

**BORGARTING COURT OF APPEAL**

**DECISION**

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**Date of pronouncement:** 09.02.2010

**Case no.:** 10-006542ASK-BORG/04

**Judges:**

Appellate Court Judge	Jan-Frederik Wilhelmsen
Appellate Court Judge	Dag A. Minsaas
Appellate Court Judge	Sveinung Koslung

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Appellant	Nordic Records Norway AS	Rune Ljostad, Attorney-at-Law
Appellant	Universal Music as	Rune Ljostad, Attorney-at-Law
Appellant	Universal City Studios LLLP	Rune Ljostad, Attorney-at-Law
Appellant	Bonnier Amigo Music Norway AS	Rune Ljostad, Attorney-at-Law
Appellant	Voices Music & Entertainment AS	Rune Ljostad, Attorney-at-Law
Appellant	Sandrew Metronome Norge AS	Rune Ljostad, Attorney-at-Law
Appellant	Playground Music Scandinavia Norge Norsk Avdeling Av Utenlandsk Foretak	Rune Ljostad, Attorney-at-Law
Appellant	Twentieth Century Fox Film Corporation	Rune Ljostad, Attorney-at-Law
Appellant	TONO	Rune Ljostad, Attorney-at-Law
Appellant	Friland Produksjon AS	Rune Ljostad, Attorney-at-Law
Appellant	Warner Music Norway AS	Rune Ljostad, Attorney-at-Law
Appellant	Steelworks Stein Groven	Rune Ljostad, Attorney-at-Law
Appellant	Warner Bros. Entertainment, Inc	Rune Ljostad, Attorney-at-Law
Appellant	Daworks Music Publishing	Rune Ljostad, Attorney-at-Law
Appellant	Sf Norge AS	Rune Ljostad, Attorney-at-Law
Appellant	Nordisk Film Distribusjon AS	Rune Ljostad, Attorney-at-Law
Appellant	Dj Beat Records Scandinavia AS	Rune Ljostad, Attorney-at-Law
Appellant	Sony Music Norway AS	Rune Ljostad, Attorney-at-Law
Appellant	Filmkameratene AS	Rune Ljostad, Attorney-at-Law

Appellant	EMI Recorded Music Norway as	Rune Ljostad, Attorney-at-Law
Appellant	The Music Business Organisation (mbo) AS	Rune Ljostad, Attorney-at-Law
Appellant	Sony Pictures Entertainment, Inc	Rune Ljostad, Attorney-at-Law
Appellant	Paramount Picture Corporation	Rune Ljostad, Attorney-at-Law
Respondent	Telenor ASA	John Steffen Gulbrandsen, Attorney-at-Law

The decision concerns a petition for a preliminary injunction with a request that Telenor should be prohibited from contributing to making available to the public and reproducing copies of works protected by copyright through the website The Pirate Bay.

The petition was filed on 16 June 2009 with Asker and Bærum District Court by 23 companies and organisations, which include 12 Norwegian record companies, TONO, five American film studios, three Norwegian film distributors and two Norwegian film producers (hereinafter referred to as the "**Rights Holders**"). A total of 5 trade associations have declared that they will assist the parties in support of the petition, cf. the Dispute Act, Section 15-7. The purpose of the claim on the part of the Rights Holders is to prevent infringements of the works protected by copyright over the Internet. The Rights Holders hold copyrights and other neighbouring rights to mainly music and film in the Norwegian market.

The Pirate Bay was established as an internet service in the autumn of 2003. The service consists of a website reachable under several addresses on the Internet. The website facilitates file sharing between the users of The Pirate Bay. The file sharing does not take place physically through The Pirate Bay, but by the establishment of direct contact between the end users, which exchange the files. The Pirate Bay is based on the so-called BitTorrent technology. The way this technology works is that the user by downloading from The Pirate Bay and opening a so-called "torrent file" automatically links up to other users offering all or parts of the file (normally a film, music or software) to which the torrent file refers. In this manner, the technology establishes contact with other users who can offer the requested file in question and at all times keeps in control of which users offers which files.

In Norway, Telenor is the biggest provider of internet services and has a market share of approx. 50 %. By virtue of being a so-called Internet Service Provider Telenor provides a service – first and foremost a purely physical infrastructure – which renders it possible for Telenor's internet customers to visit the websites of The Pirate Bay. Telenor in other words offers the necessary infrastructure for the transfer of data traffic, the result of which is that illegal file sharing can take place and to some degree takes place among customers of Telenor visiting The Pirate Bay. Telenor further perform acts in the form of operation, maintenance and user support necessary to offer this service to its end-users. Telenor is itself not a an internet provider for The Pirate Bay and is in no contractual relationship with the companies or individuals behind the website.

It is an undisputed fact that the users of The Pirate Bay in many cases use the website for illegal file sharing which may imply an infringement of the Rights Holders and that this also concerns the customers of Telenor, although there is disagreement between the parties concerning the extent of the illegal material accessible via The Pirate Bay and the share of Telenor's customers involved in the illegal file sharing. The District Court made the assumption that as much as 90 % of the material which can be offered via The Pirate Bay is made available through illegal file sharing, whereas Telenor on the basis of information from The Pirate Bay has quoted an illegal share of approximately 20 %. The District Court has further made the assumption that approximately 140,000 individuals in Norway visit The Pirate Bay on a daily basis, whereas Telenor in its reply to the Court of Appeal – on the basis of information from The Pirate Bay – has estimated the number of users to be 12,000. The Court of Appeal does not find it necessary in the following to address these questions of evidence, but makes the assumption that the illegal file sharing taking place via The Pirate Bay is considerable, also among Telenor's customers, and that this represents a serious problem to the Rights Holders. The Pirate Bay is undoubtedly one of the websites which today performs the greatest degree of facilitation of illegal file sharing.

Asker and Bærum District Court on 6 November 2009 passed a decision with the following conclusion:

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

The District Court based its conclusion not to sustain the petition on the fact that the contribution by Telenor by way of placing its network at the disposal of The Pirate Bay without surveillance or control of the relevant websites, did not represent unlawful contribution. The conclusion on this point is in the decision expressed as follows:

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.

On 9 December 2009, the Rights Holders appealed the decision to Borgarting Court of Appeal. The appeal concerns the District Court's application of the law and assessment of the actual circumstances.

On 8 January 2009 Telenor submitted its reply to the appeal. In the reply it was communicated that Telenor Norge AS has taken over the position as a party held by Telenor Telecom Solutions AS through this company's merger with Telenor Mobil AS, Telenor Privat AS and Telenor Bedrift AS into new Telenor Norge AS with the same business enterprise number as former Telenor Telecom Solutions AS. The Court of Appeal takes this as its basis that the party is as such and Telenor Norge AS is in this decision referred to as "Telenor".

**The appellants, the Rights Holders,** have essentially made the following allegations:

***Principal allegations***

The terms for granting an interim injunction are fulfilled, and the decision of the District Court is therefore incorrect.

Article 8.3 of the Copyright Directive is basic to the understanding of the issues raised by the case and the court must take it as its basis in deciding in the case.

The appellants have can lay claim not only for "money", cf. the Dispute Act, Section 32-1, third paragraph. The claim is based on sections 2, 42 and 45 of the Copyright Act concerning the exclusive rights of the originator or the neighbouring rights of artists or producers, and the liability for contributory negligence of the Section 54 third paragraph of the Copyright Act, cf. Section 55, first paragraph. Telenor contributed actively and passively to the illegal activity run by the individuals responsible for The Pirate Bay, as well as the unlawful acts which Telenor's end-users commit in uploading or downloading (making available to the public and producing copies of) works of film and music for which the appellants have rights. This contribution is unlawful.

There is a basis for provisional measure pursuant to both alternatives in Section 34-1 of the Dispute Act. Pursuant to alternative a) sustaining a claim for a preliminary injunction will not constitute a forestalled execution of the principal claim.

***The Copyright Directive as an assessment basis for the basis for an injunction***

According to the Copyright Directive (2001/29/EC), Article 8.3 the Rights Holders have access to request an injunction against intermediaries: "*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 has not been assessed by the District Court.

The necessary amendments to implement the Copyright Directive in Norwegian domestic law was made in connection with the amendments to the Copyright Act, which entered into force 1 July 2005. As regards this implementation the Ministry of Culture and Church Affairs in its letter dated 24 September 2007 stated that the Copyright Directive, Article 8.3 did not require any special form of implementation in order to become binding domestically, as the existing provisions concerning contribution in the Copyright Act and an interim measure in the Dispute Act (the then Enforcement Act) were already sufficient to establish that Norwegian law was in compliance with the directive. This statement from the ministry and Norway's obligations under the EEA Agreement to bring Norwegian legislation in compliance with the Copyright Directive are of central importance to the application of the law in this case. The conclusion of the District Court is incompatible with Norway's obligations under the EEA Agreement and the content of the letter from the Ministry of Culture and Church Affairs of 24 September 2007, and without the District Court having in its decision commented neither the relationship with the Copyright Directive nor the ministry's letter.

In the second paragraph on page 9 of its decision the District Court states that there is "no doubt" that the plaintiffs have a need to stop the violations and that it is "necessary to find a solution to fulfil this need". The court further states that "the court, however, cannot see that this would render Telenor responsible, when the other considerations weigh so heavily against it". This argument demonstrates that the District Court has misunderstood the case. No claim has been presented to the effect that Telenor should be rendered criminally liable or liable for damages. The established doctrine on liability for contributory negligence must, however, be interpreted and applied in a manner corresponding to Norway's obligations pursuant to the Copyright Directive and the EEA Agreement, cf. also Section 2 of the EEA Act and the presumption principle.

In the judicial assessment of the terms for a preliminary injunction it is important to be aware of the following basis: This is not a case concerning liability for the service provider (the internet provider), neither in terms of criminal liability nor in terms of liability for damages. The reason why the doctrine on chiefly criminal liability concerning contributory negligence has received so much attention in this case is the way in which the Norwegian legislator has elected to fulfil the obligations of the Copyright Directive. In applying the doctrine on contributory negligence to the circumstances in this case, it is of decisive importance that Article 8.3 of the Copyright Directive should provide a general and unconditional access of the Rights Holders to claim an injunction against intermediaries to prevent the infringement by a third party of copyright or related right, without regard to the provisions of exemption from liability of the Electronic Commerce Act (which explicitly excepts injunctions from its area of application).

