

ARTICLE:

# ALLEGED ILLEGAL DOWNLOADING OF MUSIC: THE DANISH SUPREME COURT PROVIDES A HIGH BAR FOR EVIDENCE AND A NEW LINE OF DIRECTION REGARDING CLAIMS FOR DAMAGES AND REMUNERATION

By **Per Overbeck**

**This article, which follows on from a previous article by the author,<sup>1</sup> sets out the legal changes in file sharing cases based on the important points of a leading decision decided by the Danish Supreme Court on 24 March 2011.**

In 2008, four civil cases concerning the peer-to-peer file sharing system named Direct Connect were brought to trial in the Danish High Courts. In these cases it was the Danish Department of IFPI (International Federation of the Phonographic Industry), together with the music and film industry, that took legal proceedings against private persons and claimed compensation for alleged illegal downloading of music from the internet using the peer-to-peer file sharing system Direct Connect. In three of the cases, the courts held that liability could not be established on the basis of strict liability.<sup>2</sup> The fact that a connection was established to a number of music files through a file sharing system from an IP address which belonged to the defendants' internet connection was not considered sufficient to hold the defendants personally liable to pay either a claim for damages or a compensation claim.

The fourth case involved a middle-aged man who lived alone in his detached house. He, as well as the other defendants in the three similar cases, had failed to take measures to secure his internet connection against abuse from a third party. In 2005 the Anti-pirate Group (an association of the Danish film and music industry that challenges illegal copying and

distribution of films and music) gathered evidence against him, and claimed to have found that he had made 13,000 music files available on the internet via the file sharing system Direct Connect. According to the plaintiffs, they had found evidence which contained information, such as an IP address and an alias that matched those used by the defendant. The plaintiffs claimed that the activity constituted a violation of their intellectual property rights under the provisions of paragraph 2 in the Danish Act of Copyright.

For the purpose of securing the preservation of evidence, the Anti-pirate Group used the specially developed computer program DCAgent to find the IP address of the relevant internet activity. Thus, the only evidence presented by the plaintiffs in this case to demonstrate who was responsible for conducting the illegal action was the file list and the log file generated by DCAgent. It was remarkable that the Anti-pirate Group did not file an application for a search order, which is an interim remedy in accordance with the provisions of chapter 57 a of the Danish Code of Procedure. The provisions of this chapter enables the holders of intellectual property rights to obtain an order to conduct a search against the defendant, for the purpose of securing the preservation of evidence of any infringement carried out by the defendant of certain specified intellectual property rights.

On the basis of these circumstances, the Anti-pirate Group initiated legal action in the Danish district court, claiming 220,000 DKK in remuneration and

<sup>1</sup> Per Overbeck, 'The burden of proof in the matter of alleged illegal downloading of music in Denmark', *Digital Evidence and Electronic*

*Signature Law Review*, 7 (2010) 87–89.

<sup>2</sup> *Eastern Court of Appeal*, 5 September 2008, case number B-19-08 and case number B-52-08 (not

published) and *Western Court of Appeal*, 6 October 2008, case number B-0940-07, *UfR* 2009, 280.

220,000 DKK in damages, a total claim of 440,000 DKK. The district court found for the Anti-pirate Group and ordered the defendant to pay 100,000 DKK, of which 50,000 DKK was in respect of remuneration and 50,000 DKK for damages for the alleged infringements. In October 2008 the defendant appealed to the appeal court. The appeal court rejected the appeal and decided that the remuneration should be increased to 80,000 DDK and – by applying the principle of “double up” – 80,000 DKK more in damages, a total amount of 160,000 DKK (Western Court of Appeal, 20 October 2008, case number B-0292-07), which provided as follows:

‘Det lægges til grund, at IP-nummeret alene blev anvendt af appellanten.

Det tiltrædes, at det skærbillede som ved hjælp af DCAGENT blev downloadet, kan anses som bevis for, at de musiknumre, der fremgår af bilag 2 (fillisten) den 2. september 2005 var indlagt på appellants computer, og at disse musiknumre blev gjort tilgængelige via DC.

Den omstændighed, at bevissikringen ikke er sket efter retsplejelovens kapitel 57 a om bevissikring, er uden betydning.

Vederlaget fastsættes skønsmæssigt til 80.000 kr.

Erstatningen findes i overensstemmelse med retspraksis passende at kunne fastsættes til et tilsvarende beløb.

Appellanten skal således til indstævnte betale 160.000 kr.’

‘It is stated that the IP address had only been used by the appellant.

