# Question Q216

**National Group:** Sweden

**Title:** **Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors**

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## Questions

The purpose of Q216A is to explore exceptions to copyright protection resulting not from issues of eligibility/qualification for protection but from various exceptions, permitted uses or defences. As stated above, this purpose is of itself extremely broad ranging. As such, the work will be limited to a small number of the potential exceptions, permitted uses or defences.

***Questions about specific exceptions or permitted uses existing in your country/region***

**1. What exceptions or permitted uses apply in relation to the activities of an ISP or other intermediaries?**

The Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce Directive) provides an ISP with exceptions from liability for infringement where the ISP is acting as a "mere conduit" or where works are copied in the course of caching or hosting. The E-Commerce Directive has been implemented in Swedish law through the Swedish Electronic Commerce Act (2002:562). The aforementioned exceptions from liability will apply provided that a number of conditions are complied with and provided that the infringing material is removed expeditiously once the ISP becomes aware of it.

In line with the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive), Section 11a of the Swedish Copyright Act (1960:729) provides that the exclusive right of reproduction is subject to an exception to allow temporary/transient copies. Said exception enables browsing as well as acts of caching, similarly to the E-Commerce Directive. Swedish preparatory works have also concluded that the act of reproduction in relation to more permanent copies on an ISP's server may not be ascribed to the ISP where the act is performed by the ISP's customer and

where the ISP is not able to influence the reproduction. Hence, in the aforementioned situations the services provided by an ISP are not considered to infringe the relevant right holder's exclusive economic rights.

**Are there any limitations on those exceptions/uses, for example when the ISP is put on notice of unlawful content?**

The aforementioned exceptions only apply within certain strict limits. Hence, the exceptions can be considered limited by their respective restricted applicability.

Preamble 46 of the E-Commerce Directive further states that in order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, has to act expeditiously to remove or to disable access to the information concerned upon obtaining actual knowledge or awareness of illegal activities. Furthermore, contributory liability on behalf of the ISP may theoretically arise where the ISP is put on notice that it's customer is e.g. utilizing the ISP's server space in a manner that constitutes copyright infringement. In such situations the ISP may be deemed to contribute to the act of infringement through promotion of such acts.

**Which types of service providers may benefit from such exceptions: would they, for example, apply to UGC sites such as YouTube or social networking sites such as FaceBook?**

According to the preparatory works to the Swedish Electronic Commerce Act, the exceptions are applicable in relation to a large number of different types of services and service providers (e.g. bulletin board systems, web hotels, chat forums, web portals etc.). It is thus reasonable to assume that the exceptions of the E-Commerce Directive will apply to said UGC sites as well.

Under the Swedish Act (1998:112) on Responsibility for Electronic Bulletin Boards (BBS Act), which for example should apply to a site such as YouTube, the provider of the site is required to monitor the service in such a way as can reasonably be required considering the scope of the service and its general theme. The provider also has a responsibility of removing or preventing the spread of certain messages, if the message e.g. constitutes a copyright infrigment. According to the preparatory works to the Electronic Commerce Act, the BBS Act is not in conflict with the prohibition of general monitoring requirements in the E-Commerce Directive since case law under the BBS Act has defined a fairly "low" requirement of monitoring activities (e.g. a "complaint wall" may be sufficient).

**2. Do service or access providers have any obligation (in co-operation with intellectual property right owners or otherwise) to identify, notify or take remedial steps (including termination of access) in relation to their customers who infringe? Is the position different depending on whether the customer has only infringed once or has carried out repeated infringing activities? Do any such obligations affect the scope of the exceptions or permitted uses that apply to those service or access providers?**

The Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED Directive) has been implemented in Swedish law. Prior to the implementation of the IPRED Directive, Swedish law did not provide any specific or comprehensive rules governing the opportunity of a right holder to receive information regarding the identity of e.g. Internet users infringing such right holder's proprietary rights. Through the implementation of the IPRED

Directive, it has become possible for Swedish courts to order e.g. ISPs to supply information regarding suspected infringements by way of a simplified court procedure.