Article 8.3 contains no reservation against unlawfulness and also does not pose any requirement of guilt on the part of the intermediary (the internet provider). According to the directive it is sufficient for it to be established that the service of the intermediary is used by a third party to infringe a copyright or related right, e.g. by through the transfer of unlawful material in the network of the intermediary. No other terms for blocking have been stipulated. This is of significance to the application of the liability for contributory negligence in this case, which is limited to a claim for blocking by the internet provider (Telenor) of the end-users' access to The Pirate Bay to prevent infringements from taking place through Telenor's network, and nothing else.

### ***Regarding the condition of the Rights Holders having a "claim" against Telenor***

The "claim" of the appellants against Telenor is based on a contribution by Telenor to the unlawful acts of The Pirate Bay's and Telenor's end-users.

Sections 2, 42 and 45 of the Copyright Act give the appellants a protection of the right to reproduce copies of (downloading) and making publicly available (uploading) titles (works of music and film) which is infringed through unlawful file sharing through

Telenor's network. Section 54 third paragraph of the Copyright Act provides liability for contributory negligence for infringements of the rights of Rights Holders. Through Section 55 the liability for contributory negligence is also rendered applicable to liability for damages.

The decision of the District Court is on page 8, third paragraph correct in concluding – without doubt – 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.*" The decision is not correct, however, in basing itself on the assumption that Telenor's contribution is not unlawful.

It is evident that the rules on exemption from liability contained in the Electronic Commerce Act do not prevent finding for a decision of a preliminary injunction. Quite the contrary, these rules support an instruction of Telenor to stop or obstruct the unlawful file sharing through Telenor's network.

It appears from Section 15 of the Electronic Commerce Act that the general rules on punishment and damages apply, unless otherwise stipulated in the Electronic Commerce Act. The Electronic Commerce Act only makes exemptions from criminal liability and liability for damages, cf. Section 16 of the Electronic Commerce Act, which governs the type for transfer services delivered by Telenor. The background legislation is therefore still relevant to the legal basis for an order to block the access of Telenor's end-users to The Pirate Bay.

Section 20 of the Electronic Commerce Act expressly excepts orders from courts of law or administrative bodies to *stop or obstruct an infringement* from the area of the exemption from liability. The preparatory works for the Electronic Commerce Act, Section 20 expressly establishes that "*the access to apply for a preliminary injunction is not affected by the introduction of Articles 12-14*", cf. Odelsting Proposition (white paper) no. 4 (2003-2004), p. 34.

There is no conflict between the specification in Section 20 that a service provider independently of a possible exemption from liability may be instructed to stop or obstruct an infringement, and the specification in Section 19, cf. Sections 16-18 that the service provider does not have a general obligation to control, monitor or inspect circumstances to achieve such possible exemption from liability. An interpretation of Section 19 which directly or indirectly prevented a court of law from instructing the service provider to stop or obstruct an infringement would, on the contrary, be in direct conflict with the dual system – where a distinction is made between on the one hand criminal liability and liability for damages in respect of infringements (Sections 16-18, cf. Section 19) and on the other orders to stop or obstruct infringements (Section 20) – stipulated by the Electronic Commerce Act.

This case does nevertheless not concern a general order to control, monitor or inspect, but to respond to concrete and already documented situations and to prevent such situations from reoccurring by blocking certain internet addresses or using other effective methods. Reference is further made to Odelsting Proposition no. 4 (2003-2004), page 32, left-hand column, in which it is stated that the service provider is not exempted from such obligation to inspect if he is in receipt of well-documented information. The appellants leave the choice of which effective method to use to Telenor.

Taking the Electronic Commerce Act in support of the view that internet providers should not take measures in terms of infringements occurring in their networks, is therefore not correct. It appears directly from Section 40 of the preamble of the Electronic Commerce Directive (which the Electronic Commerce Act implements) that: "*this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and*

*should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures*". While Telenor previously has declined every attempt of a voluntary arrangement with the Rights Holders to block the access to material protected by copyright, partly referring to "the system of the Electronic Commerce Act", it appears from the Electronic Commerce Directive that such voluntary arrangements between the parties involved are encouraged. The Electronic Commerce Act still does not constitute a barrier to the competence of the courts of law as concerns a preliminary injunction.

The freedom of expression and information also do not prevent finding for a preliminary injunction in this case. Quite the contrary, an order vis-à-vis the internet provider, in this case Telenor, to stop or obstruct infringements of copyrights or related rights, would also protect the consideration of the freedom of speech and information.

The District Court does not appear to have made a direct decision on the significance of the freedom of speech in this matter, as the case was decided on a different basis. The statement of the District Court that *"the infringing acts by the end-users [constitute] a statement on a website"* which will be limited by a blocking is incorrect, however, and appears to be perceived as being in support of a special requirement for a legal basis (but without the District Court concluding on this issue). The infringing acts by The Pirate Bay and the end-users are unlawful acts of making accessible and reproducing copies of works of film and music protected by rights and contribution to such acts. The works of film and music a legally accessible through other channels and it cannot be said to be right that the freedom of speech and information should be used in support of violators of the law-protected rights of others to give themselves and others free access to film and music available in normal trade.

The activity run via The Pirate Bay is not at the centre of the freedom of speech and information. The main purpose of The Pirate Bay is to facilitating unlawful file sharing. This is important in the assessment to be made in relation to Article 100 of the Constitution and Article 10 of the European Convention on Human Rights. Reference is made to Supreme Court Report 2007 page 404 (the Brennpunkt case), where emphasis is placed on exactly the fact that the case concerned journalistic expressions at the centre of the freedom of speech in not granting a preliminary injunction to prevent a TV programme from being broadcast. Pursuant to Article 100 of the Constitution any intervention should be considered against the reasons for the freedom of speech in the search for truth, democracy and the freedom of opinion of the individual. According to Article 10, subsection 2 of the European Convention on Human Rights an intervention may be made upon a consideration of different interests, cf. the alternative *"protect others' ... rights"*. In the consideration to be performed pursuant to these provisions, an important aspect is that the material which will potentially be blocked is material protected by copyright which is made available to the public and material of which copies are reproduced without the consent of the originator.

The prohibition in the Constitution against "precensorship" also does not prevent a preliminary injunction. It appears from NOU 1999:27, Section 7.3.5 that *"It has not been a tradition in Norway to treat preliminary injunctions as censorship and the assumption must be made that the arrangement does not conflict with the [then] Constitution, Section 100, first sentence ... The consideration of the freedom of speech is often referred to by the defendant in cases concerning a preliminary injunction, but there is no precedent from the Supreme Court to the effect that the courts of justice should be more reluctant in respect of injunctions against expressions than in other respects."*

Attention is also called to the differences between precensorship and preliminary injunctions: A preliminary injunction is concrete and not general. It is imposed by a court of law, not administratively, and there are two private parties in conflict with each other. In regard to this, attention may be called to the fact that Telenor has made no principal objections against the child pornography filter used by Telenor and other internet

providers, despite the fact that this implies blocking content without the involvement of a court of law. KRIPOS (National Bureau of Crime Investigation) alone, without a judicial review, determines which internet addresses should be blocked according to arrangement.

In this case, it is a matter of blocking following an assessment by a court of law of the petition for a preliminary injunction following fully adversarial proceedings and the adducing of primary evidence. The statement of the District Court that it is unnatural for private companies to perform an assessment of the issue of blocking (page 8, last paragraph of the decision) thus appears without relevance to the actual circumstances, since it is for the courts to evaluate this question.

It also appears from Official Norwegian Report 1999:27, Section 7.4.2.2 that it should be possible to impose preliminary injunctions against utterances also after the amendment of Article 100 of the Constitution. It appears that *"it should be made clear that preliminary injunctions can only be used when it has been rendered probable that the publication cannot be repaired satisfactorily by a financial compensation and/or punishment"*. The fact that the amendment of Article 100 of the Constitution does not imply an absolute prohibition of preliminary injunctions against utterances, not even where the utterances, as opposed to what is the case here, were to be at the centre of the freedom of speech, further appears from Report no. 26 to the Storting (2003-2004), Section 5.6.2: *"The wording of the bill of the Freedom of Speech Commission puts up a seemingly absolute prohibition of the use of preliminary injunctions against utterances before they are published. The premises show, however, that the bill is not intended to be understood in such a way, but rather as a tightening of the current state of the law."*

It is difficult or quite impossible to pursue the individual end-users, inter alia because Telenor does not pass on to or make the end-users aware of requests from the Rights Holders to the end-users with a claim that the unlawful activity should cease. This situation causes an injunction against the internet provider in reality to be the only opportunity of the Rights Holders to stop the infringements of their rights which occur on an enormous scale. This is also the legislative justification for Article 8.3 of the Copyright Directive, which lays down that the internet provider in many cases is best placed to prevent such infringements, cf. Section 59 of the preamble. Pursuant to the Copyright Directive, Article 8.3 the Rights Holders should have access to claim a preliminary injunction independently of whether the activity of the internet provider is subject to liability or not.

The consideration against the regard to the freedom of speech has in other words already been performed by the legislator (the European as well as the Norwegian in that the EEA committee has decided to adopt the Copyright Directive a part of the EEA Agreement and in that the ministry established that there was compliance between the Copyright Directive, Article 8.3 and domestic Norwegian law) in that access has been granted to request an injunction to block the access to material protected by copyright. None of the reasons for the freedom of speech as defined in Article 100 of the Constitution and in Article 10 of the European Convention on Human Rights impedes an order to block traffic to and from The Pirate Bay. The consideration of the search for truth is not threatened, because it is primarily the form of the utterances (a specific work of film or music), not their ideological content, which is shared via The Pirate Bay and which will be affected by the blocking. The consideration of democracy and the freedom of opinion of the individual is not threatened because the scarce legal material available at The Pirate Bay is also available elsewhere.

Telenor already executes a blocking of child pornography through the so-called child pornography filter. Neither Telenor nor the Norwegian authorities have raised any objections against this filter (the Norwegian parliament expressed a positive view of the filter in Innst. O. no. 66 (2004-2005), page 4, left-hand column), despite the fact that the assessment of the content to be considered unlawful is made by KRIPOS, whereas in

this case it will be made by a court of law following adversarial proceedings with the adducing of primary evidence.

***Particularly on contribution and unlawfulness as a subject of consideration for the preliminary injunction***

The accomplice liability, cf. Section 54 of the Copyright Act, forms the basis for a "claim" which forms the basis for a preliminary injunction. Although the basis in Section 54 of the Copyright Act is a criminal law accomplice concept, this case concerns a preliminary injunction. There is, in other words, no question of a claim for punishment or damages.

The Copyright Act prohibits contribution to an infringement of copyrights and related rights, cf. Section 54, subsection 3, cf. Section 55, first paragraph and sections 2, 42 and 45 of the Copyrights Act. Although this is a penal provision, it is clear that the easy standards of proof that apply to civil cases apply, cf. Rt. 2005 page 41 (Napster) paragraph 59. There is consequently a claim for ordinary preponderance of evidence that there is a claim and a basis for provisional measure.

