



Högsta domstolen, Urteil vom 18.3.2008, AZ T 2117-06, *Claes Eriksson et al v. TV 4*  
– *Werbeunterbrechung und Urheberrecht*

**Werbepausen in einem im Fernsehen ausgestrahlten Film verletzen das Urheberpersönlichkeitsrecht des Regisseurs, wenn dadurch die Integrität und der Wert des Films beeinträchtigt wird.**

### **SUPREME COURT RULING<sup>1</sup>**

handed down in Stockholm on 18th March 2008 Case No: T2117-06 PLAINTIFF TV4 AB, 556242-7152 15 79 Stockholm, Legal representative: Peter Danowsky, Danowsky & Partners Legal Chambers KB Box 16097 103 22 Stockholm opposing parties: 1. The estate of Vilgot Sjöman, 2. Claes Eriksson, Legal representative for both: Håkan Sjöström Glimstedt lawfirm AB Box 2259 403 14 Gothenburg

### **THE CASE**

Infringement of copyright Svea Court of Appeal ruling on 12th April 2006 in case no. T 451-05, Court of Appeal ruling see Annexe,

### **DECISION**

The Supreme Court confirms the court of appeal's ruling. TV4 AB shall compensate Claes Eriksson for legal expenses in the Supreme Court to the extent of one hundred and fifty-two thousand four hundred and sixty (152,460) kronor, of which 137,400 is for representative's fees, including interest as per § 6 of Interest Act from the day before the Supreme Court's ruling until payment is made. TV4 AB shall compensate the estate of Vilgot Sjöman for legal expenses in the Supreme Court to the extent of one hundred and fifty-one thousand four hundred and sixty (151,460) kronor, of which 137,400 is for representative's fees, including interest as per § 6 of the Interest Act, from the day before the Supreme Court's ruling until payment is made.

### **CLAIM IN THE SUPREME COURT**

TV4 AB has claimed that the Supreme Court dismisses Claes Eriksson's and Vilgot Sjöman's claim advanced at the District Court. TV4 has further urged that the Supreme Court order Claes Eriksson and the estate of Vilgot Sjöman to compensate the company's court expenses in the district court and court of appeal with the amounts there claimed.

Claes Eriksson and the estate of Vilgot Sjöman have disputed the claims.

The parties have claimed compensation for legal costs in the Supreme Court.

### **OPINION OF THE COURT**

The parties have cited the same circumstances as in the court of appeal in the Supreme Court. The Supreme Court has held the main proceedings. The hearing in the court of appeal with Claes Eriksson, Vilgot Sjöman and Mats Örbrink, and the hearing at the District Court with Kjell-Åke Andersson, Kjell Grede and Astrid Söderbergh Widding have been presented through playback of the tape recordings. The Supreme Court had sight of the recorded films in question - Claes Eriksson's "The Shark who knew too much" and Vilgot Sjöman's "Alfred" – through playback of video recordings including the advertising inserts.

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<sup>1</sup> Englische Übersetzung von KLYS, [http://www.klys.se/the\\_judgement\\_Supreme\\_Court\\_18\\_March\\_2008.htm](http://www.klys.se/the_judgement_Supreme_Court_18_March_2008.htm) (4.6.2008).

In § 3 clause 2 of the Act (1960:729) on copyright for literary and artistic works (the Copyright Act) it is prescribed that a work may not be changed so that the author's literary or artistic reputation or individuality are damaged. Neither may the work be made available to the general public in such a form or in such a context that is in the stated way injurious to the author. According to the third part of this section of the Act the author can concede his right with binding effect only insofar as it concerns an application of the work limited in type and scope. From §54 clause three of the Copyright Act it follows that anyone who wilfully or negligently undertakes actions, which imply infringement of copyright, shall compensate the author or his assignee for losses, suffering or other detriment ensuing from that action.