It is acknowledged that the screenshot which was downloaded by using DCAGENT, can be considered as evidence that the music tracks shown in Annex 2 (the file list) on 2 September 2005 was admitted to the appellant’s computer and that these songs were made available by the DC.

The fact that the plaintiffs have not filed an application for a search order pursuant to chapter

57 a under the Danish Code of Procedure is of no consequence.

The remuneration is estimated to be 80,000 DDK.

In accordance with case law, the compensation is reasonably to be set at an equivalent amount.

The appellant must pay the defendant 160,000 DDK.’

The appeal court stated that the screen prints displaying the file were sufficient evidence to prove that it was music, and that the data on the screen represented the fact that the files were stored on the appellant’s computer. It was taken as proof of internet piracy, and it was not rendered probable that anyone else could have used the IP address concerned, because the connection was a land line connection, which can only be used by the person that has access to the telephone connection inside the home. The court found it of no importance that the plaintiffs had not filed an application for a search order pursuant to chapter 57 a under the Danish Code of Procedure.

The opinion stated by the court included quotations from one digital evidence specialist that gave evidence. The appellant had prepared a number of questions for the specialist to answer. In the specialist’s report it appeared that the question ‘Is it possible to see if the IP address identifies a router or a computer based on that specified in appendix 1?’ was answered with a ‘no’. The specialist also declared that others cannot see who physically operate the computer and that with the speed of the appellant’s internet connection and computer, it would take a total time of approximately 2.8 years to upload 13,181 music files.

In addition to this, the ruling was significant because the court did not seem to acknowledge the importance of a statement made in the Danish Parliament in the preparatory works to the Danish Act of Copyright, to the effect that it is not possible to obtain compensation without documenting an economic loss in accordance with applicable tort law. On 9 November 2005, the minister of Economic and Business Affairs presented a bill (LFF 2005 2006.l.48) in the Danish Parliament amending the Danish Act of Copyright to implement the Enforcement Directive (EUdir2004/48) Article 13 in Danish law. The

Business Committee debated the bill and in this connection, several representatives of business enterprises posed the question regarding the remuneration and compensation. On 2 December 2005 the minister wrote, among other things, to the Business Committee:

‘Compensation shall be awarded under the general principles of Danish tort law, starting from the economic loss that has been suffered. It is not possible to obtain compensation without substantiating or making visible an economic loss.’

In the appellant’s proceeding before the High Court, this was raised both in writing and orally, but the judges found no reason to comment on it in the judgment, which is quite unusual. Interpretative comments during the debate of bills in parliament is usually attributed great importance.

### **The Supreme Court ruling**

Due to its fundamental character, the case was appealed to the Danish Supreme Court. The appellant gave evidence to the court and admitted having used the file sharing system briefly, though he did not acknowledge the claim of having shared around 13,000 tracks or the claim of 440,000 DKK.

The Supreme Court determined that the Anti-pirate Group had not proved that the 13,000 tracks that the DCAgent system had intercepted equated to the music files on the appellant’s computer. The Supreme Court found that the appellant, in the context with the use of the program Direct Connect, had made his own files – 500 old LP’s – available to other users of this program. The appellant was ordered to pay damages and compensation of 10,000 DKK, which was not based on the evidence represented by the Anti-pirate Group, but solely based on his own explanation.

The ruling of the Danish Supreme Court is significant for similar file sharing cases at several essential points:

1. The question of proof in cases of alleged infringement of copyright on the internet, including where the right holders opt out of evidence options.<sup>3</sup>
2. The question of legitimacy in upholding the High

Court’s judgment of estimating the remuneration claim and claim of damages via the ‘double up principle’ in which the claim for damages is roughly estimated to be the same amount as the remuneration claim, without substantiating an actual economic loss.

3. The question of what kind of demands are to be satisfied before an alleged violated right holder can obtain judgment on deletion of infringing copies of music files on a given computer.

### **On the question of the demands of proof**

As far as the question of proof is concerned, the appellant called attention to the fact that the mechanized systems that the Anti-pirate Group used as surveillance on file sharing activity may perhaps identify an IP address, but that they could not identify the person at the keyboard simply via the IP address. Nor did the respondents have such information that could prove whether the use of the IP address had involved the appellant’s computer or some other of his technical equipment. The appellant argued before the court against letting screen prints stand alone as evidence, and pointed out that the Anti-pirate Group had not specified the control of the content behind the music titles of music lists that had taken place. The appellant also argued that the respondents should have presented evidence describing a process or system used to produce the result of their control, and showing that the process or system produces an accurate result.<sup>4</sup> Furthermore it was argued that the Anti-pirate Group had not in the least presented any of the technical or organizational aspects of digital evidence that is essential for the introduction of digital evidence into legal proceedings.<sup>5</sup> Overall, the appellant argued that the Anti-pirate Group had not discharged the burden of proof that Danish law imposes on them as plaintiffs.

