[DK] Restraining Injunction against Internet Service Providers under Danish Law

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Søren Sandfeld Jakobsen
Aalborg University

A pending Danish court case regarding the liability of Internet service providers (ISPs) for illegal content on the Internet has attracted substantial attention in the media, both on a Danish and an international level. The case concerns the Swedish website "The Pirate Bay", a peer-to-peer service which enables users, provided they have downloaded a specific software application, to generate links to music, films etc. on other websites on the Internet.

The Danish branch of the international record company industry IFPI filed for an injunction against the Danish ISP DMT2. IFPI argued that Pirate Bay reproduced and made publicly available copyright-protected works, without the consent of the rights holders, and that DMT2 contributed to the infringement by allowing its subscribers access to the Pirate Bay's website. Hence, the IFPI claimed that the Sheriff's Court should issue an injunction ordering DMT2 to block access to Pirate Bay through its network.

Despite all the media attention received by Pirate Bay, the issue of ISP liability is not new in Danish case law. The leading case is one decided by the Supreme Court in 2006, which dealt with the large number of copyright protected music files being made accessible online, without the right holders consent, from the computers of two private individuals. The right holders filed for an injunction order against the ISP to which the owners of the personal computers were subscribers. The parties agreed, as the Supreme Court expressly confirmed in the judgement, that the ISP had neither knowledge of, nor access to, the musical works being unlawfully transmitted via the ISP's network. Thus, the ISP was free from liability under Section 14 of the Danish E-commerce Act, cf. art. 12 of the E-Commerce Directive.

The exemption from liability does not, however, preclude Member States, in accordance with their legal system, from applying interlocutory remedies, such as injunction orders, against the intermediaries (cf. art. 12(3), 13(3) and 14(3) of the E-Commerce Directive). This is supplemented by art. 8(3) of the InfoSoc Directive (2001/29/EC), according to which Member States shall ensure that rightsholders 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. Thus, the pivotal issue in the case was not whether the ISP could be liable for the copyright

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infringements carried out via the its network, but whether the conditions under Danish law for issuing an injunction order were fulfilled. The Supreme Court found that this was the case and ordered the ISP to block the subscribers' access to the illegal content.

In a rather similar case, later in 2006, the Sheriff's court of Copenhagen issued an injunction against a Danish ISP ordering the ISP to block access to the Russian website "Allofmp3", which contained illegal musical files. The injunction followed the reasoning of the Supreme Court very closely, i.e. it stated that, on the one hand, the ISP – which provided nothing more than a transmission service – was free from liability pursuant to the E-Commerce Act/Directive and, on the other hand, that the freedom from liability did not preclude the ISP from being subject to an injunction order. The conditions under Danish procedural law for issuing an injunction were found to be fulfilled. Thus, the ISP was ordered to block its subscribers' access to the Russian website.

Given these heavy precedents, it is not surprising that the Sheriff's court in the Pirate Bay case issued an injunction along the exact same lines. As the ISP in this case also only provided a pure transmission service, it could not incur liability. Thus, this was not an issue. Rather, the issue was whether the conditions for issuing an injunction under Danish law were fulfilled. The Sheriff's court found that Pirate Bay was violating the rightsholders' copyright and that the ISP was contributing to the violation by transmitting the illegal content to its subscribers. Furthermore, the ISP itself violated copyright due to the automatic, intermediate and transient storage of the illegal content that took place in the ISP's network in the course of carrying out the transmission. The Sheriff's court further found that the case could not await an ordinary trial and, thus, that an injunction was necessary. Finally, the court stated that an order to block the subscribers' access to the website did not cause disproportionate harm to the ISP. Thus, the injunction was issued.

The case against Pirate Bay is under appeal and all three cases, including the Supreme Court case, raise several complicated questions regarding both the underlying EC law (the E-Commerce Directive and the Infosoc Directive) and Danish law. This does not change the fact, however, that there is currently solid case law establishing that an injunction will be issued ordering the ISP to block the access to websites with content which undoubtedly constitutes a copyright infringement.

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The District Court of Frederiksberg's ruling in case FS 14324/2007 of 5 February 2007, IFPI Danmark vs. DMT2 A/S

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