

Copyright protection for public artworks in a digitalised world – a case study

By Carla Zachariasson and Anna Li

ABSTRACT

The growing digital landscape indeed imposes new questions and challenges for legislators and courts when adopting and adapting intellectual property law. For example, when artworks located in public outdoor spaces are published online (without the right holder's consent), a reasonable balance between intellectual property protection and other interests, such as the free use of the internet, should be ensured.

In 2016 and 2017, the Swedish courts delivered two judgments regarding the scope of protection for copyright-protected public artworks published online in the form of photographs. The purpose of this article is to discuss these judgments in light of the fact that on the one hand, the copyright holder has the exclusive right to communicate the work to the public, and on the other hand, that people may use the internet to spread information freely.

1. INTRODUCTORY REMARKS

With the almost explosive growth of digitalisation, the safeguarding of copyright-protected works continuously faces new questions and challenges. In 2016 and 2017 respectively, the Swedish Supreme Court (the “**Supreme Court**”) and the Swedish Patent and Market Court, a specialised intellectual property division of the Stockholm District Court (the “**Court**”), each delivered a judgment regarding the scope of protection for copyright-protected artworks published online in the form of photographs.¹ In short, the two cases regarded Wikimedia Sweden (“**Wikimedia**”), which provided links to a third party-database (“**Wikimedia Commons**”). On this database, private individuals had, without the consent of the copyright holders, published photographs of copyright-protected artworks located on public outdoor spaces, such as public squares, roundabouts, parks, etc.

The Supreme Court’s judgment is of interest as it, *inter alia*, balances the copyright holder’s exclusive right to communicate the copyright-protected work to the public against the freedom of panorama, i.e. the right to reproduce artworks which are permanently located outdoors on public spaces. Further, the Court’s judgment is of inter-

est from a European Union perspective, as it deals with concepts such as “communication to the public” within the meaning of Article 3(1) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the “**Directive**”), commonly known as the InfoSoc Directive.

The purpose of this article is to discuss the Supreme Court’s and the Court’s judgments in light of, on the one hand, the fact that we live in a digitalised world where millions of people can spread information on the internet and, on the other, the copyright holder’s exclusive right to communicate the work to the public. For this purpose, the concept of freedom of panorama and the case law of the Court of Justice of the European Union (the “**CJEU**”) on communication to a “new public” within the meaning of Article 3(1) of the Directive is of great relevance.

The article is structured as follows. First, the article provides a general overview of the legal framework for a copyright holder’s exclusive right to communicate the work to the public and the freedom of panorama under the Directive and the Swedish Copyright Act (the “**Act**”). Thereafter, the Supreme Court’s and the Court’s judgments are presented chronologically. For the reader’s information, the Supreme Court’s judgment was delivered before the Court’s judgment, as it concerned two specific questions referred from the Court. Lastly, the article is summarised with some concluding remarks.

2 THE LEGAL FRAMEWORK

2.1 The InfoSoc Directive

The Directive was enacted to create a harmonised legal framework for copyright and related rights through increased legal certainty and a high level of protection of intellectual property.² Without such harmonisation, it was feared that in order to respond to the technological challenges, the Member States’ legislative activities might lead to significant differences in protection and thereby lead to restrictions on the free movement of services and products related to intellectual property.³ This could, in turn, result in a defragmentation of the internal market and legislative inconsistency.⁴

Articles 2 – 4 of the Directive set out certain exclusive rights for the copyright holders. Article 2 stipulates a reproduction right, i.e. an exclusive right for the copyright holder to produce copies of the copyright-protected work. Article 3 confers a right for the copyright holder to communicate the work to the public as well as a right to make



the work available to the public and Article 4 stipulates a right to distribute the work to the public by sale or otherwise.

Article 5 of the Directive contains an exhaustive list of permissible exceptions and limitations of the exclusive rights in Articles 2 – 4. As the Directive provides the overall framework for permissible exceptions and limitations, the EU Member States may not allow any other exceptions or limitations in their respective national regulations that go beyond what is permitted according to Article 5 of the Directive.⁵ One such exception is the freedom of panorama, which is presented in further detail below under chapter 2.3.