The aforementioned duty to disclose information is governed by Section 53c in the Swedish Copyright Act. In order to obtain an information order, the right holder must first show that there is a probable cause of copyright infringement. However, there is no requirement for the right holder to show that the infringement was carried out intentionally or through negligence. Further, the court has to perform a general proportionality assessment. If all prerequisites are fulfilled the Court may order, under a penalty of a fine, ISPs and other parties in the distribution chain to provide information to the right holder concerning the origin and distribution networks for the goods or services in respect of which the infringement or the violation has been committed.

Consequently, ISPs can be obligated to identify customers who infringe. However, the ISPs are not on their own initiative, obligated to notify any detected infringement. The Electronic Commerce Act provides no general obligation for the ISPs to monitor the information which they transmit or store, or to actively seek facts or circumstances indicating illegal activity (cf. limited monitoring requirements under the Swedish BBS Act above).

The first Swedish information order case has been appealed (via the Court of Appeal) to the Supreme Court. The Court of Appeal ruled that it had not been shown that the relevant works had been made available to the public and not only to a private community (see Svea Court of Appeal, decision 2009-10-13, case nr ÖÄ 6091-09). The Supreme Court will now finally decide on the matter.

In addition to being ordered to disclose information regarding their customers who infringe, ISPs can also be obligated to take remedial steps in relation to these customers under the Copyright Act. According to Section 53b of said act, a Court may issue an injunction prohibiting, under a penalty of a fine, a party that commits, or contributes to, an act constituting an infringement or a violation of the Copyright Act to continue that act. That an ISP may be the subject of such injunction has preliminarily been confirmed in one of the civil cases following the widely reported Pirate Bay- case (see Stockholm District court, decision 2009-04-17, case nr B 13301-06). In the Black Internet-case the Court held that the ISP Black Internet objectively could be deemed to be an accomplice to the infringements carried out by the users of The Pirate Bay. Consequently, the Court granted the injunction and the case became the first in Sweden where an ISP was ordered by the Court to cut Internet access to a certain site (see Stockholm District Court, decision 2009-08-21, case nr T 7540-09/T 11712-09). In the so called Portlane-case the injunction was, however, denied. The Court inter alia concluded that the mere fact than an ISP provides Internet access is not enough for intermediary liability for contributory copyright infringement (see Stockholm District Court, decision 2009-12-01, case nr 17127-09). The judgments seem to contradict each other and they have both been appealed. Clarity regarding ISP's responsibility in this context will not be reached until the Court of Appeal and maybe the Supreme Court have tried these cases.

The aforementioned obligations of ISPs do not affect the scope of the exceptions or permitted uses that apply to the services provided by the ISPs (see previous question). The exceptions in the E-Commerce Directive only protect against criminal liability and damages. Hence, they do not prevent the grant of injunctions. However, in this connection it should be noticed that the limitation to the exceptions means that an ISP may have to pay damages or be subject to a sanction if not, upon obtaining actual knowledge or awareness of illegal activities, acting expeditiously to remove or to disable access to the information concerned under the limitations to the exceptions set forth in the Electronic Commerce Act. This means that, also based on said provisions, there is under said prerequisites an obligation to take

remedial steps (including to disable access to the information concerned) in relation to customers who infringe.

It can finally be noted that the obligation to disclose information or the possibility for the Court to order an injunction is not affected by whether a customer has only infringed once or has carried out repeated infringing activities.

## 3. What exceptions exist for "digitisation" or to allow for format shifting of sound recordings, films, broadcasts or other works?

Digitisation or format shifting of sound recordings, films, broadcasts as well as other works are considered as copying and provisions on exceptions from copyright for copying are found in the Swedish Copyright Act.

According to Section 12, anybody is entitled to make one or few copies of works that have been made public, for private purposes. A work is, according to Article 8, deemed do have been made public when it has lawfully been made available to the public. As regards literary works in analogue as well as digital written form, the making of copies may, however, concern only limited parts of works, or such works of limited scope. The copies must not be used for purposes other than private use. The right does not confer a right to make copies of a work when the copy that constitutes the real master copy has been prepared or has been made available to the public in violation of the Copyright Act. It is not allowed to make copies of computer programs or to make copies in digital form of compilations in digital form. Compilations may be copied on paper. The purpose of the copying may not directly or indirectly be commercial. This means i.a. that copying in places of work is allowed only in certain circumstances for the own, but not for the colleagues', purpose.

