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# The Supreme Court

**Decision**

Case no.

rendered in Stockholm on April 4, 2016

Ö 849-15

**Applicant**

Stockholm District Court

P.O. Box 8307

104 20 Stockholm

**Parties**

**Claimant in the district court**

Bildupphovsrätt i Sverige ek. för., 769610-3121

Hornsgatan 103

117 28 Stockholm

Counsel: Attorney at law PA

**Defendant in the district court**

Wikimedia Sverige, 802437-8310

P.O. Box 500

101 29 Stockholm

Counsels: Attorney at law HB and attorney at law RL

## **Subject-matter**

Copyright infringement

### **DECISION TO REFER BY THE DISTRICT COURT UNDER CHAPTER 56 SECTION 13 OF THE CODE OF JUDICIAL PROCEDURE**

Stockholm District Court's decision 16.02.2015 in case T 8448-14

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### **DECISION OF THE SUPREME COURT**

The Supreme Court declares that section 24 first paragraph item 1 of the Swedish Copyright Act, under which the restriction of the author's exclusive right is limited to depictions, does not imply a right for Wikimedia to communicate photographs of works of art permanently placed outdoors from its database to the public via the internet. Whether the disposal has a commercial purpose is irrelevant.

### **REASONS**

#### *Background*

1. Wikimedia Sverige is a non-profit association which, i.a., operates a webpage and a database with pictures of works of art placed in public places outdoors. The database is available to the public without restrictions free of charge. It is also the public that provides the database with the pictures by uploading their photographs there. The purpose is to provide an open database with public art in Sweden which can be used by, i.a., the public, the education system and the tourism industry.
2. Bildupphovsrätt i Sverige ek. för. (BUS) is the organisation representing the authors within the pictorial art area in Sweden and collects and distributes fees from contractual licenses.
3. BUS has brought an action towards Wikimedia in the Stockholm District Court regarding copyright infringement. The claim concerns three sculptures which are permanently placed in an outdoor public place. BUS among others claims that Wikimedia shall be enjoined from making the works of art available to the public through communication to the public. As its basis for the claim BUS claims that Wikimedia infringes the authors' exclusive right by making the works of art available to the public on the webpage at issue. Wikimedia denies the claim and i.a. argues that the disposals at issue are permissible under section 24 first paragraph item 1 of the Swedish Copyright

Act regarding a restriction of the exclusive right, since the provision not only grants a right to reproduction of copies but also communication of the copies to the public. According to Wikimedia, the Swedish provision may not upon a consistent interpretation be given a more narrow interpretation than what follows from the so-called InfoSoc directive (c.f. item 10).

#### *The questions referred*

4. The district court has referred to following questions to the Supreme Court.
  1. Shall the concept “depict” in section 24 of the Swedish Copyright Act be understood to permit in such a manner that works of art permanently placed outdoors in or by a public place may be communicated to the public via the internet without a requirement that permission has been granted or the copyright holder having been remunerated?
  2. Is the answer affected by whether the communication has a commercial purpose or if such purpose is lacking?

#### *The legal regulation of copyright*

5. Each and everyone’s property is constitutionally protected by chapter 2 section 15 of the Swedish Instrument of Government. There it is stated that no one may be forced to give up property to the public or an individual through expropriation or a similar disposal except for when it is required to provide for urgent public or individual interests. It further follows from chapter 2 section 16 that authors, artists and photographers are entitled to their works under provisions set out in law (c.f. article 17 of the EU Charter of Fundamental Rights).
6. The Swedish Copyright Act grants the author protection for the literary and artistic works, e.g. sculptures, created by him or her (section 1). The protection consists of an exclusive right to dispose of the work by making copies of it and making it available to the public (section 2). These economic rights may in whole or in part be assigned or licensed (section 27). The author’s moral rights are also protected. The protection includes a right to be named in connection to use of the work and to oppose to the work being changed or made available in a manner which is prejudicial (section 3). The moral rights may not be assigned but solely waived to a limited extent.
7. A work is made available to the public i.a. by communication to the public or by distribution. Communication to the public means that the work is made available to the public by wire or by wireless means from a place other than that where the public may enjoy the work. It also includes communication that occurs in such a manner that members of the public may access the work from a place and at a time individually chosen by them. Distribution refers to cases where physical copies of the work are placed on sale, leased, lent, or otherwise distributed to the public (section 2 third paragraph items 1 and 4 of the Swedish Copyright Act).
8. Against the author’s exclusive right stands the public interest of using protected works in certain situations or for certain purposes notwithstanding the copyright (see government bill 1960:17 p. 60). This is provided for in the Swedish Copyright Act through the restriction provisions that are set out in chapter 2 of the act. The provisions grant the possibility of disposing of a work under specifically stated circumstances. In addition, the act provides other possibilities of use pursuant to the provisions on contractual license in chapter 3 a.

