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SELECTED COURT CASES IN THE FIELD OF COPYRIGHT

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1. Abstract rules to be applied in practical life

By necessity intellectual property law has to be abstract, both because the subject matter deals with intangible subject matters (inventions, works, etc.) and because that branch of law has, in practical life, to cover a great number of situations which are impossible to foresee in advance in a legal text.

This is especially so in the field of copyright where the impact of new media and information technologies is profound and where the legislation in most countries does not keep pace with the development in the real world. Therefore, court practice has traditionally played an important role in the practical operation of intellectual property law in the economic and cultural fabric in a society.

The importance of the work of the judiciary is recognised also in, for instance, the TRIPS Agreement, where the role of the courts is stressed in several ways. At a recent TRIPS Council meeting it was mentioned also the particular need to familiarise the judiciary with intellectual property law in the new environment which the World Trade Organisation has created.

The following part of this paper deals with case law in respect of copyright and related rights only´

2. Areas where case law is particularly important

There are some areas where the importance of case law is particularly obvious. Among those areas can be mentioned

- the notion of ”work,” in particular in the era of new technologies
- the definition of what a ”reproduction” of a work is (when is a ”copy” sufficiently stable to be counted as the result of a reproduction
- the exhaustion of the distribution right (national, regional or global exhaustion)
- when is there a ”communication to the public” and, more particularly, when is there a ”public”
- the application of the moral rights
- the determination of whether an act is covered by any of the limitations in the copyright law and, more specifically, the limits of such limitations or exceptions.
- the question of the ownership of the rights
- the liability for copyright infringements

These and also some other issues are such that have been dealt with in the courts in practically all countries and will certainly also come before the Saudi Arabian courts.

The following part of this presentation describes how the courts in my own country have dealt with those issues. Rather than referring the specific cases in the collection of decisions/judgements from the Swedish Supreme Court, I found it more useful to describe somewhat the arguments that have been used in determining the issues; those arguments may have a certain general interest also for judges in other countries.

3. Some issues of particular interest

a) The notion of ”work”

The notion of work comes up in different contexts, in particular when the Court has to decide whether the creativity involved in a collection of data or other information is sufficient to meet the ***criterion of originality***.

Thus, the Supreme Court has found that a collection of cooking recipes and a collection of names and addresses of persons were not sufficiently original to form a literary work.

On the other hand, a collection of numbers and other indications relating to electric accessories was in fact such a work, primarily due to the fact that the collection was organised according to a certain systematic structure and a specific system. (In this case the question was also which the conditions were for a reproduction of that collection, or, in other words, how much of the collection should be used in order for a reproduction to exist; in this respect the court stated that also parts of a protected work is to be considered as a copy on the condition that the part per se is sufficiently original).

Another area where the question of whether a work exists is the field of ***applied art.*** For instance, there have been questions of whether textile patterns on fabrics and of whether a tunic (a kind of coat) were actually protectable as work. It is obvious that the courts usually require a high level of protection in order for such a design to be protected as work (as protection is normally available under the Design Protection Act).

Also the question of whether ***a computer program is sufficiently original*** to be a work has been under consideration; in Europe generally the level required is not particularly high due to the harmonising influence of the Community Directive on this subject matter.

b) The economic rights; the notion of ”public”

An important economic right is the right of making available to the public of protected subject matter in the form of a right of ”communication to the public” or ”public performance” or similar concepts under national copyright law. While the rights as such are mandatory under the international copyright conventions, national law is left free to determine ***the notion of what is a ”public.”***

Generally speaking, the trend is to extend the limits of that notion beyond what it was construed to be earlier. The reason is mainly that new technologies have made possible new uses of protected subject matter and thus also a need has arisen to interpret old concepts in a new environment.

Thus, the Swedish Supreme Court has in three different cases considered that a public performance occurred when music was being made available in individual hotel rooms, in radio shops for demonstration purposes and for patients in hospitals through so-called ”pillow radio.” Another issue has been whether a public performance occurs when music is played for entertainment in a club or another more or less closed environment. In such cases a public performance is considered to take place when the membership of the association is in reality not limited and membership can be obtained rather easily as a pure formality upon the payment of a fee. Generally speaking, public performance takes place when there exists a circle which is not entirely closed.

