

Sweden

A proposal for a new Copyright Act and a total revision of rules on transfer of Copyright and Copyright Contracts

Jan Rosén

The Swedish Government decided several years ago to focus on certain aspects on copyright contract law without, interestingly enough, any specific reference to EU Law, to fulfil the need for contemporary statutory support for licensing and rights clearance generally. A special commissioner was appointed in April 2008, (Jan Rosén), but with a considerably widened task: (i) to revise the whole Copyright Act (SFS 1960:729)¹, primarily to edit it thoroughly, to rephrase it to provide greater clarity, but also (ii) to analyse the effects of all articles of the Act on copyright contracts, not the least regarding *extended collective licences*.²

The first task, to edit the Copyright Act, should be seen from two aspects. 1) Copyright of today has a kind of *explanation problem*; its complexity, its embracive scope, its balancing of numerous counter interests and, not least, its intellectually demanding construction as to object of protection and scope of exclusive rights, is hard to present in a legislative instrument matching the expectations of today. 2) The Swedish Copyright Act, just as many other countries' Copyright Acts, have over and over again been amended in order to match changing conditions in society as such, as well as on the very diverse and dynamic markets on which copyright must function. The many implementations of EU regulation since the 1990ies have of course also laid an immense pressure on the national legislator posing layer after layer of amendments to the original Copyright enactment. This layering process has led to amendments to the Swedish Copyright Act on more than 25 occasions since it became effective on 31 December 1960. Some 50 years after the Act's introduction it has become a very complex piece of enactment. The explanation problem, just indicated, cannot be fully solved by a new law edition, but should be seen as a part of a will to offer a law which serves as a better instrument for practical application, and which also improves the possibilities to explain the basic values of copyright to new generations.

As for the material changes now proposed, this is the first time in some fifteen years that amendments to the Swedish Copyright Act would not be considered merely in order to effectuate the implementation of EU Law, but in order to reflect digitisation and the challenges of Internet uses and trans border licenses which had garnered such attention from the commission and the Parliament. It should be stressed, however, that some of the issues to be considered by the sole commissioner, were old leaven, touched upon several times by Nordic commissions, without much result, hopefully to be solved at last or at least carefully and finally analysed. These included such issues as *employers' rights* to an employee's protected works accomplished within the terms of an employment.

¹ As amended by SFS 1995:1274.

² See Regeringens direktiv (Dir. 2008:37) 10 April 2008 and, adding to the commission, Justitiedepartementet, Kommittédirektiv (Dir. 2009:65) 29 juni 2009.

The commissioner delivered an interim report in April 2010, SOU 2010:24, Avtalad upphovsrätt, which was concerned mainly with copyright and contracts issues. A final report, concerning the re-editing and rephrasing of the whole Copyright Act, will be published in April 2011, which will contain suggestions for adoption of a new Copyright Act.

The following text refers to and summarises the interim report. Articles of the Copyright Act, mentioned below, are those referred to or proposed in the interim report, if not otherwise indicated.

1. New general provisions on contracts

The provisions of Chapter 3 of the Copyright Act, dedicated to transfers of copyright, have remained virtually unchanged since the Act came into existence.³ Meanwhile, the commission began its work under the burden of knowing that society and the copyright market have undergone sweeping changes since its enactment. Technical developments constantly give rise to new forms of uses of works protected by copyright. Accordingly, the Inquiry's terms of reference emphasised the need to modernise Chapter 3 of the Copyright Act and to undertake a comprehensive review of the provisions in that chapter.

The terms of reference emphasise, as a general point of departure, that the Inquiry was to attempt to propose durable and flexible solutions reflecting the copyright market, giving authors a reasonable opportunity to maintain their rights while also accommodating other legitimate interests. The Inquiry has also been commissioned to consider the question of whether the position of the author as a contracting party should be strengthened, and if so, how.

The provisions on publishing contracts dominate in Chapter 3 of the Copyright Act as it stands today, while there are relatively few general provisions on contracts. The Inquiry came to the conclusion that in many respects, the rules on publishing contracts had lost their relevance. The report therefore proposes removing existing special regulations on publishing contracts, but to give general application to certain fundamental principles. This is in line with the introduction of a number of general provisions on contracts. The intention is for these provisions to promote clear and well-defined contracts. The commission assumes that this will be to the advantage of all parties. Freedom of contract should apply as the underlying assumption, so that parties may make contractual arrangements as best suit their particular needs.

