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ATTORNEY

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MNA

Borgarting Court of Appeal  
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**APPEAL**

**TO**

**SUPREME COURT OF NORWAY**

**The appeal concerns:** **Appeal against judgment of 21.06.2019 in case no: 18-062352ASD-BORG / 03**

**Appellant:** Henrik Huseby  
Proprietor of PCKompaniet, org.no.984109261  
Jernbaneveien 7, 1400 Ski

**Counsel:** Attorney Per Harald Gjerstad, Box 1258 Vika, 0111 Oslo

**Respondent:** Apple Inc,  
1 Infinite Loop,  
Cupertino, California 95014 USA

**Counsel:** Attorney Anders E. Solberg, PO Box 1813 Vika, 0123 Oslo

**Legal Assistant:** Attorney Frank Jørgensen, Njord Lawyer Partnership,  
Pilestræde 58, 1112 Copenhagen, Denmark

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With this, we appeal the Court of Appeal's decision of 21.06.2019 in case no. 18-062352ASD-BORG / 03 with the:

**Sentence:**

1. Henrik Huseby, sole proprietor of PCKOMPANIET Henrik Huseby, is sentenced to destroy, under the supervision of Customs Authority, a lot containing 62 mobile screens, withheld by the Norwegian Customs, region Oslo and Akershus, with reference 2017/29214 TTVG-053/2017.
2. Henrik Huseby, sole proprietor of PCKOMPANIET Henrik Huseby, is sentenced to cover

all storage and destruction costs associated with the Customs Administration's withholding of products as mentioned in point 1.

3. Henrik Huseby, sole proprietor of PCKOMPANIET Henrik Huseby, is sentenced to pay Apple Inc. a license fee of 5,500 - five thousand five hundred kroner within 2 - two - weeks after the verdict is announced with additional interests if payment is delayed.

4. Concerning the litigation costs of the Court of Appeal, Henrik Huseby, sole proprietor of PCKOMPANIET Henrik Huseby, is sentenced to pay 75,000 - seventy - five thousand dollars to Apple Inc. within two - two weeks after the verdict is announced.

5. Concerning the litigation costs of the District Court, Henrik Huseby, sole proprietor of PCKOMPANIET Henrik Huseby, is sentenced to pay 26,676 - twenty-six thousand six hundred and sixty-six kroner to Apple Inc. within two to two weeks after the verdict is announced.

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The appeal period was put on hold during the legal holiday from July 1 to August 15, cf. section 140 second paragraph of the Court Act. This appeal is therefore timely.

The dispute between the parties concerns whether there is an infringement of trademark law, cf. § 4 of the Trademark Act, the appeal concerns the interpretation of the law by the Court of Appeal.

The Court of Appeal incorrectly interprets section 4 of the Trademark Act. Only "use" can harm the trademark owner's interests related to the function of the trademark, which is protected under section 4 of the Trademark Act. All 63 screens that were stopped by Customs were without trademarks in that they were removed with "permanent marker", indelible marker or similar ink.

The Court of Appeal therefore misinterprets Section 4 of the Trademark Act and errs when it states in the judgment on page 13:

*"In the opinion of the Court of Appeal, it is then not necessary to take a stand to whether the fact that the screens were blacked out, means that the trademark is not used in the meaning of the law"*

Correct interpretation of the fact that the trademarks were removed by being covered permanently appears in the Oslo District Court's judgment which correctly states that:

*"The location and function of the covered trademarks in the court's view indicate that the trademarks cannot be said to be "used" before the covering is removed"*

The screens are imported as spare parts. The Appellant exports broken screens where the glass on top of the LCD panel is broken and imports back repaired screens on which a new unoriginal glass is placed on top of the LCD panel. Other parts may also have been changed and replaced with unoriginal parts.

On the part of the Appellant, it is never assumed that the new glass that have been fitted in Asia are original. Glass, by the way, is not a new invention or something that Apple has trademark rights to. It is used by both Apple and others and is completely ordinary glass that is placed as protection on top of the panel with all the functionalities. The glass that is mounted in Asia is identical to the glass that Apple uses and which Apple nevertheless labels with its logo.

The imported spare parts / screens are now composed of used original and partly new unoriginal parts. Since most of the components that the screens are composed of have the Apple logo, and because these screens can no longer be imported to Norway, all the logos are removed by covering them.

Also, as a result of the rules on regional consumption in section 6 of the Trademark Act, the logos must be covered and removed, even if completely original screens had been imported from Asia.

Since the logos are covered and are not used, because the logos are permanently covered with ink, there is no "use" according to section 4 of the Trademark Act and there is then no import of pirated copies, but compatible spare parts.

Also, the Respondent has not stated that the screens had a visible logo and trademark. The logo first appears if solvent is used on the parts.

Therefore, the Court of Appeal incorrectly interprets section 4 of the Trademark Act, when it instead of taking a position on this fact in the case, it discusses on pages 7 to 12 whether the screens consist of fake parts. This whole discussion of the Court of Appeal is erroneous in that the Appellant has never believed that the screens are genuine. That is also not the issue. Like the District Court, the Court of Appeal should have started with taking a position on whether Section 4 of the Trademark Act can be considered to have been violated when one imports screens without a logo, because these are covered and painted over.

