

## **ALAI Executive Committee meeting**

**Dubrovnik, Sunday 5 October 2008**

### **Report from the Swedish group**

## **Commercial break as a violation of moral rights<sup>1</sup>**

The Supreme Court of Sweden decided in March 2008 that the insertion of commercial breaks in the TV broadcast of a film caused a change to the film in a manner which was prejudicial to the director's artistic individuality (but not to his literary or artistic reputation), thus causing an infringement of the director's moral rights according to article 3 paragraph 2 of the Swedish Copyright Act (SCA).

This decision highlights several dimensions of moral rights touchstones in the application of those rules, concerning (i) whether the potential violation may be a *preset phenomenon* as such, like a (any) commercial break, and (ii) to what extent and under what circumstances moral rights may be *waived* and (iii) the standards for *negligence* when commercial TV-stations are negotiating acquisitions from film producers of broadcast rights for films. A fourth question, also touched upon in this decision, concerned whether a TV station, fully following the norms for commercial breaks of the EC TV-Directive, would still quite generally violate statutory norms for moral rights.<sup>2</sup>

### **About the case**

In the summer of 2002 the Swedish TV channel TV4 interrupted the broadcasting of two motion pictures - directed by Claes Eriksson and Vilgot Sjöman respectively - by inserting commercial breaks. The film directed by Claes Eriksson was interrupted twice by commercial breaks. The film directed by Vilgot Sjöman was interrupted three times, with approximately 30 minutes between the breaks. In the case of Eriksson's film, longer periods elapsed between each break. The breaks in both cases had mainly the same contents and structure, each consisting of 10 to 14 commercials each lasting for 30 seconds or less. Every block of commercials lasted for about 5 minutes. All commercial breaks started and ended with a melodic signature, a sign with the information given to the audience that "the movie will continue after the break" or "the movie now continues", plus a sounding voice giving the same information

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<sup>1</sup> This case of more thoroughly presented by *Jan Rosén* in GRUR Int 8-9/2008, p 772 et seq.

<sup>2</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, amended by Directive 97/36/EC of the European Parliament and of the Council.

In the spring of 2002, after amendments had been made to the Swedish TV and Radio Act in order to implement the TV Directive, TV4 was allowed to insert several commercial breaks in films and similar programmes. Previously TV4 had only been allowed to insert one commercial break in a film, but had since many years to some extent circumvented this restriction by breaking every evening broadcast of a film with a news forecast, i.e. another “programme” (not a commercial), which was preceded and followed by of a block of commercials, thus in fact causing a break in the showing of the film for some 30 minutes.

TV4 was unquestionably licensed by the relevant film companies to broadcast the films. The film companies' distribution contracts with TV4 indicated no express or indirect restrictions on TV4 as concerns commercial breaks.

According to Section 3(2) of the SCA a work may not be changed in a manner which is prejudicial to the author's literary or artistic reputation or to his individuality, what is usually called the author's 'droit au respect', nor may it be made available to the public in such a form or in such a context as is prejudicial in the manner stated. Further, the author may, with binding effect, waive his rights under Article 3 only in relation to uses which are limited in character and scope, Section 3(3) SCA).

According to Section 54(3) SCA anyone who wilfully or with negligence commits an act constituting an infringement or a violation of copyright, shall pay to the author or to his successor in title a compensation for losses, mental suffering or other injury caused by the act.

With regard to the Supreme Court's phrasing of its decision it is of importance to note that Claes Eriksson had argued that he felt that the commercial breaks were infringing his moral right because unfamiliar images and sounds were inserted *into* his film without his permission and that these images disturbed the film's carefully considered length and rhythm and that the commercial messages of the commercials were in strong contrast with the morale of the film and its satirical depiction of a hysterical hunt for money.

Vilgot Sjöman, on his part, argued that his film had a sort of dreamlike, slow rhythm which was in contrast with the noisy and fast-going commercial breaks. He further argued that the breaks contrasted negatively to the fact that the film took place in a Swedish and English 1900th-century setting, which had taken great efforts to create artistically.

TV4, in defence, claimed that the directors must have known and accepted the fact that their films, if shown on TV4, would be interrupted by commercials, at least in the way TV4 had generally interrupted films for the last decade – arguably a more significant kind of break than accomplished in this case. Accordingly, they must be said to have waived their moral rights to that extent.

### **Judgment of the Court**

Regarding the relationship between the norms for commercial breaks in the TV&R Act and moral rights, the Supreme Court makes the following statement. The amended TV&R Act, accepting certain breaks in film broadcasts and generally stating that commercial breaks must not violate “the integrity and the value of the programme nor the rights of the rights holders”, was well in line with the EC TV Directive.

The Supreme Court further stressed that the amendments to the TV&R Act had competition- and consumer-related purposes. Thus, they were intended to solve the competitive downsides that Swedish broadcasting companies suffered in relation to foreign broadcasting companies, which the current legislation had led to, but also to reduce the disturbances that commercial breaks in commercial television lead to from a consumer perspective. Just as in the preparatory works to the Act the Court further stressed that the change of rules does not have an effect on the law of copyright and that a change or interruption prejudicial to an author's literary or artistic reputation regarding cinematographic works, if otherwise not stated in law or contract, also in the future will need the permission from the rights holders.