The report proposes that the new Chapter 3 of the Copyright Act should contain special provisions on the following subjects.

Interpretation

It is proposed, that a provision on the interpretation of copyright contracts be introduced into the Copyright Act in Article 27 paragraph 3. This provision involves a codification and clearer definition of the principle of specification and means that the party having a contractual right to exploit a work shall not be considered to have more extensive rights than are stated in the contract or than may be considered to follow from the contract or its purpose.

³ Virtually none of the provisions of the Swedish Copyright Act (SFS 1960:729) on individual contracts have been amended; indeed some of these provisions were also part of the previous 1919 Copyright Act.

A similar provision has been a feature of the Danish and the Norwegian Copyright Acts respectively. However, both use a definition that the Inquiry found too narrow or unclear, especially in light of Swedish courts' interpretation and application of this instrument over time. The Swedish proposal thus aims to apply those developments on the so called specification principle as adopted by the courts.⁴

Modification

It is proposed, that a reference to Section 36 of the Contracts Act (SFS 1915:218) be introduced into Article 29 of the Copyright Act. Further, a special provision is proposed to enable modification of unreasonable contract terms relating to non-material rights, *i.e.* moral rights.

The proposal also that no other rules other than the general clause in Swedish Private Law on modifying or setting aside a term of a contract or to disregard a contract in its totality due to unreasonable terms or misuse of a party's inferior position in these respects should be valid in the field of copyright than elsewhere. Earlier on a specific clause of this kind did exist in the Copyright Act. It was repealed in 1976 when all similar types of correctional instruments were also cancelled in all other Private Law Acts valid in Sweden at the time - Section 36 of the Contracts Act then becoming the collective formula. Representatives of authors' groups had never liked that uniform instrument, claiming that the old rule was more strongly supportive of the interests of authors as parties to a contract. However, the Inquiry was not able to detect any situation that would be aided by such a provision which would, per definition, fall aside of Section 36 of the Contracts Act. Hence the importance of stressing, also in the authors' interest, that a direct reference to that provision of the Contracts Act is needed in the Copyright Act.

As for the latter issue, the Inquiry concludes that Moral Rights cannot be the object of a transfer based on a contract, but that contractual terms may, nevertheless, relate to such a right, *e.g.* to terms relating to moral rights being waived only to a limited extent as to their character and scope, as follows from Article 3 paragraph 3 of the Copyright Act.

Obligation to use

It is proposed, that a general provision on the obligation to use rights acquired exclusively be introduced into Article 30 of the Act. The provision would be optional and intended to mean that a party to a contract other than an employment contract who has acquired from the author an exclusive right to make a work available to the public is obligated to use this right. If the party acquiring this right has not made the work available to the public within reasonable time or, at the latest within five years from the date on which the author fulfilled her or his part of the contract, the author may cancel the contract.

The basic assumption underlying this proposal is that the idea of an exclusive agreement includes the exploitation of the work or, at least, the public exposure of it. A work or related right should not merely be put on the shelf by the owner of the exclusive right. This assumption also reflects a response to what is quite frequently claimed today, that copyright is

⁴ Cf. Jan Rosén, *Upphovsrättens avtal : regler för upphovsmäns, artisters, fonogram-, film- och databasproducenters, radio- och TV-bolags samt fotografers avtal* (Stockholm Norstedts Juridik, 3d Ed. 2006) p. 151, 300 et seq.

used to lock up products of cultural values, hence to block public access. This view is probably slightly exaggerated – authors must generally be said to support public access of their works – but the Inquiry has found it valuable to stress that exclusive licensees must actively plan for the uses allowed by the contract.

Remuneration, settlement and control

A new, general contractual provision concerning remuneration is proposed in Article 31. This provision would give the author a right to reasonable remuneration when the right to exploit a work is transferred by assignment or licence to someone who intends to use the right in the framework of commercial activities. This provision is also optional.

New provisions are proposed to give, in Article 32, the author the right, in the event of a right holder's entry into a royalty agreement, to receive a settlement once a year, together with a right to audit the information on which this is based. These provisions would be mandatory and it will not be possible to waive them by contract.

Contracts concerning communication to the public

It is proposed to retain provision on contracts relating to public performance, etc. This would be addressed separately in Article 35. The heading would be amended to *Contracts concerning communication to the public, etc.* Under this provision, a contract concerning communication to the public or public performance of a work will apply for a three-year period and will not confer exclusivity, unless otherwise agreed.

