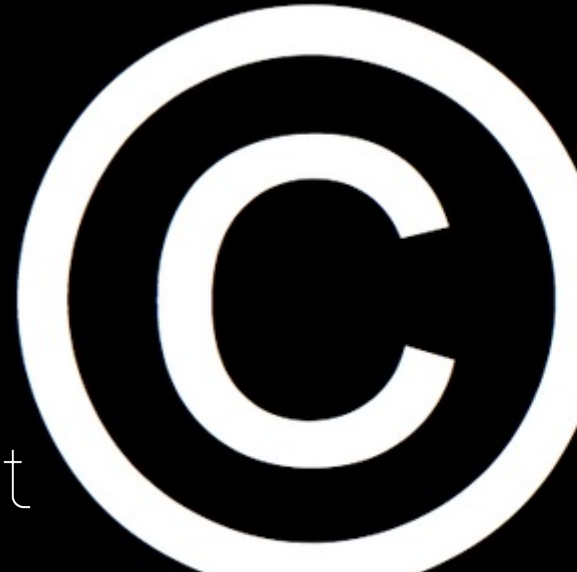


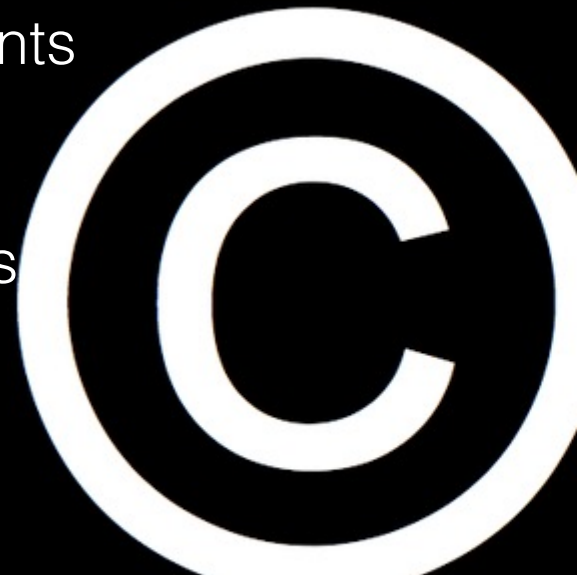
# RECENT CASE LAW FROM THE ECJ

© Dansk Selskab for Ophavsret



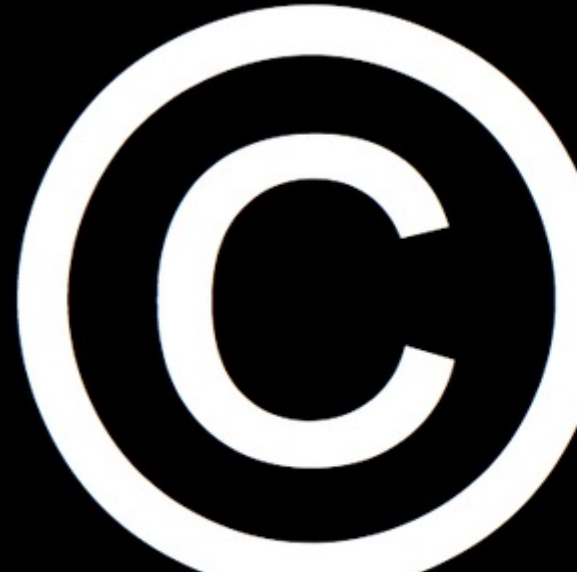
# AGENDA

- © Introduction to the ECJ and copyright  
By Professor Morten Rosenmeier
- © Use of copyrighted content on the internet and  
liability of intermediaries for infringements  
By Professor Eleonora Rosati
- © Enforcement of copyright infringements  
on the internet  
By Jakob Plesner Mathiasen



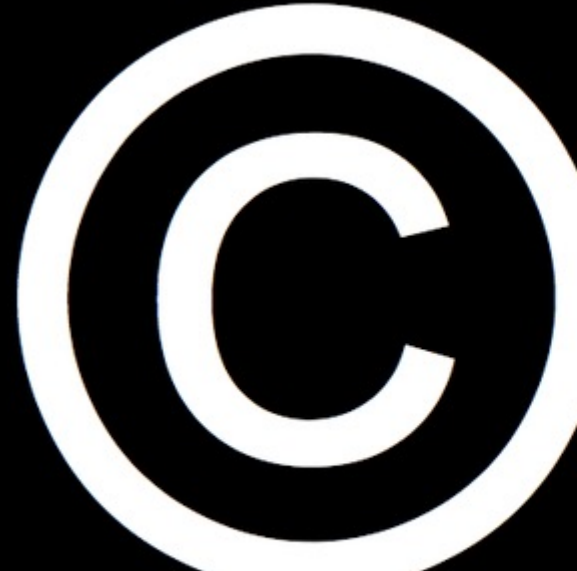
# AD. 1 INTRODUCTION TO THE ECJ AND COPYRIGHT

*Professor Morten Rosenmeier*



# AD. 2 USE OF COPYRIGHTED CONTENT ON THE INTERNET AND LIABILITY OF THE INFRIGEMENTS

*Professor Eleonora Rosati*



# AD. 3 ENFORCEMENT OF COPYRIGHT INFRINGEMENTS ON THE INTERNET

*Partner Jakob Plesner Mathiasen*



WHAT ACCESS DO RIGHTS HOLDERS HAVE TO  
ENFORCE COPYRIGHT INFRINGEMENTS MADE ON  
THE INTERNET?

