

Question Q240

National Group: Sweden

Title: **Exhaustion issues in copyright law**

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Questions

I. Current law and practice

The Groups are invited to answer the following questions under their national laws:

Right of distribution

- 1) Does the copyright law of your country recognise the right of distribution within the meaning of Article 6, paragraph (1) of WCT? If so, please cite the provisions which set forth the definition of the right of distribution and recognise such right.

Yes. Sec. 2 of the Act (1960:729) on Copyright in Literary and Artistic Works (hereinafter Swedish Copyright Act) provides the following:

Subject to the limitations prescribed hereinafter, copyright shall include 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 making of copies shall be considered to be any direct or indirect, temporary or permanent preparation of copies of the work, regardless of the form or through which method this is carried out and regardless of whether it concerns the work in whole or in part.

The work is being made available to the public in the following cases

1. When the work is being communicated to the public. This is deemed to include any making available of the work to the public by wire or by wireless means that occurs from a place other than that where the public may enjoy the work. Communication to the public includes also acts of communication that occur in such a way that members of the public may access the work from a place and at a time individually chosen by them.

2. When the work is publicly performed. Such public performance includes only such cases where the work is being made available to the public, with or without the use of a technical device, at the same place as the one where the public may enjoy the work.
3. When copies of the work are publicly displayed. Public display includes only such cases where a copy of a work is being made available to the public, without the use of a technical device, at the same place as the one where the public can enjoy the copy. If a technical device is being used, the act is instead a public performance.
4. When copies of the work are placed on sale, leased, lent or otherwise distributed to the public.

Communication to the public and public performance shall be deemed to include acts of communication and performance to or for a comparatively large closed group of persons for a commercial purpose.

Exhaustion of copyright-protected works

- 2) Does the copyright law of your country recognise the exhaustion of copyright-protected works after the first sale of the work with the authorisation of the author? Is it recognised by statutory law or case law?

Yes. The right is recognised by statutory law.

By virtue of Sec. 19 Swedish Copyright Act when a work (or a copy thereof) has been transferred in the European Economic Area with the rightholder's consent, it may be distributed further.

This exhaustion principle is subject to two exceptions whereupon one may not offer the public a work (or copies thereof), except buildings and artistic designs, for hire or other comparable uses, nor lend the public computer programs (or copies thereof) or cinematographic works (or copies thereof).

Sec. 20 Swedish Copyright Act further provides for the exhaustion of a display right, i.e. when a work has been published that particular copy may be subsequently displayed publicly. This also applies when a work of fine art has been transferred to another.

- 3) How does your law treat exhaustion of copyright-protected works?
Specifically,

- a) Does exhaustion of rights occur for all kinds of works or is exhaustion limited to certain kinds of works?

As a general principle under Swedish law, exhaustion of rights is not limited to certain kinds of works. Thus, the principle of regional exhaustion (EEA) applies to all works (and related rights). However, exhaustion of rights does not cover rental and lending (please see section b) below).

- b) Which right can be exhausted? Is it (a) the right of distribution, and/or (b) the right of reproduction, and/or (c) the right of lending and/or renting of copies?

The right of distribution (Sec. 19 Swedish Copyright Act) and the right to publicly display the work (Sec. 20 Swedish Copyright Act) can be exhausted under Swedish law.

Regarding neighbouring rights, the exhaustion of the right of distribution applies in a similar way in relation to copies of fixations (Secs. 45, 46 and 48 Swedish Copyright Act) and photographs which do not satisfy the originality requirement (Sec. 49a Swedish Copyright Act).

As to works of art, it can be noted that there are specific rules on compensation for further sale of a copy of a work of art (*droit de suite*) (Secs. 26n – 26p Swedish Copyright Act).

Exhaustion of the right to display the work (or a copy thereof) applies to all kinds of works. The rule is also applicable to *catalogues, tables or other similar products in which a large number of information items have been compiled or which is the result of a significant investment* (Sec. 49 Swedish Copyright Act), and photographs which do not satisfy the originality requirement (Sec. 49a Swedish Copyright Act).

