

## The Napster.no case

### Author of summary

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### Court decision

**Judicial authority:**

Norwegian Supreme Court

**Date of court decision:**

27 January 2005

**Case number:**

2004/882

### Relevant Acts

Act No. 2 of May 12, 1961, Relating to Copyright in Literary, Scientific and Artistic Works, etc., With Subsequent Amendments Up to June 30, 1995\* (as last amended by Law No. 27 of June 2, 1995)

[http://www.unesco.org/culture/copy/copyright/norway/fr\\_sommaire.html](http://www.unesco.org/culture/copy/copyright/norway/fr_sommaire.html)

The Norwegian General Civil Penal Code

<http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi>

### Database for case and act retrievals

<http://www.lovddata.no>

### Reading guide

Each section beneath is followed with a parenthesis containing the reference to the relevant premises of the Supreme Court decision, e.g.: (paragraph 40).

Note that the following text is rather a summary than a comment.

The relevant acts are introduced where first appropriate and will later mostly be referred to.

The summary does not include the disputing parties' contentions.

### 1 The disputing parties were:

#### **Plaintiffs (appellants):**

TONO

NCB Nordisk Copyright Bureau

EMI Norsk AS

BMG Norway AS

Sony Music Entertainment Norway AS  
Universal Music AS  
IFPI Norge

**Defendant:**

Frank Allan Bruvik

**2 Facts:**

**Domain name:** “napster.no”

**Registration date:** Registered 4 October 2000

**Registered owner:** Frank Allan Bruvik

**Location of server of “napster.no”:** Not specified in the court decision

**Location of servers where the infringed music files were stored:** Outside of Norway

**Date when links were made available:** August to November 2001. IFPI Norge (the organisation for the record companies) warned Bruvik in the autumn 2001 stating that his acts represented a breach of law and was punishable. Bruvik disagreed, but after consulting several lawyers, he deleted the links in November 2001.

**Number of music files:** The website contained links to approximately 170 music files (at most).

**Relevant text on website:** The homepage provided “Welcome to napster.no. You are now visiting Norway’s largest and best website with music free of charge. Here you may download as much music as you desire.”

**Providing web-addresses:** The website “napster.no” allowed its users to provide the website with web-addresses containing music files. A script would automatically create a new web-page under “napster.no” with links to the music files. When the script did not function, the web-addresses were provided manually.

**Employment of links:** Once the links were made available, they could either be employed to play the music instantly or download and store the music in mp3-format.

**Employment of search function:** The website employed a search function giving its users the possibility to inquire whether or not one could find the music the users desired.

**Free of charge:** Using the website was free of charge.

### **3 Questions both parties agreed on**

Both parties agreed on the fact that “napster.no” provided access to copyright protected music files, which were uploaded to the Internet without authorization by the right-holders.

Also, the parties agreed that the “uploaders” without authorization from the right-holders had produced copies of the music files and made the music files available to the public.

### **4 The Norwegian Supreme Court**

**Accessory copyright infringement:** The Supreme Court found Bruvik guilty and responsible for having contributed to make the copyright protected music files available to the public.

**Legal basis:** § 55 of the Act No. 2 of May 12, 1961, Relating to Copyright in Literary, Scientific and Artistic Works, etc., With Subsequent Amendments Up to June 30, 1995\* (as last amended by Law No. 27 of June 2, 1995) provides:

“Any damage caused by an infringement mentioned in Section 54, or by an infringement of Section 49, first paragraph, is subject to a claim for compensation according to the rules of compensation generally applicable. If the right of an author or a performing artist has been infringed willfully or by gross negligence, the court may also award him a sum of money as redress for damage of a non-economic nature.

Even if the offender has acted in good faith, the aggrieved party may, irrespective of the extent of the damage, demand payment of the net profit accruing from the unlawful act.”

