

Scandinavian Idea of Informational Fairness in Law - Encounters of Scandinavian and European Freedom of Information and Copyright Law

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1 Introduction

An excellent, recent crystallisation of Scandinavian legal thinking is found in the newly reformed section 100 of the Constitution of Norway where the last paragraph reads: “*Det paaligger Statens Myndigheter at lægge Forholdene til Rette for en aaben og oplyst offentlig Samtale*” – in English: it is the responsibility of the authorities of the State to create conditions enabling an open and enlightened public debate. Effektiv folkstyre, effective democracy, is a valued principle and policy goal in Scandinavian countries.¹ Scandinavian legal innovations represent pragmatic virtue, they seek to provide practical, efficient and accessible solutions in homely style rather than define grand formal systems of law or create grand codes of law.² Perhaps the most known example internationally of Scandinavian innovations is the principle of publicity, right of access to government documents and information.

The enactment of world first comprehensive freedom of information law, Sweden’s Ordinance relating to Freedom of Writing and of the Press of 1766, hereinafter Freedom of Print Ordinance, was essentially result of writings a Finnish Diet member (riksdagsman) and priest *Anders Chydenius*, considered to be the Adam Smith of Finland.³ History of the principle of publicity was directly connected to certain specific ideas on the equality of possibilities and influenced by teachings of the utility economics represented in the that time University of

1 Effective or functioning democracy, effektiv folkstyre is often repeated as the central goal of administrative policy in Sweden, *See* Swedish Government Proposal 1997/98:136 *Statlig förvaltning i medborgarnas tjänst* and *See* also the Swedish Government administrative policy programme by the Government of Prime Minister Göran Persson, *En förvaltning i demokratins tjänst – ett handlingsprogram*, Regeringskansliet, Justitiedepartement, Stockholm 2000. *See* also Gustaf Johnssén, *E-förvaltning och lagstiftning i Sverige 2000 -2006* in Dag Wiese Schartum, *Elektronisk förvaltning i Norden, praksis, lovgivning og rettslige utfordringer*, Fagbokforlaget, Bergen 2007, 135 – 146, p. 135.

2 Scandinavian jurists are characterised by virtues of reasonableness and realism, *See* Konrad Zweigert – Heinz Kötz, *Einführung in die Rechtsvergleichung auf den Gebiete des Privatrechts*, zweite Auflage, J.C.B. Mohr, Tübingen 1984, p. 321 – 332. Following the arguments and practise by Zweigert – Kötz I will use Scandinavian and Nordic as synonyms even though in geography Scandinavia is a narrower area than Nordic countries, *See* Zweigert – Kötz, *Einführung*, op.cit., p. 322. In legal context term Scandinavian law is a correct term because of the long common tradition in legal history including all Scandinavian legal systems and strong mutual inter-actions. This concerns also Finland who was part of Sweden from 12th century to 1809 and during the period of the autonomic Grand Duchy of Finland, which was part of the realms Russian Emperor, Finland had its own legal system which based to the old Swedish constitution and law. In independent Finland the close Nordic co-operation in law-drafting and the practise of following very closely legal developments in Sweden has maintained the connection. In addition, the second official and national language of Finland is Swedish and all Government Proposals and laws are published as officially binding versions also in Swedish which maintains also linguistic connection with the rest of Scandinavia.

3 On the role of Anders Chydenius in the enactment of publicity principle and intellectual foundations of his thinking, *See* Juha Manninen: *Anders Chydenius ja mailman ensimmäisen tietämisen vapauden lain synty*, Historiallinen aikakauskirja Vol. 104 , 2006:4, s. 470 – 484 and Juha Manninen: *Anders Chydenius and the Origins of World’s First Freedom of Information Act* in Juha Mustonen (ed.): *The Worlds First Freedom of Information Act*, Anders Chydenius’s Legacy Today, Anders Chydenius Foundation’s Publications 2, Kokkola, 2006, p. 18 – 53.

Turku. Chydenius came from Kokkola at the remote eastern side of the Gulf of Bothnia and became politically active in the opposition party Caps. He did not benefit from personal relations at the Capital giving easy access to informational resources held by the central government. This personal experience contributed to Chydenius's view on the principle of publicity. One of the ideas behind the principle of publicity was to provide equal conditions for access to information necessary for public participation. History and ideology of the principle of publicity is thus also connected to liberal principles of justice.

Copyright law has been subject to intensive Nordic law-drafting co-operation which created unity in copyright laws of 1960s. Following the unity of the texts of copyright law the Swedish preparatory works from 1956 have had de facto the same status and value as a source of law in Finland as domestic law drafting materials.⁴ Since 1970s unity in Scandinavian copyright law has diminished when each Nordic country has adopted different solutions in the urgent updates of copyright law following technological development and lately, European integration, albeit the tradition of Nordic law-drafting co-operation has been maintained.⁵

Shared historical experiences, close mutual connections, relatively similar size and other similarities between Nordic Countries concerning environmental conditions, general societal structures, way-of-life, culture, values and community-ethics and the resulting feeling of mental and cultural togetherness between Scandinavians with the absence of too intensive competition for dominance and international power have created favourable framework for co-operation in law-drafting and in legal co-operation in general. Co-operation is further facilitated by the linguistic closeness with the exception of Finnish speaking Finnish lawyers. The small size and distant geographical location of the Nordic countries have also created a particular need for common analyses of legislative policy alternatives and sharing of experiences. Scandinavia has provided an optimal epistemic community for intellectual inspiration and comparative co-operation in law-drafting and legal analyses.⁶

4 SOU 1956:22, *Upphovsmannarätt till litterära och konstnärliga verk, lagförslag av Auktoritetskommittén*, Statens Offentliga Utredningar, Stockholm 1956, which was the basis for Sweden's Copyright Act of 1960 and also provided much of the basis to the enactment of Finland's Copyright Act of 1961. On the value of the Swedish 1956 committee work as a source of law in Finland and on the significance of Nordic law drafting co-operation from the perspective of current Finnish copyright law, See among others Katariina Sorvari, *Vastuu tekijänoikeuden loukkauksesta erityisesti tietoverkkoympäristössä*, WSOY Helsinki 2005, 21-22.

5 See Pirkko-Liisa Haarman, *Tekijänoikeus*, Talentum, Helsinki 2005, p. 9. On the Scandinavian law drafting activities and co-operation between 1970 and 1990 See Mogens Koktvedgaard, *Revision of Nordic Copyright Acts 1970 – 1990*, Nordisk Immaterialrättslig Rättsskydd NIR 1991, 5 – 14 in which Koktvedgaard sees the attempt to follow technological change as defining the agenda of copyright law drafting co-operation.

6 See Zweigert – Kötz, *Einführung*, op. cit., 331-332. On the concept of semiotic group and epistemic community, See Tuomas Pöysti, *Tehokkuus, informaatio ja eurooppalainen oikeusalue*, Forum Iuris, Helsinki 1999, p. 90-94 and Bernard S. Jackson, *Making Sense in Law, Linguistic, Psychological and Semiotic Perspectives*, Deborah Charles Publications, Liverpool 1995, p. 4-6 and 93-98.

Scandinavian countries have developed a wide network of public libraries to give fair access to literature, knowledge and culture. Scandinavian law has also provided pragmatic but innovative solutions to some of the fundamental balancing problems inherent in the copyright system. An explicit recognition of lending rights, the *prima facie* right of the authors to get compensation on the public lending of his works, is in the European Union a development which was first launched in Scandinavian legislation, albeit outside the copyright law by establishment of library compensation and authors' fund schemes under public law. Compensation was first legislated in Denmark in 1946.⁷ Scandinavian academic and legal policy discussion around the lending right and authors' compensation concerned essentially a fair balance between authors and the rights of a purchaser of a published copy.⁸

My aim with this article is to contribute to the discussion on how the Scandinavian approach to informational fairness encounters legal integration in the European Union and whether the Scandinavian law is able to influence European legal developments with innovative solutions or, is the Scandinavian law only adapting internationally defined solutions. My research question is how Scandinavian law in the areas of publicity, copyright and public libraries aim to *secure informed citizenship and, what is legal conception informational fairness if informational fairness is understood as informational conditions for participation in democratic society*. The question is *how modern Scandinavian publicity and freedom of information legislation, copyright law, administrative law and library law secure access to information and to knowledge to citizens, and how these arrangements and underlying conceptions of informational fairness change in the European integration*.

Building theories on the fundamental features of groups of legal systems, legal families, is not a scientific end of itself but rather a scientific tool for understanding the dynamics of legal change and inter-action between legal systems and social systems. Comparative theories of the structural features of law make visible the background of law, legal culture, dominant ideologies and intellectual movements and economical, social and technical realities which all create forces of change in law and in community ethics and morality.⁹ Law is a part of individual and community identity and, also a representation of a certain concept of good life so understanding Scandinavian society and culture can be approached by analysing law and its changes.

7 See European Commission: *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union*, COM (2002) 502 final, chapter 1.

8 See T.M. Kivimäki, *Tekijänoikeus, tutkimus kirjailijan, taitelijan ja tiedemiehen oikeudesta teokseensa*, Suomalaisen lakimiesyhdistyksen julkaisu B-sarja N:0 27, Helsinki 1948, p. 180 – 181 and 225 – 227.

9 On the purpose and scientific value of taxonomies, See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the Worlds Legal Systems*, *The American Journal of Comparative Law*, Vol. 45, 1997, 5- 45, p. 5-8 and 13.

