



TERRALEX®

# CROSS-BORDER COPYRIGHT GUIDE 2018



# Sweden

Lindahl, Johan Norderyd



## 1. Legislation and regulation

### 1.1 What are the main sources of copyright law?

The main source of copyright legislation in Sweden is the Act on Copyright in Literary and Artistic Works (1960:729) (The Copyright Act). The Copyright Act has been amended regularly over the years, with the last amendment occurring on 1 July 2017. Statutes are the predominant source of copyright law, complemented by the preparatory work for the statutes, and their amendments, and case law.

As Sweden is a member of the European Union, the interpretation and application of Swedish legislation by the judiciary has to be read in accordance with European Directives and Regulations which have direct effect. As in other countries within the Union, the Swedish courts and other EU national courts frequently refer questions of law to the European Court of Justice, whose decisions are binding for the national courts.

## 2. Subsistence of copyright

### 2.1 What type of works can be protected by copyright?

The Copyright Act states that copyright shall apply to a literary or artistic work regardless of its form. The Act lists numerous examples of work that can be protected by copyright, with the last example being works expressed in some other manner (ie other than those outlined below).

The non-exhaustive list of examples includes:

- fictional or descriptive representation in writing or speech (this includes, *inter alia*, maps and other works of a descriptive nature executed as drawings, engravings, or in a three-dimensional form)
- computer program (this applies *mutatis mutandis* to preparatory design materials for computer programs)
- musical or dramatic work
- cinematographic work
- photographic work or other work of fine art
- work of architecture or applied art.

## 2.2 What is required for works to qualify for copyright protection?

The basic requirement for a work to be protected by copyright is that it possesses a certain degree of originality. What exactly constitutes originality depends upon the kind of work. For example, a work of art, such as a painting, generally requires a lower degree of originality in contrast to works that might have industrial applications, such as industrial design. The work has to be the result of a personal creative effort. As such, a mere reproduction of a work of art might not, in many cases, be eligible for copyright protection. It shall be noted that there is no strict requirement as to the quality of the work in question.

As a general rule, Sweden provides copyright protection if the creator is a Swedish national or domiciled in Sweden. Copyright is equally applied to work that is published in Sweden or a state which is signatory to one of the various international conventions which Sweden is a party to.

One important exception to the requirement that the work has to reach a certain threshold of originality is the extended protection afforded to catalogues or similar kinds of works (also applicable to databases), which are covered by the so-called neighbouring rights.

## 2.3 What rights does copyright grant to the rights holder?

The Copyright Act grants the rights holder the exclusive right to:

- produce copies of the work
- to make the work (whether it is the original work or a revised version) available to the public.

In addition to these rights, the rights holders also have the moral rights described in 2.4.

## 2.4 Are moral rights protected (for example, rights to be identified as an author of a work or to object to derogatory treatment of a work)?

In Sweden, the following moral rights are provided for by the Copyright Act:

- the right to be identified as the author of a copyright work, to the extent and in the manner according to good practice
- the right to object to derogatory treatment of the copyrighted work which may cause harm to the author's artistic or literary reputation. This includes the right to object to the way in which the work is made available to the public.

Moral rights are applicable to all kinds of work that can be protected by copyright. In case there is more than one author or if the work in question has been made by the author in his or her capacity as an employee, please see the questions under section 3 below.

## 2.5 What is the duration of copyright in protected works?

The duration of protection varies depending on the type of work and the date of creation. The main rule according to the Copyright Act is that copyright expires 70 years from the calendar year the author passed away. In general, for works created on or after 1 July 1961, the duration of copyright protection is as follows:

<b>Main rule</b>
<b>Duration</b>
Copyright expires 70 years from the end of the calendar year in which the author passed away.
Where a work has a joint author/co-author, copyright expires 70 years from the end of the calendar year in which the last known author passed away. Where the author's identity is unknown, copyright expires 70 years from the end of the calendar year in which the work was made or made available to the public.
<b>Category of work</b>
Practising artists (eg performing musicians)
<b>Duration</b>
Copyright of recording expires 50 years from either the end of the calendar year of the recorded performance, or the calendar year in which the recording was made available to the public (whichever is later).
<b>Category of work</b>
Musical work with lyrics
<b>Duration</b>
If music and lyrics have been created to be used together, copyright subsists until the end of the 70th year after the year of death of the last living of the composer and the lyricist. If the music and lyrics are to be used separately, copyright expires 70 years from the end of the calendar year in which the author passed away, in accordance with the main rule.
<b>Category of work</b>
Films

