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Interpretation of licence agreements for use of photographic works in Sweden

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Introduction

The commercial use of photographic works under licence or assignment raises well-known legal challenges for both licensee and licensor. A recent case⁽¹⁾ from the Patent and Market Court of Appeal regarding the exploitation of photographic works in the context of a Holocaust remembrance exhibition is a reminder of many of the challenges inherent to the interpretation of copyright assignment agreements, such as clearly defining the scope of the licence and how the photographer's moral rights shall be handled. Sometimes, even fairly standard licensing agreements end up in litigation and, in such situations, this case also serves to illuminate some common pitfalls for litigants.

Facts

The claimant was a Swedish photographer that planned a photographic exhibition, spotlighting Holocaust survivors and interviewing them for the purposes of preserving their memories for generations to come. The defendant, the Raoul Wallenberg Academy for Young Learners, was a non-governmental organisation (NGO) that promoted human rights. It partnered with the claimant in financing and conducting the exhibition.

The parties entered into an agreement for the claimant to deliver certain portrait stills and record interviews with Holocaust survivors for use in the exhibition in for a certain fee. The portrait stills and interviews were subsequently used both in the exhibition at a museum and in a mobile app that was used on the museum grounds, as well as on the NGO's social media and at certain marketing events. It did not take long until it became abundantly clear that the parties interpreted the agreement very differently, and after letters flying back and forth, off to court they went.

Patent and Market Court

In the face of the parties' wildly different interpretations of the scope of the agreement, the first-instance Swedish Patent and Market Court first had to assess the circumstances under which the agreement was entered into. The Court found that the parties' plan from the outset was for the exhibition to have a digital component with a mobile application and that the exhibition would later tour and be exhibited in Swedish schools. Since the copyright relevant actions alleged to constitute infringement (both making copies of the photographic works and making the works available to the public) were found to be explicitly governed by the agreement between the parties, the Court unsurprisingly found that these actions should be assessed under the agreement, instead of under the applicable Swedish copyright law.

Interpreting the agreement, the Court found that the photographer (the claimant) owned all IP rights in the results (ie, the photographic portraits and interviews) to be supplied and that the NGO (the defendant) had been granted a licence to use the results and the copyright vested therein for the payment of a fee. The rights granted the defendant were broad in nature, including a right to sublicense, in return for an additional payment to the photographer. As is usually the case in Swedish copyright litigation concerning the interpretation of copyright assignments, the Court interpreted the agreement using common legal principles of contract interpretation, as well as the two specific doctrinal legal interpretation principles recognised (albeit rarely considered decisive) under Swedish copyright jurisprudence:

- the so-called "speciality principle", which dictates that copyright assignments shall be interpreted narrowly; and
- the so-called "specification principle", which states that ambiguous clauses in such agreements shall be interpreted to favour the copyright holder.

One major disagreement between the parties was whether the licence granted to the defendant in the agreement had been limited to the term of the agreement or whether it was perpetual in nature. On this point, the Court found that a plain reading of the clause suggested a licence that was not limited to the term of the agreement, and that this interpretation was supported by witness evidence. Simply put, the claimant was found to have been well aware that the defendant had intended to use the materials for several years and that this had been fairly clearly set out in the text of the agreement.

Neither the exhibition of the photographic works at the museum, nor the use of the works at certain events, on the mobile application or in the defendant's social media, was found to violate the spirit or wording of the agreement. The use that third parties (ie, the museum and social media platforms respectively) had thus made of the results did not qualify as a sublicensed use under the agreement, much less one that would trigger additional remuneration to the claimant.

As to the photographer's moral rights to be mentioned as the author or photographer under section 3 of the of the Swedish Copyright Act, the claimant had argued that her name had not been properly mentioned at some time in the mobile application's interface. The Court found that the evidence invoked was not enough to establish a violation of claimant's moral rights. Since the claimant had the burden of

proof, this argument too fell flat. In the end, the claimant was not successful on any point and was ordered to pay the defendant's full legal costs of approximately €100,000.

Patent and Market Court of Appeal

The Patent and Market Court of Appeal confirmed the Patent and Market Court's decision. When interpreting the agreement between the parties, the Court methodically worked its way through the relevant clauses' different provisions and confirmed the lower court's interpretation of them and their practical meaning for the parties and the exhibition. In several instances, the Court pointed out that the evidence invoked was lacking and did not show what it had been argued to show.

Comment

This case serves as a timely reminder that copyright litigation in Sweden – and likely elsewhere – often comes down to a careful analysis of what the documents invoked in a case actually establish as facts in the case, rather than a complicated application of the overarching principles of law and a balancing of interests in favour of the little guy. Similarly, the plain wording of an assignment agreement is sometimes clear enough to withstand assault on all legal fronts. This is important to keep in mind in copyright litigation, especially in cases where the authors have a strong connection to the works and their exploitation.

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Endnotes

(1) PMT 4780-2.