



ISP liability in Denmark

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A Danish perspective on ISP liability

- ISP liability
 - Mere conduit, caching, hosting
- Danish case law
 - Mere conduit
 - Hosting
- My focus: ISP liability for *mere conduit*

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Purpose of these injunctions

- Technically, ISPs may *inter alia*
 - block access to specific websites
 - shut down specific internet connections
 - filter certain internet traffic
- Overall purpose of injunctions against mere conduit:
To enforce the law on the internet through such measures



Legal basis



Copyright law: The Infosoc Directive

Infosoc Directive art. 8(3)

- “Member States shall ensure that right holders 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.”

Recital 59 (excerpt)

- The conditions and modalities relating to such injunctions should be left to the national law of the Member States.



Copyright law: Danish statutory law

- *Mere conduit* involves transient and incidental reproductions of the information transmitted
- Under Danish law, such reproductions are legal only if the transmission is based on a copy of the work, which is legal under Danish law
 - Transmission of information protected by copyright from ordinary websites – www.cnn.com – is legal
 - *Transmission* of music, movies etc. via illegal file sharing is *in itself* a *direct* infringement of copyright
- Purpose: To create a legal basis for injunctions against such transmissions (mere conduit), cf. Art. 8(3) of the Infosoc Directive
- *Mere conduit* defense => No criminal liability / liability in damages



Copyright law: Danish case law based on **direct infringement**

- TDC case (2006)
 - Injunction against TDC (Danish ISP)
 - Subscriber used its internet access to connect two FTP servers to the internet through which a large number of music files was illegally made available to the public
 - TDC was ordered to stop *transmission* of these music files
 - The subscriber's internet access was terminated
- Allofmp3.com case (2007)
 - Injunction against Tele2 (Danish ISP)
 - Tele2 was ordered, *inter alia*, to *block access* to www.allofmp3.com
 - Tele2 blocked access to the website (DNS blocking)
 - Other ISPs followed suit
- Mp3sparks.com case (2008)

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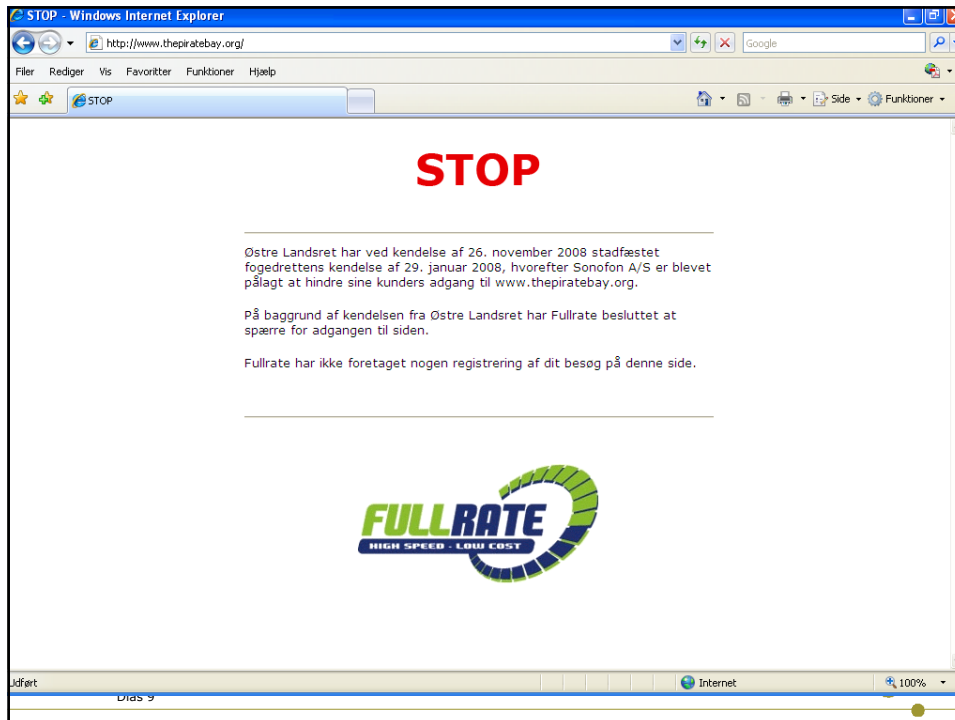


Copyright law: Danish case law ~ **contributory infringement**

- Pirate Bay case (2008-2010)
 - Injunction against Telenor
 - Telenor was ordered, *inter alia*, to block access to www.thepiratebay.org
 - Telenor blocked access to www.thepiratebay.org
 - Other ISPs followed suit

