



SUPREME COURT OF NORWAY

O R D E R

issued on 8 February 2022 by a division of the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Wilhelm Matheson
Justice Kristin Normann
Justice Ingvald Falch
Justice Kine Steinsvik

HR-2022-328-A, (case no. 19-188553SIV-HRET)
Appeal against Borgarting Court of Appeal's order 21 October 2019

In.

NextGenTel AS
Telia Norge AS
Telenor Norge AS
Altibox AS

(Counsel Rune Opdahl)

v.

Copyright Management Services Ltd

(Counsel Kyrre Eggen)

II.

Copyright Management Services Ltd

(Counsel Kyrre Eggen)

v.

NextGenTel AS
Telia Norge AS
Telenor Norge AS
Altibox AS

(Counsel Rune Opdahl)

(1) Justice **Normann:**

Issues and background

- (2) The case concerns a petition to secure evidence in a dispute over copyright infringement of film. The question is whether four internet providers are obliged to hand over subscription information relating to certain IP addresses to a copyright management company. The issue of dispute in the Supreme Court is the general interpretation of section 56b subsection 3 of the Copyright Act 1961.
- (3) Copyright Management Services Ltd. (CMS) manages the rights to the films *Cell*, *I.T*, *London Has Fallen*, *Mechanic: Resurrection*, *September of Shiraz* and *Criminal* (the titles or the films). The petition includes a request for subscription information relating to 8 799 internet users who have downloaded films through file sharing networks.
- (4) Altibox AS, Get AS, NextGenTel AS and Telenor Norge AS are providers of electronic communication services. The companies offer telephone services and internet access through subscription agreements with the users and therefore have information about their names and addresses.
- (5) The internet providers have a duty under section 2-9 of the Electronic Communication Act to keep such subscription information confidential. An exemption from the duty may be granted under section 56b of the Copyright Act 1961. The court may, upon further conditions and without hindrance by the duty of confidentiality, order the provider of electronic communication services to hand over data identifying the subscriber of the service used in the infringing activities. From 1 July 2018, the Copyright Act 1961 was replaced by the Copyright Act 2018. The corresponding provision in the Copyright Act 2018 is section 87. This case concerns the Copyright Act 1961.
- (6) Through an electronic investigation device called “Maverick Monitor”, CMS has registered copyright infringement of the titles from a total of 23 375 IP addresses. Complete films, or parts of films, had been uploaded or downloaded by connecting to one or several file sharing networks that use a so-called BitTorrent client sharing software.
- (7) The parties agree on the definition of an IP address as rendered in the District Court’s judgment:
- “An IP address is a unique address assigned to a subscription upon connection to the internet, see Proposition to the Storting 65 L (2012-2013), page 20. Subscribers may be assigned with either static or dynamic IP addresses. A static IP address remains the same each time the computer is connected to the internet, while a dynamic IP address may be different for each connection. Therefore, it is customary that internet providers, who use dynamic IP addresses, log the time span during which a subscription is assigned a subscription. By judging the time lap against the IP address, the internet provider may learn which subscription at a specific point in time has been tied to a specific IP address.”
- (8) Thus, in order to pursue the illegal file sharing, it is not sufficient only to know the IP address. Information must also be acquired regarding which subscribers are tied to the various IP addresses at the times of the relevant uploads and downloads.

