**Sweden**
**Suède**
**Schweden**

# Report Q 183 – Employers' rights to intellectual property

**In the name of the Swedish Group by**

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## 1. The State of positive Law

**1.1 The Groups are invited to present the legal framework governing relations between employers and employees in the field of intellectual property rights.**
**In particular, the Groups are invited to state whether these rules arise from provisions concerning labour law or whether these rules arise from provisions concerning intellectual property rights.**
**In addition, the Groups are invited to state whether these rules may be considered as being public policy rules (i.e. mandatory rules) or whether, on the contrary, they may be modified by contractual relations between employees and employers.**

The employers' rights to intellectual property created by employees in Sweden are generally found in the intellectual property acts. However, for certain intellectual property rights a transfer from the employee to the employer still follows according to general principles of law.

In Sweden, a specific law regulates employers' rights to employees' patentable inventions; the Swedish Act on the Right to Employee's Inventions (1949:345). The Act is mostly non-mandatory. The most important employee rights, however, are mandatory. The Swedish laws do not protect Utility Models.

The Swedish Act on the Protection of Plant Breeder's Rights (1971:392) does not have special regulations concerning plant varieties created in employment relationships. A transfer follows according to general principles of law.

There are no explicit provisions in the Swedish Act on Copyright in Literary and Artistic Works (1960:729) as to works, other than computer programs, concerning employed authors. A transfer of employees' economic rights in a work can be made by means of a collective agreement or individual employment contracts. In situations in which nothing has been expressly agreed, a transfer can apply implicitly in certain cases by virtue of the nature of the employment relationship. In such cases, guidance should be sought in the nature of the employment relationship as well as the general terms and customary

practice applicable in the sector. The general principle of law, where there is no express agreement, is that the employer may in regular business activities use such works as have been created by an employee as part of employment working tasks, or as a result of the instructions given to the employee by the employer. The scope of such use is determined on the basis of the point in time when the work came into being. This general principle is laid down in the Labour Court's judgement of 2002 No. 87. Further, there are no explicit provisions in the Act on Copyright governing employers' rights to employees' rights neighbouring to copyright. Performers, photographers and producers may be granted neighbouring rights. However, most of the copyright provisions apply *mutatis mutandis* to neighbouring rights and therefore the same general principles of law in general are applicable to the transfer from the employee to the employer.

Sec. 40a of the Act on Copyright states that the copyrights in computer programs created within the scope of employment, or when following instructions given by an employer, is automatically transferred to the employer, in the absence of contrary agreement.

Sec. 3(2) of the Swedish Act on the Protection of Topographies for Semiconductor Products (1992:1685) provides that the employer has the rights in semiconductor chips where a semiconductor chip has been created within the scope of the duties of the employment relationship, unless agreed otherwise.

One should distinguish between two types of protection relating to industrial designs existing parallel; national design protection and the European Community design protection, see Regulation (EC) No 6/2002 on Community Designs. In Sweden, general principles of law transfer the design right from the employee to the employer, where an employee in the course of employment has created a design. However, unless agreed otherwise, the right to a community design vests in the employer, where an employee in the execution of duties or following the instructions given by the employer develops a design, see Art. 14(3) of the Regulation. The Swedish Design Protection Act (1970:485) is under legislative review and it is likely that a new provision will be enacted in compliance with Art. 14(3) of the Regulation on Community Designs.

**1.2 The Groups are invited to specify, for each of the intellectual property rights (patents, plant variety rights, copyright or authors' rights, patterns and models, and software rights, it being recalled that trademarks and brand rights are expressly excluded from the scope of the study in question) what are the legal solutions concerning ownership of rights over intellectual creations:**
**- Do these rights originally belong to the employer or the employee?**

**- If these rights belong to the employer from the outset, what are the conditions for this attribution?**
**- And if these rights originally belong to the employee, does the employer have the right to have them transferred to it and under what conditions?**
**And the Groups are also invited to specify, as far as it concerns patents, if it is the employer who is the owner, from the outset, of the intellectual property rights over inventions made by employees in the context of their employment contract and in the performance of their tasks.**
**The Groups are invited to give replies both with respect to moral rights and economic rights for each type of intellectual property rights.**

In Sweden, a legal person, such as an employer, may in general not be deemed the initial owner of an intellectual property right. These rights are linked to individual physical persons. Therefore, an employer normally may only obtain intellectual property rights by assignment in contract or by law.