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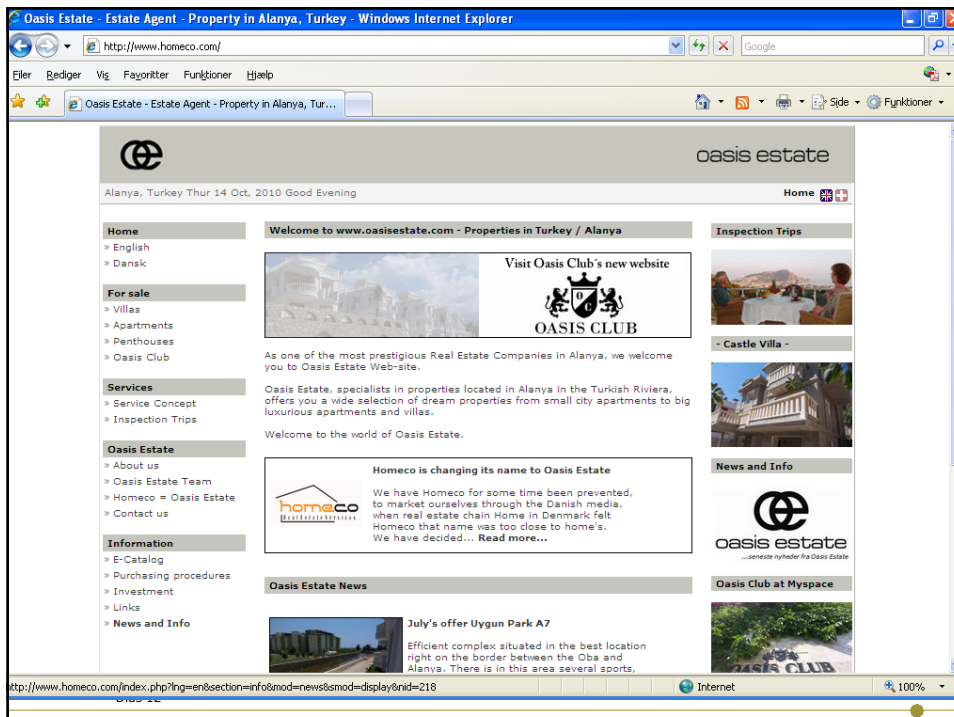
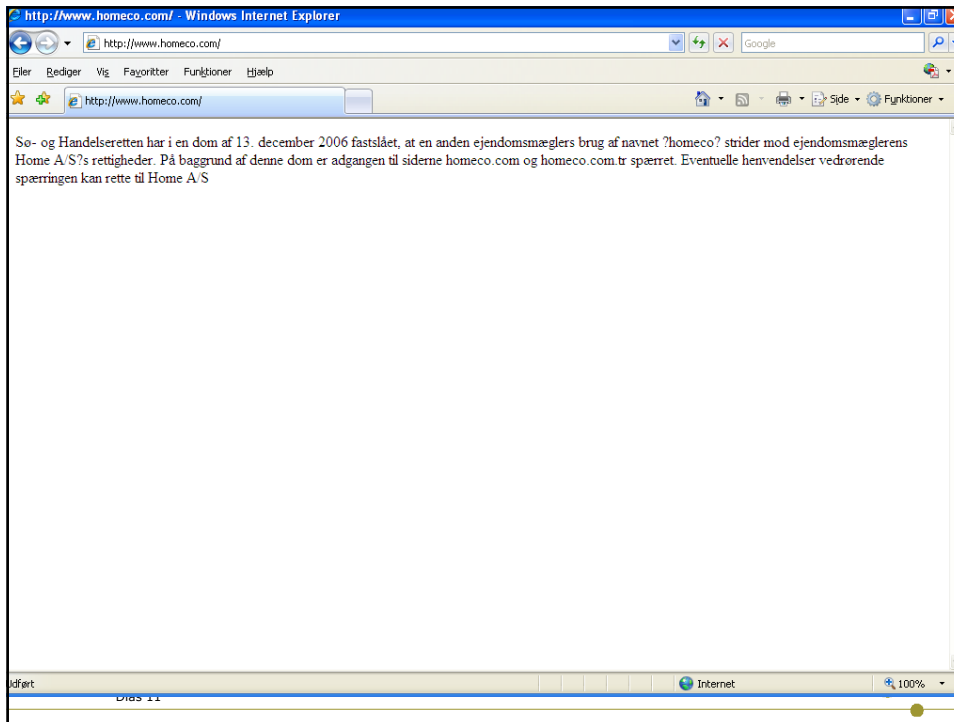


