ALAI Congress 2017 in Copenhagen: Copyright – to be or not to be

Report of the Swedish ALAI Group

Author of the report: Dr. Johan Axhamn, Stockholm University

Questionnaire

The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

The current Swedish Copyright Act (lag (1960:729) om upphovsrätt till litterära och konstnärliga verk, SCA) does not present any explicit justification for copyright protection.

The first predecessor of a copyright act in Sweden can be traced back to 1752, a Royal Ordinance which primarily protected book publishers. Direct protection for authors (writers) to their works was recognized in the Freedom of the press Act of 1810 – a statute with constitutional standing – in which copyright protection was labeled as a "property right" (with a term of protection that was unlimited in time). Later on, the provisions on copyright protection were relocated to an ordinary statute. Protection was subsequently provided in the law also for works of art. Before the current SCA entered into force, a distinction was thus made between authors' rights ("författarrätt") for writers and composers and artists' rights ("konstnärsrätt") for authors of works of art.

The SCA of 1960 (as well as most subsequent amendments to the Act) was the result of a joint Nordic cooperation and was drafted during a period influenced by a realistic (rather than idealistic or "romantic") perspective on the law. Thus, the preparatory works explicitly discards previous depictions of copyright protection as a "property right" similar to property rights in tangible assets. The extent of copyright protection is described rather as an outflow of historical dependence. It is not grounded on any profound theoretical assessments. Rather, the preparatory works to the SCA – which have traditionally been considered to be an important legal source (or means for interpretation) in Swedish and Nordic legal tradition – depicts copyright protection as an instrument of the legislator to protect the author's spiritual creations (or creativity) within the areas of literature and works of art. This is achieved by rewarding the authors by offering them an instrument by which they may have a chance to economically profit from the exploitation of their creations – hence authors' rights are basically a *private law* construction – and by protecting the personal relationship between the author and his work (his "spiritual child").

The legislator is hereby also taking into account (opposing) legitimate public and private interests. This balance of interests has had an impact on both the scope of the object of protection – the subject matter of protection and the prerequisites for protection ("work" and "created", "level of creativity" and "originality" etc.), and the scope of the economic and moral rights – while also taking into account the obligations emanating from international legal instruments such as the Berne

Convention.[1] It is stressed in the preparatory works that the economic rights provided to the author should encompass "all uses of the work that are significant from an practical/economic perspective, although the economic rights may be subject to a limitation or an exception for religious, cultural or other important public interests."[2] *Rewarding* the authors with copyright protection has also been deemed by the legislator to be a good *public policy* in the cultural area. It has been stressed that, in the long run, there is no contradiction – but rather a concurrence – between rewarding authors with copyright protection and the interest of stimulating creativity for the general well being of society.[3]

It should be stressed that the original/initial justifications for copyright protection, as set out in the national preparatory works, have at least to some extent been superseeded by justifictions provided for in the preambles to EU Copyright directives. This is so because, inter alia, the SCA should nowadays be interpreted in the light of these directives and the case law provided by the Court of Justice of the European Union. For example, the recitals to directive 2001/29 on copyright in the information society refers to justifications of copyright protection based on property theories, reward theories as well as incentive theories.

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

There are no explicit justifications for related rights presented in the SCA itself. The preparatory works to the SCA (when protection for related rights was introduced in Sweden in the beginning of the 1960s), express the interest to provide protection for creations and investments that are *related* to authors' rights. Such subject matter were deemed to have "a certain level of internal and external similarity to works created by authors" – however lacking the required element of creativity (to constitute a work); performances, recordings and broadcasts.[4]

As regards *performers*, the preparatory works from the 1950s note that recording and broadcasting technology had enabled a unauthorized, secondary and "unfair" use of performances, which had not been possible before, and against which the performers could not protect themselves via contract. Concern was also expressed that use of "mechanical music" could harm the performers' employment possibilities as well as the recruitment of young musicians.[5]

As regards the protection of *producers of phonograms*, it was stressed in the preparatory works that protection for such subject matter could be based on the need to protect the producers' investment of capital, time, technical know-how and artistic taste. The protection was thus aimed at safeguarding against unauthorized uses. To some extent the justification for protection was

[1] See Goverment Official Reports (SOU) 1956:25 p. 45 et seq, and Swedish Government bill (proposition) 1960:17 p. 48 et seq.
[2] Swedish Government bill (proposition) 1960:17 p. 60.
[3] See Goverment Official Reports (SOU) 1956:25 p. 86.
[4] See Goverment Official Reports (SOU) 1956:25 pp. 354 et seq and Swedish Government bill (proposition) 1960:17 p. 234 et seq.
[5] See Goverment Official Reports (SOU) 1956:25 pp. 355-358, 366 and 371-374, and Swedish Government bill (proposition) 1960:17 p. 234-236.

grounded on arguments based on protection against unfair competition or unjust enrichment (rather than protection against pure economic loss).[6]

Protection was provided also to *broadcasting organisations* based on similar arguments as those for phonogram producers. It was held that specific protections for broadcasting organisations were deemed necessary especially in cases were the content itself was not already protected, such as in the case of the broadcasting of sporting events.[7]

The protection provided to performers, phonogram producers and broadcasting organisations was similar to that provided to authors. Although the economic rights where drafted as rights "to prohibit", they were in practice deemed to be similar to the "exclusive rights" (rights to authorise and prohibit) provided to authors.[8] Performers were also provided with moral rights (of attribution/paternity and right of integrity) to their performances.

