

SUPREME COURT RULING

Thursday February 6, 2014

Case 146/2012

(2nd Division)

Nautische Veröffentlichung Verlagsgesellschaft mbH
(represented by Johan Løje, attorney at law)

versus

The Danish Geodata Agency (previously the Danish National Survey and Cadastre)
(represented by the Legal Adviser to the Danish Government, represented by Tomas Ilsøe Andersen)

The High Court of Eastern Denmark, 7th division previously made a ruling in this case on April 27, 2012.

There are five presiding judges: Lene Pagter Kristensen, Poul Søgaard, Thomas Rørdam, Hanne Schmidt and Kurt Rasmussen.

Claims, etc.

The appellant, Nautische Veröffentlichung Verlagsgesellschaft mbH, has filed for acquittal and, with regard to the claim for payment, offers a smaller payment as an alternative.

The respondent, the Danish Geodata Agency, has put forward a claim that Nautische Veröffentlichung Verlagsgesellschaft mbH pay DKK 3,090,000 including litigation interest from 3 February 2010, alternatively a smaller amount, and upholds all other claims, however Nautische Veröffentlichung Verlagsgesellschaft mbH shall also make public the ruling of the Danish Supreme Court in "Tursejleren" and "Bådnyt" as well as on the websites of Nautische Veröffentlichung Verlagsgesellschaft mbH and "Danske Tursejlere". Publication shall include excerpts of the ruling, including the date of the ruling, the Supreme Court case number, and the names of the parties as well as an account of the conditions of the ruling and its conclusion.

The Danish Geodata Agency has, in the alternative, claimed that the ruling be upheld with the sole change that publication of the ruling shall be carried out in accordance with the principal claim.

The payment claim in the principal claim of the Danish Geodata Agency has been calculated for the period 2005 to 2013. The Danish Geodata Agency has withdrawn its claim for payment of a fine as well as its allegations relating to the Danish Marketing Act.

Additional statement of claim

In an email dated 8 January 2008 sent from Bundesamt für Seeschifffahrt und Hydrographie (the BSH) to the Danish National Survey and Cadastre, the BSH informs that the settlement between BSH and Nautische Veröffentlichung Verlagsgesellschaft mbH (NV) that led to repeal of the German appeal case contained confidential information that

could not be divulged, however the BHS informed the Danish authorities that the settlement did not include any aspects concerning Danish waters.

In a letter dated 26 August 2008 from the Danish National Survey and Cadastre to NV, the National Survey and Cadastre wrote:

“Dear Hasko Scheidt,

We spoke on the phone earlier this year because Nautische Veröffentlichung Verlagsgesellschaft mbH (NV) had submitted an application for the right to procure our charts of the Danish west coast with a view to commercial use.

As I remember, you stated that you would get back to us regarding a date in the spring on which we could meet, however, as you know, this has not happened.

Therefore, on behalf of the Danish National Survey and Cadastre, I would like to invite you to a meeting here at our offices on Tuesday 23 September...

At this meeting, we wish to discuss the process for legalising NV's current use of chart products that cover parts of the Danish waters. Our goal is for the National Survey and Cadastre and NV to enter into a standard licence agreement this year, valid from and including 1 January 2009.”

For the Supreme Court case, an arbitration agreement was made regarding the charts in question. Regarding the issue of degree of originality, like the Danish High Court, it has been agreed that chart 133 of the Sound from 2009 is representative for all the charts in question. Regarding the question of infringement, it is agreed that the judgement should be based on only three of the six areas and charts mentioned in the Danish High Court ruling. These are the charts for the Sound, Bornholm and Limfjord Vest.

The Supreme Court was presented with further extracts of Chart Corrections for the years 2000, 2003 and 2004.

When preparing the case, the Danish Geodata Agency called upon NV to provide documentation for its net earnings from the sale of charts in Denmark, however this documentation has not been provided.

The Danish Geodata Agency has presented NV with a blank copy of the Agency's standard licence contract. The contract stipulates that when dealing with analogue paper charts, a royalty of 15% of the net earnings from Danish data is due, and a royalty of 40% for digital charts.

The Supreme Court was informed that, at a meeting in September 2009, the parties discussed a draft for a licence contract between the Danish Geodata Agency and NV based on a royalty payment of 15% of NV's net earnings from Danish data. These discussions did not lead to an agreement.