2.2 The Swedish Copyright Act

In Sweden, copyright protection is mainly regulated by the Act. Similar to the Directive's Articles 2 – 4, the protection includes certain exclusive rights for the copyright holder to exploit the work (*Sw. förfoganderätt*), including a right to make copies of the work (*Sw. mångfaldiganderätt*) as well as to make the work available to the public (*Sw. tillgängliggörande för allmänheten*).⁶ These are generally referred to as the copyright holder's economic rights. The copyright holder also has a number of moral rights such as the right to be named in connection with the use of the work as well as the right to oppose any changes to the work. However, in the context of this article, the economic rights are the most relevant.

Chapter 1, Article 2, Paragraph 3 of the Act lists different ways in which copyright-protected works are "made available to the public". One such way is communicating the work to the public (*Sw. överföring till allmänheten*), which

includes making the work available to the public by wire or wirelessly from a place other than where the public may normally access the work.⁷ This provision also includes communications that occur in such a way that individuals may access the work from a place and time of their own choosing.

2.3 The freedom of panorama

The freedom of panorama is a copyright exception which allows private individuals, by taking photographs, filming videos, or making drawings, etc. to create images of artworks that are permanently situated in public places and to use such images without the consent of the copyright holder.⁸

As mentioned above under chapter 2.1, Article 5 of the Directive allows for certain exceptions and limitations to the copyright holder's exclusive rights. One such exception is the freedom of panorama in Article 5(3)(h), which stipulates that Member States *may* provide exceptions or limitations to the copyright holder's exclusive rights to artworks, such as architectural works or sculptures, made to be permanently located in public places. This provision is discretionary, meaning that each Member State may decide whether to include such a provision in the national law of the Member State.⁹ Although the Directive, as mentioned above, provides the overall framework for permissible exceptions and limitations, the concept of freedom of panorama is not further harmonized within the EU. Thus, the Directive's broad formulation of the freedom of panorama has resulted in different approaches of the concept in different EU Member States.¹⁰

¹ The Supreme Court's judgment NJA 2016 p. 212 and the Court's case no. PMT 8448-14.

² The Directive's preamble recital 4.

³ The Directive's preamble recital 6.

⁴ The Directive's preamble recital 6.

⁵ Government Bill 2004/05:110 p. 46.

⁶ See Chapter 1, Section 2, Paragraph 1 of the Act.

⁷ Chapter 1, Section 2, Paragraph 3, Item 1 of the Act.

⁸ Shtefan, Anna, 'Freedom of panorama: the EU

experience', *European Journal of Legal Studies*, 2019, Vol. 11, No. 2, p. 14.

⁹ Government Bill 2004/05:110 p. 46.

¹⁰ Shtefan, Anna, 'Freedom of panorama: the EU experience', *European Journal of Legal Studies*, 2019, Vol. 11, No. 2, p. 17.



In Sweden, the concept of freedom of panorama manifested in law a century ago, although with a different formulation than the current provision.¹¹ The exception rule was motivated by the fact that artworks, which have been situated on certain public locations, have become a part of the cityscapes or landscapes and thus in a sense these artworks have become public property.¹² Accordingly, each and everyone should have the right to freely reproduce such artworks. The provision has been revised a number of times and the latest revision was carried out in connection with the implementation of the Directive in Sweden, particularly Article 5(3)(h) of the Directive. Today, the freedom of panorama is expressed in Chapter 2, Section 24, Paragraph 1, Item 1 of the Act and is formulated as follows (authors' translation):

*“Artworks may be reproduced
1. if they are permanently situated on or at a public
outdoor location.”*

The freedom of panorama under the Act thus constitutes an exception from the copyright holder's exclusive right as it allows the public to reproduce artworks, e.g. by taking photographs, filming videos, creating drawings, etc. and to use the reproduction without the copyright holder's consent. It should be noted that freedom of panorama only applies to artworks that are located outdoors and in a public location such as, e.g. a market place, a roundabout, a street or a park.¹³ Thus, the exception is not applicable to artworks that are only temporarily located in public locations, for example, artworks which are part of a temporary exhibition.¹⁴

Furthermore, the freedom of panorama only applies to two-dimensional reproduction, for example reproduction through drawings, paintings or photographs, and does not include any three-dimensional reproduction such as sculptures.¹⁵ In addition, the meaning of the concept “reproduce” (Sw. *avbilda*) has been subject to

discussions and different interpretations.¹⁶ In fact, the interpretation of “reproduce” under Chapter 2, Section 24, Paragraph 1, Item 1 of the Act became the fundamental question in the Supreme Court's judgment NJA 2016 p. 212. Against this background, the article moves on to discuss the Supreme Court's judgment.