The gravamen of this concept has generally been accepted since the introduction of the Copyright Act in 1960. However, it has been more honoured in the breach than in the observance. At the time of its enactment it was thought merely to relate to contracts between the performing rights societies and authors of musical works. Not even in there has it been of any significant importance. Still, the Inquiry assumes that this concept has gained in importance in the digital age and that it is particularly important in respect of use in the digital environment, such as on the Internet.

Film contracts

It is proposed to clarify the presumption rule concerning film contracts, which has, for many years been in Article 39 of the Copyright Act. Under this proposal, a contract conferring the right to use a work for purposes of recording it in a film means that an author contributing a work for a film cannot object to copies being made of the film, the film being made available to the public, provided with subtitles, or being translated into another language.

It is proposed that musical works continue to be exempt from the scope of this provision. Under the proposal, however, the provision will also include the rights that performing artists enjoy over their performances in a film.

That would also clarify, generally speaking, what probably is the crux of film contracts, namely that the rights of the contributing and normally comprehensive grouping of authors and performing artists are conferred on the producer of the film without addressing the issue

of remuneration to members of that group. This provision offers a presumption facilitating the use of the film, whereas remuneration is a separate issue, not covered by the presumption.

Copyright to computer programs created in employment relationships

It is proposed that the provisions of the Act concerning computer programs created in employment relationships be modified in Article 34 in order that the rights transferred to the employer under the conditions of the provision do not include non-material rights. A presumption is also introduced that employers are entitled to transfer their right to the computer program to others.

The novel feature of Article 34 lie in the fact that it diminishes the scope of an employer's rights to computer programs as expressed in the Copyright Act (Article 40 a), by expunging the moral rights dimension now vested in Article 40 a. The Software Directive, which forms the basis for the just mentioned article, never required Member States to leave authors' rights, with their complete content, to the employers regarding computer programs accomplished within the frames of an employment.⁵ To include the moral rights dimension in the employer's acquisition was probably merely a gesture of the legislature in the 1990's to please the U.S. software industry. However, moral rights simply cannot be part of a commercial acquisition, something in full consequence observed throughout this interim report. Hence, this dimension is separated from the employer's position.

On the other hand a very useful and import legal instrument is added to the armoury of the employer. As it stands now, Article 40 a merely concerns the situation within the employer's realm, i.e. the first transfer from the author/employee to the employer, not the next and very natural step of the employer, to address third parties on the market via licenses and sub-licenses. Article 28 of the Copyright Act, similar to the provision and content of this proposal, contains a presumption against any transferor's transfer of the right to others or to license it to someone else, or to alter it. The Inquiry now proposes that an employer, having gained the rights to a computer program from his employee, shall also have the right to transfer it to others. This is what generally happens in the marketplace when a software producer manages to introduce novel computer programs, but the present rules, however seemingly so broad in scope, seeks to hinder the employer's marketing of his software.

A work-for-hire rule?

The point of departure in Swedish law is that, initially, the copyright to a work always vests in the natural person who has created it. In the event of employment relationships, copyright is transferred to the employer only to the extent that this is deemed to be explicitly or implicitly prescribed by the employment contract or by a special agreement. Interpretation of a contract would probably generally allow works produced as part of an employee's tasks to

⁵ Cf. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs OJ (L 122) 42. See in particular Article 2 (3) which states: "Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to execute all economic rights in the program so created, unless otherwise provided by contract."

be used by the employer in his or her normal activities and to the extent that could be foreseen with reasonable certainty when the work was created.⁶

The Inquiry's analysis states that copyright legislation should be designed to be functional in its practical application. At the same time, it states that introduction of a work-for-hire rule would be a major deviation from the fundamental principle that copyright belongs to the author creating the work. Any need that may exist for a work-for-hire rule must therefore be carefully weighed against the interests of individual authors in being allowed, as far as possible, to make decision with respect to their work, and regarding other interests of relevance.

There is currently no special legislative provision concerning copyright in employment relationships. However, both in case-law and doctrinal 'rule of thumb' has been developed according to which, within their area of activities and for the purposes of their normal activities, employers may use works created by the employee as a result of employment duties to the employer. The employer's rights refer to use for the purposes foreseen when the work is created. Further, changes in the work are permitted to the extent required to achieve the purposes for which it was created during the employment relationship.

