



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

ALAI  
2021  
Madrid



## ALAI CONGRESS 2021, 29 Sept. – 1<sup>st</sup> Oct. 2021, Madrid

### COPYRIGHT, COMPETITION AND INNOVATION

#### QUESTIONNAIRE – NATIONAL REPORT OF SWEDEN

*Notes: This questionnaire aims at collecting information of law, caselaw and practices available in each country.*

*Please refer to the ALAI2021 program for further explanation on the Sessions and Panels.*

***Please, keep your answers short and factual.***

***Please send national report to [rxalabarder@uoc.edu](mailto:rxalabarder@uoc.edu).***

***Deadline: 15 August 2021.***

#### 1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS

*Identify and explain any specific instances where market competition and innovation concerns haven been specifically addressed by copyright law or caselaw in your country. This may include by means of:*

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

At the time of the enactment of the current Swedish Copyright Act (SCA) in 1960, it was stressed in the preparatory works that the guiding principle for the scope of the exclusive rights was to include “all uses of practical or economic importance for the author”, even though other (competing) rights and interests need to be taken into account (see Swedish Government Official Reports (SOU) 1956:25 p. 86 and Swedish Government bill (proposition) 1960:17 p. 60). The exclusive rights are thus not all-encompassing – i.e. they do not cover “all” conceivable uses – but are confined to (uses falling within) the right of reproduction and the rights of communicating, public performance, public exhibition, and distribution to the public. Taken combined, these rights take aim at activities (reproductions, communications, etc.) that provides the author (or other rightsholder) control over how the work is consumed/enjoyed by others by reading, watching, or listening to it (see Swedish Government Official Reports (SOU), 1956:25 p. 92).

In line with the mentioned formula – that “all uses of practical or economic importance” should be included in the economic rights – the scope of the rights have been broadened/extended over time – often as a result of technological developments (new forms of exploiting works) as well as international and regional legal developments, such as the adoption of the WIPO Copyright Treaty and EU Directives on Copyright – to include, for example, also temporary forms of reproduction and communication to the public in the form of “making available on demand”. Swedish courts have also referred to the formula (“all uses of practical or economic importance”) when interpreting and applying the exclusive rights in the SCA (see for example Swedish Supreme Court case NJA 1986 p. 702 on the public performance of music in a radio store).



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These underlying rationales for the scope of copyright protection have not changed dramatically with the increased importance of EU harmonization of copyright (cf. recital 9 to EU Directive 2001/29 which refers to a “high level of protection”), although the Court of Justice of the European Union has stressed the need – especially in so called “hard” cases – to balance the protection of copyright in relation to other (fundamental) rights, freedoms and interests. Compared to older Swedish case law, some rulings from the Court of Justice of the European Union may indicate a greater willingness of this Court to “limit” the scope of exclusive rights in “hard cases”, such as the introduction of the concept of “new public” as a limit on the right of communication to the public.

It should also be stressed that the scope of the copyrighted protected work is also an aspect that is of relevance from a “competition” perspective; the prerequisites for protection and the scope of the protected work gives rise to a position in the “market” that stimulates and rewards creative efforts. Traditionally, Swedish courts have held that the scope of protection is related to the level of originality (see, for example, Swedish supreme Court case NJA 2009 p. 159). It is however uncertain whether this “relationship” between level of originality and scope of protection is accepted in relation to EU copyright law (see, for example, case C-145/10, Painer, from the Court of Justice of the European Union).

In addition, the EU database directive (96/9) provides a sui generis protection for (substantial) investments in obtaining, verification, and presentation of content (including copyright protected works, but also other elements such as “data”) in databases. The database producer is provided with rights to prohibit extractions and verifications of substantial parts of the database. This database right is often held to be a regulation of “competition” in database markets. It has been implemented in section 49 of the SCA.

### 1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

In line with the above-mentioned formula – that “all uses of practical or economic importance” should be included in the economic rights provided to authors (and other right holders) – the Swedish legislature and Swedish Courts have stressed that the economic rights constitute “assets” of an economic importance for authors and other right holders (see Swedish Government bill (proposition) 2004/05:110 p. 83, and Swedish Government bill (proposition) 1992/93:214 section 2.1). Against this, E/L:s have been defined and interpreted narrowly and it has been held to be the prerogative of the legislator (and not the courts) to decide on permissible E/L:s (see Swedish Supreme Court cases NJA 1993 p. 263, NJA 1986 p. 702 and NJA 2020 s. 293). This reasoning is very much in line with the three-step test in international and EU copyright law, especially its second step that prohibits E/L:s that permit (free) uses that are in empirical or potential competition with the economic interests of the author (or other right holder).