The appellant also argued that it should be taken into account in relation to the assessment of evidence that the respondents had not filed an application for a search order in accordance with chapter 57 a of the Danish Code of Procedure, since these rules were established for the purpose of providing rights holders an opportunity to clearly identify the contents of the computer equipment in cases on file sharing.

In relation to the assessment of evidence, the

<sup>3</sup> For more detail on this topic, see Eva Smith ‘Denmark’ in Stephen Mason, general editor, *International Electronic Evidence (British Institute of International and Comparative Law, 2008)*.

<sup>4</sup> For the test in relation to digital evidence, see the proposed five elements in Stephen Mason, general editor, *Electronic Evidence (2nd edn, Butterworths LexisNexis, 2010)*, 4.25.

<sup>5</sup> *Electronic Evidence, Chapter 4 generally.*

Supreme Court ruled that there was no evidence that the 13,000 files that DCAgent had intercepted, covered the music titles on the appellant's computer. The Supreme Court expressed their view as follows:

'Rettighedshaverne har ikke anvendt reglerne i retsplejelovens kapitel 57 a om bevissikring ved krænkelse af immaterialrettigheder mv. De har endvidere ikke redegjort for eventuelle retningslinjer for udførelse af kontrolarbejdet, herunder i forbindelse med udarbejdelsen af de nævnte bilag. Der har ikke under sagen været nærmere bevisførelse om, hvorledes kontrolarbejdet i den foreliggende sag er udført, herunder om sikkerheden for, at de musikværker, der er anført på bilag 2, findes på appellants computer. Rettighedshaverne har ifølge det oplyste alene foretaget kontrol af indholdet bag musiktitlerne for så vidt angår to af de ca. 13.000 titler, der fremgår af listen.'

'The rights holders have not applied the rules of the Danish Code of Procedure chapter 57 a on evidence of infringement of intellectual property rights etc. They also did not explain any guidelines for conducting control work, including the preparation of the annexes. There has not been, during the proceedings, further proof of how the control work is completed in this case, including the certainty that the music files listed in annex 2 exist on the defendant's computer. According to the rights holders there has only been control of the content behind two of the music titles among the approximately 13,000 titles that are listed.'

However, the content of the control behind two of the music titles was not documented in court. In other words, the opinion of the members of the court was that as regards the value of digital documents produced by a computer, the evidence adduced by the respondents was not sufficient.

### **On the question of applying the 'double up principle'**

In pursuance to paragraph 83 in the Danish Act of Copyright, right holders have the right to require remuneration and a claim for damages when certain conditions are fulfilled. The official translation of

paragraph 83 provides:

§ 83 – (1) Anyone who with intent or by negligence violates any of the provisions of sections 76 and 77 shall pay

(i) reasonable remuneration to the infringed party for the exploitation;

(ii) damages to the infringed party for any additional damage caused by the violation.

(2) When setting the damages according to subsection (1) (ii), consideration shall be given to such matters as the infringed party's loss of profits and the of-fender's unfair profits.

(3) In cases covered by subsection (1), compensation can also be set to the infringed party for non-financial damage.

Paragraph 83 was added to the Danish Act of Copyright when implementing article 13 of EU Directive of 2004 on the enforcement of intellectual property rights.<sup>6</sup> Based on paragraph 83, right holders may seek compensation for infringement of their intellectual property rights. The compensation provision is divided into the right to charge an appropriate fee (remuneration) for the unauthorized use of their work, and the right to require compensation for damages (damages representing actual losses, lost profits or profits made by the infringer). The reason for the payment of an appropriate fee is that the infringer should pay for the use of the work as if it had been used lawfully. Compensation for damage may be awarded under the general principles of Danish tort law, if an economic loss is documented.

Until recently, Danish case law has indicated an acceptance of the rights holders use of the 'double-up principle' when estimating the amount of their compensation. The principle is that the claim for damages is roughly estimated to be the same amount as the remuneration claim. Even though this practice has been largely criticized in the Danish legal literature, this present case is the first time the Supreme Court has considered the legitimacy of the principle. The Court specifically stated:

<sup>6</sup> Directive 2004/48/EC of The European Parliament and of The Council of 29 April 2004 on the enforcement of intellectual property rights (Text with EEA relevance) OJ L 157, 30.4.2004, p. 45–86.