The Act on the Right to Employee's Inventions, individual contracts or collective agreements governs the transfer of patent rights in inventions. However, the employee has a mandatory right to a reasonable remuneration in compensation for the rights transferred to the employer. In the Act, three different categories of employees' inventions exist. The rights of the employee and the employer differ depending on the type of invention. The first category concerns inventions made within the scope of employment by an employee engaged with the purpose to invent. The connection is considered as very strong in these cases and the employer is entitled to appear as an assignee of the invention. The second category regulates an invention that falls within the scope of business but is created under circumstances differing from the first category. The employer is entitled to use the invention in regular business activities (license). The third category refers to inventions that fall within the scope of business but not the scope of employment. In such cases, the employer is given the right of preference.

The employer is entitled to acquire all rights in design and plant varieties by individual contracts or collective agreements. Where there is no express agreement, a transfer follows according to general principles of law.

The general principle in Sweden is that copyright in works, except for computer programs, may be transferred by agreement as a whole or in part with the limitations of the moral rights. The exploitation rights granted to the employer are, however, limited to the use of the work to carry out normal business activities. For any other exploitation of employees' works, the prior consent of the creator (employee) is required. No formal requirements exist on agreements for the transfer

of the copyright in works, and assignments are often made by implied agreements. Sometimes they are regulated in collective agreements.

Sec. 40a of the Copyright Act deals with the copyright in computer programs. Automatic transfer is applicable to programs created within the performance of the usual tasks of the employee, or following the employer's instructions, in the absence of contrary agreement. Under Swedish law it is a transfer of the economic rights as well the moral rights. On the other hand, if a transfer is agreed in a contract, it only covers the economic rights and the employer must respect the limitations related to the moral rights.

As regards rights neighbouring copyright the initial holder of a producers' rights may be the employee or the employer. In most situations it is the employer. As regards performers and photographers, the initial holder of neighbouring rights is always the employee.

Finally, the employer acquires automatically all rights in a semiconductor chip because of Sec. 3(2) of the Act on Semiconductor Products, in the absence of contrary agreement.

**1.3 The Groups are also invited to provide information on procedures concerning potential disputes concerning the ownership of intellectual property rights over employees' creations.**
**Are these disputes within the jurisdiction of labour courts or, on the contrary, are they within the jurisdiction of the courts which are usually competent for intellectual property disputes?**
**Is there a prior conciliation stage and if so, does it take place before the same court as the one having jurisdiction over disputes concerning the ownership or conditions for use of intellectual property rights over creations made by employees?**
**Does the termination of the employment contract have an influence on the action which an employer can bring to obtain the attribution of rights over an employee's creation?**
**Is there a limitation or statute-barring of the exercise of an action concerning the attribution of ownership rights over an invention or creation made by an employee in the context of an employment contract?**
**Can the employee require the filing of a patent application in order to protect his invention or his other creations (registering patterns and models, etc.)?**

Disputes concerning employees' inventions, as regulated in the Act on the Right to Employee's Inventions, are from April 1, 1992 within the jurisdiction of the Stockholm District Court. Previously it was a matter for the Swedish Labour Court. There is also an advisory committee, the National Swedish Committee for Employee Inventions, where both the employer and the employee can seek advice in a conflict. On the other

hand, a special arbitration board handles disputes arising from collective agreements.

In the Act on the Right to Employee's Inventions the employer is given a right of preference, to be used within four months, to acquire a right to an employee's invention. During this period the employee may file a patent application. If the employer acquires the patent right, the patent application has to be transferred to the employer, at the employers own request.

Disputes concerning other intellectual property rights are under jurisdiction of the general national courts as well as the special Labour Court. Which court shall have jurisdiction in the individual case depends on whether a dispute arises from an individual contract or a collective agreement. However, decisions by general national courts may be appealed in principle to the special Labour Court.

After the termination of the employment contract the same courts as mentioned above have jurisdiction in disputes concerning the employers' right to employees' intellectual property rights.

**1.4 The Groups are also invited to state whether there is a difference in status between employees in the private sector and researchers in universities or research institutes which receive public funding from the point of view of the employers rights.**

In Sweden, teachers/researchers employed by universities or equivalent institutions principally own their inventions and any copyright in their works (*teacher exception*). As regards inventions, this is stated in the Act on the Right to Employee's Inventions and as regards copyright in works, this follows from practices. It is uncertain whether Sec. 40a of the Copyright Act or Sec. 3(2) of the Act on Semiconductor Products also includes teachers. It is likely that the teacher exception applies to teacher's design or plant varieties. The underlying concept of the teacher exception is academic freedom. It should be noted that the question of ownership, as a main principle, is not affected by whether the university's research funding comes from industry, a research council or other source. However, if the funding comes from industry a transfer normally is included in the contract.