The addition regarding contribution in Section 54 of the Copyright Act was included after an amendment in 1988. The reason for this amendment was the technical development that took place in the 1980's with regard to the technical possibilities for extensive reproduction of copies, cf. proposition to the Odelsting no. 34 (1987-1988), page 41: *"The Ministry agrees with the Committee that the technical development over the last years have led to a need for extending the sanction rules and making them more stringent. As a result of the technical advances in recent years, it has become possible for anyone, with relatively modest investments, to mass-produce copies, especially of sound and video tapes. This has in recent years given rise to real crime – the so-called pirate activities, internationally as well as nationally. There have been considerable problems with illegal gramophone records and cassette tapes, and the problems have increased further in connection with the growing market for sale and rental of videograms. Out of consideration for the copyright holders as well as for general cultural and public interests, it is important to react against the increasing piracy."* It further appears from page 42 of the Proposition that the *"introduction of a general liability for contribution to infringement of copyrights etc."* is among the measures being proposed by the Committee, and which has later been adopted.

The technical development described in the Proposition has later increased rapidly, and the legislative arguments for an accomplice liability become fully relevant in this case. The Pirate Bay is a website providing contact between users who want to download copyright-protected material and those who offer such material via The Pirate Bay. The Pirate Bay makes it possible for these users to establish contact and upload and download material. The very transfer of the copyright-protected material happens "peer-to-peer", i.e. directly from user to user.

In the Napster.no case, Rt. 2005 p. 41, the Supreme Court decided that the providing of links on a website which makes it easier to find copyright-protected material placed on the Internet without the consent of the copyright holders was to be considered as liability-inducing contribution pursuant to the Copyright Act Section 55, cf. Section 54 third paragraph. Reference is made to paragraphs 63 and 65-68 of the judgment, cf. paragraph 2-4 of the judgment, which describe the technical process. This is just the sort of function that The Pirate Bay has, cf. page 2, paragraph 4 of the District Court's decision. The service enables the users to make available and find material which illegally has been made available. It is of no importance whether The Pirate Bay is technically involved in the actual data transfer taking place between the users, cf. paragraph 2-4 of the Napster.no judgment. In addition to this "contact-creating" function equivalent to Napster.no, which in itself is sufficient for The Pirate Bay's activities to be a criminal offence in Norway, the fact that The Pirate Bay also operates a so-called tracker implies

that The Pirate Bay's relationship to the main activity is even closer than what was the case in the Napster.no case.

The Pirate Bay's activities are therefore undoubtedly a criminal offence in Norway according to the Napster.no decision. It appears from paragraph 66 of the Napster.no judgment that it is of no importance whether The Pirate Bay's activities are also a criminal offence in Sweden (where those responsible for The Pirate Bay are domiciled), as long as they are a criminal offence in Norway. In the same way as in the Napster.no case, cf. paragraph 67, it must be assumed that The Pirate Bay's main purpose is to give others access to illegally published music and films, which is also what the District Court assumed (page 8, third paragraph of the decision).

The conditions for considering Telenor as a contributor to The Pirate Bay and/or its end-users' unlawful acts are that there must be a causal connection between the contribution act and the main act, and that the contribution act, based on an overall evaluation, is deemed to be unlawful. In addition, the requirement of guilt must be fulfilled.

It is not a requirement that the contribution act should be the only reason for the main act, cf. Rt. 2005 p. 41 (Napster.no), paragraph 63, from which it appears that it is sufficient that the contribution act *amplifies* the effect of the uploaders' (principals') acts. Only a contributing causal relation is required, cf. Andenæs, *General Criminal Law*, page 326. Potential possibilities for the users to circumvent a blocking or to use other Internet providers are therefore not relevant to the assessment of Telenor's accomplice liability.

It is also not a requirement that there should be an identifiable main perpetrator. This follows from the principle that each contributor is judged on the basis of his/her own acts, cf. Andenæs *General Criminal Law*, page 338 and the Napster.no judgment, paragraph 66.

It is further not a requirement that there should be a deliberate cooperation between the principal and the contributor. This appears from Andenæs, *General Criminal Law*, page 327 and the Napster.no judgment, paragraph 64. It is of no significance whether the principal (The Pirate Bay or Telenor's end-users) are aware of the contributor's (Telenor's) contributory act.

Finally, it is also not a requirement that the contributory act in itself should be illegal. This is explicitly stated in paragraph 63 of the Napster.no judgment, and, as mentioned above, no such requirement is found in Article 8.3 of the Copyright Directive as regards a claim for injunction to prevent or block the access to copyright-protected material.

It is principally submitted that Telenor contributes actively and physically to The Pirate Bay's and its own end-users' unlawful acts. On this point, the District Court's judgment is correct, as it assumes (page 8, third paragraph), 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*". It is not disputed that an illegal activity is taking place in Telenor's network. In many decisions, it has been assumed that the providing of infrastructure for illegal file sharing is considered as contribution, jf. TOSLO-2005-106005 (VeritasBB), TJARE-2007-6676 (Stavanger Dragon Hub), TOSLO-2003-19164 (Drink or Die) and RG-2005-1627 (DirectConnet). When the Internet provider of the contributing file sharing network is considered to contribute in the sense of the Copyright Act, there is even more reason to consider the provider of Internet services to the end-users as a contributor in this sense.

Alternatively, it is submitted that Telenor contributes passively by failing to intervene against the copyright infringements in spite of having positive knowledge of them, and in spite of the fact that such intervention would have been technically easy to implement. The District Court did not take a stand on this issue. The condition for establishing passive contribution is in principle the same as for physical contribution, as a causal connection must be established between the failure to act and the main act, cf. Husabø,

*The Periphery of Penal Liability*, pages 175 and 460-462. It is not a requirement that the alternative act – blocking Telenor's end-users' access to The Pirate Bay – should be completely effective, it is sufficient that the main act is counteracted physically or mentally. Telenor has failed both to physically counteract its end-users' access to The Pirate Bay and to mentally counteract it by forwarding or in other ways make its end-users aware of the copyright-holders' communications that illegal file sharing is taking place from the end-users' Internet connection. There are many examples in case law where the court has concluded that passively letting an action take place is to be regarded as aiding and abetting, cf. Rt. 1999 page 996 and Rt. 1995 page 820.

The District Court's decision is based on Telenor's contribution not being unlawful. This is an incorrect application of the law. The District Court concludes that Telenor's contribution is not unlawful because granting an injunction would lead to "*a situation difficult to handle in practice*". The court points out that the content of The Pirate Bay can be changed, and states that Telenor and other Internet providers should not be responsible for making assessments as to whether or not a relevant website or service should be stopped.

The copyright holders point out that the possibility that The Pirate Bay – whose main purpose for six years has been to facilitate illegal file sharing in spite of repeated occasions to change this fact – can be changed, as the District Court points out as a reason for concluding that the contribution is not unlawful, already has been taken into account in Section 34-5, first paragraph of the Dispute Act which states that the defendant can apply for a stay or limitation in the preliminary injunction if new circumstances emerge. Incidentally, the fact that circumstances may change is not particular to cases like the present, and does in the appellants' view not lead to such a difficult situation in practice that a preliminary injunction is not a suitable legal step.

As regards the District Court's reference to the fact that Internet providers should not be responsible for assessing whether or not a relevant website or service should be stopped, reference is made to the fact that in a situation like the present, it is indeed the courts of law that shall make such assessment. Such judicial review of whether an internet service should be stopped is briefly considered by the District Court in the first paragraph on page 9 of the decision, with a reference to the fact that such a situation would 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*". This is not a correct interpretation of the reservation of lawfulness and would lead to a very unfortunate state of the law.

Firstly, the E-Commerce Directive (2000/31/EF), Article 12.3, cf. paragraph 45 of the preamble, the Copyright Directive, Article 8.3 cf. paragraph 59 of the preamble and the Norwegian implementation of these into Section 20 of the E-Commerce Act and Section 32-1(3) of the Dispute Act, cf. the Dispute Act, chapter 34, the Copyright Act, Section 54, third paragraph, the Copyright Act, Section 55, first paragraph and the Ministry of Culture and Church Affairs' letter dated 24 September 2007, all prepare for injunctions based on judicial review in cases like the present. An injunction based on judicial review has thus been considered and found to be suitable in such cases by legislators in the EU as well as in Norway, even in cases concerning "*a substantial number of websites that might be in dispute*", cf. the District Court's decision, page 9. It is further explicitly established in the E-Commerce Act that orders to stop or prevent violations can be given irrespective of a possible exemption from criminal liability or liability for damages and the absence of a general obligation to control, monitor or investigate such circumstances.

Secondly, it is not correct, as the District Court seems to assume, that there will be many such cases because "*it concerns many Internet providers in Norway*". As appears from the Norwegian Post and Telecommunications Authority's report on the Norwegian e-com market – 2008, page 33, the nine largest Internet providers in Norway alone have a market a share of approximately 90 %. In any case, it should not be necessary to

institute legal proceedings against each individual Internet provider in each individual case. Other Internet providers are not legally obliged to continue to contribute to copyright infringements which a court of law has ordered one Internet provider to block the access to. The reason submitted for continuing such contribution – that Internet providers themselves do not want to assess the question of blocking – ceases to exist when the question has been subject to a judicial review. They can thus accommodate to the Court's decision without legal proceedings being instituted against them as well. This has also been the practice in Denmark, for example.

The result of the District Court's interpretation of the reservation of lawfulness is that a party will be prevented from applying for preliminary injunction or from instituting legal proceedings because the problem which the party is trying to prevent is too comprehensive. It should be noted that the general provisions on provisional measures in Section 34-2 of the Dispute Act and legal costs in chapter 20 etc. will limit groundless lawsuits, and that it is not a question of claiming liability against Telenor, but only of obtaining a preliminary injunction for Telenor to block the access to a concrete service, The Pirate Bay, the main purpose of which is to facilitate illegal file sharing, and through which such file sharing takes place to an enormous extent.

The District Court's argument for not considering Telenor's contribution to be unlawful is also not in accordance with what was stated by Telenor's own representative at the court session, viz. that in Denmark, where Telenor's associated company has been ordered to block the access to The Pirate Bay (cf. decision from Østre Landsret of 26 November 2008) none of the problems feared by the District Court have occurred.

