

Pronounced: 06.11.2009 by Asker and Bærum tingrett, Sandvika

Case number: 09-096202TVI-AHER/2

Judge: Deputy Judge Anette Eckhoff

The case concerns: Preliminary injunction

Parties:

Bonnier Amigo Music Norway AS
daWorks Music AS
DJ Beat Records Scandinavia AS
EMI Recorded Music Norway as
The Music Business Organisation (MBO) AS
Nordic Records as
Playground Music Scandinavia
Steelworks Stein Groven
Sony Music Norway AS
Universal Music as
Voices Music & Entertainment AS
Warner Music Norway as
TONO
Paramount Pictures Corporation
Sony Pictures Entertainment, Inc.
Twentieth Century Fox Film Corporation
Universal City Studios LLLP
Warner Bros. Entertainment, Inc.
SF Norge AS
Nordisk Film Distribusjon AS
Sandrew Metronome Norge AS
Filmkameratene AS
Friland Produksjon AS

All of the above represented by Lawyer Rune Ljostad, Simonsen

against

Telenor Telecom Solutions AS

Represented by John S. Gulbrandsen, Wiersholm

DECISION

The decision concerns a claim for preliminary injunction, and the question whether Telenor Telecom Solutions AS, hereinafter Telenor, as an Internet provider, can be ordered to block its customers' access to the website The Pirate Bay. The purpose of this injunction is to prevent continuous infringements over the Internet of the plaintiffs' copyright-protected works.

The claim is submitted by 23 companies and constellations, consisting of 12 Norwegian record companies, TONO, five American film studios, three film distributors and two Norwegian film producers. Furthermore, intervention is declared from five trade associations. Together they represent an important part of the Norwegian film and music industry. The parties agree that the plaintiffs have copyrights and other related rights to most of the music and films on the Norwegian market.

In this case, Telenor is a provider of Internet services to its customers, a so-called Internet Service Provider (ISP). The company has a market share of approximately 50 percent on this area in Norway. Telenor's customers are thus using Telenor's network when they are connected to the Internet.

The Pirate Bay was established in the autumn of 2003, and consists of a website and a tracker with the purpose of facilitating file sharing between the end users, the individuals. The file sharing does not take place physically through The Pirate Bay, but the website contributes to the establishment of direct contact between the end users. It is not disputed that many of Telenor's customers are taking part in illegal file sharing, also with the help of The Pirate Bay, and are thus infringing the rights of the plaintiffs.

The plaintiffs have rights to music, films and TV shows, and an excess of 90 percent of this material that can be found on The Pirate Bay is illegally shared. Music, films and TV shows constitute far more than 50 percent of the total material on The Pirate Bay, but not as much as 90 percent. There are approximately 140,000 users of The Pirate Bay in Norway every day.

The plaintiffs and their associated organisations in other countries have tried various factual and legal means to protect their rights and stop infringements. In recent years, they have chosen not to use technological protection measures, including copy protection, for music. This is out of consideration for the users and the user friendliness of the products that are sold.

The plaintiffs' associated organisations have tried to contact The Pirate Bay directly with a request to remove the content on the website. The Pirate Bay has responded by mocking the copyright holders. In the Netherlands, attempts have been made to claim injunction against the website. Despite the fact that such injunction was granted, the service is still in function. Such injunction against The Pirate Bay directly has not been tried in Norway. The persons behind The Pirate Bay have also been reported to the police in Sweden. They were convicted by the Stockholm District Court 17 April 2009. The case has been appealed, and is thus not legally binding.

Furthermore, the plaintiffs' associated organisations in Sweden have requested that The Pirate Bay's own Internet provider shuts down the service. The decision regarding such a shut-down in the so-called Black Internet case was passed by Stockholm District Court 28 August 2009. The Pirate Bay then changed Internet providers, and they have due to further claims against subsequent Internet providers changed internet providers several times. The website is thus still active.

In Norway, the plaintiffs have reported several copyright infringements to the police. All reports in the period 2005-2008, with one exception, have been dismissed. The plaintiffs have also had meetings, correspondence etc. with the Ministry of Culture and Church Affairs to shed light on the problem. The following is quoted from a letter from the Ministry of Culture and Church Affairs dated 24 September 2007 to the law firm Simonsen Advokatfirma DA:

"We refer to your inquiry of 10 May 2006 where you ask for the Ministry's view on "the legal access of the copyright holders to petition for preliminary injunction against service providers to stop illegal file sharing, and what is done to comply with Norway's international law obligations pursuant to the Infosoc Directive".

...