Licence agreements from December 2003 and February 2010 entered into between the Danish Geodata Agency and the German publishing house Delius Klasing Verlag GmbH were also presented. These agreements show that, among other things, a royalty payment of 40% was agreed with regard to digital copies of Danish charts.

The Danish Geodata Agency has presented the Danish Supreme Court with its calculation of its total claim for payment for the years 2005 to 2013 at DKK 3,090,134, rounded down to DKK 3,090,000. This amount includes a claim for consideration pursuant to section 83(1), no. 1 of the Danish Copyright Act, of DKK 1,158,800, and a claim for compensation pursuant to section 83(1), no. 2, cf. subsection (2), of DKK 1,931,334. This claim for consideration is calculated as 15% of the estimated net earnings of NV from Danish data, whereas the claim for compensation is calculated as 25% (the difference between 40% and 15 %) of net earnings. Calculation of the claim for compensation is based on the sales Delius Klasing would have had according to the Danish Geodata Agency, if NV had not sold the charts in question, and thus the Danish Geodata Agency would have received royalties from Delius Klasing.

More information about the cause of action

Act no. 1392 of 23 December 2012 on amendment of the Act on the National Survey and Cadastre etc. states:

“Section 1

The following amendments shall be made to the Act on the National Survey and Cadastre, cf. Consolidating Act no. 131 of 28 January 2010:

1. The *title* of the Act shall be replaced by the following:

»Act on the Danish Geodata Agency«.

2. Throughout the Act »National Survey and Cadastre« shall be amended to:

»Danish Geodata Agency (Geodatastyrelsen)« ...

5. After section 4, the following shall be inserted:

»Section 4a. Hydrographic surveys in Danish waters, including waters around the Faeroe Islands and Greenland, may only be carried out with permission from the Danish Geodata Agency (Geodatastyrelsen). After the survey is completed, a copy of all survey data shall be submitted to the Danish Geodata Agency (Geodatastyrelsen)...”.

In the copyright bill for literary and artistic work put forward on 15 January 1960 (Folketingstidende 1959-60, tillæg A, sp. 2682 ff. (only available in Danish)) the explanatory notes to section 1 state:

“This section identifies the type of works that are covered by copyright protection.

While current Danish law (Act 1933) in sections 1 and 2 lists a number of types of works that are covered by the copyright of authors, whereas the group of protected artistic works is defined more broadly in section 24, in accordance with the Berne

Convention, the bill defines the group of protected works as including all literary and artistic productions, under the assumption that the production may be considered a work. This includes a requirement for a certain degree of novelty and originality.

On the other hand, there is no requirement that the production possesses great literary or artistic quality, just as no requirement shall be made on the scope of the work or the purpose of the work. Protection is thus offered to literary or artistic works that wholly or partly serve a practical purpose. Also scientific works of literature are naturally covered by copyright protection.

...

Scientific maps, drawings, etc. The protection offered to maps, drawings, and works of a descriptive nature executed in graphic or plastic form (models) as stipulated in section 1(2) corresponds to section 2c of Act 1933 and ultimately to Article 2(1) of the Berne Convention. In order to enjoy full copyright protection, the works in question have to meet the requirement of a certain novelty and originality within their area, however there is no requirement regarding artistic or scientific quality of the work."

Committee Report no. 1063/1986 on image copyright protection, pp. 17-19, states under the heading "3.2.1 Descriptive maps and drawings":

"The provisions in section 1(2) of the Copyright Act stipulates that maps and drawings as well as other works of a descriptive nature executed in graphic or plastic form are included in the category literary works. This may seem a curious mix of types of work, however the provision is quite appropriate. The descriptive content of the maps etc. covered by the provision could be expressed verbally, however, in most cases, this would be cumbersome and impractical. Moreover, in most cases the maps and drawings covered are used in close connection with literary works, especially as illustrations to scientific and other non-fiction, scientific texts. Therefore it is less natural to treat these works as artistic works.

Furthermore, it would not be appropriate to allow these works to be covered by the provisions concerning distribution and exhibition of artistic works as stipulated in section 25 of the Copyright Act. These provisions may apply in several situations, one of which is that the author has transferred one or several copies of an artistic work to another party. When this is the case, the transferee may freely transfer further his copy and exhibit it in public. It is important to note that technical drawings and similar are not covered by this provision. Under commercial conditions, such drawings can be exchanged between business operators, for example when negotiating contracts. It would be detrimental to upholding the confidentiality between the parties, if the transferee could allow free access to the drawings. This aspect has been included in current legislation that stipulates that e.g. technical drawings may only be exhibited and distributed by the transferee if the works have already been published, cf. sections 23 and 8(2).