## 3. Ownership

<b>Duration</b>
For films, the reference point is the end of the calendar year the last living author (which would include, <i>inter alia</i> , the main director, the script writer, the music composer or the dialogue writer) dies. Copyright then lasts until 70 years after this event.
<b>Category of work</b>
Broadcasts
<b>Duration</b>
Copyright in a broadcast expires 50 years from the end of the calendar year in which the broadcast was made.
<b>Category of work</b>
Photographs (not qualified as an artistic work)
<b>Duration</b>
Copyright for photographs expires 50 after the picture is taken.
<b>Category of work</b>
Catalogues and databases
<b>Duration</b>
Copyright expires 15 years from the moment of creation. Please note that each update of the catalogue or database renews the duration of the copyright.

### 2.6 For how long do moral rights subsist in copyright works?

An author's moral right to be identified as the author, to object to derogatory treatment, or of privacy lasts for the duration of the copyright protection. After the death of a creator, specific government agencies have the ability to object to derogatory treatment of a work if the use of the work is liable to violate vital cultural interests. This is a very rare exception in the sense that it only protects classic works that might be deemed to be of vital importance.

### 3.1 Who is the first owner of a copyright work?

As a general rule, the first owner of the copyright is the creator of the work, which is always a natural person. Principally, this is also the case where the work has been made by a person in the course of their employment. The solution to this issue is that the copyright is presumed to transfer to the employer to the degree of what can be considered to be necessary at the time of creation, with regard taken to the normal business operations of the employer.

It might be noted that this ambiguity is generally resolved in the employment contract. The employee always has the right to his or her moral rights unless these are waived. The Copyright Act furthermore sets up a presumption that a computer program created by an employee in the course of their employment is transferred to their employer unless an agreement has been made to the contrary.

### 3.2 Can copyright in a work be jointly owned? If so, what are the rights of a co-owner?

Copyright in a work can be jointly owned by two or more persons. This can occur where a work is created by more than one person and where the parties' individual work cannot be distinguished. Where there is a case of joint ownership, all parties need to be in agreement as to any form of use of the work in question. This would include, *inter alia*, whether to make the work available to the public, to license or to sell the work.

The sole exception to this rule is that both (or all) owners are free to pursue actions for infringement. If no unity regarding the use of the work can be reached, the solution offered by the Swedish legislation is for the work to be sold by public auction. It is important to note that joint ownership is not achieved where one party's efforts solely consists of technical assistance (say the recording of a musical work). It should, however, be acknowledged that this is a distinction that is much harder to make today compared to at the time of the conception of the law in 1960.

### 3.3 Can you register copyright? If so, what are the benefits of such registration and what other steps, if any, can you take to help you bring an infringement action?

There is no system to register copyright in Sweden. Copyright is an unregistered right that arises automatically upon creation of the work in question. The extent (or existence) of copyright is ultimately decided by the court. Nevertheless, the use of a copyright notice is

useful as evidence of ownership of copyright and at the very least makes an evident claim of ownership to the work in question.

### **3.4 What steps should you take to validly transfer, assign or license copyright?**

There are no formal requirements as to the assignment or license of a copyright-protected work. It is, however, strongly advised that such an agreement is made in writing and is formally signed by or on behalf of the copyright owner.

### **3.5 Can moral rights be transferred, assigned or licensed?**

Moral rights can be waived but they cannot be assigned, transferred or licensed.

## **4. Infringement**

Owners of copyright can take legal action if any of their exclusive rights (as set out in 2.3 above) have been infringed. Let it be noted that the Swedish Copyright legislation does not formally differ between primary or secondary infringement. The circumstances relating to the infringement (ie whether there is a case of primary or secondary infringement) can, however, be a relevant circumstance when it comes to the claims for damages.

### **4.1 What acts constitute infringement of copyright?**

An infringement occurs where the copyright-protected work is exploited by copying and/or making the work available to the public, whether it is in its original or altered form. As such, this would include a large variety of actions, as outlined below.

The making of copies shall include any direct or indirect, temporary or permanent reproduction of the work, irrespective of the form or through which method the reproduction is performed and irrespective of whether this occurs in whole or in part.

In the following cases, a work is deemed to have been made available to the public:

- when the work is communicated to the public. This occurs when the work is made available to the public by wire or by wireless means from a place other than where the public may normally access the work. Communication to the public includes also acts of communication that occur in such a manner that members of the public may access the work from a place and time which they themselves choose
- when the work is publicly performed. Public performance includes only such cases where the work is made available to the public, with or without the use of a technical device, at the same place as where the public may normally access the work
- when copies of the work are publicly exhibited. Public exhibition includes only such cases where a copy of a work is made available to the public, without the use of a technical device, at the same place as where the public may normally access the copy. Where a technical device is used, the act is instead a public performance
- when copies of the work are offered for sale, leased, lent, or otherwise distributed to the public.

