[SE] Direct Linking to Streamed Broadcasts of Ice Hockey Games is Copyright Infringement (Appeal)

IRIS 2011-9:1/33

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The Court of Appeal for Southern Norrland has tried an appeal regarding criminal liability for direct linking to the streamed broadcasts of ice hockey games. The perpetrator was found guilty of violating the Swedish Copyright Act (CA) and was accordingly ordered to pay a fine and damages to C More Entertainment AB. Although the outcome of the Court of Appeal's decision is similar to that of the decision of the District Court (see IRIS 2011-1/47), many interesting issues were judged differently.

During autumn 2007 Swedish TV channel Canal + broadcast ice hockey games on a pay per view basis, inter alia, through live streaming on the Internet. The broadcasts were produced by the company C More Entertainment AB and the rights to the transmissions were owned by the same company.

In October and November 2007 a person published links to the broadcasts of the games on his website, an unofficial fan site of his favourite Swedish ice hockey team. By following hyperlinks visitors were granted direct and free access to the games on their computers.

C More Entertainment AB filed charges and the perpetrator was prosecuted for violating the CA. The claims were based on the grounds that the broadcasts constituted works of art as well as being protected by the neighbouring rights granted to the producers of recordings of sounds and images.

The defence disputed all charges invoking, amongst others, that the broadcasts were not subject to copyright and that the alleged actions did not amount to any relevant exploitation within the meaning of the CA. Nonetheless, the perpetrator was found guilty by the District Court and held liable to pay fines and damages.

The defence appealed and continued to dispute all charges. C More Entertainment AB on their side sought full compensation for their alleged loss. The Prosecutor wanted the perpetrator to be found guilty of premeditated violation of the CA.

As opposed to the District Court, the Court of Appeal did not recognize that the commentary on the ice hockey games was original and of a personal character and thus protected by copyright. In the Court of Appeal's view, the commentary essentially seemed to follow the events of the game and could not significantly be

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distinguished from other commentary performances. Neither could the commentator's personal comments and opinions be regarded as distinctive. In summary the Court of Appeal did not consider the commentary on the ice hockey games to be individual and original performances to be deserving of copyright protection.

The Court of Appeal also made a different assessment regarding the broadcasts in their entirety, i.e., the coordination by the technical producer, choice of focus, timing etc. In this regard the Court of Appeal considered the camerawork to be neither individual nor original to the extent that it should be given copyright protection. The camerawork and its coordination were accordingly not unique and could not be considered to enhance or increase the drama or specific features of the game.

C More Entertainment AB and the Prosecutor had also claimed that replays in the broadcasts were protected by neighboring rights. For such rights there is no requirement of individuality or originality under the CA.

As did the District Court, the Court of Appeal also found that replays and slow-motion sequences of goals and other highlights that occurred during the game are protected as neighboring rights. Only C More Entertainment AB had the right to distribute the replays. The latter was something that was not disputed by the defense.

By granting users direct and free access to the games through links on his website (direct linking) the perpetrator had communicated the replays to the public. The Court of Appeal noted that whether direct linking is seen as transferring to the public is not dependant on how many people actually watch the broadcast by the link. Instead, what is vital for the assessment is the possibility for the public to view the transmission.

Furthermore, the Court of Appeal stated that C More Entertainment AB could not be considered to have contributed to the linking by not having effective counter-measures in place against linking. The fact that the game was offered on a pay per view basis and the link was not available through any ordinary search engines was considered an indication that C More Entertainment AB had tried to protect the replays from infringement.

In conclusion, the perpetrator was found guilty of violating the CA. Therefore, he was ordered to pay a fine and damages to C More Entertainment AB for having made the replays available to the public without the company's consent.

Hovrätten för Nedre Norrlands dom den 20 juni 2011 i mål nr B 1309-10

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Judgment of the Court of Appeal of Southern Norrland of 20 June 2011 in Case No. B 1309-10

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