3 THE SUPREME COURT'S JUDGMENT NJA 2016 P. 212

3.1 Background

The facts of the case can be summarised as follows. Wikimedia is a non-profit association which provides, *inter alia*, the website “offentligkonst.se”. The website contained links to a third party-database, Wikimedia Commons, to which individuals could upload photographs of artworks placed outdoors in different public spaces around Sweden. The purpose of the database, which was open to everyone and free of charge, was to provide an open and easily accessible database for public art in Sweden and was intended to be used by the public, including the education system and the tourist industry.

Bildupphovsrätt i Sverige ek. för. (“BUS”) is an organisation that mainly represents copyright holders to visual art in Sweden. BUS also collects license fees as well as distributes the royalties obtained by contract licences.

On behalf of the three copyright holders mentioned below, BUS commenced proceedings against Wikimedia for infringing these artists' exclusive rights to communicate their artworks to the public: the artwork “Duo”, by Thomas Qvorsebo (1988), the sculpture “Moby Dick” by Johan Paalzow (2004) and the artwork “Binär” by Eva Hild (2012). All three sculptures were permanently located outdoors at public locations in Stockholm.

Wikimedia disputed the claims and asserted that the freedom of panorama under the Act was applicable. According to Wikimedia, the scope of the freedom of panorama under the Act should not be subject to a narrower interpretation than the corresponding provision in the Directive.

As the case involved certain legal questions that had not been previously clarified by the Supreme Court, the court decided to refer the following questions to the Supreme Court before adjudicating the case in its entirety:

¹¹ See Article 7 of the Cultivated Artwork Act of 1919 (the “CAA”) and the Swedish Government Official Reports, reports by Government commission of inquiry 1956:25 p. 263.

¹² Swedish Government Official Reports, reports by Government commission of inquiry 1956:25 p. 263-264.

¹³ Olsson, Rosén, Upphovsrättslagstiftningen – En kommentar, 2016, Norstedts Juridik, p. 202.

¹⁴ Olsson, Rosén, Upphovsrättslagstiftningen – En kommentar, 2016, Norstedts Juridik, p. 202.

¹⁵ Government Bill 2004/05:110 p. 224.

¹⁶ See Swedish Government Official Reports, reports by Government commission of inquiry 2011:32 p.171-172.

¹⁷ See NJA 1986 p. 702 and NJA 1993 p. 263.

- Should “reproduce” as stipulated in Section 24, Paragraph 1 of the Act be interpreted as to allow artworks that are permanently located in public outdoor locations-, to be freely transferred to the public via the internet and without needing to obtain any consent or making any payments to the copyright holder?
- Is the answer to the abovementioned question dependent on whether the transfer was made with a commercial purpose or not?

3.2 The relation between the Directive and the Act and the “three-step-rule”

In its judgment, the Supreme Court first presented the legal framework of copyright protection step by step, including the relevant provisions in the Act.

The Supreme Court noted that the preparatory works to the Act emphasise that the copyright holder’s exclusive rights are property rights and consequently that restrictiveness shall be observed when allowing any exceptions or limitations of such rights. Further, the Supreme Court referred to its previous case law which concludes that the courts have a very limited scope to interpret other limitations of the exclusive rights than those that are explicitly mentioned by law.¹⁷

Furthermore, the Supreme Court pointed out that the Act shall be interpreted in light of the Directive. The Supreme Court held that the Directive provides a strong protection for copyright, especially in the digital environment. Further, the Supreme Court noted that the Directive aims to balance the copyright holder’s protection, on the one hand, and certain public interests in relation to using the work, on the other.