Therefore, with its interpretation of Section 4 of the Trademark Act, the Court of Appeal ignores the fact that the logos are also not made visible on the screens when they are installed on an iPhone by the Appellant. This also helps to substantiate that one does not "use" the Respondent's logo and that there is no "use" under section 4 of the Trademark Act.

The Court of Appeal is therefore mistaken when it has not taken a position on whether the covering or painting can be said to be permanent when a logo is removed with permanent ink.

The Court of Appeal also overlooked in its discussion of Section 4 of the Trademark Act that removal of the ink must be done with a solvent such as acetone, but that on these plastic parts, the solvent can damage the electronics and the plastic in the product. After import to Norway, the ink on the different logos is therefore not removed to make the logos visible. The products are also not sold as originals, nor has the Respondant claimed as such.

The Court of Appeal is therefore mistaken by section 4 of the Trademark Act when it in the judgment on page 12, third section from below writes:

*"In the opinion of the Court of Appeal, the evidence produced makes it probable that the investigated screens are illegal copies"*

The Court of Appeal errs here in the concept of "use" in § 4 of the Trademark Act. The Appellant acknowledges that the imported screens consist of both original and non-original parts. He doesn't pretend it to be an original item. The question of how much of the screen consists of original parts is then of no significance, as it has become a "no name" product. Putting together a display of original and non-original parts in Asia, and removing the logos and exporting them back to Norway, is thus not a violation of the rights of the Respondant. The issue of what percentage of the screen is original is then irrelevant under section 4 of the Trademark Act, when all logos are removed. Therefore, the entire Court of Appeal's review of the fact and discussion on pages 7 to 12 of the judgment is incorrect. One can say that the Court of Appeal has started at the wrong end, by not first deciding whether the covering is "use" in accordance with Section 4 of the Trademark Act.

The Court of Appeal also overlooked in its discussion of Section 4 of the Trademark Act that should a repaired phone be opened later, others will also see that the phone has been retrofitted with a non-original screen, where the logos on the various parts have been removed and covered with ink. Therefore, there is also no danger that other traders could be misled.

In this connection, reference is made to the judgment of the Norwegian Supreme Court / HR 2018-110-A sections 43 to 49 (Addcon) in support of the Appellant's understanding of section 4 of the Trademark Act.

There is thus no risk of breach of the trademark's function as a guarantee of origin, cf. the general understanding of the European Court of Justice. 5 of the Trade Marks Directive and, among others, decision by the European Court of Justice of 23 May 1978 in Case C-102/77 Hoffmann-La Roche on when the provisions on the free movement of goods can be restricted.

The Court of Appeal also misinterprets section 4 of the Trademark Act when it does not take a position on whether the coverings violate the trademark's quality guarantee, cf. Judgment of the European Court of Justice of 23 March 2010 in Cases C-236/08 to C-238/08 Google. From the side of the Appellant it is stated that when covering the logo with ink and selling it as compatible screens and not "using" the trademark, it does not consist of a trademark infringement and no breach of any "quality guarantee" of the appeal.

That the non-original glass mounted on the screens originally had logos, but that they were also covered with permanent ink is not "use" according to section 4 of the Trademark Act and furthermore it has to be stated that the logo was applied to the glass *to only describe the features of the product*, and it was then removed and covered with permanent ink. Here is also no violation of § 4, cf. Addcon judgment, section 52, with reference to the judgment of the EU Court of 14 May 2002 in Case C-2/00 Hölterhoff, cf. § 5, second paragraph, of the Trade Marks Act.

As a result, the Court of Appeal has incorrectly applied Section 4 of the Trademark Act to the seized screens, since the screens are not imported as originals, they do not have a visible logo, and they are not resold as originals. The logos have been removed and covered with permanent ink, precisely so as not to conflict with Section 4 of the Trademark Act and there is therefore no "use". This is done by exporting from Asia worldwide, so as not to infringe Apple's trademark.

The Court of Appeal's judgment of 21.06.2019 will have major consequences if it remains standing, not only for the Appellant, who will then be prevented from importing compatible repaired (refurbished) spare parts from Asia, but also all other of the ten thousand unauthorised workshops in the same industry worldwide will be prevented from such imports. Those operating in the same industry as the Appellant may not purchase original spare parts from Apple, who does not sell original spare parts to anyone other than themselves and a small number of Apple selected authorised repair shops. The verdict, if sustained, will be used worldwide by Respondent Apple for all it is worth to stop an entire industry of unauthorised workshops that rely on being able to buy compatible spare parts, which are mainly made in Asia. Apple, if the verdict is left standing, will be a step closer to securing a monopoly on repairs to its products and phones. Therefore, agreement is sought with cf. Section 30-4 no. 1 of the Dispute Act, to have the appeal tried before the Supreme Court, as the appeal concerns issues that are of *significance outside the present case*, and it is also *particularly important* to have the case decided in the Supreme Court

Based on this, we finish with the following

**Claim:**

1. Henrik Husby, proprietor of PC Kompaniet is acquitted.
2. Apple Inc pays the costs for the Oslo District Court, the Borgarting Court of Appeal and the Norwegian Supreme Court.

This appeal is posted in the Actors Portal.

**OSLO, September 3, 2019**

**Per Harald Gjerstad  
Attorney**

[ NB Section 4 of the Norwegian Trademark Act can be found here:  
<https://www.patentstyret.no/en/norwegian-trademarks-act> ]