

THE NORDIC COUNTRIES

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I. Introduction and Historical Background

Nordic copyright law is regularly held to belong to the continental *droit d'auteur* tradition, although it is occasionally claimed to represent a specific "Nordic" kind thereof. Historically, the legislators in the Nordic countries—Sweden, Denmark, Norway, Iceland and Finland—have co-operated in copyright matters. Nordic copyright legislation used therefore to display a great homogeneity. Following Denmark's and later on also Finland's and Sweden's accession to the European Union, the latitude for an independent "Nordic" policy in copyright law has diminished.¹ However, as moral rights have not been subject to EU harmonisation, they are still founded on the "Nordic harmonization".²

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¹ All European Community ("EC") Directives in the copyright area have been incorporated into the Copyright Acts of the Nordic Countries, i.e. Denmark, Finland, Norway, Sweden and Iceland. Norway is part of the EEA, thus very much influenced by the EU legislation in the copyright area. Cf. Stig Strömholm, "Upphovsrätten som nationell disciplin—exemplet *droit moral*" (2005) *Nordic Intellectual Property Review* ("NIR") 650 et seq. in particular 662.

² Cf. J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann* (Munich: Beck 2004) pp.686 and 691. Indeed, the Nordic Copyright Acts of

In general, the interpretation of the laws of the Nordic countries has to a great extent been bound to statements made in the preparatory works (travaux préparatoires) by the Government or by a committee appointed by the Government as well as by the Parliamentary Committee that prepares the law for acceptance by Parliament.³ Nowadays, this is true for areas of law not founded on EU legislation⁴—such as moral rights in copyright law.

In the middle of the last century, the governments in the Nordic Countries appointed separate committees to propose new copyright legislation in each country. However, the committees cooperated to a great extent and their respective proposed copyright legislation, which was later adopted by the national parliaments, turned out to be almost identical.⁵ Of all the reports, the report of the Committee appointed by the Swedish Government is held by courts, legal scholars and practitioners in all the Nordic countries to be the most authoritative source of interpretation, not the least because it is the most extensive one.⁶ In this chapter on moral rights in the Nordic countries, reference will therefore be made mainly to the Swedish Copyright Act (“SCA”)⁷ and its preparatory works.⁸ Reference will also be made to relevant case law from the Swedish Supreme Court and from the Supreme Courts in the other Nordic countries (except Iceland),⁹ and to legal literature. In cases

the 1960’s have been amended several times, but the provisions on moral rights have been left unchanged and no genuine proposals for reforming them has been put forward. See M. Kocktvedgaard, “Moral Rights in Denmark”, (1993) ALAI p.116.

³ Cf. per J. Nordell, “National report on moral rights in Sweden”. (1993) ALAI p.399; S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint”, (2002) *Scandinavian Studies in Law* p.242.

⁴ See, for example, *Björnekulla Fruktingindustrier AB v Procordia Food AB (C-371/02)* [2004] E.C.R.I-S791 at [13] “Where a national court is called upon to interpret national law, whether the provisions in question were adopted before or after the directive concerned, it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter. . . [] That applies notwithstanding any contrary interpretation which may arise from the travaux préparatoires for the national rule.”

⁵ The Nordic legislative collaboration in the area of copyright law, for which the Swedish Government took the formal initiative, began in 1938. The process was delayed by the Second World War. Originally, also Iceland had been invited, but the country did not actively participate in the collaboration. Official Government Reports were published in Norway in 1950, Denmark in 1951, Finland in 1953 and Sweden 1956. National laws followed closely on each other: Sweden adopted its new Copyright Act on December 30, 1960 and the other countries adopted theirs in the period of May to July 1961. The collaborative work resulted in four new national Copyright Acts with almost overall conformity in substance and great similarities in linguistic form.

⁶ Cf. per J. Nordell, “National report on moral rights in Sweden” (1993) ALAI p.399; and S. Strömholm, “Upphovsrätten som nationell disciplin—exemplet droit moral” (2005), NIR p.662.

⁷ Swedish Code of Statutes (“*Svensk författningssamling*”, “SFS”) 1960:729. Available at <http://www.riksdagen.se/webbnav/index.aspx?nid=3910> [accessed July 2010]. An unofficial translation by Mr Henry Olsson is available at the website of the Swedish Ministry of Justice: <http://www.sweden.gov.se/content/11c6/13/02/85/96e05389.pdf> [accessed July 2010].

⁸ Swedish Government Official Report (“SOU”) 1956:25 and Government bill (proposition) 1960:17.

⁹ Cf. fn.5, above.

where the SCA does not have a corresponding provision, reference will be made to the Copyright Acts of Norway (“NCA”),¹⁰ Denmark (“DCA”)¹¹ and Finland (“FCA”)¹² respectively.

The moral rights acknowledged in the Nordic Countries are the right of paternity (*droit à la paternité*) and the right of integrity (*droit au respect*). They adhere closely to the minimum rights of art.6bis of the Berne Convention.

With slight variations in the wording, the Copyright Acts of the Nordic countries also provide for a specific provision for the protection of the “cultural interest”: if a work, whose author is deceased, is made available to the public or reproduced in a manner which violates cultural interests, a court may upon complaint from an authority appointed by the Government, issue an injunction restraining such performance or reproduction under penalty of a fine.

The Nordic legislators have abstained from introducing rules on a specific “moral” right of disclosure (*droit de publier, droit de divulgation*). The rationale for this decision is that the economic rights conferred on the author—the exclusive right to reproduce copies of a work and make it available to the public—are held to give him adequate protection against unauthorised publication.¹³

The FCA and NCA provide for provisions on a right to access (*droit d'accès*), i.e. a right for the author, under certain circumstances, to get access to an original copy of his work even when it has passed into the hands of a third party.

Lastly, no provisions on a right of reconsideration or retraction (*droit de repentir*) exist in any of the Nordic countries.

The moral rights of paternity and integrity apply, mutatis mutandis, also to performers and photographers.¹⁴

Generally speaking, issues concerning moral rights have come before the courts in the Nordic countries quite regularly—especially as regards the right of integrity. A principal reason for this occurrence is the increased commercial

¹⁰ The Norwegian Copyright Act No.2 of May 12, 1961, is available in an unofficial English translation at: http://www.regjeringen.no/upload/KKD/Medier/Acts/%20and/%20regulations/Aandsverkloven_engelsk_versjon_nov2008.pdf [accessed July 2010].

¹¹ An English translation of the Danish Consolidated Act on Copyright No.202 of February 27, 2010 is available at: <http://www.kum.dk/graphics/kum/English/%20website/Legislation/Consolidated/%20Act/%20on/%20Copyright/%202010.pdf> [Accessed July 2010].

¹² To the author’s knowledge, there exists no comprehensive translation of the Finnish Copyright Act. A Finnish and Swedish version of the Act is available at: <http://www.finlex.fi/sv/lakilajantasa/1961/19610404> [Accessed July 2010].

¹³ Swedish Government Official Report (SOU) 1956:25 p.129. See also S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.219. The author may also control publication of his work after his death. Thus, he may give directions in his will, with binding effect for the surviving spouse and heirs, about the exercise of copyright, or authorise somebody else to give such directions. On the exercise of moral rights after the author’s death, see below.

¹⁴ In cases where a photograph does not fulfill the criterion of originality to be eligible for copyright protection, the Nordic Copyright Acts provide for a neighboring right for persons who produce a “photographic picture”.

use of works, e.g. in broadcasting and other forms of mass-communication.¹⁵ It has also been suggested that the rights of paternity and integrity are rather vague and thus open to considerable interpretation.¹⁶

Historical background¹⁷

17-002 The Swedish Freedom of the Press Act (“FPA”) of 1810 (amended in 1812) contained provisions according to which the author of a printed work acquired exclusive rights to his work.¹⁸ A new Act on reproductions of works of fine art was enacted in 1867 and 10 years later the provisions on the protection of printed works in the FPA were relocated to a new Act on ownership of literary works. The latter Act contained some minor and disparate provisions on the author’s “personal relationship” to his work, but they were quite subordinate to the provisions on protection of the economic interests of authors. The amendments to the Swedish copyright legislation which were initiated by Sweden’s accession to the Berne Convention in 1904 had no impact on the provisions concerning the author’s personal relation to his work. It was not until the adoption in 1919 of the Acts on the protection for literary and musical works, works of fine art and photographic pictures that the protection of the author’s personal relationship to his work was given full recognition in Swedish law.¹⁹

New legislative work began soon after the revision of the Berne Convention at the Rome conference in 1928, where art.6*bis* had been introduced. However, this work resulted in only minor amendments (introduced in 1931), since the Swedish legislator took the view that the provisions then existing were sufficient in substance in relation to art.6*bis*. However, the provision requiring acknowledgment of the author only applied to acts of reproduction, but not of public performance as this was considered impractical. As regards the right of the author to prevent distortions of his work, the law provided that he could object to such acts. Further, the provisions on the

¹⁵ J. Rosén, “Moral Right in Swedish Copyright Law” (1993) NIR p.374. Cf. M. Koktvedgaard, “National report on moral rights in Denmark” (1993) ALAI p.119. See also S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.229 and J. Rosén, “Authors’ Moral Rights in Modern Media” in *Festschrift für Wilhelm Nordemann*, 2004, p.681.

¹⁶ J. Rosén, “Moral right in Swedish copyright law. Focus on waiver of rights and contract practice especially as concerns computer programs” 1993 ALAI p.261, and J. Rosén, “Authors’ Moral Rights in Modern Media” in *Festschrift für Wilhelm Nordemann*, 2004, p.681 et seq.