As mentioned above, Article 5 of the Directive contains an exhaustive list of the permissible exceptions and limitations of the rights that are regulated in the Directive. The Supreme Court noted that Article 5(5) of the Directive expresses the so-called “three-step-rule” according to the following:

1. *An exception or limitation must relate to the specific case, i.e. the infringement must be clear and precise.*
2. *An exception or limitation may not be applied in a way which conflicts with the normal exploitation of the copyright holder’s work. According to the Supreme Court, this step not only includes any current use; it also includes the copyright holder’s right to exploit the work in new ways due to technical developments.*
3. *The exception or limitation may not unreasonably prejudice the copyright holder’s legitimate interests. This rule requires a proportionality assessment of whether the exception or limitation of the copyright holder’s exclusive right can be motivated by a stronger public interest.*

According to the Supreme Court, the “three-step-rule” should be considered as an instruction for a court’s interpretation of exceptions and limitations to a copyright holder’s exclusive rights.

3.3 The Supreme Court on the freedom of panorama

Regarding the relevant exception rule in this case, i.e. the freedom of panorama, the Supreme Court held that this exception is based on the public interest of freely reproducing cityscapes or landscapes without encountering any obstacles based on any exclusive rights related to copyright-protected work.

Further, the Supreme Court stated that, for practical reasons and due to the small economic significance for copyright holders, reproduction is permitted even when the artwork is the main motive for the reproduction, e.g. on a postcard. The Supreme Court noted that the Swedish regulation on freedom of panorama differs from the other Nordic countries’ regulations, which do not allow for reproductions when the artwork is the main motive. The Swedish legislator has considered the issue of whether the Swedish legislation should be made more restrictive in this regard. However, as the Supreme Court noted, no such legislative reforms had yet been implemented.

In conjunction with the latest reform of Section 24 of the Act the legislator stated that the Directive provides the overall framework for permissible limitations under national law. As the concept of reproduction under the Act only applies to two-dimensional reproduction, the exception under Swedish law is more limited than the exceptions in Article 5 of the Directive. Therefore, the legislator concluded that no changes were necessary.

3.4 The Supreme Court’s interpretation of “reproduce” under the Act

Against this background, the Supreme Court went on to determine how “reproduce” in Chapter 2, Section 24, Paragraph 1, Item 1 of the Act should be interpreted. The Supreme Court pointed out that the Act has been reviewed on several occasions without such reviews leading to any law reforms.

The Supreme Court held that the assessment of which limitations fall under the scope of “reproduction” should be made in accordance with the “three-step-rule”. As regards the first step of the rule in this particular case, the Supreme Court pointed out that the assessment of what constitutes a “normal use” should only relate to the “normal use” of an artwork located at a public space. According to the Supreme Court, the aforesaid question also included an assessment of what type of exclusive right the copyright holder should have to economically exploit the work, i.e. the second step of the “three-step-rule”.

Going back to the aforementioned exception for reproductions on postcards, the Supreme Court stated that the exception was not relevant in this case as it was formulated for practical reasons at a time when such reproductions were produced and distributed in a relatively limited number. The Supreme Court stated that *it was different when the artwork was used in a digital environment.*

In this case, the artworks were made available to the public by Wikimedia through links to an open third-party database. The Supreme Court affirmed that typically the commercial value of such use of copyright-protected work is not insignificant to the owner of the database, or to the

person that provides access to the database, e.g. by linking. The Supreme Court held that such economic value should be reserved to the copyright holder. The Supreme Court also concluded that whether the provider of the database has a commercial purpose or not is irrelevant in this context.

After having arrived at the aforementioned conclusion, the Supreme Court continued with the last step of the “three-step-rule” which, in this case, was whether Wikimedia’s linking to the database unreasonably prejudiced the copyright holder’s legitimate interests. The Supreme Court emphasised that the exception for the freedom of panorama should be interpreted restrictively, and that the purpose of the database must be considered.

The Supreme Court stated that although the purpose of the database, i.e. to provide an open and easily accessible database for public art in Sweden, fell within the scope of a public interest, a database of this type did in fact provide for a wide use of copyright-protected works, without paying any compensation to the copyright holders. Accordingly, it led to a significantly larger limitation of the copyright holders’ exclusive rights than the provision allows. The Supreme Court held that the right to exploit artwork in this way was, *with the current formulation of the provision*, still in the possession of the copyright holder.

Thus, the Supreme Court’s answer to the referred question from the Court was that the freedom of panorama under Chapter 2, Section 24, Paragraph 1, Item 1 of the Act did not give Wikimedia the right to transfer the works via internet to the public through the linking to Wikimedia Common’s database. Moreover, whether the provider of the database had a commercial purpose or not was deemed irrelevant in this context.