9. It has on numerous occasions been underlined in the preparatory works that the exclusive rights constitute property and that hence restrictiveness shall be observed upon enactment and interpretation of restrictions of the rights (see i.a. government bill 1992/93:214 p. 41 ff. and government bill 2004/05:110 p. 83 f.). Pursuant to the cases NJA 1986 p. 702 and NJA 1993 p. 263 the margin for the courts to impose other restrictions of exclusive rights than the ones stated in the act by interpretation is exceptionally limited.

#### *The Infosoc directive*

10. The Swedish Copyright Act shall be interpreted in light of 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 (the Infosoc directive). The directive was implemented in Sweden in the year of 2005. Its purpose is to partially harmonise copyright law in order for it not to counteract the trade of goods and services across the member states' borders. National provisions that differed significantly among the member states had to be adapted while differences that did not have any negative effects on the internal market did not have to be adjusted (see recital 7 of the preamble to the directive, c.f. CJEU, C More Entertainment, C-279/13, para 29). The directive sets out a strong copyright protection, in particular within the digital environment. It also seeks to maintain a balance towards important public interest of using works.
11. The directive includes an exhaustive enumeration of permissible restrictions of the rights governed by the directive (article 5). Article 5.5 expresses what is commonly known as the three-step test, namely that (1) the restrictions may only be applied in certain specific cases (2) which do not violate the normal use of the work and (3) do not unreasonably infringe upon the legitimate interests of the copyright owner (c.f. reason 44 of the preamble to the directive). Similar provisions exist in i.a. article 9.2 of the Berne Convention for the Protection of Literary and Artistic Works and in article 10 of the WIPO Copyright Treaty.
12. The three-step test firstly signifies that the restriction must refer to a particular case, i.e. the restriction must be clearly delimited and specified. As to the normal use of the work, the restriction must not compete with the author's right to exploit his work economically. Not only the present use must be taken into consideration but a dynamic interpretation should also be made where consideration is paid to the author's right to exploit the work in the new ways that are provided for by the progress in technology. Finally, an assessment must be made of whether the restriction would unreasonably infringe on the author's legitimate interests. In this respect a balance must be struck as to whether the restriction of the exclusive right may be justified by a stronger public interest. It is hence a matter of a proportionality assessment.
13. The legislative process concerning restrictions of the copyright shall consider the principles of the three-step test (see government bill 2004/05:110 p. 83 f.). This must also be considered as directions on how provisions regarding restrictions of the copyright must be interpreted by a court.

#### *The restriction in section 24 first paragraph item 1 of the Swedish Copyright Act*

14. Pursuant to section 24 first paragraph item 1 of the Swedish Copyright Act a work of art may be depicted if permanently placed on or by a public place outdoors. The provision is founded on the public interest to freely reproduce the town- or landscape irrespective of the rights to work of arts

that are included therein. In the preparatory works the provision was designated as an exemption from the artist's exclusive right to reproduce the work of art. The depict concept was intended to permit reproductions of the work of art by painting, sketch, photography or other technology by which the work of art is reproduced in plane level (two-dimensionally).

