

Administrative Institutions in Copyright

Notes on the Nordic Countries

Jan Rosén

1 Introduction

The Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, although following a long tradition of close co-operation in legislative matters, in particular as intellectual property law is concerned, nevertheless expose a less coherent picture when focus is on the administrative build up of institutions entrusted with tasks like arbitration, licensing, final fixation of fees and dues etc. As a matter of fact, when administration of rights in authors' works and related rights are concerned, at least outside the realm of those organisations normally found in all comparable countries all over the world, typically based on various types of *collective* contractual disposal of original owners' rights, there isn't a profound coherence within the circle of Nordic countries. Clearly, administration of rights etc. is linked closely to more or less unique national traditions and by degrees worked out market behaviours.

Again, administrative boards, typically built on the lawmaker's mandate, should in this context be clearly separated from collective arrangements, often related to broadcasts, performances and recordings of music or to reprography, such as the globally interconnected performing rights societies and organisations for collective control of reprography on behalf of the rights owners. The distinction between those two categories, both may actually effectuate clearances of rights and determine the fees, is not entirely easy to draw. However, in this text we shall only relate to those authorities not having their mandate based on, at least not exclusively, a contractual relation with authors and other rights owners, but on the lawmaker's initiative, and to institutions thus offering binding or, as a service, non-binding decisions or evaluations on copyright matters.

Thus, to follow is a brief country by country presentation of an administrative structure which nevertheless goes back to the Copyright Act of each country, sometimes literally in the sense that the national lawmaker has in fact foreseen and to some extent regulated a specific administrative task and its procedure. But

as we shall see, this Nordic diversity may also be relevant as *administration* of a more or less uniquely Nordic legal creation is concerned, although as such based on a coherent Nordic legal concept, namely the so called *extended legal collective copyright license*. Still, this statutory construction is indeed rendering exertion of Nordic copyright law a certain character, thus it should firstly be somewhat defined, before we go on to a presentation of its factual exercise in the Nordic countries, along with other forms of administrative procedures, typically built on *exceptions* to the basic exclusive rights afforded to the authors and related rights owners in the national Copyright Acts. The latter form of exception, of interest here, comes typically in the form of a so-called *compulsory* or *legal license*, provided for in the Copyright Acts. Compensation may be due for certain types of use, let alone the rights owner cannot refuse the use; an exclusive right has then been converted to a right to remuneration. Such pecuniary compensation may of course be settled in court if not otherwise established. Here, the diversity among the Nordic states is overt; Denmark and Norway have in some instances settled for certain authorities to handle such remuneration, whereas Sweden and Finland have not.

In what follows, we shall not include Iceland, primarily not to overburden the presentation, but also because its legal solutions in the field often relates close to what could be found in some of the other Nordic countries. In particular, the Icelandic situation may be said to be close to the one found in Norway, as the Government, via the Ministry for Education, may imply concession to a certain organisation to be active in the field as well as to approve on certain tariffs.

2 The Extended Legal Collective Copyright License – a Nordic Creation

In the Copyright Acts of the Nordic countries there are several so-called extended collective license clauses, ECL-clauses, which were first introduced by 1960 as a result of preceding Nordic legislative co-operation. Basically, such ECL-clauses are provisions which allow an agreement made by an organisation of authors, on the one side, and a user, such as a broadcasting company, on the other, to apply to works of those authors who are *not* members of the organisation and not otherwise legally affiliated with it so as to be bound by its acts. A further condition of such an agreement is that the organisation, which concludes it, must duly represent a large number of authors in the field. The effect of the agreement will only extend to works of the same kind or category as those referred to in the agreement, and copies produced may be used in such activities as are covered by the agreement.

Such clauses, which of course would not be valid for non-members in the absence of an explicit mandate by the lawmaker, are covering at least three areas, (1) original broadcasts, (2) retransmission of broadcasts or rebroadcasting and (3) reprography for use in educational activities and, for the same purpose, recordings of works broadcast via radio or television. Some differences occur

within the Nordic context on this scope,¹ but as we shall see differences attach more to the practical handling by appointed authorities, rather than to the basic legal concept and its scope.

