

## CASE NOTE: DENMARK

CASE CITATION:  
**B-19-08 and B-52-08**

COURT NAME AND INSTANCE:  
**Danish High Court (Østre  
Landsret)**

DATE OF DECISION:  
**5 September 2008**

MEMBERS OF THE COURT:  
**Anne Thalbitzer, Ejler Bruun  
and Karsten Ahrentoft  
Nielsen**

LAWYER FOR THE PLAINTIFF:  
**Jakob Plesner Mathiasen**

LAWYER FOR THE DEFENDANT:  
**Per Overbeck**

### Summary

The Danish High Court acquitted two women of charges by IFPI Denmark of uploading copyright musical works to the internet. The decision was an affirmation of a lower court decision from 2007 acquitting the women of paying damages of DKK 152,000 and 160,000 (approx USD 29,000 and 30,000), respectively.

In each case, IFPI proved that copyright musical works had been uploaded using the women's internet connections.

Both women explained that they had installed a wireless router, which was not protected by a password. The women thus argued that someone outside their household could have uploaded the infringing material.

IFPI Denmark held that in cases where copyright material is uploaded from a specific internet connection, it must be for the owner of that internet connection to prove that the infringement does not take place from their computer. Since the women did not succeed in proving that others might have used their internet connection, IFPI Denmark argued that the women were responsible for the infringements.

The Danish High Court ruled that there is a possibility that others might have used the relevant internet connections to upload infringing material, and that the burden of proof was on the plaintiff. Since IFPI Denmark did not succeed in proving that the two women actually did upload the infringing material, the High Court acquitted them of the charges.

### Commentary

In principle, the case may still be tried before the Danish Supreme Court. An application has to be submitted to the Danish Litigation Approval Board, which may then grant its permission to try the case before the Supreme Court if it finds that the question is of general public importance.

If the Danish Litigation Approval Board rejects the application - or if it grants permission to appeal, and the Supreme Court upholds the decision - the Danish Anti

Piracy Group, IFPI and other copyright representatives and owners seem to have difficulties succeeding in cases against file sharers uploading music or films to the internet from an unsecured wireless wi-fi connection.

It seems of particular interest that because the wi-fi connections were unsecured, this helped them in suggesting that another person might have used their internet connections to upload the infringing material.

Even though it might seem very likely that the owner of the internet connection might also be the person uploading the infringing material (although in this case it was proved that the material was uploaded using their IP address, and the username used on the respective webpage was the initials of one of the women, in addition, an article about the case mentioned that the women admitted to having installed file sharing software on their computers – although this latter point is not confirmed), this ruling means that there is no rule of reversed burden of proof in Danish law in cases such as this. The surprising lesson to be learned by users of p2p file sharing programmes and the 'Pirate Group' (the Danish pro-sharing group and antithesis of the Anti Piracy Group) seems to be that the less a person does to secure a wi-fi connection, the lower the risk that the copyright owner will be able to satisfy the burden of proof.

It should be noted that no preservation of evidence was carried out in this case. Such cases are usually very standardized, with the plaintiff admitting infringing actions and agreeing to an out-of-court settlement. If the plaintiff had seized the computers of the women and found evidence that copyright works had been uploaded to the internet, the outcome of the case might have been different.

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*With thanks to Jan Hvarre, correspondent for Denmark*