[DK] Calculation of Damage and Assessment of Evidence in Illegal File-Sharing Cases

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In a recent landmark case the Danish Supreme Court decided the criteria for calculating compensation and damage in illegal file-sharing cases. The decision also contained an interesting reasoning regarding the assessment of evidence in these cases.

The case concerned whether a person (A) by use of a software programme, Direct Connect, had made a large number of musical works available to the public from his computer in violation of the Copyright Act.

The rightsholders had via a specially developed programme established contact with a certain IP address over a period of time and obtained computer-generated lists of about 13,000 titles of musical works that allegedly were available from the IP address that belonged to A. The rightsholders had not applied provisional measures to secure evidence, e.g., by the physical seizure of A's computer.

A explained that he had stored his own music collection (approximately 500 titles) on his computer and that he had installed and used the Direct Connect programme a small number of times for locating and downloading specific musical works that he only had in poor quality in his own collection. He rejected the allegation of having used the programme for downloading the titles on the rightsholders' lists.

After assessing all the evidence in the case the Supreme Court found that the rightsholders had shown that A had used Direct Connect to make his music collection stored on his own computer available to other users of the file-sharing network.

However, the Court found that the rightsholders had failed to prove that the musical works appearing on the lists generated by the rightsholders in fact emanated from A's computer. Hence, the mere presentation of a computer-generated list with music titles that was claimed to be downloaded via a given IP address is not sufficient evidence that these musical works in fact are stored on the computer connected to the IP address, let alone sufficient proof that the downloading has been conducted by the registered user of the IP address.

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By this relatively strict assessment of evidence the Supreme Court confirms a tendency established recently by the High Courts. In previous decisions of the lower courts computer-generated lists of copyright protected works being transmitted via a given IP address were often regarded as sufficient proof that the music had been downloaded to the user's computer and that the user of the IP address was in fact the infringer.

With regard to the sanctions imposed on A for making musical works available illegally, the Court found that A was liable to pay damages and compensation to the rightsholders. In accordance with the existing case law the level of compensation was based on an estimate of the royalties to which the rightsholders would have been entitled, had the use of the musical works happened lawfully.

However, as regards the level of damages (e.g., for market disturbance) in addition to the compensation, the Supreme Court rejected the so-called "double-up" principle that has been applied by the High Courts in a couple of newer cases and according to which the amount of damages - due to the difficulties in documenting that the illegal file sharing has actually resulted in a specific loss for the rightsholders - is determined by simply doubling the assessed amount of compensation. Instead, the Supreme Court measured the damage as an estimate based on the facts of the specific case. As a result, the total amount of compensation and damages was considerably lower than would have been the case if the double-up principle had been applied.

Højesterets dom af 24. marts 2011 i sag 27/2009, Poul Larsen mod IFPI Danmark m.fl

http://www.domstol.dk/hojesteret/nyheder/Afgorelser/Pages/BevisforophavsretskrnkelseVederlagogerstatning.aspx

The Supreme Court's judgment of 24 March 2011 in case 27/2009, Paul Larsen v IFPI Denmark

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