There are exceptions in Section 16 of the Copyright Act, permitting libraries and archives to shift format or to make digital copies (see answer to question 4).

Section 17 of the Copyright Act contains a right to make copies for the benefit of persons with a disability. It must not be carried out for commercial purposes. Anyone is entitled to make, by means other than recording of sounds, such copies of literary and musical works which have been made public and of works of visual art which have been made public, as persons with a disability need in order to be able to enjoy the works. This right includes both digital and analogue copying. The copies may also be distributed to those persons. It is i.a. allowed to film somebody who is reproducing a literary or musical work by using sign language. Certain libraries and organizations may by means of sound recording make copies of literary works that have been made public which persons with a disability need in order to be able to enjoy the works, as well as make such copies of works transmitted on sound radio or television, and of cinematographic works, that deaf or hearing-impaired persons need in order to be able to enjoy the works.

In Section 18 of the Copyright Act there is a provision for preparing composite works for non-commercial use in educational activities. The composite works shall consist of works by a comparative large number of authors. Minor portions of literary or musical works and such works of a limited scope, can be reproduced, provided that five years have elapsed from the year in which the works were published. Works of fine art may be reproduced in connection with the text, provided that five years have elapsed from the year when they were made public. The authors have a right to remuneration. The provision does not apply to works that have been created for use in educational activities and it does not confer a right to prepare composite works for commercial purposes.

Anyone may, according to Section 20a of the Copyright Act, prepare, by means of a film or a television program, and distribute, copies of works of fine art, if the exploitation made of the work is incidental in relation to the contents of the film or the television program. Corresponding acts of exploitation may also be carried out of works of fine art that appear in the background, or otherwise form an insignificant part, of a picture. The work of fine art must be a copy that is covered by an act of publication or a copy that has been transferred by the author.

Works of fine art which have been made public may, according to Section 23 of the Copyright Act, be reproduced in connection with the text in a scientific presentation which has not been prepared for commercial purposes, or in connection with the text in a critical presentation, except if it is in digital form, or in a newspaper and a periodical in connection with a report on a current news event, except if the work has been created for reproduction in such a publication.

Works of fine art may, according to Section 24 of the Copyright Act, be reproduced in pictorial form if they are permanently located outdoors on, or at, a public place. Works of fine art may be reproduced if the purpose is to advertise an exhibition or a sale of the works of fine art but only to the extent necessary for the promotion of the exhibition or the sale or, if they form part of a collection, in catalogues, however not in digital form. Buildings may be freely reproduced in pictorial form.

Works which are seen or heard in the course of an event may, according to Section 25 of the Copyright Act, be used in connection with information concerning the event through sound radio, television, direct transmission or film. The works may, however, be used only to the extent justified by the informatory purpose. The right exists even though the works have not been made public.

A sound radio or television organisation which has the right to broadcast a work is, according to Section 26e of the Copyright Act, also entitled to record the work on a material support from which it can be perceived, if this act is made for use in its own broadcasts on a few occasions during a limited time, to ensure evidence concerning the content of the broadcast, or in order to make it possible for a governmental authority to exercise supervision over the broadcasting activities. Recordings which have a documentary value may be preserved in the Royal Library.

## 4. Are there specific exceptions permitting libraries to format shift or to make digital copies for archive or other purposes?

As in most other countries, the digital technology has for long been seen as an efficient means for making available to the public collections in national museums, libraries, and archives. Ever since the late 1990s, there are expressed wishes of the legislator to make the entire Swedish heritage in museums, libraries, and archives digitised and freely accessible. Over time, this has caused both technical and copyright related problems.