2 Informed Citizenship and Communicational Rights

Scandinavian laws and information policy doctrine emphasises the material value of the freedom of expression and access to information as necessary elements of lively and effective democracy. Freedom of expression, access to information and democracy are closely connected even when democracy is essentially seen as a rule by majority. Discussion and freedom of organisation and expression are necessary to the rule by majority principle function effectively.¹⁰ The freedom of expression entails freedom of the exchange of information and, certain support for the access to information can be derived from the ideals of the freedom of information. In Finland the fundamental right and freedom of access to government documents and information is written in short and scarce style in section 12 (2) of the Constitution without explicit reference to re-use right as is the case in Sweden's Freedom of Print Act (*tryckfrihetsordning*). The right to re-use can then be derived from the constitutional functions of the publicity principle and essential provisions are included to the ordinary legislation.¹¹ In EU law it is only with European Community Directive 2003/98/EC on the Re-Use of the Public Sector Information that the right to re-use government held information is clearly regulated, albeit the approach of the Re-Use directive is of competition law and private law. The principal objective is not to guarantee the conditions of functioning democracy but to promote good functioning of internal markets in the area of information and information based products.

Access to information and knowledge and ability to communicate information and opinions are vital elements of individual right to self-determination (individual autonomy) and democracy.¹² Rational political, ethical and legal debate requires reliable and publicly available information. Thereby access to information and participation in public discourse are essential democratic values.¹³ Pub-

10 See Alf Ross, *Dansk statsforfatningsret I*, tredje udgave, 1980, p. 136 – 143. Ross has a fairly formal point of departure in his conception of democracy in which Ross emphasises the majority rule principle as necessary and sufficient legal criteria of democracy. But when Ross develops the elements and conditions of the majority rule to function effectively and recognises the various decrees of democracy Ross comes to the recognition of significance of public debate, See also Alf Ross, *Hvorfor demokrati?*, Ejnar Munksgaard, København 1946, 177 – 178 and 198 - 199. Albeit Ross did not connect explicitly the educational level of citizens and informed citizenship to the conception of democracy, his approach can be seen also as an application of a deliberative model, See on this Jørn Loftager, *Politisk offentlighed og demokrati i Danmark*, Aarhus universitetsforlag, Århus 2004, p. 71-78.

11 Mäenpää, *Julkisuusperiaate*, Forum Juris, Helsinki 1999 p. 12.

12 In Finnish social sciences and information management literature Timo Kuronen has written an excellent analyses of the meaning of informational freedom and freedom of access and utilisation of informational resources to democracy, See Kuronen Timo, *Tietovarantojen hyödyntäminen ja demokratia*, SITRA, Helsinki 1998.

13 Even though there is a general liberal understanding, which are the essential characteristics of democracy, there is not uniform understanding on the definition of democracy and what constitutes sufficient elements of democracy. Democracy cannot be equated only with the decisions by majority but the majority rule shall be complemented by other democratic values. Principal democratic values are (1) representation of political interests, (2) citizen's participation, (3) free building of opinions, (4) free access to information and openness, (5) legal certainty and respect for the fundamental rights and freedoms, (6) division of powers, (7) control of political decisions and (8) accountability of political decision-makers, See Alexan-

lic deliberation in decision-making arguably leads also to better quality of decisions.¹⁴ It is a condition for democracy is that citizens are well-informed and have access to societal information. Functioning democracy requires informed citizenship.¹⁵ Informed citizenship is based on the citizens' communicational rights which shall be secured by public power and which have the character of fundamental rights and freedoms. Citizens' communicational rights consist of (1) right to information and knowledge (factual information), (2) right to background knowledge concerning social and political choices, that is the right to best possible reasonable knowledge on the topic on public agenda and on the consequences of the various alternative decisions, (3) right to belonging to a community which also entails a right to high quality entertainment and arts and a right to inter-action via media and (4) right to self-expression which does not only cover the formal freedom of expression but a right to become heard and taken into account.¹⁶ These communicational rights recognised in media studies in fact define the citizen's right to information and right to knowledge and right to communication and they represent according to *Ahti Saarenpää* and I general principles of information law, the fundamental informational rights and principles of informational fairness¹⁷.

der Peczenik: *Lagstiftningen, domstolarna, rättsmedvetandet och rättssvetenskapen in Löser juridiken demokratins problem?* Demokratieutredningens skrift nr 23, Statens Offentliga Utredningar SOU 1999:58, Stockholm 1999, 7 -54, p. 25-26.

14 There is a fairly general agreement that wide public discussion and participation are an essential aspect of democracy. This fact is incorporated to the freedom of expression as a fundamental right and freedom as it is developed in the case law of the European Court of Human Rights and expressed in article 11 of the European Union Charter on Fundamental Rights. Several theoreticians of political theory have been developing the concept of deliberative democracy. In Europe Jürgen Habermas's theory of public discourses is one of the most known and discussed approaches to deliberative democracy. For Habermas it is the public discourse which also guarantees the rationality of public decisions, *See* Jürgen Habermas, *Faktizität und Geltung, Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Vierte Auflage, Suhrkamp 1994, particularly model in page 207, in which is divided to pragmatic, ethical-moral and legal discourse. The idea that discussion leads to rational decisions is expressed in Anders Chydenius writings on the reasoning of the principle of publicity; the competition of pencils ensures truth in public debate and thereby in public decision-making. Models of deliberative democracy provide good points of departure to analyses of the actual state of democracy and conditions of democracy, an example of such analyses is Jørn Loftager: *Politisk offentlighed og demokrati i Danmark*, op. cit. 2004.

15 *See* Hannu Nieminen, *Median sääntely ja informoitu kansalaisuus in* Demokratia ja säädöspolitiikka, Eduskunnan kanslian julkaisu 1/2007, p. 59-72, notably p. 59.

16 Nieminen: *Median sääntely*, op. cit., 63.

17 Ahti Saarenpää has developed the system of principles of information law in several writings. Saarenpää defines as general principles of information law right to information, right to informational privacy and freedom of information. These principles are meta-level rights which are moral objectives and principles at the level of the social contract, which means that the meta-level rights are on higher level of abstraction as the fundamental rights and freedoms written in the Constitution. Meta-level rights are also objectives behind fundamental rights and freedoms. These fundamental principles are complemented by principles of privacy, publicity, freedom of communication, information security and public service. *See* Ahti Saarenpää, *Informaatio-oikeus*, Enclopædia Iuridica Fennica, VIII, Oikeuden yleistiheet, Suomalaisen lakimiesyhdistyksen julkaisuja, C-sarja n:o 30, Helsinki 1999, p. 206 – 215, in particular p. 209-213. Saarenpää's definition of the general principles of information law provides the

Legislative or legal policy may refer to the governmental and societal policy objectives underlying written texts of law. This is how *Ronald Dworking* understands policies in law and separates them from legal principles, which represent fundamental rights and principles of justice, individual rights.¹⁸ Legal policy can also refer to a legal technology or applied legal sociology. According to *Alf Ross* law has an objective in itself: law is to realise as fully as possible the idea of justice inherent in and dependent of the law. Legal policy is discipline how this goal of justice is realised in practise.¹⁹ Legal policy is, thus, a particular *savoir-faire*, applied knowledge.²⁰ Following *Peter Seipel's* analyses legal policy towards information takes a position to (1) guarantees that certain information is produced, (2) possibilities of various parties to have access to information, (3) who shall bear the costs of securing access to information and is it allowed to use and to which purposes it is allowed to use information.²¹ Seipel's list could be expanded to include the question which incentives there shall be for the distribution of information and which is the division of labour between public sector and private markets in various aspects of information policy.

The place and borders of markets and public sector and the definition of the public domain are fundamental questions to be solved in information policy and information law. These questions are partly in Alf Ross's terms legislative policy issues of what is the most optimal realisation of constitutional rights and freedoms. But they are also questions of fundamental appreciations of the principles of justice. Tensions between the freedom of expression and the freedom of information belonging therein on the one side and copyright on the other side seem to relate to divergences where should be the border between markets and

point of departure for my understanding of the system of information law. The general doctrine of information law can be built around meta-rights, that is second level rights to information and knowledge, which describe fundamental values inherent and underlying fundamental rights and freedoms. These meta-rights are general legal principles. These principles are (1) right to information and the freedom of information, (2) right to communication and freedom of communication, (3) right to knowledge and freedom of knowledge, (4) right to public and private self-determination, (5) right to privacy, (6) right to efficiency in the markets and in public administration, (7) right to information security and (8) right to quality and good governance, See Tuomas Pöysti, *ICT and Legal Principles: Sources and Paradigm of Information Law* in *IT Law*, ed. by Peter Wahlgren, *Scandinavian Studies in Law*, Vol. 47, Stockholm Institute of Scandinavian Law, Stockholm 2004, 559-600. Stockholm 2004.

18 Ronald Dworking, *Law's Empire*, FontanaPress, London 1986, p. 219 – 224 and in particular Ronald Dworking, *Taking Rights Seriously*, Third Impression, Duckworth, London 1981, p. 22-23.

19 See Alf Ross, *Om ret og refærdighet, en indførelse i den analytiske retsfilosofi*, 2. opl., Nyt nordisk forlag, København 1966, p. 417.

20 Law is also stories about right and justice and on the powers of authorities and individuals. In the deep-structures of these stories of law certain doctrines and principles represent constantly the role of *savoir-faire*, the synthesis of the legal knowledge and regulatory techniques, See Pöysti, Tehokkuus, informaatio ja eurooppalainen oikeusalue, op.cit., p. 145 – 146.

