

District Court of Frederiksberg

Transcript from judicial record

Order

Handed down on 5 December 2017 in Case No. BS FOR-969/2017:

RettighedsAlliancen
Rights Alliance Vesterbrogade 15, 1st floor
1620 Copenhagen V
and
RettighedsAlliancen
smf Koda (association)
Lautrupsgade 9
2100 Copenhagen Ø
and
RettighedsAlliancen
smf Danish actor federation (association)
Tagensvek 85, 3rd floor
2200 Copenhagen N
and
RettighedsAlliancen
smf Danish Artist Association (association)
Dronningensgade 68
1420 Copenhagen K
and
RettighedsAlliancen
smf Danish Musicians Association (association)
Skt. Hans Torv 26
2200 Copenhagen N
and
RettighedsAlliancen
smf Danish Dramatists (association)
Nørre Voldgade 12, 2nd th.,
1358 Copenhagen K
and
RettighedsAlliancen
smf Danish Film Directors (Association)
Nørre Voldgade 12, 2nd th.,
1358 Copenhagen K
and
RettighedsAlliancen
smf Danish Scenographers (association)
Kongens Nytorv 21, backyard 3rd floor
1050 Copenhagen K
and
RettighedsAlliancen

smf Zentropa Productions ApS
Film City 22
2650 Hvidovre
and
RettighedsAlliancen
Smf Nimbus Film
Hauchsvej 17
1825 Frederiksberg C
and
RettighedsAlliancen
smf Nordisk Film A/S
Mosedalsvej 14
2500 Valby
and
RettighedsAlliancen
smf Miso Film ApS
Ryesgade 3E
2200 Copenhagen N
and
RettighedsAlliancen
Smf Fridthjof Film Production ApS
Spontinisvej 7
2450 Copenhagen SV
and
RettighedsAlliancen
smf The Association of Danish Video Distributors
Mosedalsvej 14
2500 Valby
and
The Association of Danish Video Distributors
smf Nordisk Film Distribution A/S
Mosedalsvej
2500 Valby

and
The Association of Danish Video Distributors
The Walt Disney Company Nordic ApS
Kalveod Brugge 24.3
1560 Copenhagen V
and
The Association of Danish Video Distributors
smf Sandrew Metronome Danmark A/S
Boulevarden 6.2. sole
9000 Aalborg
and
The Association of Danish Video Distributors
Smf Mis.Label Aalborg ApS
Jellingvej 5

9230 Svenstrup J
and
The Association of Danish Video Distributors
smf Scanbox Entertainment Denmark A/S
Mafstræde 10A, st.th.,
1204 Copenhagen K
and
The Association of Danish Video Distributors
smf Universal Sony Pictures Home Ent.Nor
Herstedøstervej 27-29
2620 Albertslund
and
The Association of Danish Video Distributors
smf sf studios
Wildersgade 8
1408 Copenhagen K
and
RettighedsAlliancen
smf IFPI Denmark (association)
Magstræde 10A, 2nd floor
1204 Copenhagen K
and
RettighedsAlliancen
smf Producentforeningen (association)
Bernhard Bangs All 25
2000 Frederiksberg
against
TDC A/S
Teglholmsgade 1
2450 Copenhagen SV

The background of the case and the parties' claims

This injunction case under Chapter 40 of the Procedural Code, received in court on 12 June 2017, concerns the question of whether TDC as an ISP must be prohibited from providing access to its customers in Denmark to internet services which make available or share works to which the applicants have copyrights.

The order does not contain a complete presentation of the case, cf. § 218b of the Procedural Code.

Applications

The applicants are applying for the Court to find as follows:

TDC, as an Internet provider, is prohibited from granting access for its customers to the internet services to which the following website addresses currently provide access:

popcorn-time.to
popcorn-time.is
popcorntime.sh
popcorn-time.xyz
popcorntimes.ws
films-v2.api-fetch.website
tv-v2-api-fetch.website
api.ukfntlge.xyz
api-fetch.website
eztvapi.ml
yts.ph
yify.is
tinfo.ukfntlge.xyz
api.opensubtitles.org
sub.ukfntlge.xyz
interface.time-popcorn.info
interface.time-popcorn.com
interface.thepopcorntime.net
interface.the-pop-corn-time.net
interface.time-popcorn.net
interface.popcorn-time.to
interface.time4videostream.com
updpopcorntime.xyz
upd-pct.info
popcorntime-upd.xyz
pct-upd.info
updatepopcorntime.xyz
dl.opensubtitles.org
api.yifysubtitles.com

TDC is ordered to implement a technical solution such as a DNS blocking which is able to prevent access for TDC's customers to the internet services to which the website addresses listed in Exhibit 14 currently provide access, as well as to other website addresses that provide access to the same internet services and of which the Alliance of Rights, in accordance with the Code of Conduct, expressly makes TDC aware, on the basis that the Alliance hereby undertakes legally and economically vouch that such other website addresses provide access to the internet services to which this decision relates.