Recently the Swedish Government has concluded that technological developments have had and will continue to play an important role for how the museums, libraries, and archives are working to preserve and make available their collections and meet their public. Many museums, libraries, and archives are already working ambitiously to integrate digital media into their activities. The Government affirms and supports this development. At the same time the libraries face major challenges, such as in terms of how the digital material – tomorrow's heritage – should be preserved. The Government therefore has made the conditions for digitisation more stringent by initiating the development of a national strategy

for digitisation, online accessibility and digital preservation (see government bill 2009/10:3 p. 21).

Provisions on the rights for archives and libraries to make copies of their protected works and to make them available to the public are found in Section 16 (cf. Article 5(2)(c) of the InfoSoc Directive) and Section 42d (cf. Article 5(3)(n) of the InfoSoc Directive) of the Swedish Copyright Act. The provision in Article 16 of the Copyright Act limits the exclusive economic rights, so as to enable governmental and municipal archival authorities, scientific and research libraries that are operated by public authorities and public libraries to make copies of works

1. for purposes of preservation, completion or research,
2. in order to satisfy the desires of library borrowers, for single articles or short extracts of works, or for material which, for security reasons, must not be handed out in original form, or
3. for use in reading devices.

The reproduction right given to the archives and libraries according to Section 16 of the Copyright Act is not limited to any technique or means for reproduction, an effect of which is that they are entitled to make format shifts as well as digital copies. Once work is digitised for the purposes of preservation, completion or research, that copy may then be used for secondary digital reproduction e.g. in order to satisfy the desires of library borrowers. It should also be emphasised that the provision applies even for works which have not been lawfully made available to the public. However, as an effect of the implementation of the Directive 91/250/EEC on the legal protection of computer programs, the right does not cover computer programs in any form.

In accordance with the requirements set out in the InfoSoc Directive, the provision also sets a restriction on the distribution right. Hence, only paper based copies may be distributed to the borrowers. To meet the public demand for communication and distribution of media content, a so called extended collective license provision therefore applies, which entitles the archives and libraries referred to in Section 16 of the Copyright Act to communicate (with the exception of computer programs), and to distribute copies of, single articles or short extracts of works or material which, for security reasons, must not be given away in original form. This entitlement is still given just in favour of library borrowers (Section 42d of the Copyright Act).

In Section 42a of the Copyright Act an extended collective license is defined as an agreement concerning exploitation of works between a user and an organisation representing a substantial number of Swedish authors in the field concerned. It confers to the user the right to exploit works of the kind referred to in the agreement despite the fact that the authors of those works are not represented by the organisation. The provision does however not apply if the author has filed a prohibition against the communication or the distribution with any of the contracting parties.

By references from chapter 5 of the Copyright Act on related rights, the provisions in Sections 16 and 42d Copyright Act also apply to performing artist (Section 45(3) Copyright Act) and producers of recordings of sounds or of moving pictures (Section 46(3) Copyright Act).

Hence, the extended collective license provision enables the Swedish public archives and libraries – under certain circumstances – to make the works within their collections available to the public. It makes it possible i.e. to transfer a digitised work by e-mail or to send a digitised copy on CD or USB memory by mail to the library borrowers.

In light of the above mentioned wishes to digitise the collections and to make them freely available to the public as well as the ongoing development of the multi-lingual digital library

Europeana the Swedish Government has given Additional directives to the Commission on the Revision of the Copyright Act ("Upphovsrättsutredningen"), according to which the Commissioner shall
- evaluate how the extended collective license provision in Section 42d of the Copyright Act has worked in practice,
- investigate and decide whether this provision should be extended to cover also other materials than single articles or short extracts of works, or for material which, for security reasons, must not be handed out in original form, and
- investigate and consider whether any changes should be made in the Copyright Act to make it easier for libraries and archives to digitise and make copyrighted works available to the public.

It is thus clear that the development is intended to move towards greater accessibility to media content, rather than to strengthen the authors exclusive economic rights.