21 See Peter Seipel: *Insynens gränser – Allt eller Intet*, promemoria till IT-rättsliga observatoriet, Det IT-rättsliga observatoriets rapport 16/2000, IT-kommissionen. Stockholm 2000, available at "www.itkommissionen.se/doc/108.html" [page visited 1.10.2007].

the public domain, partly they are issues of emphasis what are the pre-eminent values in the system of copyright and public sector information law.²²

In developing the reasoning and formulation of the principle of publicity Anders Chydenius connected the freedom of information to the idea of access to knowledge which is necessary for an enlightened, knowledgeable steering of the country by its citizens. For Chydenius it was the competition of the pens which ensured knowledgeable governance and accountability and competition of the pens was also a method of obtaining truth. “*The freedom of the nation cannot be upheld by laws alone but also by the light of the nation and knowledge of their use*” wrote Chydenius to the Diet’s Committee of the Freedom of the Press. Chydenius’ thinking was influenced by the utilitarian economics strongly present at the University of Turku, an English type of individualistic conception of liberty and by Samuel Pufendorf’s ideas of natural equality between people. Even public consultations held by the Emperor of China provided some albeit not very decisive source of inspiration. Formulation of publicity principle was, thus, a result of a fairly global mix of intellectual inspirations. Access to documents was a mean to provide all the citizens the sufficient knowledge basis for participation in public life. One of the background debates which influenced Chydenius thinking in formulation of the ideas of the principle of publicity was the debate on the imperative mandate of the members of the Diet, the Parliament of the time. Chydenius thought that public discussion would inform Diet members of the will of their constituencies and people in general. Then one could simultaneously maintain the old constitutional rule on the prohibition of imperative mandate and to connect decision-making to the will of people.²³

The ideals of participatory, deliberative democracy are today expressed in the texts of Scandinavian freedom of information acts. Purpose of the right of access to government documents is defined in section 2:1 of Sweden’s Freedom of Print Act (Tryckfrihetsförordningen 2:1) to be the promotion of the free exchange of opinions. In policy documents the purpose of the principle of publicity are defined to be the promotion of legal certainty, efficiency of administration

22 Copyright law has faced on process of commercialisation during the last decades, *See* for example, Mogens Koktvedgaard, *Nyere udviklingslinier in Ophavsretten* in *Festskrift till Stig Strömholm*, del II, Iustus Förlag, Uppsala 1997, p. 535- 543, in particular p. 536 – 537. This is an example of a wider commodification of information and intellectual creations, which is one of the recent topics of analyses and discussion in the research of information law, *See*, for example Niva Elkin-Koren & Neil Weinstock Netanel (eds.), *The Commodification of Information*, The Hague [etc.]: Kluwer Law International 2002. Commodification and commercialisation, which follows partly from the European legal integration and new international instruments having an impact on copyright law, such as the WTO TRIPS convention, have amplified the eventual conflict between freedom of expression and copyright. Theory of copyright centred around author’s natural and moral rights was somewhat easier to combine with the fundamental rights and freedoms than a system of copyright which is rather highly oriented towards markets, on this *See* Jan Rosén, *Upphovsrätt och yttrande- och informationsfrihet – privaträtten i en konstitutionell context* in *Festskrift till Peter Seipel*, Norstedts Juridik, Stockholm 2006, 495 – 508, in particular p. 499 – 500.

23 On the role of Anders Chydenius in the enactment of publicity principle and intellectual foundations of his thinking, *See* Juha Manninen, *Anders Chydenius ja mailman ensimmäisen tietämisen vapauden lain synty*, op.cit. p. 470 – 484 and Juha Manninen: *Anders Chydenius and the Origins of World’s First Freedom of Information Act*, op.cit., p. 18 – 53.

and efficiency of democracy.²⁴ The policy objectives of the principle of publicity are substantially similar in Finnish law. Connection to the freedom of expression is systematic: right of access to government documents and information as a fundamental right is included to the second paragraph of the general fundamental right and freedom to freedom of expression in section 12 of the Constitution of Finland. Detailed legal definition of the objectives of access to information is found in section 3 of Finland's Act on the Openness in Government Activities (621/1999), hereinafter the Openness Act. The purpose of principle of publicity is to realise openness and good information management in government and to give individuals and their associations possibilities to control use of public power and resources, form freely their opinions and to influence on the use of public power and to safeguard their interests and rights.

In Norway section 100 of the Constitution was amended in 2004 to provide an up to date and stronger expression of the purposes of freedom of expression and to provide for access to documents as a constitutional right. Last paragraph of section 100 of the Norwegian Constitution creates foundations for the task of public power to actively produce and publish information. The purpose is to create foundations for open and enlightened public debate. Formulation captures in short the essence of the Scandinavian tradition of connection between freedom of expression and information, active publicity and deliberative democracy. The publicity principle and information production of public authorities creates conditions to the use of freedom of expression. In addition to the section 100 of the Constitution there is no general act which would further define the duties of public authorities to produce and publish information in Norway.²⁵ In Denmark a more limited publicity act compared to that of Sweden and Finland was first enacted in 1970. Purpose of the act was to increase trust to public administration and to broaden democracy (*folkestyre*) and by means of the principle of publicity the informational basis of debate concerning societal issues would become better and thereby the debate would become of better quality and more constructive.²⁶ Denmark's current Publicity Act (100 om offentlighed i forvaltningen, Lov nr 572 af 19.12. 1985) from 1985 attacks too this line of thought even though the act itself is silent of the general objectives of the right of access to documents.

24 See Seipel, *Insynens gränser*, op.cit. and Alf Bohlin, *Offentlighetsprincipen*, Norstedts Juridik, Stockholm 2007.

25 On the Norwegian official information policy and the connection of public authorise information production to freedom of expression, See NOU 1999:27, *Ytringsfrihet bør finde Stedt, forslag til ny Grunnlov § 100*, which led to the modification of section 100 of the Constitution of Norway. On the active information production its legal issues in the information policy of the Norwegian public administration see Hans Petter Graver, *Retslige sider ved forvaltningens medihåndtering*, Tidskrift for Rettsvidenskap, vol 120, 3/2007, p. 321 – 360, p., 325-331. On the Norwegian legislative materials see also Government Proposal 102 (2004-2005) Ot.prp. 102 (2004-2005) p. 24-25 *om lov om rett til insyn i document i offentlig verksamhet*.

26 See statements in the preparatory works of the Danish Publicity Act in betænkning nr. 325/1963:42 and FT 1. samling 1969, sp. 3457. See also Tim Knudsen, *Offentlighed i det offentlige, om historiens magt*, Aarhus universitetsforlag, Aarhus 2003, p. 9 - 16.

In Finnish law the general information production and information service obligations are stipulated in section 20 of the Openness Act. Public authorities have a general obligation to promote openness and shall in this purpose produce, as appropriate, guides, statistics and other information materials on their services and on their administrative practise and on the circumstances of society and development of it in their domain of activity. In discretion concerning the need to produce such materials the authority shall take into account to which extent information on the activities of the authority is available on the basis of documents and on the basis of general statistics. This information production obligation incorporates nearly word by word the widened function of publicity principle developed in Swedish Government Proposal 1975/76:160 on the amendment of the Secrecy Act to a rule of law. Purpose is to promote active information strategy and increase the overall transparency in administration and society.²⁷

The information producing obligation goes further than merely providing efficient access to existing documents but means an obligation to actively produce new information. Subsection 20 (2) requires public authorities to inform of their activities and services, and, on the rights and obligations of individuals in their domain of activity. Pursuant to subsection 20 (3) the authorities shall see to that the central documents for general public's access to information or catalogues of them are available in public libraries or public information networks or in similar ways easily available. The Act, thus, emphasises the role of public libraries. According to section 19 public authorities have specific information and communication duties on the matters which are on the preparation. Section 21 of the Openness Act foresees production information materials on request. Authorities may produce added value materials if such processing and producing is not against secrecy or protection of personal data.

Considerations for informational conditions of material democracy and participatory democracy – effektivt folkstyre – can also be found elsewhere Scandinavian administrative law. Administrative Procedure Act (434/2003) in Finland requires informing persons who are not parties of an administrative matter and give them possibility to influence if decision in a matter could have significant impact on the living environment, work or other conditions. Also the service principle and authorities duty to give advice pursuant to sections 7 and 8 of the Administrative Procedure Act on how to handle matters in administration requires information services. Similar provisions are in Swedish Administrative Procedure Act, Förvaltningslag (1986:223) which together with other Scandinavian Administrative Procedure Act also provided a model for law-drafting in Finland.²⁸

27 See the Finnish Government Proposal to Openness Act, HE 30/1998 vp. *laiksi viranomaisten toiminnan julkisuudesta*, detailed motives for section 20 and See also Anna-Riitta Wallin – Timo Konstari, *Julkisuus- ja salassapitolainsäädäntö, laki viranomaisten toiminnan julkisuudesta ja siihen liittyvät lait*, Suomalaiset oikeusjulkaisut SOJ oy, Helsinki 2000, p. 226-229.

28 On the Scandinavian sources of inspiration for Finland's new Administrative Procedure Act, See Government Proposal to Administrative Procedure Act, HE 72/2002 vp. *hallintolaiksi*, p. 22 – 25. According to the Government Proposal a central objective of the new act was to increase and realise constitutional requirements on the individual right to participate and influence public decision-making concerning himself and his living environment.

A specific example of the wide transparency and universal information services in Finland is the central government internet –based reporting service Netra.²⁹ In realisation of the general principles of Openness Act, the financial accounts and detailed accounting and performance information of the central government and central government agencies shall according to provisions of the Central Government Budget Decree (1243/1992) be available in the Netra –service which provides a single portal to dynamic on-line financial and performance data and to budgets, key planning documents and performance reports.³⁰

The Scandinavian freedom of information law and administrative law has been a long time been developing towards an establishment of the universal information service to be provided by public authorities.³¹ This evolution is also related to the change of public administration and its functions. The basic modern model of public administration was of efficient bureaucracy whose function was to implement laws and government’s political decisions. Now the role of public administration has developed to be more of governance of social problems.³² Information is a resource in the governance and public authorities use active communication and information production as tools in exercising influence to society and also to democratic decision-makers. This also creates new needs for securing the quality of information and communication and also to control the fairness of authorities’ communications.³³

The evolution of the principle of publicity towards universal information service is well documented in Sweden in Government Proposal 1975/76:160 on the amendment of the Secrecy Act. The purposes of the access to information law (publicity principle) have been expanding from the control of administration towards securing access to comprehensive information of societal conditions which can provide foundations for public debate and lively democracy. According to the Swedish Government Proposal 1975/76:160 access to public documents provides objective information about conditions in state and local gov-

29 Service is available at www.netra.fi .

30 Control of governmental use of resources and performance is among the core objectives and principles of freedom of information legislation. Finland’s Openness Act states this in section 3. The realise this and to promote a model of deliberative democracy the budget formulation process in Finland is very open. The budget proposals of the ministries become public when the Minister of Finance has, prior to Government budget negotiations, signed his opinion on the central government budget proposal. The proposals thus become public prior cabinet budget negotiations and thereby part of the government budget drafting process becomes to the public domain. Central government internet based financial and performance reporting portal Netra provides an access point to links also to budget proposals. OECD has evaluated Finland’s budgeting system and found that the wide openness has rather helped to achieve fiscal sustainability and prudence than contributed to spending. The OECD secretariat also noticed the positive effect of the wide transparency of budget formulation process to budgetary discipline in its in evaluation of the Finland’s budgeting system, *see* OECD, *Budgeting in Finland: OECD Journal on Budgeting*, Vol. 2, No. 2, 2003, pp. 275-310.

