New Swedish guidelines for reasonable compensation in the event of copyright infringement

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New Swedish practice on how reasonable compensation for copyright infringement should be calculated was presented in a judgment of the Swedish Supreme Court concerning Dreamfilm's sharing of a film from Svensk Filmindustri (SF). The verdict was given on 21 January 2019 (case no. B 1540-18). In the grounds of the judgment, there are new and important arguments regarding the type of model that should be used to calculate reasonable compensation in cases of illegal online streaming of films. The judgment also sets out the evidence that is required when calculating such reasonable compensation.

Compensation calculation in copyright

According to Article 54 of the Swedish Copyright Act (1960: 729), a person who uses a work unlawfully has to pay reasonable compensation. The obligation to pay compensation exists when the infringement can be objectively confirmed, and the starting point for determining the amount of compensation is industry practice. The purpose of the scheme is, as identified in the motives of the law from the 1960s and the legislation from 1919, that a person who is liable for an infringement should not be in a better position than a person who uses the work legally.

Background

The Supreme Court case concerns the illegal film streaming site www.dreamfilm.se and Svensk Filmindustri (SF). The defendants started the Dreamfilm business in 2012, operating under the domain dreamfilm.se. The website was freely accessible, and visitors could access films through hyperlinks. Dreamfilm did not have the films stored on their own servers. Instead the films were stored on servers belonging to other websites and those servers were located in Russia. Clicking on a particular film gave access to the content from the Russian server through so-called streaming. Advertising space on dreamfilm.se was given to those who paid for it.

Lower instances' assessments of reasonable compensation

The defendants were prosecuted and sentenced in the District Court, and later by the Court of Appeal, for violations of copyright law. The objects of the infringement were 45 films. SF claimed damages for copyright infringement of one film, namely Maria Wern's "Drömmen förde dig vilse". SF claimed SEK 8,000,000 in reasonable compensation and SEK 1,876,100 in other damages (of which SEK 1,226,100 was for loss of profit, SEK 400,000 for market disruption, SEK 200,000 for reputation damage and SEK 50,000 for non-material damage).

Regarding SF's claim for reasonable compensation, the calculation was based on a hypothetical licence fee of what it would have cost a licensee to make the films available to the public in a similar manner to how the defendants had done so. In the calculation, SF referred to a production cost for the film of SEK 20 million and an expected profit of 20 percent. According to SF's calculation model, the total licence fee would therefore have been SEK 24 million and the claimed amount of SEK 8 million contained a large precautionary deduction.

The District Court found SF's calculations not to be reliable, especially in light of the fact that the licence had been non-exclusive and since there was no investigation of how many times the film had actually been streamed. Therefore, the District Court determined the reasonable compensation to be SEK 1 million. The Court of Appeal, on the other hand, considered that a hypothetical licence would have entailed a total licence, since a licence without limitation on time or limitation of the number of viewings that were made freely available on the internet could only be sold once. The Court of Appeal therefore raised the amount to SEK 4 million. The defendants appealed the judgment and stated that there is no guidance on how hypothetical total licences should be calculated and that the calculation in that specific case differed from earlier similar court cases.

The Supreme Court's assessment

The Supreme court pointed out that the purpose of Paragraph 54(1) of the Copyright Act is to enable value compensation, i.e. a payment for the unauthorized use. Reasonable compensation can therefore be both larger and smaller than the damage or loss that has actually arisen due to the illegal use. The court stated that it is therefore important that even if further damage is to be compensated, such damage is not covered by the reasonable compensation, which only refers to the compensation for the actual use.

The court concluded that SF had not shown that a commercial negotiation of a licence corresponding to the use made on dreamfilm.se would lead to a licence agreement with a fee of SEK 4 million. SF's calculation model had not taken into account that the defendants' actual use of SF's exclusive rights was limited in time and only related to transmission to the public through streaming. Therefore, the court stated that SF's calculation model could not be used as a basis for determining the reasonable compensation according to Paragraph 54 of the Copyright Act.

Instead, the Supreme Court stated that the compensation would be calculated based on the investigation presented in the case. The investigation showed that the film had been available on SF's websites and on DVDs and had been shown on TV4. The Supreme Court pointed out that the demand for films is generally high in connection with the film's publication, but that it loses news value shortly thereafter. Although the film in question was made available at the time of SF's first publication, the defendants have shown that it was probably also available on the website Swefilmer.

SF's investigation also showed that the number of legal transactions relating to the film was about 28,000. The average profit for a distributor of the film was about SEK 19 per occasion (although it could also be rented periodically for SEK 9). Furthermore, a licence for paid- or free TV is between SEK 500,000 and SEK 1.5 million. The relationship between legal film and estimated illegal streaming had been reported as being that for every film that was sold legally, it was consumed 1.7 times illegally. The Supreme Court, however, held that the majority of the information specified by SF needed to be assessed with considerable caution, since there had not been an investigation into the number of streams of the film or when the film was made available on dreamfilm.se. Nor had there been an investigation submitted regarding the time during which the legal transactions took place. The court therefore emphasized that SF should have presented additional information, especially about SF's own use of the work.

The Supreme Court thus reached its conclusion on the calculation of the reasonable compensation through an assessment of the limited material submitted by SF. It appeared that the infringement had been going on for a relatively long time, but at the same time the film had been made legally available by SF and by others, both on the internet and on TV. According to the court, there was also some information on existing licence fees, actual sales and illegal streaming which should be taken into account in the calculation of the compensation. The income after deduction for costs in connection with internet-based leasing should also be taken into account in the calculation. After considering the actual data presented in the case and following an overall assessment, the court decided SEK 400,000 was a reasonable copyright compensation for the accused's illegal use of the film.

Reflections

The Swedish Pirate Bay verdict from 2010 related to damages for copyright infringement at a time when the most common way to access copyrighted works was to download them. Now, 9 years later, we live in a world where consuming content through streaming services is the most common way to enjoy copyrighted works. Nowadays, completely different conditions apply for the calculation of damages. The calculation method in the Pirate Bay judgment is passé, because it is not possible to calculate how many times a work has been streamed. The calculation according to the Pirate Bay judgment is linked to what the right holder would reasonably have received for the use of the work. For streaming services, consumers instead pay a price for a period – an overall price – regardless of how much or how little is actually streamed from the service. The fact that we have moved from a copy-making model to a subscription model must, of course, be reflected in the calculation of the reasonable compensation under Paragraph 54 of the Copyright Act. The court noted that, since the Copyright Act is neutral, account must be taken of the payment model used in the legal dissemination of the works when calculating the reasonable compensation for the illegal use. In the future, we will probably see more judgments that shape the calculation method for reasonable subscription compensation in the event of copyright infringement.