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Trademarks

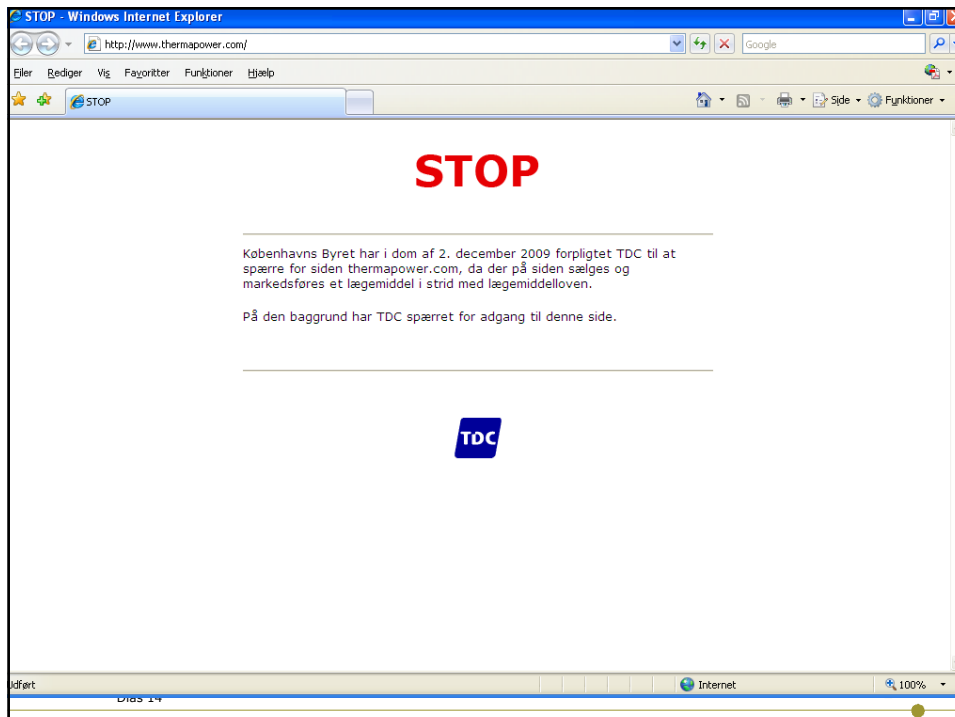
- Homeco.com case (2006)
 - Judgment from the Danish Maritime and Commercial Court
 - The use of the domain name "homeco.com" by a Turkish real estate company was found to infringe the well-known trademark "HOME" in Denmark (for a Danish real estate chain)
 - www.homeco.com was blocked by some ISPs

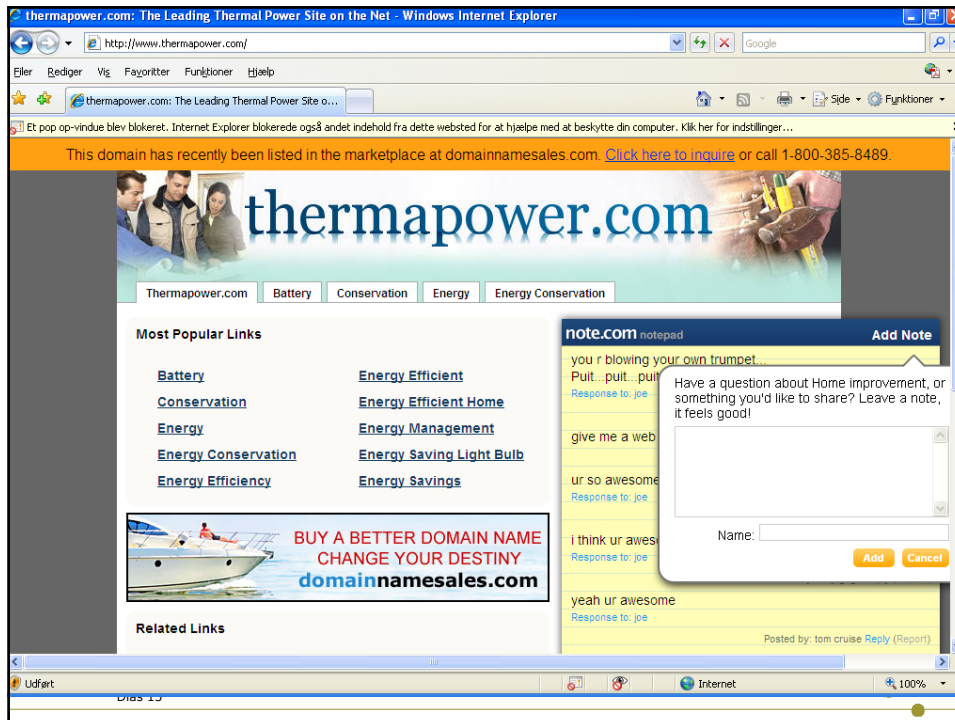
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Pharmaceuticals: Contribution to third party violation