### 1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or “joint-tariffs”, “one-stop-shops” ... and explain their impact in the market

The so-called Extended Collective Licensing (ECL) model, developed in Sweden and the other Nordic countries since the 1960s, has been used by the legislator to stimulate licensing in areas where it would be very difficult or even impossible to manage rights on an individual basis. ECL:s are collective copyright and related rights laws and licensing agreements. ECL agreements by law apply to all rights holders in a class, whether they are members of the collecting society or not and establish terms of



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licenses with users or classes of users. It is generally possible for right holders to “opt out” of an agreement with extended effect.

It is possible to argue that the ECL model “creates” markets for so-called secondary uses where it would otherwise be impossible for supply to meet demand. However, the government or any government agency is not involved in deciding on the level of tariffs; the licensing and the decision of the CMO on whether to provide a license is based on the freedom of contract and is thus the outcome of voluntary negotiations between the parties, i.e. the collective management organization and the commercial user.

1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)

See the response above related to the Extended Collective Licensing model.

1.5.- By any other means?

## 2. A STUDY CASE: DATA ECONOMY

*Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)*

*Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc ) available either online, in digital form or in analogue form.*

2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

According to section 2 of the SCA, the right of reproduction includes temporary forms of reproduction. This section is based on the broadly defined right of reproduction in article 2 of the EU (2001/29) Infosoc Directive. “Machine reading” often presupposes temporary forms of reproduction.

Section 11 a of the SCA, which is based on article 5.1 of the EU Infosoc Directive (2001/29), includes a mandatory E/L for the purposes of some temporary forms of reproduction. Case law from the Court of Justice of the European Union indicates that articles 2 and 5.1 take aim at some forms of “machine reading” (see, for example, case C-5/08, Infopaq International).

In addition, the recently adopted EU Directive (2019/790) on copyright in the Digital Single Market includes E/L:s on “Text and data mining for the purposes of scientific research” (article 3), and “Exception or limitation for text and data mining” (article 4). Text and data mining is defined as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations” (article 2.2). These E/L:s may also be of importance for “machine reading”. This Directive is currently under implementation in Sweden.



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2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc. based on reusing data produced by the Public sector.

As mentioned above, the EU database directive (96/9) provides a sui generis protection for (substantial) investments in obtaining, verification, and presentation of content (including copyright protected works, but also other elements such as “data”) in databases. The database producer is provided with rights to prohibit substantial parts of the database. This database right is often held to be a regulation of “competition” in database markets. It has been implemented in section 49 of the SCA.

In Sweden, official documents produced by the Government, a Government Agency or similar institutions or bodies are normally not protected by copyright (see section 9 of the SCA).

There are several services that base their business model on reuse of data and other information produced by the public sector. Examples include commercial services based on providing legal material, such as court cases and other legal developments, such as Juno, Infotorg and JP Infonet.

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

The ECL model and section 9 of the SCA are generally held to be good bases for the development of new (downstream) services and re-use of copyright protected content.

### 3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

*Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:*

3.1.- “Essential facilities” doctrines to foster the development of downstream markets

There is currently no concrete example from Sweden on the application of the “essential facilities” doctrine.

3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?

There are instances where some market actors are both providers of the infrastructure (such as broadband connection) and copyright protected content. There are however no court cases dealing with such situations.

3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.

Some of the collective Management Organizations are “dominant” (or even de facto “monopoly”) providers of licenses within their respective markets. Some court cases have dealt with licensing issues in such situations, see for example the case C-52/07, Kanal 5 and TV 4, from the Court of Justice of the European Union.

3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...



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See response to previous question.

#### 4. ONLINE MARKETS: “VALUE GAPS” (ONLINE PLATFORMS)

*Notice that complete and valuable information resulting from the stakeholders’ dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=68591](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591)*

*<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>*

*Please include only information that is specific to your country.*

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

There is no case law from Sweden dealing specifically with this issue. Article 17 of the EU Directive 2019/790 is currently under implementation in Sweden.

4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?

There is no case law from Sweden dealing specifically with this issue. Article 15 of EU Directive 2019/790 is currently under implementation in Sweden.

4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

The Swedish system of private copying levies is currently being under review in Sweden. An investigation is looking into the issue of whether to amend or otherwise update the private copying levy system to current market conditions and realities. Information on the investigation can be found here (in Swedish): <https://www.regeringen.se/pressmeddelanden/2020/08/en-modernare-och-mer-effektiv-ersattning-till-upphovsman-vid-privatkopiering/>

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This national report for Sweden was drafted by Johan Axhamn, jur. Dr (LL.D.), and secretary of the Swedish ALAI group (the Swedish Copyright Society). The response has been approved by the board of the Swedish Copyright Society.