§ 54 provides:

“Any person who willfully or negligently contravenes this Act shall be liable to fines or to imprisonment for a term not exceeding three months if he

\* (a) infringes provisions laid down for the protection of copyright in or in accordance with Chapters I and 2, the provisions of Section 39j or 41a, or prohibitions imposed pursuant to Section 35 or 48, or provisions made by the author pursuant to Section 39k, second paragraph,

\* (b) infringes provisions laid down in or in accordance with Chapter 5, Sections 45c, 46, 47 or 48, last paragraph,

\* (c) imports copies of literary, scientific or artistic works or of such works and fixations as are specified in Sections 42, 43, 43a, 45 and 45a with the intention of making them available to the public, when the copies have been produced abroad under such circumstances that a similar production in this realm would have been unlawful, or

\* (d) offers or otherwise makes available to the public such works or fixations as are specified in Sections 42, 43, 43a, 45 or 45a, when the copies have been produced contrary to these provisions or imported contrary to subparagraph (c) of this Section,

\* (e) imports copies of such fixations as are specified in Section 45 with the intention of making them available to the general public for gain, when the producer has not consented to such import and copies of the same fixation are offered for sale in the realm with the consent of the producer. The Ministry may by regulations make exceptions to this provision for the import of copies from specific countries.

Any person who willfully or negligently is an accessory to any infringement specified in the first paragraph shall be liable to the same penalty.

If any infringement mentioned in the first and second paragraph is willful, and has been committed under particularly aggravating circumstances, the penalty shall be fines or imprisonment for a term not exceeding three years. In assessing whether particularly aggravating circumstances subsist, importance shall primarily be attached to the damage caused to the copyright owner and others, the profit gained by the offender and the general extent of the infringement.

Any attempt at a willful infringement as specified in the first to third paragraphs may be punishable in the same way as the completed crime.

Any person who willfully or negligently fails to insert in a work for the printing of which he is responsible the information specified in Section 52 shall be liable to fines.

Infringement of the third paragraph, cf., fourth paragraph, shall be subject to public prosecution. Infringement of the other provisions of this Section shall not be subject to public prosecution unless it is so requested by the aggrieved party or by an organization, cf. seventh paragraph, or required in the public interest.

If this Act has been infringed through use of a work in a manner specified in Sections 13, 14 and 17, fourth paragraph, prosecution may, insofar as the aggrieved party does not object thereto, be demanded also by the organization entitled to enter into agreements Pursuant to Section 36.”

### **Justification for determining the case in relation to accessory copyright**

**infringement:** Before pursuing its line of argument in relation to the accessory act, the Supreme Court found it necessary to comment on whether or not the links were to be considered as the “making available to the public” in accordance with § 2 of Act No. 2 of May 12, 1961, Relating to Copyright in Literary, Scientific and Artistic Works, etc., With Subsequent Amendments Up to June 30, 1995\* (as last amended by Law No. 27 of June 2, 1995), since the parties in the proceedings mainly had focused on this point of law. (paragraph 40)

§ 2 provides:

“Subject to the limitations laid down in this Act, copyright shall confer the exclusive right to dispose of a literary, scientific or artistic work by producing copies thereof and by making it available to the public, be it in the original or an altered form, in translation or adaptation, in another literary or artistic form, or by other technical means.

The transferring of a work to any device by which it can be reproduced shall also be considered a production of copies.

A work is made available to the public when it is performed outside private premises, or when copies of the work are offered for sale, rental or lending, or otherwise distributed or displayed outside such premises.”

First, the Supreme Court introduced the first and second subparagraph of § 2 (see above). (paragraph 41).