The Interim report concludes that a general and essentially broadly framed presumption rule entailing the total transfer to the employer of the financial element of the copyright of a work produced in an employment relationship does not offer a flexible and durable solution. Some groups, primarily owners of the press or, rather, daily papers, have faced long time disagreements with their journalists regarding allocations of authors' rights, which caused these employers to recommend the broadest possible acquisition of rights for the employer to be incorporated into law. It became obvious to the Inquiry, however, that far from all employers desire vast transfers of rights or even any acquisition at all. Employers *e.g.* in the fields of teaching, science and various forms of schooling or knowledge industries were generally reluctant to step into their employees' copyright positions, which would thereby result in facing demands by the authors related to the employers (effective) commercial activity and increases in salaries for the authors. It became clear that the balance between conflicting interests in the whole area of copyright would be weakened by such a provision and would constitute a serious deviation from the fundamental principles of copyright. Instead a provision corresponding to the 'rule of thumb' was proposed.

A number of important prerequisites are defined and set out in proposed Article 33. The interim report's proposal would mean that an employer, within his or her area of activities and for the purposes of his or her normal activities, may hold exclusive rights to works created by an employee as a part of his or her tasks or following instructions by the employer. The right of the employer covers uses for the purposes foreseeable when the work is created. Where a work must be changed to achieve the purpose for which it was created during an employment relationship, this change is permitted, but only to the extent permitted by proposed Article 3 of the Copyright Act.

As mentioned above there are special provisions on computer programs in Article 34 of the proposal (current Article 40 a). The provision should also apply with respect to rights belonging to performing artists under Article 45 and to photographers under Article 49 a) of the Copyright Act respectively.

⁶ See Prop 1988/89:85, p. 21 and the decision of the Labour Court 2002, no. 87.

2. Extended collective licences

Point of connection to redeem the extended collective licence

Chapter 3 a (Articles 42 a–42 f) of the Copyright Act contains comprehensive and quite complex provisions on extended collective licences. Under these provisions, agreements on the exploitation of works may be entered into with an organisation that represents a substantial number of Swedish authors in the field concerned. By entering into such an agreement, a user can also acquire the right to exploit works by authors *not represented* by the organisation. Without the support of the legislature this would of course not come about. The intention, just as clearly, is to make it easier for a user, such as a major broadcaster or cable distributor of TV content, by agreement with the representative organisation, to acquire all the rights the user needs for his or her activities, while enabling the authors concerned to receive reasonable remuneration. The interests of authors not represented by the organisation are safeguarded by certain protective rules, *e.g.* provisions on the right to remuneration on the same basis as those of members who are contractually represented by the contracting organisation, and the possibility of prohibiting exploitation. If there was no possibility for authors to opt out the system of extended collective licenses would stand little chance to comply with the requirements of the Paris Convention.⁷

Article 42 a, the basic provision for all sorts of statutory extended collective licenses. As previously mentioned a collective licence for the time being only has extended effect in the case of agreements with organisations representing a substantial number of *Swedish* authors in the field concerned. Corresponding requirements exist also concerning the collection of a ‘private copying levy’, the so called kassettavgift, (Articles 26 k–26 m) and resale right remuneration, droit de suite, (Article 26 j). This requirement is also found in the mandatory licence provision in Article 47 of the Copyright Act (see the third paragraph), on phonogram producers’ and performing artists’ right to remuneration for public performances and communication to the public of their recordings and performances, a kind of compulsory licence structured by the same collective arrangement as the extended collective licenses in the said respect. However, the focus on Swedish authors (and performers/producers) to trigger the effect of those provisions is of course debatable, to put it mildly, from an EU non-discriminatory perspective. It has already been the subject of contention in connection with the implementation of the EC Directive on Copyright in the Information Society,⁸ where it was noted that there was cause to review whether it is a suitable delimitation for organisations to represent a substantial number of Swedish authors.⁹

Denmark amended its equivalent provisions after the European Commission’s finding that this was in violation with the prohibition of discrimination contained in the EC Treaty. The other Nordic countries have subsequently made similar amendments. The Inquiry’s terms of reference state that there is also cause in Sweden to remove the recited limitation of *a substantial number of Swedish authors* and examine what other criteria are required in order

⁷ Thomas Riis, Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience- It’s a Hybrid but is it a VOLVO or a Lemon?*, Available at: <http://ssrn.com/abstract=1535230>, Forthcoming in Colum. J. of L. & Arts, Vol. 33, Issue IV, (2010) pp. 10-12.