- c) What are the requirements for exhaustion of rights to occur? What activities by rightholders are required for exhaustion to apply? Are licencees/buyers required to take any positive steps for exhaustion to be applicable?

Exhaustion of rights occurs when a work (or a copy thereof) has been transferred, with the consent of the rightholder, within the EEA. Thus, it is the first transfer of a copy of a work that constitutes the relevant time for exhaustion of rights to occur. A transfer may occur during sale, exchange or when the work is a gift. The requirement that a work (or copy thereof) must have been transferred with the consent of the rightholder means that an illegal transaction never triggers exhaustion. This applies even to a bona fide acquirer (good faith).

Under Swedish law, it is not necessary that licensees/buyers take any positive steps for exhaustion of rights to be applicable.

- d) If the rightholder A distributes lawful copies made by A to people including B, B purchases a copy from A and sells it to C, and thereafter A cancels the sales agreement between A and B because of non-payment of the price by B to A, may A assert his/her copyright against C? May C rely on exhaustion of A's rights to the work (or the right of distribution)? In this connection, which party (A or C) will keep the right of ownership in the tangible copy?

To our knowledge there is no case law on this specific situation in Sweden. Whether there has been a transfer of title should be decisive for the assessment of this question. If transfer of title has occurred, irrespective of whether payment has been made, rights should be exhausted. If the title has not been transferred, rights should not be exhausted and C may then not rely on exhaustion of A's rights to the work. A would then keep the right of ownership to the tangible work (or copy thereof).

- e) Are there any statutory exceptions to the exhaustion of rights, e.g. transformation of the work by the licensee/buyer prior to re-selling?

There are no statutory exceptions to the exhaustion of the rights such as transformation of the work by the licensee/buyer prior to re-selling, however it is expressly provided in the Swedish Copyright Act that exhaustion does not cover rental and lending rights as described under section b) above.

- f) May the exhaustion of rights be waived contractually?

The Swedish Copyright Act is mainly discretionary legislation. Thus, the legislation allows parties to conclude their own agreements. There are, however, certain

exceptions, and exhaustion of rights has binding effect. This means that the right of exhaustion cannot be changed unilaterally since the rule regulates the relation between the author and the owner of a copy of a work.

However, it is possible for individual parties to enter into separate limiting agreements or agreements that include limiting clauses in connection with specific transactions. If an author would enter into a purchase agreement with a private buyer it would be possible to agree upon that the copy may not be further distributed or publicly displayed. Such a limiting agreement would likely be valid *between the parties* even though the rules of exhaustion stipulates otherwise. It is unclear how this relates to purely digital copies which are not delivered on a tangible medium such as on a CD or DVD.

- 4) What is the rationale/justification under your law for the exhaustion of rights?

The rules regulating exhaustion of rights in the Swedish Copyright Act originate from Article 4.2 InfoSoc Directive (Directive 2001/29/EC). Thus, Sweden's membership in the European Union is the direct reason for the scope of exhaustion of rights. However, the principle of exhaustion of rights has, as such, and in relation to copyright (and neighbouring rights) long been recognized in Sweden and the rationale of the exhaustion of rights is to balance the rights of the rightholders and the rights of the subsequent owners of works (or copies thereof).

International exhaustion (specific issue 1)

- 5) Does your law recognise international exhaustion of copyright? Specifically, if a copyright-protected work stored on a tangible medium (such as CD or DVD) which was lawfully made and distributed outside your jurisdiction is imported into and sold in your jurisdiction, may the holder of the copyright in your jurisdiction assert his/her copyright against such copy?

Currently Swedish law only recognizes exhaustion of copyright (and neighbouring rights) within the European Economic Area (EEA). Before the implementation of the InfoSoc Directive (2001/29/EC) in 2005 exhaustion of rights was worldwide.

- 6) If your law recognises international exhaustion of rights, what is the rationale/justification under your law for such international exhaustion?

Please refer to the answer to question 4).

