

A Copyright Act in the Melting-pot

A New Setting for Copyright Matters, Individuality and Collectivisation of Contracts – a Swedish Proposal

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1 Introduction

Licensing of copyright works and related rights phenomena have always occurred on a multitude of markets having very little in common, except for the fact that they concern IP rights of a certain kind. Obviously, the factual items and objects within the realm of copyright are so widely differing from each other, pursuing such multitude of purposes and uses and thus attracting very different markets and interests, hereby facing commercial reality of such plurality that contracts developed and deployed within this prolific area cannot be anything but incoherent.

This is probably one reason why the EU over time has left contractual matters in this field of law to the member states to solve nationally, although harmonization of specific elements of the exclusive rights of copyright owners and their related rights have been accomplished to a great extent during the last twenty years, based on those seven Directives with various targets valid by now within the union for copyright and related rights. As a matter of fact there is very little to find in the European Copyright Directives on contractually based uses of rights, and certainly not a coherent solution.

The most important exceptions to this unwillingness vest probably in the Sat/Cab Directive¹. The first paragraph of article 3 indicates that an author's authorization of communication to the public by satellite can be acquired only by agreement. This is primarily meant merely to stress that the exclusive right of satellite broadcasting may not be made subject to a system of statutory licensing, even if article 11bis (2) of the Berne Convention would allow this. EU copyright directives normally reject statutory licensing, thus opening for individual contracts to regulate transactions on the market.

Article 3 para. 2 of the Sat/Cab Directive says that a member state may provide for a collective agreement between a collecting society and a broadcasting organization concerning a given category of work, what may be extended to rightholders of the same category who are not represented by the collecting society. Notwithstanding the first paragraph, the system of "extended" collective licensing, a truly Nordic innovation, may be applied to the right of communication to the public by satellite, if however only in case of simulcasting by satellite of a terrestrial broadcast.

Further article 8 (1) of the Sat/Cab Directive demands that Member States shall ensure that cable retransmission of programs basically shall take place on the basis of individual or collective contractual agreements between copyright owners, holders of related rights and cable operators, whereas article 9 ensures that a grant or a refusal of authorization to a cable operator may be exercised only through a collecting society.

These examples show that, in short, the union basically has been eager not to expose the world of copyright to systems of statutory licenses, but rather letting transactions of copyright be based on and guided by private law norms or the

1 Council Directive 93/83/EC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

law of contracts, in very special cases, however, to let authorization and rightful uses be executed by collective agreements. Further, in spite of a quite extensive *acquis communautaire* in this area, based on seven copyright directives, considerable differences in the national copyright legislations of Member States still prevail.

But this is not the full picture. During the first decade of this century the Commission has been intensely involved in finding means for trans-national or, rather, pan-european solutions to on-line licensing of copyright uses or objects covered by related rights. In particular those measures have been taken in wake of and evaluation of the *Infosoc Directive*.² In its review of the Single market the Commission highlighted the need to promote free movement of knowledge and innovation as the "Fifth Freedom" in the single market.³

Here may be observed some quite telling examples of Commission activities, such as its Recommendation on collective cross-border licensing of music.⁴ Further, in the Autumn of 2009, DG INFSO and DG MARKT launched a document called *Creative Content in a European Digital Single Market*.⁵ Former EU information society and media commissioner Viviane Reding said about his paper that it is "the starting point for new EU actions to support development of innovative business models, cross-border services and consumer-friendly offers". Reding stated: "Europe's content sector is suffering under its regulatory fragmentation, under its lack of clear, consumer-friendly rules for accessing copyright-protected online content, and serious disagreements between stakeholders about fundamental issues such as levies and private copying. We should give industry legal certainty, content creators a fair remuneration and consumers broad access to a rich diversity of content online."⁶ Apart from its political rhetoric this statement pretty much captures the essence of the contemporary copyright problem.

In the context of the digital libraries initiative the Commission has pointed out that digitisation and online accessibility of cultural content require appropriate measures when dealing with i.a. so called orphan works, i.e. material still in-copyright but whose right holders cannot be identified or located. In the recently released Communications "Europeana – next steps"⁷ and "Copyright in the knowledge economy"⁸ the Commission indicates that it will examine the orphan works problem in an impact assessment, which will explore a variety of

2 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001.

3 COM 2007 724 final of 20.11.2007 – A single market for 21st century Europe.

4 Commission recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (recom. 2005/737/EC).

5 *Creative Content in a European Digital Single Market: Challenges for the Future*, A Reflection Document of DG INFSO and DG MARKT, 22 October 2009.

6 See "ec.europa.eu/internal_market/publications/e-bulletin/.../index_en.htm".

7 COM(2009) 440 final, of 28.08.2009.

8 COM(2009) 532 final, of 19.10.2009.

approaches to facilitate the digitisation and dissemination of such works.⁹ This was foregone by the a recommendation adopted by the Commission in 2006 encouraging Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of orphan works.¹⁰

All in all the last decade has seen a stream of Commission recommendations, test balloons, and assumed stepping stones for solving trans-border licensing or rights clearance issues as the digital environment is concerned. To this day there is, however, no elements of an *acquis communautaire* for this.