⁸ See Directive [2001/29/EC](#) of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society.

⁹ See Prop 2004/05:110 pp. 144 and 247.

for the systems to work in a way that is transparent, effective and competition-neutral from right holders' and users' perspectives.

According to the terms of reference, the Inquiry was also required to examine equivalent requirements in the provisions on the private copying levy (Article 26 m), resale right remuneration (Article 26 p), and the right to remuneration for performing artists and producers of sound recordings (Article 47).

Against this background the commissioner, not very surprisingly, proposed the following: That the general extended collective licence provision in Article 42 a of the Copyright Act be amended so that an organisation that is the most representative and best situated to represent the authors of the works in the area *exploited in Sweden* be authorised to enter into agreements in which collective licences have extended effect. By adhering to an organisation that represents the authors of the works in the area exploited in Sweden, Swedish Law is made conform to the demands of EU-norms on non-discrimination by setting forth the connecting element as works actually *used* in Sweden, whether works created by nationals of Sweden or by foreigners. Equivalent requirements should also of course be introduced into the provisions on collecting remuneration under Articles 26 m, 26 p and 47 of the Copyright Act.

Which organisations are to be authorised to enter into agreements under the rules on extended collective licences?

Closely linked, but of a fundamentally different nature, to which criteria should apply instead of the requirement that an organisation represents a substantial number of Swedish authors is whether *one* or *several* organisations should be authorised to conclude agreements in the same area of copyright. In the other Nordic countries this issue has been resolved by instituting a system based on a concession from a public authority to an organisation that may enter into agreements executing the extended effect for non-member authors. These apply a policy of only permitting a single organisation to have the concession for a specific area of copyright.¹⁰

In Sweden the extended collective licence provisions state only that an agreement must have been concluded with an organisation representing a substantial number of Swedish authors in the field (Article 42 a). Similar formulations appear in the above-mentioned provisions on the private copying levy (Article 26 m), resale right remuneration (Article 26 p) and the right to remuneration for performing artists and producers of sound recordings under Article 47, third paragraph. Concerning the issue of resale right remuneration, the Supreme Court has ruled in a judgment that this provision means that more than one organisation may be entitled to claim remuneration, but that certain requirements must apply with regard to the organisation's structure and stability.¹¹ In connection with the implementation of the Directive on Copyright in the Information Society, the Swedish Council on Legislation, Lagrådet, observed that problems could arise as a consequence of several organisations being authorised to claim a private copying levy or sign agreements on extended collective licences.¹²

In light of this, and other matters, the Inquiry's terms of reference stressed that there should be a careful examination into whether several organisations within the same field should be

¹⁰ See Jan Rosén, *Administrative Institutions in Copyright – notes on the Nordic Countries*, ed. Gendreau, *Collectiveness in Copyright Law*, Montreal 2001.

¹¹ See NJA 2000 p. 178, BUS v. DUR.

¹² See Prop 2004/05:110, p. 563.

allowed to operate in the extended collective licence area, or whether only one organisation should be authorised to conclude agreements in the area. A similar review was required to be carried out regarding the private copying levy, resale right remuneration and the right to remuneration for performing artists and producers of sound recordings.

The commissioner proposed the following: The new phrasing of “an organisation that is *the most representative and best represents* the authors of the works in the area” makes it clear that under the general provision on collective licences as well as in Articles 26 m, 26 j and 47 third paragraph of the Copyright Act, only *one* organisation may be authorised in a given field to enter into agreements in which collective licences have extended effect or to collect the remuneration concerned.