The dispute concerns the interruptions for advertisements, which occurred when TV4 transmitted both the films. What is contentious between the parties is whether the interruption constitutes an infringement of the author's moral rights, whether any concession of this right was granted, and whether TV4 acted negligently.

TV4 has asserted that the advertising interruption during broadcasts occurred in conformity with the legislation and practice based on the so-called TV directive, the council directive 89/552/EEG of 3rd October 1989 concerning co-ordination of certain conditions stipulated in the laws of the member states, and other conditions concerning implementation of broadcasting activity for television, amended by the European Parliament and Council Directive 97/36/EG. In Sweden the question of advertising interruptions in the radio and TV legislation (1996:844) is governed, insofar as is now in question, as amended in 2002, on the basis of the TV directive in its amended wording. According to Ch. 7 § 8 of this Act, adverts in TV broadcasts must be transmitted between programmes, but, according to § 7a, they may under certain conditions also be broadcast during such content as feature films, but only in such a way, according to § 7, that – with consideration for natural breaks and the broadcasting length and nature of the programme – the integrity and value of the programme or the rights of the copyright holder are not violated. From the preparatory work on amendment to the law it is evident that the aims were matters of competition and consumer policy, more specifically to overcome the competitive disadvantages for Swedish programme companies relative to foreign ones, to which the regulations then in force led, and at the same time reduce the disruptions that commercial TV advertising breaks involve for the public (prop. 2001/02:82 page 11). In the preparatory works it is emphasised that the change in law does not influence the copyright regulations and that an injurious change or an interruption to a film, to the extent that follows from agreement or applicable legislation, even in the future will require the rights holder's consent (a. prop. page 13). Before the change, the position was that the programme could not be interrupted by advertising broadcasts; they could however be transmitted in longer breaks within sports programmes, in breaks within programmes structured around performances and with events where breaks occurred for the public as well, and between segments of programmes consisting of finished-off parts; in feature films no advertising interruptions were allowed (prop. 1995/96:160 p. 122 ff, compared with prop. 1990/91:149 page 102 ff.).

The examination of whether an action taken in connection with a film being shown on TV violates the author's moral rights must therefore take place regardless of the public legislative regulations in the radio and TV legislation.

TV4 has stated that advertising breaks do not mean that the film interrupted is changed, as § 3 clause 2 of the Copyright Act implies.

What is typical of a film work is that ongoing progress, narrative, and the atmosphere created for the characteristic association for the feature film of pictures and sound belong, at a certain pace, to the creative elements in the work. Advertising interspersions break into the progress of the feature film and into its atmosphere. A feature film that is shown with advertising breaks must therefore by this very fact be considered as having been altered, in the sense meant in § 3 paragraph 2 of the Copyright Act. It need not therefore be considered whether the advertising insertion also means that the work is reproduced in an unfamiliar context.

Hereafter the question is whether the change is injurious to the author's reputation or distinctive character. In the Authorial Rights Committee's report SOU 1956:25 Copyright (reproduced in NJA

II 1961 page 63 ff.) among other things the following statement is made concerning the condition in § 3 paragraph two. In assessing to what extent the changes undertaken can be considered as injurious to the author the case must be seen from this point of view, but otherwise an objective yardstick is to be applied. The author is also entitled to protection against processes which, even though not detrimental to his reputation in the eyes of others, constitute an assault on the integrity of the work and violate the affection he as the artist harbours for the work he has created. The assessment must be made from the starting point of the conditions within the type of art one is dealing with and with due consideration for the circumstances in the particular case. Also externally insignificant changes can misrepresent the work. The requirements are not as strict on reproduction of literary or musical works of lower value, though here too the author should be protected against more serious interference. The purpose of the action taken is also significant. One should also take into consideration whether the reproduction claims to present the work in its original form, or whether it is self-evident that the work is not being reproduced in original form. – In the proposition the head of department agreed in essence with the committee's statement. Concerning protection for the author's distinctiveness, it is stated that one should also keep in mind processes which – even though they may not perhaps damage the author's reputation – nevertheless are injurious to his personality, as it has found expression in his work (NJA II 1961 page 73) – This statement still holds true in law.

