# [NO] The Norwegian Supreme Court Decides the napster.no Case

**IRIS 2005-3:1/28**

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The Norwegian Supreme Court has given its decision in the napster.no case, previously reported in IRIS 2003-3: 16 (first instance) and IRIS 2004-4: 14 (Appellate Court).

The Supreme Court found for the appellants - a consortium of rightsholders' organisations and record producers - holding the respondent liable for linking to illegal MP3 files on www.napster.no. Thus, as regards the outcome of its judgment, the Supreme Court confirmed the first instance decision, but its reasoning differed.

The appellants had maintained two legal bases for their claims; principally, that hyperlinking as such must be regarded as an act of making available to the public and therefore is controlled by the copyright holder under her sole rights; subsidiarily, that hyperlinking to illegal MP3 files constitutes a contributory infringement to the - obvious and non-disputed - infringement of the uploaders. Interestingly, the Supreme Court decided the case on the basis of contributory infringement, even though the judgment also contains a rather extensive obiter dictum relating to the principal question.

In its obiter, the Supreme Court stated that if hyperlinking is to be regarded as making available to the public under copyright law, then this must be so regardless of whether the material being linked to is of a legal or illegal nature. Further, the judgment as to whether hyperlinking is covered by the exclusive rights of the copyright holder or not cannot, as a point of departure, be affected by which type of link is being used (direct link, reference-link, etc). The Supreme Court also stated that merely to inform about a web-address where a certain work can be found, for instance by posting the URL on a website without generating a hyperlink, obviously cannot be regarded as making the work available to the public.

After distinguishing the case from a Swedish Supreme Court decision of 2000 (Tommy Olsson, see IRIS2000-8: 15), in which hyperlinking was seen as an act of making available to the public, and finding support to the contrary in the German Paperboy decision of 2003 (see IRIS 2003-8: 15), the Supreme Court arrived at what it seems to have regarded as the key point: When the mere posting of a URL

on a website (i.e. without any hyperlink) does not involve making any works available to the public, then how can this possibly change just because the URL is "made clickable"? Even without the technical functionality of a hyperlink, the user need only copy the URL to the clipboard and paste it to the address-field of the browser, in order to achieve the same result, namely gaining direct access to the content relating to the URL. The difference between these two situations is further diminished, considering that many computer programs today automatically transform URLs into hyperlinks. In the view of the Supreme Court, the distinction between these two situations is so subtle, that for the law to treat them differently, an adequate reason is required. Such a reason had not been presented by the appellants, and the Supreme Court could not think of any itself, stating that it found this question to be "particularly difficult".

It then stated that, to find for the appellants in this question, would mean having to operate with a presumption of implied consent, i.e. the presumption that whoever legally uploads content to the web thereby consents to the material being linked to by others. Such a rule of presumption would itself give rise to further doubts and conflicts.

Therefore, the Supreme Court chose to decide the case on the grounds of contributory infringement. It did not agree with the Appellate Court that each main infringement had been concluded as soon as the upload was completed. Rather, the Supreme Court found that in a situation like this, the main infringement is a continuous act that goes on as long as an illegal MP3 file is kept available in the web. Thus, linking to such a file - even though being an act subsequent to the uploading - can be regarded as a contributory infringement. Indeed, the Supreme Court saw it that way, characterising the acts of the respondent as "intentional and highly blameworthy".

***Norges Høyesterett - Dom., 27.01.2005, HR-2005-00133-A - Rt-2005-41***

http://www.lovdata.no/hr/hr-2005-00133-a.html

*Supreme Court judgment of 27 January 2005*