**5. Are there exceptions or permitted uses allowing the use of orphan works? If so, what is their scope?**

The notion of "orphan works" will here, conventionally, cover the kind of works that create copyright problems (also regarding neighbouring rights, such as the rights of performing artists or phonogram and video producers as well as rights to computer programs and data bases) because of the lack of users' information about a present right holder or right holders. The lack of information may also concern successors in title. It is often the case that some right holders to a work (or other protected item) are known or can easily be identified, whereas others – or just one – can not).

Related problems not only concern the accentuated demands for digitalisation of works in analogous form (e.g. in archives, libraries, educational activities etc.). They often bear upon the need for going back in time on specific contractual situations, sometimes established long before the digital era, to clarify possible present effects of earlier agreements regarding then unknown means of exploitation.

The Swedish Copyright Act does not directly address the issue of orphan work by using that expression. However, it contains a small number of provisions intended to facilitate the identification of right holders who are anonymous or otherwise not named to be known.

The Copyright Act, in this respect dating from the early 1960s, contains, in its Section 7, a drafting similar to that of Article 15(1) and (3) of the Berne Convention. Hence, absent proof to the contrary, 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 be deemed to be its author. If a work is published without the name of the author being stated in the manner just described, the editor, if he is named, or otherwise the publisher, shall represent the author until the author's name is stated in a new edition or in a notification to the Ministry of Justice. It stands out from the preparatory documents to the Copyright Act that only a physical person can be an author in the proper authors' rights sense of the law, meaning the initial right holder in all respects, i. e. the owner of both economic and moral rights. By reference in the respective parts of the Copyright Act regarding other right holders, the same Section 7 mut. mut. applies to their protected items.

There is, in Section 44 of the Copyright Act, about the term of copyright, a related provision, stating that if a work has been made public without mention of the author's name or generally known pseudonym or signature, the copyright shall subsist until the end of the seventieth year after the year in which the work was made public. If the work consists of two or more

parts, the term shall be calculated separately for each part. The authenticity of names and signatures on works of fine art is cared for by a provision in Chapter 14, Section 5, of the Swedish Penal Code.

Also dating from the early 1960s, Section 39 of the Copyright Act mirrors an attempt to get at grips with the problem of a multitude of original right holders, many of whom often difficult or impossible to identify, ever more so as time passes. Also here we find a background in the Berne Convention, its "présomption de légitimation" for the film producer in Article 14*bis* (2). Section 39 of the Copyright Act prescribes that a transfer of the right to record a literary or artistic work on a film shall include 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 or to translate them into another language. The provision, nowadays considered applicable to audiovisual works generally, does not apply to musical works. By reference in Section 45 of the Copyright Act the presumption also applies to performing artists performances (but not to their musical works). There is no provision for a "cessio legis".

Some effect of facilitating the identification of relevant right holders may be ascribed to the provision in Section 43 of the Copyright Act that the subsistence of copyright in a work of more than one author, normally enduring until the end of the seventieth year after the year of death of the last survivor deceased, is, for cinematographic (audiovisual) works, to relate to the year of death of the last deceased of either the principal director, the author of the screenplay, the author of the dialogue or the composer of the music specifically created for the work.

In this context may also deserve to be mentioned the presumption provision in Section 40a of the Copyright Act about computer programs created in employment relations, i. e. created by an employee as part of his tasks or following instructions by the employer. All rights (economic as well as moral ones) are presumed transferred to the employer unless otherwise agreed in contract (which does not need to be in writing), thus facilitating the finding of the appropriate right owner. The Copyright Act does not contain any similar provision of a general bearing on works created in other employment relations.

As a curiosity may be mentioned that the Swedish Supreme Court has decided in a case where, as a matter of fact, it found no right holder, but nevertheless declared that the copyright to the work at issue (Adolf Hitler's "Mein Kampf") had been infringed by the Swedish publisher of a translation into Swedish (see NJA 1998 p. 838 et seq.).

**6. What, if any, fair dealing/fair use provisions apply? Are there any examples of fair dealing/use provisions having a particular application to Library/search facilities such as Google Book Search?**

There are no fair dealing/fair use provisions in the Swedish Copyright Act. The Act contains a number of limitations on economic rights, which means that a work may be used in certain specified situations and under certain conditions despite copyright protection. When a work may be used in accordance with these provisions, the moral rights of the author must nevertheless be observed.