## 4.2 What acts are permitted with respect to copyright works (ie what exceptions apply)?

There are a number of explicit limitations. Many of these are based on the implementation of the Information Society Directive (2001/29/EC) which contains what has been known as a 'shopping list' of exceptions and limitations. These permitted acts are wide in variety but often relate to very specific scenarios. They include (amongst others):

<b>Act</b>
Making of temporary copies
<b>Description</b>
A copy that is transient or incidental which: <ul style="list-style-type: none"> <li>• is an integral and essential part of a technological process</li> <li>• has the sole purpose of enabling a transmission of the work in a network between third parties by an intermediary</li> <li>• has no independent economic significance.</li> </ul>
<b>Act</b>
Personal copies for private use
<b>Description</b>
The making of a copy that is made for the individual's personal and private use and not for ends that are directly or indirectly commercial. If the work is a written work, the copy may only be in regards to limited part of the work or work of limited scope. This exception does not confer a right to construct works of architecture, make copies of computer programs or copies in digital form of a compilation in digital form.
<b>Act</b>
Educational purposes
<b>Description</b>
Teachers and pupils may, for educational purposes, make recordings of their own performances of works. Such recordings may not be used for other purposes.
<b>Act</b>
Copies for certain archives or libraries
<b>Description</b>
Archives and libraries are entitled to make copies of works (with the exception of computer programs) for the purpose of:

- preservation, completion or research
- allowing library borrowers to obtain sections or brief sections of a work under the condition that it is a single article or a short work
- For use in reading devices.

### Act

Composite work

### Description

Anyone is free to, in the course of educational activities, prepare a composite work containing work by a comparatively large number of authors under the condition that the reproduction of the work is a minor portion of said literary or musical work and under the condition that five years have passed from the time of the work's publication. The authors (of the sourced work) have a right to remuneration.

This exception does not apply if the works that form the parts of the composite work were made for educational purposes. Neither does the exception confer a right to prepare composite works for commercial purposes.

### Act

Use of fine art in films, television or pictures

### Description

Anyone is entitled to prepare a film, a television programme or a picture which copies, performs or features a work of fine art if the exploitation is incidental in relation to the content of the new work or if the work of fine art forms an insignificant part of the new work.

### Act

Quotation

### Description

Quotation of a work is permitted if it is done in accordance with proper usage and to the extent necessary for the purpose.

### Act

Copies of work of fine art

#### Description

Works of fine art that have lawfully been made available to the public may be reproduced in connection with a text in a scientific publication if it has not been done for commercial purposes; in connection with a critical text provided that such text is not in digital form; or in a newspaper if the text in question refers to current events. Fine art may also be reproduced in pictorial form if the work is permanently located on or at a public outdoor location; if the purpose of the picture is to advertise an exhibition or sale of the works of fine art; or if the works form a part of a collection or catalogue, provided that they are not in digital form.

### 4.3 Is it permissible to provide a hyperlink to, or frame, a work protected by copyright? If so, in what circumstances?

The CJEU decision in *Nils Svensson v Retriever Sverige* (C-466/12) referred to the question on whether linking to or framing links to copyright material without consent could be construed as a 'communication to the public' and therefore infringes the rights holder's 'communication to the public' exclusive right. The CJEU clarified that in order to be considered a 'communication to the public', a link would need to be a communication to a 'new' public, ie, a public which the rights holder had not intended when they originally published the work.

As such, in the instance where a party uploads material to the internet, the 'communicated public' would include the internet at large. Hence, the linking to a work freely available on the internet could not be considered a communication to a 'new' public. It is, however, important to note that where a work is not freely available, for example in the case where the work might be available behind a paywall, it would be deemed that the rights holder could not be said to have communicated the work to the internet as a whole. Therefore, the act of linking to a work that would circumvent the paywall could constitute a communication to a 'new' public and infringe the rights of the rights holder.