# COPYRIGHT INFRINGEMENTS ON THE INTERNET

- Effective enforcement of IP infringements on the Internet remains a complex affair
- Many different actors, such as;
  - Users
  - Content providers
  - Intermediaries
  - Piracy services
  - Stream ripping services
- Enter into an agreement or enforcing one's rights?

# COPYRIGHT INFRINGEMENTS ON THE INTERNET

## Remedies for enforcement:

- Preliminary injunctions (e.g. blocking)
- Civil lawsuits
- Criminal proceedings (e.g. Pirate Bay)
- Voluntary enforcement systems (e.g. notice and take down systems)
- Using third parties to enforce infringements

## New case law from ECJ:

- C-264/19 (Constantin)
- C-597/19 (Mircom)



C-264/19 (CONSTANTIN)

# BACKGROUND

- Two movies had been uploaded to YouTube without the permission of the filmmaker
- The filmmaker required YouTube to provide email addresses, phone numbers and IP addresses on the individual users, who had uploaded the films
- Article 8 states that Member States must ensure that, in the context of proceedings concerning an IP-infringement and in response to a justified and proportionate request of the claimant, the national judicial authorities may order information regarding the infringements
- The case concerned the interpretation of Article 8(2)(a) of the Enforcement Directive and whether the term “addresses” covers email addresses, telephone numbers and IP addresses

# "ADDRESSES"

- The ECJ limited the term to postal addresses, not digital address information
- ECJ weighed on:
  1. The usual (linguistic) meaning of the term
  2. Nothing in the Directive or its preparatory work indicated that the term should be understood broadly
  3. The interpretation was consistent with the understanding of the concept in other EU legal acts
  4. The interpretation was consistent with the purpose of Article 8 taking into account the general objective of the Directive
- Members States must ensure that national courts may order information regarding infringements, but only in relation to postal addresses, cf. Article 8

C-597/19 (MIRCOM)

# BACKGROUND

- A number of movies had been uploaded and shared on a BitTorrent-based peer-to-peer network without the permission of the rights holders behind the movies
- The company Mircom had contractually been handed certain rights to the movies by the rights holders in order to claim damages for the users' file sharing
- Mircom obtained and systematically registered IP addresses of users and requested a Belgian internet service provider (ISP) to provide users' identification information in order to prosecute the users
- The ISP refused to disclose customer information

# QUESTIONS FOR THE COURT

1. Can the downloading of a file via a peer-to-peer network and the simultaneous provision for uploading of parts thereof ('seeding') be regarded as "making available to the public" within the meaning of the Infosoc Directive – even if the individual pieces as such are unusable?
2. Can a person, who is the contractual holder of the copyright, but does not himself exploit those rights and merely claims damages from alleged infringers (and whose economic business model thus depends on the existence of piracy, not on combating it) enjoy the rights in the Enforcement Directive?
3. Is the systematic registration and general further processing of the IP addresses of a "swarm" of "seeders" legitimate under the General Data Protection Regulation?

# “MAKING AVAILABLE TO THE PUBLIC”

- The files had been shared on a BitTorrent-based peer-to-peer network
  - The movies were uploaded by one person and split into sub-elements in the form of files. Users could download and share the sub-elements. The individual elements were in themselves unusable
  - Para. 44: *“(...) the operation of peer-to-peer peer networks does not differ, in essence, from the operation of the Internet in general or, more specifically, from the World Wide Web, where the files containing a work are divided into small data packages, which are routed between the server and the client in a random order and by different channels.”*
- The uploading constituted “making available to the public”

# LEGAL STANDING

- ECJ established that companies, such as Mircom, have legal standing to bring proceedings even though such companies cannot be said to have suffered a “loss” due to the infringements
- Therefore, as **a general rule** such companies can make use of the measures etc. in the Enforcement Directive (e.g. by requesting identification information from internet service providers in accordance with Article 8)
- **Unless**, the company’s activities can be regarded as “abusing” the measures etc. in the Directive
  - The Directive imposes **a general obligation** to ensure that the measures, etc. are necessary to ensure the enforcement of rights
  - Requests for information based on Article 8 must be rejected if they are *unjustified* or *disproportionate*..
- *Assessment of abuse*
  - *The operating method? Offers amicable solutions? Brings legal proceedings in the event of refusal on amicable solution etc.*
- Two Danish High Court decisions



# PROCESSING OF IP ADDRESSES

- **Mircom's systematic registration of IP addresses of users whose internet connection allegedly were used for the uploading**
  - The registration presupposes three cumulative conditions met:
    1. A legitimate interest is being pursued
    2. The action is necessary in order to pursue the legitimate interest
    3. The interests of the data subject or fundamental rights and freedoms do not precede this
- **The internet service provider's processing of IP addresses and possible communication of users' personal information to Mircom**
  - No EU obligation for internet service providers to communicate such information for the purpose of prosecuting copyright infringements before the civil courts
  - However, member states are not precluded from imposing such obligations in a national legislative measure
- Danish High Court decision from 2018

# SUMMARY

- Using BitTorrent networks to share works may constitute “making available to the public” of the works
- Companies may enforce infringements on the internet on behalf of rights holders, unless the company’s actions constitute an abuse of rights
- Requests for identification information on suspected infringers are in principle not in conflict with the General Data Protection Regulation (if justified and proportionate)
- The national courts must make individual assessments in each case