On the other hand, with regard to researchers employed by publicly funded research institutes and agencies, e.g. the Swedish Defence Research Institute, the employer may claim intellectual property rights in the objects in the same manner as with employees in general.

**1.5 An important question in practice is whether compensation is due to employees in return for the rights of employers over the creations made by employees.**

**Moreover, it is in this field that the greatest disparities are currently observed in the world.**
**The Groups are therefore invited to specify whether their domestic laws provide employees with a right to compensation (financial or in nature) in return for the transfer of rights over their creations to their employers.**
**How is this compensation calculated?**
**What is the time limit for prescription or statute-barring of a claim for payment of this compensation?**

The employee has a mandatory right to a reasonable remuneration in compensation for the patent rights in an invention that are transferred to the employer. The parties involved shall decide the amount of the remuneration. The value of the invention, the scope of the rights acquired by the employer, the terms of employment and the significance that the employment may have had in the making of the invention are factors taken into consideration when determining the amount of remuneration. The weaker the connection between the scope of employment and the invention, the stronger is the right to remuneration. The compensation right must be exercised within 10 years from the day the employer was notified by the employee.

For other intellectual property rights there are no mandatory provisions that provide employees with a right to compensation.

**1.6 Finally, the Groups are invited to state whether there is a significant level of dispute in their countries concerning the ownership and use of rights over intellectual creations made by employees, and to give a general opinion on the effectiveness and/or efficiency of the national system.**

The frequency of intellectual property ownership disputes being brought to the courts is very low in Sweden. On the other hand, intellectual property ownership disputes in general are fairly common but often are settled before the court or arbitration proceeding.

**2. Suggestions with respect to International Harmonisation**
**The Groups are invited to reply to the following Questions concerning the possible harmonisation of the status of employers' rights over intellectual creations made by their employees.**

**2.1 Do the Groups think that such harmonisation is desirable on the international level for each of the types of intellectual property rights?**
**Do the Groups wish such harmonisation to be undertaken through labour law rules or through rules of intellectual property law?**

The Swedish Group believes that harmonisation would be desirable; particularly as intellectual property rights show an increasing tendency to overlap so that a given object of intellectual creativity may be covered by several and perhaps conflicting rights. Divergent rules, national and international, concerning employees and employers' rights create uncertainty, this especially when companies act across borders.

The Swedish Group is of the opinion that harmonisation should be carried out through the rules of intellectual property law, this particularly as Art. 2(3) of the Directive 91/250/EEC on the Legal Protection of Computer Programs in general has been implemented in the member states intellectual property laws and as Art. 14(3) of the Regulation (EC) No 6/2002 on Community Designs is directly applicable in all EC Member States. See also Recital 29 of the Directive 96/9/EC on the legal protection of databases, Art. 11(4) of the Council Regulation (EC) No 2100/94 on Community plant variety rights and Art. 3(2)(a) of the Council Directive 87/54/EEC on the legal protection of topographies of semiconductor products.

**2.2 The Groups are requested to state whether as a general rule it is the employer who is to be the owner, from the outset, of the intellectual property rights over creations made by employees in the context of their employment contract and in the performance of their tasks, or whether, on the contrary, it is the employee who must conserve his rights, but with the possibility for the employer to have them attributed to it under certain conditions.**

Since in Sweden a legal person, such as an employer, in general may not be the initial owner of intellectual property rights, an employer should have the possibility to have those rights transferred under certain conditions found in the intellectual property acts.

**2.3 If the employer was to be considered as owner from the outset of the intellectual property rights over creations made by employees, do the Groups think that the employee should receive a particular reward, in addition to his salary, for these creations, or do they think that such a reward is not justified?**
**If, on the contrary, the employer is not vested from the outset in the intellectual property rights over creations made by employees, what would be the conditions for the attribution of these rights and, in particular, what could the remuneration be, corresponding with the possibility of having the intellectual property rights in question attributed to the employer?**
**Do the Groups consider that the adoption in principle of a reward could have an influence over the general system of intellectual property rights and if so, what would that influence be?**

The Swedish group believes that a reward to the employee may be justified, especially when employed inventors are economically compensated for the rights that are transferred to the employer. However, the Swedish Group is of the opinion that coherent principles are preferable to all intellectual property rights.

**2.4 The Groups are also invited to present their opinions on the organisation of disputes concerning the attribution of intellectual property rights over employees' creations and concerning their use by employers.**
**Are the Groups of the opinion that such disputes should be governed by the courts which have jurisdiction in labour law matters, or are they more of the opinion that these disputes should be subject to those courts which judge intellectual property disputes?**
**It should be recalled that the disputes may concern various aspects of relations between employers and employees: attribution of ownership of such rights; decisions concerning the means of protection and, finally, any compensation as may be due.**

The Swedish Group is of the opinion that due to the low frequency of court disputes and the different courts jurisdictions, it is important that litigation be channelled in to one court. This would allow that courts to gain experience and practice in these matters.

