

ISP Liability in Finland & Bird & Bird

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Jesper Nevalainen, Senior Associate
Bird & Bird (Helsinki)

Legal Framework

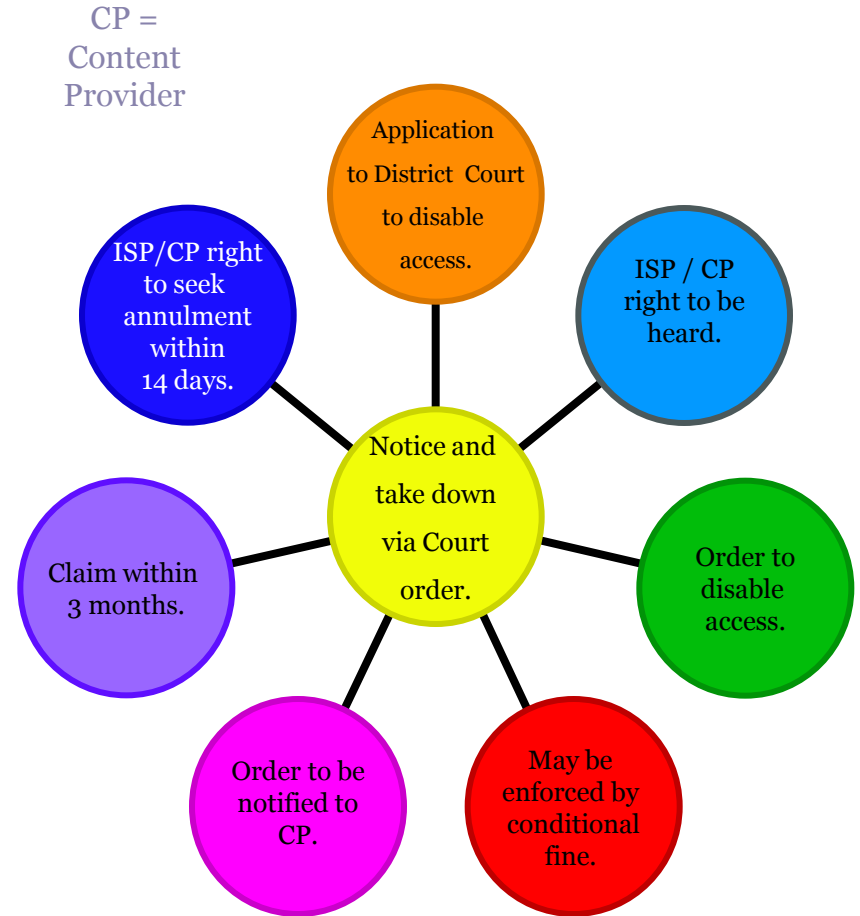
- Act on Provision of Information Society Services (2002/458).
 - Implements the E-Commerce Directive (2000/31/EC).
- Copyright Act (404/196, as amended).
 - InfoSoc Directive (2001/29/EC) implemented by amendment enacted in 2005.
 - Enforcement Directive (2004/48/EC) implemented (parts) by amendment enacted in 2006.
- Police Act (493/1995, as amended).

Legal Framework – Information Society Services

- ISP liability under the Act on Provision of Information Society Services.
 - Mere Conduit
 - Does not initiate.
 - Does not select receiver.
 - Does not select or modify information.
 - Catching
 - Does not modify information.
 - Complies with access conditions.
 - Complies with updating rules.
 - Removes or disables access upon actual knowledge of removal at initial source, disabled access, or court or administrative order to remove or disable.
 - Hosting
 - Activity purely technical
 - Disables access immediately upon
 - ~ receipt of Court order;
 - ~ receipt of copyright proprietor's written notice; or
 - ~ otherwise receiving actual knowledge that the content is illegal.
- No general obligation to monitor.

Legal Framework – Notice and Take Down

- Notice and take down upon Court order or other actual knowledge.
- May be applied against any content which keeping available or conveyance is subject to criminal or civil liability.
- If ISP disabled access without a Court order (actual knowledge), the ISP must notify the CP.
- CP may seek annulment in the District Court within 14 days from the receipt of ISP's notice.



Legal Framework – Notice and Take Down

- Notice and take down upon copyright proprietor's notice.
- Available in case of copyright infringing material only.
- Not available for P2P.