Against this background it is understandable that the Swedish Government several years ago decided to focus on certain aspects on copyright contract law without any specific reference to EU Law, but observing the contemporary need of statutory support for licensing and rights clearance generally. A special commissioner was appointed in April 2008, the author of this article, to revise the whole Copyright Act (1960:729), basically for editorial reasons and reasons of clarity, but also to test all articles of the Act on copyright contracts, not least those concerning extended collective licences.¹¹

As a matter of fact it is for the first time in some fifteen years that amendments to the Swedish Copyright Act may come about not being a necessary implementation of EU Law, but of course reflecting digitisation and the challenges of Internet uses and trans-border licenses intensely observed i.a. by the Commission and the Parliament. It should also be stressed, however, that some of the issues posed upon the sole commissioner, were old leaven, touched upon several times by Nordic commissions without much result, hopefully to be solved at last or at least carefully and finally analysed, such as an employers' right to an employee's protected works accomplished within the frames of an employment.

The commissioner delivered an interim report in April 2004, SOU 2010:24, *Avtalad upphovsrätt*, concerning mainly the copyright contracts issues. A final report, concerning the re-editing and rephrasing of the whole Copyright Act, will be published in April 2011, then suggesting a new Copyright Act to be adopted.

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

2 Proposals in Brief

As was just indicated the main tasks of the Inquiry on Copyright in this interim report were to undertake a comprehensive review of the provisions on the

9 *Cf.* Study on the implementation and effect in Member States' Laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Institute for Information Law, University of Amsterdam, The Netherlands, February 2007.

10 *See* Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, L 236/28.

11 *See* Dir. 2008:37 and, adding to the commission, Dir. 2009:65.

transfer of copyright in Chapter 3 of the Copyright Act and fundamentally to analyse issues concerning extended collective licences and related matters. Hereby, somewhat paradoxically, the proposals of the Inquiry stresses the need for norms supporting, on the one hand, the individual author as a party to contracts on transfer of rights as well as, on the other, further collectivisation of rights clearances. The latter phenomenon to match all those markets in broadcasting, Internet uses and other forms of mass market uses where authors' rights simply cannot be handled piece by piece as the Copyright Act basically sets forth.

The proposals presented in the report are briefly as follows. It is suggested that many new general provisions on contracts will be introduced in Chapter 3. At the same time, the special provisions on publishing contracts, introduced in the Act of 1960, will be removed. To observe is in particular that a provision will be introduced on interpretation of contracts that will codify and clearly define the 'principle of specification'. In addition, a reference will be introduced to Section 36 of the Contracts Act (1915:218) and a general provision will be introduced on the obligation to use rights acquired with exclusivity.

Further, provisions are introduced clarifying the rights of the author in the event of transfer by assignment or licence of works protected by copyright. Thus a provision will be introduced entailing a presumption that the author is entitled to reasonable remuneration when he or she by assignment or licence transfers the right to exploit the work to someone who intends to use this right in the framework of commercial activities. Moreover, a provision will be introduced giving the author the right in the event of a royalty agreement to receive a settlement once a year and to inspect the information on which the remuneration is based. Further still, a provision will be introduced concerning the right of the employer to works created in the framework of employment relationships, as a result of which the 'rule of thumb', as developed in case-law and doctrine, will be codified and clearly defined. Subject to certain conditions, this provision will give the employer a limited but exclusive right to use works created in the framework of employment relationships.

The proposals on extended collective licences in Chapter 3 a of the Act on Copyright in Literary and Artistic Works ('the Copyright Act') concern, firstly, fundamental changes in the general provision in Article 42 a of the Copyright Act and, secondly, changes and extensions in some of the specific provisions on extended collective licences. Among other consequences, the proposals in Article 42 a will make it clear that only one organisation in each area shall be authorised to enter into agreements under which collective licences have extended effect. Corresponding amendments are also made in the provisions concerning collection of remuneration under Article 26 m of the Copyright Act, the provisions on collection of resale right remuneration under Article 26 p of the Copyright Act and the provisions on collection of remuneration under Article 47, third paragraph of the Copyright Act.

The provision on extended collective licences in Article 42 b concerning the making of copies at places of work – authorities, companies, organisations - is broadened to include digital copies. Further, the provision on extended collective licences in Article 42 d of the Copyright Act is broadened to make it easier for libraries and archives to digitise works in their collections and make them

accessible. A broadening of the provision concerning sound radio and television broadcasts in Article 42 e of the Copyright Act is also proposed, so as to make it cover all communication to the public and such making of copies as is necessary to enable the communication to take place. This means that the provision covers cases in which material is made available at the request of individuals. Moreover, a completely new provision on extended collective licences is proposed, allowing the parties to enter into agreements under which collective licences have extended effect in areas other than those specified in the Act. This will be known as a special extended collective licence.