The respondent is applying for rejection.

Information on the case

The applicants, the Alliance of Rights, are an association that works to counteract the illegal use and distribution of films, television shows, music, literature, etc. on the internet in particular.

Popcorn Time offers free films and TV shows over the Internet on the Danish market without the necessary agreements with the licensees for distribution of the content products.

Popcorn Time is a decentralised system, which means that it consists of many different parts that jointly create Popcorn Time, thereby creating free access for internet users to watch films and TV shows.

This means that films and TV series with accompanying metadata, subtitles, etc are present on various websites which Popcorn Time programs are programmed to link to and which form part of the system that is crucial for the user's ability to play films and TV shows through the Popcorn Time system.

As Popcorn Time is a decentralised system, it will be necessary to block the use of more than one website whose access to use of Popcorn Time is to be prevented.

Popcorn Time operates like a media player with a built-in application that collects and presents to the user films and TV shows with related metadata (image layers, backgrounds, plot descriptions, season and paragraph list, genre, length, etc.) located on websites to which the Popcorn Time system is programmed to link and which are part of the system that is essential to the user's ability to play the desired films and TV shows.

There are three different versions of Popcorn Time, and each version has its own system. The three versions of Popcorn Time are available from the following websites:

popcorn-time.to
popcorn-time.is
popcorntime.sh

The websites covered by the applicants' claims are all necessary parts of Popcorn Time.

The following websites provide the Popcorn Time programs:

popcorn-time.to
popcorn-time.is
popcorntime.sh
popcorn-time.xyz
popcorntimes.ws

The following websites provide links to content, infrastructure, metadata and subtitles for Popcorn Time:

films-v2.api-fetch.website
tv-v2-api-fetch.website
api.ukfntlge.xyz
api-fetch.website
eztvapi.ml
yts.ph
yify.is
tinfo.ukfntlge.xyz
api.opensubtitles.org
sub.ukfntlge.xyz
api.yifysubtitles.com

The following websites deliver and store menu structure and subtitles for Popcorn Time:

interface.time-popcorn.info
interface.time-popcorn.com
interface.thepopcorn.net
interface.the-pop-corn-time.net
interface.time-popcorn.net
interface.popcorn-time.to
interface.time4videostream.com
dl.opensubtitles.org

The following websites update the Popcorn Time program:

udp popcorn time .xyz
udp-pct.info
popcorn time-udp .xyz
pct-udp.info
update popcorn time .xyz

The applicants wrote in May 2017 to the websites that are subject to the injunction application and urged them to terminate the infringements of copyright holders' rights. The applicants also wrote to the websites in October 2017 with information on these proceedings and the hearing on November 14, 2017, at 9.30.

None of them has responded to the court or has attended prior to the hearing.

The views of the parties

The applicants state the following in their submission of 13 November 2017:

"1. Popcorn Time

In support of the allegations made, it is in the first place requested that the websites in question should be blocked because they provide content for the Popcorn Time services, which are illegal services.

Popcorn Time gives Danish users access to a comprehensive catalogue of films and TV series, to which the proprietors have copyrighted exclusive rights.

Since these films and TV series are made available to the public without the permission of the licensees, this is contrary to § 2 (2) of the Copyright Act. 1, cf. 3, No. 3, cf. 4, No. 1, cf. § 65, paragraph 1. 1 and 6 and 66 (1). 1 and 2 and 67 (1). 1 and 2.

In addition, Popcorn Time users make copies of the works in violation of § 2 (2) of the Copyright Act. 2 when they are downloaded to the users' computers via the Popcorn Time services. When the users play the content products through the Popcorn Time programs, they also, in addition to their own copies, create an illegal availability for other users, as the content products are simultaneously made available to other users.

Popcorn Time Services (.TO), (.IS) and (.SH) each act as a media player, which, through the built-in program, allows access to a massive but defined directory of content products contrary to copyright.

It is apparent from § 2 (1) of the Copyright Act. 4, No. 1 that when a work is made available *"in such a way that the public has access to it at an individually chosen place and time"* this constitutes a public performance of the work. More specifically, it is a transfer to the public, which is an EU-harmonised exclusive right, cf. Directive 2001/29EU (Infosoc Directive) Article 3 (1). The right to transfer to the public is implemented by § 2 (1) of the Copyright Act. 4, No. 1.