This statement needs some clarification, particularly as the proposal does not foresee a concession system – perhaps executed by the Government - as is employed in the other Nordic countries, but rather, something to be dealt with by the contracting parties in the marketplace or, in cases of severe disagreement, a civil court. The following observations of the commission address the issue:

As long as the organizations represent authors in different areas or sub-areas and do not compete with each other, normally no problems would arise in determining which is competent to conclude agreements with extended collective license effect. On the other hand, problems may arise in determining their competence in situations where the organizations compete with each other and represent authors in the same area or sub-area. As mentioned, it might be possible that the organizations come together to form a party to the agreement, for instance if they are only in such a case representatives. If, in a specific area or sub-area, several organizations exist where they individually may be seen as sufficiently representative, it would be sufficient, in the opinion of the commissioner, if an agreement with only one of those be concluded in order for the agreement to have extended collective license effect. The user cannot be required to conclude additional agreements with the other organizations or with one of them. Such an agreement would not provide the user with additional rights or provide additional remuneration for the authors, but would only complicate the picture and the payment system. This would conflict with the underlying purpose of the extended collective agreement system. Nor can it have been the intent of the legislator that a user would be required to conclude agreements with each one of the organizations where each one is acting in a representative capacity.

Generally speaking, competition is considered to promote administrative efficiency and pricing. In the course of the Inquiry it was suggested that the new law be designed to encourage competition. Indeed, the Terms of Reference mention competition as a positive factor that should be balanced against other advantages, such as clarity and transparency.

Competition between two or more organizations that represent authors or other rightholders can arise in two different respects. The organizations may compete with each other on the one hand in relation to the authors or right-owners in respect of the best management of the rights, and, on the other hand, in relation to the users concerning the best agreements relating to the use. In the commissioner’s view, free competition should, as a matter of principle, exist in relation to the members. As an author or a rightholder one should be able to select the organization in which an author has the most confidence to manage his or her rights. In practice, under the current regime, which surely allows for more than one organisation in each copyright field, such freedom of choice is present only to a very limited extent, as broadly speaking, de facto there is only one organization in each area. In almost fifty years of uses of statutory extended collective licenses in Sweden we have never seen two competing organisation actively working in the same field. The interest in establishing a “new”

organization in addition to the ones already established has so far been extremely low. One reason for this could be that comparatively wide degree of experience, contacts and administration is needed to handle the management of rights in an efficient way. This may, however, change over time. The new provisions should take this into account.

Looking at the competition issue in relation to the users does not provide a clear answer. In other words it is not obvious that users should be free to choose to conclude agreements with the organisation that offers the best conditions in relation to the use. Organisations represent their members and have, therefore, only a limited scope when it comes to the agreements that they can offer to users. In principle only the administrative cost related to their management is subject to variation and competition. For users the alternative to an extended collective license would be to negotiate directly with the authors or the rightholders. In relation to those there is no freedom of choice if one wishes to use a certain work or a certain subject matter. The exclusive right in itself constitutes in consequence, a sort of monopoly, to which, however, are linked certain limitations required to satisfy certain public and private interests.

The fact that the organizations hold a certain monopoly position has been accepted within European Community law, and the European Court of Justice has for a long time seen a considerable market concentration - in fact a monopoly position – on the part of right holders as being necessary to obtain reasonable results in relation to negotiating with large user enterprises, such as radio and television corporations and other enterprises in the mass market.¹³

An organization considered to hold a dominant position in the market place must, however, not misuse that position by making unreasonable demands. Such a misuse may consist in the application of too high a price which does not reflect a reasonable relation to the economic value of the transaction. The misuse may also consist of the application of a certain remuneration model.¹⁴ No misuse was found in the Kanal 5 case but the application of a remuneration model, which was *per se* acceptable, could, according to the CJEU, under certain circumstances constitute misuse, namely if another method for calculation of the remuneration to the authors existed which made it possible to more closely identify and quantify the use of copyright-protected material.

The CJEU, has, in a number of decisions, shown considerable understanding for authors' problems (and their successors in title) from a practical and administrative point of view in obtaining reasonable remuneration in mass markets.¹⁵ In the Kanal 5 case the CJEU (at para 40) stated that, even if more detailed calculation methods were desirable in order to avoid misuse from a competition point of view, a remuneration model must always be based on fundamental legitimate aims, of safeguarding the authors' interests and that more precise and detailed systems for licensing and collection must not result in an disproportionate increase of costs of administering agreements and controlling use of copyright-protected works. This obviously speaks in favour of a concentrated administration of rights in mass markets.

In practical terms problems rarely appear in the application of the existing legislation. In most areas it is more or less obvious which organization is competent to conclude agreements with extended collective license effect. In the areas of photography and still pictures there are,

¹³ See Thomas Riis, Kollektiv forvaltning og konkurrenceretlige spørgsmål (Collective management and competition law questions), NIR, (June 2009), p. 621.