A particular question is how to deal with so-called ***on-demand situations*** where material is made available to the public only when a member of the public demands access to the material or, in other words, where the material is accessed from a place and at a time individually chooses by the members of the public. This is a concept which is especially regulated in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty where an exclusive right is provided for in respect of these situations.

One question is how these situations are to be categorised under national law. They could possibly be included in the concept of ”public performance” or under a special right of ”communication to the public.” In any case these situations are most likely to come up in litigation before national courts where then various questions about the nature and the delimitation of those rights will have to be decided, in addition to various liability questions.

The question of what kind of right is involved when works are made available on ***Bulletin Board Services (BBS)*** in computer networks has also been dealt with by the Supreme Court although not in a very conclusive way The main issue was whether the operator of the BBS had acted in a way which was sufficiently active to make him liable under criminal law, which the Court held not to be the case.

c) The economic rights; the notion of ”copy”

This issue contains several different aspects. Reproduction means the preparation of copies, ”in whatever manner or form” as the Berne Convention puts it. In some instances the copies of a work are made in another technique and may differ considerably from the original. Nevertheless the new copies are copies if the main creative element from the original is still to be recognised. Thus a pencil drawing of a photograph or a photograph of a building are copies of the photograph and of the architectural work, respectively.

An issue which has been considered by the Swedish Supreme Court is whether a photograph of some persons in front of a theatre scenography was a copy of the scenography (the picture was then used as a cover for a gramophone record). The Court considered that also copies or images of a work which differ considerably from the original both in the manner of execution and in their format, or copies made in a completely different technique are still copies of the original work. A condition is, however, that the picture of the original does not form only a background or otherwise is only an insignificant part in the whole context.

Another aspect of the issue of ”copy” has still not been considered by the Supreme Court, namely the nature of ***transient or incidental copies*** made in the course of transmissions or of so-called ”browsing”. More specifically, the issue is when a fixation is sufficiently stable to form a copy. This is a subject matter of a particularly heated debate in the world, for several reasons, among them because the telecommunications operators fear that if copies are made in the course of transmissions they could be held liable for copyright infringement for their transmissions.

his is in fact an especially crucial issue and national courts may come to different solutions. In the United States, the question of defining what constitutes a “copy” is left to the courts. In the European Union the question has been solved through a provision in the recent Directive on Copyright and Related Rights in the Information Society. The relevant provision there (Article 5.1) prescribes basically that temporary acts of reproduction....such as transient and incidental acts of reproductions which are an integral and essential part of a technological process, including those which facilitate effective functioning of transmission systems, whose

sole purpose is to enable use to be made of a work or other subject matter and which have no independent economic significance shall be exempted from the right of reproduction.

d) The issue of exhaustion of the distribution right

The distribution right means the right of the author to control the sale, resale, rental, lending or other distribution to the public of copies of his works.

It is generally considered that the distribution right, at least as regards the right to control the sale, is exhausted as regards the copies which are brought on the market by the author or with his consent.

There are then two different approaches to the geographical scope of that exhaustion.

According to one approach, the distribution right is exhausted regardless of where in the world the first sale has taken place. This is the so-called ***"international exhaustion"*** *or* ***"global exhaustion"*** This means that the author can not oppose so-called parallel importation. The other approach is the ***national (or regional) exhaustion*** which means that the exhaustion applies only within the country/region where the first sale has taken place. This in turn means that the author can control the parallel import.

The choice of approach is a politically rather difficult issue. The advocates of the global exhaustion invoke competition and consumer policy argument, while those in favour of national or regional exhaustion stress the need for the right-owner to have different prices in different areas of the world without risking his pricing policy to be ruined by uncontrolled parallel import from markets where the goods are cheaper.

Sometimes the law itself spells out which type of exhaustion should apply. If such is not the case, it is for the courts may have to determine the question, taking into account, of course, in the first instance the law and its preparatory works but also the more general rationale behind the different approaches.

e) The moral rights

Moral rights are the ***right of paternity*** (the right to claim authorship of the work) and the ***right of integrity*** (the right to oppose any derogatory action in relation to a work which would be prejudicial to the author´s honour or reputation).