3.5 Concluding remarks regarding the Supreme Court’s judgment

The aforesaid judgment by the Supreme Court involves several interesting aspects. Firstly, the Supreme Court clarified the method for the court’s assessment regarding the interpretation of any limitations of the copyright holder’s exclusive rights pursuant to the Directive. The Supreme Court laid down that the courts should observe the so-called “three-step-rule” stipulated in Article 5(5) of the Directive when they interpret the limitations. In addition, each step of the aforesaid rule was described in detail in the judgment.

Secondly, the Supreme Court was faced with the question of the copyright holder’s rights in relation to the new technical environment and development. This was particularly clear when the Supreme Court compared the exemption rule related to the distribution of postcards and deemed it to be irrelevant for present purposes. According to the Supreme Court, the exemption rule related to postcards was enacted due to practical reasons and at a time when it was a question of producing and distributing a relatively limited amount of analogue reproductions. The situation was *different* when the artwork was used in a digital environment. Thus, the Supreme Court took into account the digital environment and the effect thereof including the fact that an extensive amount of reproduc-

tions of artworks could be produced and distributed on the internet.

Lastly, and perhaps the most interesting aspect of this judgment, is that the judgment can provide further guidance in relation to the interpretation of the freedom of panorama exception set out in Chapter 2, Section 24, Paragraph 1, Item 1 of the Act, particularly regarding the interpretation of “reproduce”. As mentioned above, the Supreme Court held that the “three-step-rule” should be observed by the courts when interpreting limitations of the exclusive rights. This rule was also applied by the Supreme Court in the present case and formed the basis of its assessment.

The Supreme Court’s statement in regards to the economic exploitation of copyright-protected works may, since Wikimedia is a non-profit organisation, be interpreted so that an objective assessment should be made in this regard. It is also deemed sufficient that such use only has a commercial value for a third party (that in one way or another contributes to providing access to the database) and not for the owner itself.

In the Supreme Court’s conclusion, it was stressed that according to the *current* formulation of the provision, the right to exploit artwork through the use of new technology was still within the copyright holder’s possession. This statement may be interpreted as implying that the outcome may have been different if the provision had been amended and thus had a different formulation. It may be noted that the Supreme Court also emphasised in its judgment that although the meaning of the concept of “reproduce” had been the subject of discussion, *inter alia*, in connection with the latest revision of the Act, no legislative reforms had yet been implemented.

Nevertheless, the aforesaid judgement has been the subject of discussion and the legal reasoning of the Supreme Court has been criticized by some legal scholars.¹⁸ Further, the judgment and its consequences have been discussed among politicians and the general public. Hence, the judgment has led to a legislative proposal in Sweden which includes a proposal for making the aforesaid provision technically neutral and thus allowing pictures of public artworks to be freely shared on the internet.¹⁹ However, the legislative proposal has been rejected.²⁰ In this context it may also be noted that the European Commission’s proposal for a Directive on copyright in the Digital Single Market does not include any provisions related to the panorama exception.²¹ Accordingly, no further harmonization of the concept in relation to the digital environment is likely to be expected in the near future at European level. Moreover, BUS has also expressed its own interpretation of the Supreme Court’s judgment in an article published in a local newspaper.²² According to BUS’s interpretation, the judgment only applies to databases such as Wikimedia’s database and does not limit private individuals’ rights to upload photos of artworks on social media in general.²³ The latter question is one of the questions the Court dealt with in its case no. PMT 8448-14. This case will be further described in the following section.

4 THE COURT'S CASE NO. PMT 8448-14

4.1 Background

After the Supreme Court's ruling in NJA 2016 s. 212, the dispute between BUS and Wikimedia was subject to new proceedings in the Court.

In these proceedings, BUS contended that the Court should prohibit Wikimedia under penalty of a fine from communicating the artworks to the public for the remainder of the artworks' copyright protection period. Further, BUS demanded that the Court should declare that Wikimedia was obliged to pay fair compensation (Sw. skälig ersättning) for the use of the artworks as well as damages for the additional loss pertaining to the infringement (Sw. *den ytterligare skada som intrånget har medfört*).