- (9) The users have employed a so-called BitTorrent protocol. “Protocol” is the term for the rules governing the communication between the software and the hardware in a computer network. The software facilitates direct transmission between computers, also referred to as peer-to-peer or user-to-user. As opposed to when uploading or downloading from one database, it is not necessary for the user to have access to one single computer with the complete file. Different pieces of the film may be downloaded from different computers at various times. Therefore, the user is not dependent on stability in the network of the person or persons possessing the file.
- (10) The copyright infringement in the case at hand may occur when an internet user personally installs BitTorrent software to access a film. This has the effect that also others may access the film, without this necessarily being the intention. If the user is to prevent others from uploading, he must actively deactivate the upload function. BitTorrent software can be downloaded from several well-known and much visited websites. The technology is also used for fully legal internet activities.
- (11) To illustrate the gravity and scope of the file sharing in this case, CMS has classified the IP addresses. The various parameters on which the classes are based, are indicators of presence in the network and thus contribute to substantiating illegal copying (downloading) and making available (uploading) of one or several titles. Both the District Court and the Court of Appeal have based their rulings on this classification. In the District Court’s order, the different classes are described as follows:
- (12) Class A:
- “Class A includes 1 488 IP addresses (users) ... The users in this category have been registered as having shared *fragments* (‘packets’) of one or several works to which CMS holds the rights, and the registered sharing from *each* of the IP addresses in this category is simultaneously tied to sharing with a ‘swarm size’ of at least 10 000. As explained initially, the swarm size shows the number of users that have shared and downloaded *the relevant film* in the BitTorrent network, on the relevant day, from the specific IP address stated in the attached Excel spreadsheet. The disclosed swarm size indicates only the number of IP addresses that MaverikMonitor has registered in the swarm.”
- (13) Class B:
- “Class B includes 2 457 IP addresses (users) ... The users in this category have been registered as having shared *fragments* (‘packets’) of two or more works to which CMS holds the rights. IP addresses in this category are thus linked to repeated infringement of CMS’s works.”
- (14) Class C:
- “Class C includes 3 921 IP addresses (users) ... The users in this category have been registered as having shared *fragments* (‘packets’) of one of the works to which CMS holds the rights, on *20 or more different* occasions. IP addresses in this category are thus also linked to repeated infringement of CMS’s works.”
- (15) Class D:
- “Class D includes 2 207 IP addresses (users) ... The users in this category have been registered as having shared *fragments* (‘packets’) of one of the works to which CMS

holds the rights, on at least two different days. IP address in this category are thus also linked to repeated infringement of CMS's works. ... The total 'days' value as such does not necessarily only show 'captures' of CMS's works. Nonetheless, the Court finds based on the presented evidence that it is possible to see for how long a user has been sharing one of works to which CMS holds the rights, because the presented lists focus on a 'hash' relating to one of CMS's works."

(16) Class E:

"Class E includes 2 081 IP addresses (users).... The users in this category have been registered by MaverikMonitor as having shared *fragments* ('packets') of 10 or more works ('hashes'). These users have thereby shared a considerable number of protected works. As previously explained, the 'hash' value shows how many different main files the user has shared by means of the device. CMS does not necessarily hold the rights to all the works that have been registered."

(17) Class F:

"Class F includes 5 191 IP addresses (users) ... The users in this category have been registered by MaverikMotor has having shared *fragments* ('packets') of at least one work on 10 or more different days. These users also have thus shared a considerable number of protected works. CMS does not necessarily hold the rights to all the works registered in this category. However, from the presented materials ... it appears that CMS holds the rights to at least one of the works."

(18) Class G:

"Class G includes 3 469 IP addresses (users) ... The users in this category have been registered by MaverikMonitor has having shared *fragments* ('packets') of one or more works at least *100 times*. This is illustrated by the value 'captures/total' ...

These users also have thus shared a considerable amount of protected works. CMS does not necessarily hold all the rights registered in this category, either..."

(19) Class H part 1:

"Class H part 1 includes 547 IP addresses (users) ... The users in this category qualify to *at least* two of the classes E ('hashes' exceeding 10), F (10 or more 'days') or G (100 'captures/total'), and at the same time, sharing of one of CMS's works has been registered 20 or more times ('captures/title')."

(20) Class H part 2:

"Class H part 2 includes 443 IP addresses (users) ... The users in this category have been registered by MaverikMonitor as having shared two or more of CMS's works, *each of the works* more than 19 times."

(21) Class I:

"Class I covers other secured IP addresses in the case assigned to companies, institutions, authorities etc."

The court proceedings

- (22) CMS filed petitions to secure evidence in Oslo District Court towards the internet providers on 7 December 2016, on 16 December 2016, on 17 February 2017, on 4 April 2017 and on 5 May 2017. The petitions were joined in one case.
- (23) On 15 January 2018, Oslo District Court issued this order after written pleadings:
- “1. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class A, Exhibit 3 and thus linked to a swarm size of at least 10 000.
 2. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class B, Exhibit 4 and linked to sharing of at least two films to which CMS holds the rights.
 3. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class C, Exhibit 5 and linked to sharing at least 20 times of a work to which CMS holds the rights.
 4. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class D, Exhibit 6 and linked to making available of a work to which CMS holds the rights, over a period of at least two days.
 5. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class E, Exhibit 7 and linked to uploading of at least 10 works/files with different hash value.
 6. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class F, Exhibit 8 and linked to sharing of various works over a period of at least 10 days.
 7. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class G, Exhibit 9 and linked to sharing of works at least 100 times.
 8. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class H –part 1, Exhibit 10 and therefore linked to very serious infringements.
 9. Telenor AS, Altibox AS, Get AS and NextGentel AS are to hand over the names and addresses of the subscribers behind IP addresses falling under Class H part 2, Exhibit 11 and therefore linked to very serious infringements.”
- (24) From items 10-13 of the ruling, it appears that CMS was ordered under section 28-5 subsection 1 of the Dispute Act to cover the defendants’ legal fees and incurred costs from securing and handover of IP addresses.