31 On the trend in access to information laws towards the establishment of universal information service, *See* Tuomas Pöysti, *ICT and Legal Principles*, op.cit., p. 567-568.

32 On the change of the basic model of public administration and its impact on the general doctrines of administrative law, *See* Olli Mäenpää, *Toimeenpanovallan käytöstä ongelmien hallintaan*, Lakimies, Vol. 103, 2005, 1065 – 1085.

33 *See* Graver, *Retslige sider*, op. cit., p. 321 – 360.

ernment and the significance of the publicity principle reaches beyond transparency of the public administration.³⁴ Similar considerations have been later presented in the Norwegian law-drafting materials and policy documents related to the amendment of section 100 of the Norwegian Constitution. Publicity principle is the point of departure for informed democracy and creates material conditions for the use of freedom of expression. The purposes and the application of the publicity principle have been evolving towards a more maximalist approach emphasising the general value of openness from the minimalist approach focusing on the control of administration.³⁵ However, the purpose of enabling a comprehensive view on societal conditions and enabling more knowledgeable democracy seems to be exactly what Anders Chydenius and other draftsmen of the 1766 Freedom of Print Ordinance had in mind.

Within the Scandinavian legal culture the minimalism and maximalism differentiates Sweden and Finland from Denmark and Norway where, due to historical reasons more minimalist approach to publicity principle has been prevailing. Maximalist approach to publicity principle has also contributed to some difficulties to see the relationships and balance between right to privacy and publicity principle. Striking example is 72th recital in the preamble of the EC personal data protection directive 46/95/EC stating that the principle of publicity may be taken into account in the application of the Directive. This recital was included to the text after the accession of Sweden and Finland as a response to worries and following demands of Sweden. In Finland the Parliamentary Ombudsman has in 2007 reminded municipalities that the right to privacy and thereto belonging fundamental right and freedom to protection of personal data shall be taken into account when giving access to protocols and other official documents of local government bodies via internet and other public information networks. Ombudsman even requested to consider legislative clarifications to the rules concerning public communication of documents containing personal data³⁶.

A balanced application of the right to privacy together with the principle of publicity requires skill and good consideration in individual cases. The maximalist point of departure focusing on the as wide application of the publicity as possible does not necessarily give a good foundation for such reasoning. On the other hand the ideal of participatory democracy and effective individual participation can also be attached to the law concerning processing of personal data, the informational privacy law. Access to information concerning one's own personal data and the processing of such data and, thereby wider data subject participation and control is a general principle of data protection law.³⁷

34 See Seipel, *Allt eller intet*, op.cit.

35 On the minimalist and maximalist approach to access laws, See Peter Seipel, *Access Laws in a Flux* in *Law and Information Technology, Swedish Views*, an anthology produced by the IT Law Observatory of the Swedish ICT Commission, Statens Offentliga Utredningar SOU 2002:112, Stockholm 2002, 87 – 98, p. 95-98.

36 See decision 441/4/05 by Parliamentary Ombudsman Riitta-Leena Paunio, done 3.4.2007. Decisions are available via the www-site of the Parliamentary ombudsman at <http://www.oikeusasiamies.fi>.

37 See Lee A. Bygrave: *Data Protection Law, Approaching Its Rationale, Logic and Limits*, Kluwer Law International (2002), p. 63-66.

Principle of publicity has recently spread to a variety of jurisdictions and gained recognition as a fundamental right and freedom in article 42 of the Charter of Fundamental Rights of the European Union and, even gained recognition in the Inter-American Court of Human Rights.³⁸ Still, today Scandinavia, albeit differences between East-Scandinavian jurisdiction Sweden and Finland with long and strong tradition of publicity principle, and the West-Scandinavian legal systems of Norway and Denmark where publicity principle historically is younger and has been somewhat weaker, Scandinavia is an area of openness and shared ideal of participatory democracy.³⁹

At the time of accession to the European Union both in Finland and in Sweden were some concerns of the faith of publicity and transparency in the European Union.⁴⁰ There were reasons to have such concerns because at a time of accession discretionary publicity was the default communication strategy of the EU Institutions.⁴¹ Since the accession of Sweden and Finland the European Union law concerning publicity has changed to have another default stance. Major milestone towards publicity and transparency was the inclusion of Article 255 to the EU Treaty and the adoption on basis of that Regulation (EC) 1049/2001. Treaty provision is significant since Treaty is the level of Community law, which is taken particularly seriously. However, rules concerning exceptions to access are vaguely formulated and give a fair amount of discretion to the Institutions.⁴²

38 Approximately 70 countries had in 2006 enacted formal freedom of information acts. See Thomas S. Blanton, *The Global Openness Movement in 2006: 240 Years after the First Freedom of Information Law, Access to Government Information Now Seen as a Human Right* in *The Worlds First Freedom of Information Act, Anders Chydenius Legacy Today*, Anders Chydenius Foundation Publications 2, Kokkola 2006, p. 80 - 97. On the jurisprudence of the Inter-American Court of Human Right, see case of Claude-Reyes et al. v. Chile, Judgement of September 19, 2006, Series C No 151, para 77-86.

39 See Tim Knudsen, *Offentlighed*, op.cit., p. 112-118.

40 Concerns were also expressed in official documents, for example, in the Swedish Government Proposal concerning accession of Sweden to the European Union, See Regeringens proposition 1994/95:19, *Sveriges medlemskap i Europeiska unionen*, chapter 33 of the Proposal.

41 The initial communication strategy of the European Community institutions is discretionary publicity, See Olli Mäenpää, *Julkisuusperiaate*, op.cit., p. 19-20 and 152, and Olli Mäenpää, *Eurooppalainen hallinto-oikeus*, 2. painos, Kauppakaari, Helsinki 2001, p. 301 - 307. Communication strategy describes which is the stance towards publicity and communication in public authority. The main communicational strategies are secrecy, discretionary publicity, classic publicity principle, active publicity principle and communication principle, See Timo Konstari, *Asiakirjajulkisuudesta julkisessa hallinnossa*, Suomalainen lakimiesyhdistys, Helsinki 1977, p 3 and Kenneth Abrahamson, *Samhällskommunikation, om kontakten mellan myndigheter och medborgare*, Studenlitteratur, Lund 1977. On the evolution of communicational strategies in European Union and Finnish law, See Pöysti, *ICT and Legal Principles*, op.cit. 571-573.

42 On criticism on the too broad discretion on granting access, See Mäenpää, *Eurooppalainen hallinto-oikeus*, op.cit., 301-307. Recent cases from the Court of Justice seem to confirm Mäenpää's analyses. Compared to Finland's Openness Act and Sweden's Secrecy Act (*Sekretesslagen*) exceptions to publicity are broadly formulated and the Court of Justice has emphasised the discretionary powers of the Institutions in the application of those rules as long as the Institutions comply with the duty of giving sufficient reasons for decisions. See, for example Case C-266/05 P *Jose Maria Sison v. Council of the European Union*, Judgment of

Pressure from Finland, Sweden and Denmark and from other Member States with transparency legislation, particularly Netherlands, and the good intellectual example provided by the efficiency, integrity and quality of the Northern European administrations together with good general level performance of Scandinavian societies created conditions to successfully introduce publicity as a principle of Community law. This lobbying and pressuring for the recognition of the principle of publicity was also facilitated by the legitimacy problems the more and more ambitious European integration project faced since 1990s. At the practical level significant contribution was made by some of the Court of First Instance and Court of Justice.⁴³ The Court of First Instance and Court of Justice have, however, adopted fairly cautious lines in the interpretation underlining the compulsory character of several exceptions to publicity and the wide discretion of the institutions in the application of exceptions.⁴⁴ At the stage of implementation one shall not forget the practical work done by Scandinavian civil servants in the implementation of various institutions administrative practises, particularly information management.

European Union institutions have commenced to develop somewhat similar principles of active communication strategy and information production and promoting easy access to information which have been evolving in the Swedish and Finnish publicity legislation.⁴⁵ Traces of this are found for, example, in the publicity of registers of documents and access via the register and, also at the legislative level at the Regulation 1049/2001 where development of good administrative practises with easy access have been defined as on the objectives of the Regulation. Problematic feature in the European Union publicity legislation is sometimes vague formulation of secrecy rules which give a fair amount of discretion to the Institutions. More problematic for rooting of a good openness culture particular to the Council of the European Union is the increased role of the Union and, in particular, the inter-governmental co-operation organised in the

the Court of 1 February 2007 (not yet reported in ECR). In the *Green Paper Public Access to Documents held by institutions of the European Community, A review*, COM (2007) 185 final, the European Commission expresses satisfaction how the overall legislative scheme for access to documents functions and points out to statistics how much information resources available to the public have increased.

43 Case C-353/99 P *Council of the European Union v. Heidi Hautala*, ECR [2001] I-9565 should be mentioned here. This case is later often cited by the Court of Justice in access to documents cases. The court established in the case particular criteria to control the fairly wide criteria let to the EU Institutions in the application of discretion granted by Community legislator to the Institutions. Court of Justice required also Institutions of the Union to consider and reason on the partial publication. Case was an appeal against the Court of First Instance judgment in Case T-14/98 *Hautala v. Council* [1999] ECR II-2489. The Court of Justice upheld Court of First Instance judgment to annul Council's decision which did not contain sufficient reasoning.