Wikimedia disputed the requests for relief on the basis that, although the artworks could be accessed via the links on Wikimedia's website, the works had not been communicated to a *new public* as the artworks could be accessed on the artists' own websites (we will return to the term "new public" below). Further, Wikimedia argued that the artists had given their implied consent to the use of the artworks by publishing them on the internet. Lastly, Wikimedia asserted that, in any case, Wikimedia had not acted with intent or gross negligence and could thus not be required to pay compensation or damages to BUS. Wikimedia also disputed the contention that BUS had suffered damage as a result of Wikimedia's actions.

Against this background, the fundamental issue in this case was whether Wikimedia, by providing links to Wikimedia Commons, where pictures of the artworks had been published without the artists' consent, constituted a communication of the works to the public as set out in Chapter 1, Section 2, Paragraph 3, Item 1 of the Act and in Article 3(1) of the Directive.

4.2 Communication to a "new public" within the meaning of Article 3(1) of the Directive

The Court noted that in order to establish whether linking on the internet to a copyright-protected work constitutes a communication to the public, the CJEU has introduced the term *new public* (Sw. *ny allmänhet* or *ny publik*). In case C-466/12 ("*Svensson*"), the CJEU stated that a communication falls within the meaning of Article 3(1) of the Directive if the communication concerns the *same works* as those covered by the copyright holder's commu-



nication ("**the initial communication**") and is made with the *same technical means* as the initial communication. Further, the communication must be directed at a new public, i.e. a *public which was not taken into account by the copyright holder when he or she authorised the initial communication to the public*.

With reference to the case of *Svensson*, Wikimedia argued that the artworks had not been communicated to a new public, as Wikimedia's website visitors could access the same artworks on the artists' respective websites. Wikimedia asserted that the visitors to their website were included in the "internet population" which must have been taken into account by the artists in their initial communication.

BUS on the other hand argued that a copyright holder's exclusive right to communicate a work to the public could not reasonably be lost merely because the work has been made available on a website with the consent of the copyright holder. According to BUS, this would be a far-reaching restriction of the copyright holder's exclusive rights with no support in the CJEU's case law.

The Court noted that the facts of the case were different from those in *Svensson*. The latter concerned a website which linked to another website where copyright-protected works had been published with the consent of the copyright holder, and thus did not constitute a communication to a new public. However, in the present case, Wikimedia's website linked to a database on a website where the artworks had been published without the consent of the artists. Consequently, the principles outlined in *Svensson* could not be applied to this case.

¹⁸ See, for example, the article written by Björkenfeldt, 'Offentlig konst mindre offentlig. Kommentarer till Högsta domstolens beslut den 4 april 2016' (NJA 2016 s. 212), *Nordiskt immateriellt rättsskydd*, 2016, Vol. 3 p. 310-324.

¹⁹ See the Private Member's Motion to Riksdagen 2018/19:2544, *Panoramafrihet*, submitted by Rickard Nordin (C) and Peter Helander (C) p.1.

²⁰ See further in the committee report

2018/19:NU16 by the Committee on Industry and Trade, *Skydd för beteckningar som omfattas av EU:s handelsavtal med Japan*, p.12-13 and p. 20-21.

²¹ See COM(2016) 593 final, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, 14 September 2016, Brussels.

²² Lindberg, M., *Fortsätt att fota Poseidon i Göteborg*, *Borås Tidning*, 30 April 2016, available on the following website: [https://](https://www.bt.se/insandare/fortsatt-att-fota-poseidon-i-goteborg/)

www.bt.se/insandare/fortsatt-att-fota-poseidon-i-goteborg/ (last visited on: 27 March 2020).

²³ Lindberg, M., *Fortsätt att fota Poseidon i Göteborg*, *Borås Tidning*, 30 April 2016, available on the following website: <https://www.bt.se/insandare/fortsatt-att-fota-poseidon-i-goteborg/> (last visited on: 27 March 2020).



Instead, the Court referred to case C-160/15 (“**GS Media**”), in which the CJEU emphasised the significance of obtaining the copyright holder’s consent for communicating copyright-protected work, as Article 3(1) of the Directive prescribes that any communication to the public requires such consent.