The new general provisions overall aim is to promote clarity and certainty in copyright contracts, which supposedly should be to the advantage of all parties. In addition, they are intended to prevent lock-in effects arising, a problem quite often observed in today's media landscape. The provisions are also intended to clarify the rights of the author and to uphold the principles of copyright in an increasingly complex and many-faceted market for protected works and performances. The amended and new provisions on extended collective licences clearly aim to facilitate rights clearance in connection with various forms of mass use of works and performances protected by copyright so as to make the great repertoire available in organised form and on terms that are acceptable to the users, authors and other rightholders. Not least uses in Sweden of works of foreign authors and rightholders are meant to be covered by those extended collective licenses

3 Remit

As indicated above the main tasks of the Inquiry on Copyright, as set out by the Government,¹² have been to undertake (i) a thorough re-editing and re-writing of the Act so as to modernise vocabulary and improve understandability, and (ii) to pursue a comprehensive review of the provisions on the transfer of copyright in Chapter 3 of the Copyright Act, and, not least, to look over a number of fundamental issues concerning extended collective licences and related matters - on the basis of an added remit in June 2009, a full scale test of the whole system based on statutory extended licenses was expected. This allows for an almost endless number of issues and tasks potentially to fall within the frames of the inquiry. At a closer look there are, however, a number of issues stressed by the Government.

Within the frames of the general provision on copyright contracts must be observed the very specific task of investigating and taking a stand on whether the position of the author, as a contracting party, should be *strengthened*. The task of undertaking a comprehensive review has also, in particular, included investigating and taking a position on whether a kind of 'work-for-hire rule' should be introduced. A 'work-for-hire rule' is defined by the Inquiry's terms of

12 Cf. Dir. 2008:37, which was quite strictly listing tasks for the commissioner to deal with, in spite of its basically broad approach, and, eventually, adding to the commission, by Dir. 2009:65, a full scale test of the collective licensing system as such.

reference as a provision entailing that the financial element of the copyright to material produced in the framework of an employment relationship will pass to the employer unless otherwise agreed. This was an old task not successfully treated at any point of time in the Nordic countries, but of which the Government obviously wanted a thorough (and hopefully final) irradiation.

The task of looking over certain issues concerning extended collective licences has included the general and, not least from the positions of Competition Law, very intrinsic, question of the criteria to apply in deciding which organisation or organisations should be authorised to enter into agreements with the effect of extended collective licences to be executed, instead of the criterion, now valid, that the organisation should represent a substantial number of merely *Swedish* authors. Obviously, the potentially discriminatory effect of the Copyright Act in this respect, may conflict with basic EU principles.

The general issues have also included investigating and taking a position on whether it should only be one organisation that can have the authority to enter into agreements with the effect of extended collective licences or whether several organisations should have that authority.

With regard to the specific provisions on extended collective licences, the remit has included in its listing of important endeavours the issue of whether the provision on the making of copies within public authorities, enterprises and organisations, etc., should be broadened so as to also cover the making of digital copies, and the question of whether a new extended collective licence should be introduced for making available, on request, works forming a part of radio and television programmes.

The supplementary terms of reference issued to the Inquiry in June 2009 added considerably to the workload of the commissioner as it put forth the questions of (i) whether the Copyright Act should be amended to make it easier for libraries and archives to digitise works protected by copyright and make them available, (ii) whether a general extended collective licence should be introduced, and (iii) whether the Copyright Act should be amended to ensure that the remuneration paid to an organisation on the basis of extended collective licences reaches the rightholders, particularly those who are not represented by the organisation.

4 A Comprehensive Review of Chapter 3 of the Copyright Act

4.1 *New General Provisions on Contracts*

The provisions in Chapter 3 of the Copyright Act have remained virtually unchanged since the Act came into existence.¹³ Meanwhile, the commission started off from the assumption that society and the copyright market have undergone sweeping changes. Technical developments are constantly giving rise

13 The Swedish Copyright Act (1960:729) became effective on 1 January 1961. Virtually none of the provisions on individual contracts then introduced have been amended since then; furthermore some of those provisions were also part of the previous 1919 Copyright Act.

to new forms of uses of works protected by copyright. In light of this, the Inquiry's terms of reference emphasise the need to modernise Chapter 3 of the Copyright Act.

The task of the Inquiry has therefore been to undertake a comprehensive review of all provisions in Chapter 3 of the Copyright Act. The terms of reference emphasise, as a general point of departure, that the Inquiry is to strive for durable and flexible solutions reflecting the copyright market and give authors a reasonable opportunity to maintain their rights while also accommodating other justified interests. The Inquiry has also been instructed, as set out above, to consider the question of whether the position of the author as a contracting party should be strengthened, and if so, how.

In Chapter 3 of the Copyright Act as it stands today, the provisions on publishing contracts dominate, while there are relatively few general provisions on contracts. The Inquiry came to the conclusion that in many respects, the rules on publishing contracts had lost their relevance. The report therefore proposes removing the special regulations on publishing contracts, but certain fundamental principles that occur in them will be given general application. This is in line with the introduction of a number of general provisions on contracts. The intention is for the provisions to promote clear and well-defined contracts. This should be to the advantage of all parties, the Inquiry assumes. *Freedom of contract* should apply as the basis for legislative measures, so that the parties can make contractual arrangements as best suits their particular needs, hereby rejecting the suggestion from a number of authors' organisations that authors need *mandatory* provisions in the Copyright Act to protect their interests in contractual matters.