Thus, to focus primarily on the Swedish situation, teachers and other persons who, on the basis of an ECL-agreement, are entitled to make copies of a class of works by means of reprography for use in their educational activities may for the same purpose also make copies of published works in that class by non-represented authors. Only agreements between an organisation of the kind just mentioned and the parties pursuing educational activities in organised forms fall under these rules. Nonetheless, this excludes cases where an author has filed a prohibition against such reproduction with any of the contracting parties – otherwise an ECL-clause would probably conflict with the Berne Convention. Furthermore, authors whose works have been reproduced subject to ECL-provisions shall, with regard to both remuneration deriving from the subject agreements and certain benefits from the organisation essentially paid for out of such remuneration, be treated in the same way as the members of the organisation. They will, nevertheless, always have a right to remuneration in respect of any subject reproduction, provided they claim such remuneration within three years from the end of the year of the reproduction. The ECL-agreement can, with binding effect for the author, provide that claims for such remuneration may be directed only towards the organisation.

On the basis of this provision, ECL-agreements in force cover the entire public educational sector of Sweden, elementary schools as well as universities, and a large part of the Swedish private educational institutions. Foreign authors may raise individual claims as well as Swedish authors, and the Swedish organisations having concluded an ECL-agreement may conclude mutual agreements over national borders. Such agreements are certainly in force, at least between Nordic organisations.

The ECL-clause on *broadcasting* allows a Swedish radio or television organisation, as defined in the applicable ordinance, which may broadcast literary and musical works according to an agreement with an organisation representing a large number of Swedish authors in the field, may also broadcast published works of non-represented authors. Excepted, however, are dramatic works and works for which the author has prohibited broadcast or where there is a particular reason to assume that he will oppose it.

Lastly there is the ECL-clause on *retransmissions*, affording anyone who, on the basis of an ECL-agreement, has acquired the right to distribute to the public – simultaneously and in an unchanged form, by wireless means or by cable retransmission, works forming part of a sound-radio or television broadcast – the right to retransmit by the same media works of non-represented authors as well. The terms of the ECL-agreement, also regarding e.g. limitations to specific kinds of works, will also apply in other respects to the retransmission. With regard to remuneration resulting from the agreement, as well as benefits from the organisation which are principally paid for from the remuneration, the author of a retransmitted work shall be placed on an equal footing with represented

¹ Particularly as Danish and Norwegian ECL-clauses are concerned, relative to those to be found in Finnish and Swedish law.

authors. He will, however, always have the right to claim individual remuneration from the organisation. Such must be raised within three years from the end of the year when the retransmission took place.

By Swedish standards, claims against rediffusers may only be put forward by representative organisations and all claims regarding a retransmission must be forwarded by all possible organisations *at the same time*. Also, a representative organisation may be anyone, at least in Sweden, of several which shows the necessary qualification of factually being representative in the sense that it has a mandate from a “substantial number of Swedish authors in the field concerned”.² Those words within quotation marks does not necessarily mean a majority of the authors within the specific group. Accordingly, at least as a matter of principle, two or more organisation may potentially be active in the same field, thus open to competition. But there isn’t a single example of such competition yet within the frames of national ECL application. However, in Sweden the recently introduced droit de suite-rules, also relating to organisations representing “a substantial number of authors”, have led to the establishment of competing organisations, which the supreme Court of Sweden has found rightful and reasonable, also against an organisation claiming that representativeness in this context meant that only a single organization, if any, could meet such a qualification.³ If two organisations would try to act within the same field of authors and class of works Swedish law would probably support this today. As such an organisation needs *approval* or concession from an official authority in Finland, Denmark and Norway, unlike in Sweden, we immediately see a difference within the Nordic context, which is more than a matter of principle.

These ECL-clauses are equally applicable also to performances of artists and recordings of sound producers, at least those clauses numbered (2) and (3) above, thus valid also for so called related rights. But as sound recordings are concerned we should stress that the performing artists and sound producers have nothing more than a kind of statutory license to remuneration for communication to the public of their recordings. A strict use of an ECL-clause is therefore relevant primarily as recordings of audio-visual performances are concerned. However, the statutory licence for sound recordings may only be exercised by an organisation representing, here it comes again, a substantial number of performers and sound producers, and claims for remuneration should be put forward at the same time as claims under ECL-clauses. The lawmaker has thus tried to synchronise the organisations in the field having them to act within the confines of the ECL concept.

As should be stressed again, this legal tool of the ECL-clauses may be structured conceptually in the very same way in each one of the Nordic countries. But they are generally *administered* in different ways, as will be demonstrated below. Hence, as a matter of principle, they are open to market actors, which is particularly the case in Sweden, or mainly or to some extent left to specially appointed boards or authorities to handle, which is demonstrated most clearly in Norway, but also in Denmark.