In its consideration, the Court does not take into account the alternative: that aggrieved copyright holders, instead of instituting legal proceedings against one (or, at the most, a handful) Internet providers, must bring action before the courts against each one of the approximately 140,000 unique Norwegian users who every day take part in illegal file sharing through The Pirate Bay. That would indeed be a situation that is *"inadequate based on considerations of legal policy"*, and it can only be avoided if the request for a block instead can be directed against the Internet provider in accordance with the EU Directives and the Norwegian implementation of the system of the Directives.

The reservation of lawfulness is a question of whether a restrictive interpretation should be applied to counter potential unreasonable results of establishing accomplice liability. In Proposition to the Odelsting no. 90 (2003-2004) *"On the Penal Code"*, it appears from the description of current law that the question of unlawfulness is a question of exceptions to reach a reasonable result. What is to be regarded as unlawful contribution therefore depends on the result of one or the other interpretation. In this case, the question is whether it is reasonable to demand that Telenor should block the access to The Pirate Bay for its end-users. It is therefore of importance that this concerns the blocking of access to one service, the purpose of which is to facilitate illegal file sharing and to make enormous quantities of illegal material available, and not a claim for punishment or compensation. In other words, it is not a question of punishability, but of the reasonableness of the plaintiffs' claim that the access of Telenor's end-users to The Pirate Bay should be blocked.

It follows explicitly from Section 20 of the E-Commerce Act that in Norwegian law, a division must be made in cases like this between criminal liability and liability for damages on the one hand and an order to terminate or prevent violations on the other. Section 20 of the E-Commerce Act establishes that service providers can be ordered to terminate a violation or to prevent it, even if they are exempted from criminal liability and liability for damages under sections 16 – 18 of the E-Commerce Act. The fact that criminal liability or liability for damages cannot be imposed on the service provider can thus, under Norwegian law, not be used as a justification for not ordering the service provider to terminate or prevent a violation. The letter from the Ministry of Culture and

Church Affairs of 24 September 2007 also explicitly establishes that this division must be assumed also in the case of infringement of copyrights and related rights.

The division between potential criminal liability and liability for damages on the one hand and an order to terminate or prevent a violation on the other, also follows clearly from both the E-Commerce Directive, Article 12.3, cf. paragraph 45 of the preamble, and the Copyright Directive, Article 8.3, cf. paragraph 59 of the preamble. Thus, Article 8.3 of the Copyright Directive does not set forth any requirement of criminal liability or liability for damages in order for a prohibition to be imposed against intermediaries, and paragraph 59 of the preamble explicitly states that the possibility of applying for an injunction also should be available if the acts carried out by the intermediary are covered by an exception pursuant to Article 5 of the Copyright Directive (inclusive of the exception for temporary reproduction in Article 5.1, implemented into Norwegian law by the Copyright Act, Section 11a), and liability thus cannot be invoked.

Both the system which the legislator has established through the E-Commerce Act and confirmed to be applicable also to the infringement of copyrights and related rights, and Norway's obligations under international law thus imply that a distinction must be made between criminal liability and liability for damages and an order to terminate or prevent a violation. The fact that criminal liability or liability for damages cannot be imposed on the service provider can thus, under Norwegian law, not be used as a justification for not ordering the service provider to terminate or prevent a violation.

The fact that the principle under Norwegian law is that also technical contributors are contributors in the sense of the law, follows implicitly from the special provisions we have on exemptions from liability for such contributors. Without such a principle, the special provisions on exemption from liability for technical contribution would be superfluous. Section 254 of the Penal Code is one example of such a special provision.

In NOU 2009:1: "*Individual and integrity*", page 121, the following is stated: "*To the extent service providers, web hosts, suppliers of file sharing services, and others, facilitate anonymous statements, they should also be responsible for preventing such statements from causing any harm*". In cases like the present, where technical contributors, in this case the Internet provider Telenor, facilitate anonymous statements – the "opposite" of pointing out and identifying a liable party, e.g. an editor, owner or publisher – the *technical contributors* should, in the view of the Privacy Commission, be responsible for preventing that such statements cause any harm, e.g. by terminating or preventing them.

Telenor has been notified that infringements are taking place, and extensive documentation for the infringements has been submitted. The fact that infringements are taking place has also not been disputed by Telenor. Telenor is, in other words, not ordered to block because Telenor itself has not examined or controlled data being transferred through Telenor's network, but because they have failed to follow up such notifications with adequate measures.

The guilt requirement in Section 54, paragraph 3 of the Copyright Act, cf. Section 55, paragraph 1, is negligence, cf. Section 54, paragraph 1. Telenor has on several occasions been notified that unlawful acts are taking place through its network. Telenor does not dispute that these infringements are taking place. The company has therefore been aware of the unlawful acts, but has nevertheless done nothing to prevent the infringements from continuing. The guilt requirement is thus fulfilled in this case.

The fact that Telenor does not have a general duty to control, monitor or investigate circumstances pursuant to Section 19 of the E-Commerce Act, is without significance to this issue. It appears explicitly from Section 19 that the provision only governs a general duty to control, monitor or investigate circumstances in connection with exemption from criminal liability or liability for damages under sections 16 – 18 of the E-Commerce Act

which does not imply that they have such a general duty of investigation. The provision does not include an order to terminate or prevent a violation, cf. Section 20 of the E-Commerce Act, and a possible special duty of investigation related to the basis for, e.g. the accomplice liability, or the implementation of such an order.

The Ministry of Culture and Church Affairs also concludes in its letter of 24 September 2007 that the service provider *"at least after having received an approach from the copyright holder with a claim/information of a third party infringement – at any rate with regard to the subsequent infringements – not [will] be in good faith, and there may then be a basis for liability"*.

Together this implies that the Court must assume that the copyright holders have a claim against Telenor that Telenor shall be prohibited to contribute to making copyright-protected works available to the public and to make copies through its website The Pirate Bay.

### **Re the requirement that the Copyright Holders must prove a basis for a provisional measure**

There is basis for a provisional measure under both alternatives in Section 34-1, paragraph 1 of the Dispute Act.

There is basis for a provisional measure pursuant to *litra a* in Section 34-1, paragraph 1 in the Dispute Act. Telenor's conduct – by failing to block its end-users' access to The Pirate Bay – makes provisional a measure necessary. The copyright holders' pursuance and execution of the main claim will otherwise be considerably impeded, since there in reality, as explained above, are no other effective alternatives for preventing the infringements.

An injunction will not imply an anticipatory enforcement of the main claim. In its decision in Rt. 2003 page 1165, the Supreme Court's establishes that the main claim in cases regarding infringement of copyrights is the claim for respect for the copyrights. The claim for injunction in this case is a claim to secure this respect by blocking, because the pursuance or execution of the claim for respect for the copyrights otherwise would be considerably impeded. It further appears from Rognstad, *Copyrights*, pages 401-402, that there often will be basis for a provisional measure in cases regarding infringement of copyrights, because a continued infringement – in the form of failure to block – will impede the execution of the copyright holders' exclusive rights. The same interpretation was assumed in a court of appeal decision LE-2008-48261: *"On the other hand, the Court of Appeal is of the opinion that the requirement in litra a) is met. As mentioned above, Nordby's "claim" must be seen as his ideal claim for respect for the exclusive right to make his works available to the public. A preliminary injunction ordering Soby to withdraw his book from the market will then be a measure to secure the execution of this underlying claim, and not an anticipatory enforcement of it."*

A preliminary injunction is necessary because it is in reality the only alternative for preventing a continued infringement of the copyright holders' rights. As also pointed out by the District Court, it is *"beyond doubt"* that the appellants have a need to stop the infringements, cf. the second paragraph on page 9 of the District Court's decision.

The copyright holders have worked a long time, nationally as well as internationally, to stop illegal file sharing in general, and The Pirate Bay – the largest and best known file sharing network – in particular. The continuous efforts to stop the infringements have included information work, reports to the police and civil enforcement in Norway and other countries. A number of requests directly to The Pirate Bay have met with ridicule and been refused. In 2006, The Pirate Bay was reported to the police, and Swedish police confiscated equipment belonging to the service. In 2009, the Stockholm District Court sentenced the men behind The Pirate Bay to long imprisonment and to pay a large amount of damages, and The Pirate Bay's internet provider was ordered to block the

access to infringed film and music works. The consequence has been that The Pirate Bay has moved its services to other Internet providers in various countries. In spite of all these measures, the extensive infringements are thus being continued via The Pirate Bay.

In Norway, some hundred cases of copyright infringements via The Pirate Bay have been reported to the police since 2006. All, except for one, have been dropped. Furthermore, an approach was made to Internet providers in 2008 regarding some hundred other, equivalent cases of copyright infringements via the service. Leading Internet providers, including Telenor, refused categorically through their interest group IKT-Norge to contact affected end-users regarding such notifications. In other words, these efforts have also been unsuccessful. A preliminary injunction is therefore necessary.

Even though it may be possible to evade a blocking of The Pirate Bay, it will prevent many from gaining access to the website. An injunction will therefore be effective. The Supreme Court has assumed that confiscation of domain names is effective, cf. Rt. 2009 page 1692: *"Even though a website will be available through the IP address also after the domain name has been put out of operation, it follows from the arguments for operating with a domain name that the availability will be considerably reduced."*

Also the condition in litra b is fulfilled. A preliminary injunction is necessary in order to avert considerable loss or inconvenience. According to Rt. 2002 page 108, a composite evaluation shall be made when assessing this alternative as to *"the importance of the disputed legal issue to the plaintiff, the plaintiff's need for a preliminary injunction, how severe a preliminary injunction will be, the defendant's conduct etc."*

It is not disputed that extensive infringements are taking place via The Pirate Bay through Telenor's network. These infringements lead to considerable financial losses for the appellants. The appellants also have a strong need for terminating the infringements through a blocking order, as this is in reality the only alternative for preventing a continued infringement of their rights. Subsequent economic liability for the infringements is not possible because of the Internet providers' exemption from liability for damages under Section 16 of the E-Commerce Act, and because experience shows that it is difficult or impossible to document afterwards the extent of such infringements, challenges which increase with the total extent of the infringements.

A blocking order will not be particularly severe to Telenor, as the Company's and the end-users' other services – such as e-mail, Internet bank, public services and all other services except for the illegal file sharing via The Pirate Bay – will remain unaffected by such a block. Furthermore, the technology which is already being used to block child pornography, can also be used to block Telenor's end-users' access to The Pirate Bay. Moreover, Telenor's standard subscription terms and conditions also give Telenor the right to block Telenor's end-users, a right which Telenor makes use of in other situations of abuse of the Internet connection.

