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Museum commits copyright infringement – how much compensation must be paid?

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Introduction

The question of how to calculate reasonable compensation for copyright infringement has been a subject of much discussion in Sweden in recent years. In Swedish copyright jurisprudence, this calculation is commonly conducted on the basis of a fictitious hypothetical licensing fee between the parties, in which evidence of licensing standards on the relevant market is of crucial importance. However, in NJA 2019 s 3, the Swedish Supreme Court found the outer limits of this method and established that a court cannot base its calculation on a hypothetical licensing fee in situations where the infringing use would never have been licensed under any circumstance in reality. The Patent and Market Court of Appeal recently revisited the issue in an interesting case that divided the panel of judges.[(1)]

Facts

The claimant was a professional documentary filmmaker who held copyright in two films released in the 1960s. The defendant was the municipality of Stockholm in its position as the owner and operator of the Stockholm City Museum. The museum had copied the films and made them available to the public in various ways, including by digitising them and making them available for free over the Internet. The claimant sought sizeable damages from the defendant.

Patent and Market Court

The first-instance Patent and Market Court faced a number of common copyright questions, such as:

- whether the films constituted film works – the Court found that they did; and
- whether a 1960s copyright assignment from the author to the museum should be construed to include the right to make one of the works available over the Internet, which did not exist at the time – the Court found that it did not, based on traditional Swedish principles of copyright contract interpretation (such an interpretation will likely concern Swedish museum operators who want to use modern digital tools to make their collections available to dwindling audiences).

On the issue of the amount of damages, the Court applied the common Swedish method of establishing a hypothetical licensing fee, based on evidence about the licensing standards on the relevant market and the legal fiction that the parties would have entered into a licence that covered the copyright-relevant uses in the case.

In light of the Supreme Court's decision in NJA 2019 s 3, the Court found that the claimant had not invoked sufficient evidence as to the typical market value of the works at issue. Instead, the Court was forced to make an overall assessment that resulted in a comparatively low award of about €3,000 for the museum's seven-year infringement.

Patent and Market Court of Appeal

Following the claimant's appeal, the main issue before the second-instance Patent and Market Court of Appeal was the amount of the reasonable compensation to be awarded for the museum's copyright infringement. The issue of the first-instance court's harsh interpretation of the contract was unfortunately not put before the appeals court.

Like the first-instance court, the Patent and Market Court of Appeal based its assessment on a calculation of a hypothetical licensing fee, as set out by Swedish Supreme Court in NJA 2019 s 3. However, it reached a very different conclusion regarding the amount of compensation due.

The Court's first question was whether there was support for the existence of established licensing tariffs or other common principles on the relevant market. Based on witness testimony and the trade association tariff, the majority of the Court found that there was a relevant licensing market and compensation model that could serve to support the calculation of a hypothetical licensing fee. When applying these tariffs and principles, the claimant's sought damages were awarded in full – approximately €25,000 instead of the previously awarded €3,000.

The chair of the judge panel filed a strong dissent, arguing that the precedent in NJA 2019 s 3 had been applied incorrectly when calculating damages in this case. The chair found that the trade organisation tariff that had been invoked was of little relevance to this case since it was more commercial in nature and did not cover the uses the museum had made of the works at issue – namely, using the works in museum collections and similar. The chair also pointed out that the tariff did not appear to be applicable to these kinds of film works. In the view of the dissenting judge, the majority's application of the hypothetical licensing fee was manifestly wrong since it resulted in the museum paying a large amount for two works, out of likely thousands in the collection.

Comment

The perennial question of how to apply the hypothetical licensing fee construct in copyright litigation remains an interesting one and this

decision is a welcome further application of the principles for calculating reasonable compensation for copyright infringement set out in NJA 2019 s 3. If nothing else, this case shows the importance and value of invoking evidence to establish a baseline for calculating reasonable compensation. In this instance, the municipality of Stockholm appears to have had the opportunity to defend its case more forcefully on the issue of damages.

The chair's dissenting opinion seems to suggest that if the museum should rightly pay this much on a per-film basis for all the film rights in its city museum collections, the inhabitants and, perhaps more importantly, the taxpayers, of the Stockholm municipality must indeed be the most film-loving people in the world.

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Endnotes

(1) Patent and Market Court of Appeal, PMÖÄ 13244-21.