"The access to petition for preliminary injunction is regulated in the Enforcement Act. In section 15-1 there is a basic requirement that the plaintiff has "a claim" against the defendant. In our view, this claim can follow from the defendant's contribution to the third party's infringement".

The law firm Simonsen has, on behalf of some of the copyright holders in a period from November 2006 until June 2009 had a license from the Data Inspectorate to document copyright infringements. The plaintiffs used the documentation, amongst other things, to correspond with internet providers, including Telenor, with a request for forwarding of notifications to each customer regarding illegal file sharing registered on their subscription. IKT-Norge responded to the letter through a joint letter on behalf of Telenor and the business in general, where they opposed to the forwarding of such notification letters.

In February 2009, the plaintiffs sent letters to the defendant requesting the defendant to block The Pirate Bay and with a notification regarding preliminary injunction if such blocking was not effectuated. The defendant responded to the letter 28 February 2009 opposing to such blocking.

A petition for preliminary injunction was received by the District Court of Asker og Bærum 16 June 2009. The petition was presented to Telenor ASA, and a timely response was received by the court 13 June 2009. An oral hearing was scheduled to 12-16 October 2009. The defendant was later, during the preparations of the case, referred to Telenor Telecom Solutions AS.

The court session was subsequently held for discussion of the petition for preliminary injunction. Litigant parties for the plaintiffs were Marte Thorsby and Cato Strøm. Litigant parties for the defendant were Harald Krogh and Morten Foss. The court questioned 8 witnesses, including witnesses from the litigant parties, and documentation was recorded as set out in the court records.

The plaintiffs have mainly submitted the following:

The claim and the basis for provisional measure are substantiated, and the conditions for preliminary injunction are therefore met. There is a legal basis for the plaintiffs' claim in section 2 of the Copyright Act, cf. the same Act's sections 54 and 55. Telenor contributes to infringements of the plaintiffs' copyrights and related rights via The Pirate Bay, and can therefore be ordered to stop these infringements.

Activities on the website other than distribution of protected material are limited, and the plaintiffs have the right to a large part of the material available on The Pirate Bay.

Telenor's customers use Telenor's network when uploading and downloading via The Pirate Bay. Telenor is the largest internet provider in Norway with both a technical and a contractual access to block. Furthermore, Telenor actively offers its network and does nothing to prevent infringements from taking place in this network.

The Electronic Commerce Act does not make exemptions from court orders, cf. section 20, and an order to block is not in conflict with section 19 of the Electronic Commerce Act. Use of technological protection measures is not a condition for protection, and does not mean that the main hearing is not in conflict with the law.

Telenor contributes both to The Pirate Bay's illegal activities and its customers' illegal activities. In order for such contribution to be illegal, Telenor must be liable in the form of negligence or wilful misconduct, and there must also be causality between the contribution and the infringement. There is also a requirement of unlawfulness. The conditions are met, and the unlawfulness is substantiated.

The freedom of speech does not prevent preliminary injunction. The case is not in the heart of the freedom of speech, there is no absolute prohibition against preliminary injunction against utterances, the conditions for infringement pursuant to Article 10 of EMK are met, and the freedom of speech aspect is already taken into consideration in the Copyright Directive. Furthermore, grounds already exist for blocking of other unwanted material on the Internet.

There is international case law in this area. All of these cases have resulted in blocking vis-à-vis the supplier or the end-user.

There is a basis for provisional measure under the Dispute Act, Section 34-1, both litras a and b. There is no obvious imbalance, cf. the Dispute Act, Section 34-2, 2nd paragraph, and a blocking of the domain name is effective. An preliminary injunction will be necessary and the petition must be implemented immediately. The plaintiffs have attempted all other legal and out-of-court measures before the petition for a preliminary injunction. Without such an injunction the plaintiffs are effectively without legal rights.

The general rules on litigation costs apply under the Dispute Act, Chapter 20. There is no exemption from liability in respect of litigation costs under the E-Commerce Act.

The following claim is submitted:

1. Telenor Telecom Solutions AS is prohibited from contributing to making available to the public and reproduction of copies through the website and the trackers The Pirate Bay to the works protected by copyright and works to which the plaintiffs have copyrights or neighboring rights.
2. Telenor Telecom Solutions AS is instructed to take the necessary steps to prevent the customers of Telenor Telecom Solutions AS to gain access to the Internet addresses thepiratebay.org, thepiratebay.com, thepiratebay.net, thepiratebay.se, thepiratebay.nu, piratebay.net, piratebay.org, piratebay.no, piratebay.se and tracker.openbittorrent.com and their related sub-pages and sub-domains.
3. The plaintiffs are awarded the costs of the case with the addition of the statutory interest on overdue payment from maturity until payment takes place.