**7. How does the law in your country/region understand the requirement of international treaties that exceptions to copyright must not conflict with a**

**normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author?**

The requirements set out in Article 9(2) of the Berne Convention, and Article 13 of the TRIPs Agreement, as well as Article 5(5) of the InfoSoc Directive, has not literally been implemented into the Swedish Copyright Act. Instead, the requirement is seen as a rule of interpretation for the legislator to consider when implementing limitations to copyright. The requirement has not been implemented into Swedish law, because of its unspecific character. The starting-point and the absolute basis for copyright protection is that copyright is an exclusive right and the property of the copyright owner. When this exclusive right is limited it has to be limited through legislation. This has also been stated by the Supreme Court in various decisions (see NJA 1986 p. 702 and NJA 1993 p. 263). When implementing limitations, restrictively should be the rule (see government bill 2005/05:110 p. 83). The legislation should be predictable, and exceptions be clear, restrictive and with effects that can be foreseen.

**8. Are there any other exceptions or permitted uses which you consider particularly relevant to the hi-tech and digital sectors with regard to ISPs, digitisation and format shifting or orphan works?**

The Swedish Copyright Act contains provisions on extended collective licenses (see Sections 42a - 42f). The other Nordic countries have similar provisions. An article by Thomas Riis and Jens Schovsbo evaluates extended collective licenses and their compatibility with international copyright norms (published in Columbia Journal of Law and the Arts, vol. 33, Issue IV; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230). Extended collective licenses are called extended because of their extended effect. Works may, according to law, be exploited in a specific manner, when the user has concluded an agreement with an organization representing a substantial number of Swedish authors in the field concerned. It is currently investigated how the provision in the Swedish Copyright Act of representation only of Swedish authors should be changed to be more in accordance with legislation within the European Union (Dir. 2008:37). Works of the kind referred to in the specific extended collective licensing agreement may be used despite the fact that the authors of those works are not represented by the organisation that entered into the agreement on behalf of the authors. The agreement with the organisation lays out the terms and conditions for the exploitation. Authors not represented by the organization shall be treated the same way as authors represented by the organization. The author has a right to remuneration for the exploitation if he forwards his claims to the organization within three years from the year in which the work was exploited.

Where there are two or more competing organisations equally representing authors in the field concerned, it could be hard to decide which of them that is authorised to enter into extended collective licensing agreements with users. A case put forward to the Swedish Supreme Court (see NJA 2000 p. 445) illustrates this. In Denmark, Norway and Finland the copyright acts contain a provision that only an organisation approved by a ministry or department in charge of copyright legislation is authorised to conclude an extended collective licensing agreement (see Section 50(1) Danish Copyright Act, Section 38a Norwegian Copyright Act and Section 26 Finnish Copyright Act).

Extended collective licenses are provided for by the Swedish Copyright Act in the following areas: Reproduction in order to satisfy the need for information within the parliament, decision-making municipal assemblies, governmental and municipal authorities as well as enterprises and organizations, reproduction within educational activities, communication of works and distribution of copies to library borrowers in archives and libraries, and sound

radio and television broadcasts. Generally, there is an opt out provision for right holders not wishing to let their works be exploited by an extended collective license. The provision in Section 42f about re-transmission of works contained in sound radio or television broadcasts does not contain an opt out provision for right holders.

The extended collective licenses are currently evaluated and new extended collective licences, which, for example, will make it possible for libraries to digitize and make available copyright protected works on the Internet are going to be proposed by the Commission on the Revision of the Copyright Act.

**Your views**

**(a) In your opinion, are the exceptions to copyright protection for (i) the activities of an ISP (ii) digitisation or format shifting; and (iii) orphan works, and the fair dealing/fair use provisions that apply to Library/search facility applications in your country/region suitable to hold the balance between the interest of the public at large and of copyright owners in the hi-tech and digital sector?**

The copyright system is built on the principle of striking a balance between different interests, and the exclusive right is subject to a number of limitations. Due to the technological developments this balance of interests has been disturbed, and the last decades of efforts to strengthen the exclusive rights has not been accompanied by the exceptions to copyright. Sweden, that has well developed broadband (high speed Internet connection), have been in the frontline for illegal online piracy as well for developing legal alternatives for consuming copyrighted works.