¹⁷ This section will focus on the historical background to the moral rights in Swedish law.

¹⁸ On the origins, break-through and codification of moral rights at the international and European levels, including the Nordic Countries, see S. Strömholm, *Le droit moral de l’auteur en droit allemand, français et scandinave*, Vol.I and II:1 (Stockholm: Norstedt, 1967); Vol. II:2 (Stockholm: Norstedt, 1973). On the origins, etc. of authors’ rights in Europe in general, with special emphasis on the Nordic Countries, see G. Petri, *Författarrättens genombrott* (Stockholm: Atlantis, 2008).

¹⁹ NJA II 1919 s.576. See also S. Strömholm, “Om upphovsmannens droit moral i svensk rätt”, 1956 NIR p.184.

“right of paternity” and the “right of integrity” (also referred to as “right of individuality”) were non-mandatory and could be set aside by an agreement between the author and the exploiter of his work.²⁰

At the time of the revision of the copyright laws of the Nordic countries in the middle of the last century, the Swedish legislator rectified some of the deficiencies of the provisions referred to. The amendments of the provisions on moral rights in Swedish law were also made necessary by the amendments to art.6*bis* of the Berne Convention at the Brussels Conference in 1948. Among other things, plain non-waivable rights of “paternity” and “integrity” were introduced. The legislator deliberately also set out to clarify, at national level, some of the “ambiguities” regarding art.6*bis*, identified at the international level. For example, the “right of integrity” was drafted so that it focussed on the author’s reputation or honour (the word “individuality” or “uniqueness” is used in the SCA to make explicit that the protection covers the author’s personal relationship with his work, not only his social status as an author) as an author—not as a citizen.²¹

II. Membership of Conventions²²

Sweden has ratified all the major conventions in the copyright field. However, these conventions are not self-executing since Sweden follows a dualistic approach in public international law. To obtain legal effect, they must be transposed into national legislation. This has been done as regards all major conventions, thus assigning national protection to most foreigners and foreign works and, to the extent that this is provided for in the relevant conventions, also to neighbouring right holders.

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Sweden has ratified the following conventions:

- Berne Convention for the Protection of Literary and Artistic Works 1886 (1904), Paris Act 1971 (1973).
- Universal Copyright Convention 1952 (1961).
- Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms 1971 (1973).
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961 (1964).

²⁰ NJA II 1931 s.120 et seq.

²¹ Swedish Government Official Report (SOU) 1956:25 pp.113 et seq. Protection for his honour or reputation as a citizen was rather to be encompassed by provisions on defamation in the Penal Code.

²² This section focuses on Sweden’s membership of international conventions. In general, the same principles (as provided for in the international conventions) apply to the Copyright Acts of the other Nordic countries.

- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1994).
- On December 14, 2009, Sweden (along with the European Union and some of its other member states)²³ ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

III. Present National Legislation on Moral Rights

17-004 The principal moral rights acknowledged in Nordic copyright law are the right of paternity and the right of integrity. In the SCA and the Copyright Acts of the other Nordic countries, provisions on these moral rights are contained in s.3. In Finland and Norway, there are also provisions on a right of access (FCA s.52a and NCA s.49).

As regards the right of paternity, s.3 p.1 of the SCA stipulates that the name of the author must be stated to the extent and in the manner required by proper usage when copies are made of a work, or when it is made available to the public. On the right of integrity, s.3 para.2 states that a work may not be changed in a manner which is prejudicial to the author's literary or artistic reputation or to his individuality, nor may it be made available to the public in such a form or in such a context as is prejudicial in the manner stated. Section 3 para.3 states that the author may, with binding effect, waive his right under s.3 only in relation to uses that are limited as to their character and scope.

The prerequisite to obtain copyright protection—and thus moral rights protection—to a work is provided in s.1 of the SCA. There it is stated that “Anyone who has created a literary or artistic work shall have copyright in that work”. In order to be protected as a literary or artistic work, the work has to be the result of an “individual, intellectual creation”. This is the traditional criterion of originality (“*verkshöjd*”) in Nordic copyright law. The preparatory works state that the work must be a product that has been:

“[R] raised to a certain degree of independence and originality; at least to some extent, the expression of the individuality of the author is necessary; a purely mechanical production is not satisfactory”.²⁴

Thus, in conformity with the EU *acquis communautaire*, it is only the individual expression of the author which can be protected as a work.²⁵

²³ Some EU Member States had ratified the treaties at an earlier stage.

²⁴ Swedish Government Official Report (SOU) 1956:25 p.66.

²⁵ According to art.2a of the Council Directive 91/250/EEC of May 14, 1991 on the legal protection of computer programs, art.3.1 of Directive 96/9/EC of the European Parliament and of the Council of March 11, 1996 on the legal protection of databases and art.6 of Directive 2006/116/EC of the European Parliament and of the Council of December 12, 2006 on the term of protection of copyright and certain related rights (codified version), works such as computer programs, databases and photographs are protected by copyright only if they are original in the sense that they are their “author's own intellectual creation.” Following the

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Indeed, the traditional *droit d'auteur* idea that literary and artistic creation constitutes to a particularly high degree an involvement and expression of the innermost personality of the author and that the work thus always remains his “spiritual offspring” permeates Nordic copyright law as a whole²⁶—or at least used to before the extensive EU harmonisation. In any case this idea still finds support in the provisions on moral rights (which have not been subject to such harmonisation).²⁷

The literary or artistic quality, quantity, style, manner, or ethical value of the work is irrelevant so far as its eligibility for copyright protection is concerned.²⁸ Pornographic pictures and movies and computer viruses may also be regarded as protected works.²⁹ Hence, the purpose of the author in creating the work is irrelevant to its protection,³⁰ as is the fact that a work may be the result of substantial effort or labour.³¹

The concepts of “literary” or “artistic” works are to be given a broad

ECJ, this criterion of originality seems to apply also to other categories of works. See ECJ judgment of July 16, 2009 in *Infopaq International (C-5/08)* [2009] E.C.D.R. 16 at [33]–[37], and E. Derclaye, “Infopaq International A/S v Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law” [2010] E.I.P.R. 247 et seq. The criterion of originality in the said Directives is similar to the criterion of originality according to established Swedish/Nordic copyright tradition. Thus, the obligation of Nordic courts to interpret the criterion of originality in the light of the wording and purpose of the above Directives to achieve the result sought by them, should not create any major discrepancies in relation to prior (national) case law on the interpretation of the criterion of originality. G. Karnell, “European originality: A Copyright Chimera” in *Intellectual Property and Information Law: Essays in Honour of Herman Cohen Jehoram*, (The Hague: Kluwer Law International, 1998) p.201 et seq. Cf. Ole-Andreas Rognstad, *Opphavsrett* (Oslo: Universitetsforlaget 2009) p.85.

²⁶ Swedish Government Official Report (SOU) 1956:25 p.85: Cf. S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.228.

²⁷ Cf. S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.228:

“The idea that the work protected by copyright law is principally an expression of the author’s personality, not a commodity, an impersonal ‘object’, may be said to have been the driving force behind the emergence of droit moral rules and the notion which (side by side with considerations of legal technique and legal policy) caused European jurists and legislation to abandon the conception of the author’s right as a form or right of property or ownership. . . . The notion that the protected—and protection-worthy—work is an expression of the author’s personality plays an important role as one of the most weighty policy arguments (and one which happens to coincide with strong ethical and also aesthetical considerations) for providing legal protection to intellectual creators in the form of an exclusive and non-assignable right that can be invoked against all other persons.”

²⁸ Swedish Government Official Report (SOU) 1956:25 pp.67 et seq. and Supreme Court case [2002] NJA(S) p.178. Cf. Ole-Andreas Rognstad, *Opphavsrett*, 2009, p.84. The Swedish Supreme Court has stated that Adolf Hitler’s “Mein Kampf” is protected by copyright, Swedish Supreme Court case [1998] NJA(S) p.838.

²⁹ H. Olsson, *Upphovsrättslagstifningen—En kommentar*, 2nd edn (Stockholm: Norstedts juridik, 2006) p.43.

³⁰ Swedish Government Official Report (SOU) 1956:25 p.69.

³¹ Swedish Government Official Report (SOU) 1956:25 p.68. However, if the maker of a database has compiled a large number of information items or if the database is the result of a substantial investment, this product may be eligible for database protection in accordance with the neighboring right provided for in s.49 of the SCA.

interpretation.³² The objects encompassed by these terms may vary over time in line with contemporary values of what is to be regarded as literary or artistic. Hence, the copyright Acts of the Nordic countries can absorb new technological phenomena and new forms of expression without any need for legislative amendments.³³

Section 1 para.2 of the SCA provides a non-exhaustive list of what is considered as a literary or artistic work. The list of examples is supplemented by a last point stating that the protection also covers works that have been expressed in some other way:

1. a fictional or descriptive representation in writing or speech,
2. a computer program,
3. a musical or dramatic work,
4. a cinematographic work,
5. a photographic work or another work of fine arts,
6. a work of architecture or applied art, and
7. a work expressed in some other manner.

There is no requirement for a work to be fixed in tangible form to be protected by the SCA. Thus an improvised speech or a musical improvisation may be eligible for copyright protection.³⁴

The moral right of paternity applies to all categories of works. The same goes for the right of integrity, with an exception for buildings or utilitarian objects (applied art) in certain cases.³⁵

The right of access in Finland is limited to “works of fine art”, whereas this right in Norway is limited to “original copies” of a work.

