Advocate General: Opinion in the Dispute Between Private Television Channels and the Swedish Collecting Society STIM

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Michael Plogell and Erik Ullberg
Wistrand Advokatbyrå, Gothenburg

In February 2007, *Marknadsdomstolen* (the Market Court) requested a preliminary ruling from the European Court of Justice in a dispute between, on the one hand, the private television channels Kanal 5 Ltd (Kanal 5) and TV 4 AB (TV 4) and, on the other hand, the collecting society *Föreningen Svenska Tonsättares Internationella Musik Byrå* (Swedish Performing Rights Society) (STIM).

The procedure concerns the compensation that STIM requires from television channels so as to allow them access to copyright-protected music works from the repertoire administered by the organization.

The private TV channels have challenged STIM's demands and put forward that it should be required to refrain from applying certain compensation models for calculation of the remuneration to be paid by users, due to breach of competition law, since STIM in this manner abuses its dominant position.

STIM applies different models for the calculation of the remuneration. From Kanal 5 and TV 4, STIM receives a share of the revenue from advertising sales or advertising sales and subscription sales. The annual use of copyright-protected music is established at the end of each year. SVT – a public service TV channel – is mainly financed by government fees and the remuneration is instead calculated according to a model of hypothetical advertising sales. Thus, from SVT, STIM receives a share of the hypothetical income of the annual use of copyright-protected music in advertisements. The annual use is estimated, however, in advance and the actual proportion of use is not taken into consideration.

Marknadsdomstolen (Market Court) established that the relevant product market and the relevant geographic market is the provision of copyright-protected musical works in television within Sweden. *Marknadsdomstolen* also found that STIM holds a de facto monopoly and therefore has a dominant position in this market. Given that STIM's actions could affect community trade, Article 82 EC applies.

In light of these circumstances, the Market Court referred four questions for a preliminary ruling to the European Court of Justice, all relating to whether the models used to calculate the amounts of remuneration constitute an abuse of a

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dominant position within the meaning of Article 82 EC.

The Advocate General has now handed down her opinion in a ruling on 11 September 2008 in case C-52/07, stating inter alia the following:

The use of different remuneration models for a public service television channel, on the one hand, and private television channels, on the other hand, constitutes an abuse of a dominant position if certain conditions are fulfilled. If application of the compensation model implies that the public service channel will pay a lower compensation than the private television channels for a similar transaction and there is an element of competition between the public service television channel and one of the private TV channels, then the application constitutes an abuse. Furthermore, the Advocate General held that attention should be paid to the actual proportion of the use of copyright-protected material when calculating remuneration.

Förslag till avgörande av Generaladvokat Verica Trstenjak i Mål C-52/07 Kanal 5 Ltd, TV4 AB mot Föreningen Svenska Tonsättares Internationella Musikbyrå

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Opinion of Advocate General Verica Trstenjak in Case C-52/07 Kanal 5 Ltd, TV4 AB versus Swedish Performing Rights Society

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