In Europe, the InfoSoc Directive gives in principle an exhaustive and optional list, from which national legislators could pick the exceptions that suited the country. The directive also gives the national legislators the possibility of adopting more restrictive wordings. It is the opinion of the Swedish group that it is necessary to have more up-to-date exceptions, e.g. related to libraries digitisation's initiative and to bring its collections to a wider audience.

Further, the request of more effective sanctions to prevent digital copyright infringement has grown. However, it is an international trend that right holders, instead of prosecuting infringers, request that ISPs should block or shut down its Internet customer's access. Whether an ISP should be responsible for the activities of its customer is questionable. At least there should be a distinction of an ISP that only provides a connection service and an ISP that also hosts websites.

**(b) Are these exceptions and permitted uses appropriate to the technology, understandable and realistic? Do they contribute to a situation where copyright is enforceable in practice?**

Already before the Swedish implementation of the European directives regarding copyright and neighbouring rights, the Swedish Copyright Act was rich in detailed exceptions and limitations compared to what could be found in many other legislations. By successive amendments the structure of the text of the Copyright Act has become as well adapted to technology developments as any other developed European national system; persisting problems related to, among other matter, private copying, orphan works, certain forms of distribution of information and "pirates galore!". However, the Copyright Act has also become ever more complex by insertions of new matter, renumbering and a number of subsections

and subparagraphs as well as changes in the succession of Sections. The Copyright Act has become difficult to read, at least by others than experts in the field. Also the language of the Copyright Act needs to become modernised. The implementation of the InfoSoc Directive has drastically contributed to the need for a total overhaul of the text. Presently, as mentioned above, work is done to put the text in order and to review parts of the provisions about substance.

So much about “appropriate to the technology” and intelligibility.

Richness in details among exceptions and limitations means that the text of the Copyright Act is exposed to a rather constant need for updating, so as to stand up to new market and technical developments. Established legislative tradition, directed to predictability in this field of combined civil and criminal law, has furthered detailed statutory provisions insofar as limitations to property rights as well as moral rights are concerned, together with a usually restrictive view by courts at the interpretation of the respective limiting provisions of the Copyright Act. Deliberately, Sweden has not introduced the “three step test” into the Copyright Act. Nevertheless, there may be perceived a tendency among courts and in the general discussion about the interpretation of various limiting provisions of the Copyright Act, to entertain a more than earlier open attitude, in particular where difficulties to uphold proprietary expectations can be set aside by rights to remuneration in various forms, in particular those already existing, or now prospective, about extended collective licensing under appropriate organisational guarantees. Also, the principle of “de minimis non curat iudex” may to some extent make potentially problematic applications of limitations or lack of such ones less acute.

The main reason why want of enforceability is an issue is not related to exceptions and permitted uses but to the fact that only very well financed parties have the means to protect their rights or liberties before the appropriate instances.

**(c) What, if any, additional exceptions would you wish to see relevant to these areas?**

An additional exception would be a general right to use the work for experimental purposes. Even though several limitations within the Copyright Act open for possibilities to use a work for different purposes, there is today no general experimental use provision. Such a provision would be motivated primarily by systematic reasons, as it exists within the harmonised designs protection (cf. Article 13(1)(b) of the Directive 98/71/EC on the legal protection of designs). Hence, as a design registered in or in respect of a Member State in accordance with Article 17 of the said Directive shall also be eligible for protection under the law of copyright, it would be appropriate if the same right was given also within copyright law.