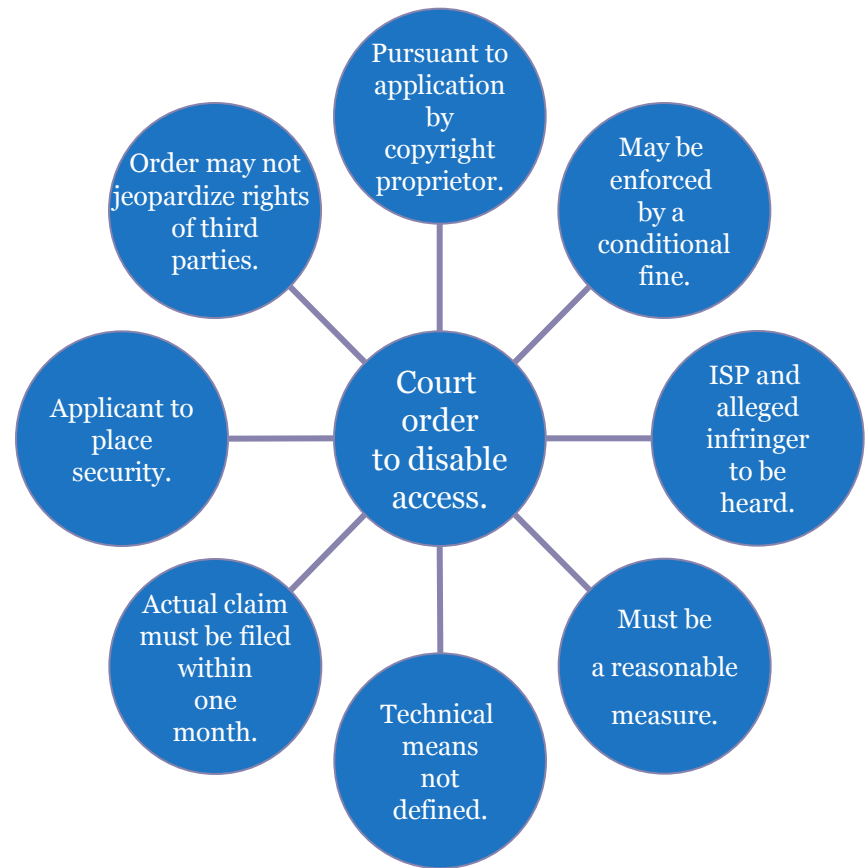


Legal Framework – Copyright Act

- ISP liability under the Copyright Act.
- The provisions of the Copyright Act of relevance in case of P2P networks.
- Obligation to provide contact information.
 - The Court may order an ISP pursuant to an application by a copyright proprietor to provide the contact information of a subscriber.
 - Applicant must show that significant amount of infringing content is being distributed through the subscriber connection.
 - Copyright proprietor liable for ISP's costs and liable to indemnify the ISP against possible damages.
 - ISP to be heard.
 - A civil claim must not necessarily be filed.

Legal Framework – Copyright Act

- Court order to (temporarily) disable access to alleged infringing content.
- May be issued in connection with the processing of a copyright proprietor's petition to prohibit infringement or prior to that, if obvious that the copyright proprietor's rights would otherwise be compromised.
- Applies to ISP's only.



Legal Framework – Police Act

- In addition to the civil procedure available to copyright proprietors under the Copyright Act, a copyright proprietor may also initiate criminal investigation.
- The police may in connection with a criminal investigation order an ISP to supply the police with the details regarding a subscriber connection that are not publicly available.

Recent Legislative Proposal

- Proposal to amend the Copyright Act and the Act on the Protection of Privacy in Electronic Communications.
- Amendment of the Copyright Act.
 - The Court could order the ISP to supply the Court with the contact details of an alleged infringer.
 - Could in exceptional circumstances be executed *ex officio* by the Court.
 - Would generally be used when a copyright proprietor has filed an application with the Court to order an ISP to provide the details of a subscriber connection of an alleged infringer.
 - ISP to be heard.
 - Purpose of the amendment is to secure the availability of the contact information.
 - Copyright proprietor would be liable for costs and indemnifying the ISP also when ordered *ex officio* by the Court.