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

4.2 Interpretation

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

A similar provision is since many years valid in the Danish and the Norwegian Copyright Acts respectively. However, both use a definition that the Inquiry found both narrow and unclear, especially in light of the courts' interpretation and use of this instrument over time. The Swedish proposal thus aims to cover those developments on the so called specification principle as adopted by the courts.¹⁴

4.3 Modification

It is proposed, Article 29, that a reference to Section 36 of the Contracts Act (1915:218) be brought into the Copyright Act. Further, a special provision is

14 Cf. Rosén, *Upphovsrättens avtal*, 3rd ed. 2006, p 151, 300 et seq.

proposed to enable modification of unreasonable contract terms relating to non-material rights, i.e. moral rights.

As for the reference to the general clause in Swedish Private Law on modifying or setting aside of a term of a contract or to disregard a contract in its totality due to unreasonable terms or misuse of a party's inferior position, it indicates that no other rules in these respects are valid in the field of copyright than elsewhere on the market. Earlier on there was a specific clause of this kind in the Copyright Act, expunged from the Act in 1976 when all similar types of correctional instruments were also cancelled in all other Private Law Acts valid in Sweden at the time - Section 36 of the Contracts Act then being the collective formula. Representatives of author groupings have never approved of that uniform instrument, claiming that the old rule was more strongly oriented to support the interests of the author as a party to a contract. However, the Inquiry was not able to detect any situation that should be covered by this correctional instrument, that would per definition fall aside of Section 36 of the Contracts Act. Hence the importance to stress, also from the interest of the authors, that a direct reference is needed in the Copyright Act to that provision in the Contracts Act.

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

4.4 *Obligation to Use*

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

The basic assumption underlying this proposal is that the idea of an exclusive agreement is the exploitation of the work or, at least, the public exposure of it. A work or related right should not merely be put on the shelf by the owner of the exclusive right. This assumption also reflects a counteract to what is quite frequently claimed today, that copyright is used to lock up products of cultural values, hence blocking public access. This is probably slightly exaggerated – authors must generally be said to support public access of their works – but the inquiry has found it valuable to put some stress on exclusive licensees to actively plan for the uses allowed by the contract.

4.5 *Remuneration, Settlement and Control*

A new, general contractual provision concerning remuneration is proposed, Article 31. This provision gives the author the right to reasonable remuneration when the right to exploit a work is transferred by assignment or licence to

someone who intends to use the right in the framework of commercial activities. This provision is optional.

New provisions are also proposed giving the author the right in the event of a royalty agreement to receive a settlement once a year together with the information on which this is based, and the opportunity to inspect this settlement, Article 32. These provisions will be mandatory and it will therefore not be possible to waive them by contract.

4.6 *Contracts Concerning Communication to the Public, etc.*

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

The content of this article was basically valid already in 1960, when the Copyright Act was introduced. However, it has been very little observed, at the time merely relating to contract between the performing rights societies and authors of musical works. Not even in that region of uses has it been of distinguished importance. Still, the Inquiry assumes that this article has gained impetus in the digital age and that it is particularly important in the event of use in the digital environment, such as on the Internet.

4.7 *Film Contracts*

It is proposed, Article 39, that the presumption rule concerning film contracts, already in the Copyright Act since many years, be clarified. Under this proposal, a contract conferring the right to use a work when recording a film means that an author contributing a work for a film cannot oppose copies being made of the film, the film being made available to the public, provided with subtitles or being translated into another language.

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

Hereby, it is also clarified what probably is the crux of film contracts, generally speaking. Namely that those rights of the contributing and normally comprehensive grouping of authors and performing artists are conferred to the producer of the film, but has nothing to say about remuneration to members of that grouping. This provision offers a presumption facilitating the use of the film, whereas remuneration is a separate issue, not covered by the presumption.

4.8 *Copyright to Computer Programs Created in Employment Relationships*

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

The novelties of Article 34 lie in the fact that it diminishes the scope of employer's rights to computer programs as expressed in the Copyright Act (Article 40 a), by expunging the moral rights dimension now vested in Article 40 a. The Software Directive, forming the basis for the just mentioned article, never asked the Member States to leave authors' rights, with their complete content, to the employers regarding computer programs accomplished within the frames of an employment.¹⁵ To include the moral rights dimension in the employer's acquisition was probably merely a gesture of the legislature in the 1990ies to please the software industry of North America. However, moral rights simply cannot be part of a commercial acquisition, something in full consequence observed throughout this interim report. Hence, this dimension is cut off from the employer's position.

On the other hand a very useful and import legal instrument is added to the armoury of the employer. As it stands now, Article 40 a merely concerns the situation within the employer's realm, i.e. the first transfer from the author/employee to the employer, not the next and very natural step of the employer, to address third parties on the market via licenses and sub-licenses. In Article 28 of the Copyright Act, same provision and content in this proposal, there is a presumption against any transferor's transfer of the right to others or to license it to someone else, neither to alter it. The Inquiry now suggests that an employer, having gained the rights to a computer program from his employee, shall have the right also to transfer the right to others. This is naturally what generally happens when a software producer has managed to introduce novel computer programs, but the now valid rules, however seemingly broad at scope, seeks to hinder the employer's marketing of his software.

