Supreme Court's
JUDGMENT

Case no.

delivered in Stockholm on 12 May 2023

B 1513-22

PARTIES

Appellant

1. Prosecutor General

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2. beIN Media Group LLC

PO Box 23231 Doha

Qatar

Counsel: Attorney JL

Respondents

1 AA-H

Counsel and Public Defender: Attorney JC

2. HA-H

Counsel and Public Defender: Attorney JN

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THE MATTER

Violation of the Copyright Act

RULING APPEALED

Judgment of the Svea Court of Appeal, Patent and Market Court of Appeal, of 07/02/2022 in case B 7503-18

JUDGMENT

The Supreme Court declares that beIN Media Group Ltd.'s television broadcasts during the period in question were not protected under Section 48 of the Act on Copyright in Literary and Artistic Works (1960:729).

The Supreme Court does not grant leave to appeal otherwise in the case. Accordingly, the judgment of the Patent and Market Court of Appeal is affirmed.

JC shall receive compensation from public funds for the defence of AA-H in the Supreme Court in the amount of SEK 86,520. Of the amount, SEK 69,216 relates to work and SEK 17,304 relates to value added tax. The State shall bear the cost.

JN shall receive compensation from public funds for the defence of HA-H in the Supreme Court in the amount of SEK 78,409. Of the amount, SEK 62,727 relates to work and SEK 15,682 relates to value added tax. The State shall bear the cost.

CLAIMS IN THE SUPREME COURT

The Prosecutor General has requested that AA-H and HA-H be convicted of violating the Act on the Prohibition of Certain Decoding Equipment (*Lagen om förbud beträffande viss avkodningsutrustning*) (2000:171) (charge 1) and violating the Act on Copyright in Literary and Artistic Works (1960:729) (charge 2), and that the penalty for each violation be imprisonment.

BeIN Media Group Ltd. ("beIN") has claimed, in the first case, that the Supreme Court shall reverse the judgment of the Patent and Market Court of Appeal as regards the dismissal of charges 1 and 2 of the indictment, beIN's claim for damages and beIN's claim for compensation for litigation costs, as well as remanding these parts of the case back to the lower court for further consideration. Alternatively, beIN has claimed that the Supreme Court shall convict AA-H and HA-H of charges 1 and 2 of the indictment, sustain beIN's claim for damages and order them to pay compensation to beIN for litigation costs. BeIN has become a party to the prosecution.

AA-H and HA-H have opposed modification of the judgment of the Patent and Market Court of Appeal.

REASONS FOR THE JUDGMENT

Leave to appeal to the Supreme Court

1. The Supreme Court has granted leave to appeal in the issue of whether beIN's television broadcasts during the period in question were protected under Section 48 of the Copyright Act.

Background

2. BeIN produced television programmes in Qatar. The company bought the rights to show various sporting events, added its own commentary in the relevant language and produced its own content to be broadcast during the breaks in the

various sporting events. The signal was sent via optical fibre cable from beIN in Qatar to beIN in France. The signal was then forwarded to the United Kingdom and Spain for uplinking to satellites, and then received by subscribers on the earth.

3. Advanced TV Network Sweden AB ('ATN'), established in Malmö, Sweden, carried on business activities consisting of the reception, decoding, packaging and rebroadcasting of television broadcasts for payment.

4. AA-H and HA-H were charged, in their capacity as representatives of ATN, with, inter alia, violating the Act on the Prohibition of Certain Decoding Equipment (charge 1) and the Copyright Act (charge 2). According to charge 2 of the indictment, between 1 July 2014 and 23 August 2016, AA-H and HA-H, jointly and in concert with one another and others did, intentionally or through gross negligence, unlawfully rebroadcast beIN's television broadcasts. In doing so, they had infringed beIN's rights to the television broadcasts.

5. The Patent and Market Court convicted both defendants of violating the Act on the Prohibition of Certain Decoding Equipment and violating the Copyright Act. HA-H was also convicted of certain other offences. He was sentenced to two years and six months' imprisonment, and AA-H received one year's imprisonment. They were ordered to pay damages to beIN jointly and severally, with each other and others, in the amount of SEK 194,794,000 plus interest. They were also ordered to pay beIN's costs of litigation.

6. According to the Patent and Market Court, beIN's television broadcasts were protected under the Copyright Act because the broadcasts could be

considered to have been made in countries, namely Spain and the United Kingdom, which were parties to the Rome Convention[1].