In Sweden, economic and moral rights are separated from each other. The main provision on economic rights is s.2 of the SCA. Copyright is stated as including the exclusive right to exploit the work by making copies of it and by making it available to the public, be it in the original or an altered manner, in translation or adaptation, in another literary or artistic form, or in another technical manner. The exclusive right is, however, limited in several aspects. These provisions are mainly contained in Ch.2 of the SCA.³⁶ However, the limitations and exceptions only concern economic rights, not moral rights.

³² Swedish Government Official Report (SOU) 1956:25 pp.65 et seq., and Ole-Andreas Rognstad, *Opphavsrett*, 2009, pp.79 et seq.

³³ Swedish Government Official Report (SOU) 1956:25 p.64.

³⁴ Swedish Government Official Report (SOU) 1956:25 p.70.

³⁵ According to s.26(c) of the SCA, the owner of a building or a piece of applied art is entitled to alter the property without the consent of the author. Hence, such an alteration may be made regardless of whether it would otherwise violate the author’s right of integrity.

³⁶ The traditional Swedish view is that limitations and exceptions must be interpreted restrictively. See, for example, Government bill 2004/05:110 p.83. This is also in line with recent case

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Section 11 para.1 (the first section of Ch.2) of the SCA states that “the provisions of this Chapter do not limit the author’s right under Section 3, except as provided for in Section 26c.”³⁷ Section 11 para.2 of the SCA provides for additional moral rights to be respected when the work is used on the basis of a limitation or an exception in Ch.2 of the SCA. It states that

“[W] when a work is used publicly on the basis of the provisions in this Chapter, the source must be stated to the extent and in the manner required by proper usage, and the work may not be altered more than necessary for the use.”

According to this provision, not only the name of the author but also the “source”, i.e. the title of a book, magazine etc. from which a work is borrowed, must be mentioned.³⁸ Further, the prohibition against undue alterations when a work is used on the basis of a limitation or an exception in Ch.2 of the SCA is more far-reaching than the prohibition against changes that are prejudicial to the author’s individuality or reputation according to the moral rights provisions in s.3 of the SCA. The right to make alterations must be interpreted strictly. Only such alterations as are necessary for the authorised use are permitted.³⁹

A. Beneficiaries of protection of moral rights

(i) Authors

As mentioned above, anyone who creates a literary or artistic work is entitled to the copyright, including the moral rights, in that work. Thus, the author, composer, or artist who has created the work is considered to be the initial owner of the copyright. Section 7 of the SCA provides a rule of presumption: the person whose name or generally known pseudonym or signature appears in the usual manner on copies of a work or when it is made available to the public, shall, in the absence of proof to the contrary, be deemed to be its author. The initial owner must be a natural person. A minor can also be an author.

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law from the ECJ, see *Infopaq International* (C-5/08) [2009] E.C.D.R. 16 at [56]–[58]. To the extent that limitations and exceptions do not apply, the right holder’s exclusive rights must apply. The application of the limitations and exceptions may in general be restricted by a contract.

³⁷ s.26c is explained in fn.35.

³⁸ J. Rosén, “Authors’ Moral Rights in Modern Media”, in *Festschrift für Wilhelm Nordemann*, 2004, p.683.

³⁹ The provision in s.11 para.2 of the SCA satisfies the requirement in arts 5.3.a, 5.3.c, 5.3.d and 5.3.f of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society that “the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.” On this matter, see Government bill (proposition) 2004/05:110 pp.85 et seq.

Co-authorship

17-006 A main principle is that the author's exclusive rights are strictly individual. If there are co-authors to a work, the rights are to be shared between the authors. If such a division is impossible, s.6 of the Nordic Copyright Acts states that the copyright in works with two or more authors whose contributions do not constitute independent works, shall belong to the authors jointly. However, each of them may bring action for infringement.

17-007 **Works created in employment relationships etc.**—Even if only natural persons can be the initial owners of copyright, a legal entity can subsequently acquire the ownership of the economic rights, e.g. by means of an employment contract or other agreement.

According to legal doctrine and case law a “rule of thumb” applies in employment relationships. It says that an employer acquires such economic rights as are necessary for the normal running of his business, etc. However, even if the economic rights are transferred to the employer because the work is made in the course of an employment, it is the general rule that the moral rights still belong to the employee. A slight deviation from this general rule applies to computer programs created in the course of an employment (see below).

17-008 **Computer programs created in the course of an employment.**—The copyright in a computer program created by an employee as part of his tasks or following instructions by the employer is transferred to the employer unless otherwise agreed.⁴⁰ Both the economic and the moral rights are deemed to be transferred to the employer.⁴¹ It means that an employed creator of a computer program cannot claim his right of authorship or right of integrity as would otherwise be the case under s.3 of the SCA.⁴² It is the employer who has the right to enforce these rights.⁴³ The employer may also transfer the economic rights. However, it is probably not possible for the employer to transfer the moral rights.⁴⁴ According to the travaux préparatoires, the reasons behind including not only the economic, but also the moral rights, in the transfer to the employer, are that computer software normally has a commercial purpose and involves significant investment; that moral rights often are of subordinate interest with regard to computer software; and the importance for the employers to be able to amend and adapt computer software.⁴⁵ Section 40a only applies to computer programs that have been

⁴⁰ s.40 a of the SCA was incorporated into the Copyright Act as a consequence of Council Directive 91/250/EEC of May 14, 1991 on the legal protection of computer programs. See Government bill (proposition) 1992/93:48 pp.114 et seq.

⁴¹ Government bill (proposition), 1992/93:48, pp.115 et seq.

⁴² S. Wolk, *Arbetstagaras immaterialrätter*, 2nd edn (Stockholm: 2008) p.85.

⁴³ Government bill (proposition) 1992/93:48 p.118.

⁴⁴ M. Bruun, *Vennebog til Koktvedgaard*, M. Levin (ed), (Stockholm: 1993), p.161.

⁴⁵ Swedish Government bill (proposition) 1992/93:48 p.115.

created by employees, not to computer programs that have been made on commission.

Audiovisual works.—The general rule of co-authorship in s.6 of the SCA also applies to audiovisual works.⁴⁶ Thus, the copyright in an audiovisual work—unless otherwise agreed—belongs to the co-authors jointly. However, in order to solve the problems related to the large number of co-authors,⁴⁷ s.39 of the SCA prescribes that, unless otherwise agreed, a transfer of the right to record a literary or artistic work on a film (normally to a producer) includes the right to make the work available to the public, through the film, in cinemas, on television, or otherwise, and to make spoken parts of the film available in textual form (e.g. subtitles), or to translate them into another language (e.g. dubbing). The provision does not apply to musical works.

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According to its wording, s.39 only covers the right of making available, as it does not mention the right of reproduction. However, it is clear from the *travaux préparatoires* that the film company that is entitled to make the film available to the public also has the right to produce necessary copies for that purpose.⁴⁸

As mentioned above, s.39 makes an exception for music. Hence the presumption of transfer of rights does not cover works of music. The rationale for this exception is the special characteristic of the music business where composers normally have transferred their rights to collective management organisations, which generally do not assign the rights to make the musical works available to the public to film companies.⁴⁹

(ii) Performers

The moral rights of performers are granted to “a person who performs”. In accordance with international provisions, the SCA provides protection for performances of literary or artistic works or expressions of folklore.⁵⁰ Thus, as for authors and their works, moral rights in relation to a performance will only arise in relation to performances by human beings.

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Similarly to what is said above regarding copyright, a legal entity can subsequently become the owner of the economic rights to a performance, e.g. by means of an employment contract or other agreement. Hence, the

⁴⁶ See above.

⁴⁷ Swedish Government Official Report (SOU) 1956:25 pp.151 et seq.; Government bill (proposition) 1960:17 p.209; and Government bill (proposition) 1973:15 p.98.

⁴⁸ Government bill (proposition) 1960:17 p.210.

⁴⁹ Swedish Government Official Report (SOU) 1956:25 pp.152, 336; and Government bill (proposition) 1960:17 p.210.

⁵⁰ Cf. art.2(a) of WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on December 20, 1996; and Government bill (proposition) 2004/05:110 pp.350 et seq.

above-mentioned “rule of thumb” generally applies to performers as well. However, as in the case of copyright, the moral rights cannot be transferred.

The provision in s.39 also applies in respect of performers’ rights.⁵¹ Moreover, with regard to performers’ rights, the provision also applies to performers of musical works.⁵²

- 17–011 Photographers.**—In cases where a photograph does not fulfil the criterion of originality to be eligible for copyright protection as a photographic work, the Nordic Copyright Acts provide for a neighbouring right for persons (photographers) who produce a “photographic picture”. Photographers are nevertheless given the same moral rights in their photographic pictures as authors have with respect to their works.

Foreign rightholders

- 17–012** In general, moral rights can be enforced by foreign authors in accordance with the normal principles laid down in the Berne Convention and the Universal Copyright Convention.

As regards authors, the general rule on the direct applicability of the SCA, i.e. the application of the SCA to works with generally speaking a Swedish origin or Swedish connection, is stated in s.60 of the SCA. The provisions of the SCA are directly applicable to: (i) works of Swedish nationals or persons habitually residing in Sweden⁵³; (ii) works first published in Sweden or simultaneously in Sweden and outside the country⁵⁴; (iii) cinematographic works the producer of which has his headquarters or habitual residence in Sweden;⁵⁵ (iv) works of architecture constructed in Sweden; and (v) works of fine arts incorporated in a building situated in Sweden or in some other way permanently fixed to the ground (SCA s.6 para.1). These criteria are not mutually exclusive, e.g. a cinematographic work which does not fulfil the criteria under (iii) is still protected if it satisfies the criteria under (i) or (ii).