4.9 A Work-for-hire Rule?

The point of departure of Swedish law is that, initially, the copyright to a work always vests in the natural person who has created the work. In the event of employment relationships, copyright is transferred to the employer only to the extent that this is deemed to be explicitly or implicitly prescribed by the employment contract or by a special agreement. Interpretation of a contract would probably generally allow works produced as part of an employee's tasks to be used by the employer in his or her normal activities and to the extent that could be foreseen with reasonable certainty when the work was created.¹⁶

The Inquiry's terms of reference state that copyright legislation should be designed to be functional in its practical application. At the same time, it states that introduction of a work-for-hire rule would be a major deviation from the fundamental principle that copyright belongs to the author creating the work. The need that may exist for a work-for-hire rule must therefore be carefully

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

16 See Govt. Bill 1988/89:85, p. 21 and the decision of the Labour Court 2002, no. 87, *Marinens Musikkår*.

weighed against the interests of individual authors in being allowed, as far as possible, to decide over their work, and other interests of relevance to the issue.

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

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

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

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

5 Extended Collective Licences

5.1 *International Obligations*

As has already been mentioned, the provisions in the European Community Treaty on free movement and on non-discrimination have an impact on the

formulation of the new provisions on licenses with an extended effect. Recently a new element has, however, been added that has an impact in this context, namely the Service Directive.¹⁷

The Service Directive is a horizontal Directive with a wide scope of application. It builds on a general principle that it shall be possible to make available services freely within the European Union. The notion of “service” is defined in Article 4.1 in the Service Directive as “any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty.” The European Commission has on numerous occasions alleged that the collective management of rights is a making available of services - in relation to the right-owners as well as users and also in relation to each other - and that organisations that pursue collective management of rights are subject to the provisions on, among other matters, the free movement of services in the European Community Treaty and the Service Directive.

It has to be assumed that the activities pursued by the managing organisations in accordance with the provisions in the Copyright Act on extended collective licenses and collection of remunerations respectively are covered by the notion “service” in the Service Directive and consequently fall under the scope of application of the Directive.

From Article 16 follows that the Member States shall respect the right of service providers to provide services in a Member State other than the one where they are established and that consequently they must not make a service provider established in another Member State subject to certain requirements. For instance, the Member States must not – in order to permit access to or exercise of a service on their territories – impose obligations that are directly or indirectly discriminating with regard to nationality (Article 16.1 (a)). Nor must the Member States impose obligations that a service provider established in another Member State shall obtain authorization from the competent authorities in order for it to be able to provide its services in a Member State (Article 16 2.(b)).

Article 17 contains, however, an enumeration of a number of exceptions from Article 16. From Article 17.11 follows, *inter alia*, that Article 16 shall not apply to *copyright* and certain other intellectual property rights.

Already during the negotiations concerning the Service Directive, there were discussions on how the exception in Article 17.11 should be interpreted. Sweden like the other Nordic countries considered that the exception applies to provisions related to the collective management of rights while the Commission held that the exception applies only to the rights themselves. In the course of the implementation of the Directive, the Commission has continued to argue for its position while a number of the Member States (including Sweden) have argued that provisions related to the management of rights are covered by the exception in Article 17.11, because the rights in themselves can not be considered to be services. A Government Bill on the implementation of the Service Directive was submitted to the Parliament on May 26, 2009.¹⁸ The Parliament adopted the Bill on November 4, 2009.

17 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

18 See Government Bill 2008/09:187.

The Service Directive contains, in addition to the provision on free movement of services, also general provisions on authorization schemes. In Article 9 is for instance prescribed that the Member States may make the access to a service or exercise of it subject to an authorization scheme only if it is called for overriding interests relating to public interests.

All in all the Swedish position lays no hindrance for continuation and development of extended collective license regimes.

5.2 *Point of Connection to Redeem the Extended Collective Licence*

Chapter 3 a (Articles 42 a–42 f) of the Copyright Act contains comprehensive and quite complex provisions on extended collective licences. Under these provisions, agreements on the exploitation of works may be entered into with an organisation that represents a substantial number of Swedish authors in the field concerned. By entering into such an agreement, a user can also acquire the right to exploit works by authors *not represented* by the organisation. Without the support of the legislator this would of course not come about. The intention, just as overt, is to make it easier for a user, like a major broadcaster or a cable distributor of TV content, by an agreement with the representative organisation, to acquire all the rights the user needs for his or her activities, while enabling the authors concerned to receive reasonable remuneration. The interests of the authors not represented by the organisation are safeguarded by certain protective rules, e.g. provisions on the right to remuneration on the same basis as those authors who are members and thus represented by the contracting organisation, and the possibility of prohibiting exploitation. Was there not a possibility to opt out for any author the system of extended collective licenses would stand small chances to comply with the norms of the Berne Convention.¹⁹

Article 42 a is the basic provision for all sorts of statutory extended collective licenses. As already mentioned a collective licence for the time being only has extended effect in the case of agreements with organisations that represent a substantial number of *Swedish* authors in the field concerned. Corresponding requirements exist also concerning the collection of a ‘private copying levy’, a so called kassettagift (Articles 26 k–26 m), and resale right remuneration, droit de suite (Article 26 j). This requirement is also found in the mandatory licence provision in Article 47 of the Copyright Act (see the third paragraph), on phonogram producers’ and performing artists’ right to remuneration for public performances and communication to the public of their recordings and performances. The last example is a kind of compulsory licence structured by the same collective arrangement as the extended collective licenses in the said respect.