44 European Commission *Seems* to be rather satisfied to the caution by the Courts and lists in 2007 green paper and review several cases "clarifying" the rules of access. A common tenet is that all these cases are several aspects friendly to the Institutions' reasoning, *See* COM (2007) 185 final, chapter 2.

45 Commission in its 2007 review and green paper o public access to documents underlines the success in increasing transparency of legislative proceedings and active provision of information, *See* COM (2007) 185 final.

Council, as a security organisation. Secrecy has then, a more natural place at the operational culture. The problem of the Commission is a certain lack of consolidated, institution wide good information management practise which leads to a situation that the public register of documents is not comprehensive.

On the national level traditional publicity has been fairly well maintained in the context of the EU Membership. One safeguard for this has been the fact that the publicity of EU documents in the possession of national administration is decided on the basis of Sweden's and Finland's own publicity laws even though Community regulations have direct applicability and could, thus, bypass domestic laws. Community does not, however, have general powers to regulate access to documents.⁴⁶ Swedish and Finnish Governments have also defended sometimes fiercely the national competence to regulate on the publicity on the grounds that regulation of access to documents at national level does not belong to the competences of the Union. European Union law has an additional impact via interpretation of domestic rules of access. According to the practise of Finnish Supreme Administrative Court secrecy based on Union legislation and confidentiality requested by an Institution of the Union is a factor which even shall be taken into account in considerations of giving access to EU documents in national administration.⁴⁷ However, the general principles of interpretation are those of the national legislation which emphasise pursuant to section 17 of the Openness Act access to documents and information. Taking into account the EU rules on the interpretation has not narrowed publicity in any significant way.

In some occasions Community law and Union policy have led to wider transparency than is the case according to national legislation. European Commission's transparency initiative emphasises the publicity of all EU subventions including the agricultural subsidies and seeks to establish this publicity in all Member States.⁴⁸ In Finland there is a centralised register on the paid agricultural subsidies. The register is established by and regulated by a specific Act of Parliament (1515/1994). According to this Act most parts of the information included to the register is considered to be secret. In administrative practise requests for information concerning agricultural subsidies have been decided by applying the provisions concerning this register and then interpretation have excluded the publicity of underlying administrative documents in accordance with the Openness Act. In 2006 however, Supreme Administrative Court gave a precedent ruling which rectified this erroneous application of the law and required the access to the documents concerning subsidies in accordance with the rules of Openness Act.⁴⁹ European Commission has on the same time even

46 See Mäenpää, *Eurooppalainen hallinto-oikeus*, op.cit., p. 302.

47 Precedents of the Finnish Supreme Administrative Court date from time before enactment of Openness Act, see cases KHO 1997:54 and KHO 1997:121. Openness Act contains a comprehensive list of grounds of secrecy and the impact of the Community law is mainly to the way national rules should be interpreted. The principle of Community loyalty, however, requires giving a due consideration to the requests of confidentiality by the Community Institutions.

48 See European Commission Green Paper, *European Transparency initiative*, COM (2006) 194 final.

49 See KHO 2006:64. On this case and generally concerning the access to information held in agricultural register and on the law-drafting concerning Act 1515/1994, See Tuomas Pöysti,

pushed for a wider publicity of agricultural subsidies. Interesting observation to be made of this case is that in this particular issue concerning the transparency of EU subsidies the new policy of the Commission requires wider publicity and access to information what has been the case according to some specific acts in Finland. European Commission's transparency initiative has led, among other things, to inclusion to the Financial Regulation (EC, Euratom) No 1605/2002 applicable to the general budget of the European Communities of the general principle of transparency of EU subventions and principle of public access, with some exceptions, to a European Commission held register concerning subventions paid by the Commission.⁵⁰

Conclusion to be drawn here is that the influence on of EU law to Scandinavian legal tradition, including transparency, is not an issue of the fight between good and bad, the Scandinavian openness vs. secretive EC law. Rather, EU law and Scandinavian law contain sometimes even contradictory dimensions and developments. There is a mutual inter-action between the legal systems in which the EU law may, occasionally, strengthen the publicity tradition against the some other tendencies in national special legislation. The strong constitutional status of the right of access and the general acts specifying the conditions and exceptions to the general constitutional right of access to information, provide a foundation for a living legal institution which can inform and influence the development of European law.

3 Public Libraries Encounter EC Copyright Law

Scandinavian conception of informational justice sets to the public sector the role of promoting and securing equal access to culture, knowledge and information to all. Right to information and right to knowledge can be regarded as general principles of Scandinavian information law.⁵¹ A particular concern for the efficiency of these legal principles with the objective of enriching the public debate and knowledge creates a connection between publicity legislation, copyright law and legislation concerning libraries. Fundamental rights and freedoms and their objectives and underlying societal virtues provide also a basis for what could be called a democratic understanding of copyright.⁵²

Oikeudellisen tiedon niukkuus ja henkilötietojen suoja in Syntymästä kuolemaan, oikeudesta informaatioon, Ahti Saarenpää 60 vuotta, Suomalaisen lakimiesyhdistyksen julkaisuja, E-sarja N:o 17, Suomalainen lakimiesyhdistys, Helsinki 2006, p. 303 – 328, in p. 321 - 323. Secrecy of the register was presented in law-drafting as a technical necessity and matters of policy and principle were not raised up the law-drafting materials.

50 See Council Regulation (EC, Euratom) N:o 1995/2006 amending Financial Regulation applicable to the General Budget of the European Communities N:o (EC, Euratom) 1605/2000, adopted pursuant to Article 279 of the Treaty, preamble and Art. 3 and 30 of the Regulation.

51 See Pöysti: ICT and Legal Principles, op. cit. p. 561 – 586.

52 On the concept and idea of democratic understanding of copyright law, See Michael D. Birnhack, *More or Better? Shaping the Public Domain* in Lucie Guibault & P. Bernt Hugenholtz (eds.), *The Future of Public Domain, Identifying the Commons in Information Law*, Kluwer Law International, Alphen aan den Rijn 2006, p. 59-86, p. 79 - 82

Public libraries are part of a universal service assuring everyone access to information contained in books and also on information networks.⁵³ Sweden's Library Act (1996:1596) states that the purpose of the public information services provided by public libraries is to promote equal access to civilisation, literature and arts, to continuous development of knowledge, skills and citizenship skills, and equal access to internationalisation and to lifelong learning.⁵⁴ Swedish Library Act functioned as a model for Finnish law-drafting and Section 2 of Finland's Library Act (904/1998) contains similar provisions.⁵⁵ Information policy behind the system of public libraries shares the same intellectual background idea with the principle of publicity, the individualistic conception of utility, idea of participative and deliberative democracy leading to more enlightened governance by the people and emerging duty of public power to provide its resources and sources of information to the benefit of its citizens. The underlying policy is well expressed in the Swedish Government Proposal 1996/97:3 leading to the adoption of Library Act. According to proposal "*real freedom of expression requires that everyone has access to language, knowledge and information*". Access to language, knowledge and information should be provided via multiple arenas which also are available for those individual who cannot pay a high price for access to information and knowledge.⁵⁶

Scandinavian law concerning public libraries and also certain exceptions to copyright for the benefit of public libraries have been reformed in 1996-1998. Background is the changing role of the libraries. Traditional library, which lends books, loses significance. Simultaneously libraries have become public infor-

53 On the international and American perspective on this expansion of the task of libraries and the close relationship of the universal service to efficient access to information *See* Christine L. Borgman, *From Gutenberg to the Global Information Infrastructure, Access to Information in the Networked World*, The MIT Press, Cambridge Massachusetts 2003, 54-55 and on the purpose of the libraries in the task of ensuring the broadest possible access to knowledge which is essential to participatory democracy, p. 169 -170.

54 Legislative preparatory works in Sweden connect explicitly cultural policy and also the role of public libraries to freedom of expression, *See* Swedish Government Proposal 1996/97:3 on Cultural Policy, RP 1996/7:3 Kulturpolitik, in which the Sweden's current Library Act was also proposed. The promotion of freedom of expression was *Seen* as a particular policy objective of cultural policy, *See* chapter 5 of the Proposal. This was not a new emphasis since already 1974 promotion of freedom of expression has been defined as a central objective and role for governmental cultural policy. Task of the cultural policy is to create material, real conditions to all to use freedom of expression and a real freedom of expression requires that everyone shall have access to language, knowledge and information: *Det är en central kulturpolitisk uppgift att värna denna frihet och skapa reella förutsättningar att använda den. En reell yttrandefrihet kräver att alla har tillgång till ett språk, till kunskaper och information. Libraries are Seen as institutions which give access to literature and information, See* chapter 7.1. of the Proposal.

55 Finnish Government Proposal HE210/1997 for Library Act states that public libraries are part of the realisation of the general principle expressed in that time section 13 (2) of the Form of Government – since 2000 section 16 (2) of the Constitution, that public power shall promote equal possibilities to everyone to receive education and develop oneself without being hindered by lack of resources. Library system is, thus, connected to the right to education expressed in Constitution.

56 *See* Swedish Government Proposal 1996/97:3, Cultural Policy Proposal, chapter 5 (Regeringens Proposition 1996/97:3, Kulturpolitiska propositionen.

mation and cultural centres, information portals and access points to entertainment.⁵⁷ Libraries have according to current Scandinavian understanding an access point and public information service function in the realisation of what can be called citizens' communicational rights. This changing role of the public libraries has been the point of departure for the reforms of library laws and library rules and exceptions in copyright acts in Scandinavian countries since the end of 1990s.⁵⁸ Section 2 (2) of Finland's Library Act expresses well the new role of libraries in securing access to resources in information networks by stating that the objectives of public libraries include also promotion of the development virtual and interactive network services and their civilisational content.