The special provision in s.51 of the SCA on the protection of “cultural interests” applies to all literary and artistic works regardless of their origin (SCA s.6 para.3).

⁵¹ Cf. art.2.5 of the Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

⁵² As s.45 para.3 only makes reference to the first sentence of s.39, the last sentence of the latter section—on the exception for authors of music—does not apply to performers.

⁵³ In the absence of proof to the contrary, a person shall be deemed to be the author of a work if his name or generally known pseudonym or signature appears in the usual manner on copies of the work or when it is made available to the public (SCA s.7).

⁵⁴ A work is deemed to have been published when copies thereof have, with the consent of the author, been placed on sale or otherwise been distributed to the public (SCA s.8 para.2). As regards the notion “simultaneous publication”, this shall be considered to have taken place if the work has been published in Sweden within thirty days from its publication abroad (SCA s.6 para.2).

⁵⁵ As regards the notion “producer of a cinematographic work”, this shall be deemed to be the person whose name appears on a cinematographic work in the usual manner, in the absence of proof to the contrary (s.60 para.2, last sentence).

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To meet the obligations of the international conventions in the area of copyright and related rights, to which Sweden is a party, s.62 of the SCA states that on condition of reciprocity or where it follows from such an agreement with a foreign state or with an intergovernmental organisation, the Government may provide for the application of the SCA in relation to other countries. The Government has provided for this by enacting the Swedish International Copyright Regulation (“SICR”), (*“Internationella upphovsrättsförordningen”*).⁵⁶ As a consequence of Sweden’s ratification of the WCT and the WPPT, the SICR is currently (February 2010) in the process of a far-reaching revision.

The SICR prescribes that the provisions of the SCA, including the provisions on moral rights, apply to (i) all works of BC nationals or persons who have their habitual residence in a BC country; (ii) works first published in a BC country other than Sweden; (iii) works first published in a non BC country and subsequently within 30 days in a BC country; (iv) cinematographic works the producer of which has his headquarters or habitual residence in a BC country; (v) works of architecture constructed in a BC country; and (vi) works of fine art incorporated to a building in a BC country or in some other way permanently fixed to the ground in a BC country (SICR s.2). Subject to some qualifications, nationals and residents of WTO countries enjoy protection under the SCA (SICR ss.18 and 19). Protection is not afforded to works where the protection has lapsed in the country of origin (SICR s.3, based on the comparison of terms in BC art.7.8).

As regards performers, the SCA and its protection for performances’ moral rights is directly applicable to performances if they take place in Sweden. In addition, the moral rights in respect of a performance are protected by the SCA if the performer is a Swedish national or has his or her habitual residence in Sweden (SCA s.61 para.1).

In addition to the protection afforded to performers and their moral rights directly by s.61 of the SCA,⁵⁷ performances carried out in Contracting States of the Rome Convention⁵⁸ are protected under the SCA (SICR s.13). Further, SICR provides a minimum level of protection for performers if they are nationals or habitual residents of a WTO country (SICR s.20).

Protection of “foreign” performers’ moral rights by the SCA typically ends when the protection in the country of origin lapses (see, for example, s.14 of the SICR).

Following Sweden’s membership of the European Union and the EEA, legal or natural persons from an EEA country are afforded the same protection under the SCA as those of Swedish nationality (SICR s.1.2).

⁵⁶ Swedish Code of Statutes (*Svensk författningssamling*, SFS) 1994:193.

⁵⁷ See below.

⁵⁸ Convention for the protection of performers, producers of phonograms and broadcasting organisations, adopted at Rome, 1961.



B.

Rights of paternity integrity, disclosure, retraction and access

The right of paternity

17-013 The right of paternity (attribution) is provided for in s.3 para.1 of the SCA, according to which the name of the author must be stated to the extent and in the manner required by proper usage when copies are made of a work, or when a work is made available to the public.

The general rule is that the author's name must always be mentioned when copies are made of a work or when a work is made available to the public. The name to be mentioned is the author's real name or, if he so wishes, his pseudonym. The name must be mentioned in the spelling and in the manner which the author himself otherwise tends to use, in order to avoid confusion.⁵⁹

The right of paternity is of a "moral" character since it protects the author's personal interest in having his name attached to the work that he has created. Indeed, this may also have economic implications for the author as he may be well-known and thus establish a reputation and goodwill, etc. However, the paternity right also secures the public's interest in knowing the name of the author of a specific work.⁶⁰

The right of paternity applies to all types of authors and all kinds of works. The name must be stated to the extent and in the manner required by proper usage. The assessment of "proper usage" is not to be based on the author's own subjective assessment, but from an objective one. Hence, the name must be stated when to do so is in accordance with good practice and where it is not unreasonable, i.e. if it is difficult or impossible to mention the name. However, good practice is not the same as mere custom or usage.⁶¹ For example, in a Danish case an author of a municipal report was found to have the right to be identified as the author of the report.⁶²

It follows that there are some situations where the name does not have to be stated.⁶³ According to the preparatory works, this is the case when, for example, music is performed in the context of worship or at a restaurant. Another example is on copies of certain works of applied art if, for technical reasons, it is difficult to affix the name on each sample.⁶⁴ A third example is

⁵⁹ Swedish Government Official Report (SOU) 1956:25 p.117.

⁶⁰ P. Schönning, *Ophavsretsloven med kommentarer*, 4th edn (Copenhagen: Thomson Reuters 2008) p.179 and Ole-Andreas Rognstad, *Ophavsrett*, 2009, p.200.

⁶¹ Peter Schönning, *Ophavsretsloven med kommentarer*, 4th edn, 2008, p.180, Ole-Andreas Rognstad, *Ophavsrett*, 2009, p.200. Cf. S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.246.

⁶² Danish Supreme Court Case (1985) p.782 V (Somiljorapport).

⁶³ This is the statutory wording of s.3 para.1 of the SCA. The wording of the NCA, DCA and FCA are slightly different, leaving out the words "to the extent". However, this seems to have no practical implication.

⁶⁴ Swedish Government Official Report (SOU) 1956:25 p.116. M. Koktvedgaard, "National report on moral rights in Denmark" (1993) ALAI p.121 and P. Schönning, *Ophavsretsloven med kommentarer*, 4th edn, 2008, p.179.

UFR



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when a text or an image is used in advertising materials.⁶⁵ As a rule of thumb, attribution shall be carried out unless practical or ethical considerations indicate the opposite.⁶⁶

(Case law on the paternity right in relation to broadcasting is described below).

If a work is translated, both the name of the author of the original work and the author of the derivative work (translation) shall be mentioned.⁶⁷

The right of paternity has been interpreted by the Swedish Supreme Court in a case concerning an architect's drawings for a building.⁶⁸ When the building was altered, the architect's original drawings were altered, and in this context, the original architect's stamp of authorship was replaced by a new one. The court stated that each of these two measures, i.e. the removal of the stamp and the addition of another stamp, constituted violations of the architect's right of paternity.

Another case from the Swedish Supreme Court concerned a situation where a TV channel had failed to mention the name of the composer of the music for a poem by a famous Swedish poet (Gustaf Fröding).⁶⁹ The music was used together with the poem in a television program about the poet. The court found that the TV channel violated the paternity right of the composer. A similar case from the Danish Supreme Court concerned the showing of a film where the name of the composer of one of the musical works in the film was omitted.⁷⁰ This was found to be a violation of the composer's paternity right.

The obligation to state the name of the author applies not only when the work is used legally, but also when the work is used illegally. Thus, in the case of plagiarism, there can be an infringement not only of the economic rights, but also of the paternity right.⁷¹ Further, the removal of the author's name from a copy of a work is considered to be in violation of the paternity right.⁷²

As mentioned above, s.11 para.2 of the SCA states, inter alia, that when a work is used on the basis of the provisions in Ch.2 of the SCA on limitations and exceptions to copyright, the source must be stated to the extent and in the manner required by proper usage.⁷³

⁶⁵ H. Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.96.

⁶⁶ J. Rosén, "Moral Right in Swedish Copyright Law", (1993) NIR p.356, and J. Rosén, "Svensk rättspraxis—Upphovsrätt och närstående rättigheter" 1977–2002, SvJT 2004 p.176.

⁶⁷ Swedish Government Official Report (SOU) 1956:25 p.118, and P. Schønning, *Ophavsret-sloven med kommentarer*, 4th edn, 2008 p.178.

⁶⁸ Supreme Court Case [1992] NJA(S) p.264.

⁶⁹ Swedish Supreme Court Case [1996] NJA(S) p.354.

⁷⁰ Danish Supreme Court Case [1947] UFR p.187 Ø (Den lille Napoleon).

⁷¹ Swedish Government Official Report (SOU) 1956:25 p.118 and P. Schønning, *Ophavsret-sloven med kommentarer*, 4th edn, 2008, p.178.

⁷² Swedish Government Official Report (SOU) 1956:25 p.118 and P. Schønning, *Ophavsret-sloven med kommentarer*, 4th edn, 2008, p.179.

⁷³ See above.

