

ARTICLE:

# THE BURDEN OF PROOF IN THE MATTER OF ALLEGED ILLEGAL DOWNLOADING OF MUSIC IN DENMARK

By **Per Overbeck**

**Four civil cases concerning the peer-to-peer file sharing system named Direct Connect ('DC') were brought to trial in the Danish High Courts in 2008. The Danish department of IFPI (International Federation of the Phonographic Industry), together with the music and film industry, 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 DC. DC is a system which makes it possible to exchange music and film files on the internet with other users of the system, and to make the music files available to the public. Using the DC system requires the installation of a DC client on to the computer, and the exchange of music files is enabled by the users establishing a connection from their computer to a hub on the internet.**

The Danish department of IFPI and the owners of copyrights within the music and film industry are members of the Danish association 'Antipiratgruppen'. The object of the association is to enforce the members' copyrights. For the purpose of securing the preservation of evidence, Antipiratgruppen uses DCAgent, which is a program designed for this purpose. The program DCAgent works by establishing contact to a hub, and collects the other users' file lists. The preservation of evidence is documented in a log file. The log file

contains information, such as the IP addresses that have established contact with the hub. Antipiratgruppen purports to identify people by identifying an IP addresses, and then obtains the name and address of the person linked to the IP address from the internet provider. Antipiratgruppen's lawyer then writes to the person whose IP address is identified on behalf of Antipiratgruppen, and raises both a compensation claim and a claim for damages for violating the Danish Act of Copyright and the Information Directive.<sup>1</sup> The claim for damages is roughly estimated to be identical to the amount of the compensation claim. In addition, an offer of settlement is made if the person agrees to make a payment of a third of the total amount. Antipiratgruppen took legal action against four people after having sent them a letter. In all four cases, Antipiratgruppen also claimed criminal liability, but later withdrew this part of their claim, presumably because they foresaw that the conditions for incurring criminal liability could not be satisfied.

Two of the cases were nearly identical, in that they concerned households of four persons living in detached houses. Each of the families consisted of a married couple and two or three teenage children, where the children had access to a computer from their own rooms, and the parents were listed as subscribers to the internet connection, which was wireless and not secured. The total claim for damages and the compensation claim amounted to about 160.000 DKK in each of the cases. In the third case the person lived alone, but in a block of flats where hacking from

<sup>1</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and

related rights in the information society, OJ L 167, 22/06/2001 P. 0010 – 0019.

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neighbours was technically possible, and the internet connection was wireless and not secured. The total claim for damages and the compensation claim amounted to about 60.000 DKK.

In all three cases, the clients denied having carried out any of the actions claimed, and they were all acquitted by the appeal courts, because Antipiratgruppen was not able to meet the burden of proof. The liability for infringement of copyright rests with the individual person who uses the computer or the internet connection, and it is for the plaintiff to prove that there is or has been illegal sound recordings on the defendant's computer, that the sound recordings were downloaded illegally, and that they were made accessible to the public illegally.

The plaintiffs did not file an application for a search order, which is an interim remedy according to chapter 57a, paragraph 653-653d, in the Danish Code of Procedure.<sup>2</sup> Chapter 57a was added to the Danish Code of Procedure by Consolidated Act no 352 of 19 May 2004 for the purpose of meeting the demands put on Danish law by article 30 of the TRIPS Agreement,<sup>3</sup> which concerns the preservation of evidence in cases of infringement of intellectual property rights. According to paragraph 653, section 1 in the Danish Code of Procedure, the enforcement court may issue a search order 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. According to paragraph 653, section 2 in the Danish Code of Procedure, the certain specified intellectual property rights include the infringement of intellectual property rights, or rights akin to intellectual property rights, infringement of paragraph 91 in the Danish Act of Radio and Television Production,<sup>4</sup>

infringement of pattern rights, infringement of design rights, including EU-designs, infringement of trade mark rights, including EU-trade marks and standardization marks, infringement of rights to business names, infringement of patent rights, infringement of small patent rights, infringement of rights to semiconductor product's shaping, infringement of rights to news of planting, infringement of rights to geographical terms, and infringement of paragraph 1 in the Danish Act of Marketing,<sup>5</sup> in cases of illegal product imitation.

The only evidence presented by the plaintiffs in the four cases to demonstrate who was responsible for conducting the illegal actions was the production of the file list and log file. The High Courts ruled that liability could not be established on the basis of strict liability, and 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 connections, was not adequate to hold the defendants personally liable to pay either a claim for damages or a compensation claim. The fact that the defendants failed to take measures to secure their internet connection against abuse from a third party was neither culpable nor actionable. In regard to the two cases concerning households of four people, it was also an important factor that under Danish law, parents are not responsible for acts committed by children or other family members unless the parents have behaved negligently.

In the fourth case, the person lived alone in his detached house and the internet connection was an unsecured land line connection. The defendant acknowledged having used the file sharing system briefly, but did not acknowledge the claim amounting to 13,000 music files and a claim of 440.000 DKR. The

<sup>2</sup> Consolidated Act no. 1053 of 29 October 2009 (retsplejelovens kapitel 57a, §§ 653-653d, jf. lovbekendtgørelse nr. 1053, 29. oktober 2009).

<sup>3</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights came into effect on 1 January 1995. The TRIPS Agreement is Annex 1C of

the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

<sup>4</sup> Consolidated Act no. 429 of 27 May 2009 (lov om radio- og fjernsynsvirksomhed, jf. lovbekendtgørelse nr. 429, 27. maj 2009).

<sup>5</sup> Consolidated Act no. 839 of 31 August 2009 (lov om markedsføring, jf. lovbekendtgørelse nr. 839, 31. august 2009).

appeal court ordered him to pay 160.000 DKR, based on the plaintiffs' production of evidence from the DC Agent, which consisted of two screen prints displaying the file content of the defendant's computer. It was not rendered probable that anyone else could have used the IP address concerned, since 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 defendant submitted that it should be taken into account in relation to the assessment of evidence that the plaintiffs had not filed an application for a search order in accordance with the above-mentioned chapter 57a, paragraph 653-653d, in the Danish Code of Procedure for the purpose of seizing the defendant's computer and surveying the content of the defendant's network systems, but the court found that it was of no consequence. The defendant had acted negligently by using the DC program without acquainting himself with the implications, and this was adequate to hold the defendant personally liable to pay a claim for damages and a compensation claim.

The fourth case is presently before the Supreme Court. It is a leading case and the first of its kind, not only concerning the demands for proof, but also to measure the amount of damage. The first question of overriding importance concerns the standard of electronic evidence required to establish which data was on the computer at a given time, how the data was placed on the computer, to what extent the data could be viewed by other users, and which person should be

held liable or at least carry the risk. The defendant will submit to the Supreme Court that the plaintiffs were obliged to follow the procedure of chapter 57a in the Danish Code of Procedure in order to meet the burden of proof. The second question of overriding importance concerns the upholding of the 'double up principle' in which the claim for damages is roughly estimated to be the same amount as the compensation claim without substantiating an actual economic loss. The measure of damages could be solely based on market intrusion and the cost of control measures, however, the plaintiffs did not in any way substantiate or measure an economic loss.

It is a case of general public importance, because the decision will not only become important for cases concerning infringement of rights to music and films by using the internet, but also for all cases concerning the assessment of both the claim for compensation and the claim for damages in pursuance of the Danish Act of Copyright. The Supreme Court will decide the case in March 2011.

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*Per Overbeck, Law Firm Per Overbeck, Hovedvagtsgade 6, 1103  
Copenhagen K, Denmark*

**advokat.overbeck@sol.dk**