

# Submission of evidence in court proceedings does not constitute copyright infringement

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### Introduction

Whether the submission of copyright-protected materials as evidence in court proceedings can constitute copyright infringement has been the subject of much discussion in Sweden, due largely to the traditionally narrow Swedish understanding of what constitutes the 'public' as well as earlier conflicting decisions on the matter.

This uncertainty led the Patent and Market Court of Appeal (PMCA) to refer questions to the European Court of Justice (ECJ), which were answered in a recent case (C-637/19 BY). By applying the ECJ's preliminary ruling, the PMCA has now determined affirmatively that copyright-protected materials can be freely submitted as evidence to courts in Sweden, as long as the material has some *prima facie* relevance as evidence in the proceedings.

### Facts

The case concerned two individuals that operated competing websites. In court proceedings, the respondent submitted a copy of a page from the appellant's webpage as evidence. The page contained a photo that the appellant argued was protected by copyright. The appellant argued that the respondent had committed copyright infringement by:

- printing a physical copy of the photograph from the webpage (a reproduction of the photo); and
- submitting a digital copy of the photograph to the court (a communication to the public of the photo).

The first-instance Patent and Market Court found that the respondent's use of the photo constituted copyright infringement but that no damages should be awarded.

On appeal, the PMCA referred questions to the ECJ that essentially asked whether the submission of copyright-protected materials as evidence in court proceedings could constitute a 'communication to the public' under Article 3(1) of the EU Information Society Directive (2001/29/EU).

### ECJ decision

The ECJ reiterated that in accordance with settled case law, the concept of 'communication to the public' includes two cumulative criteria:

- an act of communication of a work; and
- the communication of that work to the public.

The court also reiterated that it follows from settled case law that 'public' refers to an indeterminate number of potential recipients and implies a fairly large number of people.

Applied to the facts of the case, the court found at Paragraph 28 that the respondent's submission of the photo was targeted to a clearly defined and closed group of people who held public service functions within a court and therefore not to an indeterminate number of potential recipients. The court thus held that the submission of evidence did not constitute a communication to the public under Article 3(1) of the EU Information Society Directive.

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The fact that Swedish law on public access to information meant that the public could subsequently ask for copies of the photo lacked relevance to the question of whether the respondent's submission constituted a communication to the public.

### **PMCA decision**

By applying the ECJ's admirably clear preliminary ruling, the PMCA confirmed that the respondent's submission of a digital copy of the photo to the court did not constitute a communication to the public and therefore did not constitute copyright infringement.

The remaining question in the case, which had not been answered by the ECJ due to some apparent misunderstandings in how the highest court understood the referral, was whether the respondent's earlier printing of a physical copy of the photograph from the webpage constituted a reproduction in violation of the appellant's exclusive reproduction right under Article 2 of the EU Information Society Directive.

The PMCA found that the printing of the photo objectively constituted a reproduction and thus would constitute copyright infringement, unless allowed by a limitation or exception in the Copyright Act. According to Section 26(b) of the Copyright Act, exceptions to the author's exclusive reproduction right can be made "in the interest of the administration of justice or public security".

The PMCA found that this seldom-applied section should be interpreted in light of the EU Information Society Directive. By balancing the appellant's copyright interest in this case against the respondent's fundamental interest in access to justice and a fair trial, the court found that Section 26(b) of the Copyright Act suggested that the respondent's reproduction had been made in the interest of the administration of justice and thus did not constitute copyright infringement, provided that the material could have had some *prima facie* relevance as evidence in the proceedings.

Regarding future court determinations of whether such materials have evidentiary relevance, the PMCA further clarified that the bar should be low; it is sufficient that the materials could have some relevance for matters in the proceedings.

### **Comment**

The conclusion that materials protected by copyright may be submitted as evidence in court proceedings in Sweden is clearly correct. Any other conclusion would seriously affect the fundamental right of access to justice and a fair trial. While the materials must have relevance as evidence in order to not constitute copyright infringement, the bar has been set extremely low by the PMCA and in practice it is expected that the submission of copyright-protected materials in court proceedings will no longer be a practical issue in Swedish litigation.

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