- (25) Hence, CMS's petition to secure evidence succeeded on all counts except for when it came to Class I. The District Court found that all the users in Classes A to H had shared protected materials of a "certain scope", see section 56b subsection 3 of the Copyright Act 1961. In the District Court's view, it was not necessary to set a lower threshold for copying, because it had been substantiated that all the acquired IP addresses had also uploaded titles to other users in the network.
- (26) Telenor Norge AS, Altibox AS, NextGenTel AS and Get AS appealed against the District Court's order to the Court of Appeal. The Court of Appeal heard the petition to secure 8,799 IP addresses. Get AS ceased to exist as a company on 1 March 2019 due to the merger with Telia Norge AS as the acquiring company. After that, Telia entered as the appellant in the case instead of Get AS.
- (27) On 21 October 2019, Borgarting Court of Appeal issued this order after an oral hearing:
- "1. Telenor Norge AS, Altibox AS, Telia Norge AS and NextGenTel AS are to hand over to Copyright Management Services Ltd. the names and addresses of their respective subscribers assigned with the following IP addresses at the times stated as grounds for the petition:
 - Class B IP addresses that within a period of six months have been registered with at least one 'capture' on three or more different works (titles) to which Copyright Management Services Ltd. manages the rights.
 - Class C IP addresses that within a period of six months have been registered with at least 20 'captures/title' on one work to which Copyright Management Services Ltd. manages the rights, not counting more than one 'capture/title' per hour is included.
 - Class D IP addresses that are registered with at least one 'capture' over ten days or more of one unique copy of a work (a 'hash') to which Copyright Management Services Ltd. manages the rights.
 - Class H2 IP addresses that within a period of six months have been registered with at least 20 'captures/title' on every two works to which Copyright Management Services Ltd. manages the rights, not counting more than two 'captures/title' per hour on each of the films.
 2. Telenor Norge AS, Altibox AS, Telia Norge AS and NextGenTel AS are not obliged to hand over subscription information that is not covered by item 1.
 3. Copyright Management Services Ltd. is to pay to the appellants, represented by Telenor Norge AS, costs in the District Court of NOK 907 414 within two weeks of the service of this order.
 4. Copyright Management Services Ltd. is to pay to the appellants, represented by Telenor Norge AS, costs in the Court of Appeal of NOK 1 911 611 within two weeks of the service of this order."
- (28) The appeal was partially successful. The Court of Appeal found that the number of IP addresses had to be limited compared to the number stipulated by the District Court. The

Court of Appeal ordered the appellants to hand over subscription information relating to 2 353 users.

- (29) Altibox AS, Telia Norge AS, NextGenTel AS and Telenor Norge AS have appealed against item 1 of the Court of Appeal's order to the Supreme Court. The appeal challenges the Court of Appeal's general interpretation of the law.
- (30) CMS has submitted a derivative appeal, contending that the District Court's interpretation of the law is correct. This appeal challenges item 2 of the Court of Appeal's order.
- (31) On 12 February 2020, the Supreme Court's Appeals Selection Committee referred the case to hearing in a division of the Supreme Court composed of five justices, see section 5 subsection 1 second sentence of the Courts of Justice Act. The Committee also decided that the case would follow the procedure applicable for appeals against judgments, see section 30-9 subsection 4 of the Dispute Act.
- (32) In a joint pleading of 11 May 2020, the parties stated that they had agreed to stay the proceedings in anticipation of the ruling of the European Court of Justice (ECJ) Case C-597/19, see section 16-17 of the Dispute Act. The proceedings were then stayed for a minimum of six months with effect from 11 May 2020. Upon the parties' request, the case was resumed on 1 September 2021.
- (33) A remote hearing has been held in accordance with section 3 of temporary Act relating to certain adjustments in the rules of procedure due to the COVID-19 outbreak.