As stated in the district court's ruling, TV4 inserted interruptions for advertisements when showing the two feature films, in two instances in Claes Eriksson's "The Shark who knew too much" and in three instances in Vilgot Sjöman's "Alfred". Each interruption is introduced with a vignette with musical signature and including the word "Advertisement" (Reklam), and a voice saying that "the feature film continues in a moment", and the interruption then finishes with a vignette with music and the words "The feature film now continues". On one occasion the vignettes got mixed up. Each interruption, lasting about five minutes, contained about ten advertising slots for goods and services directed at consumers. The interruptions occurred in connection with scene changes or a change in the narrative of the film. The advertising interruption was at a somewhat higher noise level than the feature film.

Claes Eriksson has declared that he considers the advertising breaks to be injurious because extraneous film pictures and sound come into his film without his permission and disturb his carefully considered length and rhythm, and that the advertisements' messages contrast starkly with the moral of the film and its satirical description of a hysterical pursuit of money. Vilgot Sjöman stressed that his film has a sort of dreamy, hesitant pace, which is in conflict with the noisy and disjointed advertising inserts, and that the film is enacted in a Swedish and European 19th century speech environment, which he went to very great pains to re-create.

The judgement on whether the advertising interruption in a feature film violates the author's reputation or distinctive character must be made on the basis of the criteria stated a short time ago. This means that the TV viewers' perception of the advertising interruption in general as disruptive must not be taken into consideration. The interest of viewers is considered to be met through the mechanism of public legislation.

A starting point is the circumstances within the type of art in question. It is apparent from the expert evidence presented, such as Claes Eriksson's and Vilgot Sjöman's information that it is characteristic of film works that the creative work – including production, direction and cutting – aims at an overall experience, which leads the audience to participate in the narrative of the film in time and space.

The fictitious period in which the film takes place is complex and unique for each film. Interruptions to a feature film mean that the intended overall experience is broken up, and the audience risks losing the thread of the narrative or missing allusions forwards or backwards in the narrative. Spatially an interruption means a change from the film's environment to other environments and moods created by the advertising slots. Even if the advertising break occurs in connection with the film's scenes or environment being changed, the director's intended interplay between the film's different scenes is broken through the insertion of completely different

environments and occurrences. Interruptions for advertisements also mean that the film's actual length is prolonged for the audience; the length of the film is a not insignificant part of the work.

In reaching judgement the nature and significance of the work should also be considered from an artistic point of view. A feature film --whether a comedy or a tragedy in its aim -- in the form of a long film must be regarded as more sensitive to encroachment than a film of the nature of a short story or an episode, built up of mutually independent, complete parts that are not necessarily intended to be seen in a reciprocal connection, or a film of a non-narrative genre, like for example an instructional or training film. Irrespective of the artistic level, ambition and propensities of a feature film, the occurrence of advertising slots normally means that the continuity and dramatic nature of the film is broken and that the extraneous film pictures inserted into the work are bound to harm the author's distinctive nature.

The purpose of the break must also be considered. The advertising interruption occurs for commercial purposes and the intention is to draw the audience's attention away from the film to the advertising slot. The interests that lie behind the advertising interruption are, as the court of appeal found, not such that on establishing what can objectively be considered acceptable routes across the author's interest that his work is not reproduced in a way injurious to his intellectual rights.

Because of the stated sine qua non that the courts have supported, the advertising interruptions in the shows concerned in this case are considered to constitute a violation of the author's distinctive nature, contrary to the condition in § 3 paragraph two of the Copyright Act. The Supreme Court considers on the other hand, like the other courts, that the interruption does not violate Claes Eriksson's or Vilgot Sjöman's literary or artistic reputation.