However, the focus on Swedish authors (and performers/producers) to trigger the effect of those provisions is of course debatable, to put it mildly, from an EU non-discriminatory perspective. Already in connection with the implementation of the EC Directive on Copyright in the Information Society,²⁰ it

19 Riis/Schovsbo, *Extended Collective Licenses and the Nordic Experience*, Columbia Journal of Law and the Arts, Vol. 33, Issue IV, 2010.

20 See note 2 supra.

was noted that there is cause to review whether it is a suitable delimitation for organisations to represent a substantial number of Swedish authors.²¹

Denmark amended its equivalent provisions after the European Commission's finding that this was in violation with the prohibition of discrimination contained in the EC Treaty. The other Nordic countries have subsequently made similar amendments. It is stated in the Inquiry's terms of reference that there is cause also in Sweden to remove the limitation of *a substantial number of Swedish authors* and examine what other criteria are needed for the systems to work in a way that is transparent, effective and competition-neutral from both a rightholder's perspective and a user's perspective.

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

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

5.3 *Which Organisations are to be Authorised to Enter into Agreements under the Rules on Extended Collective Licences?*

Closely linked, however of a fundamentally different nature, to the issue of which criteria should apply instead of the requirement that an organisation represents a substantial number of Swedish authors is whether merely *one* or *several* organisations should be authorised to conclude agreements in the same area of copyright. In the other Nordic countries this issue has been solved by a system based on a concession from a public authority to an organisation that may enter into agreements executing the extended effect for non-member authors. Hereby they apply a policy only allowing for one single organisation to have concession for a specific area of copyright.²²

In Sweden the extended collective licence provisions state only that an agreement must have been concluded with an organisation representing a substantial number of Swedish authors in the field (Article 42 a). Similar formulations appear in the above-mentioned provisions on the private copying

21 See Govt. Bill 2004/05:110 pp. 144 and 247.

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

levy (Article 26 m), resale right remuneration (Article 26 p) and the right to remuneration for performing artists and producers of sound recordings under Article 47, third paragraph. Concerning the issue of resale right remuneration, the Supreme Court has ruled in a judgment that this provision means that more than one organisation may be entitled to claim remuneration, but that certain requirements must apply with regard to the organisation's structure and stability.²³ In connection with the implementation of the EC Directive on Copyright in the Information Society, the Swedish Council on Legislation, Lagrådet, observed the problems that could arise as a consequence of several organisations being authorised to claim a private copying levy or sign agreements on extended collective licences.²⁴

In light of this, and other matters, it is stressed in the Inquiry's terms of reference that there is cause to examine more closely whether several organisations within the same field should be allowed to operate in the extended collective licence area, or whether only one organisation should be authorised to conclude agreements in the area. A similar review should be carried out regarding the private copying levy, resale right remuneration and the right to remuneration for performing artists and producers of sound recordings.

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

This statement needs some clarification, particularly as the proposal does not foresee a concession system – maybe executed by the Government - as employed in the other Nordic countries, but something to be dealt with by the contracting parties on the market or, in case of severe disagreement, a civil court. To this issue the following deliberations of the commission may be observed.

As long as the organisations represent authors in different areas or sub-areas and do not compete with each other, normally no problems arise in determining which one or which is competent to conclude agreements with extended collective license effect. On the other hand, problems may arise in determining the competence in a situation where the organisations compete with each other and represent authors in the same area or sub-area. As just mentioned, it could be possible that the organisations together form a party to the agreement, for instance if they only in such a case become representative. If in a specific area or sub-area several organisations exist that each one can be seen as sufficiently representative, it must, however, in the opinion of the commissioner, be sufficient if an agreement has been concluded with one of those in order for the agreement to have extended collective license effect. It can not be required that the user concludes additional agreements with the other organisations or with

23 See NJA 2000 p. 178, BUS v DUR.

24 See Govt. Bill 2004/05:110, p. 563.

one of them. Such an agreement would not provide the user with additional rights or additional remunerations for the authors but only complicate the picture and the system for payment. This would be in conflict with the basic aim of the extended collective agreement system. Nor can it have been the intent of the legislator that the user would have to conclude agreements with each one of the organization of which each one is representative.

Generally speaking, competition is considered to promote administrative efficiency and pricing and in the course of the inquiry it has been suggested that the new law should be designed in such a way that competition is encouraged. Also the Terms of Reference mention competition as a positive factor that should be balanced against other advantages, such as clarity and transparency.

A competition between two or more organisations that represent authors or other rightholders can come into being in two different respects. The organisations may compete with each other, on the one hand in relation to the authors or right-owners in respect of the best management of the rights, and, on the other hand, in relation to the users concerning the best agreements relating to the use. In the view of the commissioner free competition should, as a matter of principle, exist in relation merely to the members. An author or a rightholder should be able to select the organisation in which the author/rightholder has the most confidence to manage his or her rights.

In practice, under the current regime, which surely allows for more than one organisation in each copyright field, such freedom of choice is present only to a very limited extent, as there factually exists, broadly speaking, only one organisation in each area. Under a period of almost fifty years of uses of statutory extended collective licenses in Sweden we have never seen two competing organisation actively working in the same field. The interest in establishing a “new” organisation in addition to the ones already established has so far been extremely low. One reason for this could be that comparatively wide experience, contacts and administration is needed to handle the management of rights in an efficient way. This may, however, change over time. The new provisions take this into account.