² Wording from the English translation of the Swedish Copyright Act by the Ministry of Justice (December 1998).

³ See the Swedish Supreme Court’s decision, NJA 2000 p 445, Droit de suite.

3 National Idiosyncrasies

3 a) *Finland – the Copyright Council*

In 1986 a Copyright Council was set up in Finland to assist the Ministry of Education in the handling of copyright matters and to issue opinions on the application of copyright law. The Copyright Council, CC, was preceded by a so-called Expert Board on Copyright with more limited tasks. Upon the nomination of the Ministry of Education, the Council of State appoints the chairman of the CC, vice-chairman and a maximum of fifteen other members, representing holders of copyright as well as major user groups. The opinions of the Council may thus be “authoritative”. It is important to stress, however, that an opinion of the Council is not binding to those who have requested it, individuals, organisations or courts; merely, those opinions expose something considered right and reasonable to a group of qualified persons. Also, such an opinion is free of charge, thus potentially offering a “solution” to disputes in cases not suited to be brought before a court due to the costs and the labour a specific matter may then entail. An opinion of the CC may, as already indicated, be requested by private individuals (this is most often the case) as well as organisations and authorities. While a matter is pending in a court, this court may thus find reason to make such a request. Also, the CC itself may arrange for an oral hearing and hear experts, which comes about quite frequently.

It is obvious that the CC offers to conflict parties an access to, in addition to litigation, a speedy, simple and cheap procedure in matters relating to the application of the Copyright Act in individual cases. The main task of the CC seems accordingly to have been the issuing of statements on the application of the Copyright Act.⁴ This distinction entails that the CC does not include investigation or evaluation of issues of proof. Neither does the CC include in its opinions any criminal-law assessment of actions, nor any interpretation of contract clauses. However, to distinguish i. a. means for copyright protection is as such a great task. Further, opinions with a “general significance” from the point of view of the application of the Copyright Act are published. So far all opinions – on an average twenty opinions each year – have been published, thereby certainly having an impact on legal thinking in the area!

Due to its decisions until now, it is more than indicated that the CC sees the *preparatory works*, not only to the Finnish Copyright Act, as a significant basis for its opinions, but also the *travaux préparatoires* of the other Nordic countries’ copyright legislation, their precedents as well as commentaries.⁵ A common Nordic attitude to issues relating, in particular, to criteria on protection, scope and limits of the protected works, may then stem from these opinions, thereby forming a mould of Nordic legal thinking. Already by this certain significance is

⁴ Cf. Haarmann, *On the Copyright Council’s Activities in Finland*, Ånd og rett, Festschrift til Birger Stuevold Lassen på 70-årsdagen 19. augusti 1997 (publication in honour of Birger Stuevold Lassen), Oslo 1997, pp 403 *et seq.*

⁵ Still, the Nordic countries attach much attention to the very thorough preparatory works to the Copyright Acts; in particular those accomplished in the late 1950s by each Nordic country, foregoing the great Nordic revision in the field.

given to these opinions. This should also be evaluated on the basis that the Finnish Supreme Court only publishes about one single decision on copyright matters per year, however then much observed and intensely analysed.

Of course, some opinions of the CC may be nothing more than a clarification of a very specific matter, saying nothing about another matter even if of a somewhat similar nature.⁶ But several opinions are no doubt of an *abstract* and *general* nature, stating principles and affording interpretations of the legislation of a general interest, also on an joint Nordic arena. Among those we may notice opinions on the position and rights of workers in employment relationships (1986:10 and 1987:12), the possible accession – at the time – of Finland to the Satellite Convention (1987:5), video games as potential film works (1992:3), copyright protection for graduate works in educational institutions (1989:2), the granting of rights in a photograph to three persons, the person who had selected the lenses and the shutter times used as well as the cropping of the photograph, the person operating the camera and the person who had determined the timing of the picture (1991:6).

Even if the CC's primary task may be dedicated to issuing recommendations in cases not suited for heavy litigation, its opinions certainly has grown over the years to afford considerably more than that. If these non-binding opinions, given by an “authority”, but without the stature of a court, are an adequate and just force in the development of positive Nordic copyright law, can only be judged by the factual results thereof over time. However, some would claim that the CC has the function of elaborating on and actually defining authoritative standards of the law, which, at least as a matter of principle, should be a task for the courts, or the lawmaker.

