

## REGARDING "COMMUNICATION TO THE PUBLIC" AND EVIDENCE IN COURT

*In his proposal for a preliminary ruling from the Court of Justice of the European Union (CJEU) on September 3, 2020, the Advocate General Gerard Hogard answered, inter alia, the Patent and Market Court of Appeal's (PMCA) questions regarding the term "public" in general in article 3.1 and 4.1 of the Infosoc Directive<sup>1</sup> and whether a general court is to be considered as "the public" in the meaning of these articles. The Advocate General's response is that the measure of submitting a copyright protected work as evidence to the court by e-mail does not constitute neither a communication nor a distribution to the public. This, however, again raises the question of how copyright protected material can be secured as evidence and submitted to a Swedish court and whether the legal situation is about to change.*

PMCA's questions to the CJEU have been prompted by a case concerning infringement of the copyright to a photograph. Two private individuals had been in conflict with each other for many years and used their respective websites to communicate in the dispute. On both sides, the parties had brought actions for damages for defamation and in connection with this process invoked and submitted screenshots from these websites which, on the one hand, included a photograph and, on the other hand, a text. The parties brought actions against each other with mutual claims for compensation for copyright infringement through reproduction and making the copyright-protected works available to the public. In the Patent and Market Court (PMC) it was determined that the text and the photograph as such were protected by copyright and that the reproduction and the submission (distribution) constituted unauthorized disposals. Concerning the text, however, PMC found that there was a legitimate interest in using it as a part of the lawsuit and that the measure therefore fell under the exception to use copyright protected works in the interest of the judiciary.<sup>2</sup> The same could not be demonstrated concerning the photograph, whereby this constituted an infringement. Since the party, however, could not prove any damage, both parties' actions were dismissed. The case was appealed only in respect of the photograph. During the proceedings in the PMCA, after it was clarified that the evidence was submitted to the court by email, the question was raised whether the copyright dispositions in addition to reproduction and distribution also constituted an unauthorized communication to the public.

In the Advocate General's preliminary ruling, it is initially stated that the transmission by e-mail constitutes a communication in accordance with Article 3.1 in the Infosoc Directive, not a distribution of the work according to Article 4.1 of the Infosoc Directive. The reason for this conclusion is that distribution requires a physical copy of the work.<sup>3</sup> The relevant question instead was whether a court was considered as "the public". According to the Advocate General's assessment, a communication of copyright protected material to third parties performing administrative or judicial

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<sup>1</sup> DIRECTIVE 2001/29 EC OF THE EUROPEAN PARLAMENT AND OF THE COUNCIL of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society.

<sup>2</sup> See Chapter 2 Section 26 b second paragraph of the Copyright Act and PMFT 2158-17 p. 12 – 17.

<sup>3</sup> The Advocate General refers in this case to the CJEU's ruling *Nedelands Uitgeversverbond and Groep Algemene Uitgevers* (C 263/18), EU:C:2019:111) as well as *Syed* (C- 572/17, EU:C:2018:1033). The latter for the purpose of clarifying that the submission of a photograph as evidence in a case cannot be considered to constitute sale or transfer of ownership right to the work or even as a preparation for such a sale.

functions<sup>4</sup> can normally not be considered a “communication to the public” within the intended meaning of Article 3.1 of the Infosoc Directive, “*precisely because those persons, while not a private group per se, would nonetheless be constrained by the nature of their official functions.*”. Court personnel also have no right to treat copyright protected material as if though it was not protected by copyright. Further, the communication itself, through submission to the court, is aimed at a “*clearly defined and limited or closed group of people who exercise their functions in the public interest and who are [...] bound by legal and ethical rules concerning, inter alia, the use and disclosure of information and evidence received in the course of court proceedings*”. Therefore, the court cannot be considered as “the public”, according to the Advocate General. It is clear that the Advocate General attaches great importance in his assessment to the fact that the transfer lacks independent financial significance for the copyright owner and that the recipients, i.e. the court and its officers as well as any members of the public who request access to the material, thereby are not given the right to freely dispose it.<sup>5</sup> In summary the Advocate General concludes that a party’s electronic submission to a court of copyright protected material as evidence in a case does not constitute a “communication to the public” or a “distribution to the public” within the intended meaning of Article 3.1 respectively Article 4.1 in the Infosoc Directive.

In Sweden, since Göta Court of Appeal’s judgement of October 15, 2014<sup>6</sup>, it has been highly debated that when evidence in the form of e.g. screenshots is invoked and submitted to the court, it may be considered as an infringement of copyright. The question has been tried in several cases and it is clear that according to older Swedish case law, it constitutes an unauthorized reproduction to reproduce a copyright protected work for the purpose of submitting it to the court as evidence.<sup>7</sup> When the physical sample is, subsequently, submitted to the court, it constitutes a distribution to the public.<sup>8</sup> However, when it concerns a submission of an electronic copy by e-mail it has been established that it does neither constitute distribution to the public nor communication to the public, since the court is not to be considered as “the public”.<sup>9</sup>

If the Advocate General’s preliminary ruling is accepted by the CJEU, the Swedish view that a court does not constitute a “public”, at least in cases that concerns electronic copies (communication to the public), will be determined. It is, however, more doubtful whether such outcome will change the perception that a court is a public in the case that an unauthorized physical example is submitted to

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<sup>4</sup> The Advocate General does not totally rule out in his assessment that authorities and courts can very well exceed “a certain minimum requirement” with respect to the number of potential people concerned.