The right to publish the work anonymously or under a pseudonym

- 17-014** It is stated in the preparatory works to the SCA that the author has a right to remain anonymous if he so wishes, even if there are no explicit rules in this regard.⁷⁴

Ghost-writing

- 17-015** According to s.7 of the SCA, a person whose name or generally known pseudonym or signature appears in the usual manner on copies of the work or when it is made available to the public, shall, in the absence of proof to the contrary, be deemed to be its author. The effect of this presumption rule is that the person indicated on the copies of the work will be deemed to be the author instead of the “ghost-writer” in the absence of proof to the contrary. (A “ghost-writer” may, when agreed upon in the publishing contract, waive his right to be mentioned as the author of the work with regard to clearly specified uses of the work.) However, it is clearly stated in the preparatory works to the SCA that “according to fundamental principles within the right to the personality”, the author himself must always have a right to be named.⁷⁵ The meaning of this in relation to “ghost-writing” is not clear, but at least it must be possible to waive moral rights to the extent that is warranted by the purposes agreed upon or the purposes intended with respect to the work at the time of its creation.⁷⁶

The right to object to false attribution

- 17-016** The SCA does not contain a specific provision on false attribution.⁷⁷ However, s.20 of the Swedish Names Act⁷⁸ stipulates that, without being entitled to do so, no one may use for commercial purposes, to the detriment of a person having acquired a distinctive name, a trade name, trademark or any other distinctive sign that can easily be confused with that name. Thus, even if the provisions of the Names Act provide for some protection against the illicit use of an author’s name, the Act is only applicable when the author’s (distinctive) surname has been used for commercial purposes. Therefore an author, for example, has no absolute right to prevent the making and distribution of artistic works which are wrongly attributed to him in cases when they are not made by him.

There are, however, special provisions on “false attribution” in the Copyright Acts of the other Nordic countries. Section 74 para.1 of the DCA states that the name or signature of an author may not be placed on a work of art by anyone else without his consent. According to s.72 para.2 the name or

⁷⁴ Government bill (proposition) 1960:17 p.71. See also Ole-Andreas Rognstad, *Opphavsrett*, 2009, p.203.

⁷⁵ Swedish Government Official Report (SOU) 1956:25 p.129.

⁷⁶ Per J. Nordell, “National report on moral rights in Sweden” (1993) ALAI p.401.

⁷⁷ S. Strömholm, “Hur svår man sig fri?” (1975) NIR pp.350 et seq.

⁷⁸ The Names Act, Swedish Code of Statutes (*Svensk författningssamling*, SFS) 1982:670.

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signature of the author may not in any case be put on a reproduction in such a manner that the reproduction may be confused with the original. Similar provisions are contained in s.47 of the NCA and s.52 paras 1 and 2 of the FCA. In addition, according to s.52 para.3 of the FCA anyone who reproduces or makes available to the public a work of fine art shall make an indication/mark on the copy in such a way that it will not be confused with the original work.

Performers' paternity right

Correspondingly (SCA s.45 para.3), the performers' paternity right is identical to that provided to authors. **17-017**

Photographers' paternity right

Correspondingly (SCA s.49a para.4), the photographers' paternity right is identical to that provided to authors. **17-018**

The right of integrity

According to s.3 para.2 of the SCA, a work may not be changed in a manner which is prejudicial to the author's literary or artistic reputation or to his individuality, nor may it be made available to the public in such a form or in such a context as is prejudicial in the manner stated.⁷⁹ In short, this provision aims at protecting the author's "artistic" personality, as it is shown in the work, its structure, attitudes and sentiment.⁸⁰ **17-019**

According to the preparatory works of the SCA, changes in a work may consist of changes made in a single copy of a work, and of amendments to the work as such, without the need for a new copy being made. An example of the latter situation is when a work is performed on stage and is thereby modified. Whether changes in a single copy of a work violate the right of integrity or not is determined by the circumstances of each case, in particular the value of the work from an artistic point of view and the purpose of the changes. Restorations of a work are usually allowed, even if the restoration results in a loss of the original character of the work. Moreover, it is not forbidden completely to destroy a copy of a work.⁸¹

⁷⁹ A similar provision is contained in s.3 para.2 of the FCA and DCA respectively. The wording of s.3 para.2 of the NCA is also of the same kind, but in addition it has the wording "or prejudicial to the reputation or individuality of the work itself." It is stated in the preparatory works to the NCA that a violation of the work normally would be a violation of the author, but that in many cases it would be more natural to say that it is the work that has been infringed. See Ole-Andreas Rognstad, *Opphavsrett*, 2009, p.203.

⁸⁰ J. Rosén, "Moral Right in Swedish Copyright Law", (1993) NIR p.375; and J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, p.684.

⁸¹ Swedish Government Official Report (SOU) 1956:25 pp.124 et seq.; Governmanet bill (proposition) 1960:17 p.72; U. Bernitz, "Skydd för offentliga konstverk mot förvanskning

The right of integrity also includes situations where a work is made available to the public in such a form or in such a context as is prejudicial to the author's individuality or reputation. This may be the case where the work is broadcast through radio or television or performed on a stage or in a concert in a form or in a context that is prejudicial to the author's individuality or reputation.

For the provision on the right of integrity to apply, the violation must impinge on the author's reputation or individuality as an author. The word "reputation" relates to the author's standing or status in the eyes of others, whereas the word "individuality" is concerned with the author's personal relationship/affection for his work.⁸² However, the question of what is prejudicial to the author's individuality or reputation is to be measured by an objective yardstick—it is not sufficient that the author feels offended.⁸³ This objective yardstick is said to take account of the nature of the work and its importance from a literary or artistic point of view. Further, account should also be taken of whether it is clear that the work is in its original form or an altered one. If the work is said to be in its original form, the author has a justifiable interest that this remains the case. Of importance in this context is also the type of work in question: even minor adjustments to poetry may have important consequences. In other areas, such as instruction manuals, there will be greater room to make alterations without violating the integrity right.⁸⁴ Thus, the genre and putative area of use seem to be factors to be taken into account, as is the form of exploitation/use permitted by the author.⁸⁵ If

och förstöring", *Festskrift til Birger Stuevold Lassen* (Oslo: Universitetsforlaget 1997) pp.115 et seq.; S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.242, and M. Koktvedgaard, "Moral Rights in Denmark" (1993) *ALAI* p.120. However, in NCA there is a special provision on destruction of works. According to s.49 para.1, if circumstances necessitate the destruction of the original copy, the author, if he is alive, shall be notified in reasonable time, if this can be done without particular disadvantage.

⁸² S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.240. As stated in the preparatory works to the SCA, the interests of the author, which the right of integrity intends to safeguard were, first, his reputation in the eyes of others and, secondly, "the integrity of the work and the feelings that he as an artist may cherish for the work he has created." Indeed, violation of the right of integrity can be constituted by alterations which most persons would regard as enhancing the literary or artistic quality of the work, thus actually increasing the author's "honour", provided that the author's intentions or authentic experience are thereby changed (thus violating his "individuality"). See Swedish Government Official Report (SOU) 1956:25 p.122. As stated by a distinguished scholar on moral rights, we are here facing the traditional view that the work is an extension of the author's personality, his "spiritual offspring", which he has a right to defend regardless of whether an attack on the work affects other people's opinion of him and the work. See S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.242.

⁸³ Ole-Andreas Rognstad, *Opphavsrett*, 2009, p.204; and J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, p.684.

⁸⁴ Swedish Government Official Report (SOU) 1956:25 p.123.

⁸⁵ S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.241; and J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, p.684.

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a work is created for a practical purpose a user might be allowed to make alterations conditioned by that purpose, however much the author opposes them.⁸⁶ Outside the scope of the provision fall editorial amendments to a journalist's article made by the editor of a newspaper or insignificant translation or drafting mistakes.⁸⁷ In any case, however, such characteristics of the work as the ideas expressed, its viewpoint or substantive stylistic features must be respected.⁸⁸

If the author has reviewed and approved changes to the work, such changes are normally not considered an infringement of the integrity right.⁸⁹

The integrity right has been subject to interpretation by the Swedish Supreme Court in several cases, as follows⁹⁰:

- (a) Alterations to a television program, which had been produced by an employee, were not considered to be a violation of the integrity right.⁹¹ The program as a whole was intended to highlight the economic disparities in society. The court considered that the relationship between the sequences which had been cut and the rest of the program could not be considered in any way to illuminate the economic disparities in Swedish society, nor had the loss of the sequences decreased the film's socially critical purpose or artistic value.
- (b) An artist's posters of paintings showing naked women's bodies had been used as advertisements outside a pornographic cinema in Stockholm.⁹² The montage included very substantial alterations and two of the images had been broken down. Both this procedure and the alteration were considered to be in violation of the integrity right. Furthermore, the fact that the images had been mixed with images of a pornographic character outside a cinema with such a repertoire was also considered to be a violation of the integrity right, because the images had been made available to the public in such a context as was prejudicial to the author's individuality and reputation.
- (c) Where commercial breaks had been inserted in the broadcasting of feature films, the question arose whether these breaks constituted a

⁸⁶ J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, p.684.

⁸⁷ H. Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.97.

⁸⁸ Swedish Government Official Report (SOU) 1956:25 p.122; Government bill (proposition) 1960:17 p.71; and S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.241.

⁸⁹ H. Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.99.

⁹⁰ Indeed, the right of integrity is very much a case-by-case evaluation, cf. S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.246. Other cases from the Swedish Supreme Court, not referred to here, but of some interest, concerning the integrity right are to be found in [1975] NJA(S) and s.679/[1979] NJA(S) s.352. These cases are discussed in J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann* 2004, pp.685 et seq.

⁹¹ Swedish Supreme Court case [1971] NJA(S) p.226.