3 b) Denmark – Ophavsrettslicensnævnet – the Copyright License Board

The Danish authority to be observed here is the special administrative entity called Ophavsrettslicensnævnet, the Copyright License Board, CLB. It relates its undertakings to certain exceptions to the authors' rights, in the form not only of compulsory or legal licenses,⁷ but these days also to the ECL-clauses in the Danish Copyright Act. Initially, we should note, though, that the ECL-clauses are somewhat more comprehensive in Denmark than for example in Sweden. ECL-clauses according to Danish law comprise not only those activities noted under Section 2 above, but also reprography within public or private institutions and communication to the public of published works of art in a “generally informative” presentation. Further, those organisations aspiring a mandate to enter agreements on an ECL-basis, as retransmission of broadcasts are concerned, must be *approved* by the Danish government (the Minister of

⁶ See e.g. the laconic headings of opinion 1993:5: “A fabric consisting of red lingonberries and green lingonberry leaves against a background of dark green and aiming at creating a three-dimensional impact as light hit the berries and the leaves by using different colours, is a work as referred to in Section 1 of the Copyright Act.”

⁷ Until 1995 the Board was called “Tvangslicensnævnet”, i.e. “The Compulsory License Board”.

Culture), whereby may be decided that a specific organisation shall be of a collective nature, representing several groups of rights owners.⁸

The CLB is directly mentioned in section 47 paragraph 1 of the Danish Copyright Act, where it is also indicated that the Minister of Culture appoints the trio of qualified persons forming the Board. Its chairman is a judge from the Supreme Court, assisted by two persons who right now are lawyers with special copyright competence.

The CLB's tasks are further described in a specific ordinance,⁹ thus rendering the CLB a clear authoritative status, whereby it may (1) conclude conclusive decisions in cases of dispute on *the size of the remuneration* upon uses of protected works based on such exceptions within the confines of compulsory or legal licenses under the Copyright Act. Here we find remuneration for copies made for handicapped, production of sound-books and production and use of anthologies for educational purposes. Further, (2) the CLB may enter *agreements* on matters, where an approved organisation for rights owners denies, without reasonable grounds, radio- or TV-companies retransmission by cable or accepts this only on unfair terms. This reflects also that the competence of the CLB matches the heading of Article 12 of the EU Directive on Satellite Broadcasting and Cable Retransmission,¹⁰ namely to "prevent abuse of a bargaining position". Hereby, the CLB may also fixate the terms for recordings of radio- and TV-broadcasts for educational purposes and for the use of visually handicapped or hearing-impaired. Lastly, (3) the CLB may try certain cases whereby non-represented (by any appointed organisation) *individual persons* claim remuneration within the frames of an ECL-license.

The main objective the CLB is apparently to decide on compensation for certain uses of copyright in a quick and cheap way by qualified persons. That it offers a conclusive administrative solution means that its decisions cannot be brought to the Ministry of Culture or to other official authorities, but they can certainly be appealed to and tried by a general court. This has happened only in rare cases.¹¹ A court is hereby capable to decide on the amount to be paid on the basis of a compulsory license, even if this has not been an issue before the CLB. The CLB only handles a dispute provided that the conflicting parties agree on the Boards competence. A decision by the CLB cannot immediately form basis for compulsory recovery, as this presupposes a decision by a court on the existence of the remuneration and its size. This also mirrors a probably unique Danish construction in Section 47 para. 3 of the CA; a compulsory license may be converted to an exclusive right, namely if the user doesn't pay properly for a continuous use of a protected work.¹² If so, a court may accomplish the said conversion into an exclusive right. But certainly not the CLB; naturally, a judicial control of the conditions for the suspension of the compulsory license

⁸ See the Governmental concession to similar organisations in Norway, Section 3 c) below.

⁹ Ordinance No. 762 of 2 October 1997.

¹⁰ Council Directive 93/83/EEC.

¹¹ See U 1994.425, UBVA v Gyldendal; CLB's decision upheld; in a district court decision, ØLD 16.1.1996, a CLB-decision on cable-TV was not upheld.

¹² Cf. Rosen, *Ersättningsrätt eller ensamrätt*, Publication in honour of Birger Stuevold Lassen, Oslo 1997, pp 869 et seq.

must be accomplished by a court. If a user does not respect a judgement on suspension, but continues using the work contrary to the court's decision, this behaviour amounts to an infringement of the author's exclusive right.