According to the CJEU decision in *GS Media BV v Sanoma Media Netherlands BV*, (C-160/15), linking to a work which is freely available on the internet *without* the rights holder's consent might, under certain circumstances, constitute a 'communication to the public'. Whether such a linking will be deemed to constitute a 'communication to the public' depends on whether the person who provides the links *has knowledge* that the links will provide access to unlawful material. If the purpose of the linking is commercial, it is

assumed that the person who is providing the links is aware that those links provide access to unlawful material. This kind of linking constitutes a 'communication to the public', provided that the person's knowledge of the fact that the links lead to material which has been published without consent from the rights holder cannot be refuted.

### 4.4 Is a licensee of copyright able to bring an infringement action?

Under the Copyright Act, an infringement of copyright is actionable by the copyright owner. When copyright is licensed, the authority to bring an infringement action will become dependent on the type of licence involved. It is, however, clear from the wording of the statute that a licensee can, under the correct circumstances, bring an infringement action.

## 5. Remedies

### 5.1 What remedies are available against a copyright infringer?

The Copyright Act provides the following remedies for rights holders:

- interim injunctions (including infringement investigations, freezing orders and pre-action order to provide information)
- recalling from the market, alteration or destruction of infringing articles
- final and interim injunction under a penalty of a fine against the infringer (including disclosure)
- demand a public acknowledgement of the infringing act
- damages

### 5.2 Are there any specific remedies for online copyright infringement?

There are no specific remedies exclusively available for online copyright infringement. Rights holders are, however, able to utilise the remedies listed above to have internet service providers (ISP) disclose information pertaining to a website if they can show probable cause that the website is used to carry out copyright infringing activities.

### 5.3 Under what circumstances is copyright infringement a criminal act and what sanctions may apply?

In Sweden, any action which could be considered to be an infringing act (see 4.1) can also be considered a criminal act. An infringement is a criminal act if the infringing act was carried out with (criminal) intent or gross negligence. The penalty for the offence is either a fine or up to two years in prison.

Complicit and attempted infringement is also punishable as outlined above. The sanctions involved will in turn depend heavily on the parties' involvement and/or knowledge. It is up to public prosecutors to decide whether to press charges.

### 5.4 Is there a time limit for bringing a copyright infringement claim?

The time limit is 10 years to bring a claim for a breach of copyright. The statute of limitations for the criminal act of infringement is five years.

### 5.5 Can legal (or any other) costs be recovered in an action for copyright infringement? If so, what percentage of costs will typically be recovered by the successful party?

In Sweden, the general rule is that the unsuccessful party reimburses the successful party for their legal costs in the proceedings as long as they are reasonable. It should be noted that this is subject to a great deal of discretion for the court, which will make an assessment at the end of the proceedings whether the costs in question are reasonable. If the parties both win and lose in relation to various parts of the case (for example, the infringement claim is successful but the damage claim is not) the costs of the proceedings can be split between them.

## 6. Enforcement

### 6.1 What courts can you bring a copyright infringement action in, and what monetary thresholds, if any, apply?

In Sweden, the financial value of the claim is inconsequential. In order to bring a civil copyright infringement action the claimant is required to file an application for a summons to the Patent and Market Court, a newly established specialised court in Sweden (Swedish: *Patent- och marknadsdomstolen*).

### 6.2 Are there any other ways in which you can enforce copyright?

#### Seizure

A copyright holder may request seizure by the Swedish Customs Authority of infringing copies being imported into Sweden.

#### Criminal proceedings

Criminal proceedings, although rare, can be brought as outlined in 5.3 above.

### 6.3 What agency bodies are responsible for promoting and/or enforcing copyright? What do they do?

The Swedish Patent and Trademark Office (*Patent och Registreringsverket*, or PRV) is the official government body responsible for intellectual property rights including patents, designs, trade marks and copyright in Sweden. PRV is responsible for:

- IP policy
- educating businesses and consumers about IP rights and responsibilities
- supporting IP enforcement
- granting Swedish patents, trade marks and design rights.

There is no official public body that actively enforces copyright. The Swedish police and the Swedish Customs Authority will target criminal activity (see 5.3) but it is generally up to the rights holders or the rights management agencies to spot infringing work and inform the police or take actions on their own.

### 6.4 What are the main collective rights management agencies that operate in your jurisdiction and who do they represent?