⁹² Swedish Supreme Court case [1974] NJA(S) p.74.

violation of the film directors' integrity right.⁹³ The Swedish Supreme Court found that the characteristic elements of a cinematographic work are the pattern of continued progress, the story, and the atmosphere created by the film—including the use of image and sound, and that commercial breaks interrupt this process and the film's atmosphere. Thus, a feature film that is interrupted by commercial breaks must be said to have been changed within the meaning of the integrity right. According to the Supreme Court, the film directors' integrity right had therefore been violated. The court emphasised that the commercial breaks violated the individuality, not the reputation, of the directors.⁹⁴

Examples from the Danish courts are as follows:

- (a) A sound track from a television broadcast was played as an introduction to a public meeting.⁹⁵ It had no connection with the purpose of the meeting. The Court of Appeal held the playing of the sound track was a violation of the author's right of integrity.
- (b) The sound track from a TV broadcast, in which a member of the Danish parliament took part in a debate about public matters, was later on played as an introduction to a public meeting on the same subject.⁹⁶ The TV producers considered this separation of sound and picture to be a violation of their rights. The Supreme Court held, however, that the separation was no violation as it was not possible at the meeting to show the TV broadcast, and the important points of interest were to be found in the sound track.
- (c) An article on sexual behaviour ("Misplaced chastity"), written by a medical doctor, was later bought and published by a weekly magazine.⁹⁷ The article was illustrated by a photograph of a sculpture showing a young naked woman and a young naked man. The sculptor found this to be prejudicial to his artistic reputation and individuality, as the article dealt with sexual problems, and his work of art was meant to show just the opposite: togetherness, warmth and harmony. The Supreme Court found that there was no infringement, because the purpose of the article was to create more openness and harmony in sexual relations.
- (d) A feature film (Sydney Pollack's "Three Days of Condor") was transferred onto a video format in a pan-scanned form.⁹⁸ The Court of

⁹³ Swedish Supreme Court case [2008] NJA(S) p.309.

⁹⁴ This case has been commented on by the author of this chapter, J. Axhamn, in (2008) NIR pp.400 et seq.

⁹⁵ Danish Appeals Court Case (1979) UFR p.685 Ø (Centrum-Demokraterne).

⁹⁶ Danish Supreme Court Case (1971) UFR p.24 H (Skoleudsendelse).

⁹⁷ Danish Supreme Court Case (1969) UFR p.544 Ø (Voksen Erotik).

⁹⁸ Danish Appeal Court Case (1997) UFR, p.975. The case is referred to in (1998) I.I.C. p.609 et seq. and discussed in J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, p.688.

Appeals held that the pan-scanning constituted a violation of the director's right of integrity but that he had waived his rights in accordance with s.3 para.3 of the DCA.

Travesties and parodies.—As explained in the preparatory works to the SCA, travesties and parodies are not to be considered acts of infringement of the integrity right.⁹⁹ The parody issue has been subject to a case before the Supreme Court. The case concerned the children's book character "Alfons Åberg" ("Alfie Atkins" in English).¹⁰⁰ Fifteen lines from eight different Alfons Åberg books were mixed with lines from a movie in such a way that the listener got the impression that "Alfons Åberg" participated in a dispute with a drug dealer, followed by a fight. The Supreme Court found that the radio sequence should be considered as an independent work and that the modifications made in the program which aimed to achieve a comic effect did not violate the integrity right of the author.¹⁰¹ 17-020

Performers' integrity right

Performing artists are granted the same right of integrity as given to authors, i.e. protection of their reputation and/or their individuality (SCA s.45 para.3). In a case decided in 1968 by the District Court of Stockholm, an actress had without her consent been replaced by a naked "stand in" in certain scenes of a film.¹⁰² The court found that the added "scenes with the other woman, by reason of their extent and contents, essentially change . . . [the actress's] . . . appearance in the film role" and that the actress's artistic individuality as a film actress must be considered to have been infringed by this.¹⁰³ 17-021

Photographers' integrity right

Correspondingly (SCA s.49a para.2), the photographers' integrity right is identical to that provided to authors. 17-022

⁹⁹ Swedish Government Official Report (SOU)1956:25, pp.124 and 136 et seq. See also J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, pp.689 et seq.

¹⁰⁰ Swedish Supreme Court Case [2005] NJA(S) p.905. An English version of this case is available in (2009) I.I.C 492. Some background information on the case is provided in J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann* 2004, pp.681 et seq.

¹⁰¹ The case has been commented on by J. Rosén in (2005-06) *Juridisk Tidskrift* ("JT") pp.714 et seq.; and Per J. Nordell in (2007) NIR pp.317 et seq. Of some interest is that the author of the children's book (Gunilla Bergström) could not invoke her economic rights because these rights were covered by a so-called extended collective licence: according to s.42e of the SCA (then s.26.d) a sound radio or television organisation, as specified in particular cases by the Government, is entitled to broadcast those published literary and musical works and works of fine arts which have been made public. On the extended collective licence, see, e.g. G. Karnell in (1991) NIR pp.15 et seq.

¹⁰² Case referred to in (1970) NIR p.209.

¹⁰³ Cf. S. Strömholm, "Droit Moral—The International and Comparative Scense from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.245.

Other rights: disclosure and retraction

- 17–023** In the NCA and the FCA, there are special provisions on a right of access. According to Section 49, paragraph 2 of the NCA, if the possessor of the original version of a work prevents, without reasonable grounds, the author from exercising his exclusive economic rights, he may be ordered by a court to give the author such access to the work as the court finds reasonable. The court will reach a decision after taking into consideration all the existing circumstances, and may make the author's access to the copy conditional on his providing security, or impose other conditions. Such proceedings may only be brought by the author personally with the consent of the Ministry concerned. A somewhat similar provision is provided for in s.52a of the FCA.

*C. Protection of moral rights by other causes of action***Quasi protection of moral rights**

- 17–024** The protection of the author's moral rights may be said to be constructed according to the following pattern: around a "core" of rights, which provide protection against the grossest violations and which in principle cannot be transferred and can only to a limited extent be the object of a binding agreement (in Nordic law this core is contained in s.3 of the Copyright Acts of the Nordic Countries), there is an outer line of defence, consisting of rules which generally protect the same interests but can be set aside by contractual agreement.¹⁰⁴ For example, s.28 of the SCA prohibits changes in works which have been the subject of a transfer. The s.11, mentioned above, of the SCA also belongs to this "outer" defence. A further example consists of rules (which also can be set aside by contract) in ss.30 and 33 of the SCA; s.30 limits the assignment of the right of reproduction to a certain period and s.33 makes it a duty for a person acquiring a right to publish, to issue the work. In essence, these rules are intended to prevent "slave contracts" and excessively long-term and indefinite commitments as regards literary and artistic creativity.¹⁰⁵

Special provision on the protection of the "cultural interest"

- 17–025** With some differences in wording, the Copyright Acts of the Nordic countries provide for a special provision on the protection of the "cultural interest".

¹⁰⁴ S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.220; J. Rosén, "Authors' Moral Rights in Modern Media" in *Festschrift für Wilhelm Nordemann*, 2004, p.682; and J. Rosén, "Moral Right in Swedish Copyright Law", (1993) *NIR* p.356.

¹⁰⁵ S. Strömholm, "Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint" (2002) *Scandinavian Studies in Law* p.220.

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The main difference between the provisions on the Copyright Acts of the Nordic countries is that the Danish and Norwegian Acts make a connection between the right of integrity and the special provision on cultural interest, whereas the Finnish and Swedish Acts provide no such explicit connection.

According to s.51 of the SCA, if a literary or artistic work of a deceased author is made available to the public or reproduced in a manner which violates cultural interests, a court may upon complaint from an authority appointed by the Government issue an injunction restraining such performance or reproduction under penalty of a fine. The provision is intended to apply only to cases which are truly offensive against the cultural heritage or the classic masterpieces.¹⁰⁶ It is not sufficient that a (single) person who has particular knowledge of the area considers the re-issue of an older work to have shortcomings; it must be a question of a re-issue which appears grossly objectionable to the “educated public” in general.¹⁰⁷ Gross distortions of the *tendency* of a work would often seem to imply a violation of the cultural interest of the public.¹⁰⁸ However, it is made clear in the preparatory works that parodies and travesties do not fall under the provision,¹⁰⁹ and the Parliamentary Committee that prepared the law for acceptance by the Swedish Parliament expressed a certain hesitation about the proposed rule and stressed that it was important that it should be applied with caution.¹¹⁰

The “authorities” appointed by the Swedish Government capable of bringing a case to court on the basis of this provision are, in their respective areas, the Royal Swedish Musical Academy, the Swedish Academy and the Royal Swedish Academy of Fine Arts. These authorities are, however, not obliged to take actions against alleged violation of s.51 of the SCA, but only have the power to do so, where they deem it appropriate.¹¹¹

There are no sanctions other than a prohibition under penalty of a fine. The provision does not prohibit destruction of a work.¹¹² The provision

¹⁰⁶ The preparatory works to the SCA indicated examples of abuse of the freedom to use and manipulate works in the public domain. These examples included valuable works of old literature that had been published in “adaptions” that damaged the original work.

“[T]he protection of classical works against distortion etc., so as to be presented to the public in a worthy form” was seen to be “of important national interest”.

See Swedish Government Official Report (SOU) 1956:25 pp.403 et seq.; G. Karnell, “Moral Rights and Modern Times—The Gradual Obsolescence of Section 51 of the Swedish Copyright Act”, *Mélanges Victor Nabhan* (Québec: Yvan Blais, p.257; 2004) and M. Levin, *Lärobok i immaterialrätt*, (Stockholm: Norstedts juridik, 2007) pp.164 et seq.

¹⁰⁷ Swedish Government Official Report (SOU) 1956:25 p.409.

¹⁰⁸ S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.250.

¹⁰⁹ Government bill (proposition) 1960:17 p.278.

¹¹⁰ Parliamentary Committee Opinion No.41 (1960) pp.39 et seq.

