
June 2014

Does your evidence constitute copyright infringement?

Last year, the Göta Court of Appeal ordered damages against the municipality of Mörbylånga because the municipality, in a dispute to which it was a party, adduced as evidence, screen dumps from the counterparty's website. The Supreme Court has now decided not to grant leave to appeal and the ruling remains in place. The ruling is of principal interest and gives rise to copyright issues which one does not perhaps consider when one routinely obtains and adduces evidence in a court.

The background is as follows. The person K.M.F. had a website with photographs which he had taken himself. K.M.F. became embroiled in a dispute with the municipality. The municipality adduced as evidence at the District Court in Kalmar screen dumps from K.M.F.'s website. K.M.F. was of the opinion that this constituted a copyright infringement and brought an action against the municipality for damages. The District Court rejected the claim, whereupon K.M.F. appealed to the Göta Court of Appeal.

The Court of Appeal held that the pictures were afforded photographic protection under copyright law. This protection entailed that only the author was entitled to make copies of the pictures and to make them available to the general public. The question was whether the municipality had been guilty of copyright infringement when it made copies of the pictures by printing them out from the Internet. The municipality was of the opinion that it was entitled to print the pictures because they were to be adduced as evidence in a dispute in which the author was the counterparty and the pictures constituted evidence in support of the municipality's case. The Göta Court of Appeal held, however, that a party to a dispute does not have unlimited rights to obtain evidence, and drew the analogy that a party is not entitled freely to obtain other's property just because it is needed as evidence in a case. The Court of Appeal was of the opinion that if evidence was necessary, one ought instead to request disclosure (i.e. an order requiring the holder of evidence to deliver it to the party requesting it). The municipality was ordered to pay damages in the form of reasonable compensation to K.M.F. The Court of Appeal estimated this to be SEK 500 per picture. In setting the amount, the Court of Appeal took into consideration the fact that K.M.F. had uploaded the pictures for the viewing of the general public and thereby limited the value of them and that they were publically accessible and that he had not explained in which way he had suffered pecuniary or non-economic loss.

From a strictly legal perspective, the judgment would not appear perhaps to be controversial. In disputes where settlement is permitted, it is the parties who are to produce the evidence they wish to adduce. As opposed to, for example, the USA, there

June 2014
Does your evidence constitute copyright infringement?

are no rules of evidence in Sweden, which means that the court tries the case on the basis of the evidence presented regardless of how it has been obtained. The fact that a party has broken a rule or law in obtaining the evidence is a matter which is to be investigated separately. As a party, you are thus always free to adduce whatever evidence you like, but you must be prepared at a later stage to accept the consequences if you have not been law-abiding in obtaining the evidence.

The consent of the right holder is required in order to produce copies of copyrighted work. If there is no consent then the production of copies constitutes copyright infringement. Such an infringement is accompanied by liability for damages. There is no applicable exception in the Copyright Act for the production of copies by a party to a legal dispute.

The Court of Appeal was of the opinion that it was the production of copies that constituted the infringement. What then is deemed to be the production of copies? According to the Copyright Act it is "each direct or indirect and temporary or permanent production of copies of the work, regardless of the form or the method by which it takes place and regardless of whether it is in whole or in part." As soon as you save a screen dump, with copyrighted material to your computer, from a legal perspective you have produced a copy. How should you handle this legally if you wish to secure evidence from the Internet?

You can request the consent of the copyright holder. If the copyright holder is the counterparty as was the case in the Göta Court of Appeal, the risk of making such a request is, however, obvious. The counterparty's willingness to be accommodating in the matter is likely to be limited. Before you obtained your consent, you ought to assume that the evidence will suddenly "disappear" from the Internet.

Is there any possibility of securing evidence without the consent of the copyright holder before the copyrighted work which one wishes to adduce as evidence is changed or removed? No, hardly. The rules on disclosure do make it possible to obtain an order for the defendant to deliver up a copy of the work concerned on the pain of a fine. Such an order cannot be executed in a way other than by giving the addressee the possibility of delivering the work. In which case, the element of surprise is long gone; and possibly even the requested work.

The effect of our system of rules is clear in the judgment. It is not, quite simply, possible to secure evidence of copyrighted material which is available on the internet by taking screen dumps of the material without becoming guilty of copyright infringement in doing so. In practice one must therefore consider perhaps that a party that needs to adduce a print out of a website for which the counterparty has copyright, does so by taking a screen dump and then compensating the right holder by offering a reasonable sum. In respect of the quantum of this compensation, the ruling of the Court of Appeal provides no guidance. The Court of Appeal ruled that each and every one of the pictures in question gave entitlement to a reasonable compensation of SEK 500. One question which arises is, of course, the question of whether the payment of such compensation will

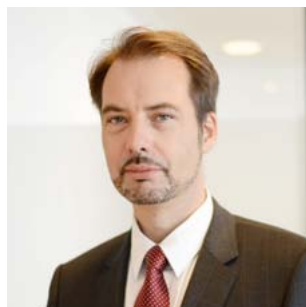
June 2014
**Does your
evidence
constitute
copyright
infringement?**

be accepted by the court as recoverable costs. The cost does in fact constitute a cost for evidence but can be seen as damages and not as consideration. The answer may possibly depend on whether the court is of the opinion that securing evidence by way of infringing copyright was justified because the evidence was so valuable and there was a risk that it would otherwise disappear.

The assessment of the copyright rules that guide the Court of Appeal in its judgment are not limited to screen dumps or to photographs. One should also be able to regard the judgment as an expression of a principle which applies to any copyrighted work and which means that no copies of such a work may be produced with the purpose of submitting to a court as evidence without the consent of the right holder.

One may then conclude that a large part of the written evidence adduced in the courts of this country in civil disputes probably have some copyright protection. It is most probable that it is not usually the counterparty has the copyright, instead it is more likely that the majority of rights are held by a third party. Not a few of those rights holders will probably remain unknown to the parties to the dispute. Thus, perhaps in the majority of cases the copyright protection for evidence adduced in court will not involve any practical problems despite the fact the right holder loses out on compensation. In any event the judgment gives rise to a large number of questions regarding the circumstances relating to the securing of evidence in disputes without the consent of any possible rights holder. It is beyond the scope of this newsletter to discuss these issues, but there may well be reason to return to the matter.

The cited ruling is from the Göta Court of Appeal judgment dated 15 October 2013 in case number FT 311-13.



Kristian Fredrikson,
Senior Associate / Advokat



Ulrica Dahlberg,
Senior Associate / Advokat