It is clear from the recent case law of the European Court of Justice that the provision of a media player with a built-in program that allows users to play and use content products without the permission of the licensees constitutes a transfer to the public in violation of Article 3 (1) of the Infosoc Directive. Reference is made to the judgement of 26 April 2017 (Case C-527 Film Player), paragraphs 41 and 42.

It is argued that the Popcorn Time programs (.TO), (.IS) and (.SH) with the websites of Exhibit 14 (and illustrated in Exhibit 16) each constitute a service similar to a media player which, as shown in the above case concerning film players, transmits protected content to the public contrary to the exclusive rights of the applicants under the Copyright Act.

This is the case because the websites to which this application relates all take part in the illegal activities that occur using Popcorn Time services.

The websites provide the necessary content, features and users that are essential for keeping the Popcorn Timetables functioning. All the websites in question are required parts of the Popcorn Time Services systems, and without them, the Popcorn Time services will not work.

Reference is made to Oslo District Court's decision of 3 November 2017 (court case number 17-093347TVI-OTIR/05), in which the court in a very similar case to the present ordered the telecommunications companies to block the websites that are part of Popcorn Time services.

As a result, it is claimed that the conditions for blocking the websites covered by the request are met.

2. Websites

On a subsidiary basis, it is argued that the websites that this case concerns should be blocked because they themselves make content available in violation of the exclusive rights of the applicants under the Copyright Act.

In what follows, submissions are reviewed in relation to the different types of websites that are covered by the blocking application. See Exhibit 16 for an overview.

a. Websites that deliver and update Popcorn Time programs:

popcorn-time.to
popcorn-time.is
popcorntime.sh
popcorn-time.xyz
popcorntimes.ws

updpopcorntime.xyz,
upd-pct.info,
popcorntime-upd.xyz,
pct-upd.info,
updatepopcorntime.xyz

The website's function and purpose is to provide Popcorn Time programs. The offering of the programs is a transfer to the public in violation of § 2 (2) of the Copyright Act. 3, No. 3, cf. 4, No. 1.

This is evident from the judgement of the European Court of Justice in Case C-527/15 (Film Player), in which the Court finds that the delivery of a media player with built-in programs that provide users with access to illegal content products is a transfer to the public in violation of the Infosoc Directive, Article 3 (1). Reference is made in particular to paragraph 41 and paragraph 42.

On this basis, it is claimed that on the above websites there is a transfer to the public of content to which the applicants have rights under the Copyright Act. This transfer to the public is in violation of the rights of the applicants, since they have not granted permission for it, cf. § 2 (2) of the Copyright Act, 4, No. 1.

In addition, it is claimed that the above websites are illegal because they contribute to the distribution of Popcorn Time. Popcorn Time programs are the decisive means by which users are induced and encouraged to access the other host websites in the case and therefore directly cause a distribution that violates the rights of the applicants.

It is claimed that the conditions for the blocking for these websites are met.

b. Hosting sites that provide links to content, infrastructure and metadata:

movies-v2.api-fetch.website,
tv-v2-api-fetch.website,
api.ukfntlge.xyz,
api-fetch.website,
eztvapi.ml,
yts.ph, yify.is, yts.ag,
tinfo.ukfntlge.xyz,
api.opensubtitles.org,
sub.ukfntlge.xyz,
api.yifysubtitles.com.

The above websites contain links to copyrighted content. To make copyrighted material available through links to content on other sites is in itself an illegal act when the link is not made available with the licensee's consent. This is shown, inter alia, by the judgement of the European Court of Justice in Case C-160/15 (GS Media).

This also applies even if the link is not directly to content but, for example, to so-called torrent files. This is apparent, in particular, from the Supreme Court order of 27 May 2010, referred to in UfR 2010.2221H. In addition, it has been confirmed by the European Court of Justice in a new decision of 14 June 2017 in Case C-610/15 (Ziggo vs. Brein).

It is therefore claimed that the websites are illegal because they link to content made available without the consent of the rights holders.

Even if, in individual cases, the content was originally made available on the web with the consent of the copyright holders, the websites are still illegal because of the fact that the content is being made available via Popcorn Time using a *new technical approach*. Reference is made to the latest case law of the European Court of Justice in this area, including Case C-527/15 (Film Player) and Case C-607/11 (TV Catch-up).

Thus, it can be established that the websites containing links to content posted on other websites perform an independent transfer to the public which, in accordance with the above, violates § 2 (2) of the Copyright Act, 4, No. 1.