As a peculiarity to Nordic copyright law, protection was also provided when the SCA was enacted in the beginning of he 1960s to producers of catalogues, tables and similar products that was the result of the gathering a large number of information items ("the Nordic catalogue rule"). This protection aimed at supplementing copyright protection for certain collections of information items in cases where the producer had invested time and expenses into a collection that did not satisfy the criterion (for ordinariy copyright protection) of creativity in the selection and arrangement of the information items. The protection for "catalogue products" was largely justified on similar arguments as those for phonogram producers and broadcasters.[9]

Later on, neighbouring rights protection has also been provided in the SCA to film producers and photographers. This protection has been based on similar arguments as those for phonogram producers and performers, respectively.[10]

As a result of the implementation of the EU database directive, the SCA also provides a *sui generis* protection for database producers, for invetments in obtaining, verifying and presenting contents in a database. This protection has been based on similar arguments as those for phonogram and film producers and broadcasters, as well as the interest to provide an incentive to invest in the establishment and operation of databases.[11]

Notably, the wording of the economic rights provided to performers, photographers, phonogram and film producers as well as broadcasting organisations have been redrafted in later years as "exclusive rights" (to authorize and prohibit).[12] The legislator has held that as a matter of principle all rights

[6] See Goverment Official Reports (SOU) 1956:25 pp. 366, 374-376 and 384, and Swedish Government bill (proposition) 1960:17 pp. 253-254.
[7] See Goverment Official Reports (SOU) 1956:25 pp. 377-378 and 387-388, and Swedish Government bill (proposition) 1960:17 p. 258.
[8] See Goverment Official Reports (SOU) 1956:25 pp. 381-388, Swedish Government bill (proposition) 1960:17 p. 241 and 245 and Swedish Government bill (proposition) 2004/05:110 p. 268-269.
[9] See Goverment Official Reports (SOU) 1956:25 pp. 390-392, and Swedish Government bill (proposition) 1960:17 p. 268–271.
[10] See Swedish Government bill (proposition) 1985/86:79 pp. 17–18, and Swedish Government bill (proposition) 1993/94:109 p. 21–26.
[11] See Swedish Government bill (proposition) 1996/97:111 pp. 38–42. See also recitals 6–12 and 38–42 in the preamble to the EU database directive (96/9/EC).
[12] Swedish Government bill (proposition) 2004/05:110 p. 269 and 407.

holders (in the area of copyright – authors' rights and neighbouring rights) should be treated equally and thus be provided with a similar level of protection. Nowadays, the main difference between authors' rights and neighbouring rights is that the former also protected against unauthorized adaptations, translations etc. – a matter related to the fact the authors' rights protect *creative* subject matter.[13]

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

The justifications for authors' rights are reflected in the subject matter of protection (the prerequisites for protection and the notion of a "work") and the the scope of the exclusive rights. The fact that it is possible to introduce exceptions and limitations to those rights only for specific uses and in any case not in conflict with the authors' economic rights, is also related to the interests of protecting authors' rights.

The justifications regarding related or neighbouring rights were used as arguments for including in the statute the protection of such rights.

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

In the legal literature in the Nordic countries[14], several different justificatons – some more theoretical and other more practical – for copyright protection, have been put forward in the legal literature, sometimes also appearing in contemporary preparatory works as well as in decisions by the courts: 1) Under natural justice, the author deserves his pay and authors deserve a reward for their time and efforts; 2) copyright strengthens the negotiating position of the author vis à vis publishers, producers and other users; 3) the author deserves protection against mutilations of the work; 4) copyright stimulates the creation of new works by enabling that the works generate income for their authors; 5) copyright increases the security of the investments necessary for the production, exploitation and dissemination of works; and 6) copyright helps dispersing the costs of rewarding the authors and the costs of making making and disseminating works among all users.

Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

There has not been any academic research examining the economic size of copyright-based industries in Sweden.

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

N/A

[13] Swedish Government bill (proposition) 1994/95:58 p. 34.
[14] See also the response to this questionnaire by the Danish ALAI Group.

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

N/A

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

Sweden has a long-standing tradition of collective management of copyright and related rights. The most relevant organisations are Copyswede (audiovisual works), Bonus Copyright Access (print, text and pictures), Stim (musical works), Sami (performers' rights), IFPI (phonogram producers) and BUS (fine art).

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

A Nordic specialty is the extended collective licensing regime. In addition, on January 1, 2017, the Collective Copyright Management Act (lag (2016:977) om kollektiv förvaltning av upphovsrätt) entered into force. It implements Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

Sweden has implemented some of the exceptions and limitations provided for in EU Directive 2001/29 (to some extent in collaboration or coordination with the other Nordic countries[15]): Temporary acts of reproduction, private copying, reproductions by libraries, archives and museums, ephemal recordings made by broadcasters, reproduction of broadcasts by social institutions, illustrations for teaching or scientific research, use for the benefit of people with a disability, reporting by the press on current events, quotation for criticism or review, use for public security purposes, use of public speeches and public lectures, use during religious or official celebrations, use of works of architecture or sculptures in public spaces, use for the purpose of research or private study. Sweden has also implemented the EU directive on orphan works (2012/28/EU), concerning reproducing and making available of orphan works.

In general, the legislator has made use of the "free use" model, although provisions on extended collective licensing, compulsory licensing and obligatory collective management is present for certain uses. Provsions on extended collective licensing and obligatory collective management are generally not deemed to constitute exceptions and limitations in the meaning of article 5 of EU directive

[15] See also the response to this questionnaire by the Danish ALAI Group.

2001/29 or the three-step test. Rather, such modalities are deemed to constitute *arrangements concerning the collective management of rights* (cf. recital 18 to directive 2001/29).