Kluwer Copyright Blog

Swedish Supreme Court issues decision regarding the freedom of panorama

Johan Norderyd, Elna Jönsson (Lindahl) · Monday, May 9th, 2016

Question referred to the Supreme Court by Stockholm District Court in a case between Bildupphovsrätt i Sverige ek.för. (BUS) vs Wikimedia Sverige (Case nr Ö 849-15)

On 4th April 2016 the Supreme Court handed down its decision in a case between Bildupphovsrätt i Sverige (BUS) and Wikimedia Sverige. The question referred to the Supreme Court concerned the interpretation of the freedom of panorama in relation to the rights conferred by copyright, more precisely what is to be understood by the word “depict”.

The freedom of panorama is a common concept in copyright laws of various jurisdictions. Under Swedish copyright law (section 24 of the Copyright Act) it allows the depiction of works of fine art, which are permanently situated outdoors at a public place or exhibited. This exception applies even when the works are used commercially, for example on postcards. Thus, it is an exception to the normal rule that the copyright owner has the exclusive right to authorise the creation and distribution of derivative works.

In the case at hand, Wikimedia operated a website and a database which included pictures of works of fine art located in public places outdoors. The database was available to the public free of charge, and was created by its users uploading their photographs. According to Wikimedia the purpose was to provide a public database of public works of fine art to be used by the general public, tourism industry and education system.

BUS represents authors in Sweden and manages the collection and distribution of fees from collective agreement licences. BUS filed a lawsuit against Wikimedia alleging that the photographs of three sculptures made available to the public on the website constituted copyright infringement. Wikimedia claimed that the freedom of panorama applied since the provision allows both making reproductions of the works and communicating them to the public. BUS claimed however that this applies only to printed materials, not online.

Stockholm District Court decided to refer two questions to the Supreme Court, namely whether the word “depict” pursuant to section 24 first paragraph item 1 was to be understood as allowing works of fine art permanently placed outside at a public place to be communicated to the public via the Internet, without permission or remuneration to the copyright owner, and whether it made any difference if such communication had a commercial purpose or not.

Following a review of the rights conferred by copyright and relevant exceptions, the Supreme Court clarified that the provision in the Swedish Copyright Act should be interpreted in light of the Infosoc Directive. While the Infosoc Directive offers broad protection for copyright, particularly in the digital environment, it also seeks to balance the rights of authors with the public interest in accessing and using works of art. As for the freedom of panorama principle, it is clear that it is based on the public interest in freely reproducing landscape irrespective of the rights to works of arts included therein. In the preparatory works the provision was created as an exception to the author's right to reproduce the work of art. Further, the concept of depiction was intended to permit reproduction of the work of art by painting, sketch, photography or other technology by which the work or art is reproduced two-dimensionally.

Bearing the above in mind, the Supreme Court interpreted the provision in accordance with the three-step test set out in the Infosoc directive, namely that (1) restrictions of copyright 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 author.

As for the principles laid down in the three-step test, the Supreme Court first clarified that as a starting point the relevant provision should be subject to a restrictive interpretation, it being an exception. Secondly, on the question of what constitutes normal use of a work of art placed in a public place and what exclusive right the author should have to exploit his work economically, the court concluded that use in an open database is typically not of insignificant commercial value, neither for the person operating the database nor the person that accesses the database. Therefore, such value should be reserved for the author, regardless of whether the operator of the database has a commercial purpose. As for the last criteria, whether the communication to the public that took place from Wikimedia's database unreasonably infringed the authors' legitimate interest, the Supreme Court argued that although the purpose of the database is in the public interest, bearing in mind that exceptions should be interpreted restrictively, a database of the present kind allows the extensive use of copyright protected works without any compensation to the authors. Therefore, the restriction of the authors' rights is considerably greater than the purpose of the provision. Thus, the right to exploit works of art through new technology by a public database on the Internet remains with the authors pursuant to the present wording of the Copyright Act.

The debate in Sweden has been intense. Although the general opinion seems to be that the outcome was correct, in the sense that the interpretation of the Copyright Act in its present wording does not allow for any other outcome, some might argue that a change of law is required. Bearing in mind that the Supreme Court actually performed a balancing of interests, one practical solution could be to establish a system based on collective license agreements in order to safeguard the rights of authors in similar situations. Watch this space for future developments.

This entry was posted on Monday, May 9th, 2016 at 9:21 am and is filed under Case Law, Infringement, Limitations, Making available (right of), Reproduction (right of), Sweden
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.