

CASE NOTE: SWEDEN

CASE CITATION:

Bonnier Audio AB, Earbooks AB, Norstedts Förlagsgrupp AB, Piratförlaget AB and Storyside AB v Perfect Communication Sweden AB (the Ephone case)

CASE NUMBER:

Ä 2707-09

NAME AND LEVEL OF COURT:

Solna District Court

DATE OF DECISION: 25 June 2009

MEMBERS OF THE COURT: Mats Jender, Hans Cappelen-Smith, Carl Rosenmüller

LAWYER FOR THE CLAIMANT: Peter Danowsky and Olof Roos of Danowsky & Partners Advokatbyrå KB

LAWYER FOR THE DEFENDANT:

Peter Helle and LL.B. Magnus Moström of Wistrand advokatbyrå

Action for infringement of IPR; right of claimants to request IP address; probable cause

Background

Illegal copies of 27 audio book titles had been found by the Swedish Anti-Piracy Organization (Svenska Antipiratbyrån) on a FTP server on the internet, all uploaded on the FTP server by one IP address that belonged to PCS. It appears that the books had also been downloaded.

Since 1 April 2009, after the implementation of the IPRED Directive¹ in Sweden (Lag om ändring i lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk (SFS 2009:109)), rights holders may request Swedish courts to order persons and companies that are found to be providing services used in infringing activities on a commercial scale, to provide information related to an infringing activity. In this case, the claimants requested the Solna District Court to order Perfect Communication Sweden AB (PCS) to provide information of those customers that had been using the IP address during the period of time when the 27 audio book titles were uploaded on the FTP server.

The reasoning of the court

PCS is an internet service provider (ISP). PCS challenged the legal basis upon which it was to be ordered to provide such information. The court concluded that, because ISPs provide services on a commercial scale, it is possible to order ISPs to provide such information (for

which, see the Swedish Copyright Act, Section 53 c, paragraph 4 'The obligation to provide information relates to any party that /.../ 4. has on a commercial scale made available an electronic communication service or another service that has been used in connection with the infringement or the violation,'). PCS then claimed that s53(c)(4) of the Act violates the European Convention and EC law, and therefore the provisions in the Swedish Act could not be applied by the court. The court ruled that the standard of evidence (here 'probable cause to believe') and the requirement of proportionate evaluation in s53(d) in the Act, gives adequate legal security for individuals. Further, PCS claimed that the rules regarding the Order of Information (Informationsföreläggande) are in violation of the Electronic Communication Directive.² The court did not find that the Electronic Communication Directive constitutes a restriction when applying the provisions of the IPRED Directive. On the contrary, the court noted that the European Court in case No. C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* did not even mention this question in its judgement. If the Electronic Communication Directive prevents the provision of personal data for such purposes as are provided in the IPRED Directive, which PCS has claimed, the European Court would, according to the Solna District Court, reasonably have mentioned this.

With respect to the question as to whether the claimants showed probable cause to believe that someone had committed an infringement, the court pointed out that the infringing party does not have to be identified before a claim for right to information is made

¹ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004).

² Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available

electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L105, 13/04/2006 P. 0054 – 0063.

(as this is often the purpose of the claim). Further, it is not a requisite that the infringement has been carried out by failure or neglect, but it is sufficient that the infringement can be concluded objectively. The court found that the evidence provided by the claimants gave (at least) probable cause to believe that the 27 works have been on the FTP server.

An interesting question arose as to whether, if the works had been available to the public when published on the FTP server, it was possible for any member of the public to download the work from the FTP server, because it was not possible to obtain access to the FTP server without a password. However, the claimants had shown that the Swedish Antipiracy Organization was able to obtain access to and download files from the FTP server. In accordance with the preparatory works of the Act (amongst others, the government bill to the Act, Prop.1960:17) and relevant Swedish case law, only communications and performances that are restricted to private circles do not form part of the copyright. The court decided that restriction by means of a password in itself may not be sufficient to claim that it is a private circle. The copious number of audio books on the FTP server was, in the view of the court, an indication that there were a significant number of 'customers'. Further, the nature of the Order to Information is pre-procedural in nature, and the standard of evidence demonstrating that the work was made available to the public should not be too high. Therefore, the court concluded that the claimants had fulfilled the requirement of showing probable cause to believe that there had been an infringement.

Section 53 d in the Act provides that an Order of Information may only be issued if the advantages with issuing the Order outweigh the disadvantages for the integrity of the individual. This becomes important when it comes to information about customers that is covered by professional secrecy, in accordance with the Swedish Electronic Communication Act (2003:389)

(implementation of the Electronic Communication Directive in Sweden) (Lag (2003:389) om elektronisk kommunikation). In the preparatory works to the implementation of IPRED in Sweden, it is mentioned by the Ministry of Justice (Justitiedepartementet) that an Order of Information must be of a certain scope in order for a rights holder to receive information about a customer behind an IP number used in an infringement. Uploading a film or music on the internet for members of the public to download is generally considered to be of major damage to the rights holder. However, where the IP address has only copied a few works (in practice, what is meant by a few works may depend on whether it is film or music) the interest for integrity should outweigh the advantages.

The court concluded that 27 works constitutes a considerable number of works, and the claimants demonstrated that there was probable cause to believe infringement in all the 27 works. The court also concluded that, as the works were made available on the internet, it is probable that there have been extensive infringements in the copyright. It cannot reasonably be of a major inconvenience for the customer to take part in the investigation conducted by the claimants in order for the rights holders to look out for their rights. In this instance, the advantages outweighed the disadvantages, and an Order to Information was issued.

PCS has appealed against the decision to the Svea Court of Appeal, but at the time of writing, the court yet to decide if PCS will be granted leave to appeal.

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Mathilda Andersson is an associate with Bird & Bird Advokat KB, Stockholm

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