Furthermore, the fact that the copyright holders already have suffered considerable losses does not prevent there being a basis for a provisional measure, cf. the Court of Appeal decision RG 2001, page 253, which concluded that there was a basis for a provisional measure even if the most serious risk of loss was related to the time before the preliminary injunction was decided. The infringements taking place via The Pirate Bay are continuous and still going on to a huge extent, and there is therefore a basis for a provisional measure as far as these infringements are concerned.

### ***Re the balancing of interests***

An order to block will not be obviously disproportionate to the appellants' interest in the injunction being granted, cf. Section 34-2 second paragraph 2 of the Dispute Act.

It appears from the preparatory works to the Enforcement Act, Proposition to the Odelsting no. 65 (1990-1991), p. 291, that a balancing of interests must be made: "*The second paragraph emphasises the fact that a preliminary injunction cannot be granted if the loss or inconvenience inflicted on the defendant is obviously disproportionate to the plaintiff's interest in the injunction being granted. The provision makes it clear that a maxim of proportionality applies to preliminary injunctions, taking all interests into consideration.*"

The wording – "*obviously disproportionate*" – implies that there is a high threshold for refusing to grant a preliminary injunction. As mentioned above, Telenor is already blocking other material, and the necessary technology is therefore in place. Blocking will not be contrary to Telenor's standard subscription terms and conditions. There is therefore no risk of Telenor suffering a loss if the company blocks its end-users' access to The Pirate Bay. As explained above, the freedom of speech and information does not prevent such decision to block. A crucial aspect in the balancing of interests is also the fact that this is not a question of blocking end-users' access to the Internet – it is a question of blocking the access to one single service, The Pirate Bay, which enjoys a unique position with regard to the extent of infringements and attitude to the copyright holders' attempts to protect their rights. If The Pirate Bay should change dramatically and switch to a system where the service performs a copyright clearance of copyright-protected works offered through the service, a new evaluation is possible pursuant to Section 34-5 of the Dispute Act.

A blocking order will therefore not be obviously disproportionate to the appellants' interest in the injunction being granted.

Based on the above, the following claim has been 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 works protected by copyright and works to which the plaintiffs have copyrights or related rights.
2. Telenor Telecom Solutions AS is instructed to take the necessary steps suitable to prevent the customers of Telenor Telecom Solutions AS from gaining access to the Internet addresses [thepiratebay.org](http://thepiratebay.org), [thepiratebay.com](http://thepiratebay.com), [thepiratebay.net](http://thepiratebay.net), [thepirateby.se](http://thepirateby.se), [thepiratebya.nu](http://thepiratebya.nu), [piratebay.net](http://piratebay.net), [piratebay.org](http://piratebay.org), [piratebay.no](http://piratebay.no), [piratebay.se](http://piratebay.se) and [tracker.openbittorrent.com](http://tracker.openbittorrent.com) and their related sub-pages and sub-domains.
3. The appellants are awarded the costs of the case with the addition of the statutory interest on overdue payment from the due date until payment is made.

**The respondent, Telenor**, has mainly submitted the following:

### ***Principal submissions***

It is upheld that the appellants cannot substantiate the claim, and nor can they substantiate a basis for a provisional measure. Telenor shall therefore claim that the appeal be dismissed and that legal costs be awarded. It is argued that item 1 of the conclusion is correct, and the respondent agrees, in all material respects, with the District Court's assessment of evidence and application of the law in respect of this item. However, it is argued that the District Court's application of the law in respect of item 2 of the conclusion on legal costs is incorrect.

Telenor cannot see that the appeal contains any new facts or legal submissions. The respondent uses the same basis for its statements of claim and the same rules of law as in the District Court. The appellants' claim is brand new in a Norwegian context. Previously rights holders have filed their claims against Internet customers who have

performed illegal actions on the Internet or against parties engaged in illegal online services (such as discussion groups, websites or file sharing services). Now the appellants have chosen to file their claim against a provider of online infrastructure. Telenor maintains that Internet service providers are not obliged to block their customers' access to websites and online services.

### **The facts of the case**

Throughout the case, including the appeal, the appellants have focused a lot on the website The Pirate Bay. However, the relevance of this site is limited. As regards The Pirate Bay, Telenor emphasises the undisputed fact that there is no illegal content on The Pirate Bay's website. However, The Pirate Bay arranges so that Internet users may contact one other directly, and thus files may be shared between them. Such file sharing may be legal or illegal, as chosen by the user.

The core of the matter is Telenor's role as an Internet service provider. The important question is whether Telenor – as an Internet service provider – may be deemed to be contributing to the copyright infringement that takes place from the use of the facilities that The Pirate Bay offers.

Telenor does not deny that the company has customers who are using services such as The Pirate Bay to infringe the rights of the appellants, but this is only a premise for the matter of Telenor's potential obligation to block The Pirate Bay. A duty to block, if any, cannot depend on how the relevant site is constructed technically or how many users it has. Legally, Telenor's role would be the same even if the matter concerned a different website or a different type of rights infringement. This illustrates that the subject-matter of this case is not The Pirate Bay in particular, but blocking of potentially illegal websites in general.

Telenor believes that it is not, and nor should it be, the Internet service providers' responsibility to block, or rather to censor, parts of the Internet upon request from rights holders' or rights pretenders. Such a situation might have far-reaching and potentially very unfortunate consequences for the information flow on the Internet. In practice a duty to block will imply that Internet service providers must take on a role that is meant to be reserved for the prosecution authority and the courts of law. Therefore, just like the rest of this industry, Telenor has taken a principal stand in terms of how blocking requests from rights holders and rights pretenders are to be dealt with. All requests are dealt with in the same way. Telenor does not consider whether the requests are sufficiently substantiated by facts or by law. As an Internet service provider, Telenor has no authority or opportunity to consider the thousands of requests received each month. "

The relationship between Telenor and The Pirate Bay is not described in the appeal. It is an undisputed fact that there is no relationship. Telenor is not The Pirate Bay's Internet service provider, and nor does Telenor have any other actual or contractual relationship with The Pirate Bay. Besides giving its customers access to the Internet, which may include the website The Pirate Bay and other, similar websites, Telenor plays no part in the illegal file sharing that takes place. Telenor provides a completely generic service. Its role may be compared to other providers of communication and infrastructure services such as telephone, electricity, logistics, public transport etc., including Posten and the Norwegian Public Roads Administration.

### **The condition that the rights holders shall have a "claim" against Telenor**

The appellants' (principal) claim is described as "*respect for copyright*". The claim is substantiated by the allegation that "*Telenor contributes to the illegal actions of The Pirate Bay's and Telenor's end users.*" Since The Pirate Bay's do not constitute a direct offence, but contribution to copyright infringement, if anything, the relationship between Telenor and The Pirate Bay will therefore be a matter of contribution to contribution to copyright infringement.

Telenor's principal claim is that the appellants have no statutory basis for their claim.

The E-Commerce Act exempts Internet service providers from liability unconditionally. Thus, Internet service providers shall not be liable for the traffic (files) transferred in their network, cf. Section 16. This exemption from liability is principally substantiated, including by the respect for freedom of speech and freedom of information. Section 19 of the E-Commerce Act confirms that Internet service providers have no general duty to inspect or investigate of the traffic through their network. Nor do Internet service providers have a duty to carry out inspections, investigations or other forms of action upon rights holders' request. Section 20 of the E-Commerce Act, which in the appellants' opinion "establishes" a duty to block (p. 14 of the appeal), contains nothing but a reference to "other legal grounds". Thus, this is not an independent statutory basis for a claim, which the District Court correctly pointed out. Under any circumstances, the E-Commerce Act is not a statutory basis for a claim for "respect for copyright".

The Copyright Act is the legal basis for claims for compensation, penal sanctions or confiscation, cf. the penal provisions in Sections 54-56. It is undisputed that Telenor cannot become the object of such claims. However, the Copyright Act contains no provisions on claims for respect. Nevertheless, Section 11a of the Copyright Act exempts the actions of Internet service providers from the originator's exclusive rights, and the appellants can therefore not withdraw the actions in the exclusive rights sphere by constructing a contribution liability.

Article 8.3 of the Copyright Directive provides no independent statutory basis for the appellants' claim. EU Directives have no direct effects in Norwegian law, and the provision was not actively implemented in Norway. Nevertheless, the directive provision does not give legal basis for an unconditional right for an injunction. That means that passive implementation or directive-conformal interpretation does not give the Copyright Act or the E-Commerce Act a meaning that provides a statutory basis for the rights holders' claim.

The Ministry of Culture and Church's letter of 27 September 2007, which the appellants attach a lot of importance to when interpreting the Directive, does not indicate that a preliminary injunction may be decided upon in this case. The letter refers to a different situation than this one, and nevertheless the Ministry does not give voice to an unconditional right of injunction in the situation described in the letter.

Provided that there should be a statutory basis, Telenor's alternative submission is that Telenor does not unlawfully contribute to infringement of the appellants' copyright. The appellants have claimed that both active and passive contribution occurs. However, during the oral proceedings before the District Court it became clear that it is in fact passive contribution they refer to. This is continued in the notice of appeal, in which Telenor's actions are described as "failure to block their end users' access to *The Pirate Bay*".

For unlawful active contribution (if relevant) more is required than providing a generic, legal service. That the District Court describes Telenor's service as an activity appears somewhat unbalanced. Telenor has no activities that are specifically related to illegal file sharing. (On the contrary, Telenor informs its customers and others that file sharing must take place in accordance with the rights of the originator.)

According to the Ministry's discussions in the legislative background of the E-Commerce Act, Odelsting Proposition no. 4 (2003-2004), providing access to the Internet, irrespective of whether the access is used for illegal purposes, is basically legal even without the exemption from liability that was established by law in Section 16 of the E-Commerce Act. "He who offers transfer or access services under Section 16 is probably already exempted from liability for the information he only transfers." That implies that such services cannot, in principle, be regarded as illegal contribution.

For illegal passive contribution, a special connection is required between the principal and the contributor, and the contributor must have a special obligation to act. It can be established that there is no connection between Telenor and The Pirate Bay, and there is nothing more than a normal connection between Telenor and the customers. It can also be established that Telenor does not have a duty to act no matter what. On the contrary, they are given the freedom not to act by law.

In order for active or passive contribution to be illegal, culpability must be present. However, Telenor's actions are not reprehensible. Since there is no duty to block website before an administrative or legal decision, if any, it can be established that Telenor has not violated any standards of care in this case. On the contrary, Telenor and the business in general believe that non-compliance with blocking requests from civil parties is the alternative with the most care. It is also an approach that is in accordance with applicable law.