The central legal issue concerning section 1(2) is the scope of the protection given to the drawings etc. in question, including especially technical designs. The

question is whether protection only covers use of the drawing itself as a drawing, or whether it also covers manufacture of the product depicted.

Until now, Danish law has rejected such extensive protection ("indirect product protection"). This is because determination of whether a "work" is covered by copyright protection varies from area to area depending on the opposing interests with regard to free and unhindered commercial activities. Thus section 1(2) offers very liberal protection of works (cf. Folketingstidende 1959/60, till. A, sp. 2686 (only available in Danish)) because no parties have a notable interest in being able to copy drawings that are not their own, even if they are rather banal drawings. The conditions are very different for the industrial products etc. that the drawings represent. Here, strong interests are at stake in favour of limiting protection so as not to prevent parties other than the copyright holder in question from entering the market. In order to be able to operate with these differences, the two different categories of work must be kept separate. This also secures the relevant level of protection between the copyright and the patent/registration of design.

...

... the recommendation is therefore that Denmark continue to not recognise "indirect product protection". This view is in accordance with the legal conception within other EC Member States."

Section 9(1) of the Danish Copyright Act states that Acts, administrative orders, legal decisions and similar official documents are not subject to copyright. The legislative background for this regulation can be found in Folketingstidende 1988-89, tillæg A, L 132, sp. 3197 ff (only available in Danish). This document also includes (sp. 3212) several explanatory notes about "maps", including:

"Public documents of a more general or informative nature, such as teaching material, examination papers... shall no longer be covered by section 9. Instead, such documents shall be subject to standard copyright protection. This shall also apply to maps and similar public services that are published by public authorities and bodies, and that serve as a public service rather than exercise of authority. As regards maps, historically the maps of the Geodetic Institute enjoy special protection privileges that are still valid by virtue of section 62 (now section 92) of the Danish Copyright Act."

The Copyright Bill (Folketingstidende 1994-95, tillæg A, L 119, s. 1311 ff. (only available in Danish)), continues section 1(2), and the explanatory notes to the provisions of the bill (p. 1332 ff.) include the following concerning section 1:

"Re. subsection (1)

Pursuant to section 1(1) of the current Copyright Act, the person creating a literary or artistic work shall have copyright therein. The regulation includes an incomplete list of the different categories of protected works. This protection of a work applies, regardless of the format of the work. Digital works, including collections of unprotected data, may therefore also be covered by copyright protection in

accordance with subsection (1), providing that their representation resembles a work, i.e. that the representation is the result of the creator's own, independent intellectual work. Assessment of whether this last requirement has been met in the individual case is made by the courts.

...

Re. subsections (2) and (3)

The proposed subsections (2) and (3) correspond to section 1(2) and (3) in the current Copyright Act, as amended in 1989 and 1992”.

Depositions

A supplementary deposition has been submitted by Berit Hølse for use by the Supreme Court stating, amongst other things, that the chart mentioned as the first chart in her deposition to the Danish High Court shows an extract from the national hydrographic depths database. The depths database contains all the soundings in Denmark. A 5x5 Grid has been chosen on the chart, which means that there is a sounding within every 5x5 meters. There are differences between the locations of the individual soundings within each 5x5-meter square. It is a multibeam survey. On the chart described in her deposition to the Danish High Court as the second chart, it is apparent that the cartographer has drawn the chosen depth contours on his computer. For example, this can be done by choosing a depth contour showing a depth of 5 meters, and to be certain of including all the 5-meter soundings, by setting the depth at 5.1 meters. The reason the cartographer has chosen 2-, 4- and 6-meter contours on the chart is that these depths can be used in old surveys, and these have been further developed. If an entirely new chart is to be prepared, other depths can be chosen. Because of the scale of this chart, it can look as if there are a number of dots close to each other in the bottom right-hand corner of the chart. However, in reality these are different depth contours and it is possible to see this by zooming in on the chart. It could have been decided to show the different depths on the chart by different colours, but as she did not prepare the chart, she does not know why this was not done. If an entirely new chart is prepared, the persons responsible for chart planning determine which depths are to be used on the new chart. This decision is made on the basis of individual conditions such as how calm it is in the relevant area, what the chart is to be used for, and what the real conditions are at the relevant location. An example of the latter is conditions in Godthåbsfjorden, which have meant that completely new depth contours have to be used than originally planned, because it is so steep that depth contours would otherwise run right up to the coastline.