The parties' contentions

- (34) The appellants – *Altibox AS, Telia Norge AS, NextGenTel AS and Telenor Norge AS* – contend:
- (35) The Court of Appeal's order is based on an incorrect interpretation of the law. The individual application of the law is suited to shed light on this. The Court of Appeal's interpretation of section 56b subsection 3 of the Copyright Act 1961 has the result that the threshold for handing over subscription information is set too low.
- (36) Section 56b subsection 3 prescribes a balancing of interests. The Court of Appeal interprets this as a requirement that the infringement must be of "a certain scope". The "gravity" and "damaging effects" of the infringement and the users' right to privacy have been considered in the determination of the scope. The conception that privacy considerations are not to be given weight apart from in extraordinary circumstances is an incorrect interpretation of the law. The Court of Appeal has made the balancing of interests into a closing calibration. The protection of privacy is made into a balancing item.
- (37) The Court of Appeal has also failed to consider the basic condition for establishing an infringement, namely that the users must have acted in full knowledge of the consequences of their conduct, see the ECJ's judgment 17 June 2021 in Case C-597/19 *Mircom* paragraphs 48–49 and the summary in paragraph 59.

- (38) The lack of weight given to CMS's role in the balancing of interests is due to an incorrect interpretation of the law. CMS's objective is not to combat copyright infringement.
- (39) CMS cannot succeed in its derivative appeal. No schematic rule on handover of information can be laid down solely based on automatic uploading in a peer-to-peer BitTorrent network exceeding a certain size.
- (40) Altibox AS, Telia Norge AS, NextGenTel AS and Telenor Norge AS ask the Supreme Court to rule as follows:

“Principally

- 1. Telenor Norge AS, Altibox AS, Telia Norge AS and NextGenTel AS are not obliged to hand over subscribers' names and addresses, with an exception for subscribers tied to the IP addresses at the time stated in the petition that within a period of six months have been registered with at least one 'capture' on a number stipulated by the Supreme Court of several different works ('titles') to which Copyright Management Services Ltd. manages the rights.

In the alternative

- 1. Item 1 of the Court of Appeal's order is set aside.

In CMS's derivative appeal

- 1. The appeal is dismissed.

In all cases

- 1. Copyright Management Services Ltd. is to cover Telenor Norge AS's costs in the Supreme Court.”

- (41) The respondent – *Copyright Management Services Ltd.* – contends:
- (42) The District Court's interpretation of the law is correct. The only qualification requirement under section 56b subsection 3 of the Copyright Act 1961 is evidence of uploading in a peer-to-peer network exceeding a certain size, see Rt-2010-774-A *Max Manus* and the *Mircom* judgment of the ECJ.
- (43) Each user contributes to the spread of works to the public by simultaneously downloading and uploading films. Each user is thus part of the overall copyright infringement. The Court of Appeal's failure to give weight to this contribution is a result of an incorrect application of the law.
- (44) The requirement of substantiation of the spread from the individual user conflicts with the requirement of balancing copyright protection against the right to privacy. The privacy considerations are not prominent in this case, as it concerns sharing of “normal” titles.
- (45) The individual user meets the subjective conditions for establishing an infringement. By accepting the user terms, the users have been informed that the uploading of data takes place automatically.
- (46) There is no evidence that CMS's operating method involves abuse of any intellectual property rights, see *Mircom* paragraphs 94 and 95. The company is actively striving to combat

copyright infringement. The acquisition of IP addresses to pursue this objective constitutes legitimate processing of personal data.

- (47) In the alternative, the Court of Appeal's interpretation of the law is correct.
- (48) Copyright Management Services Ltd. asks the Supreme Court to rule as follows:

“In the appellants' appeal:

1. The appeal is dismissed.
2. ALTIBOX AS, GET AS, NextGentel AS and Telenor Norge AS are jointly and severally liable for Copyright Management Services Ltd. costs in the Supreme Court.

In CMS's derivative appeal:

1. Items 1-10 of the District Court's order are upheld.
2. Costs in the Court of Appeal are not awarded.
3. ALTIBOX AS, GET AS, NextGentel AS and Telenor Norge AS are jointly and severally liable for Copyright Management Services Ltd.'s costs in the Supreme Court.”