Further, the CLB has not the capacity to fixate general tariffs. This is of great importance, as it stresses the Boards capacity and inherent aim to try each cases by its specific qualities, not as one of many similar cases. Quite often the CLB has in fact tried cases of much the same character, like remuneration from local radio stations working under quite similar conditions, but it has nevertheless decided in each case brought before the Board.¹³

As for CLB-activities on cable retransmission the Board probably strives to accomplish a coherent evaluation of all circumstances relevant to the conflicting parties, trying to find "reasonable" solutions in the light not only of the public interest of general access to radio- and TV-broadcasting, but also in consideration of the importance of fair competition and non-discrimination also on this market.¹⁴ Important statements of the CLB have in this context focused on terms for example on the intrinsic character of coded and non-coded retransmission of broadcasts.¹⁵ In short, the CLB may approve a retransmission requested by one of the parties as well as set the terms for it, the amount of the remuneration included. This sum may just relate to copyright uses, not to costs for technical use, decoder costs etc.

3 c) Norway – State Concession and Special Copyright Boards

The Copyright Act of Norway exposes, just as the other members of the Nordic family, a set of compulsory licenses and extended copyright licenses of virtually the same nature and scope. Also in Norway, just as in Denmark, these rules form the basis for an administrative structure not only given by the lawmaker but also exercised to some extent by authorities of the state. To start with, those organisations representing a majority of the authors in a certain field, the Ministry of Culture must nevertheless first approve thus claiming to fulfil the demands to enter an agreement upon an ECL-license.¹⁶ Accordingly, the Ministry factually appoints such an actor on the market and has therefore already by this a strong and basic control over a fundamental market factor in the field. ECL-licenses are generally of the same kind and scope as we have met before, as described in Section 2 above, but more similar to the Danish rules. But, as will be demonstrated below, the Ministry has an even stronger position, e.g. by its direct influence on the fixation of the compensation based on some ECL-rules or

¹³ Cf. Schønning, *Ophavsretsloven med kommentarer*, 2nd ed. 1998, p 391. See also the Ministry of Culture's website overview of the Board's activities over the years: "http://www.kum.dk/.dk/con-34_PUB_2089_15807.htm".

¹⁴ This is also in line with the EU Satellite and Cable Directive, mentioned in note 10 *supra*.

¹⁵ See e.g. CLB: s decision 20.12.1996 whereby the sports channel DSF's refusal to accept retransmission of uncoded signals was not considered unfair, as it was directed towards the German market and as DSF had not acquired necessary TV-rights to certain sports events for Denmark.

¹⁶ As has several times been indicated already, such concession is necessary also as ECL organisations in Finland, Denmark and Iceland are concerned.

compulsory licenses. However, technically the Ministry under certain circumstances works via two separate Copyright Boards.¹⁷

As for *remuneration* on the basis of two of those ECL-rules, on reprography for educational purposes and for original broadcasts, Sections 13 and 37 of the Norwegian Copyright Act, and on several statutory licenses, Sections 15, 20, 23 and 45 b of the same Act, covering i.a. recordings of broadcast work at healthcare institutions, prisons etc., presentation of published works of art in scientific journals and books, publication of photographic pictures in news media and remuneration for public performances by performing artists and phonogram producers, disputing parties may bring the matter before a special board, here called Board 1, which is appointed by the Ministry of Culture. Quite generally, these clauses are valid also for performances of artists and recordings of sound producers.

At a closer look, Board 1 consists of a legally trained chairman and two other members suggested by Justitiarius at the Oslo District Court for a period of five years. The costs of the Board's work are covered by the parties in each case in the way decided by the Board. In exceptional cases the Board may decide that the costs will be covered by the State.

If someone, who is obliged to pay remuneration, due to the just mentioned rules in the Copyright Act, refuses to do so, the Ministry of Culture may fixate the price. This happens frequently, but not, for quite obvious reasons, if a public authority is one of the parties – such cases are left to Board 1 to decide on, whereby the Ministry or its officials may not participate in any way in the Board's work. The Ministry may also leave other cases to the Board, if it finds this appropriate. Also, a party to a conflict may choose to have the case tried directly by Board 1 or demand that the Ministry transfers the case to the Board. Such a demand must be delivered when that party brings the case before the Ministry. The other party may demand that the case be transferred to Board 1 within a certain period, decided by the Ministry.