¹¹¹ S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.249; and G. Karnell, “Moral Rights and Modern Times—The Gradual Obsolescence of Section 51 of the Swedish Copyright Act”, *Mélanges Victor Nabhan*, 2004, p.258.

¹¹² M. Levin, *Lärobok i immaterialrätt*, 9th edn, 2007, p.165.

in s.51 of the SCA has yet to be relied upon.¹¹³ It has been argued that the provision no longer has any relevance in practice.¹¹⁴

Examples from the other Nordic countries of the application of the special provision on protection of the cultural interest include a Finnish case concerning a publishing house which had published, inter alia, “Alice in Wonderland”, “The Last of the Mohicans” and “Tom Sawyer” in abbreviated versions without mentioning that the publications were not the original versions. The publishing house was found to be in violation of the cultural interests.

In a Norwegian case from 1964, the staging of “Ghosts” in a new Norwegian translation was not found to be offensive to Ibsen or harmful to general cultural interests. Another case concerned whether the shortened and distorted way in which Grieg’s music appeared in the movie “Song of Norway” was offensive to Grieg’s reputation and individuality. The court found that this was the case, but did not regard it as significant enough to announce a prohibition on grounds of general cultural interests.

As mentioned above, the DCA makes a stronger connection between the author’s right of integrity and the special provision on protection of the “cultural interests”. According to s.53 para.1 of the DCA, even if copyright has expired, a work may not be altered nor made available to the public contrary to an author’s right of integrity, if cultural interests are thereby violated. Violations of this provision are instituted by the public authorities. It has been subject to two court decisions. The first concerned a musical work, “Venetian Serenade”, composed in 1880 by a well-known Danish composer (Johan Svendsen). The work was brought out on gramophone record in 1962 under a new title, “Caterina”, and with considerable changes in melody, rhythm, etc. The judgment of the Court of Appeal, which gained support from the Supreme Court, stated that:

“[T]he composer Johan Svendsen is such a recognized and distinctive artist that cultural interests will be prejudiced if his serious works, among which ‘Venetian Serenade’ must be held, are distorted.”¹¹⁵

Another case concerned a film producer who in 1975 had obtained a grant from the Danish Film Institute (an agency under the Danish Ministry of Culture) for the production of a film on the life of Jesus: “Many faces of Jesus Christ”.¹¹⁶ When the Ministry realised that the film was likely to be highly pornographic, the grant was cancelled on the ground that the film would be an infringement of the moral rights of the Evangelists. The producer then

¹¹³ U. Bernitz et al., *Immaterialrätt och otillbörlig konkurrens*, 10th edn (Stockholm: Jure, 2007) p.79.

¹¹⁴ M. Levin, *Lärobok i Immaterialrätt*, Norstedts juridik 9th edn, 2007, p.165; and G. Karnell, “Moral Rights and Modern Times—The Gradual Obsolescence of Section 51 of the Swedish Copyright Act”, *Mélanges Victor Nabhan*, 2004, pp.255 et seq. Cf. S. Strömholm, “Droit Moral—The International and Comparative Scene from a Scandinavian Viewpoint” (2002) *Scandinavian Studies in Law* p.249.

¹¹⁵ Danish Supreme Court case (1965) UFR p.137 H (Venetian Serenade).

¹¹⁶ Danish Supreme Court case (1990) UFR p.856 Ø (Venetian Serenade).

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sued the Ministry. The court held that it was so doubtful whether the film—if made—would infringe the moral rights of the Evangelists that the cancellation was not justified (thus implicitly stating that the bible was protected by the provisions on Moral Rights in the DCA).¹¹⁷ For various other reasons, however, the judgment found in favour of the defendant. To sum up, according to Danish legal doctrine, the cultural interests protected by this provision are violated when the violation concerns a work or an author who belongs to the cultural heritage.¹¹⁸ Nowadays, this concept of “everlasting right of integrity” is more or less regarded as defunct in the legal literature, e.g. on the basis that it nowadays is extremely difficult to establish any consensus or agreement on a permanent and general perception of the notion “cultural interests”. Implicitly, the ruling in the “Venetian Serenade” is no longer good law.¹¹⁹

D.

Duration of moral rights

Swedish law follows the current EC harmonisation measures. The same principles apply to all creations qualifying for copyright protection. Section 43 of the SCA provides for the basic rule that copyright, including all economic rights as well as moral rights, in a work subsists until the end of the 70th year after the year in which the author died. At that point the work enters into the public domain. The exceptions to this basic rule are described below.

17-026

Joint works

Section 43 of the SCA provides that copyright in a joint work subsists until the end of the 70th year after the year in which the last surviving author died.

17-027

Audiovisual works

Section 43 of the SCA provides that copyright in an audiovisual work follows the principles of a joint work, but with some qualifications. Copyright subsists until the end of the 70th year after the death of the last to die of one of the following persons: the principal director, the author of the screenplay, the

17-028

¹¹⁷ On this matter, see M. Koktvedgaard, “National report on moral rights in Denmark” (1993) ALAI p.118.

¹¹⁸ P. Schönning, *Ophavsretsloven med kommentarer*, 4th edn, 2008, p.625.

¹¹⁹ M. Koktvedgaard, *Lærebog i immaterialret*, 6th edn (Copenhagen: Jurist- og Økonomforbundet, 2002) p.123 and M. Koktvedgaard, “National report on moral rights in Denmark” (1993) ALAI p.118.

author of the dialogue, or the composer of the music specifically created for use in the work.¹²⁰

Previously, the term of protection was calculated from the year in which the last surviving author died. A transitional provision from the amendment in 1995, by which the term of protection was extended from 50 to 70 years, stipulates that if the term of protection for a specific audiovisual work becomes shorter than would have been the case if the older provisions of the law applied, then the older provisions do indeed apply. The result is that an audiovisual work remains protected even though 70 years have passed since the death of the persons listed in s.43 of the SCA, mentioned above, provided that less than 50 years have passed since the death of some other recognised co-author, e.g. the cameraman (cinematographer).¹²¹

Anonymous works and non-published works

17-029 In the event that the author remains anonymous, i.e. his name has not been revealed or the work carries a pseudonym or signature that is not commonly known, s.44 of the SCA stipulates that the copyright subsists until the end of the seventieth year after the year in which the work was first made public.¹²² If the pseudonym or signature is commonly known, the standard term of 70 years after the death of the author in s.43 of the SCA applies. Where an anonymous work is made public in volumes, parts, instalments, issues, or episodes, the term of protection runs for each such item separately.

However, if the author discloses his identity or his identity becomes commonly known during the term of protection mentioned above, even without the author having taken the initiative, the standard term of 70 years after the death of the author becomes applicable. If, however, the author discloses his identity 70 years after the year in which the work was lawfully made public, the copyright will already have expired and the works will have entered into the public domain.¹²³ There are transitional provisions regarding revival of the protection for anonymous works due to the extension of the duration of the protection from 50 to 70 years.¹²⁴

E.

Alienability/waivability of moral rights

17-030 Since moral rights are said to safeguard the author's personal relationship to his work, an author cannot, as a general rule, transfer his moral rights to

¹²⁰ Government bill (proposition) 1994/95:151 p.25.

¹²¹ Government bill (proposition) 1994/95:151 p.35; and Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.328.

¹²² This provision is based on art.1.3 of Directive 2006/116/EC on the term of protection of copyright and related rights (codified version).

¹²³ H. Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.337.

¹²⁴ H. Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.336 et seq.

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another person or another legal entity. However, he may waive his moral rights. As stated in s.3 para.3 of the SCA:

“[T]he author may, with binding effect, waive his right under Section 3 only in relation to uses which are limited as to their character and scope.”

The provision regulates the author’s possibility to waive his moral rights and limits the permissible scope of such a waiver.¹²⁵

Consequently, the author is not bound by a general waiver of his moral rights. No matter what the agreement between the author and his assignee or licensee says about moral rights, such a waiver cannot extend further than to uses that are limited in their character and scope.¹²⁶

However, the author may waive his right totally ex post particular events, when he is fully aware of the extent and nature of the amendments, etc. to his work.¹²⁷

Moral rights may be waived either explicitly or implicitly. A waiver is also valid when the circumstances of a transfer of the economic rights are such that moral rights must also be considered to have been waived.¹²⁸

The provisions on moral rights may seem to create great difficulties in the exploitation of works of art and literature, notably because the rights cannot be waived except in respect of a use of the work which is limited in nature and extent. As regards the right of integrity, this means that the “hard core” of the author’s personal and intellectual interests is always protected irrespective of what has been agreed. In this “hard core” there is an objective, abstract and contract-neutral protection of the author’s personal relationship to his work which is fundamental and ineluctable in handling the works on the market.¹²⁹ This principle may seem reasonable in the case of valuable works of great literary or artistic merit—the hard core of classical copyright law—but is more dubious when it comes to works of a more ordinary or technical character.¹³⁰

In the normal course of life, however, moral rights do not present any serious obstacle to the exploitation of the works in the Nordic countries: normally, authors and their lawful successors in title rely on and respect contractual provisions about the use of their works, and the statutory provisions are seldom invoked.¹³¹

¹²⁵ An exception applies, however, in respect of computer programs made under an employment contract.

¹²⁶ Swedish Government Official Report (SOU) 1956:25 pp.127 et seq.; and J. Rosén, “Authors’ Moral Rights in Modern Media” in *Festschrift für Wilhelm Nordemann* 2004, p.687.

¹²⁷ J. Rosén, “Authors’ Moral Rights in Modern Media” in *Festschrift für Wilhelm Nordemann* 2004, p.687.