15. Depiction is also permissible where a work of art forms the main subject, e.g. on a postcard. That such depiction was permissible already by the enactment of the Swedish Copyright Act raised the principle question of whether it would be motivated that the artist should be entitled to compensation for production and distribution of the postcards. Due to practical reasons, and because such depictions were considered to be of little economic significance to the artists, no provision on right to compensation was enacted. It may be remarked that the Swedish regulation deviates from what currently applies in this respect in other Nordic countries where the restriction of the author's exclusive right does not cover commercial use of depictions where the work of art forms the main subject. It has been considered during subsequent legislative processes whether the Swedish provision should be limited, i.a. not to cover works forming the main subject. This has however not led to any amendments of the act (see SOU 1956:25 p. 264 f., SOU 1990:30 p. 480, government bill 1992/93:214 p. 100 and Ds 1996:61 p. 83 f.).
16. In the course of the implementation of the Infosoc directive, section 24 was given its current wording. As to use of a work, e.g. architectural works or sculptures, intended to be permanently placed in a public place may, according to section 5.3 h of the directive, restrictions of the right to make copies and making the work available to the public may be enacted. In connection with the amendments of the act the government argued that the directive sets out the outer limit as to which restrictions are permissible in the national legislation. As to the exclusive rights that are governed by the directive, the member states may not uphold any exceptions or restrictions that go beyond what is provided for under the directive. It was argued that depiction pursuant to the national provision refers to plane level reproductions. It was therefore assessed to be more limited in several manners than what was permissible under the directive. No factual amendment of the provision was therefore required (see government bill 2004/05:110 p. 46 and p. 226). Since the provision's conformity with the three-step test had been disputed within the comments on the bill circulated for consideration it was however reasoned that the question of whether it should be further limited should be reviewed in another context. No review of the provision from a factual perspective has however been performed thereafter.

### *The Supreme Court's assessment*

17. The case concerns the question of how the concept “depict” pursuant to section 24 first paragraph item 1 of the Swedish Copyright Act is to be interpreted in light of the situation in the present case. Wikimedia has a database with photographs of works of art placed in public places. The works are by means of communication via the internet made available to the public.
18. The Swedish Copyright Act has been reviewed on numerous occasions, i.a. in connection with the implementation of the Infosoc directive. The most recent review was performed in the report SOU 2011:32, A new Swedish Copyright Act (Sw. *En ny upphovsrättslag*), where it was pointed out that the meaning of the concept “depict” had been subject for debate and that there were reasons to clarify the concept (see p. 172). The report has however yet to lead to any legislation in this respect.
19. An assessment of what restriction of the author’s exclusive right that lies within the concept “depict” should be made in accordance with the principles of the three-step test (see item 11). In a case such as the present it must be examined what constitutes normal use of a work of art placed in a public place. Herein lies an assessment of which exclusive right the author should have to exploit his work economically. It should be remarked that the restriction of the exclusive right with respect to distribution of postcards is not relevant in this context. This restriction was enacted due to practical considerations in a time when it referred to reproduction and distribution of a relatively limited amount of analogue depictions. It is however a different matter when the work of art is used in a digital environment.
20. In the present case the works have been made publicly available in an open database. Such use of works of art is typically not of insignificant commercial value, either for the person operating the database or for the person that access the database in connection with the offering of other services, through e.g. linking. This value should be reserved for the authors of the works of art. Whether the operator of the database actually has a commercial purpose is then irrelevant.
21. The question is thereafter whether a communication to the public, in such a way as occurs from Wikimedia’s database, unreasonably infringes the authors’ legitimate interests. The starting point is that section 24 first paragraph item 1 of the Swedish Copyright Act should be subject to a restrictive interpretation. This is about striking a balance in relation to the purpose which the database seeks to achieve (see item 1). This purpose is admittedly within the scope of what may be regarded as a public interest. A database of the present kind does however provide for great use of copyright protected works without any compensation being paid to the authors. It will thus be a considerably greater restriction of their exclusive right than the provision aims at.
22. The right to exploit works through new technology in this way therefore remains with the authors pursuant to the present wording of the act.

*Conclusion*

23. Section 24 first paragraph item 1 of the Swedish Copyright Act, where the restriction of the author's exclusive right is limited to depictions, does not grant Wikipedia the right to from its database with photographs of works of art permanently placed on or by public places outside communicate the works via internet to the public. Whether the disposal has a commercial purpose is irrelevant. The questions referred should be answered accordingly.
24. The issue of compensation for legal fees in the Supreme Court shall be examined by the district court in connection with the case after it has been reopened.

[SIGNATURES]

The following have participated in the decision: Justices of the Supreme Court Marianne Lundius, Ella Nyström, Gudmund Toijer, Johnny Herre and Lars Edlund (reporting judge)

Reporting Justice Secretary of the Supreme Court: Elisabet Rune