7. The Patent and Market Court of Appeal has dismissed the charge concerning violation of the Copyright Act. In the case of AA-H, the Court also dismissed the charge of violating the Act on the Prohibition of Certain Decoding Equipment. However, HA-H has been convicted for that offence and several other offences. He has received a conditional sentence. The Court dismissed beIN's claim for damages and released both defendants from the obligation to pay beIN's costs of litigation.

8. According to the Patent and Market Court of Appeal, beIN's television broadcasts were not protected since they were made from Qatar, which had not acceded to the Rome Convention at the time in question. Nor, according to the Court, was there any other reason to suppose that the broadcasts were protected under the Copyright Act.

Violation of the Copyright Act

9. Section 53, first paragraph, and Section 57 of the Copyright Act state that infringement of copyright and related rights is punishable, if the offence is committed intentionally or through gross negligence, by a fine or imprisonment for a maximum of two years.

Copyright protection of television broadcasts

Rights of television organisations

10. Chapter 5 of the Copyright Act deals with certain rights related to copyright. Section 48 regulates the rights of television organisations to their broadcasts. It provides that such an organisation has an exclusive right to

[1] The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 26 October 1961.

exploit a television broadcast by, inter alia, authorising rebroadcasting (first paragraph, item 4).

11. This right applies to the broadcast of the electronic signals transmitting the programme, the so-called signal right, and not to the content of the programme itself. The term "broadcast" is intended to apply regardless of the technology used. (Cf. Govt. bill 1960 No. 17 p. 256 and 259, Govt. bill 2004/05:110 p. 69 et seq. and Govt. bill 2009/10:115 p. 176.)

Scope of application of the Copyright Act to television broadcasts

12. Section 61 regulates the scope of application of the Copyright Act with regard to related rights in connection to Sweden. As far as television broadcasts are concerned, the Act applies in principle to such broadcasts taking place in Sweden. The Act also applies if the television organisation has its registered office in Sweden.

13. According to Section 62, the Government may, under certain conditions, issue regulations on the application of the Act with regard to other countries. Such regulations have been laid down in the International Copyright Regulation (*Internationella upphovsrättsförordningen*) (1994:193).

14. Section 12 of the International Copyright Regulation states that Section 48 of the Copyright Act, and provisions related to that Section, shall apply to radio and television broadcasts that have been done in a country other than Sweden, if that country is a party to the Rome Convention (first paragraph, item 1), and shall apply to broadcasts by radio or television companies based in a Convention country (first paragraph, item 2).

15. The provisions of Section 12 are based on Article 6 of the Rome Convention. According to that Article, a Contracting State shall grant national treatment to broadcasting organisations if the headquarters of the broadcasting organisation is situated in another Contracting State (paragraph 1(a)) or if the

broadcast was done from a transmitter situated in another Contracting State (paragraph 1(b)).

16. The Rome Convention aims to protect, between Contracting States, the often-substantial investments made in the broadcasting of television programmes, among other things. This is achieved by obliging states undertaking to adhere to the Convention to protect broadcasts done from other Convention countries. The Convention will provide mutual protection whereby radio and television organisations covered by the Swedish Copyright Act will be protected in other Convention countries at the same time as companies covered by the copyright legislation of other Convention States are protected in Sweden. (See, e.g., Govt. bill 1962 No 151 p. 13.)

17. The Convention, adopted in 1961, deals with wireless radio and television broadcasting to the public. At the time the Convention was drafted, satellite transmission did not exist. Nevertheless, satellite broadcasting should be considered to be covered by the regulation (cf., e.g., BIRPI, "Working Group on Copyright Problems of Satellite Communications", United International Bureaux for the Protection of Intellectual Property, Final report, Geneva, 1968, para. 6–10, and Annika Lokrantz Bernitz, "Telesatelliterna och upphovsrätten", NIR 1969 p. 318 et seq.).

The SatCab Directive

18. Section 61a of the Copyright Act contains special provisions that apply when works or other performances protected under the Act are broadcast to the public by satellite. The provision, which is based on the EU's so-called SatCab Directive[2], states as a premise that, in such a situation, the act which is relevant from the point of view of copyright shall be deemed to take place in

[2] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

the country where the broadcasting company, under its control and its responsibility, initiates the performance into an uninterrupted chain of communication to the satellite and then back down to the ground.

19. The main rule in Section 61a does not apply if the act takes place in state which neither forms part of the EEA nor provides the degree of protection prescribed by the SatCab Directive. In such a case, if the transmission to the satellite takes place in an EEA country, the act which is relevant from the point of view of copyright is instead considered to take place in that country.

