[DK] Danish Supreme Court Upholds Injunction to Block the Pirate Bay

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The Swedish website The Pirate Bay offers a service with which users can find and download so-called 'torrent files'. When using appropriate file-sharing software, these files can be used to download music, films, software, etc., from other users of the same file-sharing software (the so-called 'peer-to-peer (P2P) file sharing').

In April 2009, the four persons behind the operation of The Pirate Bay website were found guilty by a Swedish court of contributory copyright infringement and were sentenced to one year in prison, as well as ordered to pay damages of SEK 30 million. The website has also given rise to injunction cases against internet service providers (ISPs) in several European countries, including all of the Scandinavian countries (see IRIS Merlin database for a collection of previous articles on such cases).

In this Danish case, the Supreme Court by its decision of 27 May 2010 upheld an injunction against a Danish ISP to block access to The Pirate Bay. The injunction was first issued by the bailiff's court in 2008 and upheld by the high court later the same year.

The case started in 2007 when a number of rightsholders filed for an injunction ordering the Danish ISP Sonofon (at that time called DMT2) to block its subscribers' access to The Pirate Bay through its network. IFPI argued that The Pirate Bay infringed the rightsholders' copyright and that Sonofon contributed to the infringement by providing its subscribers with access to The Pirate Bay (see IRIS 2008-6: 7/10)

The decision in the case in all court instances very closely followed the reasoning in the leading case, a Supreme Court case from 2006, where another ISP was effectively ordered to terminate an internet connection that was used to distribute a large amount of copyright-protected music. It was taken into account that Sonofon, being a mere conduit service provider, was free from liability under Section 14 of the Danish E-Commerce Act, implementing Article 12 of the E-Commerce Directive (2000/31/EC). It was also taken into account that the liability exemption does not preclude member states, in accordance with their legal system, from applying interlocutory remedies such as injunction orders against the intermediaries (cf. Article 12(3) of the E-Commerce Directive and Article 8(3)

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of the InfoSoc Directive).

Thus, the pivotal issue in the case was whether the conditions under Danish law for issuing an injunction were fulfilled. Under the Danish Administration of Justice Act, it is, inter alia, a condition for imposing injunctive relief that the defendant has infringed or intends to infringe the plaintiff's rights. This notion of infringement is based on an objective standard, i.e., it is not a requirement that the defendant has acted with intent or negligence. It is also a condition that the injunction is proportionate, i.e., does not harm the defendant in a way which is obviously disproportionate to the plaintiff's interest in the injunction.

The Supreme Court concurred with the high court that the Pirate Bay contributed to serious copyright infringement and that Sonofon contributed to this infringement by providing its subscribers with access to the Pirate Bay. Through this chain of contributory liability Sonofon was held objectively to have infringed the plaintiff's copyright.

The Supreme Court also concurred that the injunction was proportionate, considering the relatively low costs and slight disadvantages for the ISP in blocking access to the website, compared to the very large number of copyright infringements being conducted via the Pirate Bay.

Before the Supreme Court the ISP also argued that the requested injunctive relief was too imprecise, because it did not specify how the blocking should be established. This argument was rejected by the Supreme Court.

With two Supreme Court decisions there is a now clear precedent under Danish law for imposing injunctions against ISPs performing mere conduit in cases of extensive copyright infringements via the internet. However, the decisions have raised some uncertainty with regard to, inter alia, the precise scope of the rules on contributory liability in injunction proceedings against ISPs and other intermediaries on the internet and the interpretation of the balancing of interest rule in relation to broader interests, including the right to freedom of expression. These issues were not tried before the Supreme Court.

Højesterets kendelse, afsagt torsdag den 27. maj 2010, Sag 153/2009, Telenor (tidligere DMT2 A/S og Sonofon A/S) mod IFPI Danmark

http://www.domstol.dk/hojesteret/Documents/Domme/153-09.pdf

Supreme Court's decision of 27 May 2010 in case 153/2009 (Telenor v IFPI Denmark)

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