

Supreme Court rules on balancing of copyright and fundamental rights

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Introduction

A landmark Supreme Court judgment has closed the book on the widely known 'iron pipe scandal'. The rights holder in this copyright infringement case was a member of the controversial right-wing political party, the Sweden Democrats. The copyrighted work at issue was a video of altercations where members of the party voiced racist arguments towards persons they met on the street late one night – one who happened to be a well-known Swedish comedian – and thereafter armed themselves with iron pipes for the expressed purpose of being ready in the event that said altercations escalated into physical violence. Because of this, the case has stirred up more emotions than copyright infringement cases usually do.

Facts

In June 2010, members of the Sweden Democrats who – at the time – were running for parliament were involved in altercations with a well-known Swedish comedian and members of the public. One of the parliamentary candidates filmed the altercations and thereafter consented to the publication of a sequence of the full-length video on the Sweden Democrats YouTube channel.

In 2012, a newspaper published the full-length video on its website, including parts previously not published on YouTube. The Swedish public service television company Sveriges Television (SVT) published several sequences and still images from the full-length video on different occasions over a number of years, in news reports and TV programmes.

The rights holder sued SVT for copyright infringement, requesting compensation for this use. SVT asserted that the exceptions for reporting on current events under the Copyright Act gave them a right to publish the protected materials without the rights holder's consent.

Both the first and second-instance court found mainly in favour of the rights holder, awarding him compensation for the use.

Decision

The Supreme Court initially noted that freedom of speech and freedom of information are fundamental in Swedish legislation, as expressed in several provisions in the Constitution, but that copyright protection is also supported thereunder. Considering the balancing of these interests, certain exceptions to copyright have been considered justified in case law. These include the exceptions for reporting on current events as set out in Sections 23 and 25 of the Copyright Act. Section 23 applies to published works that are reproduced in connection with a report on current events, which means that the work must have been published with the rights holder's consent. Section 25 applies to works that are seen or heard in a news event, which may be reproduced when reporting on that news event.

These exceptions have applied since the adoption of the Copyright Act in 1969 and the balancing of interests has been addressed by the legislature several times, including during the implementation of the EU InfoSoc Directive. [\(1\)](#)

Referring to European Court of Justice (ECJ) case law, the court noted that the EU InfoSoc Directive must be implemented in national law in such a way that the author's rights to their work is balanced against the general interest of information.

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During the implementation of the EU InfoSoc Directive, the legislature found that no amendments to Sections 23 or 25 of the Copyright Act were necessary. The Supreme Court therefore held that the legislature had concluded that the prerequisites for those exceptions to apply – in other words, that the work must be published (Section 23) or seen and heard during a news event (Section 25) – were justified. According to the Supreme Court, this meant that the legislature had not considered a general exception for use in news reporting to be justified.

Addressing other limitations in copyright, the court turned to criminal liability for copyright infringement. Here, the court noted that there may be situations where the interest of freedom of speech is so important that courts must be able to hand down an acquittal. This could entail that the unlawful publication of a work would not cause criminal liability, but that the rights holder would still have a right to compensation for that use.

SVT had also invoked Article 10 of the European Convention on Human Rights (ECHR), which protects freedom of speech and freedom of information, as grounds for non-infringement. However, the Supreme Court held that the ECHR concerns obligations of the state against its individuals (eg, in cases of criminal liability for copyright infringement) and that it does not have direct effect between individuals.

The court concluded that the situation is different when it is not a question of criminal liability, but rather a civil law issue of whether the rights holder has a right to compensation for the use. In the latter situation, it is particularly important that the rights holder is not deprived of their legal rights. The interest of maintaining respect for the balance of interest set out by the legislature through the Copyright Act is also more relevant here, than when considering criminal liability in a particular case.

Consequently, the court held that the ECHR could not result in the rights holder's loss of their right to compensation for unlawful use. However, the court stated that this does not prevent established principles of freedom of speech and freedom of information to affect the interpretation of provisions that are applicable between individuals.

Turning to the case at hand, the Supreme Court noted that the parliamentarian held producer and photographer's rights to the video and images published by SVT. It concluded that the full-length video published by SVT had not been published with the rights holder's consent and that the exception in Section 23 of the Copyright Act therefore did not apply. The work had also not been seen or heard during a current event, and the exception in Section 25 of the Copyright Act was thus also inapplicable. The general public's interest of information could not deprive the rights holder of his right to compensation under the Copyright Act. Consequently, the Supreme Court confirmed the Patent and Market Court of Appeal's finding that SVT was liable to pay compensation for the use at issue.

In relation to moral rights, the Supreme Court confirmed the reasons set out by the Patent and Market Court of Appeal. The second-instance court had found that there was such a right for photographers, but not for producers. The Patent and Market Court of Appeal had found that the publications had not been prejudicial to the rights holder's reputation as a photographer. However, the court found that the parliamentarian had a right to be named in relation to several of the published photographs. Further, SVT had in some instances specified the newspaper that originally published (without permission) the video as photographer. Consequently, the court found that SVT had also infringed the rights holder's moral rights.

The rights holder had only requested the court to establish that SVT was liable to pay compensation for its use. Therefore, the court did not assess the amount of the compensation.

Comment

Through this judgment, the Supreme Court has confirmed that fundamental rights such as freedom of the press, no matter how fundamental, do not justify the use of copyrighted materials outside the scope of the existing exceptions and limitations as set out in the Copyright Act and the EU InfoSoc Directive. This is in line with ECJ case law (not least the three recent judgments rendered on 29 July 2019)⁽²⁾ and thus quite unsurprising.

The judgment also illustrates the impact of EU law on Swedish IP law. Both the Supreme Court and the Patent and Market Court of Appeal (which is often the final instance) regularly refer to EU case law, giving it precedence over older Swedish authorities, and highlight the importance of interpreting Swedish legislation in line with applicable EU law.

The Supreme Court's clear distinction between criminal copyright infringement actions and civil law disputes on compensation may open up interesting discussions on how to handle this balancing of

interests in joined cases. It may seem reasonable that fundamental freedoms are given narrower scope of application when criminal penalties are not in the mix, but rights holders' claims for damages are often joined with criminal actions. Courts may be reluctant to apply different assessments of liability within the same proceedings, but rights holders may have significant damages claims as criminal cases often concern extensive infringements. It remains to be seen whether rights holders will benefit from initiating separate actions regarding compensation, rather than joining the public prosecutor in such criminal actions.

In the Patent and Market Court of Appeal case, an additional question was whether the parody exception was applicable to SVT's publications. In this regard, the court rejected the Swedish requirement that parodies must be sufficiently original to constitute their own work as the exception is harmonised within the European Union and there is no such requirement under EU law. The Patent and Market Court of Appeal held that the parody exception applied to some of the uses at issue in the proceedings. As the rights holder did not appeal the Patent and Market Court of Appeal's judgment, this issue was never brought before the Supreme Court.

The judgment might have marked the end of this political scandal – at least as far as copyright is concerned. However, when commenting on the judgment, SVT voiced disappointment over the outcome and expressed an intention to work with other media companies to achieve a change in legislation in this regard – and it seems that there will be more to come in the Swedish discussion on the balancing of copyright and freedom of the press.

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Endnotes

(1) EU Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

(2) C-476/17 *Pelham*, C-469/17 *Funke Medien* and C-516/17 *Speigel Online*.

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