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

The fact that the organisations have a certain monopoly position has been accepted within European Community law, and the European Court of Justice has for a long time seen a considerable market concentration - in fact a monopoly position - at the side of the rightholders as a necessity for obtaining reasonable negotiation results in relation to large user enterprises, such as radio

and television corporations and other enterprises in the mass market.²⁵ Media concentration is what authors' organisations normally have to face at the other side of the table when negotiating contractual terms.

An organization considered to hold a dominant position in the market place must, however, not misuse that position by making unreasonable demands. Such a misuse could consist in the application of too high a price which does not reflect a reasonable relation to the economic value of the transaction. The misuse may also consist of the application of a certain remuneration model.²⁶ No misuse was found in that case but the application of a remuneration model which was *per se* acceptable, could, according to the European Court of Justice, under certain circumstances constitute a misuse, namely if another method for calculation of the remuneration to the authors existed which made it possible to more closely identify and quantify the use of copyright-protected material.

The European Court of Justice, now the Union Court of Justice, has in a number of decisions shown a considerable understanding for the authors' problems (and their successors in title) from a practical and administrative point of view to obtain a reasonable remuneration in the mass markets.²⁷ In the Preliminary Opinion C- 52/07, referred to above and footnote 26, the European Court of Justice (at p. 40) stated that, even if more detailed calculation methods were desirable in order to avoid misuse from a competition point of view, a remuneration model always must be based on the fundamental legitimate aims, i.e. to safeguard the interests of the authors and that more precise and detailed systems for licensing and collection must not result in an disproportionate increase of the costs for the administration of agreements and control of the use of works protected by copyright. This obviously speaks in favour of a concentrated administration of rights in the mass markets.

In practical terms problems rarely appear in the application of today's legislation. In most areas it is more or less obvious which organisation is competent to conclude agreements with extended collective license effect. In the areas of photography and still pictures there are, however, organisations that each one has considered itself competent to conclude agreements under Article 42 c of the Copyright Act. New organisations also can come into existence and when the limitation to Swedish authors is deleted, foreign organisations may enter the Swedish extended collective license market. Starting from the position that a user for a specific exploitation shall have to conclude only one agreement at each point of time, i.e. for a certain agreement period, the Inquiry could not see any problems in each one of several organisations to be potentially competent to conclude extended collective license agreements in the same area.

On the other hand it is to be assumed that a system meaning that only one organization in each area (or part of a specific area) is competent to conclude

25 See Riis, *Collective management and competition law questions*, Nordic Intellectual Property Journal, NIR, 6/2009, p. 621 et seq.

26 See e.g. the judgement of December 11, 2009, European Court of Justice, case C-52/07, Channel 5 Ltd and TV 4 AB v. Swedish Performing Rights Society (STIM), in particular items 28 – 40 and the references made there to earlier decisions.

27 See in particular Case C-395/87, Tournier, REG 1989 p. 2521.

agreements with an extended collective license effect would have some advantages, for instance as regards clarity. This is obvious especially in relation to the users, but also in relation to the authors, those represented as well as those who stay outside, and in relation to the organisations themselves.

Legislation in the other Nordic countries contains, as has been said before, no explicit provisions related to the number of organisations that can be competent to conclude agreement with extended collective license effect. The system of concession implies, however, in practice that only one organisation in each field has such competence or that a number of organisations factually cooperate. This should speak in favour of a system also in Sweden where it is made clear that only one organisation in each field has such a competence.

Consequently, the proposal does not prevent another organisation than the one that has concluded the agreement with extended collective license effect, at a certain point of time, to conclude a subsequent agreement in that field on the next occasion, if that other organisation meets the criterion to be the most representative one and the one that best takes into account the authors' interests. Also the proposed system means that the users may negotiate with only one organisation in each field. They would consequently not be able to select the organisation that in their view gives them the best conditions for the use of copyright works, i.e. the lowest price for the use. The Copyright Act for the protection of authors' rights really can't, as a matter principle, provide for a system that would merely have the function to press the authors' revenues downwards.

In conclusion, the Inquiry considers that advantages outweigh the disadvantages that would result if only one organization in each area is competent to conclude an agreement with extended collective license effect. On the basis of these considerations and as the Inquiry did not find any obstacles in European Union legislation or Union Court practise, it came to the conclusion that only one organisation in each area or partial area should have competence to conclude agreements with an extended collective license effect.

5.4 *Distribution of Remuneration under Extended Collective Licences*

The mandate of the commission foresaw also an overall analysis of how the system for extended collective licensing has actually functioned in Sweden over the years. Somewhat surprisingly such an investigation has not ever been accomplished by a public authority. Such an analysis was necessary as the Inquiry also should suggest, if found appropriate, new forms of extended licenses and widened scope of already existing licenses. Such proposals could naturally not come about if the result of such study would have led to a negative picture of the system of extended collective licenses

The report makes the assessment that the distribution systems for extended collective licences currently used by the organisations that collect and distribute remuneration function well, and remuneration paid to rightholder organisations on the basis of the extended collective licence provisions reaches the rightholders, including those not represented by the organisations. Nothing has come to light to suggest that there are irregularities concerning payments. That the relevant active organisations perform with great transparency adds to the

positive picture given. Therefore, no new provisions have been proposed in the Act to ensure that e.g. remuneration reaches the rightholders.

