Bildupphovsrätt

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Summary of the Supreme Court's ruling on the dispute between Bildupphovsrätt and Wikimedia Sweden

Sweden's Supreme Court has today found in favour of Bildupphovsrätt in an important matter of principle regarding the interpretation of a restriction in the Swedish Copyright Act. The ruling relates to a long-running dispute between Bildupphovsrätt and Wikimedia Sweden, the Swedish arm of the worldwide network of organisations that support the US Wikimedia Foundation, which is behind the user-generated encyclopaedia Wikipedia, for example. Today's ruling by the Swedish Supreme Court establishes that the online publication of artworks that are placed in or at a public place outdoors is forbidden without permission first being granted.

Wikimedia Sweden runs the website www.offentligkonst.se, a collective database of Sweden's public artworks. In December 2013, Bildupphovsrätt contacted Wikimedia to discuss a licensing agreement for their publication of our members' works in the database. The suggestion was utterly rejected by Wikimedia, who claimed that their reproductions of the artworks were permitted under an exemption rule in the Swedish Copyright Act. The rule they referred to states that it is permitted to 'reproduce in pictorial form' artworks that are permanently placed in or at a public place outdoors. Bildupphovsrätt's interpretation of that rule, which is in line with both the legal text and preparatory documents, is that the wording 'reproduce in pictorial form' only refers to producing copies of the work and not 'communication to the public', which is what online publication entails.

This interpretation has now been affirmed by the Supreme Court, whose ruling states:

"The Supreme Court declares that the regulation in Article 24, paragraph 1 of the Swedish Copyright Act, where the restriction in the artist's exclusive rights is limited to reproductions, does not entitle Wikimedia, from its database of photographs of artworks permanently placed in or at a public place outdoors, to communicate the works to the general public via the internet. Whether this disposition takes place for commercial purposes or not is of no significance."

In its ruling the Supreme Court refers to previous cases, noting that the courts have only very limited scope to interpret other restrictions in exclusive rights than those implied in the law.

The Supreme Court also notes the following regarding the adoption of Article 24 in its current form:

"In conjunction with the changes in legislation, the government claimed that the [Infosoc]directive sets the outer limit for which restrictions are permitted in national legislation. /... /Reproduction in the national regulation was intended to refer to reproduction in two dimensions. It was therefore deemed in several ways to be more limited than the restriction permitted by the directive."

The Supreme Court applies what is known as the three-step test in assessing the scope of the term 'reproduce in pictorial form'.

"In a case of the type in question, the matter of what is normal use of an artwork in a public place must be considered. This includes an assessment of what exclusive rights the artist should have to exploit his or her work financially.

"In the case in question, the works are publicly accessible in an open database. Such use of artworks typically has a not insignificant commercial value, either for the manager of the database or for the party which, in conjunction with other services, provides access to the database, e.g. through linking. This value shall be reserved for the artists creating the works. Whether the database manager as such has any commercial purpose is of no significance.

"The question is then whether transfer to the general public, in the way this takes place from Wikimedia's database, unreasonably prejudices the artist's legitimate interests. The point of departure is that the regulation in Article 24, paragraph 1 of the Swedish Copyright Act should be interpreted restrictively. It is a matter of balance in relation to the purpose the database aims to serve. /.../ This purpose is in itself within the framework of what may be regarded as a public interest. A database of the kind in question does, however, open the door for widespread use of copyright-protected works, without any remuneration being paid to the artists. It thus becomes a matter of far greater restriction to their exclusive rights than the regulation aims for."

The Supreme Court then concludes by noting that:

"Under the Act in its present form, the right to exploit works using new technology in this way therefore remains with the artists."

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