On this basis, the Court concluded that Wikimedia’s linking to Wikimedia Commons’ database could in fact constitute a communication to the public within the meaning of Article 3(1) of the Directive and Chapter 1, Section 2 of the Act. The fact that the artworks were available on the artists’ own websites did not alter this conclusion.

4.3 Back to the question of freedom of panorama

The Court then addressed Wikimedia’s contention that the publications of the artworks on Wikimedia Commons’ website were lawful reproductions under the freedom of panorama and that consequently Wikimedia’s linking to such publications were lawful.

Wikimedia argued that the photographs on Wikimedia Commons’ website had been lawfully published by private individuals, with reference to the freedom of panorama in Chapter 2, Section 24, Paragraph 1, Item 1 of the Act. According to Wikimedia, the Supreme Court’s ruling in NJA 2016 p. 212 did not apply to private individuals who publish pictures of artworks on Wikimedia Commons.

However, the Court stated that the freedom of panorama only applies to, e.g. photographs, paintings, etc. but not reproductions in three-dimensional or other plastic form nor publishing a picture of a copyright-protected work on the internet. As such, the Court held that a publication of copyright-protected work on the internet cannot be deemed as anything other than a communication to the public which requires the consent of the copyright holder. Since consent from the copyright holder had not been obtained for the photographs of the artworks published on Wikimedia Commons, Wikimedia’s linking to such photos was not lawful under the Act.

4.4 The relevance of financial purpose and/or bad faith

In order to determine whether Wikimedia’s linking activities constituted a communication to the public, the Court again referred to the case of *GS Media*. According to this case, linking to copyright-protected works, which are freely available on another website *without* the consent of the copyright holder, does generally not constitute a communication to the public provided such links are provided *without the pursuit of financial gain* by a person *who did not know* or could not reasonably have known the illegal

nature of the publication. On the contrary, if links are provided for such purpose, knowledge of the illegal nature is presumed.

As it was undisputed that Wikimedia, in its capacity as a non-profit association, did not act with the pursuit of financial gain, the Court went on to determine whether Wikimedia knew or should have known that the links on their website gave visitors access to unlawful publications of copyright-protected artworks. In this regard, the Court noted that Wikimedia had received a letter from BUS on 19 December 2013, in which BUS alleged that Wikimedia had committed copyright infringement. Accordingly, the Court asserted that Wikimedia had been aware of the illegal nature of their linking since at least 19 December 2013.

Consequently, Wikimedia’s linking to Wikimedia Commons’ database constituted a communication to the public within the meaning of Article 3(1) of the Directive and Chapter 1, Section 2 of the Act. As a final question, the Court assessed Wikimedia’s claim that the artists had given their consent to communicate the artworks to the public.

4.5 Implied consent?

Wikimedia asserted that the artists, by publishing the artworks on their own websites, had given their implied consent for others to publish the artworks on other websites. Under such circumstances, the copyright holder must have considered and consented to a widespread dissemination of the works on the internet. Further, Wikimedia stated that when copyright-protected work has already been published on the copyright holder’s website, there is no practical or economic significance for the copyright holder as to whether a third party links to the same work on another website.

The Court stated that the copyright to a work, from the point of creation, belongs to the copyright holder, and that such copyright can only be granted to a third party by express or implied consent. Unclear or “tacit” agreements are to be interpreted to the beneficially for the copyright holder’s. According to the Court, the fact that the artists had published the artworks on their own websites could not constitute an implied consent for Wikimedia, without limitation, to link to the artworks on other websites. Further, the Court noted that there was no evidence which demonstrated that Wikimedia had initiated any contact with the artists or BUS since the launch of Wikimedia’s website in 2012. Further, as mentioned above, BUS had contacted Wikimedia in December 2013 without Wikimedia taking any action. Thus, the Court concluded that the artists had not even implicitly consented to Wikimedia’s linking.

In conclusion, as Wikimedia had communicated the artworks to the public without the express or implied consent of the artists, Wikimedia had infringed the artists’ copyright.

4.6 Concluding remarks on the Court’s judgment

With the Court’s judgment in mind, it seems that the Court did not base its conclusion of copyright infringement on an assessment of whether the artworks had been communicated to a “new public” (at least not expressly). The lack of discussion around the “new public” issue can

perhaps be explained by the difficulties associated with determining whether a communication has occurred to a “new public” when, prior to the communication in question, the copyright-protected work has already been published on the internet by the copyright holder.