The Supreme Court confirms the judgement of the lower courts that Claes Eriksson and Vilgot Sjöman have not conceded their moral rights as far as the interruption to the films is concerned, and that the infringement has occurred through negligence.

The Court of Appeal's ruling is therefore confirmed.

## ***Anmerkung***\*

### **I. Das Problem**

Im bemerkenswerten Ausgangsstreit aus Schweden hatten die schwedischen Filmemacher Vilgot Sjöman und Claes Eriksson mit Unterstützung der KLYS, einem Zusammenschluss von 16 Berufsverbänden aus dem Bereich von Kunst und Literatur, gegen die Fernsehanstalt TV4 geklagt. Sie warfen dem Privatsender die urheberrechtswidrige, weil ungenehmigte Praxis vor, nicht den dramaturgischen Erfordernissen Rechnung tragende Werbeunterbrechungen bei Filmen einzusetzen, um so Mehreinnahmen zu erzielen. Sie verlangten Unterlassung und Schadenersatz.<sup>2</sup>

Der beklagte Sender wendete ein, dass es sei seit Beginn kommerziellen Fernsehens „allgemein bekannt“ wäre, dass Filme durch Werbung unterbrochen würden. Werbung störe die Integrität und den Wert eines Films in keinster Weise und wäre schon gar nicht „kränkend“. Ein Verstoß gegen das im wesentlichen auf EU-Richtlinien gründende schwedische Fernsehgesetz läge ebenfalls nicht vor. Die Gerichte hatten letztlich darüber zu befinden, ob die Unversehrtheit eines Filmwerks durch derartige Werbezwangspausen verletzt würde oder nicht?

### **II. Die Entscheidung des Gerichts**

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\* RA Dr. *Clemens Thiele*, LL.M. Tax (GGU), *Anwalt.Thiele@eurolawyer.at*, Rechtsanwalt in Salzburg und gerichtlich beideter Sachverständiger für Urheberfragen aller Art, insbesondere Neue Medien und Webdesign. Näheres unter <http://www.eurolawyer.at>.

<sup>2</sup> Eingehend bereits *Thiele*, Werbezuspaußen in Fernsehfilmen: Ein Musterprozess in Schweden, MR-Int 2006, 141 ff.

Der *Högsta domstolen*, das höchste Zivilgericht in Schweden, bestätigte das Berufungsurteil und verurteilte den beklagten schwedischen Privatsender auf Zahlung von Schadensersatz in Höhe von jeweils EUR 14.000,-- an die beiden Kläger.

Das Gericht urteilte, dass TV 4, der zuschauerstärkste schwedische Fernsehkanal, durch die Werbepausen das ideelle Urheberrecht dieser Regisseure an zwei ihrer im Jahre 2002 ausgestrahlten Filme verletzt hatte und daher einen Schadensersatz von je rund 14.000 Euro zahlen musste. Eine Unterbrechung von Filmen stellte immer dann eine „Kränkung der Integrität des Werkes und des Urheberrechts des Regisseurs“ dar, wenn die Werbepausen so gesetzt worden, dass die „Kontinuität und die Dramaturgie des Films abgebrochen“ und „der dramatische Effekt des Wechsels zwischen zwei Szenen ausradiert würde“. Dies führte zu einer Verletzung des „ideellen Urheberrechts des Regisseurs“ und rechtfertigte den Schadensersatzanspruch in der genannten Höhe. Der Sender brauchte daher eine Zustimmung der Rechteinhaber für die Werbepausen. Diese konnte TV 4 nicht nachweisen. Die Pauschalverträge mit Regisseuren und Filmverleihen enthielten keine derartigen Werbegestattungsklauseln.