Recent Legislative Proposal

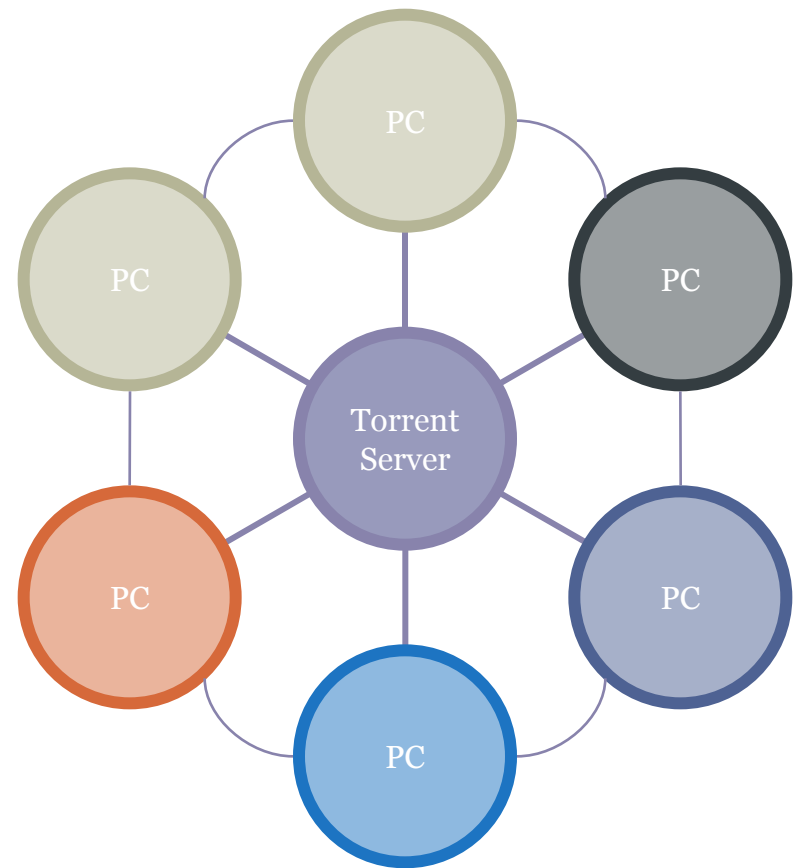
- Amendment of the Act on the Protection of Privacy in Electronic Communications.
 - Right of ISP's to process identification data in order to convey a notice of copyright infringement to a subscriber.
 - ISP would be under obligation to convey a notice issued by a Finnish copyright society or other entity supervising copyrights.
 - Obligation to convey only to subscribers whose contact information is in the possession of the ISP.
 - ISP's liability would be limited to conveyance.
 - ISP's not to store information on to whom the notice has been conveyed.
 - No obligation to monitor.

Recent Legislative Proposal

- Formal requirements on the contents of the notice laid down in the Act.
- Copyright societies must have a PoW from the copyright proprietors that they represent.
- The copyright society would be liable for ISP's costs.
- Amendment aims at providing a "soft" alternative as compared to the Court based proceedings.
- The proposed amendments are planned to enter into force during spring 2011.

Recent Case Law – Case Finnreactor

- Supreme Court (KKO 2010:47).
- The defendants maintained a file-sharing network or a so-called "torrent" server or "tracking" server.
- The server contained torrent/metadata files of computers that were connected to the server.
- The torrent files enabled the connected computers to see what content was available on the other computers.
- The connected computers formed a P2P network.
- The defendants monitored (technically) the downloading and sharing of content per end-user (so-called "ratio number").
- The effective functioning of the system required not only downloading but also sharing of content.



Recent Case Law – Case Finnreactor

- The defendants had various roles in the maintenance and administration of the Finnreactor service:
 - technical maintenance;
 - user administration; and
 - supervising the content of the files being shared.
- The defendants argued that the above acts did not amount to copyright violation since
 - they did not copy or distribute any works;
 - none of the works were in their possession nor did they distributed any thereto related description files;
 - possible violations have not been a direct result of their activity; and
 - their activity has not concerned any particular work and they have not even been aware of all works made available.

Recent Case Law – Case Finnreactor

- First time that the Supreme Court assessed the joint activity of many in a communication network as grounds for copyright violation.
- The Supreme Court found that
 - copyright protection shall not be dependent on the technical execution of the illegal sharing;
 - although the defendants have not themselves shared the protected works, the torrent files have been necessary for downloading and copying the content files;
 - the torrent server has been set-up for the sole purpose of sharing works protected by copyright and therefore the activity of the defendants must be reviewed as a whole, not separately for each defendant (except for the relevance of each individual persons acts for the purposes of criminal liability);

Recent Case Law – Case Finnreactor

- the Finnreactor network is the result of cooperation between many people;
- the operation of the network has been organized and based on a clear division of responsibilities, which has been central for enabling the sharing of the protected works;
- the torrent files have been connected to individual content files and the torrent files in particular have enabled the downloading of the content files from users' computers.
- Based on the foregoing facts, the Supreme Court found the defendants guilty for copyright violation (some only for aiding) by in cooperation with each other and the end-users reproducing and making illegal copies available to the public.

Recent Case Law – Case Finnreactor

- The Supreme Court ruled also that, although the hosting exception could be argued to apply to the defendants activity, the defendants could not appeal to the grounds for discharge from liability since
 - they participated in the activity amounting to copyright infringement; and
 - the defendants have been aware of the purpose of the Finnreactor network, i.e., enabling the sharing of copyright protected content.
- The Supreme Court elaborated also on what should be deemed as fair compensation for the illegal use in the case.

Thank you & Bird & Bird

Jesper Nevalainen
Senior Associate

Bird & Bird Attorneys Ltd.
Mannerheimintie 8
00100 Helsinki
Finland

T: +358 (0)9 622 6670

F: +358 (0)9 622 6677

@: jesper.nevalainen@twobirds.com