On-line exhaustion (specific issue 2)

- 7) Does your law recognise on-line exhaustion or exhaustion in the case of downloaded copies of copyrightable works?

Swedish law does not distinguish between different types of exhaustion and exhaustion is likely to apply irrespective of whether a copy of the work is in digital or physical form. Further, in light of the applicability of CJEU case law in Sweden it is likely that a Swedish court would follow the same type of reasoning as in *UsedSoft v Oracle* (C-128/11).

Under which conditions are which kind of rights in different kinds of copyright-protected works exhausted?

Please refer to the answer to question 3).

- 8) Are rights exhausted in a perpetual or non-perpetual licence?

A copyright licence agreement is per definition not a sale. Since no sale has occurred, no copyright has been exhausted under Sec. 19 Swedish Copyright Act, irrespective of whether the licence is perpetual or non-perpetual because the work as such as not been transferred by the rightholder.

The outcome may however be different if the licence agreement is found to constitute something other than a licence, e.g. a sale from a rightholder to a third party. In this respect, whether a so-called licence is perpetual may be relevant for the question whether the "licence" does in fact constitute a sale.

Are "re-sellers" of digital copies allowed to further re-sell such digital copies under the circumstances described in *UsedSoft v. Oracle*?

Under the circumstances described in *UsedSoft*, and in light of the applicability of CJEU case law in Sweden, it is likely that a Swedish court will reach the same decision as the CJEU did in *UsedSoft*.

Can multi-user-licences be split up and sold separately?

For the purposes of this question, we understand the question to concern whether a multi-user-license may be split up and re-sold by the licensee.

If the multi-user-license does indeed constitute a licence according to the above, no sale has occurred. Since no sale has occurred, no copyright has been exhausted under Sec. 19 Swedish Copyright Act and the multi-user-license cannot be split up and sold separately without infringing the rightholder's copyright.

However, under the circumstances described in *UsedSoft*, and in light of the applicability of CJEU case law in Sweden, it is likely that a Swedish court would find that multi-user-licences constitute a sale of several copies (albeit not physical ones) of a copyright licence. Since copies of the copyrighted work have been sold by the right holder to a third party, the copyright in the copies have been exhausted and those copies can be re-sold by the third party in its capacity as owner of those copies under Sec. 19 Swedish Copyright Act.

- 9) Is a distinction made for each kind of copyright-protected work (computer programs, music files, e-books and videos)?

A distinction is not made for each kind of copyright-protected work. In the Swedish Copyright Act some examples of types of copyright-protected works are provided when stating that copyright-protection subsists in literary or artistic works regardless of whether it is (i) a fictional or descriptive representation in writing or speech, (ii) a computer program, (iii) a musical or dramatic work, (iv) a cinematographic work, (v) a photographic work or another work of fine arts, (vi) a work of architecture or applied art, or a work expressed in some other manner.

- 10) If your exhaustion regime for digital works differs from that for analogue works, what is the rationale/justification for such difference?

Swedish law does not differentiate between exhaustion of digital works and of analogue works.

Exhaustion of copyright-protected works in case of recycling and repair of goods (specific issue 3)

- 11) In the case of recycling or repair of goods which are copyright-protected works, to what extent may one recycle or repair such goods without infringing (1) the right of reproduction, (2) the right of adaptation, the right of arrangement and/or other alteration rights; or (3) the right to integrity?

This is not a problem under Swedish law. It does not seem as if copyright creates a direct hindrance to recycle or repair goods which are copyrighted goods. There is an explicit exception on repair in works of applied arts, and buildings, in Sec. 26c Swedish Copyright Act. In line with international discussions there might however be a potential problem with lack of access to handbooks and repair manuals, since these are themselves protected by copyright.

II. Policy considerations and proposals for improvements of the current law

- 12) How should the law treat exhaustion of rights?
Specifically,

- a) Should exhaustion of rights occur for all kinds of works or should exhaustion be limited to certain kinds of works?