My opinion

The Supreme Court's jurisdiction

- (49) When hearing a second-tier appeal against an order, the Supreme Court may only review the Court of Appeal's procedure and “the general legal interpretation of a written legal rule”, see section 30-6 (b) and (c) of the Dispute Act. The appeal concerns the general interpretation of the law. Although the Supreme Court cannot review the Court of Appeal's findings of fact or individual application of the law, the individual application of the law and the presented facts may still shed light on the Court of Appeal's interpretation, see HR-2017-833-A *Scanbox* paragraph 23 with further references.
- (50) The question is whether the Court of Appeal has correctly interpreted section 56b subsection 3 of the Copyright Act 1961. This provision is continued in the Copyright Act of 15 June 2018 no. 40 section 87 without substantive changes, see Proposition to the Storting 104 L (2016–2017) page 351.

The general interpretation of the law

- (51) The three first subsections of section 56b of the Copyright Act 1961 read:

“If it is substantiated that copyright or other rights under this Act have been infringed, the court may without hindrance by the duty of confidentiality under section 2-9 of the Electronic Communication Act, upon the rightholder's request, order a provider of

electronic communication services to hand over information that identifies the owner of the subscription used in the infringing activities.

Before the court makes its ruling, one must obtain the consent of the Norwegian Communications Authority to exempt the provider from the duty of confidentiality under section 2-9 of the Electronic Communication Act. The rightholder must send a request to the Authority and present the Authority's statement to the court. The statement must then be announced to the parties. The Authority may withhold its consent only if it may otherwise be damaging the State or public interests or seem unreasonable to the person entitled to secrecy.

For the petition to succeed, the court must find that the considerations in favour of handing over the data outweigh the duty of confidentiality. When assessing this, the court must strike a fair balance between the privacy of the subscriber and the rightholder's interest in accessing the data, in the light of the gravity, scope and damaging effects of the infringement. After such a balance of interests has been struck, the court may order the data handed over even if consent has been withheld, or that the data be retained even if consent has been given."

- (52) The provision must be interpreted so that it does not conflict with superior legal rules. The Privacy Act regulates the processing of personal data acquired in accordance with section 56b subsection 3 of the Copyright Act 1961, see section 56b subsection 6. According to section 1, cf. section 2 subsection 4 of the Privacy Act, Regulation (EU) 2016/679 of 27 April 2016, the General Data Protection Regulation – often referred to as GDPR – applies as Norwegian law with precedence over other legislation regulating the same matters. According to the Regulation, the internet providers must have a basis for processing under Article 6 in order to hand over the relevant data. The Regulation must be interpreted in conformity with the relevant rulings of the ECJ, see Article 6 of the EEA Agreement.
- (53) In my view, however, section 56b subsection has absorbed the balancing of interests requirement set out in Article 6 (1) (f) of the Regulation. I will therefore not consider this set of rules any further. Nor is it necessary to consider Article 102 of the Constitution and Article 8 of the European Convention on Human Rights (ECHR).
- (54) Directive (EU) 2001/29/EF, the Copyright Directive, is incorporated into the EEA Agreement, Annex XVII. The Directive was implemented by an amendment of the Copyright Act 1961 in 2005, see Proposition to the Odelsting no. 46 (2004–2005) and Recommendation to the Odelsting no.103 (2004–2005). All provisions arising from this Directive must be interpreted in conformity with the relevant rulings of the ECJ. The Copyright Directive, however, does not have a provision corresponding to section 56b of the Copyright Act 1961 section 56b.
- (55) Section 56b of the Copyright Act 1961 was added by Act of 31 May 2013 no. 26 and entered into force on 1 July 2013. Community law does not require that the internet providers be ordered to reveal the identities behind IP addresses to rightholders for use in civil proceedings, see Proposition to the Storting 65 L (2012–2013) paragraph 3.3.2. On the other hand, it is also not in conflict with Community law to have rules giving access to such information, as long as national law allows a fair balance to be struck between the various fundamental rights, see the ECJ's judgment of 29 January 2008 in Case C-275/06 *Promusicae* paragraph 68. The consideration of effective management of intellectual property rights must be balanced against the consideration of privacy, and the Member States have a margin of appreciation in creating legislation.