Under any circumstances, the main claim and the injunction claim will constitute an infringement of the freedom of speech and the freedom of information, cf. Section 100 of the Norwegian Constitution and Article 10 of the European Human Rights Convention. A duty to block will imply that Telenor is forced to prevent its customers from sharing and receiving information on The Pirate Bay. This will also include legal content, the presence of which on The Pirate Pay is undisputable. For example, the website is used as a channel for communication of political opinions. It is not decisive that this legal material can also be acquired through other channels. The freedom of speech and the freedom of information's main rule of prohibition against pre-censorship will be violated through an injunction in this case. The freedom of speech and the freedom of information must carry the most weight when considering the case not only independently, but also in light of the far-reaching consequences an injunction might have in this case, cf. Kyrre Eggen's "Freedom of Speech" of 2002, page 157 et seq.

If the Court should still reach the conclusion that the freedom of speech shall be infringed in this case, this presupposes a clear statutory basis. As the District Court suggests in its decision, there is no clear statutory basis for the appellants' claim. A principle of proportionality applies to infringements of the freedom of speech, cf. Article 10 of the ECHR. A principle of proportionality applies correspondingly for the limitation in the EEA law's four freedoms, on which the E-Commerce Directive and the E-Commerce Act are based. However, there is no proportionality between the appellants' claim for injunction and the facts on which it is based. Whereas the claim is based on some of Telenor's customers having used The Pirate Bay for illegal file sharing, an injunction will order Telenor to block all customers' access to use The Pirate Bay for illegal and legal purposes in the future.

***Regarding the condition that the Rights Holders must establish a basis for a provisional measure***

Telenor maintains that there is no basis for a provisional measure.

The appellants have experienced a shortfall in turnover in recent years. They believe that this is particularly due to illegal file sharing. It is argued that they are losing hundreds of millions each year. That means that illegal file sharing allegedly implies a loss of tens of millions per month. Therefore, the appellants have claimed that there is a basis for a provisional measure pursuant to Section 34-1 (1), litra a and b, of the Dispute Act. Both alternatives require necessity. Telenor argues that the necessity requirement is not fulfilled in this case. In clause 7.1 of the appeal, the appellants claim that a preliminary injunction is necessary because "*it is, in fact, the only alternative*" to enforce their rights. It is particularly emphasised that even though the persons behind The Pirate Bay have been sentenced to pay damages and imprisonment in Sweden, The Pirate Bay is still available.

It may be established that it took six years from The Pirate Bay was established in 2003 until the appellants claimed a preliminary injunction against Telenor in the summer of 2009. In the case it has been documented that the Rights Holders, as represented by IFPI, already in 2004 had decided on a global strategy on how to enforce their rights in illegal file distribution. It has also been documented that the appellants' counsel has over a long period of time held several lectures in which the rights holders' access to claim injunction against internet service providers has been defended. However, this access has not been used.

The rights holders in Denmark filed a petition for injunction against internet service providers in 2006 (the Tele 2 case concerning the website All of Mp3) and 2007 (the Sonofon case concerning the website The Pirate Bay). In Norway the rights holders have had the opportunity to file a petition for preliminary injunction against The Pirate Bay since 2003, file a petition for preliminary injunction or bring a civil action against file sharers directly, or file a petition for preliminary injunction or bring a civil action against Telenor. In this period, several of the appellants have also stopped using technical protection systems to limit illegal file sharing. It was not until in the summer 2009 that a petition for preliminary injunction was filed against Telenor. An ordinary action has still not been brought, even though the petition is substantiated by the disadvantages which the appellants suffer in the period between an injunction decision and a final and enforceable judgement. The necessity, if any, of an injunction can therefore not burden Telenor.

Telenor, on the other hand, has long been working on the rights holders' side to establish good solutions for legal sale of music on the Internet. Telenor's attitude is that such solutions is necessary for web-based sales, and that they may compete against and thus prevent illegal file sharing. Therefore, Telenor has recently spent considerable resources on launching a subscription service for sale of music together with Platekompaniet and Asono. Telenor also has a service for legal web-based sale of movies.

In this case a report prepared by TONO's Swedish associated organisation STIM has been presented. This report concludes that nine out of ten music users on the Internet are interested in paying for legal web-based subscription services for music. That good, legal solutions result in increased sales is substantiated by IFPI's own sales statistics. The statistics show a marked increase in legal sale of music on the Internet in course of 2009.

For Telenor, the case appears to be almost nothing but an ordinary action disguised as a petition for preliminary injunction. If the appellants' views are heard in the matter of whether there is a claim, they can nevertheless not be heard in the matter of whether there is a basis for a provisional measure.

### ***Regarding the Court's assessment of the substantive issues***

The District Court first makes an assessment of Telenor's principal submission that there is no legal basis for the claim. The Court correctly states that neither section 20 of the E-Commerce Act nor Article 8.3 of the Copyright Directive provides any basis, as they only contain references to other legal authority.

The Court then considers whether the Copyright Act provides a legal basis and comments that it follows as a necessary consequence of the copyright, cf. section 2 of the Copyright Act, that copyright holders must have a right to demand that infringements of their exclusive rights are stopped or prevented. It seems here that the Court may have mixed the assessment of the main claim and the claim for injunction. Although a claim for injunction may imply that infringements are stopped or prevented, a main claim must be founded on the sanction provisions of the Copyright Act, which only contain instructions regarding penal sanctions, compensation and confiscation, but not termination or prevention.

Having expressed its uncertainty regarding the question of legal basis, the District Court considers Telenor's alternative claim – that Telenor, if there is a legal basis, not negligently or wilfully is contributing to infringement of copyrights. The Court finds that Telenor's acts constitute physical contribution to the copyright infringements, but because Telenor's acts are the same irrespective of whether the Internet access is used for legal or illegal purposes, the Court is of the opinion that the contribution is not unlawful. The District Court has here chosen one of two approaches to the concept of contribution – an approach which may perhaps lead to misunderstandings. The approach chosen by the District Court is first to consider whether Telenor's activity is a factual/technical condition for the principal's acts and then establish the limits of the concept of contribution via a reservation of lawfulness. It is of course a fact that the services of Internet providers are a condition for any illegal activity on the Internet. The same can be said about suppliers of computers and other forms of technical equipment and services. Such factual contribution is often referred to as "technical contribution".

However, providing services that are a physical condition for an illegal act is not sufficient for being regarded as an accomplice in the legal sense.

The somewhat more usual approach, which was not chosen by the District Court, is to make these two steps in one and the same process, i.e. to interpret a reservation of lawfulness into the concept of "contribution". The circumstance which the Court's reservation of lawfulness is based on – is that this is a legal service which is being used by some for illegal purposes – is in theory and practice normally used as a circumstance which places the act totally outside the concept of contribution. This is done already in the preparatory works to the Penal Code of 1902: "*Acts that in themselves pursue a legitimate aim should never be considered as criminal complicity to an illegal act even if they implicitly also make something illegal possible*".

However, since the result of the two approaches is the same, it is not of decisive importance how the concept of contribution is understood. Having established that Telenor's legal service does not constitute any unlawful contribution based on the fact that Telenor's service is the same irrespective of whether the Internet access is used for legal or illegal services, the District Court proceeds with its assessment of the reservation of lawfulness. It appears somewhat unclear why the District Courts continues its assessment of unlawfulness, having concluded that there is no unlawfulness, and the statements therefore appear almost as an obiter dictum.

In its assessment, the District Court first considers the practical and fundamental consequences an injunction may have to Telenor and other Internet providers. The Court then considers the appellants' need for terminating the infringements. Telenor is of the opinion that the starting point for the latter assessment is somewhat mistaken. The reservation of lawfulness is meant to prevent that acts that may be unreasonably affected by the wording of the provision should be regarded as illegal. The starting point for this assessment must be the act in itself (here: whether it is reasonable that the otherwise legal services of Internet providers should be deemed unlawful complicity in Internet crime). It is, of course, not the case that the extent of the copyright holders' need for an injunction makes the services of the Internet provider more or less unlawful. Also the appellants' submissions regarding the reservation of lawfulness are incorrectly based on "*the reasonableness of the plaintiffs' claim*".

### ***Regarding the appellants' submissions and statement of claim in the appeal***

The appellants have submitted the claim that Telenor should be prohibited from contributing to acts which take place "*via the website and the trackers The Pirate Bay*". The "website" and the "trackers" are two somewhat different things. From what Telenor understands, The Pirate Bay no longer has any tracker. This means that this part of the claim cannot be allowed.

To simplify, a tracker can be described as an electronic catalogue of contact information which is used to establish contact between Internet users. This contact can be used for a number of purposes, legal and illegal, depending on the users' choice. The contact can inter alia be used for file sharing without the consent of the copyright holder. File sharing can also take place without a tracker, by contact being established between Internet users in another way (e.g. via e-mail). A tracker does not necessarily have a connection with a website. There are a number of trackers on the Internet. Previously, The Pirate Bay had a tracker. This was found on the domain tracker.thepiratebay.org. This tracker has now closed down.

As far as Telenor understands, the file sharing which at present is associated with The Pirate Bay takes place by means of a number of different trackers, or it takes place without the assistance of a tracker. The above also clearly illustrates the complex consequences of ordering Internet providers to block websites and web services. The Internet is very dynamic and decentralised. Websites and web services are being changed, established, closed down and linked to continuously. Internet providers have no possibility to keep themselves updated of all such changes, which is a prerequisite for a blocking duty.

Before Telenor received the request to block The Pirate Bay, Telenor had received requests from the copyright holders to disclose customers' identity to the copyright holders and to forward to its customers a notification letter from the copyright holders. The appellants point out that Telenor did not comply with such requests. Telenor assumes that this is done in an attempt to establish guilt on the part of Telenor. It is, however, not disputed that Telenor has no *obligation* to comply with such requests. Besides, Telenor is of the opinion that they are not *entitled* to this, cf. section 2-9 of the Electronic Communication Act. Telenor's opinion is supported by the letter from the Norwegian Post and Telecommunications Authority, cf. their letter of 14 April 2009: "*the forwarding is a breach of the duty of confidentiality which the Internet providers have under section 2-9 [of the Electronic Communication Act]*".

The appellants point to the Copyright Directive as the fundamental basis of the case. As an extension of this, vital importance is attached to the letter from the Ministry of Culture and Church Affairs of 27 September 2007 as support of the appellants' understanding of the Directive. The appellants claim that the Copyright Directive and the Ministry's letter "*have not at all been considered by the District Court*" (items 5.1 and 5.3 of the appeal). However, the District Court's reasoning does not indicate such conclusion. The District Court's reasoning only indicates that no decisive importance has been attached to the letter and the Directive. This is in accordance with Telenor's view.

