www.thepiratebay.org can be blocked. The declaration states:

"By order of 26 November 2008, the Courts of Appeal, Eastern District, upheld Bailiff's Court of Frederiksberg order of 29 January 2008 to impose Sonofon A / S, now Telenor A / S to prevent access to the website www.thepiratebay.org.

The Courts of Appeal' reasoning was among other things:

"Given the information about the effects of the Appellant's established DNS-blocking and the lack of information from Appellant about the cost of managing the blocking, the court holds an injunction on the Appellant does not to contravene the requirement of proportionality, see Code of Civil Procedure § 643, paragraph. 2."

ISP Ansvarsgruppen (Internet Service Provider group) in the Trade-organization for Telecommunications Companies and Internet Services Providers called the Telecommunications-Industry, which covers more than 95% of the Danish telecommunications market (hereinafter "ISP-group") wish in this context to explain the costs that occur for businesses in the ISP group by deployment and management of a number of different types of blockings, including the so-called DNS-lockout as mentioned by the Courts of Appeal, whereby access to the website www.thepiratebay.org is sought blocked.

injunction was obtained by the Performing Rights Society of Iceland in November 2007 against Isotorrent and its operator Svavar Luthersson. Isotorrent had been used to facilitate the distribution of copyright infringing music and film. Although the damage was primarily be caused by the conduct of site users, the court agreed that the owner was liable as he was aware that his conduct was unlawful. The Supreme Court ruled that the defendant should pay 700,000 Iceland Crowns (~ US\$5,415) to the plaintiff in respect to litigation costs, Original decision in Icelandic at <http://www.haestirettur.is/domar?nr=6419> (visited July 2010). See summary in English at Marcus Hoy, *Iceland's Supreme Court Upholds BitTorrent Site Injunction*, ELECTRONIC COMMERCE & LAW REPORT, 15 ECLR 279 (2010).

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In the by Contest A/S given expert statement of 2. August 2006, reproduced in the Courts of Appeal’s order, is discussed the following four types of blockings:

1. Installation of hardware and software between the ISP’s Internet connection and their customers’ access (“Deep Packet Inspection”)
2. Establishment of a Proxy
3. Blocking at the DNS level
4. Blocking at the IP level

...

It is the unanimous opinion of the ISP-group that the ISP-group by administration of the above four types of blockings, whereby access to the website www.thepiratebay.org is sought blocked, in minimum will cost,

...

Blocking at the DNS level

The costs for blocking at the DNS level are a few million dollars annually. The solution is already implemented in connection with the so-called “child-porn-filter” and there is given no explanation for the figure, as the administrative costs are dependent on the number of pages to be blocked and the blocked sites’ activity-level.”

Pleas

Appellant has also before the Supreme Court recognized that the appellant’s transmission of copyright protected works on behalf of its subscribers in it’s telecommunications network might be a violation of Appellee’s copyrights, but have in particular argued that the prohibition and injunction is not formulated with sufficient clarity and precision, see Code of Civil Procedure § 646, paragraph 2, and § 348, paragraph 2, no 3, that the prohibition and injunction are not proportional, see Code of Civil Procedure § 643, paragraph 2, and that the injunction is of relatively minor importance and secondary, see Code of Civil Procedure § 641, paragraph 2.

The Appellees contends that the Code of Civil Procedure’s conditions for issuing an injunction are satisfied, and refers in particular to the fact that the Appellant after the Bailiffs court’s order have chosen to comply with the order in a way (DNS level), which the Appellees consider sufficient and not overblown/unproportioned.

The Supreme Court’s reasoning and result

The injunction the Bailiff’s court has issued and which has been upheld by the Courts of Appeal, prohibits Telenor A/S to help others’ reproduction and publication via the website www.thepiratebay.org of works, which the Appellees have copyright to. The prohibition, along with the simultaneously announced an injunction must be understood as a obligation for Telenor to abstain from contributing to allow Telenor’s customers to have access to the site by ensuring to hinder access for Telenor’s customers to the website. Although it is left to Telenor to choose between different ways to block or hinder access to the website, the Supreme Court holds that the prohibition and injunction is formulated with sufficient clarity and precision.