¹⁴ See e.g. Judgement of December 11, 2008, Case C-52/07, *Kanal 5 Ltd, v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, [2008] ECR I-9275. in particular paras 28 – 40 and the references there to earlier decisions.

¹⁵ See case C-395/87, *Ministère public v. Jean-Louis Tournier* [1989] ECR 2521

however, several organizations where each has considered itself competent to conclude agreements under Article 42 c) of the Copyright Act. New organizations may also come into existence and when the limitation to Swedish authors is deleted, foreign organisations may enter the Swedish extended collective license market. Starting from the position that a user for a specific exploitation shall have to conclude only one agreement at each point of time, *i.e.* for a certain agreement period, the Inquiry could not see any problems in the concept that several organisations at a time could be competent to conclude extended collective license agreements in the same area.

On the other hand it is to be assumed that a system which requires that only one organization in each area (or part of an area) be competent to conclude agreements with an extended collective license effect has some advantages, for instance as regards clarity. This is obvious especially in relation to the users, but also in relation to the authors, those represented as well as those who stay outside, and in relation to the organisations themselves.

Legislation in the other Nordic countries contains no explicit provisions related to the number of competent organizations which may conclude agreement with extended collective license effect. However, the system of concession implies, in practice, that only one organisation in each field has such competence or that the organisations cooperate. This should speak in favour of a system for Sweden where it is clear that only one organization in each field actually has such a competence.

Consequently, the proposal does not prevent an organization other than the one that has concluded the agreement with extended collective license effect, at a certain point of time, to conclude a subsequent agreement in that field on the next occasion, if that other organisation meets the criteria to be the most representative one and best takes into account the authors' interests. The proposed system would mean that users may negotiate with only one organization in each field. They would consequently not be able to select the organization that, in their view, gives them the best conditions for use, *i.e.* the lowest price. The Copyright Act for the protection of authors' rights really can't, as a matter of principle, provide for a system that would create downward pressure on authors' revenue.

In conclusion, the Inquiry considered that the advantages outweigh the disadvantages resulting from a single organization in each area being deemed competent to conclude an agreement with extended collective license effect. On the basis of those considerations and as the Inquiry did not find any obstacles under EU legislation or EU case law, it concluded that only one organization in each area or partial area should have competence to conclude agreements with an extended collective license effect.

Distribution of remuneration under extended collective licences

The mandate of the commission also requested an overall analysis of how the system for extended collective licensing has functioned in Sweden over the years. Somewhat surprisingly, such an investigation has not ever been performed by a public authority. The analysis was necessary if the Inquiry were also to have suggested, if appropriate, new forms of extended licenses and a widened scope of existing licenses. Such proposals could naturally not be made if the result of such study would have resulted in a negative analysis of the existing system of extended collective licenses

The report makes the judgment that the distribution systems for extended collective licences as currently used by the organizations collecting and distributing remuneration function well, and remuneration paid to right holder organizations on the basis of the extended collective

licence provisions does in fact, reach the right holders, including those not represented by the organizations. Nothing has come to light to suggest that there are irregularities concerning payments. Therefore, no new provisions have been proposed in the Act to ensure that remuneration reaches the rightholders.

Making of digital copies at public authorities and private enterprises

The report proposes a simplified and extended arrangement for rights clearance concerning copying carried out at places of work for internal information purposes. It therefore proposes that the extended collective licence provision in Article 42 b of the Copyright Act be broadened to include the production of *digital* copies. Currently, the statute deals only with the making of copies by reprographic means, *i.e.* photo copying. By this amendment, copying from the Internet world falls within the framework of an extended collective licensing system which encompasses virtually all entities, organisations and public authorities in Sweden.

In addition, it is proposed to remove restrictions to the effect that the only works of art covered by the extended collective licence provision are reproductions in connection with the text in a literary work. The proposal would also include separate pictures in the statutory licensing system. In line with a step towards digital copying it is also proposed that the provision's current requirement, that works in question must have been *published*, be amended to state that the works must merely have been *made public*.

Possibility for archives and libraries to digitise works and make them available to the public

The report proposes a broadening of the extended collective licence provision in Article 42 d of the Copyright Act to make it simpler for libraries and archives to digitise works in their collections and make them accessible, for example, by communicating them via the Internet. It is therefore proposed that Article 42 d of the Copyright Act cover (i) all kinds of production of copies and all forms of (ii) making available of works to the public that cannot be reproduced under to the restrictions in Articles 16 and 21 of the Copyright Act. As a result, libraries would be able to communicate their repository of assets on screens, not only to visitors to their premises, but also to make them available online.