It is claimed in the appeal that "*the Copyright Directive gives a general and unconditional right for copyright holders to apply for injunctions against intermediaries to prevent the violation of a third party...*". This is oversimplified and reflects an incorrect understanding of the Directive provision. It follows from the wording of the Directive that it only directs the individual member state to place copyright holders "*in a position to apply for an injunction*". Pursuant to paragraph 59 of the preamble, it is left to the individual member state to establish the further "*conditions and modalities*" for this. The Directive can hardly be understood as a "*general and unconditional right (...) to apply for injunctions*".

The appeal further claims that the Copyright Directive does not contain any reservation of lawfulness and no requirement of guilt. It is unclear what the appellants claim here, as it is acknowledged that the Copyright Act sets forth conditions of guilt and that a reservation of lawfulness applies. In any case, it is, as mentioned above, left to the individual member states to lay down conditions. The condition of guilt and the reservation of lawfulness are therefore not in any way contrary to the Directive. For this reason, it is also difficult for Telenor to understand how a possible Directive-conform interpretation of Norwegian statutory rules could give another result than an ordinary interpretation.

It is also stated in the appeal that *"The Ministry of Culture and Church Affairs has assumed that the copyright holders have such a "claim" against Internet providers (...) and that this claim can form the basis for a preliminary injunction"*. The appellants have here attributed a point of view to the Ministry which is not substantiated by the letter. The letter refers to the Danish TDC case, where the Internet provider TDC was ordered to block an illegal file sharing service which had its Internet access as a TDC subscriber. It is clear that The Pirate Bay does not have its Internet access from Telenor, but as a subscriber of another Internet provider. In any case, the Ministry's letter cannot be taken to mean that the copyright holders have a claim in such subscription cases, but as an expression of the fact that the copyright holders, depending on the circumstances, may have a claim, but that this is for the courts to consider. The incorrect understanding of the content of the letter leads to the mistaken conclusion that *"the District Court's decision is inconsistent with the letter from the Ministry of Culture and Church Affairs"*.

In its decision, the District Court emphasised the fundamental qualms about Internet providers being given the responsibility for evaluating the legality of websites which the copyright holders demand stopped. As mentioned in previous pleadings, Telenor receive approximately 14,000 such requests each month. If a duty to block is imposed on Telenor in the present case, Telenor must continuously decide whether an equivalent duty applies to the other requests received by Telenor. The appellants argue that the District Court's evaluation of this point is wrong. Reference is made to the fact that it is the courts, not the Internet providers, who shall make this evaluation.

Telenor finds it difficult to understand the appellants' reasoning on this point. The appellants submit that Telenor has a duty to block, not that a duty is only triggered by a legal decision. The authority for the claim must depend on Telenor acting contrary to a statutory duty which exists, independent on a subsequent legal decision. If the appellants succeed in their claim that Telenor has a duty to block, that would imply that Telenor and other Internet providers are obliged to continuously consider copyright holders' requests for blocking – prior to a legal decision. The result would be that the Internet providers themselves must act as police and law courts.

The appellants have submitted that Telenor has been at fault because Telenor has done nothing to prevent the file sharing. As part of this reasoning, the appellants refer to the preparatory works of the E-Commerce Act. In the appeal it is stated: *"Reference is further made to Proposition to the Odelsting no. 4 (2003-2004), page 32, left column, where it is established that the service provider is not exempted from such duty to inspect if he receives well-documented information"*. The appellants here refer to the Ministry's account of the previous consultation paper, without saying so. In the Ministry's subsequent assessment on the following page (p. 33, item 10.3), it is emphasised that the consultation paper's statements on the duty to inspect only apply to the providers of storing services, so-called net hosts, but not to Internet providers like Telenor.

Even if the appellants should succeed in their claim that there is a claim and basis for a provisional measure, the Court cannot allow the submitted claim. The claim refers to not very specified duties to act based on general legal characteristics. It is thus not suited to give precise legal effects which Telenor with a sufficient degree of predictability can relate to.

### **Regarding the question of legal costs**

Although the Court found for Telenor, Telenor was not awarded legal costs. The District Court referred to the Dispute Act, section 20-2, paragraph 3, which authorises exemption in cases where *"weighty grounds justify exemption. The court shall, in particular, have regard to a) whether there was justifiable cause to have the case heard because the case was uncertain..."*. The exception from the main rule was justified by the fact 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"*.

Telenor cannot see that the District Court has expressed any doubt. The District Court has not even gone into the other legal submissions, including the question of basis for a provisional measure. No doubt on these issues can thus be deduced from the District Court's reasoning. The fact that the case gives rise to questions of a principle nature should, in Telenor's opinion, rather be addressed to the legislator. Telenor cannot see that there are sufficient weighty grounds for applying for preliminary injunction which could justify any exceptions from the main rule that Telenor shall be awarded legal costs. Telenor can also not see that any exception from the main rule can be justified by section 20-2, paragraph 3, litra b or c. Pursuant to section 20-9 of the Dispute Act, Telenor claims that the District Court's decision on legal costs should be reversed.

Moreover, Telenor maintains that the company is not liable for the appellant's legal costs in the event they should succeed in their claim. Pursuant to section 20 of the E-Commerce Act, Telenor is exempted from liability with regard to claims for damages under other legal framework. Thus, Telenor is not obliged to compensate the appellants for their legal costs pursuant to chapter 20 of the Dispute Act

In accordance with the above, the following statement of claim is made:

1. The appeal shall be dismissed.
2. The appellants shall jointly and severally pay Telenor Norge AS' legal costs before the District Court and the Court of Appeal with the addition of statutory interest on overdue payment from the date of maturity until payment is made.

**The Court of Appeal** has the following view of the case:

The Rights Holders have in their petition for a preliminary injunction requested that Telenor should be prohibited from contributing to making accessible and reproducing copies of material protected by copyright via the website The Pirate Bay. Further, the Rights Holders have requested that Telenor should be ordered to prevent Telenor's customers from gaining access to a number of internet addresses at which The Pirate Bay can be reached. The petition is formulated in accordance with the Dispute Act, Section 34-3, first paragraph, which establishes on a general basis that a preliminary injunction may aim for the defendant to be instructed to refrain from performing or to perform certain actions.

In order for the petition to be sustained the Rights Holders must have a claim against Telenor which the injunction is fit to secure (the Dispute Act, Section 34-1, first paragraph, litra a), or for which the injunction can serve as a temporary arrangement in the dispute regarding the claim (the Dispute Act, Section 34-1, first paragraph, litra b). It follows from the Dispute Act, Section 34-2, first paragraph that the Rights Holders must prove the claim as well as the basis for a provisional measure. It further follows from the Dispute Act, Section 34-1, second paragraph that an injunction is conditional on the inconvenience of the injunction to Telenor being patently disproportionate to the interest of the Rights Holders in an injunction being granted.

The Court of Appeal will first decide on the basic condition that the Rights Holders must prove a claim against Telenor.

The claim in the present case must be based on the Rights Holders' exclusive right under the Copyright Act, Section 2:

Subject to the limitations laid down in this Act, copyright shall confer the exclusive right to dispose of a literary, scientific or artistic work by producing permanent or temporary copies thereof and by making it available to the public, be it in the original or an altered form, in translation or adaptation, in another literary or artistic form, or by other technical means,

in combination with the criminal or compensatory liability for accessorizing of the Act, cf. the Copyright Act, Sections 54 and 55. The central issue of this case is whether Telenor within the meaning of the Act – objectively and with the necessary degree of subjective guilt – may be regarded as accessorizing in the infringements of copyright which take place among Telenor's customers via The Pirate Bay in Telenor making its network available and failing to comply with the request of the Rights Holders that it should block The Pirate Bay from its network.

The distinctive aspect of the application of the law in this case is that the legislator through the Electronic Commerce Act, Section 16, third paragraph expressly exempts Telenor by virtue of being a provider of transfer and access services from its potential liability for damages and criminal liability under the Copyright Act. At the same time, the legislator has in the Electronic Commerce Act, Section 20 made the assumption that this exemption from liability should not prevent "a court of law or an administrative body from insisting, on other legal basis than this Act, that the service provider stops or obstructs an infringement". According to the preparatory works of this provision, the legislator has assumed that Telenor is exposed to petitions for preliminary injunctions independent of the exemption from liability, cf. Odelsting Proposition no. 4 (2003-2004), p. 34.

Sections 16-18 of the bill shall thus not prevent any court or administrative authority from requesting that a service provider stops the infringement in accordance with national law. Nor shall they prevent the member state from establishing a procedure for removing information or prevent access to it. This is set out in section 20 of the bill. Pursuant to Norwegian law, a party may obtain preliminary injunction. This is normally done to secure a claim when the claimant has not yet established any basis for execution. The right to preliminary injunction is not affected by the introduction of articles 12-14. This also applies to seizure.

The fact that Norwegian law shall allow preliminary injunction against service providing intermediaries contributing to infringement of copyright is also assumed in article 8.3 of the Copyright Directive.

However, the Court of Appeal cannot see that the conditions expressed in connection with the E-Commerce Act and the Copyright Directive that there must still be access to petition for preliminary injunction against technical service providing intermediaries alone warrant a claim against the Rights Holders. Item 59 of the preface to the Copyright Directive firmly establishes that it is up to the member states to formulate the further conditions for preliminary injunction:

In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

Based on this, the Court of Appeal disputes the Right Holders' submission that the Copyright Directive does not have other conditions for blocking than stating that "the intermediary's service is used by a third party to infringe a copyright or a related right". The Copyright Directive formulates no conditions for the preliminary injunction petitioned by the Rights Holders in this case. The general principle that the applicant of the law shall choose the result that best conforms to the rule in international law, and thus "the interpretation that allows blocking", can therefore not be taken into account by the Court of Appeal in what follows.

Neither the wording or preparatory works of the E-Commerce Act, the Amendment Act that implemented the Copyright Directive in the Copyright Act nor the letter from the Ministry of Culture of 27 September 2007 gives any relevant guidance as to the question dealt with by the court in this case. Even though all sources, at some point, indicate that claims and petitions for preliminary injunction can be submitted against technical intermediaries, they say little about the scope of the accomplice liability. The Court of Appeal assumes that this is a part of the background for the notification by the Ministry of Culture in Prop. 1 S (2009-2010) regarding a review of the Copyright Act, with a view to specify the accomplice liability for unlawful file sharing.