Directive 91/250/EEC (computer programs), Article 4 c
Directive 2001/29/EC (infosoc-directive), para 28 and 29
Directive 2006/115/EC (rental and lending)

Exhaustion of rights should not apply to all kind of works as regards:

- a. making the copy available to the public through placing the copy on sale or display – exhaustion of rights for (i) all kind of works.
- b. making the copy available to the public through rental – no exhaustion of right, except for (i) buildings, (i) works of applied art and (iii) art works.
- c. making the copy available to the public through lending – exhaustion of rights, except for (i) computer programs and (ii) film works.

- b) Which right(s) should be exhausted?

Only the rights to publicly distribute the copy and publicly display the copy should be exhausted. See above.

The same rules should apply for exhaustion of rights to distribution and display in relation to neighbouring rights.

Moral rights and droit de suite should not be exhausted.

- c) What should be the requirements for exhaustion of rights to occur?

The copy should have been transferred with the consent of the rightholder.

- d) Should copyright be exhausted even if the first sale of a copy by which exhaustion occurs is cancelled due to non-payment of the sales price or similar circumstance?

It depends on whether there has been a transfer of title. If transfer of title has occurred, irrespective of whether payment has been made, rights should be exhausted. If the title has not been transferred, rights should not be exhausted.

International exhaustion (specific issue 1)

- 13) Should there be international exhaustion of copyrights?

Whereas the Swedish group recognizes that international exhaustion of rights may be opposed by various rights holders, inter alia since such exhaustion may diminish their control over goods entering the EU market and since importation of exhausted products may exact downward pressure on prices, the Swedish group is of the opinion that there should be international exhaustion, not least because of the globalized world in which works are distributed, whether on the Internet or otherwise, and the interest of ensuring legal certainty that the legitimate purchase of a copyright-protected work from a rightholder abroad will not be subject to the risk of infringement proceedings in the home jurisdiction by the national rightholder when the purchaser subsequently wishes to sell the work on their return.

On-line exhaustion (specific issue 2)

- 14) Should there be on-line exhaustion of downloaded copies? In your view, are downloaded copies fully comparable with copies stored on tangible data media?

Yes. The opinion of the Swedish group is that the difference between copies stored on tangible media (such as a CD or DVD) and downloaded copies is the method of distribution, whereas the economic transaction remains the same. If the rightholder has consented to the transfer and obtained remuneration for the copy of the work exhaustion should apply. The Swedish group recognizes, however, the issue of ascertaining by a subsequent acquirer that a downloaded copy (e.g. a song) was originally transferred with the consent of the rightholder. The distribution of downloaded copies consequently raises questions regarding exhaustion, which distribution of copies stored on tangible media simply does not. Thus, the Swedish group notes that the principle of exhaustion is not suitable in its full capacity for downloaded copies as for copies stored on tangible media, however as long as it can be ascertained that a copy has been transferred with the consent of the right holder exhaustion should apply. The Swedish group believes this is a reasonable and fair development of the principle of exhaustion, especially that sophisticated digital rights management (DRM) systems are available to rightholders and introducing a mechanism permitting the transfer of "purchased" digital works to a third party is not a technical impossibility today for the many digital online marketplace operators.

- 15) If there should be on-line exhaustion, under which conditions should different kinds of rights be exhausted? Should there be any differences between downloading a work and streaming it? Should rights be exhausted in a perpetual or non-perpetual licence? Should "re-sellers" of digital copies be allowed to further re-sell such digital copies? Should multi-user-licences be split up and sold separately?

The principle of exhaustion should not apply to streaming services. A streaming service is an online access service, usually provided for a recurring subscription fee, rather than a one-off fee with perpetual access. For this reason it differs from paying for a specific song and permanently downloading it to the hard drive of a device.

- 16) Should a distinction be made for each type of copyright-protected work (e.g. computer programs, music, books and films)?

The Swedish group cannot see that there should be any distinction between different kinds of works. The assessment should be the same.

Should rights be exhausted in a perpetual or non-perpetual license?

Based on *UsedSoft* a licence could be considered as a sale. The Swedish group believes that an assessment should be made on the basis of all relevant circumstances in order to decide whether or not a licence is a licence or in fact a sale and thus if exhaustion is at hand.

