

Patent and Market Court rules on global retransmissions of TV broadcasts

22 October 2018 | Contributed by [Advokatfirman Lindahl](#)

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Introduction

On the ever-growing market for streaming services and online access to TV broadcasts, illegal services are common and sometimes difficult to shut down due to their technical complexity and the multi-jurisdictional scope of the infringing activities. In a 29 June 2018 judgment, the Swedish Patent and Market Court held three persons liable for global retransmissions of TV broadcasts, sentencing them to prison and awarded rights holders significant compensation for damages (Case B 16838-17).

Facts

A Swedish company operated by receiving, decoding, packaging and retransmitting TV broadcasts to paying customers around the world. It offered subscriptions to more than 2,000 TV channels, most of which were Arabic or Turkish, through its own website as well as to resellers in different parts of the world. The company operated mainly from Sweden but had technical equipment in Jordan, the United States, Greece, Denmark and Canada. It had an annual turnover of approximately €5 million.

Three persons were indicted for copyright infringement and crimes against the Decoding Act: **(1)**

- the company's CEO;
- an employee who was acting as the company's IT and channels manager; and
- another trader who supplied TV cards and infrastructure to decode and transmit certain channels.

Two international TV broadcasting companies claimed damages totalling approximately €23 million.

Decision

The Swedish Patent and Market Court began by examining its jurisdiction, as the case concerned rights holders that were not domiciled in and broadcasts that originated from outside Sweden. The relevant provisions on the rights of TV broadcasters in the Swedish Copyright Act apply to broadcasts originating from countries that are party to certain international treaties, such as the Rome Convention, the European Agreement on the Protection of Television Broadcasts and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

The court made an individual assessment of the broadcasts at issue, taking into account:

- where the broadcasts were produced;
- how they were broadcasted (eg, via cable or satellite); and
- where the broadcasts were made available to the public.

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The court concluded that the broadcasts enjoyed protection under the Swedish Copyright Act through the different international treaties. As the defendants had carried out decoding and retransmission activities in Sweden, the court found that it had jurisdiction over the whole chain of infringing activities.

In order to establish the facts, the court used information from the defendants' own management system which had been:

- used to track their business; and
- recovered by the authorities as part of the criminal investigation.

The system's database included information regarding (for example) active channels, channel packages, TV boxes and paying subscribers. Investigators had also analysed the data and found that the illegal retransmissions had been active and accessed by customers when the investigation was carried out. The court concluded that the defendants had decoded and retransmitted broadcasts illegally on a commercial scale. Further, it found that the defendants had operated decoding equipment in Jordan as well as in Sweden in order to access the original broadcasts.

The defendants alleged that they had sub-licensed a right to retransmit the broadcasts globally from an Iraqi company and submitted agreements between:

- themselves and the Iraqi company; and
- the Iraqi company and the original broadcasting companies.

The plaintiffs stated that the agreements were forgeries and that they would not have been able to provide such licence rights. As the broadcasts included (for example) English Premier League football and other premier sports broadcasts, the plaintiffs argued that global retransmission rights, such as those alleged by the defendants, are never used in practice and that any such hypothetical licences would be so expensive that no licensee would agree to pay that price.

The court found that it was clear that the defendants were aware of how the licensing industry regarding TV broadcasts – in particular sports broadcasts – worked and that it was therefore highly unlikely that they were of the impression that they had acquired any legal global retransmission rights. This conclusion was also supported by the fact that they had continued the retransmissions despite having received cease and desist letters, alleging that the retransmissions constituted copyright infringement, on several occasions.

In light of these considerations, the court held that the defendants had committed intentional copyright infringement and crimes against the Decoding Act and sentenced them to jail.

As regards damages, the court found that under the Swedish Copyright Act, the defendants were liable to pay reasonable compensation for use as well as compensation for any and all other loss which the rights holders could prove.

Reasonable compensation for copyright infringement is generally calculated based on a hypothetical licence fee, but as it was clear that no global licences such as those at issue would ever be used, this model could not be used. Instead, the court referred to Supreme Court case law regarding reasonable compensation for use based on the Decoding Act and concluded that the calculation should be made based on:

- the price that subscribers would have paid for legal access to the channels (irrespective of whether the subscribers had actually accessed each and every channel included in their subscription);
- the number of subscribers; and
- the period during which the infringement had occurred.

In this case, there had been approximately 55,000 subscribers to one of the channel packages and approximately 8,200 to the other. The rights holders had submitted price lists from the relevant periods and based their claims on the lowest annual prices used. The court found that there was some

uncertainty regarding, among other things, subscriptions that had been shorter than one year and deducted 10% from the amounts claimed by the rights holders. They were awarded approximately €19 million and €1.4 million, respectively, in reasonable compensation for damages. The rights holders also argued that they had suffered further damages (eg, goodwill damages and loss of revenue). However, they had neither specified how they had arrived at the claimed amounts nor submitted any evidence. Consequently, the court held that they had not shown the existence of any such damages and dismissed their claims in this regard.

Comment

As the Internet provides a global market for TV broadcasts and other digital services, piracy is becoming a global issue. Encouragingly, the Swedish specialised IP court made an in-depth analysis and discovered that it had jurisdiction over the full infringement case. While the court generally has wider jurisdiction in criminal proceedings, the conclusions regarding copyright protection under Swedish law for foreign rights holders may prove equally useful in civil proceedings against Swedish infringers.

Rights holders should also note that the cease and desist letters sent to the infringers were important evidence in establishing that they had acted intentionally after having received the letters. The established view that any continued infringement after receiving (and perhaps ignored) such letters will be considered negligent or intentional is thus further asserted by this judgment. As the infringer is liable for damages beyond reasonable compensation for use only in cases of negligence or intent, rights holders will continue to benefit from sending cease and desist letters as soon as infringements are identified.

Further, this judgment highlights the need for rights holders to be able to specify all claims for damages and provide a sound basis for their damage calculations since there are no statutory or punitive damages under Swedish law. In this case, the rights holders had:

- provided price lists;
- taken into account changes in prices and monetary value during the time of the infringement; and
- provided the court with detailed calculations of the reasonable compensation.

The court found these calculations to be reasonable and used them as the basis for its decision. In contrast, the rights holders failed to provide substantial arguments or evidence regarding further damage and were thus not awarded any such compensation.

For further information on this topic please contact [Hans Eriksson](#) or [Siri Alvsing](#) at Advokatfirman Lindahl by telephone (+46 8 527 70 800) or email (hans.eriksson@lindahl.se or siri.alvsing@lindahl.se). The Advokatfirman Lindahl website can be accessed at www.lindahl.se.

Endnotes

(1) Act (2000:171) Prohibiting Certain Decoding Equipment, which implements EU Directive 98/84/EC.

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