

[NO] Court of Appeal Decision in Norwegian DVD Case

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*Thomas Rieber-Mohn
University of Oslo*

In its decision of 22 December 2003, the Norwegian Borgarting Appellate Court acquitted a young man, Jon Johansen, who had been prosecuted for breaking the Norwegian Criminal Code section 145 (2) by participating in breaking the technical protection system CSS used on DVD movies. The background of the case, and the acquittal of Johansen by the court of first instance, are described in a prior IRIS article (see IRIS 2003-2: 15).

The Norwegian Criminal Code section 145 (2) makes it a crime to break a security measure or in similar ways to unlawfully access "data" or computer programs stored or communicated by electronic or other means. The court briefly stated that both DVD movies and the CSS-code itself constitute "data" in the context of section 145 (2). The main question was whether Johansen's gaining access to such data had been "unlawful". The court discussed several alternatives that might make Johansen's acts "unlawful".

The first alternative was related to the function of the DeCSS decryption program. Johansen had bought all his DVD movies legitimately and was therefore within his full rights to play the movies. However, the court had to determine whether the additional gaining of access to movies in decrypted form, and hence the possibility of copying the movies, rendered possible by DeCSS, was "unlawful". Based on the wording of section 145 (2) and the corresponding doctrine, the court found that it was up to Johansen to establish that such use of DeCSS would be lawful.

On the basis of section 12 of the Norwegian Copyright Act (the exemption for private use copying), the court found such lawfulness established. Considering the three-step-test of the Berne Convention art. 9, the court concluded that section 12 at least in a penal law context allows reproduction of DVD movies for private use. It was emphasised that DVD discs generally are easily damaged, and that consumers therefore have reasonable grounds for making backup copies of lawfully acquired movies. Further, rejecting one of the prosecution's arguments, the court stated that unilateral labelling on the DVD cover, prohibiting reproduction, generally is not sufficient under Norwegian law to deprive consumers of their "right" to make private-use copies.

The court then considered the second alternative: whether the decryption program itself had been unlawfully acquired. The decryption program had been developed by a German called "the nomad", utilizing, among others, the play keys from a Xing DVD player. In the court's view, the work performed by "the nomad" was reverse engineering (decompilation). It found that this reverse engineering was lawful according to section 39i of the Norwegian Copyright Act (decompilation in order to establish functional integration). (Despite the nationality of "the nomad", the court did not consider whether German law should be applied here). The court's argument on this issue was also, to some extent, based on the burden of proof.

The third alternative for the court to decide was whether the acquisition of the play keys as such had been unlawful. It found that these keys did not enjoy protection as such by section 145(2); the keys were part of the protection, while the decision of whether the access was unlawful had to be related to the movies.

As a result, the court concluded that Johansen had not unlawfully broken or circumvented a technical protection measure.

In addition, the court had to determine whether Johansen could be held liable for contributory infringement because of having aided, or attempted to aid, the use of DeCSS by others. In the case, the prosecution had not proven that other individuals had utilized DeCSS to copy unlawfully acquired movies. Thus, Johansen could not be held liable for contributory infringement. Still, the question remained whether he could be punished for attempted contribution, on the basis of publishing a program that made it possible for others to unlawfully access decrypted movies. The court admitted that DeCSS might be used for unlawful purposes, but, citing doctrine, it found that such a possibility was not sufficient as long as DeCSS also had a lawful use.

As a result, Johansen was acquitted.

Decision by Borgarting Appellate Court of 22 December 2003

http://www.jus.uio.no/iri/english/law/the_norwegian_dvd_case.html