International character of the sources and impulses to the development of copyright law and, the close inter-relationship between technology, socio-economic development and copyright law make it some difficult to distinguish authentically "Scandinavian" institutions in copyright law. At the beginning of 20th century the accession of Scandinavian countries to Berne convention, which has been the 'basic law of the copyright', launched series of legislative activities and the Scandinavian features relates to how the more universal ideas are interpreted and various elements and interests weighted in legislation.⁵⁹ Distinctive,

57 Udvalget om bibliotekerne i informationssamfundet UBIS, *Betænkning om bibliotekerna i informationssamfundet*, Kulturministeriet, København 1997, p. 11 – 35 and bilag p. 195. In recent years the use of public libraries has been on decline. In Finland during 2006 borrowing from public libraries diminished 3,2 % compared to previous year but the visits on the resources provided by libraries in the information networks have increased 12,6 % during 2006, See Statens bokslutsberättelse för 2006, del I och II, B 12/2007 rd., s. 229 (Government Report to the Parliament on the Central Government Final Accounts on year 2006), available in Swedish at a service provided by the Ministry of Finance at "tilinpaatoskertomus.vm.fi/index-sv.html" (page visited 24.9.2007) and at the www-site of the Parliament, "web.eduskunta.fi/Resource.phx/riksdagen/index.htx" (choose riksdagsärenden och dokument). The vision of public libraries becoming increasingly information centres and portals is, thus, gradually realising.

58 Library acts have been reformed in Scandinavian countries at the end of 1990s and beginning of 2000. Sweden passed a new act in 1997, Finland 1998 and Denmark in 2000. Argumentation and style in Swedish and Finnish library acts resemble in many essential aspects. A close connection to the materiality of the freedom of expression and the right to information and communication entailed in constitutional rights is the characteristic feature of Swedish and Finnish acts. Danish library act lov 2000-05-17 nr 340 and the Government Proposal leading to its enactment are more pragmatic in argumentative style and there are no direct references to the system of libraries as an element realising fundamental right and freedom to expression and participation. In the preparation of the Danish act inter-relationships between copyright law and law concerning public libraries as institutions were taken up in a wider scale than in Swedish and Finnish law-drafting. A key issue in Denmark was the changing role of libraries in information society and creation of conditions for them to act as information access points to electronic information. Danish law has also foreseen that some of the materials in public libraries can only be given access as a chargeable service. Charge would enable financial conditions in which libraries could also obtain access to electronic resources which less regularly used.

59 Mogens Kokvedgaard has characterised Berne Convention as the 'basic law of the copyright', See Kokvedgaard, *Nyere udviklingslinier*, op.cit., p. 535 -543. Intellectual inter-action and European influence has during many phases of history been wider than the nationalistic interpretation of history and legal history would admit. Scandinavian copyright doctrine has developed on the basis of common European and international inspirations and, in particular, in modern times developed following the accession of Nordic countries to Berne con-

cultural features of Scandinavian copyright law are the style of writing, the visible presence of collectivism and certain conceptions of informational fairness. A remarkable feature in Scandinavian copyright law is the wide use of collective licenses in order to allow use of works in occasions considered to be necessary in the general societal interest.⁶⁰ Collective licenses granted by copyright organisations instead of obligatory licenses created directly by law have been a Scandinavian way of governance of protected works and finding the balance of author's interests and general societal considerations. The idea of collective licenses has well fitted to the general Scandinavian model of "Contract Society" with binding collective agreements. Collective licensing and exceptions to copyright reflects a general tension between liberal elements and collective paternalism in Scandinavian societies and law. Paternalistic, collective features are an expression of the requirement of solidarity between members of society. Collectivisation has also been a trend in recent years in Scandinavian copyright law.⁶¹

Commonness in Scandinavian copyright law also approaches conception of informational justice and information policy underlying copyright law but fails to arrive at a unity of understanding. Copyright law provides certain exceptions to the copyright regime in order to enable and favour the activities of public libraries. However, close reading of the Scandinavian classics of copyright law literature and the principal study books reveals certain differences in tone concerning the question of copyright balance, that is, to which extent copyright law as a matter of principle and as a matter of policy seeks to find a fair balance between the exclusive right of the author (copyright holder) and the users of works and between the copyright owners' interests and rights and the general societal interests.

Influential Norwegian 20th Century intellectual property lawyer *Ragnar Knoph* emphasises the significance of drawing a fair balance between interest of the public and interests of authors (copyright holders). Balance in communication to the public should be drawn to different position than in the use of published works. According to Knoph the balance in communication to public should favour author and his right of decision whereas in the use of published works the interests of the public should have more weight.⁶² Knoph also states that protection of public freedom of discussion (*offentlige diskusjonfrihet*) is a reason to exclude certain types of works, for example official documents, from the copyright protection.⁶³

vention. Early modern development was, however, uneven and various countries have found their own solutions. A good and comparative perspective to the history of various influences in Scandinavian copyright law in general and particularly concerning moral rights is Stig Strömholm, *le Droit moral de l'auteur en droit allemande, français et scandinave avec un aperçu de l'évolution internationale, étude de droit compare, I première partie, evolution historique et le mouvement international*, P.A. Norstedt & Söners Förlag, Stockholm 1969, p. 352 – 368, 437 and 485 – 497.

60 See Mogens Koktvedgaard, Review of Nordic Copyright, *op.cit.* and Gunnar Karnell, *Peculiar Features of Nordic Copyright Law*, Nordisk immaterialrättslig rättsskydd NIR 1991, p. 15 - 23.

61 Koktvedgaard, *Nyere udviklingslinier*, *op.cit.*, 535 – 543.

62 See R Knoph, *Ånsdretten*, Nationaltrykkeriet, Oslo 1936, p. 115-116.

63 Knoph, *Ånsdretten*, *op.cit.* p. 118.

Finland's *T.M. Kivimäki* underlines in the classical Finnish copyright studies the nature of copyright as an exclusive right of the author and the fact that the author has a natural claim and right to determination and control of his works. For Kivimäki copyright is closely related to the personality of author and have basis in the general principles of law and justice beyond the rules of law.⁶⁴ This character of copyright as a personality right is fairly dominant in Kivimäki's thinking in comparison with arguments favouring taking into account considerations of societal, public interests leading to "right of the public", that is limitations of copyright for the benefit of the public utilising works.⁶⁵ Kivimäki is clearly more influenced by the German doctrine than for example Knoph. Doctrinally Kivimäki does not attach the exclusion of official documents from copyright to a wider idea and principle of public freedom of discussion.

In Danish and Swedish modern literature the concept of copyright is that copyright is a relative exclusive right or limited exclusive right. Relativity follows from the ideas of analytic jurisprudence and the fact that according to laws in force exclusive right of copyright can be made valid and effective in certain relations but not in some other relations.⁶⁶ The idea of balance is inherent in many rules and institutions of copyright law. For example, the system of collective license is an innovation and instrument of finding a balance.⁶⁷

The argumentation in the preparatory works of copyright law seems to follow the pattern set by influential academic writers. Argumentative pattern seems to be persistent in time. In Finland the government proposals concerning amendments of the Copyright Act of 1961 have often been presented as fairly technical issues and the idea of copyright balance has not been present in the line of argumentation. In Sweden and in Norway the idea of balancing between various individual and public interests has been more visible. The scarcity of perspectives in copyright law-drafting and literature has also led to a criticism towards the inability of the copyright law and doctrine to accommodate aspects of fundamental rights and freedoms into the copyright law and of the risks what the tradi-

64 See T.M. Kivimäki, *Tekijänoikeus, tutkimus kirjailijan, taiteilijan ja tiedemiehen oikeudesta teokseensa*, Suomalaisen lakimiesyhdistyksen B-sarja N:o 27, Werner Söderström Osakeyhtiö, Porvoo – Helsinki 1948, p. 19 – 26 and 35-36 on conclusions that copyright essentially represents personality rights.

65 See in particular Kivimäki, *Tekijänoikeus*, op.cit., 63- 67 and 192 – 194 on the nature and justification the limitations of copyright.

66 On the relativity of intellectual property rights, See Mogens Koktvedgaard, *Immaterialrettspositioner*, Juristforbundets forlag, København 1965, p. 9.

67 See, for example Mogens Kokvedgaard och Marianne Lévin, *Lärobok i immaterialrätt, upphovsrätt, patenträtt, mönsterrätt, känneteckensrätt i Sverige, EU och internationellt*, Norstedts juridik, 6. uppl., Stockholm 2000, p. 30 – 33 and 112. Copyright balance is thoroughly discussed Viveca Still's doctoral thesis, See Viveca Still, *DRM och upphovsrättens obalans*, Publications of the IPR University Center 2, IPR University Center, Helsinki 2007, in particular p. 4-5, 7-9, 47-68 and 289 - 316. Thesis is available electronically from the Helsinki University e-thesis serie at "ethesis.helsinki.fi." Still regards collective licensing as a mechanism of governance, which as a concept is difficult to translate to proper Swedish. Still uses term control, 'kontrol' in the meaning of governance, See Still, op.cit., p. 75-82. According to Still collective licensing had a significant impact on the development of copyright and it enabled efficient solutions to the information and transaction costs related to licensing of the copyrighted works.

tional narrow view on copyright with the tendency to emphasise primacy of copyright in eventual conflicts.⁶⁸

Balancing between exclusive right the copyright entails and the freedom of information provided for in Sweden's Freedom of Print Ordinance is not a new issue but has been subject for regulation long time in the Copyright acts and doctrine. According to the traditional principle Freedom of Print shall not limit other person's right.⁶⁹ Internal balancing within the traditional copyright doctrine may, however, be insufficient. There is a need, at least in legislative policy, to evaluate and consider the effects of social and technological changes together with the effects of the application of the rules of copyright law, and form a sufficiently wide view on the balance between various fundamental rights and freedoms and between various interests.⁷⁰ Copyright balance means (1) balance between various interested persons and their legal rights and societal interests and, (2) also optimisation and balancing between various goals or policy objectives (dworkinian policies) of copyright.⁷¹ The societal functions and policies of copyright law include promotion of democracy, cultural pluralism, functioning competition and markets and innovation and information processes.⁷² Inviolability of human dignity and integrity attached to a creative person who is exercising autonomy over his creativity is protected and promoted as a right and principle of justice by the copyright system, particularly by exclusive rights concerning communication to the public and by moral rights.