It is claimed that the conditions for the blocking for these websites are met.

c. Hosting sites that store and deliver content:

interface.time-popcorn.info,
interface.time-popcorn.com,
interface.thepopcorn.net,
interface.the-pop-corn-time.net,
interface.time-popcorn.net,
interface.popcorn-time.to,
interface.time4videostream.com,
dl.opensubtitles.org.

The above websites contain content made available through the Popcorn Time services.

The content of the websites is protected by the copyright owners' rights.

It is alleged that infringements of the exclusive rights of the applicants under § 2 (2), 4, No. 1 of the Copyright Act are infringed on the above mentioned hosting sites.

It is claimed that the conditions for the blocking for these websites are met.

TDC's obligation to block the illegal services

Article 8 (3) of the Infosoc Directive makes provision for blocking intermediaries, including Internet providers such as TDC. The provision is implemented in Danish law and has been the basis for several cases of blocks of illegal websites.

It is apparent, in particular, in Case C-557/07 (Promusicae) that Internet service providers such as TDC are intermediaries in the sense of the Infosoc Directive.

The Infosoc Directive was implemented in Danish law by amending the Copyright Act in 2002. Article 8 (3) of the Directive is discussed in the comments on the proposal for § 11a, paragraph 1:

"The provision in § 11, paragraph 3 on legal orders also applies to the exception clause 11a. This means that a network operator's dissemination of copyright-infringing material, irrespective of the provision in § 11a, will be illegal and the rights holder may therefore obtain a prohibition, in accordance with Article 8 (3) and recital 59 of the Directive, according to which rights holders must be able to demand a prohibition on an intermediary transferring a third party's violation of protected works or other creations in a network. The issue has been discussed with the Ministry of Justice."

TDC's transmission of data in its network objectively constitutes copyright infringement, cf. § 11 (1) of the Copyright Act. 3 and 11a, although TDC cannot be subjectively liable for violations due to the rules of the e-commerce act on exemption from liability. That is, when a customer of an ISP uses the Popcorn Time services to play films or TV shows, the content is transmitted in the form of data in the ISP's network. The transmission involves temporary copies of content products, which, due to the condition of legal submission in § 11, paragraph 1. 3, is prohibited in § 11a of the Copyright Act.

This is emphasised in the case law several times, notably in the Supreme Court's order, referred to in UfR 2010.2221H.

The fact that Popcorn Time services are accessed through a program instead of a website does not change the facts about the creation of temporary copies, as discussed above.

It is argued that TDC, as an ISP, may be ordered to block the websites referred to in the case.

In addition, reference is made to Article 11 of the Law Enforcement Directive, which allows intermediaries like TDC to be ordered to block illegal services that infringe intellectual property rights. Article 11 is implemented in the general rules of the Procedural Code.

Provisions of the Procedural Code on injunctions

The general rules on temporary prohibition and injunctions in the Procedural Code do not require any subjective liability, but merely that unlawful activities occur in the ISP's network.

The actions for which prohibition is requested are clearly contrary to the rights of the members of the applicants under the Copyright Act.

The illegal activities to be prohibited are expected to continue.

The law's general rules on penalties and compensation do not give the applicants sufficient legal protection, as it is noted that, in the context of the tightening of the statutory provisions for the suspension of temporary prohibition, the legislature has explicitly stated that the conditions for prohibition will generally be met in cases of breach of intellectual property rights, cf. comments on the bill § 642 (now § 414).

As far as possible, the rights holders have informed the relevant players in connection with the operation of the websites in question without this causing the violations to cease.

As it can be assumed that the content that violates the rights of the rights holders constitutes a significant part of the content made available through the Popcorn Time services and that it is possible for TDC to block the websites at DNS level, the blocks will not unnecessarily remove Internet users' access to legitimate information.

The imposition of a prohibition is in accordance with the case law.

The licensees should not be ordered to pay a bail in connection with the prohibition."

The respondent has stated the following in the submission of 2 October 2017:

that it is entirely the responsibility of the licensees to meet the burden of proof that a prohibition may be imposed,

that it is the responsibility of the licensees to prove that the websites mentioned in the injection applications contain sufficiently illegal material in addition to the requirement of proportionality being met

that TDC is an ISP and does not have any knowledge of or liability for the websites in question

that TDC's primary interest in the matter is that a substantive correct judgement is delivered so that TDC has a safe legal basis to follow.

The parties have essentially proceeded in accordance with the above.

The court's grounds and decision

It is the applicants that hold the rights to the films and TV series that can be accessed via the Popcorn Time system.