Telenor has chosen to comply with the prohibition and injunction by blocking access to the website at the DNS level. The Appellees have declared that that blockage is sufficient to fulfilling the order and that the Appellees if they want to commit Telenor to use another kind of blockage, will have to file a new case by the Bailiff’s court, where after a new proportionality-test must be done.

In light of the given information regarding the costs and disadvantages associated with blocking on DNS level, in connection with the extensive violations of the copyrights administered by the Appellees and as disseminated through the website www.thepiratebay.org and to which the Appellees have a significant and protection- worthy interest to get terminated or at least reduced significantly, the Supreme Court concur that there is no reason to hold that the prohibition to Telenor will result in damage or inconvenience that is manifestly disproportionate to the Appellees’ interest in the issued injunction, see Code of Civil Procedure § 643, paragraph 2. In addition, the Supreme Court holds that the duty to act imposed on Telenor does not exceed the limits outlined in Code of Civil Procedure § 641 paragraph 2.

Subsequently, and also for the reasons listed by the Courts of Appeal, the Supreme Court affirm the order.

The issue of costs falls under the merits of the confirmatory lawsuit.

It is so ordered:

The decision of the Courts of Appeal is affirmed.⁸

⁸ Translator: HOWEVER, on 19 July 2010 a court in The Hague [Rechtbank’s-Gravenhage – Case number 365643 – Roll no. KG ZA 10-573, LJN: BN1445] in *BREIN v ZIGGO* [Bescherming Rechten Entertainment Industrie Nederland v Ziggo B.V.) rejected the wish of BREIN

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(the Protection Rights Entertainment Industry Netherlands) for a ruling ordering internet service provider Ziggo to block its subscribers accessing The Pirate Bay. BREIN should first sue infringing subscribers of Ziggo before a blocking of access to the illegal website The Pirate Bay can be put in place. BREIN wanted the order as The Pirate Bay had ignored the below mentioned decision of 30 July 2009 and continued its illegal trade by having a website making it possible in the Netherlands to get illegal access to films, tv series, music, games and digital books. The original decision in Dutch is available at http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=kenmerken&vrije_tekst=BN1445 (visited 26 July 2010). An unofficial rough Google English translation is available at www.hssph.net/misc.html#Cases. See also Dutch judge rules that BREIN should sue individual internet, SlyckTom, 19 July 2010 at <http://www.slyck.com/forums/viewtopic.php?t=51950> (visited 26 July 2010).

On 30 July 2009, a court in Amsterdam [Rechtbank Amsterdam], Netherlands, in *BREIN v Hans Frederik Lennart Neij et. al.* ordered the men behind the website The Pirate Bay had to block traffic between the site and the Netherlands within 10 days. The court ordered them "each separately and together, to stop and keep stopped the infringements on copyright and related rights of" the Dutch-based organization funded by various copyright holders groups BREIN or face a charge of EURO 30,000 (\$42,000) per day. The court held that "The Pirate Bay is not a legal person who can be summoned, but a cooperative." It was not clear how the court expected the site's operators to block traffic to the site, or whether it can enforce its order if they decline, *Dutch court rules Pirate Bay must quit Netherlands*, AP 30 July 2009 at <http://www.huffingtonpost.com/huff-wires/20090730/eu-netherlands-pirate-bay> (visited July 2010).

In September 2009, Italy's Court of Cassation affirmed a injunction blocking Pirate Bay issued by the Court of Bergamo. Besides this, Italy's major label representative body, FIMI, along with the anti-piracy organization, FPM, has filed a \$1.6 million damages lawsuit against the site on behalf of the Italian music industry, Mark Worden, *Italian Appeals Court Rules against Pirate Bay*, BILLBOARD.BIZ, 1 October 2009 at www.billboard.biz/bbbiz/content_display/industry/e3ie41d1967dbc1d096568ef12b2176a1e5 (visited February 2010).