[SE] Depicting art work online not covered by an exception but subject to artists' exclusive rights

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The Swedish Supreme Court has ruled on the scope of an exception in the Swedish Copyright Act. According to the exception, a work of art that is permanently placed in a public location, can be depicted without the permission of the creator. The exception is motivated by the public interest in freely depicting art in public space without being limited by copyright to art works that are placed in such public spaces.

Wikimedia, a non-profit association, had launched a database of pictures of public art works in Sweden where information on the art work was displayed with a photograph, along with information on where the art work is placed geographically and the name of the artist. The site was freely accessible to users online, and the photographs were uploaded by the users themselves. The aim of the site was to provide the public, educational and tourist sectors with information on public art in Sweden.

The Supreme Court in the case had to interpret whether the notion of depict ("avbilda") included the making available of photographs on a website presented as a database of information. According to the preparatory work for the Copyright Act, the exception allowed for reproduction of an art work through a painting, drawing, photography or other technique through which the art work could be depicted in a two dimensional fashion. The exception has enabled post cards with public art to be sold without the permission from, or payment to, the artists.

The exception was introduced into the Copyright Act when the Internet was unknown. In the latest review of the Act (SOU 2011:32), it was said that the notion had been subject to discussion and that there were reasons to clarify it. The review in this part never led to any legislative change.

The Supreme Court interpreted the application of the exception in light of the three-step-test and considered that the old notion of depicting art work did not apply to the database of pictures that Wikimedia made available to the public. Whether the making available was commercial or not had no impact according to the Court. In conclusion the Supreme Court's ruling mean that Wikimedia cannot make available pictures of art works in its database without the consent of the artists concerned.

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Högsta domstolen, mål nr Ö 849-15, 04/04/2016

http://www.hogstadomstolen.se/Domstolar/hogstadomstolen/Avgoranden/2016/2016-04-04%20%C3%96%20849-15%20Beslut.pdf

Supreme Court, decision of 4 April 2016, mål nr Ö 849-15

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