- (56) Section 2-9 of the Electronic Communication Act imposes internet providers among others “to maintain secrecy regarding the content of electronic communications and third party use of electronic communications”. Section 56b of the Copyright Act 1961 lays down an exception on the duty of confidentiality. Subsection 1 contains the basic condition for having information handed over that identifies the owner of the subscription tied to the IP address. The rightholder must file a request to the courts, and it must be substantiated that infringement of copyright or other protected rights has taken place.
- (57) Section 56b subsection 2 sets out that the court must obtain the consent of the Norwegian Communications Authority before making its ruling. The consent must be presented to the court, but it is not binding, see subsection 3 final sentence. The Authority may only refuse consent when “it may otherwise be damaging to the State or public interests or seem unreasonable to the person entitled to secrecy”. The assessment is identical to that prescribed in section 22-3 subsection 2 of the Dispute Act.
- (58) In a letter of 20 April, the Norwegian Communication Authority refused to consent to exempting internet providers from the duty of confidentiality, see section 2-9 of the Electronic Communication Act, cf. section 56b subsection 2 of the Copyright Act 1961.
- (59) It follows from section 56b subsection 3 that whether or not information should be handed over must be decided after striking a fair balance between the consideration of the subscriber and the rightholder’s interest in accessing the data, in the light of the gravity, scope and damaging effects of the infringement. The petition can only succeed if “considerations in favour of handing over the data outweigh the duty of confidentiality”, see section 56b subsection 3 first sentence and HR-2017-833-A *Scanbox* paragraph 28. The Act does not require an objective preponderance of evidence. Based on such a balance of interests, the court may order the data handed over even if the Norwegian Communication Authority has refused to exempt the providers from the duty of confidentiality, or order that the data be retained even if the Authority has consented, see section 56b subsection 3 third sentence.
- (60) The preparatory works give further guidance on the balancing of interests, see Proposition to the Storting 65 L (2012–2013) paragraph 3.3.6.3 pages 34–35. The same assessments are reiterated in the special motives for section 56b, see the Proposition’s chapter 8 pages 38–40.
- (61) HR-2017-833-A *Scanbox* concerned, like the case at hand, a petition for handover of the subscription information tied to the IP addresses of users who had downloaded complete or pieces of films by means of the BitTorrent technology. The order gives a thorough outline of the preparatory works, see paragraphs 30-39. Therefore, I confine myself to highlighting some main points, and I rely on the following for the balance of interests that is to be struck:
- (62) As set out in the preparatory works, the starting point for the balance of interests is that the rightholder should be given access to the subscriber’s identity if the infringement is of a *certain scope*. That will normally be the case for uploading (making available) of a complete film if it may be assumed that this exposes the rightholder to substantial damage. The same applies to extensive copying (downloading) of copyright protected materials. Uploading of materials will normally cause more damage to the rightholder than downloading, with the result that, for uploading, the threshold is lower for the identity of the subscriber tied to the IP address be handed over.

- (63) Of particular importance to the case at hand is that the Ministry, during the legislative process, was well aware that downloading in a peer-to-peer network by means of BitTorrent protocol simultaneously leads to uploading (making available), see Proposition to the Storting 65 L (2012–2013) chapter 2 on page 6 et seq. The Ministry found nonetheless that the assessment under section 56b subsection 3 when the this technology is used should not in principle differ from when the user uploads a complete work in a more traditional way from a database, see *Scanbox* paragraphs 32–33. An *individual assessment* must also be made in these instances, whereby a balance must be struck between the rightholder’s interests in having the information handed over and the consideration of the user in the individual case. For the user, the right to privacy is paramount, see *Scanbox* paragraph 34.
- (64) CMS contends that a correct interpretation of the law implies that substantiation of evidence of uploading in a peer-to-peer network with a certain swarm size is sufficient for demanding the handover of subscription information. I cannot find basis for such an interpretation of section 56b subsection 3. The swarm merely shows how many users that, at any given time, contribute to the sharing of the small pieces of files that in aggregate constitute the work (the film). And in *Scanbox*, the Supreme Court dismissed that a schematic rule could be laid down for the BitTorrent cases, see paragraph 35 and 37 with further references to the preparatory works. An individual balance of interests must be struck in these instances as well.
- (65) In CMS’s view, there are substantial differences between *Scanbox* and our case. CMS contends that in *Scanbox* – as opposed to in our case – no evidence of infringement of a certain scope had been presented. However, I cannot see how this was significant for the Supreme Court’s general interpretation of the law.
- (66) The Supreme Court order Rt-2010-774 *Max Manus* and the ECJ’s ruling of 17 June 2021 in Case C-597/19 *Mircom* have been invoked by both parties in the Supreme Court.
- (67) In *Max Manus*, the rightholders had petitioned for securing of information from Lyse Tele AS (later Altibox AS) relating to a subscriber held to be responsible for or having participated in illegal sharing of the films *Max Manus* and *The Kautokeino Rebellion* by means of the file sharing service “Lysehubben”. This did not involve such automatic sharing that takes place when materials are downloaded (copied) in a peer-to-peer network, but deliberate uploading of protected materials. Therefore, this order concerns a different and to some extent more serious case.
- (68) In the *Mircom* judgment, the ECJ interprets the Copyright Regulation. The judgment clarifies that the making available in itself of a file or pieces of a file containing a protected work by means of BitTorrent protocol constitutes an infringement. The ECJ’s view is summarised in paragraph 59. This corresponds to the phrase in section 2 subsection 3 of the Copyright Act “making it available to the public”. However, it gives no guidance as to which threshold applies for handover under section 56b subsection 3 of the Copyright Act 1961.
- (69) The substantiation of an infringement is a necessary, but not a sufficient condition for a handover to take place. When discussing the other questions raised, the ECJ points out that whether or not the petition should succeed must be based on a balancing of interests, see *Mircom* paragraph 132. The Court noted that Article 6 (1) of the Privacy Regulation read in conjunction with Article 15 (1) of Directive 2002/58/EC on privacy and electronic communications implies that the rightholder may request the communication of names and postal addresses tied to IP addresses used in the infringing activities, provided that this is