Moreover, it is proposed that an amendment be made to the existing exemptions in Article 21 to improve opportunities for archives and libraries to make works contained in their collections available within their own premises, *i.e.* if they possess a lawful digital copy they may also display it on screens in their premises in spite of the fact that such a use would be a communication to public and otherwise barred.

Works and performances that appear in radio and TV programmes

A major practical problem today in Swedish broadcasting is the fact that no extended collective licenses cover further uses of a broadcast in the Internet environment, *i.e.* for what is often called Webb-TV. A broadcasting organization must therefore negotiate individually all copyright element in a TV-program if that organization would like to post the program on its own web, thus communicating it to the public. Currently, no extended collective license

covers on-demand forms of communication to the public, thus not what is available on the Web, but merely broadcasting.

The report favours simpler rights clearance for radio and TV companies for programmes made available at the request of individuals, for example via the Internet after the regularly scheduled transmission time. It is therefore proposed to broaden the extended collective licence provision in Article 42 e) of the Copyright Act concerning sound radio and television broadcasts. Under the proposal, the extended collective licence provision would cover all communication to the public and not just broadcasts. In addition, it is proposed that the provision cover such copying as is necessary to enable the communication to take place.

It is also proposed that the provision cover performing artists' performances of certain literary works under Article 45 of the Copyright Act, as well as certain sound recordings under Article 46 of the Copyright Act.

A special extended collective licence

All existing extended collective licenses are valid for very specific purposes and for well-defined areas works and uses as stated by the legislator. The underlying basic assumption is that extended licenses should only be executed in areas where ordinary Private Law principles of copyright do not function well, *i.e.* if individual contracts cannot be employed for necessary rights clearances. Prior to the proposal, the legislature has decided what would be covered.

Now it is proposed that the general provision on extended collective licences be supplemented with respect to the scope of a potential extended license. This offers the possibility of entering into agreements in which collective licences have extended effect in areas *other* than those specified in the Act. This would be known as *special extended collective licences* or *general extended collective licence*. The proposal would require the following conditions be met: the agreement must apply to a limited and well-defined area; an agreement under which a collective licence has extended effect must be a precondition for exploitation; the agreement must be in writing and contain information to the effect that the parties' intention is for the collective licence to have extended effect. Special protective provisions will be introduced, under which, among other things, the author will always have the right to file a prohibition against exploitation.

This novelty already exists in the Danish Copyright Act. Obviously, this is a strong mandate for the actors on market and it expresses a strong belief in their capacity to comply with the prerequisites set forth. It must be observed, though, that in Denmark the concessional system offers control by a public authority, whereas the Swedish proposal is built on the assumption that contracting parties on the market may themselves enter into a special extended collective license instrument in an acceptable way.

The more unique Swedish approach to these issues lies of course in its focus on amendments to the Copyright Act supportive of authors of literary and artistic works as parties to commercial contracts. This addition to general Contract Law is quite rare in a European context, although *e.g.* The Netherlands have recently made proposals for some provisions similar to those discussed here.

As for rights clearances for mass uses of works and objects of related rights, in particular as far as broadcasting and Internet uses are concerned, (a truly trans-border or Pan-European phenomenon), these are dealt with in the Swedish proposal utilising the Nordic formula. The extended collective license has proved to be quite successful in the Nordic countries. It is not

guaranteed to be successful as a vehicle for a simplified licensing system for the entire EU, much less as a system for a one-stop service. Certainly, a principle of EU-wide mutual recognition of a work's status cannot be generated under the Nordic license.¹⁶ But perhaps it may be that trans-border licensing of mass uses of copyright works and objects of related rights can never be fully harmonised.

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Jan Rosén

¹⁶ Cf. Tilman Lueder, *The Orphan Work's Challenge*, Fordham Int. IPL Conference, (New York 2010). Available at http://webcache.googleusercontent.com/search?q=cache:IBulaLP_J40J:www.fordhamipinstitute.com/ip_conference/documents/TilmanLueder.pdf+Tilman+Lueder+Orphan+Works+challenge+fordham&cd=1&hl=en&ct=clnk&gl=us last visited September 19, 2010.