Accordingly, the Supreme Court states that the question whether the interruption of commercial breaks when broadcasting cinematographic works is violating the author's moral rights, shall be answered without prejudice to the regulation of commercial breaks in the TV&R Act. The viewers' opinion whether the commercial breaks disturb the cinematographic work shall thus not be regarded when considering whether the authors' moral rights have been infringed. The viewers' interests are being taken care of by the TV&R Act.

Regarding the argument of TV4 that the commercial breaks do not change the cinematographic works in a manner which is prejudicial to the directors' literary or artistic reputation or their individuality, the Supreme Court states that the creative elements in a cinematographic work includes a specific rhythm in the continuance of the film, the story telling and the atmosphere that is created by the specific combination of images and sound. The commercial breaks interrupt the continuance of such elements of a cinematographic work and its atmosphere. A cinematographic work which is interrupted by commercial breaks must thus be said to have been *changed* in the manner stated in section 3.2 SCA.

In considering whether the commercial breaks were prejudicial to the directors' reputation or individuality, the Supreme Court referred to the preparatory works to the SCA and noticed that this a priori is to be answered from the author's perspective, however more generally to be tested by an objective standard. Furthermore, the author has a right to be protected against disposals which, even if they are not prejudicial to his reputation, denotes an attack against the integrity of the work and infringes the emotions he as an artist has for the work he has created. A judgement must also consider the kind of art at issue and the circumstances of the individual case. Great regard has to be taken to the characteristics of the work at issue and its importance from an artistic point of view.

Cinematographic works are characterised by a creative process, the Supreme Court states, including directing and editing, that aims at a total effect which enables the viewer to mentally participate in the film. The fictive time during which the film takes place is complex and unique for every film. Commercial breaks in a film have the effect of breaking apart the intended total effect, and the viewer may lose the theme of the story or lose references forwards or backwards in the storytelling.

A commercial break further has the effect of a transfer from the environment of the film to other environments and moods created by the commercial breaks. Even if the commercial break takes place when the movie alters scenes or environments, the mood sought by the director regarding the different scenes of the film is disturbed by the insertion of totally dissimilar environments and phenomena. Commercial breaks also have the effect of altering the actual length of the film, what is an important part of the work.

A cinematographic work - in this case a comedy and a drama respectively - in the form of a feature length film has to be considered more sensitive to interferences than a film based on short stories, where the stories not necessarily have to be viewed in a reciprocal relation, or a film in a non-feature genre, for example an instructional or educational film.

Further, a crucial statement of the Supreme Court is that, *irrespective* of the importance, ambitions or tendency of the feature film from an artistic point of view, the phenomenon of commercial breaks do normally have the effect that the continuity and dramaturgy of the film is broken as strange images are inserted into the work in a way that infringes the individuality of the author. Commercial breaks are produced with a *commercial purpose*, accordingly with the aim to draw the attention of the audience from the film to the commercial break. The interests behind the commercial breaks are not of such a standard that they are to be given priority over the interests of the rights holders when evaluating objectively whether the moral rights of the rights holders have been infringed.

In sum, The Supreme Court finds that the commercial breaks must be said to constitute an infringement of the right holders' *individuality* in the meaning of section 3.2 SCA. The commercial breaks did not, however, infringe the directors literary or artistic reputation. The Supreme Court also finds that the directors have not waived their rights as regards the commercial breaks and that the infringements have been done with negligence.

### **Some remarks**

A test of a potential violation of an author's *droit au respect* has hitherto presumed a strict in casu evaluation of the elements potentially causing the violation. Not so in this case. Following the Supreme Court's judgement *commercial breaks* of any length and nature are as such more or less generally degrading to any film. In any case are two breaks for five minutes in a film running for more than 90 minutes beyond what is acceptable, irrelevant where they are "inserted" into the film, their actual content and whether they are preceded and followed by sign, sound and image indications. The norms of the EC TV-Directive, to the extent they are stating a maximum standard for commercial breaks, are then totally irrelevant.

Further, moral rights cannot be transferred or licensed, but they can be waived in relation to uses which are limited as to their character and scope. All courts found that no waiver had been given by the authors by their mere acceptance of broadcasts of the films in commercial TV. Furthermore, the court of first instance found that even if such a waiver had been given, it could not be considered limited as to character and scope in this case, thus not valid. The appeal courts did not contest this view.

TV4 was also found negligent by not asking for permission to broadcast the films directly from the film directors. The acceptance of the film companies, the TV-channel's contractors, to broadcast the films with or without commercial breaks was irrelevant in this respect. As demonstrated in this case, TV4 had never met a prohibition from an author to send a film with commercial breaks, what they actually had done almost daily since more than a decade. Still, the Supreme Court found that TV4 was negligent by not directly asking for permission from the directors or, practically speaking, from any author or performing artist contributing to a film to be sent with commercial breaks. What the Court then poses upon a commercial broadcaster is nothing less than a strict liability for *droit moral* violations, thus going far

beyond what statutory law actually states. All the more so, if the clear position of the court of first instance is followed, as even if a TV-station actually asks the author for a permission to send a film with commercial breaks, such a permission is invalid, not being limited as to its character and scope.

Jan Rosén