Borrowing books from the libraries have in Scandinavia legal foundation in the from the outset fairly technical rule that the exclusive copyright to distribution of published copies of protected works is consumed when the copy is sold. The consumption rule also protects the market value of the economic rights of copyright. If the owner's of copies could not lend and sell copies without the consent of author, the economic value of the copy would be smaller and, thus, purchasers would be paying less for copies.⁷³ There is neither international agreement on the exact extent of the copyright nor on the geographical area of consumption.

The change of lending rights regime and impact of international and European harmonisation becomes clear by tracing the change of lending rules in Finnish Copyright law. According to section 2 of Finland's Copyright Act (404/1961), lending is one of the ways of communication of work to the availability of public. According to section 19 of the Copyright Act the exclusive right is consumed when the copy has been sold. The consuming of the exclusive rights of the author concerns only further sale or lending or public showing of the published copy. Renting is excluded and thus, renting remains the exclusive right of the author. Current formulation of the section 19 is based on Act

68 On this risk *See* Still, DRM, op.cit., p. 32-33.

69 *See* Report of Sweden's Copyright Committee SOU 1956:25, p. 165.

70 Still, DRM, op.cit., p. 31-34.

71 Still, DRM, op.cit., p. 47 – 51.

72 *See* Still, DRM, op.cit., p. 51- 61.

73 On the consumption as legal foundations of library activities, *See* Mogens Kockvedgaard – Marianne Lévin, *Lärobok i immaterialrätt*, p. 117 – 120.

446/1995 implementing European Community Directive 100/92/EC on Lending and Rental Rights, Act 821/2005 implementing European Community Directive 29/2001/EC on the harmonisation of certain aspects of copyright in the information society, the Infosoc –directive, and Act 1228/2006 implementing changes required by European Commission for proper implementation of the Lending and Rental Rights Directive 100/92/EC. Renting was defined to be among the exclusive rights of the author in Act 446/1995. In the original act of 1961 the consuming of the author's exclusive right stipulated in section 23 concerning literal works and compositions, however notes of compositions could be publicly rented only with the consent of the author. Movies and works readable with computers were excluded from the consuming rule by Act 418/98.⁷⁴ In the light of the new functions of libraries serving as information services and portals and centres providing access to entertainment, the relative significance of the lending exceptions to books diminishes.

The traditional rule in Scandinavian copyright law has been international consumption which means that if a copy is sold somewhere in the world the exclusive right is consumed and a copy could be sold further without the consent of the author. European Community law has opted for a system of regional consumption in which the exclusive right is consumed only when the copy is sold in the European Union and Scandinavian copyright laws have modified accordingly.⁷⁵ A particular provision has been added to the copyright law which enable public libraries to lend books following the principle of international consumption rather than European consumption.⁷⁶

Traditional library and lending rights regime in Scandinavia consists of two parts: (1) there is a generally accepted free access to everyone to public libraries and the authors' may not prevent lending from those libraries, but (2) there is a particular fund of public law nature which provides to the authors remuneration for lending from public libraries.⁷⁷

The issue whether the exclusive right of the author should extent to the borrowing and whether the authors should get compensation for borrowing of their works from libraries has been long time a well debated topic in Scandinavian copyright literature and in law-drafting. According to Knoph covers the concept of copyright as the author's general exclusive right also borrowing of works from libraries.⁷⁸ Doctrine is that the legally published copy can be distributed

74 According to the preceding Act on the Copyright to Intellectual Products (174/1927) distribution to the public was considered to be an exclusive right of the author but once copies were released on public circulation the author's exclusive right was consumed, *See* T.M. Kivimäki, *Tekijänoikeus*, op.cit.,p. 180 – 181 and 225- 227. Section 17 (9) of the Act on the Copyright to Intellectual Products of 1927 stated explicitly that lending and borrowing of books is permitted.

75 On the Finnish law and change of it *See* Kristiina Harenko, Valtteri Niiranen, Pekka Tarkela, *Tekijänoikeus, kommentaari ja käsikirja*, WSOY Pro, Helsinki 2006, 154 – 161.

76 *See* Finnish preparatory works for the implementation of Borrowing and Lending Directive, *See* Government Proposal HE 287/1994 vp., p. 36-38 and 41-42.

77 These two arrangements provide the basis of Swedish literature policy, *see* Swedish Government Proposal 1996/97:3 *Kulturpolitik proposition* (the Cultural Policy Proposal).

78 Knoph, *Åndsretten*, op.cit., p. 91 – 93 and 130.

further.⁷⁹ However, the main principle in Scandinavian copyright doctrine is that economic rights shall belong to the author unless very important societal reasons require other solution.⁸⁰

Question whether the authors should get compensation for the borrowing of their works in public libraries proved to be difficult both in theory and in practise. Academic and practical discussion in Denmark led to establishment of the authors' compensation fund in 1946. In Sweden the question was subject to several official inquires and reports before the system of library compensation and Swedish Author's Fund was established in 1954/1955.⁸¹ The compensation and authors funds were outside the copyright law and compensation was of public law nature. The Swedish copyright committee in 1956 considered that a compulsory license for lending in libraries would have been doctrinally the most appropriate solution but for practical reasons committee did not propose change to the system of Swedish authors' fund and library compensation. Committee also found that a fair basis for calculating the library compensation for individual author would be the number of books borrowed from libraries.⁸² Sweden's library compensation is currently based on Act 1962:652. In Denmark library compensation is based on Act 2002-12-17 Nr 1175 on library fee (lov om biblioteksafgift).

In Finland the traditional system for library compensation was in overall terms similar to Swedish one but the compensation was given in the form of grants to authors and translators on the basis of the Act on Certain Grants and Transfers to Authors and Translators (236/1961), hereinafter the Author's Library Grant Act. The grant system was not tied to the borrowing of individual books from the libraries but to the amount of total purchases of books for municipal libraries. In addition, the grants under the act were discretionary by their nature and no-one had a legal right to claim a grant as remuneration for lending.⁸³ The Authors' Library Grant Act is fairly de-connected from the idea of a compensation for compulsory license and the approach and objective of the Act is to organise state support for cultural activities. In this regard the act differs from the same type of acts in other Scandinavian countries.⁸⁴ Following the con-

79 On the preparatory materials *See* Report of the Swedish Copyright Committee SOU 1956:25, op.cit., p. 246.

80 SOU 1956:25, op.cit, p. 248.

81 *See Bibliotekslånesakkunnigskomitee* SOU 1935:22 and *Bokutredningens betänkande* SOU 1952:23.

82 SOU 1956:25, op.cit., p. 249 and 251.

83 The completely discretionary nature of the grants is underlined in Government Proposal HE 212/1992 vp. on the amendment of the Act on Certain Grants to Authors and highlighted further by the fact that in 2001 the Act on State Aids and Discretionary Transfers, statsunderstödslagen (688/2001) became applicable to the procedure of granting and paying the grants referred to in the Act on Certain Transfers to Authors.

84 In Sweden the library lending remuneration is paid via Swedish Authors' Fund, Sveriges Författarfond, in accordance with Decree 1962:652 and the Danish law 2002-12-17 nr 1175. In Norway the compensation is regulated in lov om bibliotekvederlag, lov 1987-05-29-23. Common feature of these laws, after amendments, is that the remuneration is paid to the authors following a system in which the author's remuneration is tied to the lending of his copyrighted works from public libraries.

sumption rule in the Copyright law the authors could not prohibit the lending from the public libraries and there was not a particular remuneration.

The Finnish authors' grant system in the course of years distanced from the copyright even though the purpose of the Act was to compensate to the authors borrowing from libraries. The grants were increasingly seen as a general means of promoting literature for cultural policy reasons and not only as an instrument of fairness and connected to the rights of authors. In the original Finnish system neither the municipal libraries nor scientific libraries and libraries of educational establishments paid remuneration to the authors on the lending in public libraries. State paternalism and collectivism was, thus, rather far-reaching in the Finnish law as it was developed in 1960s.

European Community adopted on November 1992 Directive 92/100/EC on the Rental and Lending Right and on certain Related Rights, hereinafter Rental and Lending Rights Directive 1992. This Directive has now been repealed and replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, hereinafter the 2006 Rental and Lending Right Directive. Replacing the 1992 Directive is part of the programme of codification of Community law and did not change any substantive contents so substantially discussion and interpretations of the 1992 Directive are directly applicable to the 2006 Directive.⁸⁵

The aim of the 1992 Lending and Rental Right Directive was to harmonise Rental and Lending Rights in the Community and thereby contribute to the creation and functioning of the internal markets. The Directive has a clearly market-driven approach. The underlying assumption is that use of the protected works through rental and also through lending could be market-based activities and that there is a legal and economical link between rental and lending which required regulating these two activities together. The link between rental and lending is that the increase in public lending in the music and film sector might have a considerable negative effect on the rental business and thereby deprive the rental rights of its meaning.⁸⁶ The Directive's aim was to preserve certain activities in the markets. The Directive defined the borderline between markets and non-commercial activities differently than in traditional Scandinavian law. Also the pre-eminent objectives were very different than what is the ideology behind the objectives of the Swedish or Finnish Libraries Acts.

The 1992 Rental and Lending Right Directive provided an exclusive right to the author or other copyright holder to authorise or prohibit the rental or lending of works subject to copyright. The 1992 Directive also aimed at harmonising the concept of public lending and contained a definition of it which also covered lending for non-commercial activities. On the Scandinavian perspective the Directive resolved long time debated issue of the extent of the exclusive economic

85 The 1992 Directive had been amended several times substantially and it was argued that in the interest of clarity and rationality the Directive should be codified.