Should "re-sellers" of digital copies be allowed to further re-sell such digital copies?

Yes, if the right holder has consented to the original transfer and/or obtained a remuneration corresponding to the economic value of the copy for that transfer.

Exhaustion of copyright-protected works in case of recycling or repair of goods (specific issue 3)

17) To what extent should one be able to recycle or repair goods which are copyrightable works without infringing (1) the right of reproduction, (2) the right of adaptation, arrangement and other alteration rights; and (3) the right to integrity?

It should be possible to recycle or repair goods which are copyrightable works, in accordance to what is possible today.

III. Proposals for harmonisation

18) Should exhaustion of rights as set forth in Question 12 above generally be harmonised? Please provide your reasons.

The Swedish group is of the opinion that same principal of exhaustion of rights should occur for all kinds of works, and also the same principal should apply for digital as well tangible works.

Worldwide exhaustion benefits global free trade and is in the interest of consumers in the form of competitive parallel importation.

However, there should be limitations related to lending and rental of works.

19) Should international exhaustion of rights be harmonised or not? Please provide your reasons.

The Swedish group is in favour of international exhaustion of rights to be harmonised.

Due to the global market and today's mobility of both consumers and goods, it is likely that consumers generally appreciate that the exhaustion of copyright (and related rights) is global and not regional. If this is true, international exhaustion of copyright is more in line with the common sense of justice than regional exhaustion. Moreover, it is difficult to control the observance of the rules on regional exhaustion, thus, regional exhaustion may give the rightholders a false sense of security. With harmonised international exhaustion of rights, rightholders would instead set their prices and strategy taking regard to the disposals after the first sale that the global market makes possible.

20) Should on-line exhaustion of rights be harmonised? Please provide your reasons.

The Swedish group is of the opinion that same principle should apply for downloaded works, works stored on tangible media, and tangible works (e.g. a painting or a book).

See above answers 18-19.

21) Should exhaustion of rights in case of recycling and repair of goods be harmonised? Please provide your reasons.

No opinion.

SUMMARY

In Sweden exhaustion of rights is recognized under statutory provisions. The principle of exhaustion concerns the distribution right and the right to publicly display the work, and it does not distinguish between different types of works (such as a tangible work and a digital work). The Swedish Copyright Act provides expressly that the principle does not incorporate a rental and lending right (with the exception of buildings and artistic designs). There are no special requirements for exhaustion to be applicable, except the transfer of a work to another within the European Economic Area with the rightholder's consent. By virtue of Sweden's membership in the EU, a Swedish Court is likely to follow the same reasoning as the CJEU in *UsedSoft v Oracle* if faced with the same facts.

Whereas the Swedish Group recognizes that international exhaustion of rights may be opposed by various rights holders the Swedish Group is of the opinion that there should be international exhaustion, not least because of the globalized world in which works are distributed, whether on the Internet or otherwise, and the interest of ensuring legal certainty that the legitimate purchase of a copyright-protected work from a rightholder abroad will not be subject to the risk of infringement proceedings in the home jurisdiction by the national rightholder when the purchaser subsequently wishes to sell the work on their return. Consequently the Swedish groups also believes that the exhaustion principle should be harmonized.

Furthermore the Swedish Group believes online-exhaustion to be desirable for all works, however the Group recognizes the practical issue of ascertaining by a subsequent acquirer that a downloaded copy (e.g. a song) was originally transferred with the consent of the rightholder. The distribution of downloaded copies consequently raises questions regarding exhaustion, which distribution of copies in tangible form or stored on tangible media simply does not. Thus, the Swedish Group notes that the principle of exhaustion is not suitable in its full capacity for downloaded copies, unless it can be ascertained that a copy has been transferred with the consent of the right holder, in which case exhaustion should apply.

With regard to Questions 18 through 21, if you note that harmonisation is desirable, we will assume that harmonisation should be as your proposals for improvements of the current law as described in your answers to Questions 12 through 17. If that is not the case, please explain.