Second, the Supreme Court introduced the preparatory works, OT.prp. nr. 26 (1959-60), which emphasize that the exclusive right to make the copyright available to the public covers the making available in any way by any mean (paragraph 42). Thus, the third subparagraph of § 2 of the Copyright Act is not meant as a legal definition of the “making available to the public”. The notion is technology neutral. The Supreme Court concurred with the preparatory works. (paragraph 42)

Third, the Supreme Court noted that the exclusive right to make the copyright available to the public is not lost after the copyright is made available to the public for the first time. The making available of what another person has made available is an independent act of making available. (paragraph 43)

Fourth, the Supreme Court noted that if the linking is considered as “making available to the public”, the linking will include linking to material published both legally as well as illegally. The understanding of what constitutes “making available” is equal in both cases. (paragraph 44)

Fifth, the Supreme Court refers to what the disputing parties have explained in relation to the technology. (paragraph 44 and 45)

Sixth, the Supreme Court neither places significant emphasis on the type of link employed nor whether the user technically was on his/her own PC, on “napster.no” or was moved to the web-address containing the music-file. The Supreme Court states that it is difficult to see that neither should be significant as to whether the copyright must be regarded as made available to the public in accordance with the Copyright Act. What must be decisive is how the technology functions and if and how access is given. The Supreme Court admits that there might exist links coded in such a way that they may be considered differently in relation to the notion “making available to the public”, but the parties have not evidenced this before the court. (paragraph 46 and 47)

Seventh, the Supreme Court states that it is beyond doubt that making a web-address known on a website does not constitute a “making available to the public”, regardless of

whether or not the link refers to a web-address containing legally or illegally published material. Whether a web-address is expressed on the Internet or in a newspaper is immaterial. To this the parties agree. (paragraph 48)

Eighth, the Supreme Court states that when the Copyright Act was adopted in 1961, the present question was not topical. In turn, this impedes the Court's consideration of the question whether or not linking constitutes "the making available to the public". The Supreme Court refers in summary to what the legislative authorities have done to modernize the Copyright Act (implementation of the E-commerce directive in Ot.prp. nr. 4 (2003-2004) and the ongoing work on the revision of the Copyright Act). However, the preparatory works do not elucidate responsibility in relation to linking. (paragraph 49)

Ninth, the Supreme Court refers to a decision by the Swedish Supreme Court – the Tommy Olsson case (regarding links to sound-files, which the Court decided constituted the "making available to the public" – however, the performance was not encompassed of the record company's exclusive right, rendering Olsson not guilty) – and a decision by the German supreme Court – the Paperboy case – without giving those decisions any weight. (paragraph 50 and 51)

Tenth, the Supreme Court distinguishes the present case from the Swedish case by stating that the Swedish Supreme Court did not consider the problem whether the music-files could have been reached through "napster.no" simply by providing the web-addresses in writing on the website and not as links. Even though the web-addresses were quite complicated when considered as text, they were easy to copy and paste in the browser window. Such an act would give the same direct access to the music files. (paragraph 53)

Eleventh, the Supreme Court continues by stating that when one illegally makes available to the public, one may be liable both according to criminal law and civil law. For those reasons one must give satisfactory and appropriate grounds as to why the use of one method is covered but not the other. The parties have not been able to give such good reasons. The Supreme Court states that it itself finds this question very difficult. The Supreme Court states again that the Copyright Act was not, at the time of its adoption, adopted to apply to the present technological development, and it is now under revision. (paragraph 54)

Twelfth, the Supreme Court states that the close similarity between direct linking/deep linking to a website and the mere making available of information about a website's address is illustrated further by the development of new software that may recognize a web-address and create a link to the address, thus transforming the web-address into a direct link. It would be very problematic if such transformation would be considered as "making available to the public". (paragraph 55)

Thirteenth, the Supreme Court refers to what the parties contend as the consequences if linking is considered as the "making available to the public" being that linking to legally and illegally published copyright protected material require authorization from the right-holder. The party appealing the case contend that making available implies authorization.

The Supreme Court states that such an understanding of the law could probably solve a lot, but could lead to difficult question as to delimitation of such an authorization, which in turn could lead to doubt and initiate and increase the number of court proceedings.

By these reasons, the Supreme Court decided to consider the case in relation to whether or not Bruvik was accessory to make the copyright protected music files available to the public. (paragraph 56 and 57)

### **Ratio decidendi and the question of accessory copyright infringement in relation to TONO and NCB:**

First, the Supreme Court states that in accordance with the Copyright Act § 55 first subparagraph which provides that “Any damage caused by an infringement mentioned in Section 54, [...], is subject to a claim for compensation according to the rules of compensation generally applicable.”