5.5 *Making of Digital Copies at Public Authorities and Private Enterprises*

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

In addition, it is proposed to remove the restriction to the effect that the only works of art covered by the extended collective licence provision are those that are reproduced in connection with the text in a literary work. Hence, also separate pictures are covered by the proposed statutory licensing system. In line with the step toward digital copying it is also proposed that the provision's current requirement, that the works in question must have been *published*, be amended to state that the works must merely have been *made public*, e.g. lawfully available on the Internet.

5.6 *Possibility for Archives and Libraries to Digitise Works and make them Available to the Public*

One of the strategically and for media policies most important suggestions of the proposal follows from its endeavours to facilitate public access to and communication by modern means of the assets of libraries and archives. The report proposes that the extended collective licence provision in Article 42 d of the Copyright Act be broadened to make it easier for libraries and archives to digitise works in their collections and make them accessible, for example, by communicating them via the Internet. It is therefore proposed that Article 42 d of the Copyright Act cover (i) all kinds of production of copies and all forms of (ii) making available of works to the public that cannot be undertaken pursuant to the restrictions in Articles 16 and 21 of the Copyright Act. Hereby, the libraries would be able to communicate their assets on screens not only to visitors to their premises, but also to fully communicate them online.

The strong political dimension in these proposals follows from the assumption, as expressed in the proposal, that libraries and archives should not have statutory licenses or mere exceptions to copyright as a basis for their communication of their vast assets to the public. The extended collective license naturally urges them to come to the table for negotiations and to finance their uses of protected works and performances, recordings etc.

Moreover, it is proposed that an amendment be made to the exemption already existing in Article 21 to improve opportunities for archives and libraries to make works contained in their collections available within their own premises, i.e. if they possess of a lawful digital copy they may also display it on

screens in their premises in spite of the fact that such a use would be a communication to public and thus

5.7 Works and Performances that Appear in Radio and TV Programmes

A major practical problem today in Swedish broadcasting is the fact that no extended collective licenses cover further uses of a broadcast in the Internet environment, i.e. for what is often called Webb-TV. A broadcasting organisation must therefore negotiate individually all copyright element in a TV-program if that organisation would like to post the program on its own webb, thus communicating it to the public. Currently, no extended collective license covers on-demand forms of communication to the public, thus not what is available on the webb, but merely broadcasting.

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

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

5.8 A Special Extended Collective Licence

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

Now it is proposed that the general provision on extended collective licences should be supplemented with respect to the scope of a *potential* extended license. Hereby is offered the possibility of entering into agreements in which collective licences have extended effect in areas *other* than those specified in the Copyright Act. This is to be known as *special extended collective licences* or (less appropriate) *general extended collective licence*.

The proposal requires the following conditions to be met: the agreement must apply to a limited and well-defined area; an agreement under which a collective licence has extended effect must be a precondition for exploitation; the agreement must be in writing and contain information to the effect that the parties' intention is for the collective licence to have extended effect. Special protective provisions will be introduced, under which, among other things, the author will always have the right to file a prohibition against exploitation.

This novelty is already existing in the Danish Copyright Act. Obviously, this is a strong mandate for the actors on market and it expresses a strong belief in

their capacity to comply with the prerequisites set forth. It must be observed, though, that in Denmark the concessional system offers the control of a public authority, whereas the Swedish proposal is built on the assumption that contracting parties on the market may themselves in an acceptable way dispose of the special extended collective license instrument.

6 Some Words to Conclude

All these amendment to the Copyright Act would, if accepted by the Swedish Parliament, purport the most comprehensive remake of the Act since 1960. Consequently, a new Act will be proposed by the commission in its final report in April 2011.

It is proposed that the new provisions enter into force on 1 July 2011. The new provisions are to apply also to works and performances that originated before the entry into force of the new provisions. Existing provisions will continue to apply with regard to measures taken or rights acquired before entry into force. This means, among other things, that the new provisions will not affect agreements already entered into.

As has been demonstrated the proposed amendments, however certainly not comprising an act of implementation of the *acquis communautaire*, still reflect a certain area of Union interest, certainly expressed by the Commission's policy documents and, to some extent, the Parliament. The more unique Swedish approach to the above issues lies of course in the focus on amendments to the Copyright Act to support authors of literary and artistic works as parties to commercial contracts. This addition to general Contract Law is quite rare in a European context, although e.g. The Netherlands have recently accomplished proposals for some provisions similar to those mentioned above.

As for rights clearances of mass uses of works and objects of related rights, in particular as broadcasting and Internet uses are concerned, thus truly trans-border or pan-european phenomena, they are dealt with in the Swedish proposal upon the Nordic formula. The extended collective license certainly has proved to be successful in the Nordic countries. As a vehicle for a simplified licensing system for the whole Union it is not a given success, though, much less as a system for a on-stop service embracing the whole area. Certainly, a principle of EU-wide mutual recognition of a work's status cannot be generated under the Nordic license.²⁸ But maybe trans-border licensing of mass uses of copyright works and objects of related rights can't ever be fully harmonised.

28 Cf. Lueder, *The Orphan Work's Challenge*, Fordham Int. IP Law Conference, NY 2010, "www.fordhamipconference.com".