“justified, proportional and not abusive” and has its basis in national legislation. Here, the EU Court prescribes the same balancing of interest as section 56b subsection 3 the Copyright Act 1961.

- (70) Against this background, I cannot see that these two rulings may change the general interpretation of the law that follows from the preparatory works to section 56b subsection 3 of the Copyright Act 1961 and the *Scanbox* order.

Summary

- (71) My view on the general legal interpretation of section 56b subsection 3 of the Copyright Act 1961 may be summarised as follows:
- (72) A petition to secure evidence cannot be filed unless it has been substantiated that copyright infringement of a certain scope has occurred. If this is confirmed, the rightholders’ interests normally outweigh the consideration of the users’ privacy. According to its wording, the Act does not require an objective preponderance of evidence.
- (73) Illegal uploading (making available) usually has the result that the scope of the infringement is greater than in the case of downloading (copying). The fact that automatic uploading takes place when using technology such as BitTorrent, is relevant in the assessment of the scope of the infringement. The preparatory works do not give a clear answer as to the importance of such automatic uploading. However, as stated by the ECJ in Case C-597/19 *Mircom* paragraph 49, users who have consented to the use of a software after having been duly informed of it characteristic, must “be regarded as acting in full knowledge of their conduct and of the consequences which it may have”.
- (74) In the balance of interests that must be struck under section 56b of the Copyright Act 1961, it is nonetheless possible to emphasise in favour of the users that their chief objective was to access the film themselves and not to make it available to others. The precondition is that this can be substantiated.
- (75) The rightholder’s interest must always be balanced against that of the user. The balancing of interests may vary from case to case. The sources of law offer no general description of what is required in different cases. However, because the users are unknown when the balance is struck, their individual interests will generally also be unknown. The courts are therefore to consider their general interests, unless information has been provided suggesting that special individual interests should also be taken into account.

The Court of Appeal’s interpretation of the law

- (76) In its interpretation of section 56b subsection 3 of the Copyright Act 1961, the Court of Appeal was split into a majority and a minority.
- (77) A united Court of Appeal took as its starting point that several conditions must be met before a petition to secure evidence can succeed. It must be substantiated that a copyright infringement has occurred, and the basic requirements in section 56b subsections 1 and 2 of the Copyright Act 1961 must be met. The disagreement related to the implications of the

factors “scope”, “gravity” and “damaging effects”, and the significance of the subscriber’s privacy.

(78) The following is set out in the order:

“The Court of Appeal based its general interpretation of the law on the requirement in section 56b subsection 3 of the Copyright Act 1961 of an individual overall assessment. The rightholder’s ‘weight scale’ contains several mutually closely connected factors. The scope of the infringement will also be highly significant for the assessment of the gravity and assumed damaging effects of the infringement. Presumptively, an infringement of a ‘certain scope’ will be of such ‘gravity’, and entail such economic ‘damaging effects’, that a handover should in principle take place, see the preparatory works. However, even if a certain scope is established, a separate assessment must be made of whether the gravity and damaging effect of the infringement give reason to depart from this principle. Finally, an individual balance of interests must in any case be struck in each case, where due regard must be had to the consideration of privacy, see HR-2017-833-A paragraph 45.”