Further, the Supreme Court introduces the Copyright Act § 54 second subparagraph provides that “Any person who willfully or negligently is an accessory to any infringement specified in the first paragraph shall be liable to the same penalty”. (paragraph 58 and 59)

Second, the Supreme Court considers the Copyright Act § 54, first paragraph, a) which provides:

“Any person who willfully or negligently contravenes this Act shall be liable to fines or to imprisonment for a term not exceeding three months if he

\* (a) infringes provisions laid down for the protection of copyright in or in accordance with Chapters I and 2, the provisions of Section 39j or 41a, or prohibitions imposed pursuant to Section 35 or 48, or provisions made by the author pursuant to Section 39k, second paragraph,”

Thus, the Copyright Act § 54, first paragraph, a) refers to the Copyright Act § 2. (paragraph 61)

The Supreme Court rejects the court of second instance's view that the uploaders' illegal acts stopped at the point in time when the music was uploaded, and that due to this reason, there was no basis for accessory liability. The Supreme Court reasons that the section determining criminal liability covers infringements of “provisions laid down for the protection of copyright”, and the uploaders' infringement is to make the music available. One may not deduce from the wording of that provision that the infringement ceased when the uploading technically terminated. The Supreme Court states that the infringement continues as long as the uploader makes the music available on the Internet. In addition, it would seem strange if the date of obsolescence would start running already at the time when the uploading ended. (paragraph 62)

Bruvik contention - that if the linking was not considered as making available to the public, there could be no legal basis for accessory liability – was rejected by the Supreme Court stating that it is not a requirement in criminal law that the accessory act in itself must be illegal. The linking has enhanced the effect of the uploaders` acts by increasing the availability of the music. (paragraph 63)

Further the Supreme Court states that it is without relevance to the question of accessory liability whether or not the uploaders knew Bruvik`s acts. (paragraph 64)

The Supreme Court goes on stating that whether or not there is ground for a claim for compensation according to the rules of compensation generally applicable depends on the concrete circumstances of the case and what must be considered as improper, unwarranted, irresponsible, reprehensible or a like. (paragraph 65)

The main person and the contributor must be considered in relation to their own individual and independent acts. (paragraph 66)

The Supreme Court states further that Bruvik acted wilfully, referring to the introductory text on the homepage: “Welcome to napster.no. You are now visiting Norway`s largest and best website with music free of charge. Here you may download as much music as you desire.” Links were provided to popular music with well-known artists, and Bruvik must have known that the music was uploaded without the right-holders` consent. Thus, Bruvik is liable and must pay compensation for damages primarily due to the fact that some of the users of the website otherwise would have bought CDs. There is causality between his acts and (TONO`s) loss. In addition, the Supreme Court states that liability is not incompatible with the freedom of speech. (paragraph 67 to 70)

Finally the Supreme Court - referring to instructions to the Copyright Act in accordance with the Copyright Act § 59 - states that the protection granted by the Copyright Act is afforded to foreign copyrights as if they had been Norwegian copyrights.

### **Ratio decidendi and the question of accessory copyright infringement in relation to performing artists and producers:**

First, the Supreme Court states that the Copyright Act affords performing artists protection in § 42 and producers in § 45. Those provisions do not grant an exclusive right to public performance of a recorded music file. However, by amendment to the Copyright Act in law of 23 December 1988 nr. 101, performing artists as well as other right-holders were afforded a protection in accordance with chapter 5 of the Copyright Act by a prohibition against the making available of works or recordings (sound fixations) as mentioned in § 42 and 45 when the works are reproduced in discord with those provisions. (paragraph 72)

Second, the Supreme Court introduces the question whether the performing artists and producers in the case before the court belong to the circle of right-holders protected by the law. (paragraph 73)

