

# No copyright protection for sport broadcasts

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### Introduction

Following the European Court of Justice (ECJ) decision in Case C-279/13 (which was referred by the Swedish Supreme Court), the Supreme Court handed down its judgment (B 3510-11). The ECJ decision tackled the issue of whether member states can give wider protection to rights holders by enabling communication to the public to cover a greater range of acts than those found in Article 3 (2) of EU Directive 2001/29/EC (InfoSoc). In the final Swedish judgment, the question before the court was whether linking to live broadcasts of hockey games was communication to the public, and whether the live broadcasts met the requirements for copyright protection.

Through hyperlinks on a particular website set up by the defendant, internet users could access live broadcasts of hockey games from a third-party website without having to pay the third party or the defendant.

As for the possibility that the live broadcast could constitute a copyright-protected work, the Court of Appeal (whose judgment had been appealed to the Supreme Court) had previously found that no part of the commentators', cameramen's or picture producers' work on the live broadcasts reached the level of originality required for copyright protection. The broadcaster therefore did not hold copyright in the live broadcasts but did hold related rights in these broadcasts. These related rights covered only the repeats within the broadcasts (ie, instant replays of the game).

Applicable national legislation provided for wider protection for related rights than those set out in Article 3(2), in practice granting the broadcaster the right to prohibit the communication to the public of broadcasts of live sporting events. The referring court thus sought the court's opinion on whether member states may interpret 'communication to the public' to cover a greater range of acts than those found in Article 3(2).

### Decisions

#### *ECJ*

The question before the ECJ was whether member states can grant broadcasters exclusive rights over acts that can be classified as acts of 'communication to the public', but which do not constitute acts of 'making available to the public' at a time and place of their choosing (ie, on demand) under Article 3(2).

Copyright and related rights have been only partially harmonised by EU legislation. Article 3(2) does not seek to harmonise national legislation concerning the extent of the protection granted to rights holders not expressly referred to in that provision. Moreover, InfoSoc recognises other EU directives regarding intellectual property, one of which is Directive 2006/115/EC (the Rental Directive).

It follows from the Rental Directive that member states can provide more far-reaching protections for rights holders, in respect of broadcasting and communication to the public, than that which is

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required by the directive. Additionally, Article 8 states that member states must provide broadcasters with the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The court found that member states may grant broadcasters exclusive rights to prohibit acts of communication to the public of their broadcasts on conditions different from those laid down in Article 3(2), in the way that Sweden had done.

### **Supreme Court**

The Supreme Court found that the broadcasts had been communicated to the public. It tried only the issue of copyright protection for the broadcasts and not the related rights for broadcasters.

Historically, there has been some debate in Sweden as to how far-reaching the application of the EU definition of 'copyright' is in Swedish law and whether the requirements are the same. These two questions have now been addressed by the Supreme Court. The court stated that the requirement for copyright protection in Swedish law has developed and is now given the same meaning as the requirements presented by the ECJ in its judgment in Case C-5/08 (*Infopaq*).

The court referred to the EU requirement for copyright protection as a "quite moderate requirement of originality". It now appears to be clear that Swedish national law recognises only one harmonised definition of 'copyright protection'; which applies to all categories of work protected under the Copyright Act. In a split judgment (three to two), the Supreme Court found that the live broadcasts of the hockey games did not meet the requirements of copyright protection since they were not the result of "intellectual creation". This was largely due to the fact that the work of the commentators, cameramen and picture producers was mainly driven by the events in the game. Even when taking into account that there were some choices to be made in the creation of the broadcast and use of graphic design elements, the result could not be considered to constitute an intellectual creation.

Consequently, even though the live broadcasts were considered to have been communicated to the public, no copyright infringement had been committed.

### **Comment**

The main issue answered by the Supreme Court was whether broadcasts of sporting games meet the requirements for copyright protection. The court made clear that the EU standard of copyright fully applies in Swedish law. Following this judgment, it would appear that these types of broadcast can rely only on the protection of related rights, which the Court of Appeal found covered only the repeats within the broadcasts (ie, instant replays). However, the Supreme Court's seemingly broad conclusion that no parts of the broadcast would be protected can be questioned – for example, graphical elements would typically be considered to be protected by copyright. Moreover, the two dissenting opinions concluded that the broadcasts were copyright protected.

A practical consequence of this may be that broadcasting companies try to increase the level of originality of sport broadcasts so as to achieve copyright protection for the broadcast itself. Considering that the broadcast at issue was from 2007, to a certain extent this development has already taken place. In any case, it is clear that the need for proper technical protection to prevent unlawful hyperlinking will be all the more important for these types of broadcast.

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