86 See Commission Proposal for a Council Directive on rental right, lending right and on certain rights related to copyright, OJ C 53 of 28 February 1991, p. 35. On the background and development of the argumentation behind the Directive, See COM (2002) 502 final, *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the public lending right in the European Union*. chapter 3.

rights of the copyright holder. In article 5 it was stipulated, however, that Member States may derogate from copyright holder's exclusive right to decide on public lending if, at least, authors received remuneration for such lending. Pursuant to article 5 (1) of the 1992 Directive the Member States are free to determine the remuneration taking into accounts their cultural promotion objectives. This phrase was inserted on the initiative of a Member State intending to create a new library system.⁸⁷ In the terminology of the Directive public means all establishments which are accessible to general public and the concept, thus, does not refer to the ownership of public organisations and the organisational basis in public law. Pursuant to article 5 (3) of the Directive Member States may exempt certain categories of establishments from the payment of remuneration. In the negotiations of the 1992 Directive in the Council the Commission also stated that public libraries, universities and educational establishments are establishments which are covered by the possibility of exemption. The statement of the Commission and the formulation of article 5 was a compromise between the needs of developing Community internal markets and some of the traditions of the Member States in which lending of copyrighted works from libraries was not essentially seen as an issue of the markets but rather as part of cultural policy. At the time of the negotiations for the Lending and Rental Rights Directive the EFTA countries tried to exclude the lending right from the directive.⁸⁸

The statement of the Commission was used eagerly by the Finnish and Swedish governments to continue the old regime concerning libraries and lending remunerations. Exemption in Finland pursuant to section 19 of the Copyright Act covered municipal libraries, university libraries and libraries of other educational establishments. Several other Member States also opted to continue their old systems of fairly wide exemptions without remuneration despite of the harmonisation of exclusive rights to public lending by the Directive.

European Commission defined further its policy concerning exemptions to public lending right and remuneration to the authors in the 2002 report on the public lending right.⁸⁹ Commission stated that article 5 (3) allowed certain categories of establishments to be exempted from the payment of remuneration but if the exemption covered public libraries in a Member State with a well-established library system, then the majority of the lending institutions would not be applying the public lending right. Such situation would deprive the adequate effect of the public lending right provided for in article 1 (3) of the 1992 Lending and Rental Right Directive and would be contrary to the intention of the Community legislator. According to the Commission the Member States may exempt certain but not all establishment from paying the remuneration referred to in article 5 (3). The amount of remuneration is in the discretion of the Member States but the remuneration must correspond to the underlying objectives of the Directive and to copyright protection in general. The argumentation of the Commission relies here to the fairly well established doctrine of the Community law of the effect utile, the efficiency of Community objectives and rights.

87 COM (2002) 502 final, chapter 3.3.

88 On this *See* Finnish Government Proposal on the amendment of the Act on Certain Grants to Authors HE 212/1992 vp. yleisperustelut.

89 COM (2002) 502 final.

Commission opened at the beginning of 2000 Treaty infringements proceedings against several Member States including Finland on the failure to implement properly the Lending and Rental Right Directive. Some of the cases reached the European Court of Justice. In case *C-433/02 Commission v. Belgium* the formal issue was the absence of decrees defining the precise level of remuneration and thereby enabling the collection of it.⁹⁰ Belgian government's defence recalled the resistance of the federated authorities against the lending right and the willingness of those authorities for cultural policy reasons to exempt all categories of establishments lending copyrighted works from remuneration. Further the Belgian government referred to difficulties to draw distinctions between various categories. The Court considered here that since Article 5 (3) of the 1992 Rental and Lending Rights Directive authorises but does not oblige the Member State to exempt. Then if the circumstances prevailing do not enable drawing a distinction between categories of establishments lending works the obligation to pay remuneration must be imposed to all establishments concerned.⁹¹ Indirectly this judgment also supports the Commission's argument that exemption shall only cover certain categories of establishments exercising lending and that main rule is that remuneration should be paid. In case *C-175/05 Commission v. Ireland* the Court of Justice states this explicitly. The Court of Justice declares in the Judgment delivered on 11 January 2007 that by exempting all categories of public lending establishments within the meaning of the 1992 Rental and Lending Rights Directive from the obligation to remunerate authors for lending Ireland has failed to fulfil its obligations under Articles 1 and 5 of the Directive.

Finland responded to the Commission's formal notice in 2005 that Copyright Act will be amended and remuneration shall in the future be also paid by municipal libraries. Government Proposal was presented to the Parliament in 2006 and the amendment to the Copyright Act (Act 1228/2006) entered into force 1st January 2007. Exception to municipal libraries concerning the payment of remuneration to authors on lending was deleted and now the municipal libraries shall pay remuneration on the basis of lending to authors.⁹² The remuneration system is also now an integral part of the copyright system itself and not any longer compensation under public law. After modification Finnish law resembles also what the Swedish Copyright Committee in 1956 considered as the correct system.⁹³

The technical and systematic unity of Scandinavian copyright legislation was, however, diminished in the process of these changes following European Commission's new activities and stricter interpretation. In Sweden, Denmark and Norway the remuneration for the authors on lending from libraries is still a specific compensation scheme under separate acts and statutes under public law even though the remuneration is a right of the author. Maintaining the traditional Nordic law-drafting co-operation has, however, proven be difficult in the frag-

90 Case C-433/02 *Commission v. Kingdom of Belgium*, ECR [2003] I-12191.

91 See para. 20 of the judgment.

92 See Government Proposal HE 126/2006 vp. on the amendment of Copyright Act and Act 1228/2006 amending Copyright Act.

93 See SOU 1956:25 p. 249.

mented and rapid, responsive changes in law in the context of European Commission initiated infringement proceedings.

The impact of Community law here is the expansion of the markets based activity compared to the traditional Swedish and Finnish approach. Community law also expands the scope of copyright and the right of the authors to receive remuneration. The expansion is considered fair in terms of justice incorporated to the European Community law. Community law is more centred on the rights of the author than some of the collectivist dimensions and layers in Scandinavian law are. In the balancing between authors and societal interests the impact of the Community law is to the direction of strengthened protection of the rights of the authors. Terms of informational fairness and information policy behind the law have become increasingly a matter of international and European legislation and politics. In practise European Community law has resolved by means of binding legal harmonisation certain points of discussion and strengthened certain directions and thoughts already present in Scandinavian doctrine. Scandinavian discussion and legislation has also provided some of the impetus for the change of Community law. The impact of the community integration in that sense is limited.

Increasing European integration and new and more intensive international instruments in the area of copyright law also strengthens what in the theory of legal integration has been called negative integration. The room of manoeuvre for national legislator is more limited when essential elements of the system are already defined in international and European sources of law. Possibilities of Scandinavian law to provide intellectual leadership are, then, more limited and determined by the capacity of both private and governmental actors of these countries to proactively and early influence international developments. Scandinavian law and countries do not have big market powers or force of big nations. But they still can exercise intellectual leadership by providing segments of markets or public services which are innovative and successful and by sharing information on these effectively and early.

4 Conclusions

Scandinavian law is shaped by a conception of and drive towards material democracy, where the substantive conditions of realisation of public and private right to self-determination are promoted by law and legal institutions much beyond what is required in the formal classical models of rule of law. This can be seen in the evolution of copyright law, library law and the publicity principle towards establishing foundations for material and rich democracy and informational justice.

Publicity principle widens up to a general principle of the freedom of information and individual right to information, communication and knowledge which creates material foundations for the use freedom of expression and political rights. Public authorities are increasingly set a universal information service obligation to actively produce and disseminate information on societal conditions in addition to information concerning their own function. The citizens' informational and communicational rights are the foundations for informed citi-

zanship in participative democracy. A Scandinavian innovation, principle of publicity, has well developed in the realisation of a broader idea of informational justice and securing informational foundations of living democracy. The evolution of the principle of publicity and the European and international adoption of the principle of publicity shows that Scandinavian law is still capable of providing solutions of international interest, influence international developments and create innovative new solutions which are based on the Scandinavian conceptions of fairness and solidarity.

In copyright law influence of EC law is rising. European Union law has a conception of fairness which is less collective and less paternalistic than particularly has been the case in some dimensions of Scandinavian law. European law and international law have, so far, strengthened certain dimensions already present in Scandinavian copyright tradition and sometimes resolved certain points of discussion in classical doctrine. The influence and impact of the European Union law has not exhausted the possibilities of Scandinavian law to influence and innovate within the framework of international law and European law. In the case of the rental and lending rights the Scandinavian discussions and solutions coming back to 1930s and to legislative solutions from the end of 1940s to 1960s have influenced European Commission's argumentation and the development of Community law. However, in the longer run more detailed international conventions and the European Union has not necessarily narrowed down the possibilities of Scandinavian law to develop its particular features. The international influence is not of the adaptation of Scandinavian law to EC law but of mutual inter-action, influence and learning.

It seems that in the field of public law Scandinavian law has a larger room of manoeuvre to cultivate its own tradition. The innovative cultivation of Scandinavian legal tradition is facilitated further by the high international valuation of the Scandinavian countries as examples of efficiency, economic success, security and integrity and, consequently as sources of inspiration. The work of Scandinavian academic experts and practitioners and political leaders and enterprise and civil society leaders has made these innovations known and provided a foundation for international learning from Scandinavian legal tradition and its institutions. In some areas of private law, for example copyright, the small economic power and size of Scandinavian countries and the rigidity in general systemic structures and principles created by international conventions and EC legislation the space for unique development and innovation are considerably smaller. The negative harmonisation impact of, for example, the EC copyright directives and, for example, WTO TRIPS Agreement are considerable. These instruments have not necessarily radically changed the current foundations of Scandinavian copyright law as it is today but, they also stonewall certain current solutions.