

WHEN ROYALTIES AREN'T REQUIRED

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On December 1, 2009, the Supreme Court of Denmark, as the second instance body, ruled in a case settling a dispute over the copyright to a computer program. The case was tried in the first instance by the Maritime and Commercial Court, on August 21, 2007.

The parties disputed the copyright and royalties for MediBOX, a computer program developed by Poss Design (Poss) for Fonden for Tidsskrift for Praktiserende Læger (Fonden). During the case, Poss claimed the rights to MediBOX and said that Fonden should pay royalties for copies it sold. Fonden denied the allegation and asked for judgment for the defendant. It also said that in the event the court found in favour of Poss, the royalties payable should be small.

From 1995, Fonden and Poss jointly developed MediBOX, the program in suit. Poss updated and developed MediBOX according to instructions from Fonden about content, layout and text, and in return for payment.

In 1998, negotiations took place between the parties regarding Fonden's acquisition of the rights to MediBOX, but no agreement was reached.

In September 2002, Poss first raised a royalty claim, which was elaborated in January 2003 with a more precise indication of the amount claimed. In March 2003, Fonden accepted a quotation from Poss for an update to MediBOX, but at the same time, stated that it did not accept the royalty claim. The 2003 update was delivered by Poss and Fonden paid for the service. In 2004, Poss delivered an update to MediBOX at Fonden's request. Later in 2004, the co-operation ceased and Fonden received a debit note from Poss claiming royalties for copies sold in 2004. Fonden denied that the copyright belonged to Poss and claimed to be the sole proprietor of the rights to MediBOX.

The Maritime and Commercial Court ruled that even though MediBox in relation to third parties may be copyright-protected, the parties are entitled to joint rights to the program due to their mutual relationship. This is based on the fact that MediBOX was developed due to mutual effort, an effort that continued in the years after the parties had unsuccessfully tried to agree entitlement to the copyright.

However, the Supreme Court of Denmark stated in its argument that Poss alone owns the copyright to MediBOX. Even though Fonden contributed content and made suggestions and demands regarding the functions of MediBOX, this does not change the fact that the actual programming of the computer program was undertaken by Poss. Therefore, the rights belong to Poss, the court found.

The Maritime and Commercial Court stated that the behaviour of the parties must be understood as if Fonden sold copies of MediBOX and paid

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Poss a salary for specified changes and updates to the program. Without any explicit agreement regarding changes in the parties' legal relationship, Poss was not entitled to demand royalties. Fonden had at no time accepted Poss's royalty claim and had not implicitly done so by accepting and paying for the updates of 2003 and 2004.

A three-fifths majority of the Supreme Court of Denmark ruled that as Poss delivered the 2003 and 2004 updates of MediBOX, even though Fonden rejected its royalty claim, Poss effectively waived further payment in the form of a royalty. The court also noted that a right to claim royalties cannot be based on Poss's copyright on MediBox as this does not extend to resale under Danish copyright law. Only the parties' mutual agreements dictate whether Poss can claim royalties.

Even though two courts judged differently on the issue of who owns the copyright, the outcome was the same: there is no right to claim royalties in the absence of a specific agreement between the parties. This ruling is in accordance with Danish copyright law, where the ownership of the copyright does not *per se* entitle a royalty claim if the copyright holder has already received payment for developing the creation.

Based on these two verdicts, it is worth stressing the importance of written agreements when software and other copyright-protected works are developed on commission. This ensures that any specific rights of the copyright holder are formalised and generally clarifies the legal relationship between the parties.

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