<sup>5</sup> The Advocate General’s conclusion is thus not changed by the fact that the copyright protected work becomes a public document, which, if it is not protected by confidentiality according to Chapter 31 Section 23 of the Public Access to Information and Secrecy Act, may become available to the public.

<sup>6</sup> Case no. FT 311-13.

<sup>7</sup> See Göta Court of Appeal’s judgement in case FT 311-13 and the PMC’s judgements in cases PMFT 2585-17 and PMFT 4717-18.

<sup>8</sup> See PMCA’s judgement in case PMFT 4717-18 announced on December 7, 2018.

<sup>9</sup> See PMCA judgement in case PMFT 2585-17 where reference was made to Reha Training (C- 117/15, EU:C:2016:379) in the assessing whether the court should be considered to constitute a public.

the court (distribution).<sup>10</sup> The prevailing discrepancy in Sweden between, on the one hand, electronically submitted examples and, on the other hand, digitally submitted examples, may seem somewhat strange as the reasoning concerning the economic significance of the disposal for the copyright holder as well as the principle of openness apply regardless of how the copyright protected work was submitted to the court. Reasonably, the same reasoning could be applied to the reproduction itself.

In light of the above, it is particularly interesting that the Advocate General takes the principled outset that it would be a serious restriction to a party's right to defence if it was not possible to submit evidence to a court because another party or a third party claims copyright protection to that piece of evidence.<sup>11</sup> In a footnote, the Advocate General states that the concept itself of "fair trial" includes the principle of equality between the parties of a process, which in turn requires that each party is given a reasonable opportunity to present its case and evidence on terms that do not give significant disadvantages to the counterparty.<sup>12</sup> According to the Advocate General, "*the very function of the optional exception or limitation to copyright protection for uses in administrative and judicial proceedings provided by Article 5(3)(e) of Directive 2001/29*" is to avoid such a risk.

However, the question of the application of Article 5(3)(e) of the Infosoc Directive was not relevant for the Advocate General's (or the CJEU's) assessment.<sup>13</sup> This is unfortunate since there is still uncertainty in Swedish law regarding on whether the exception in Chapter 2, Section 26 b second paragraph of the Copyright Act may be applied to the reproduction of copyright protected works for the purpose of securing evidence.<sup>14</sup> In PMFT 4717-18 the PMCA stated that an objective assessment in the individual case must be carried out, taking into account that the requirement cannot be placed too high on the individual to show that the use of the protected work has taken place in the interest of the judiciary. If a copy of the copyright protected work can be assumed to be of importance in the process, the exemption shall thus apply.<sup>15</sup>

The conclusion that can be drawn from the above is that the PMCA and the Advocate General agree that, from a rule of law perspective, it is close to necessary to, in some cases, allow reproduction for the purpose of securing evidence and that the subsequent submission should not constitute a relevant copyright disposal.<sup>16</sup> However, a conscious consideration is required before the measures are taken, including to clearly ensure that the copyright protected work has significance as evidence in the case. This development in the field of law is welcome, as the means

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<sup>10</sup> PMCA in its order for preliminary ruling, referred to a question to the CJEU as to whether the term "public" should be interpreted differently in the various provisions, but the Advocate General unfortunately did consider that question could be answered in the context of the present case since it was clear that it only applied to electronically submitted examples.

<sup>11</sup> See the right to effective legal remedies and an impartial court, which is guaranteed in Article 47 of the European Union's Charter of Fundamental Rights.

<sup>12</sup> See footnote 18 in the proposal for a decision with reference to *Otis et.al.* (C- 199/11, EU:C:2012:684).

<sup>13</sup> Art. 5.3 e in Infosoc Directive has been implemented in Swedish law through Chapter 2 Section 26 b second paragraph of the Copyright Act.

<sup>14</sup> In PMCA's judgement in case no PMFT 4717-18 has, however, clarified that the exemption can also be applied to the use of individuals with reference to the right to a fair trial.

<sup>15</sup> See PMFT 4717-18.

<sup>16</sup> PMC's reasoning in case PMT 2158-17 s. 14 provides support for the corresponding position.

of edition claims or asking a potential counterparty for consent to reproduction are very blunt tools in order to secure a party's right.

There is still no information on when the CJEU will finally rule in the matter, but we will monitor the outcome.

For questions concerning use of copyright protected works, you are welcome to contact Elin Etéus or Wendela Hårdemark.