- Thermapower.com case (2009)
 - This website included a commercial in Danish regarding the diet product Therma Power, which could be ordered on the website
 - Therma Power is an illegal product in Denmark
 - Therma Power is probably a dangerous drug for consumers
- TDC was ordered to block access to www.thermapower.com (DNS blocking)
- Argument: By giving its subscribers access to this website, TDC contributed to a third party violation of Danish drug legislation, which includes a prohibition against sale, marketing and advertising for such drugs





Gambling: Bill introduced in March 2010

- Transmission of information (via the internet) to illegal gambling websites should be a **criminal offense** (subject to a **fine**), if performed intentionally or gross negligently
- The Danish public authority for gambling would continuously inform ISPs what websites were allegedly illegal
- ISPs could avoid liability by blocking access to these websites
- During the public hearing, many critical comments were submitted
 - *Administrative* internet censorship
 - *Mere conduit* defense under the e-commerce directive
 - No obligation to actively seek facts or circumstances indicating illegal activity (e-commerce directive)



Gambling: New Danish Act on Gambling (July 2010)

- New sec. 65: Transmission of information (via the Internet) to an illegal gambling site is illegal
 - Purpose: Legal basis for injunctions against ISPs with an aim to block access to illegal gambling web sites
 - No (direct) criminal liability
- Liability in damages?
 - E-commerce directive Art. 1(5)(d):
The directive does not apply to **gambling activities** which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions
 - Does the *mere conduit* defense apply to ISPs transmitting information to an illegal gambling site?



Other legal areas

- This new "transmission-is-illegal-model" is likely to be included in other Danish legislation
 - Pharmaceuticals?
 - IP law?
 - Law against defamation?



Conclusion

- The special provisions in copyright law (Infosoc art. 8(3)) no longer seem to play a vital role in Danish law
- Instead, injunctive relief against *mere conduit* is available within several legal areas, if the *transmissions* in some way *contribute* to illegal activities



Challenge

- Termination of internet access will prevent **any** use of the internet – also a legitimate use
- Blocking access to a website will prevent **any** communication with that website – also a legitimate use
- This may cause serious harm to the legitimate interests of third parties
- Questions:
 - Is it today possible to terminate **any** internet connection used to illegal transmissions? to block access to **any** website with a content, which is illegal under Danish law?
 - How are such legitimate third party interests safeguarded in the injunctive process?



Limitation: Principle of proportionality

- A balance of interests is a common prerequisite for injunctive relief
- Under Danish law, injunctive relief may be denied if such relief will cause harm or inconvenience to the **defendant** (=ISP), which would obviously be disproportionate to the **plaintiff's** interest in the injunction
- This principle does not (explicitly) require courts to take into consideration the legitimate interests of
 - owners/users of the website, which may be blocked,
 - subscriber/users of the internet connection may be terminated
- Such interests are not (explicitly) considered under current Danish case law



Limitation: Right to receive and impart information (1)

- Everyone has the right to freedom of expression, which shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers – ECHR Art. 10(1)
- Termination of internet access and blocking of websites restricts the freedoms under Art. 10(1)
- Such restriction may entail a “violation” of Art. 10 of the ECHR, unless it satisfies the conditions in Art. 10(2), i.e.
 - is prescribed by law
 - safeguards one or more specified legitimate purposes
 - is necessary in a democratic society



Limitation: Right to receive and impart information (2)

- Necessary in a democratic society means that
 - it must answer a pressing social need, i.e. be justified by relevant and sufficient reasons
 - it must be proportionate to the legitimate aim pursued
- Broad proportionality principle, including *inter alia*
 - The legitimate aim pursued
 - Are other, less restrictive but efficient means available?
 - The nature and scope of the restrictions
 - What legitimate interests of third parties may be harmed?
- This has not been considered in current Danish case law



Procedural aspects (1)