**2.5 The Groups are also invited to give their opinion on the existence of differences, if any, between the status of private sector employees and researchers in universities and in research institutes which are financed by public funds.**
**Are there any grounds for providing for a difference in treatment in the hypothesis of international harmonisation or, on the contrary, should all employees and researchers be treated in the same way?**
**Finally, the Groups are invited to make any and all further suggestions concerning a possible international harmonisation of the status of employers' rights over employees' intellectual creations.**

It is debatable whether it is a good or a bad situation that researchers/teachers at universities are treated in the same way as employees in general. However, in the opinion of the Swedish Group it is of great importance to secure academic freedom. Researchers' academic freedom is the right to decide when, how and in which circumstances the results shall be published.

Finally, the Swedish Group believes that a significant number of questions have to be considered before it is possible to harmonise the

status of employers' rights to employees' intellectual creations. European intellectual property laws have been harmonised in the area of employers' right to employees' computer programs and community design. The opinion of the Swedish Group is that further harmonisation shall correspond to those criteria laid down in the Directive 91/250/EEC on the Legal Protection of Computer Programs and the Regulation (EC) No 6/2002 on Community Designs. Compare with Art. 11(4) of the Council Regulation (EC) No 2100/94 on Community plant variety rights and Art. 3(2)(a) of the Council Directive 87/54/EEC on the legal protection of topographies of semiconductor products.

**Summary**

The Swedish Group believes that harmonisation of employers' rights to intellectual property rights would be desirable, particularly as intellectual property show an increasing tendency to overlap. Several different and perhaps conflicting rights may cover a given object of intellectual creativity. Divergent rules, national and international, create uncertainty when companies act across borders. The Swedish Group is of the opinion that it is important that the same principles should apply to all intellectual property rights. However, a significant number of questions have to be considered before it would be possible to harmonise the legal status of employers' rights to employees' intellectual creations, e.g. the initial ownership by legal persons, economic compensation and universities' ownership of researchers'/teachers' intellectual property. The Swedish Group recommends that the work on Q 183 be continued.

**Zusammenfassung**

Die schwedische Gruppe ist der Ansicht, daß eine Harmonisierung im Bereich von Arbeitgeberrechten am geistigen Eigentum erstrebenswert ist, insbesondere weil die geistigen Schutzrechte eine zunehmende Tendenz zu Überschneidungen aufweisen. Ein Schutzobjekt mag von mehreren verschiedenen, eventuell kollidierenden Rechten gedeckt sein. Verschiedene gesetzliche Ausgestaltungen, national wie international, verursachen Rechtsunsicherheit für grenzüberschreitend tätige Unternehmen. Die schwedische Gruppe ist der Ansicht, daß die gleichen Prinzipien auf jeden Typ geistigen Eigentums anwendbar sein sollten. Sicherlich ist eine beträchtliche Anzahl an Fragen zu bedenken, bevor eine Harmonisierung der Arbeitgeberrechte an Arbeitnehmererfindungen möglich ist, wie z.b. die Fähigkeit juristischer Personen zum originären Eigentumserwerb, die Frage der angemessenen wirtschaftlichen Vergütung sowie die Frage des Eigentumsübergangs von Forschungserfindungen an die Universitäten. Die schwedische Gruppe empfiehlt, Q 183 fortzusetzen/beizubehalten.

**Sommaire**

Le groupe suédois pense que l'harmonisation des droits des employeurs dans le domaine de la propriété intellectuelle serait

désirable, particulièrement comme des propriétés intellectuelles de plus en plus montrent une tendance à se cumuler. Une création donnée peut être couverte par une multitude de droits différents et d'aventure en conflit. Des droits différents, nationaux et internationaux, créent une incertitude quand des entreprises opèrent en franchissant des frontières. Le groupe suédois a le point de vue qu'il est important que les mêmes principes sont applicables pour tous les propriétés intellectuelles. Cependant, un grand nombre de questions doivent être considéré avant qu'il sera possible d'harmoniser la portée des droits des employeurs sur des créations intellectuelles des salariés, comme exemples le droit dès l'origine de propriété des personnes morales, la compensation financière et les droits de propriété des universités sur la propriété intellectuelle des chercheurs/professeurs. Le groupe suédois recommande la continuation de la Q 183.