The chart described as the third chart in her deposition for the Danish High Court shows the soundings selected by the cartographer. The chart is an intermediate step in drawing the final depth contour. The cartographer decides the scale, and on the basis of this the computer program finds the relevant number of soundings. On this chart the shallowest depth was in another Grid so that it becomes readable. After this, an electronic copy of the red contours is taken, and on the basis of this, an automatic generalisation is made using a computer program. There is no figure showing this automatic generalisation. An automatic generalisation is not always done, but if it is, this is an intermediate step in drawing the final depth contour. In an automatic generalisation, the contours are drawn and some points are removed. On the basis of this, the cartographer prepares a manual

manuscript that compares the automatic generalisation with the selected depth contours. In practice, this is done by lying a transparent version of one figure over a paper version of the other figure, after which a manual generalisation is done by drawing manually over the depth contours. This process will show that the automatically generalised depth contours could lie on the wrong side of a shallow depth, and the cartographer must ensure that this is rectified so that the depth contour is correct in relation to the marked depths. Other factors will also play a part in the decision of how the final depth contours are drawn. The depth contours must be readable in relation to other information on the chart and there may be safety reasons for drawing the depth contours slightly differently than physical reality. Around the channel of 8 meters, there are two soundings of 5.5 meters and 5.9 meters respectively. It has been necessary to draw in these soundings manually and larger than they are in reality in order to ensure that they are readable for mariners and so that mariners are clear that in the event of an evasive manoeuvre they have to steer around these soundings. It can be necessary to make many manual adjustments, depending on the areas covered by the chart.

The chart referred to as the fourth chart in her deposition to the Danish High Court shows one figure juxtaposed on top of another figure. Based on the juxtaposed figures, the cartographer has drawn the final depth contour in blue. The chart can also be described as the cartographer's interpretation of reality. This illustrates that there are individual choices in relation to drawing the depth contours and it explains why it is not possible to generalise how they are drawn. For example, a blue line has been drawn all the way around the large number of red dots in the bottom right-hand corner. On the final chart it does not look as if there is passage in the area above the dots. However, in reality there is passage of about 100 meters, but it has been decided to block this for safety reasons so that mariners sail around to the south to the channel. The same has been done, for example, for the pylons of the Great Belt bridge in order to direct traffic as safely as possible. If, instead of drawing depth contours manually, one continued with the automatic generalisation, it is possible that the various red contours would at some time join up. However, it is not possible to say for certain at which point and how this would happen, nor whether the depth contours would be on the right or wrong side of the marked depths. It is difficult to say how much of the total work by the cartographer on drawing the depth contours is manual. It depends on the area covered by the chart and on how difficult and time-demanding this work is. The choices made by the cartographer in manually drawing the depth contours are made on the basis of considerations about safety of navigation, how things in the relevant area look, including how much is already marked, as well as that the chart must be legible. When the cartographer has finished the manual work, this is entered into a computer program. Another cartographer checks the completed work and it is possible that there will be a lot of changes. However, there is not just one single solution in creation of a chart and therefore the number of corrections depends on the decisions made by the cartographer and the reasons for these. If factors to be corrected are not critical, a change will be made merely because another solution is preferred. A certain amount of learning is often also involved in this connection; the superior takes this into consideration when assessing the work completed, and when assessing what needs to be corrected. She would not approve a chart that is produced solely based on automatic generalisation. The automatic generalisation is an intermediate step that requires further work, and what can be seen on such a chart is not a depiction of reality. She and her colleagues do not usually consult with other authorities or users when making charts. However, this may be necessary in

specific situations. One example is the current project to make new charts of the whole west coast of Greenland. Immediately after the High Court case there was a round of redundancies at the Danish National Survey and Cadastre and there are now 12 cartographers employed. They still use the manual technique to draw depth contours and make charts.