Third, the Supreme Court states that when the criminal liability in accordance the Copyright Act § 54, first subparagraph, letter d) refers to illegal production of copies, this means production of copies that are illegal in relation to the Copyright Act. Thus, a premise for criminal liability – and civil liability – is that the Copyright Act gives the right-holders protection against the reproduction of the work carried out by the uploaders. A geographical limitation of which right-holders chapter 5 of the Copyright Act extend to is determined in § 58 of the Copyright Act and of the Instruction to the Copyright Act by Instruction of 21. December, 2001 nr. 1563. § 6-1, first subparagraph of that Instruction decides that the Copyright Act shall apply equivalently to works specified in the chapter 5 of the Copyright Act for private persons who are citizens of or domiciled in the EEA area as well as for legal persons having their seat in the EEA area. (paragraph 75)

Fourth, Bruvik does not deny that if he is responsible in relation to TONO he is also responsible in relation to the performing artists and producers who fall within the scope of the Copyright Act § 58 and the Instruction to the Copyright Act. However, Bruvik contends that performing artists and producers who are not citizens of or domiciled in the EEA area are not protected by the Copyright Act. (paragraph 75)

Fifth, the Supreme Court rejects (in paragraph 76) Bruvik's contention in relation to the producers by referring to the Copyright Act § 58, second subparagraph, third sentence, which provides that:

“The provisions of Chapter 5, except for Sections 43, 43a and 44 and the right of distribution referred to in Sections 42 and 45, shall apply for the benefit of works created by

- (a) a Norwegian national or a person who is resident in the realm,
- (b) a company which has a Norwegian board of directors and whose registered office is in the realm.

The provisions of Sections 42 and 45a shall, moreover, also apply to performances and broadcasts which take place in Norway. The provision concerning the right of distribution in Sections 42 and 45 shall apply to sound and film fixations made in Norway. The provision in Section 45 concerning the right to make copies shall apply for the benefit of all sound and film fixations. The provision in Section 43 shall apply to works that are published in Norway. The provision in Section 44 shall apply to press releases which are received in Norway. The provision in Section 43a shall apply to photographic pictures first published in the realm or which have been produced by a person who is a national of or resident in or who has his registered office in a country within the European Economic Area. The same shall apply to photographs placed in buildings or permanent structures situated in a country within the said area. The provision in Section 45c shall apply to pictures of persons who are or have been resident in the realm.”

Sixth, the Supreme Court concludes that in relation to the producers' protection against the production of copies in accordance with the Copyright Act § 45, there is no geographical limitations as to which persons that enjoy protection. Thus, the uploaders' production of copies fall within the scope of the Copyright Act, and Bruvik has been accessory to the uploaders' making available of copies to the public – copies breaching the prohibition in § 45 of the Copyright Act. (paragraph 77)

Seventh, the Supreme Court states that the Copyright Act § 58, second subparagraph, third sentence does not apply in relation to the performing artists. This implies that chapter 5 of the Copyright Act only protects the performing artists against recording of their performances as far as this protection is afforded by other rules laid down in § 58 or those laid down in the Instruction to the Copyright Act by Instruction of 21. December, 2001 nr. 1563. The personal scope of chapter 5 of the Copyright Act delimits the area of application of the Copyright Act § 42. When the Copyright Act § 54, first subparagraph letter d) covers the making available to the public of recordings (sound fixations) as mentioned in the Copyright Act § 42, the Supreme Court concludes that this only applies in relation to those artists who are protected in accordance with chapter 5 of the Copyright Act. Since the Copyright Act does not protect performing artists, the Supreme Court concludes that the performing artists cannot plead that the recordings breached the prohibition in § 42. (paragraph 79)

Eighth, the Supreme Court concludes that Bruvik's civil liability in relation to the performing artists must be limited to those artists falling under the scope of the Copyright Act § 58 or the Instruction to the Copyright Act by Instruction of 21. December, 2001 nr. 1563. (paragraph 79)