Obviously there are innumerable situations when works have been used without proper identification of the author or in contexts which the author considers very offending for him, and such cases very often come to the Courts. As the situations vary very much it is not of any particular use to give examples here.

Only as a matter of principle it could be underlined that the question whether something is offending should as much as possible be dealt with according to objective criteria but that the author´s own subjective reaction also has to be taken into account.

Also, the moral rights have come very much into focus nowadays with the advent of the new digital technologies which make possible all kinds of manipulations of works to the extent that the identity of the work may be in jeopardised and the author´s integrity in danger.

f) Framing of the limitations on the exclusive economic rights

All copyright laws contains limitations of or exceptions to the exclusive rights. In the common law traditions such limitations are sometimes expressed in terms of ”fair use” or ”fair dealing”, while in civil law jurisdictions usually contains specific and rather detailed such limitations. In the former case more discretion is of course given to the courts in framing how such more generally worded limitations should be applied to specific cases.

In this context it should be noted that the so-called ***”three step test”*** in Article 9(2) of the Berne Convention always has to be taken into account as forming the outer limits on the limitations which can be put on the right of reproduction. This test means that any limitations on the right of reproduction may only apply to specific cases (and not be generalised) and must not ”conflict with a normal exploitation of the work” and furthermore must not ”unreasonably prejudice the legitimate interests of the authors.”

g) Ownership of the rights in a work

Generally speaking, the rights in work are in the first instance owned by the individual creator of the work. In common law jurisdictions, however, the rule as regards works created in the course of an employment or upon commission are owned by the employer or the person commissioning the work, unless otherwise agreed. In civil law jurisdictions the presumption is generally the opposite.

It has happened rather frequently that the Swedish Supreme Court has been called upon to consider who is actually the owner of the rights in a work. Examples are cases where articles in newspapers are re-used by others for instance for advertising and then the question comes up who owns the rights in those secondary uses. (This is an issue which appears much less frequently in common law jurisdictions with their works-made-for-hire doctrines). The reply to the question depends very much on the specific circumstances in the individual case.

h) Liability for copyright infringements

In most cases there is no particular problem as to who is liable for a copyright infringement; it is the person who has, for instance, used a work without permission. In some cases the question is however, more doubtful.

In the Swedish Supreme Court in particular two typical situations have come up for consideration. One is in the case of unlawful public performances in clubs, etc. and more specifically under which conditions the arranger of the event can be held liable for the infringement; this would mainly depend on his possibility to actually control the events taking place.

The other situation concerns the liability for copyright infringements committed by journalists and more specifically under which conditions the employer/editor of the newspaper can be liable for the infringement. This would mainly depend on whether he has actually informed the employees of what they should take into account when using other persons´ material.

The issue of liability, in particular for service providers, has become a contentious issue in the discussions about electronic commerce which is rapidly emerging as a significant element in national and international trade. Legislative initiatives are occurring in different regions of the world. For instance, in the European Union there is a Directive on Legal Aspects of Electronic

Commerce. This Directive contains provisions on the conditions under which intermediary service providers shall be exempted from liability (liability generally and not only in respect of copyright) in three situations, namely a) so-called mere conduit, b) caching (intermediate storage for making transmissions more efficient) and, c) hosting (storing of material provided by a recipient of the service). Also this question is far from ready for solution but the proposal indicates in any case important questions which the Courts inevitably will have to face in the future.

i) Other questions

With the advent of new technologies the courts dealing with copyright questions will have to face a number of new issues.

In addition to the ones which flow from what has been said now there are such matters as ***the applicable law*** in the case of transborder transmissions, the ***nature of certain new types of works, in particular multimedia works,*** and ***the delimitations between copyright law properly speaking and other areas of law*** (e.g. competition law, and law governing certain high-technology phenomena).

To a large extent these new issues are not yet dealt with by the legislators, and the Courts can be expected to play an important part in the creation of the legal framework governing these new phenomena.

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