Supreme Court reasoning and result

For reasons stated by the Danish High Court, and because the depositions put forward to the Supreme Court cannot lead to any other result, the Supreme Court agrees *that* charts from the Danish Geodata Agency are legally protected pursuant to section 1 of the Danish Copyright Act and Act no. 4000 of 16 April 1816, *that* based on the evidence it has been proven that, in its production of charts of Danish waters, Nautische Veröffentlichung Verlagsgesellschaft mbH (hereafter NV) has copied charts by the Danish Geodata Agency, and *that* the company's sale in Denmark of the charts related to this case constitutes an infringement of the rights of the Danish Geodata Agency. It is noted that it is apparent from the legislative background to section 1(2) of the Danish Copyright Act that, in order to be subject to the provision, a work shall have a certain novelty and originality within the relevant area, but that a specific artistic or scientific quality cannot be required as a condition for protection. In relation to charts, this is deemed to entail that the individual cartographic elements cannot in themselves be considered as protected, but that the selection and combination of these elements can be protected.

In early February 1997, NV was made aware that the Danish National Survey and Cadastre, now the Danish Geodata Agency, considered the company's publication of charts of Danish waters an infringement of the Agency's copyright, and already at that time the company was presented with the demand from the Agency that, as a condition for using the Agency's data, a licence agreement based on the Agency's standards terms needed to be established.

The Danish Geodata Agency has at no time withdrawn its demand for establishment of a licence agreement as a condition for being able to reproduce parts of the Agency's charts, and the Agency imposes similar demands on others who intend to use the Agency's data. NV has been aware of this and the company has been aware that the legal action by the Agency has been awaiting the outcome of other legal proceedings against NV and the result of the ongoing contacts there have been between the parties.

The Supreme Court rules that this course of events could not provide NV with a legitimate expectation that the Danish Geodata Agency has withdrawn its demand and has not acted passively in such a way that the Agency forfeited its right to demand consideration and compensation from the company as a consequence of the infringements.

Pursuant to section 83(1), no. 1 of the Danish Copyright Act, the Danish Geodata Agency is entitled to reasonable consideration for unlawful exploitation of the rights of the Agency by NV. Determination of the amount of the consideration can take outset in the Agency's standard licence contract, according to which the usual royalty rate for copying the Agency's charts in analogue, paper-based format is 15% of the licensee's net earnings on Danish data. Despite calls to do so from the Agency, NV has not documented its net earnings from sales of the relevant charts in Denmark. NV had exceptional occasion to

submit documentation following the calculation by the Agency of the claim for consideration based on net earnings by Delius Klasing, NV's competitor on the Danish market, and an estimate of NV's market share. On this basis, the consideration due to the Danish Geodata Agency has been estimated at DKK 1,000,000.

The Supreme Court rules that the Danish Geodata Agency has not proven that it has suffered losses of sales that exceed the consideration in the ruling, and therefore does not allow the claim by the Agency for award of compensation pursuant to section 83(1), no. 2, of the Danish Copyright Act, cf. subsection (2).

The Supreme Court agrees that the infringing charts shall be delivered to the Danish Geodata Agency for destruction, cf. section 84(1), no. 4 of the Danish Copyright Act.

Finally, the Supreme Court allows the Agency's claim on public announcement, cf. section 84a of the Danish Copyright Act.

In costs for the High Court and the Supreme Court, NV shall pay the Danish Geodata Agency DKK 360,760. This amount covers costs of legal counsel in both courts of DKK 300,000, and DKK 60,760 to cover court costs, calculated in relation to the amount awarded. Determination of costs has taken into account the value of the case and the scope of the work.

IT IS HELD THAT:

The ruling by the Danish High Court shall be upheld with the changes that Nautische Veröffentlichung Verlagsgesellschaft mbH shall pay to the Danish Geodata Agency DKK 1,000,000 with litigation interest from 3 February 2010, and that Nautische Veröffentlichung Verlagsgesellschaft mbH shall publish the Supreme Court ruling in "*Tursejleren*" and "*Bådnyt*" as well as on the websites of Nautische Veröffentlichung Verlagsgesellschaft mbH and Danske Tursejlere, and that publication shall be in the form of extracts from the ruling, including information on the date of the ruling, the Supreme Court case number, the name of the parties and an account of the conditions and conclusion of the ruling.

In costs for the High Court and the Supreme Court, NV shall pay the Danish Geodata Agency DKK 360,760.

This amount shall be paid no later than 14 days after delivery of this ruling by the Supreme Court, while the provisions of the ruling on delivering the charts and publication of the ruling shall be complied with by no later than three months after delivery of this ruling by the Supreme Court.

The amounts of costs shall be subject to interest pursuant to section 8a of The Interest Act.