

[NO] Court of Appeal Decision in the napster.no Case

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On 3 March 2003, the Norwegian Eidsivating Court of Appeal gave its decision in the napster.no case (civil lawsuit). Finding for the defendant, the court overruled the first instance decision, which was reported in a previous IRIS article (see IRIS 2003-3: 16).

In brief, the defendant had maintained a web-site (napster.no) containing hyperlinks to illegal MP3 files on the web. The napster.no site did not itself contain any MP3 files, only links to such files elsewhere on the web. Clicking on the links published on napster.no led users directly to the chosen MP3 file and, through a popup menu, they were offered the options of playing the song or saving the file on their own computer (a third option was that of aborting the operation). The question before the Court of Appeal was whether the acts of the defendant were infringing the copyrights held by the creators and performers of the musical works concerned.

According to the Norwegian Copyright Act section 2, the exclusive rights of a copyright holder are defined as the right to exploit the work by producing copies thereof and by making it available to the public.

The court stated that persons uploading the illegal MP3 files to the web undoubtedly were infringing the rights of the copyright holders, since such uploading both involves producing unauthorised copies of the works and making them available to the public.

The question in this case, however, was whether the act of publishing hyperlinks to such already uploaded files also was a copyright infringement. This was seen as a question of whether linking involved making the works available to the public. According to the Norwegian Copyright Act section 2, a work is made available to the public (i) when it is performed outside private premises (public performance), or (ii) when copies of the work are offered for sale, rental or lending, or otherwise distributed or displayed outside such premises. Between these two alternative ways of making a work available to the public, the plaintiffs had argued that the acts of the defendant fell within the public performance criterion.

However, despite two prior Swedish and Danish court decisions considered by the Court of Appeal, both indicating that linking to a work involves making it available

to the public, the court found to the contrary. It concluded that, under Norwegian copyright law, the mere act of linking does not involve making the works available to the public.

The court then went on to discuss whether the defendant had contributed to the infringements committed by the uploaders of illegal MP3 files. It found that the infringing act of the uploader (the main infringement) was concluded as soon as the file had been successfully uploaded. As the acts of the defendant were subsequent to the actual uploading, the court could not establish any causality between the defendant's acts and the main infringements. On this ground it concluded that the defendant was not guilty of contributory infringement.

Further, there was no contributory infringement related to the downloading of files performed by the users of napster.no, as these acts involved the making of copies for private use, therefore it was outside the exclusive rights of the copyright holders.

Judgment by the Eidsivating Court of Appeal of 3 March 2004