‘Højesteret bemærker...at der i sager om retsstridig tilgængeliggørelse af musikværker og lignende over internettet ikke er grundlag for at udmåle erstatningen til rettighedshaverne til et beløb, der beregnes i forhold til vederlagets størrelse, f.eks. princippet om “dobbelt-op”’.

‘...in cases of making musical works and the like illegally available to the public through the internet, there is no basis of calculating the claim of damage to the right holders for an amount which is calculated by reference to the size of the compensation, for instance by applying the “double up principle”’.

Thus the Danish Supreme Court for the first time ruled that this ‘double up’ method of compensation cannot be applied in copy right infringement cases. This statement is a clear defeat for the right holders, because they were successful in the High Court in maintaining such a ‘double up’ model.

The appellant claimed that he did not understand how to use the Direct Connect software, but admitted visiting the home page. On this evidence, the court ruled that he had behaved negligently. On that ground, the court emphasized that under the conditions laid down in the Danish Copyright Act paragraph 83, there was a right for the right holders to seek compensation for infringements. But due to lack of documentation, excluding the explanation of the appellant, the Supreme Court determined the compensation in total would only amount to 10,000 DKK. The reasoning of Supreme Court was expressed as follows:

‘Rettighedshaverne er ikke fremkommet med nærmere oplysninger, som kan danne grundlag for fastsættelsen af et rimeligt vederlag for appellants udnyttelse af musikværkerne. Omfanget af krænkelsen er heller ikke nærmere dokumenteret, og vurderingen heraf må derfor ske på grundlag appellants forklaring’.

‘The right holders have not provided more detailed information that can form the basis for determining appropriate compensation for the defendant’s use of the musical works. The extent of the infringements is not documented, and the assessment must therefore be based on the

defendant’s explanation’.

‘Rettighedshaverne har heller ikke nærmere underbygget deres påstand om erstatning, herunder vedrørende markedsforstyrrelse, tab af afsætning og udgifter til gennemførelse af kontrol.’

‘Neither have the right holders further substantiated their claim for damages, including those regarding market disruption, loss of sales and expenses for completion of control.’

The right holders failed to substantiate their claim for compensation, including compensation concerning the market disruption, loss of sales and the cost of their control. The Supreme Court, however, found that it is sufficiently made probable that the violations of the appellant had led to some market disruption and that the right holders had paid out expenses. Under these circumstances, the remuneration and compensation was based on an estimate that is subject to considerable uncertainty. The Supreme Court subsequently set out the remuneration and compensation which the appellant had to pay to the right holders at a total of 10,000 DKK.

### **On the question on deletion of infringing copies of music files**

In pursuance of paragraph 84 of the Danish Act of Copyright, the court can decide that infringing copies of the works shall be destroyed. At the earlier stage of the case, the High Court had acceded to the claim of the Anti-pirate Group for deletion of illegal copies of music on the defendant’s computer in accordance with paragraph 84. In the Supreme Court, the appellant held that this claim should be dismissed, and it was argued that the basis for dismissal was that the Anti-pirate Group had not proved that the appellant had infringing copies of music on his computer or other media in his possession. The appellant specifically indicated the fact that the Anti-pirate Group had only presented two annexes with screen shots of file lists without any evidence or an accurate representation of the files physically present on the defendant’s computer. Regarding this claim the Supreme Court found for the appellant on the following grounds:

‘Da bilag 2 og 15 ikke udgør bevis for de

musikværker, der lå på appellantens computer, kan disse lister ikke danne grundlag for et krav om sletning. Som rettighedshavernes påstand om sletning er formuleret, kan den herefter ikke tages til følge’.

‘Because annex 2 and 15 do not constitute proof of the music works that were on the defendant’s computer, these lists do not form the basis for a claim for deletion. As the right holders claim for deletion is formulated it then must be rejected’.

### **Final considerations**

This Supreme Court decision has clarified several important areas in cases governing file sharing on the internet. As regards the main question of the case – determining the amount of remuneration and

compensation for damages – it is now made clear that right holders cannot rely on highly questionable or weak evidence. In addition to this, the decision recognizes that just having an IP address is not sufficient evidence on its own. In the future, right holders will have to seize the hardware containing the files in order to get physical evidence to support their case, or deliver strong evidence on the quality and control of their own systems to prove authentication of their computer generated evidence.

© Per Overbeck, 2011

Per Overbeck, Law Firm Per Overbeck, Viggo Rothes Vej 38,  
2920 Charlottenlund, Copenhagen, Denmark

[advokat.overbeck@sol.dk](mailto:advokat.overbeck@sol.dk)