If and when an obligation to pay is stated according to these rules, the Ministry of Culture state a *prohibition* on continuous use against the obliged party. Both an author, whose work is used, and an organisation, which is the legitimate owner of the right, managing it on the basis of a contract, may bring forward a demand for prohibition. As already mentioned, such an organisation, which relates to an ECL-clause, must however be approved beforehand by the Ministry of Culture.

As for disputes relating to *retransmissions* of broadcasts the Ministry of Culture may also appoint another board, here called Board 2. Also this board consists of a chairman, having competence as a judge, and two other persons, appointed for a period of four years. Procedure and handling of costs are treated similarly as for Board 1.

Board 2 may decide on both permissions to retransmit broadcasts and the terms for such acts, according to Section 45 a) of the Copyright Act. It tries such matters on demand from an organisation relating to an ECL-clause, or from

¹⁷ Cf. the Ministry's homepage information on the organisation and work of its Copyright Boards, "http://odin.dep.no/kd/norsk/aktuelt/hoeringssaker/paa_hoering/018041-080072/index-dok000-b-n-a.html".

someone responsible for the retransmission of broadcasts in cable networks or in the air. Several cable networks, linked together by retransmission from a common receiving antenna, are considered as one single cable network. Hereby, the Board may very well test intrinsic civil law matters, like how to draw the border line between private and public circles while applying the authors' right to transmission.¹⁸ But Board 2 has no mandate to handle a conflict between a broadcaster and a transmitter of solely airborne retransmission. Permission by the Board to a retransmission should be considered as a compulsory license, although as such not given in the text of the Copyright Act; accordingly it is only valid for the conflicting parties, which is naturally true also if the decision forbids further retransmission. The same is valid also for its decision on the compensation, if such is to be paid, although in this case the decision has an impact on authors and artists who are not organised but nevertheless comprised by the ECL-clause applied.

As for retransmission according to Section 45 b) of the Copyright Act, the competence of Board 2 is limited to the fixation of the *remuneration*. In both cases Board 2 is bound by the claims of the parties and decides on the basis of an oral negotiation, unless either of the parties demands a conduct in writing and Board 2 finds this appropriate. Just as matters before Board 1, the second Board may try to *mediate* between the parties – if this conduct is successful also the reconciliation may be taken to the protocol.

To conclude, just as in Denmark, decisions of Board 2 certainly show respect for the owners' exclusive rights in broadcasting.¹⁹ But its decisions also reflect the strive to offer general public access to program contents, to keep the bulk of programmes together for the audience, although certainly on fair terms to both parties.²⁰

3 d) Sweden – a Boardless Country

There is in Sweden no special organisation or legal entity provided for by law to protect copyright or related rights. The Swedish organisational system certainly includes authors' unions and other professional organisations, collecting societies, publishers' organisations, users' organisations etc. But we must stress that this is a privately organised system within privately developed forms. As such it is very elaborate – some claim that it should probably be counted among the most efficient in the world.²¹ For considerable time this "system" has endeavoured to balance the interests of authors and users and has contributed to, or created, a relatively peaceful development of the Swedish copyright market,

¹⁸ Cf. the Board's decision 15 August 1995, n:o 4/1994, Communal Aerial System.

¹⁹ Cf. The Board's triple decisions on retransmission of Eurosport in Norway, 25 June 1993, n:o 1,2/1993, 5 November 1993, n:o 4,5/1993 and 6 February 1994, 1,2, 3/1994.

²⁰ This is reflected also in the preparatory works to the relevant provisions of the Norwegian Copyright Act; see *Ot.prp.* No. 80 (1984-85) p 23.

²¹ Cf. Karnell in Nimmer/Geller, *International Copyright Law and Practise*, Vol 2, 1992, Sweden, SWE 9(2).

supported by some ECL-clauses and a handful of compulsory licenses of the Nordic type.

Among those organisations should, in this context, be mentioned *Copyswede*, a cartel of authors' and performing artists' organisations negotiating contracts regarding satellite and cable transmissions, the use of broadcasts for videogram production and distribution, etc. Also, the collecting society *BONUS*, formed by virtually all Swedish societies and associations of authors and other holders of rights in the field of copyright, has a special standing to administer ECL-agreements relative to reprographic copying for educational purposes.