The access to watch films and TV shows on the Internet provided by the Popcorn Time system is in violation of the applicants' rights, as those rights holders have not granted permission, cf. § 2 (2) of the Copyright Act. 1, cf. 3, No. 3, cf. 4, No. 1, cf. § 65, paragraph 1. 1 and 6, § 66, subsection 1 and 2 and 67 (1). 1 and 2. In addition, it violates § 2 (1) of the Copyright Act. 1, cf. 2, to engage in film and television series production without the permission of the rights holders.

Article 3 (1) of the Infosoc Directive (2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society) requires that the member states of the European Union have a uniform right to permit or prohibit wireless transmission to the public of their works, including the provision of their works in such a way that the public can access them at an individually chosen place and time.

In a decision of 26 April 2017 (C-527/15), the European Court of Justice stated that the delivery of a media player called "film player" had to be regarded as a transfer to the public as set out in Article 3.

Regarding that "film player", it is apparent from paragraphs 41 and 42 of the judgement that it gave buyers access to protected works published on streaming sites without the permission of the copyright holders, allowing buyers to view these works on their TV screen. This "film player" contained preinstalled add-ons that enabled menu access to the links that these add-ons contained and, if enabled by the media player's remote control, gave users direct access to protected works, published without permission from the copyright holders.

The court agrees with the applicants that, in the same way as the "Film Player" referred to in the judgement, the Popcorn Time system makes copyrighted films and television series accessible to the public over the Internet without the permission of the copyright owners. This violates copyright laws as stated above. As the Popcorn Time system makes use of the websites mentioned in the claim for the illegal viewing of films and television series, under § 413 of the Procedural Code it is possible to prohibit the websites in question.

By communicating access for its customers to the services on the websites covered by the prohibition, the respondent's transmission of data objectively infringes the applicants' copyright.

It also follows from Article 8 (1), 3 of the Infosoc Directive that Member States must ensure that rights holders may apply for a prohibition on intermediaries whose

services are used by third parties to infringe copyrights or related rights.

The applicants have shown that they hold the rights for which prohibition is requested and that the respondent's conduct necessitates the imposition of prohibitions and injunctions as requested and that the applicants' ability to exercise their rights will be lost if the applicants are required to await the full legal resolution of the dispute.

It is noted in this connection that it follows from the "Code of Conduct for handling decisions on blocking access to IPR services" concluded between the players in the telecom industry (Exhibit 2) that, when website addresses are DNS-blocked on the basis of a court decision, telecommunications industry members will also block additional website addresses if the proprietor claims that these website addresses also provide access to the service covered by the court order. The blocking presupposes that the Alliance agrees to indemnify the ISP provider financially in this regard.

The applicants' claims are therefore upheld, as the circumstances mentioned in § 414 of the Public Prosecutor's Act are not deemed to exist and as the conditions of § 413 of the Procedural Code are found to be met.

Since the respondent's customers, who are prevented from accessing the above services, will not be able to claim compensation against the respondent because the customers themselves are acting in breach of the Copyright Act, no bail need be imposed for the cancellation of the prohibition and the injunction.

In the circumstances, each party should bear its own costs.

The court accordingly finds as follows:

TDC, as an Internet provider, is prohibited from granting access for its customers to the internet services that the following website addresses currently provide access to:

popcorn-time.to
popcorn-time.is
popcorn-time.sh
popcorn-time.xyz
popcorn-times.ws
films-v2.api-fetch.website
tv-v2-api-fetch.website
api.ukfrnlge.xyz
api-fetch.website
eztvapi.ml
yts.ph
yify.is

tinfo.ukfrrlge.xyz
api.opensubtitles.org
sub.ukfrrlge.xyz
interface.time-popcorn.info
interface.time-popcorn.com
interface.thepopcorn.net
interface.the-pop-corn-time.net
interface.time-popcorn.net
interface.popcorn-time.to
interface.time4videostream.com
updpopcorn.net
udp-pct.info
popcorn-time-upd.xyz
pct-upd.info
updatepopcorn.net
dl.opensubtitles.org
api.yifysubtitles.com

TDC is ordered to implement a technical solution, such as a DNS blocker, that is suitable for preventing TDC's customers from accessing the Internet services currently accessible through the website addresses, as well as for other website addresses that provide access to the same internet services, which the Alliance of Rights, in accordance with the Code of Conduct, will expressly notified to TDC, and in connection with which the Alliance hereby undertakes legally and economically to demonstrate that such other website addresses provide access to the internet services to which this decision relates.

Neither party shall pay costs to the other party.

Tine Hammershøj Madsen

The correctness of the printout is confirmed.
District Court of Frederiksberg, December 5, 2017.

Henrik Olsen, Clerk of the Court