### III. Kritische Würdigung und Ausblick

Die Kläger, einer der beiden ist bedauerlicherweise verstorben, erfreuten Und sich prominenter Unterstützung: Kollegen wie Martin Scorsese, Woody Allen und Oliver Stone begrüßten den Versuch, etwas gegen die zunehmende Verhuzung von Filmen zu tun - egal ob durch Reklame, Schriftzeilen für Werbebotschaften, Ankündigung nachfolgender Sendungen, Formatänderungen oder Farbmanipulationen.<sup>3</sup> Damit ist angedeutet, dass das „Schwedische Modell“ für Reklamepausen durchaus zum Exportschlager werden könnte: „Die Werbeunterbrechung bei einem im TV ausgestrahlten Film verletzt das Urheberrecht des Filmregisseurs – und macht den Sender schadensersatzpflichtig.“

Die (präzisere) Kernaussage des Schwedischen Höchstgerichts erscheint äußerst bemerkenswert: Charakteristisch für einen Spielfilm ist ein fortlaufender erzählerischer und atmosphärischer Prozess, der durch Werbung zerbrochen werden kann. Betrifft die Werbeunterbrechung eine Veränderung des Filmwerkes, die massiv die persönlichkeitsrechtlichen Beziehungen des Urhebers zu seinem Werk eingreift, sind derartige Filmpausen ohne dessen Zustimmung rechtswidrig.

Dadurch ist aber deutlich gemacht, dass nicht jede Werbeunterbrechung zustimmungsbedürftig ist, sondern lediglich solche, die in den Rhythmus bzw. die Dramaturgie des Filmwerks eingreifen. § 21 Abs 1 letzter Satz öUrhG formuliert insoweit treffend: *„Zulässig sind insbesondere Änderungen, die der Urheber dem zur Benutzung des Werkes Berechtigten nach den im redlichen Verkehr geltenden Gewohnheiten und Gebräuchen nicht untersagen kann, namentlich Änderungen, die durch die Art oder den Zweck der erlaubten Werknutzung gefordert werden.“*<sup>4</sup>

Mit Blick auf die gesetzliche Vorgabe kann das Schwedische Modell auch hierzulande in gewissem Maß Schule machen: Werbeunterbrechungen stellen bei Filmwerken dann eine Änderung iS des § 21 iVm § 39 öUrhG dar,<sup>5</sup> wenn sie in den Verlauf und die Atmosphäre von Filmen eingreifen. Das vom jeweiligen Regisseur angestrebte Zusammenspiel verschiedener Filmszenen sowie die Kontinuität und Dramatik des Films wird nämlich mE dann zerstört, wenn zwischenzeitlich völlig andere Szenen und Situationen eingeblendet werden. Durch derartige massive Werkänderungen, die den Grad von Entstellungen oder Verstümmelungen erreichen, wird die nach § 21 Abs 3 öUrhG unabdingbar geschützte Individualität des Filmurhebers verletzt.<sup>6</sup> Die Grenze muss jeweils im Einzelfall gezogen werden. Abzuwarten bleibt, ob österreichische oder deutsche Gerichte dazu Gelegenheit haben werden.

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<sup>3</sup> Zitiert nach einer Pressemeldung der taz vom 19.3.2008, abrufbar unter <http://www.taz.de/1/leben/medien/artikel/1/regisseure-siegen-ueber-sender/?src=TE&cHash=125f8c37cf> (besucht am 4.6.2008).

<sup>4</sup> Eingehend *Grubinger* in *Kucsko*, urheber.recht (2008), 340 ff mwN.

<sup>5</sup> Vgl. *Grubinger* in *Kucsko*, urheber.recht (2008), 345 f; *Wallentin* in *Kucsko*, urheber.recht (2008), 546 f.

<sup>6</sup> Näher zur Begründung bereits *Thiele*, MR-Int 2006, 141, 143.

#### **IV. Zusammenfassung**

Nach bemerkenswert einhelliger Auffassung der schwedischen Zivilgerichte stellt die Unterbrechung zweier im Fernsehen ausgestrahlter Spielfilme durch Werbung eine Verletzung der Urheberpersönlichkeitsrechte der Regisseure dar.