The primary submissions of the defendant:

The conditions for an preliminary injection are not fulfilled. Neither the claim nor the basis for provisional measure has been rendered probable.

There is no case law supporting the claim. The E-Commerce Act provides no legal basis for the claim. The exemption from liability of the E-Commerce Act, Section 16, has been substantiated in principle. Under the E-Commerce Act, Section 19, Telenor neither has an obligation to monitor, nor to perform inspections. There is no legal basis for the claim in Section 20; it merely expresses a possibility for orders from a court of law or an administrative body. The Copyright Act does not provide a legal basis for the claim, neither in Sections 11 a, 54 or 55, and the Copyright Directive provides no basis in Article 8.3. The letter from the Ministry of Culture and Church Affairs constitutes a complementary work and must be subject to a strict interpretation.

The decisions available from Denmark are not of decisive importance. The TDC case relates to the shutting of an Internet service which was a client of TDC's. The DMT2/Sonofon case has been appealed and there are, moreover, decisive differences between Danish and Norwegian law in this area. In terms of the decisions from Ireland and Italy, they are not comparable to Norwegian law.

Alternatively, if there is a legal basis for the claim, it is asserted that Telenor under no circumstances has an unlawful contributive role in relation to the actions of the customers or the services of The Pirate Bay. Telenor does not contribute actively to unlawful acts. The Penal Code, Section 254, must be subject to an analogous interpretation, not an antithetical one. Telenor also does not contribute passively to unlawful acts and there is no particular connection with The Pirate Bay or with its customers. Finally, Telenor has not acted negligently or intentionally.

Under any circumstance, the claim will imply a violation of freedom of speech and freedom of information, as well as basic requirements for proportionality. A measure would also have a “chilling effect” on other cases.

There is no basis for a provisional measure, under the Dispute Act, Section 34-1, neither *litra a* nor *b*. A preliminary injunction is not necessary and implies a forestalled execution of the claim. In any case, a preliminary injunction will constitute a form of censorship of the Internet, for which there is no legal basis. The objective of preventing a financial loss due to violation of copyright is not comparable to the prevention of physical injury in cases of child pornography.

Telenor is exempted from liability in respect of litigation costs, cf. the E-Commerce Act, Section 16.

The following claim is submitted:

1. The petition is rejected.
2. The plaintiffs will jointly and severally pay Telenor Telecom Solutions AS litigation costs, with the addition of the statutory interest on overdue payment from maturity until payment takes place.

The comments of the court:

In order for the petition for preliminary injunction to be sustained, the plaintiffs must substantiate the claim and the basis for provisional measure, cf. the Dispute Act, Section 34-2.

The plaintiffs have submitted that Telenor is contributing to its customers’ violations of copyright via The Pirate Bay, and the claim aims at stopping the contribution of these violations. The defendant has primarily submitted that there is no legal basis for such a claim under Norwegian law.

From the E-Commerce Act, Section 16, it appears that, on more closely defined terms, *“an information society service provides transmission in a communication network of information provided by a recipient of the service, the service provider is not responsible under criminal or tort law for the information transmitted”*. The parties agree that Telenor pursuant to this provision cannot be held liable for damages or be sentenced to penalties or imprisonment if its customers commit infringements of copyright via The Pirate Bay in accordance with the Copyright Act, Sections 54-55. It further follows from Section 20 of the E-Commerce Act, that the provision of Section 16 *“shall not affect the possibility for a court or administrative authority, pursuant to a different legal basis than this Act, of requiring the service provider to terminate or prevent an infringement”*.

Finally, it appears from Directive 2001/29/EC (The Copyright Directive), Article 8.3 that *“Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right”*. This provision did not lead to a legal amendment in Norwegian law in the implementation of the Directive.

The court notes that both the E-Commerce Act, Section 20 and the Copyright Directive, Article 8.3 presupposes that there is an independent legal basis in order for requiring the alleged violation of the service provider/intermediary to stop. Said provisions in this respect do not per se provide such legal basis.

The rights of the plaintiffs are primarily governed by the Copyright Act and the main rule concerning their exclusive right of reproduction of copies and making available of their copyright protected work appears from the Copyright Act, Section 2. The plaintiffs have

submitted that the legal basis for the claim may be deducted from the exclusive right in the Copyright Act, Section 2, together with the principles appearing from the doctrine on contribution, as set out, inter alia, in the Copyright Act, Sections 54-55.