¹²⁸ Swedish Government Official Report (SOU) 1956:25 p.128; and J. Rosén, “Authors’ Moral Rights in Modern Media” in *Festschrift für Wilhelm Nordemann*, 2004, p.687.

¹²⁹ J. Rosén, “Authors’ Moral Rights in Modern Media” in *Festschrift für Wilhelm Nordemann*, 2004, p.687.

¹³⁰ M. Koktvedgaard, “National report on moral rights in Denmark” (1993) ALAI p.119.

¹³¹ Mogens Koktvedgaard, “National report on moral rights in Denmark” (1993) ALAI p.119.

F. Remedies and penalties for infringement of moral rights

1. Generally

17–031 Sweden has implemented the EC Enforcement Directive,¹³² but in some respects, the SCA offers a higher level of protection for the copyright owner against violations of moral rights.

2. Reasonable compensation and damages

17–032 In cases where the violation of a moral right has been carried out intentionally, or as a result of negligence, compensation is payable for the moral damage that the violation has caused (SCA s.54 para.2 item3).¹³³ There is no requirement that the negligence be gross. Whatever the circumstances, the right holder is not entitled to any punitive damages.¹³⁴ Furthermore, according to procedural rules, a court may not order a defendant to pay higher damages than those claimed by the claimant.¹³⁵ The provisions on damages in the SCA apply to violations of an author's moral rights regardless of whether the exploitation of the work as such has been authorised by the author (e.g. by way of a licence of the economic rights).¹³⁶

The provisions on damages apply correspondingly to performing artists (SCA s.57).

The burden of proof to quantify the damages rests, in principle, with the right holder. However, a generally applicable provision in Ch.35 s.5 of the Swedish Code of Judicial Procedure allows the courts some discretion when setting the amount of damages in cases where the claimant encounters difficulties in presenting evidence in this regard.¹³⁷ This provision stipulates that with respect to the extent of damages, if full proof of damage cannot be presented at all, or only with difficulty, the court may estimate the damage

¹³² Directive 2004/48/EC of April 29, 2004 on the enforcement of intellectual property rights; the implementation took place by virtue of Swedish Code of Statutes (*Svensk författningssamling*, SFS) 2009:109.

¹³³ This provision is consistent with art.13.1 of Directive 2004/48/EC, according to which judicial authorities, when setting the damages, in appropriate cases, shall take into account other elements than economic factors, such as the moral prejudice caused to the rightholder by the infringement. A similar provision, albeit with a slightly different wording, was introduced at the 1931 revision of the (then applicable) copyright law. It was introduced as an expression of the idea that the work is the "spiritual offspring" of the author and that copyright law should protect the author's personality, which by that time permeated Nordic copyright law and doctrine.

¹³⁴ Government bill (proposition) 2008/09:67 p.271.

¹³⁵ Code of Judicial Procedure Ch.17 s.3.

¹³⁶ H. Olsson, *Upphovsrättslagstiftningen—En kommentar*, 2nd edn, 2006, p.512.

¹³⁷ Code of Judicial Procedure (Swedish Code of Statutes, *Svensk författningssamling*, SFS) 1942:740) Ch.35 para.5. It is, however, a prerequisite for the application of the this provision that the right holder has presented evidence regarding the damage, see Supreme Court case [2005] NJA(S) p.180.

at a reasonable amount. This may also be done if proving the actual damage can be assumed to entail costs or inconvenience not being in a reasonable proportion to the size of the damage and if the claimed compensation is a lesser amount than the likely actual damage.¹³⁸

3. Injunctions

Upon a petition by the right holder or by a party that, on the basis of a licence, has the right to exploit the work, a court may issue an injunction prohibiting, under a penalty of a fine, a person who commits or contributes to a violation of moral rights, from continuing the violating acts (SCA s.53b). An injunction may be issued regardless of intent or negligence.¹³⁹

17-033

The provisions on injunctions in s.53b of the SCA are supplemented by the general Swedish Procedural Fine Act (“Lagen om viten”).¹⁴⁰ The claim for an injunction put forward by the claimant must be precise with regard to the infringing acts to be prohibited.¹⁴¹ If the claim is imprecise or otherwise too extensive, the court may limit the injunction within the scope of the claim put forward by the claimant.¹⁴²

If the claimant shows probable cause that a violation is taking place and if it can be reasonably assumed that the defendant, through the continuation of the act, will cause a diminution in the value of the exclusive right, a court may issue an interlocutory injunction until the case has been finally adjudicated or is otherwise decided. Exceptionally, the court may issue an interlocutory injunction *ex parte*, if a delay would involve a risk of damage. The claimant must deposit a security with the court, normally a bank guarantee, to cover the injury that may be caused to the defendant. The court may dismiss a petition for an interlocutory injunction if the security is considered insufficient.¹⁴³ In exceptional cases, the court may relieve the claimant from depositing a security if the claimant is unable to make a deposit. It is a prerequisite for a petition for an interlocutory injunction under the SCA that proceedings on the merits are initiated at the same time or are pending (s.53b para.2).

In addition to the special provisions regarding interlocutory injunctions in the SCA, there are general provisions on security measures in Ch.15 s.3 of the Code of Judicial Procedure. These provisions may also be used in order to obtain an interlocutory injunction. However, they may also be applied when no proceedings on the merits are initiated at the same time or pending.¹⁴⁴

¹³⁸ T. Eltell and M. Radetzki, “Skadeståndsbedömning vid intrång i upphovsrätt”, (2005) NIR p.252.

¹³⁹ Government bill (proposition) 2008/09:67 pp.194 et seq.

¹⁴⁰ Swedish Code of Statutes (*Svensk författningssamling*, SFS) 1985:206.

¹⁴¹ Government bill (proposition) 1993/94:122 p.67.

¹⁴² Government bill (proposition) 1993/94:122 p.67.

¹⁴³ Supreme Court case [1995] NJA(S) p.631.

¹⁴⁴ Government bill (proposition) 2008/09:67 p.198.

Injunctions, including interlocutory injunctions, may also be directed at acts constituting an attempt to, or preparation for, a violation of moral right.

The provisions on injunctions in s.53b of the SCA described above apply correspondingly to performing artists (SCA s.57).

Criminal sanctions

17-034 Anyone who commits an act that violates the moral right to a work may, when the act is committed intentionally or with gross negligence, be punished by fines or imprisonment for not more than two years (SCA s.53 para.1). Violations of performers' moral rights can also be prosecuted under the same conditions (SCA s.57). Criminal liability also applies to participatory acts and attempts to infringe as well as to preparatory acts under s.23 of the Criminal Code ("Brottsbalken").¹⁴⁵

A conviction may result in forfeiture of property in relation to which a violation has occurred or forfeiture of the value of such property, forfeiture of tools (or the value of the tools) used in the violation, etc. (SCA s.53a).

IV. Exercise of Moral Rights

17-035 Chapter 3 of the SCA relates to the transfer of copyright.¹⁴⁶ Copyright may be transferred entirely or partially (SCA s.27 para.1). There are no formal requirements for copyright transfers in so far as economic rights are concerned.¹⁴⁷ However, as mentioned,¹⁴⁸ Swedish copyright law is based on the principle that the copyright of a work initially belongs to the natural person who has created the work. A transfer of the whole or a part of the copyright must thus be based on an explicit or implicit agreement.

Section 27 paragraph 1 of the SCA explicitly states that a transfer of copyright is subject to the limitation that follows from s.3 of the SCA concerning moral rights. Moral rights may thus not be transferred. As has been seen, the author may, with binding effect, waive his moral rights, but only in relation to uses that are limited as to their character and scope. The only exception to this rule concerns computer programs (SCA s.40a).¹⁴⁹

The provisions on transfers of copyright in s.27 also apply to performing artists (SCA s.45 para.3).

¹⁴⁵ Swedish Code of Statutes (*Svensk författningssamling*, SFS) 1962:700.

¹⁴⁶ In April 2008, the Government appointed a special committee of inquiry for the purpose of reviewing inter alia the provisions in Ch.3 of the SCA. The inquiry is to be submitted in April 2010. See below.

¹⁴⁷ Swedish Government Official Report (SOU) 1956:25 p.277.

¹⁴⁸ See above.

¹⁴⁹ See above.

As regards the transfer of copyright at the death of an author, the provisions of the Marriage Code (“Äktenskapsbalken”)¹⁵⁰ govern the division of property between spouses on inheritance, and will apply to copyright, after the death of the author.¹⁵¹ The author may, with binding effect for the surviving spouse and heirs, give directions in his will concerning the exercise of moral rights or authorise somebody else to give such directions (SCA s.41 para.2). These provisions in s.41 also apply to performers (SCA s.45 para.3).

The assignment of the copyright in a work to a collecting society cannot include moral rights as these rights remain with the author. Hence the collecting societies cannot enforce any moral rights.

V. New Developments

In April 2008, the Government appointed a special committee of inquiry for the purpose of reviewing certain aspects of copyright law. The inquiry comprises a review of the provisions on the transfer of copyright, a review of certain issues concerning extended collective licences, and a review of the SCA in its entirety from the drafting and linguistic points of view. A first report, on the issue of transfer of copyright and certain questions related to extended collective licences, will be submitted in April 2010. The final report on the inquiry is to be submitted in the autumn of 2011.

17-036

¹⁵⁰ Swedish Code of Statutes (*Svensk författningssamling*, SFS) 1987:230.

¹⁵¹ Section 41 of the SCA thus makes an exception to Ch.10, s.3 para.1 of the Marriage Code, which provides, inter alia, that rights “of a personal matter” must not be included in a division of property between spouses.