For example, when an artwork is permanently placed in a public square, the artwork’s public is more or less distinct, namely anyone who visits the public square. Thus, if someone other than the copyright holder photographs the artwork and publishes it on the internet, is it quite clear that the artwork has been communicated to a “new public” in such a way that the copyright holder’s exclusive right has been infringed (see further below).

However, when the copyright holder has published a photograph of the artwork online, the question of a “new public” becomes a bit more problematic to determine. As everyone who has access to the internet may in fact visit the copyright holder’s website, it is difficult to limit the public to any other public than the entire internet population. In this regard, one may ask if it is possible to communicate the work to a “new public” after the initial communication by the copyright holder.

Against this background, it may be argued that the question of whether a communication has been made to a “new public” is irrelevant in situations where copyright-protected works have been published online by the copyright holder. This might be why the Court, instead of discussing the “new public” issue, emphasised the importance of obtaining the copyright holder’s consent (with reference to the CJEU’s case law). By this argumentation, the artists’ copyright to the artworks could be protected even though the “new public” argument was not clearly applicable.

Lastly, one may ask what the practical consequences of this case may be, especially in light of the Directive and the CJEU’s case law. First of all, it should be noted that the Court’s case has a limited value as a precedent and should thus not lead to any far-reaching conclusions since it is a decision from the first court instance. With this being said and considering the incalculable reach of the internet today with interconnected websites, it may in many cases be difficult or even impossible to identify the copyright holder and to obtain his or her consent. Consequently, private individuals and legal entities would be in breach of copyright more or less on a daily basis, e.g. when posting pictures of artworks on social media such as Facebook, Instagram and other digital platforms. Therefore, the CJEU’s decision in *GS Media* is of great relevance. As mentioned above, the case allows communications without the copyright holder’s consent if: (i) the communication is provided without the pursuit of financial gain; (ii) by a person who did not know or could not reasonably have known the illegal nature of the publication. Accordingly, private individuals and other actors on the internet are not prohibited from posting pictures of copyright protected works online always provided that the economic value related to the work is reserved to the copyright holder. Thus, the decision in *GS Media* could be said to serve as an outlet for the free use of the internet in a way that accords with the copyright holder’s exclusive rights.

5 SUMMARY

The purpose of this article has been to discuss the Supreme Court’s and the Court’s judgments in light of, on the one hand, the expansive growth of digitalisation and, on the other, the copyright holder’s exclusive right to communicate the work to the public, the freedom of panorama exception set out in Chapter 2, Section 24, Paragraph 1, Item 1 of the Act, and the term communication to a “new public” according to the CJEU’s case law related to Article 3(1) of the Directive.

In the Supreme Court’s judgment, the copyright holder’s exclusive right to communicate the work to the public took precedence over the freedom of panorama, as the provision of the database in question led to a significantly larger limitation of the copyright holders’ exclusive rights than is permissible under the Act.

The Court’s judgment demonstrates the difficulties associated with determining whether a communication has been made to a “new public” when the copyright holder has already published the copyright-protected work online, as millions of people today have access to the internet.

To summarise, the Supreme Court’s and the Court’s judgments are clear examples of how the application of intellectual property law continuously needs to be adjusted and adapted as the digitalisation continues to expand rapidly. In light of the fact that digitalisation will undoubtedly continue to grow, legislators and courts will face new questions and challenges when adopting and adapting intellectual property law to ensure a reasonable balance between the copyright holder’s exclusive rights and the free use of the internet.



Carla Zachariasson

is currently working as an associate at the Swedish law firm Vinge’s Corporate Commercial and IP groups. Carla has an LL.M. from Uppsala University (2019) and has also studied business law at the Universidad Complutense de Madrid (2017). In 2018, she was a master thesis trainee at the Embassy of Sweden in Washington D.C.



Anna Li

is currently working as an associate at the Swedish law firm Vinge’s Dispute Resolution and IP groups. Anna has an LL.M. from Uppsala University (2019) and has also studied, inter alia, IP law at the University of Zurich (spring 2018). In Anna’s master thesis, she studies the trademark and design protection for fashion designs.