[NO] First Ruling on Criminal Liability for ISP

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From July 1998 until May 1999, Tele2 made so-called newsgroups available to its subscribers. Some of these newsgroups gave access to explicit sexual films and images involving children, animals, violence, coercion and sadism. This illegal pornography was stored on Tele2's server. Tele2 was therefore charged with infringement of Straffeloven § 204(1)a (the General Penal Codestrl.), which prohibits attempts to disseminate illegal pornographic material.

In examining the case, Oslo Tingrett pointed out the following. According to the preparatory works relating to § 204 strl., Internet hosts, access providers and cable companies are in principle excluded from § 204 strl., because they lack awareness regarding the distribution of the pornographic material. Tele2 cannot therefore be held responsible for material put on the Internet merely because it provides access to the World Wide Web.

However, the preparatory works do not hinder the application of § 204 strl. to newsgroup providers. Oslo Tingrett stressed that Tele2, in its role as a newsgroup provider, acted as a technical intermediary that has no control over the content of the material made available. This means there is only a small margin for creating criminal liability for newsgroup providers.

Directive 2000/31 EC (Directive on electronic commerce) limits an ISP's criminal liability for negligent behaviour, but does not exclude it entirely. Article 15(1) states specifically that an ISP is not obliged to control the content of material on its server. Recitals 47 and 48 of the Preamble mitigate the scope of Article 15(1).

The Court stated that there are other reasons why such liability might not be desirable. First of all, there is a conflict between the ISP's role as an intermediary on the one hand and the duty to censor on the other hand. Furthermore, it would be undesirable that an ISP be called upon to judge the legality of utterances. Finally, one has to take into account that it is difficult to control content automatically in an efficient and nuanced manner. The Court found that these arguments did not weigh very strongly in this case. The control that Tele2 had over the newsgroups it offered was incidental and mostly based upon tips from users. The company did not have a clear policy on this matter. The Court found that Tele2 could and should have been more efficient in its manual checks and controls based on the names of the newsgroups. Moreover, these checks should

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have been made on Tele2's own initiative. Especially so, since the number of newsgroups was limited to a few hundred and the names of these newsgroups clearly indicated the presence of illegal pornography. It would have been easy and practicable for Tele2 to go through the groups at regular intervals in order to identify conspicuous newsgroup names.

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