It does not follow directly from the wording of Section 2 that a violation by an intermediary should be stopped. The court does, however, agree with the plaintiffs that, in principle, a necessary consequence of the exclusive right should be that the rights holders should be able to demand that any infringements of the exclusive right should be stopped or impeded. The court further agrees with the plaintiffs that this must apply both for those directly infringing their rights and to those contributing to such infringements. In this case, however, the infringements by the end-users also constitute a statement on a website, and consequently stopping the alleged contribution by Telenor to these acts will imply a restriction of the right of Telenor's customers to seek and receive information on this website. The question to the court is therefore whether the fact that the freedom of speech and the freedom of information are affected renders a clear statutory basis for the claim necessary.

It is not obvious to the court that the claim can be derived from the mentioned provisions. However, it is not necessary for the court to consider this, as the court finds that the petition can be rejected on other grounds.

In order for the claim to be substantiated, Telenor must negligently or wilfully have contributed to the copyright infringements. Telenor actively offers the necessary infrastructure and necessary service for transmission of information so that the infringements can take place. Furthermore, Telenor actively carries out operating tasks to offer this service, such as management, maintenance and user support. It is also submitted that Telenor passively contributes to the infringements by failing to intervene when a service is used for illegal file sharing, in spite of positive knowledge of this.

After the presentation of evidence, the court finds that Telenor's conduct as such constitutes physical contribution to the infringements, as the network is a physical condition for the infringements to take place. At the same time, the court submits that this contribution is not specifically directed; neither to Telenor's individual customers and its activities nor to The Pirate Bay. Telenor acts in the same way irrespective of whether its service is used for illegal or legal purposes. In the court's view, this means that the contribution cannot be regarded as unlawful.

The general condition of unlawfulness is formulated as follows in Johs. Andenæs in General criminal law, 4th edition on page 144: *"a general reservation from the legislator's side, that it is not the intention to cover all events that otherwise would be covered by the description in the penal provision"*. In Rt 1979 page 1492 on page 1499, the first voting judge states: *"In each individual case, it will be the courts' task to review whether other considerations must be emphasised so that an action normally covered by the description of the deed, cannot be regarded as unlawful and therefore not covered by the relevant penal provision"*. The court finds that the same principles applies in the assessment of Telenor's conduct in relation to the claim, and uses this as basis in its further assessment.

The court has assessed the consequences of the preliminary injunction. If the plaintiffs' claim is heard, this will, in the court's view, give a situation difficult to handle in practice. Reference is made to the fact that the content on The Pirate Bay, and also other websites, can be changed and is in fact constantly being changed. The court further states that Telenor as an Internet provider does not have a duty to monitor or investigate what Internet is used for, so that the Internet providers must be notified of alleged illegal actions. Thus, Telenor and other Internet providers, as private companies, must assess whether or not to stop a relevant website or service. This task normally belongs to public authorities, and the court finds that in the present situation, it is unnatural to assign such responsibility to private companies. If this solution is to be

chosen, a closer study will be required. As we have been informed, the Ministry of Culture and Church Affairs has already initiated a legislation process on these matters.

An alternative to impose the Internet providers with such a task is to take legal steps in each case, either by ordinary legal action or by petition for preliminary injunction, as in this case. This situation will be inadequate based on considerations of legal policy, as it concerns many Internet providers in Norway and a substantial number of websites that might be in dispute.

Against this, the court has measured the plaintiffs' need to stop the infringements. In the court's view, it is beyond doubt that the plaintiffs have such a need, and that it is necessary to find a solution to meet this requirement. However, the court cannot see how Telenor is liable, when the other considerations speak so strongly against it. The Pirate Bay is the website facilitating most illegal file sharing as of today, but the court cannot see that this should give a different conclusion. The court does not find it significant that closing this website will only block a very small part of Telenor's Internet service to its customers.

On this basis, the court has concluded that a contribution by Telenor, either active or passive, cannot be regarded as unlawful. As the contribution is not regarded as unlawful, it is not necessary for the court to consider whether liability and causality exist. Nor is it necessary to consider whether basis for provisional measure exists. The petition has not been heard, and will subsequently be rejected.

Claims for legal costs has been submitted by both parties. Considering the result, the defendant is normally awarded legal costs, cf. section 32-10, cf. section 20-2 first paragraph. However, the court finds that the case has given rise to doubt, as it raises questions of a principle nature, and that the plaintiffs had a good reason for trying the case. Thus, the court finds that there are weighty reasons for exempting the plaintiffs from liability for legal costs, cf. section 20-2 third paragraph letter a. Legal costs are therefore not awarded.

DECISION

1. The petition is rejected.
2. Legal costs are not awarded.

Court adjourned

Anette Eckhoff