- Injunctive relief against mere conduit may harm legitimate third party interests
- As Danish law stands today,
 - internet connections may be terminated, and
 - websites may be blockedwithout notification to anyone but the ISP
- The ISP cannot reasonably safeguard third party interests
- Preliminary injunctive relief is relatively easy to obtain (risk of wrong decisions)
- No real safeguards against incorrect injunctions and abuse



Procedural aspects (2)

- Current procedural law is clearly insufficient to provide the necessary basis for courts to perform the broad balancing of interests, which is set forth in the ECHR art. 10(2)
- Significant risk of wrong injunctions and abuse of process



Conclusion

- Current Danish legislation is inadequate to handle injunctions against *mere conduit*
- A new legislation is need
- Example: UK Digital Economy Act 2010



UK Digital Economy Act 2010

s. 17 on blocking of access to specific websites

- Provides statutory basis for such injunctions
- In determining whether to grant an injunction, the court must take account of, *inter alia*
 - whether the injunction would be likely to have a disproportionate effect on **any person's** legitimate interests
 - the importance of **freedom of expression**
- Notice of an application for an injunction must be given to the ISP **and the operator of the website**



What about content filtering?



Danish law

- Under Danish law, ISPs may be ordered to
 - terminate an internet connection
 - block access to specific websites (DNS blocking)
- In the Danish Pirate Bay case, Telenor was keen to ensure that a DNS blocking was sufficient to comply with the injunction
- No Danish case law on imposing a **content filtering** system on ISPs



Audible Magic / CopySense system

- In-network technology
- Detects P2P protocols within an ISP's network
- Is able to specifically identify illegal copyrighted content sharing in real-time
- The ISP is alerted when illegal P2P traffic is detected
- Allows ISPs to implement a variety of graduated communications, sanctions or monetization
- Further information at www.audiblemagic.com



Comparative outlook: SABAM vs TISCALI (2004-)

- District Court of Brussels ordered a Belgian ISP (Scarlet/Tiscali)
 - to stop P2P copyright infringements via its network
 - “by making impossible any form of sending or receipt by its subscribers, by means of P2P software, of electronic files containing musical works that are part of the SABAM repertoire”
 - 6 months implementation deadline
- A report from a technical expert had identified
 - 11 solutions which were technically pertinent in the short term for filtering P2P
 - 7 solutions which were applicable to the ISP’s network
 - 6 solutions merely blocked P2P traffic (traffic management)
 - 1 solution (Audible Magic) tries to block only illegal transmissions (content filtering)
 - Problem: Targeted at the education industry – not to high volume traffic of ISPs



Specific issues related to content filtering (1)

No general obligation to monitor

- E-commerce directive art. 15: No general obligation
 - to monitor transmitted or stored information
 - to actively seek facts or circumstances indicating illegal activity
- Is this what content filtering systems are all about?
 - District Court of Brussels: No
 - Irish High Court, case [2009 5472 P]: No



Specific issues related to content filtering (2)

Right to privacy / data protection issues

- District Court of Brussels:
Content filtering does not involve the processing of personal data
- Irish High Court:
The right to privacy is not engaged by
 - the scrutiny of files publicly made available for copyright theft on the internet, nor by
 - deep packet inspection for the purpose of detecting and diverting or disabling such transmissions



Comparative outlook: SABAM vs TISCALI (2004-)

- The judgment from the District Court of Brussels has been brought before the Brussels Court of Appeal
- This court has referred two questions to the Court of Justice (Case C-70/10)
- The CJ's decision is expected in autumn 2011



Comparative outlook: Court of Justice – case C-70/10

1. Does EU law and the European Human Rights Convention permit member states to authorize a national court to order an ISP to introduce,
 - for all its customers, in abstracto and as a preservative measure, exclusively at the cost of that ISP and for an unlimited period,
 - **a system for filtering all electronic communications**, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of copyright protected works, and subsequently
 - **to block the transfer of such files**, either at the point at which they are requested or at which they are sent?

2. Does EU law require a national court to apply the principle of proportionality when deciding on the effectiveness and dissuasive effect of the measure sought?



For more information

- **Clement Salung Petersen:** "Netværksoperatørers rolle i bekæmpelsen af ophavsretskrænkelser på internettet"
- NIR 2009(1)
- **Søren Sandfeld Jacobsen & Clement Salung Petersen:** "Injunctions against Mere Conduit of Information protected by Copyright – A Scandinavian Perspective"

Forthcoming IIC 2011

Currently available for download: <http://ssrn.com/abstract=1687228>



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