20. The purpose of Section 61a, and of the underlying Directive, is to identify the country in which the broadcasting organisation shall have broadcasting rights to the work or performance to which the broadcast relates (see Govt. bill 1994/95:58 p. 46 et seq., cf. also Articles 2 and 3 and recitals 14 and 15 of the Directive). The provisions thus address the question of where the licensing of the protected work or performance must occur. As stated in the text of Section 61a, its application presupposes that the right in question is protected under the Copyright Act. Thus, the Section has no immediate relevance to the assessment of whether the broadcast as such is protected by that Act.

Multi-stage satellite broadcasting

21. In terms of the application of the relevant provisions of the Rome Convention and the International Copyright Regulation, it is significant to assess from where the broadcast has been done. This assessment can be difficult when the broadcast involves several technical steps in different countries. In satellite broadcasting, which is the case here, the programme-carrying signals may be sent from one country to another, where it is uplinked to a satellite, which in turn transmits the broadcast to receivers on the earth in a third country.

22. The Rome Convention does not explicitly regulate satellite transmissions (see para. 17) and does not include any specific provisions regarding where a multi-stage broadcast is deemed to have taken place. Nor does the International Copyright Regulation include any such provisions. In related contexts, it has been found that industry-standard intermediary technical activities used in a satellite broadcast should not be considered interruptions in the chain of communication, but that all links in such a chain are considered to constitute a single communication to the public by satellite (cf. para. 18 above and the judgment of the European Court of Justice 13 October 2011 in Joined Cases C-431/09 and C-432/09 Airfield and Canal Digitaal, EU:C:2011:648).

23. Applying this approach to the application of the provisions of the Rome Convention and the International Copyright Regulation can be considered consistent with the wording of the provisions. Regarding broadcasts with industry-standard intermediary technical activities, it is natural to consider that the broadcast "was made" (as stated by the Rome Convention) or "has been done" (as stated by the International Copyright Regulation) in the country where the signal was originally generated. The fact that the chain of communication may include stages which, individually, do not fall within the scope of the Rome Convention, e.g., because the signals in one element are not transmitted wirelessly, does not preclude such a reading of the provisions.

24. Such an application is also in line with the policy reasons motivating the special protection of broadcasting organisations. The significant investments made by such organisations would be impossible without legal protection against the unauthorised use of the broadcasts by others (cf. Henry Olsson and Jan Rosén, *Upphovsrättslagstiftningen, En kommentar*, Juno, 2019, Version 4A, commentary on Section 48 of the Copyright Act). Typically, it can be assumed that such investments have primarily been made in the country where the broadcast is initiated. This interest could not be

protected to the same extent if the satellite-uplink location, or some other technical stage according to established best practice, were used instead.

25. In aggregate, there are compelling reasons why a broadcast involving several technical stages, for the purposes of Section 12 of the International Copyright Regulation, must normally be considered to have been made in the country where the communication of the programme-carrying signals was initiated.

Assessment of the issue on which leave to appeal has been granted

26. BeIN does not have its registered office in Sweden, or in any other country that was a party to the Rome Convention at the time in question. The issue is, therefore, whether the broadcast has been done in a Convention country (see Section 12 of the International Copyright Regulation).

27. The programme-carrying signal was sent, by beIN in Qatar, via optical fibre cable to beIN in France and then, via uplinks in Spain and the United Kingdom, to satellites, which in turn sent the signals down to the earth for reception by subscribers. For the purposes of the International Copyright Regulation, all stages of this communication chain shall be considered to constitute a single communication to the public by satellite. The broadcasts must therefore be considered to have been made in Qatar, where the programme-carrying signals were initiated (cf. para. 24). On the other hand, no broadcasting was made in France, Spain or the United Kingdom, where – as far as it emerged – only industry-standard intermediary technical activities occurred.

28. At the time in question, Qatar was not a party to the Rome Convention, and, therefore, Section 12 of the International Copyright Regulation does not apply. Nor is there any other reason to suppose the broadcasts are protected under Section 48 of the Copyright Act. The degree of broadcast protection

provided by Qatar at the time in question is immaterial to the assessment of that issue (cf. paras. 18-20).

29. In conclusion, beIN's television broadcasts were not protected under Section 48 of the Copyright Act at the time in question. The question posed in the leave to appeal is to be answered in this way.

30. Given this outcome, there are no grounds for granting leave to appeal in the remainder of the case. The judgment of the Patent and Market Court of Appeal shall therefore stand.

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Justices of the Supreme Court Gudmund Toijer, Agneta Bäcklund, Dag Mattsson, Johan Danelius (reporting Justice) and Jonas Malmberg participated in the ruling.
Judge referee: Emelie Hansell