This system causes disputes on i.a. remuneration related to ECL-clauses and compulsory licenses to be solved by the courts.²² In certain cases, namely relative to anthologies for educational purposes, remuneration for some public documents, ECL-clauses on broadcasts and on retransmission of broadcasts as performing artists and sound producers rights are concerned, the District Court of Stockholm is always the first instance, according to Section 58 of the Swedish Copyright Act. Thus, it is transformed into something of a specially initiated court in such matters. In fact, it would be, even without this mandate, as the Stockholm area simply generates most of the litigation in the field of copyright in the country.

As a tool to reconcile disputes in certain copyright matters, the lawmaker has also enacted what is called the *Act on Mediation in Copyright Disputes*,²³ offering the possibility of both mediation and, ultimately, arbitration, if conflicting parties would desire this. If so, the Government will appoint a mediation officer. This Act is applicable on disputes relating to ECL-licenses on reprography and retransmission of broadcasts as well as other disputes relating to those phenomena and, in particular, matters relating to the rights of performing artist and phonogram producers. However, so far the Act on Mediation has never been applied.²⁴

The accuracy and effectiveness of the Swedish copyright market may be pretty obvious to observers. A slightly less obvious phenomenon, but arguably still relevant, would probably be that some groups are not particularly well off in the bargaining position offered by the lawmaker, history shows, such as the performing artists, having nothing more than a claim on remuneration for public performances of their sound recordings, original broadcasts and retransmissions included, recognised in Section 47 of the Swedish Copyright Act, thus a kind of compulsory license. From harsh market conditions could surely emanate the opinion that support from a neutral but materially competent copyright board would afford them better results. Particularly as a right to remuneration, as opposed to an exclusive right to dispose of an exclusively protected work or performance, affords the rights owner virtually no legal remedies to be used in a

²² See e.g. the decision of the Supreme Court of Sweden, NJA 1968 p. 104 (NIR 1969 p 103), whereby this court had to decide the amount per minute, which The Swedish Broadcasting Organisation should afford i.a. performing artists.

²³ See Lag (1980:612) om medling i vissa upphovsrättstvister, latest amendment SFS 1997:791.

²⁴ Cf. the often applied Finnish statutory rules for a special court of arbitration as concerns disputes on remuneration to performing artists and record producers for public performances of recordings; Sections 47 and 54 of the Finnish Copyright Act.

conflict. Prohibition, seizure etc are therefore not available remedies to those who have related right in sound recordings and, further, those rights owners cannot act on the basis of their statutory right to remuneration until a relevant use has factually been accomplished. Still, they have not found reason to bring a case before the potential test of a mediation officer, as the above-mentioned enactment facilitates.

4 Some Conclusions

By and large the five Nordic countries, notwithstanding almost similarly running copyright acts, expose national idiosyncrasies or at least three different groupings as administrative institutions relating to copyright are concerned. However, as this survey may have demonstrated, the Swedish organisational "system", as little as the Finnish one, may not generally be said to have led to material results greatly differing from those of Denmark, Iceland and Norway, in spite of the formal lack of coherence on substantial administrative areas. At least it is probably fair to claim that the interests of the authors and the performing artists have been comparatively well provided for in Denmark and Norway, offered arguably the highest level of remuneration e.g. for retransmission of broadcasts in the world, relatively speaking. But an adequate comparison is hard to generate, as these questions very much are linked to geographical structures, demographics and other specifically national criteria.

In line with the aforesaid, those organisational differences between the Nordic countries in the field probably merely demonstrates varying attitudes to market behaviours, closely linked to traditions in each country, also in a number of countries as coherent as those of Scandinavia and the other Nordic countries. Possibly, since long established fears of the authors impeding public access to certain potential mass uses may have worked in favour of rather strong governmental activities in certain countries. The Swedish approach, stressed under recent years, leaving more and more for the general courts to handle, has always been to uphold primarily such phenomena as freedom of contract and bargaining and the autonomy of the parties, thus underlining the civil law nature of copyright. Where copyright boards are working, typically in areas of mass uses, hard to master on an individual basis, and in the remote quarters of copyright, shaped by compulsory licenses, collective handling is no doubt necessary. But even if all Nordic countries have a common platform in ECL-clauses and, by and large, common statutory licenses, the stress on free negotiations must be said to be more overt in Sweden than e.g. in Denmark and Norway. However, some would claim that the authors of the last mentioned countries have been amply paid for their relative loss of free bargaining power.