In Sweden there are a number of agencies who represent particular groups of rights holders. However, as a result of the practical difficulties and administrative burden for copyright owners in granting licences individually

to all those seeking them, copyright holders participate in collection schemes by signing up as members of the collecting societies. Once members, they either transfer rights to the collecting society, which then administers the rights for them, or appoint the society as their agent. The key collecting societies in each sector are as follows:

<b>Agency</b>
Bildupphovsrätt i Sverige (BUS)
<b>Who it represents</b>
Visual artists, regardless of their chosen medium, including painters, photographers, illustrators designers, craftspeople and so on
<b>Agency</b>
Sveriges Tonsättares Internationella Musikbyrå (STIM)
<b>Who it represents</b>
Music creators and publishers
<b>Agency</b>
Svenska Artisters och Musikers Intresseorganisation (SAMI)
<b>Who it represents</b>
Performers
<b>Agency</b>
Administration of Literary Rights in Sweden (ALIS)
<b>Who it represents</b>
Writers
<b>Agency</b>
Copyswede
<b>Who it represents</b>
Creators of culture participating in TV and radio productions – such as screenwriters, singers, musicians, composers, actors, writers, directors and photographers
<b>Agency</b>
Bonus Copyright Access
<b>Who it represents</b>
Authors, publishers and editors.
<b>Agency</b>
Teaterförbundet (TF)
<b>Who it represents</b>
Directors, actors, singers and other performers in relation to theatre

## 7. Copyright reform

### 6.5 Are copyright levies payable? By whom, and in what circumstances?

Copyright levies are payable to Copyswede. The products covered by the private copying levy in accordance with the Copyright Act are products which can record sound and moving images and which are considered as being particularly suitable for private copying, eg computers with an internal hard drive, tablets with internal memory, CDs/DVDs, MP3-players, USB sticks, external hard drive, digital boxes with a built-in hard drive and certain types of mobile phones.

Manufacturers, importers or registered retailers (who have taken over the responsibility to report and pay the levy from an importer) who sell storage media to professional users or organisations for the disabled are not required to pay the levy in these cases. The same applies in cases where the products are exported. This is because the levy must only be paid for sales of products that are to be used for private copying.

### 7.1 What do you consider to be the top recent copyright developments?

Since 1 September 2016, all intellectual property rights cases have been referred to the new specialised courts, the Patent and Market Court (*Patent- och marknadsdomstolen*) and the Patent and Market Appeal Court (*Patent- och marknadsöverdomstolen*). This is an important change aimed at improving the procedure both in relation to efficiency and to the quality of the judgments.

From a case law perspective, it is worth noting that in a recent judgment (*Case nos. T-1963-15*), the Supreme Court discussed how to assess whether a work should be considered an adaptation of an existing work or a new and independent work (within the meaning of Section 4 of the Swedish Copyright Act).

If a work is considered an adaptation, the right to exploit the work is conditioned by the fact that the copyright holder of the original work gives their permission to the exploitation. A work which is deemed to be a new and independent work, on the other hand, can be freely exploited by its creator, regardless of the existence of any consent from the copyright holder of the original work. The question in the dispute was whether a painting of a photograph (protected by copyright) was a new and independent work or an adaptation.

The Court came to the conclusion that, even though the painting and the photograph were very similar to each other, the painting had been changed in such way that it expressed a different meaning than the photograph. The Court stated, among other things, that while the photograph was a portrait, the painting represented a criticism of society. Since the painting was deemed to have a purpose different from the purpose of the the original work (the photograph) it was to be deemed a new and independent work.

In two judgments from 2016, the free movement of goods was discussed. In one of the cases, *Textilis*, a UK-founded company sold textiles and textile-related products not protected by any IPRs in the UK, but protected by both copyright and trade marks in Sweden. The products were sold online and on the company's own website, and it was concluded that the products were offered for sale in Sweden. The court came to the conclusion that it was not possible to rely on the fact that the products were not protected in the UK and thus, the company was infringing copyright by selling them. In a later case, this principle was upheld by the Patent and Market Court (*Case nos. T 14506-13 Textilis and B 6871-14 Designers revolt.*).

## **7.2 What do you consider will be the top copyright developments in the next year?**

As part of the new specialised court system, it will only be possible to appeal a judgment from the Patent and Market Court to the Patent and Market Appeal Court. Previously, it was also possible to file an appeal to the Supreme Court. With this new system, it will only be possible to appeal a judgment to the Supreme Court if the Patent and Market Appeal Court allows it (*Sw. venti*). However, even if the Patent and Market Appeal Court decides to allow a case to be appealed, the Supreme Court will still need to grant leave for appeal. It will be interesting to see how the Patent and Market Appeal Court uses this possibility and how the Supreme Court grants that leave to appeal.

From a legislative perspective, it should be noted that the Swedish Government has ordered a special investigation to consider increasing punitive measures in regards to the most serious cases of copyright and trade mark infringement. The outcome of this investigation will be presented by 15 February 2018, at the latest.

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