

# Responsibility for third-party violation of preliminary injunction

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### Introduction

The Supreme Court<sup>(1)</sup> has strengthened the position of copyright holders in enforcing their rights against companies trying to circumvent court-ordered injunctions. When deciding whether an injunction has been violated, companies are generally not responsible for the actions of third parties. However, if circumstances strongly indicate that a company and a third party have coordinated in order to circumvent an injunction, the company can be held responsible unless it can prove that it has taken reasonable measures to prevent the third party from violating the injunction.

### Facts

A Swedish furniture company was granted a preliminary injunction under penalty of a fine against another company's marketing and sale of infringing copies of a well-known designer armchair. The infringing products were manufactured in Poland.

Shortly after the grant of the preliminary injunction, the furniture company placed an order for the chair with a local reseller and the chair was delivered by the Polish manufacturer. The furniture company claimed breach of injunction and requested imposition of the penalty. The defendant claimed that it was not responsible for the actions of the Polish manufacturer – a company owned by the defendant's father – and that it had taken adequate measures to comply with the injunction. It was not the defendant that had marketed, sold and manufactured the chair after the preliminary injunction had been granted, but rather the reseller and the Polish manufacturer.

### Decision

The question before the Supreme Court was whether the defendant could be held responsible for the actions of a third party (ie, the Polish manufacturer) and thereby be considered to have violated the injunction.

The court considered that a company generally cannot be held responsible for a third party's actions. However, this principle is not without exceptions. A company can, for example, be held responsible if the company and the third party are part of the same group of companies and thereby under common control. Another exception is when a company and a third party have coordinated themselves with the purpose of circumventing an injunction. In this regard, the Supreme Court highlighted the difficulty of proving such coordination and stated that coordination should be presumed when it is strongly indicated by the circumstances. This presumption can be rebutted if the company can show that no relevant coordination has taken place or that it has taken reasonable measures to prevent the third party from violating the injunction.

In this case, the court found that there were connections between the company and the Polish

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manufacturer that gave the impression of an integrated business, including:

- a common background;
- how the business activities had been divided between the companies; and
- the fact that the owners were related.

There were therefore strong indications of coordination and the company had at least a responsibility to inform the Polish manufacturer of the injunction.

The company had sent an email to the Polish manufacturer informing of the injunction. However, the email was sent 11 days after the injunction had been granted. The court found that even though an email of this kind could be sufficient to rebut the presumption of coordination, it had not been sent in a timely manner. Instead, it was held that the company had not taken reasonable measures to prevent the Polish manufacturer from violating the injunction and the company was thereby held responsible for the Polish manufacturer's infringement.

### **Comment**

This judgment is important for copyright holders trying to enforce their rights against companies dealing with counterfeit products. By shifting the burden of proof from the copyright holder to the infringing company when there is strong reason to believe that an injunction is being circumvented, it will be much harder to evade an injunction and avoid the imposition of a penalty. It is thus likely that the judgment will result in more active measures from the infringing companies to avoid responsibility for third-party actions, which in turn would result in fewer violations of injunctions – an effect that is beneficial for all copyright holders – regardless of their field of business.

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### **Endnotes**

(1) NJA 2015 s. 512.

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