- (79) As it appears, a united Court of Appeal found that, as a starting point, a handover can only take place if the infringement is of “a certain scope”, but a separate balance of interests must always be struck, having due regard to the consideration of privacy. This is a correct interpretation of the law.
- (80) The majority found that “an infringement ‘a certain scope’ can normally be established if it can be substantiated that the relevant IP address has had a presence in the network over time, indicating that this user has shared (uploaded) to other users something more than an amount of data corresponding to a complete title.”
- (81) The minority did not agree that the passive uploading resulting from downloading in a peer-to-peer network by means of BitTorrent should be given separate weight when assessing the scope and gravity of the infringement.
- (82) As it appears from my view on the general interpretation of the law, the minority applies an incorrect interpretation of section 56b subsection 3, see *Scanbox* paragraph 43 and *Mircom* paragraphs 53–55.
- (83) I note that the Court of Appeal interpreted the law correctly when disregarding the uploading of films to which CMS does not manage the rights. The balance of interests prescribed in section 56b subsection 3 must relate to the scope of the infringements to which the rightholder has been exposed.
- (84) The appellants contend that the majority’s interpretation of the law has the effect that section 56b subsection is turned into a requirement that the infringements must be of “a certain scope”. I disagree. It appears from the Court of Appeal’s order that, in addition, a balance must be struck between the conflicting interests.
- (85) The Court of Appeal’s application of the law does not indicate that its general interpretation of the law is incorrect. In this regard, I reiterate that the petition in the Court of Appeal included 8 799 unique IP addresses. In my view, although a fair balance must be struck in each case, this does not imply that the Court of Appeal interpreted the law incorrectly when linking its assessment to various categories of infringement.

- (86) It is outside of the Supreme Court's jurisdiction to determine how strong the users' interests must be to justify secrecy in the case at hand. The same applies to the Court of Appeal's individual balancing of the user's interests against the rightholder's interests and the further assessment of the swarm size. In this type of cases, it is difficult to individualise the strength of the right to privacy. In my view, it is not possible to give further guidelines on the individual assessment without reviewing the Court of Appeal's application of the law.
- (87) The appellants – the internet providers – contend that it must be emphasised in the proportionality assessment that the company has acquired the rights to the work. They hold that the consideration of the rightholder is diminished as the purpose of the petition is not to prevent copyright infringements, but to earn money on them.
- (88) This contention cannot succeed. Intellectual property rights may be assigned, and the acquirer should therefore not suffer less favourable treatment than the original rightholder, see *Mircom* paragraph 77. That rule would also undermine the possibility to leave the management of such rights to companies that have specialised in pursuing infringements.

Conclusion and order

- (89) Against this background, my conclusion is that there are no errors in the Court of Appeal's general interpretation of the law. The appeals against items 1 and 2 of the Court of Appeal's order, must therefore be dismissed.
- (90) In accordance with the main rule in section 28-5 subsection 1 of the Dispute Act, CMS was ordered by the Court of Appeal to cover the internet providers' costs for the District Court and the Court of Appeal. I agree with this ruling. However, after the Court of Appeal's thorough order, the internet providers had no reasonable cause to oppose the securing of evidence. I therefore find that the appellants are liable for CMS's costs in the Supreme Court.
- (91) The claim amounts to NOK 613 125 including VAT. The claim is accepted.
- (92) I vote for this

O R D E R :

1. The appeals against items 1 and 2 of the Court of Appeal's order are dismissed.
 2. Items 3 and 4 of the Court of Appeal's order are upheld.
 3. Altibox AS, Telia Norge AS, NextGenTel AS and Telenor Norge AS are jointly and severally liable for Copyright Management Services Ltd.'s costs of NOK 613 125, which fall due two weeks from the service of this order.
- (93) Justice **Steinsvik:** I agree with Justice Normann in all material respects and with her conclusion.

(94) Justice **Falch**: Likewise.

(95) Justice **Matheson**: Likewise.

(96) Justice **Skoghøy**: Likewise.

(97) The Supreme Court issued this

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1. The appeals against items 1 and 2 of the Court of Appeal's order are dismissed.
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