This state of the law leaves questions as to where the limit for intermediary service providers' accomplice liability – and thus the possibility that the Rights Holders have a claim against Telenor – shall be drawn. The issue is discussed in Rognstad/Lassen, Copyright (2009) page 227:

Even if the rules regarding exemption from liability in the E-Commerce Act become applicable, one must still consider whether the intermediaries can be imposed with measures to prevent that their services are used as tools to conduct copyright infringement. In article 8(3) of the Copyright Directive, it is assumed that the rights holders can petition for preliminary injunction towards intermediaries if the services provided can be used for copyright infringement. In Danish legal practice, there are an increasing number of decisions where access providers are imposed to block the access to unlawful material. In the decision by the Danish Supreme Court, UfR 2006 p. 391, the telecom company TDC was ordered to block the internet access of the owners of two servers containing illegal music files. The decision was based on the fact that TDC presented temporary samples when transferring the files (from the provider to the receiver), and that a temporary presentation based on illegal copying is in conflict with section 11 no. 3 of the Danish Copyright Act. As long as TDC thereby violated the Copyright Act and other conditions for preliminary injunction under the Danish Dispute Act were complied with, the decision to block the internet access was warranted. Similarly, in 2008, the Danish Telenor, Sonofon, was ordered by *Østre Landsret* to block its customers' internet access to the website The Pirate Bay.

In Norwegian law, similar decisions cannot be made on the same basis. In Norway, the access to present temporary copies in connection with network transactions is not conditional on a lawful use of a work, cf. section 11 a first paragraph litra a of the Copyright Act. On the other hand, it is worth mentioning that the rules on exemption from liability in the E-Commerce Act are not "of impediment for a court of justice ... on a different legal basis ... to claim that the service provider stops the infringement or prevents it", cf. section 20 of the E-Commerce Act. If the service provider can be regarded as "contributing" to unlawful conduct in conflict with section 54, cf. section 55 of the Copyright Act, there might be a basis for the prohibition and preliminary injunction even if the rules on exemption from liability in the E-Commerce Act apply and the conditions for punishment or damages *for that reason* are not met. Whether this is sufficient to secure compliance of the requirement in article 8(3) of the Copyright Directive is a different matter.

The Court of Appeal finds, in line with the views expressed above, that the correct point of departure under applicable law must be to imagine that Telenor's exemption from liability is gone. Only if Telenor's position as a provider of internet services otherwise would have fallen under the scope of the Copyright Act regarding contribution to copyright infringement, the Rights Holder might have had a claim against Telenor. The amendment regarding contribution was made to the Copyright Act through an Amendment Act of 23 December 1988 no. 101. The preparatory works of the Amendment Act only indicate the fact that the scope of the provision regarding contribution shall be determined based on the general background law, cf. NOU 1983:35 p. 120 and Odelsting Proposition no. 34 (1987-1988) p. 55. As already expressed, the Court of Appeal does not see how such an approach can give results that are in conflict with Norway's obligations under the EEA Agreement, or that are not in accordance with the legislator's premises in connection with granting the exemption from liability in the E-Commerce Act.

Based on this, the Court of Appeal has concluded that the Rights Holders do not have any claim against Telenor. It is unnatural to consider Telenor's activity as a provider of a network as a criminal contribution to the direct uploading or downloading of copyright protected material between some of Telenor's customers. Telenor's neutral and technical contribution to such activities is too remote to be characterised as illegal and criminal. On this point, the Court of Appeal has found support in the preparatory works of the Amendment Act that introduced the rules on exemption from liability in the E-Commerce Act, cf. Odelsting Proposition no. 4 (2003-2004) p. 15.

The completion of article 12 [corresponds to section 16 of the E-Commerce Act] is not assumed to imply any change of reality from applicable law for these service providers... Those who offer transfer and access services pursuant to section 16 are probably already today exempted from liability for the information they only convey.

The content of section 254 of the Penal Code regarding liability for defamation can to a certain extent be transferred to the interpretation of the provision regarding participation in the Copyright Act. A person who has only participated in the technical presentation or distribution of the text cannot be punished for defamation. The purpose of this exception is to add a reasonable scope to the accomplice liability, and must be regarded as a result of a generally accepted reservation in accomplice theory, cf. Andenæs/Bratholm, Special criminal law, page 188.

The exceptions in section 254 are also based on a wish to add a reasonable scope to the accomplice liability. In most cases, it would be in conflict with people's sense of justice if the mentioned groups were to be prosecuted. Nor was this done until 1973 when the provision was adopted, and the Ministry stressed that the effect of an amendment would be more symbolic than real.

The Court of Appeal's view that Telenor's accomplice liability pursuant to the Copyright Act – not even without the specific exceptions for exemption for liability in the E-Commerce Act – would not have been so extensive as to make Telenor an accomplice for the crimes that might be committed by Telenor's end customers via the website The Pirate Bay, may also be supported by the general reservation of unlawfulness. In the so-called Napster judgement, the Supreme Court stated the following, cf. Rt. 2005, page 41 paragraph 65:

Whether or not the linking shall be considered as contribution giving rise to liability must be due to an evaluation of the details of the matter. A line must be drawn from a general reservation of unlawfulness. I refer to Andenæs page 154 et seq, and mention briefly that, here, it is stated that the expression unlawful often can be translated with "improper", "inappropriate", "reprehensible" or similar.

The Rights Holders have asserted that the result in this judgement, which stated that publishing links on the internet to protected music files, was regarded as giving rise to liability, as a support from its petition, including its alleged claim against Telenor. The Court of Appeal cannot see that the judgement can be in aid for such an analogical conclusion: In the Napster case, the music was directly available on the internet via the links uploaded on Napster's website. The person liable in this case was the same person who had organised the unlawful uploading. The present case is different. The Pirate Bay offers a tool to those who visit the website for finding files with copyright-protected material, and the website thus enables the various users to come in contact with each other so that they can share files directly between them. Such file sharing can be lawful or unlawful, depending on the users' choices. Therefore, Telenor has a completely different role in the unlawful file sharing taking place via The Pirate Bay than what was the case for the liable party in the Napster case. As opposed to the Napster case, there is no basis for concluding that Telenor, as a provider of technical infrastructure, is liable for "wilful and highly reprehensible acts of participation", cf. paragraph 67 in the judgement. It is difficult to characterise Telenor's contribution to unlawful file sharing amongst Telenor's internet customers via The Pirate Bay, as improper, inappropriate or reprehensible.

The Court of Appeal cannot see that Telenor's role as a passive accomplice by not blocking the website in spite of repeated requests and its knowledge of unlawful acts taking place via The Pirate Bay, changes the legal assessment that Telenor is not participating. The decisive element is still that the rights holders, based on the Copyright Act, cannot require that Telenor blocks The Pirate Bay. In this respect, it is also of relevance that the E-Commerce Act, in terms of Telenor's position as a provider of internet access pursuant to section 16 of the Act, does not impose Telenor with any obligation to remove or block the access to the unlawful content that it transmits. Such an obligation to act is, pursuant to the E-Commerce Act, reserved for the providers of hosting services pursuant to sections 17 and 18 of the Act, cf. Odelsting Proposition no. 4 (2003-2004), page 33.

What happens if a service provider is notified that he is storing unlawful information? How detailed must a notification be before the service provider risks coming in a situation where he might lose his exemption from liability pursuant to the law if he does not investigate whether the contents of the notification are correct? These questions are relevant for the service provider that offers hosting pursuant to section 18. These service providers must themselves assess whether or not the information they store is unlawful.

Consequently, the Court of Appeal has concluded that the basic condition for allowing the Rights Holders' petition for preliminary injunction – that there exists a claim that the injunction can secure or serve as a preliminary arrangement for in a dispute about the claim – is not met. The claim on which the injunction is based is not warranted by Norwegian law. In the sense of the Copyright Act, Telenor does not participate in criminal acts or acts giving rise to liability amongst its end users by making its network available to the public without blocking The Pirate Bay.

Consequently, the Court of Appeal does not need to elaborate on the other conditions in order to allow the petition and the parties' submissions in this respect. All the same, the Court of Appeal establishes briefly that it does not find that the claimants have rendered probable the basis for provisional measure.

The claim on which the Rights Holders base their petition raises a principal legal issue with enormous consequences for providers of internet access. The nature and scope of the issue in itself speak against a preliminary ruling to secure a claim that in reality is identical to the petition for injunction.

A preliminary injunction is meant to serve as security or as a temporary arrangement in a dispute regarding the claim. Even though a dispute between the parties has been pending for years, the Rights Holders have still not instituted legal proceedings to have Telenor block The Pirate Bay on its network. The Court of Appeal cannot see that the time that might pass until a legally binding decision is made is sufficient for claiming that the pursuit or completion of the claim will be materially complicated or requires an injunction to "prevent material damage or disadvantage". Telenor is not liable and the Rights Holders are, at any rate, referred to seeking compensation for their loss from those who carry out the unlawful file sharing. The substantial loss suffered by the Rights Holders because Telenor is not immediately imposed to block The Pirate Bay based on a petition for preliminary injunction, is, in the view of the Appeal Court, not an adequate provisional measure for the claim that the Rights Holders have submitted against Telenor.

The appeal is therefore dismissed.

Telenor has won the appeal and shall, pursuant to section 20-2 first paragraph of the Civil Dispute Act, have all legal costs incurred in the appeal by the Rights Holders covered. The decision in the Rights Holders' appeal has not been subject to such doubt that makes it reasonable to exempt the Rights Holders from their normal obligation to cover the legal costs as the failing party, cf. section 20-2 third paragraph letter a of the

Civil Dispute Act. Nor can the Court of Appeal see that there are "weighty reasons" for exempting the Rights Holders from their obligation to cover Telenor's legal costs.

In its reply, Telenor has requested in particular that the Court of Appeal re-examines the District Court's decision that the legal costs should be split, cf. section 20-9. Even if the Court of Appeal shall base such re-examination on its result, the court remains with the decision by the District Court. The court's decision is a result of the court's view that the case is so principled for the Rights Holders having raised so difficult legal questions that the Rights Holders had adequate reason to have their claim examined in the lower instance, cf. section 20-2 third paragraph letter a. However, the Rights Holders should have accepted the District Court's decision as sufficiently clarifying in the dispute between the parties. The District Court's result was the same as the Court of Appeal's – and, in all material respects, with the same arguments.

Telenor has presented to the Court of Appeal a statement of legal costs in the amount of NOK 252,625 exclusive of VAT, of which all constitutes the counsel's fee. The Court of Appeal takes for its basis that VAT shall not be compensated as Telenor can make deductions for incoming taxes. The Rights Holders have not made any objections to the statement, and the Court of Appeal takes into account that the stated amount constitutes Telenor's necessary costs in connection with the appeal, cf. section 20-5 first paragraph of the Civil Dispute Act.

As for Telenor's claim for default interest, the Court of Appeal refers to section 4-1 third paragraph of the Enforcement Act.

The decision is unanimous.