**(d) Given the international nature of the hi-tech and digital fields, do you consider that an exhaustive list of exceptions and permitted uses should be prescribed by international treaties in the interests of international harmonisation of copyright? Might you go further and say that there should be a prescribed list? If so, what would you include?**

International harmonization of copyright legislation should continue to be an overall goal, but as a general comment we would like to advocate a broader perspective than the creation of an exhaustive/prescribed list of exceptions; We think that further developments within copyright law should be viewed - and analyzed - in light of a broader legal framework of

intellectual property rights and its underlying general principles and functions (cf. comments under query (c) above regarding the possible introduction of a research exemption within copyright law). We also note, and advocate, a continued "contextualization" of copyright related issues within the applicable legal frameworks such as e.g. telecommunications law. In our view, the further development of such "applied" copyright regimes (and a continuous norm exchange with the aforementioned underlying general principles of intellectual property rights law) should be seen as an important contributor to the evolution of a legal framework adapted to its purpose.

**Summary**

In a general perspective, Swedish law, by implementation of the E-Commerce, the InfoSoc and the IPRED Directives, as well as the early introduction of its so called Electronic Bulletin Boards Act, appears reasonably well equipped for a balanced handling of copyright related situations involving ISPs and other Internet intermediaries. Numerous detailed exceptions to the exclusive rights to copyright works and neighbouring rights, without formal support of the so called three step test and not supplemented by any fair use doctrine, allow, directly or by interpretation, digitalisation and use of digital formats in specifically limited situations, such as for libraries/archives or for information purposes more generally. They now need to be supplemented/modernised, as can be foreseen to happen as a result of efficient ongoing governmental revisionary work. Some few statutory provisions of limited coverage already facilitate access to works of right holders unknown or too difficult to reach for contracting. However, it can here be foreseen that current revisionary legislative work will result in solutions to such problems – as well as to problems related to various other digitalisation-induced make-available situations – by the introduction of new Copyright Act provisions about so called extended collective licenses.

This Report expresses special wishes for developments that relate to the need to distinguish ISPs that only provide a connection service from those that also host web sites, as well as for a formal modernisation of the Swedish Copyright Act. It also lays stress on formation of more open attitudes at the interpretation of provisions about exceptions and limitations to the new role of copyright within the more general sphere of the law of intellectual property, suggesting inter al. a copyright exception for freedom of use for experimental purposes.

**Zusammenfassung**

Alles recht betrachtet, zeigt sich die schwedische Gesetzgebung, nach der Umsetzung der gehörigen Europäischen E-Commerce-, Info- und andere Richtlinien sowie durch das frühzeitig erlassene Gesetz über elektronische Anschlagstafel, mit Vorkehrungen recht gut gerüstet für eine ausgewogene Handhabung von urheberrechtsbezogenen und benachbarten, mit ISPs und anderen Internet-Vermittlern verbundenen Situationen. Zahlreiche detaillierte Ausnahmen von den ausschließlichen Rechten an urheberrechtlich geschützte Werke und verwandte Schutzrechte, ohne formelle Unterstützung der sogenannten Drei-Stufen-Test und nicht von einer „fair use"-Lehre ergänzt, ermöglichen, direkt oder durch Auslegung, die Digitalisierung und die Nutzung von digitalen Formaten in abgegrenzten Situationen, z. B. für Biblotheken/Archive oder zum Zwecke der Information im Allgemeinem. Sie müssen nun aber ergänzt werden und modernisiert, so wie vorgesehen werden kann als Ergebnis der laufenden revisionären Bestrebungen des Justizministeriums. Einige wenige gesetzliche Bestimmungen begrenzter Deckung erleichtern bereits den Zugang zu Werken unbekannter Rechteinhaber oder solcher die zu schwierig erreichbar sind für eine Lizenzvergabe. Allerdings kann es hier vorgesehen werden, dass die derzeitige revisionäre Arbeit in Lösungen für solche Probleme führen wird – wie auch für Probleme im Zusammenhang mit verschiedenen anderen Digitalisierungs-induzierten Situationen des

Zuverfügungstellens von geschützten Werken und anderen Leistungen – durch die Einführung von neuen Bestimmungen über sogenannte erweiterte kollektive Lizenzen.

Der Bericht bringt spezielle Wünsche für Entwicklungen, die auf die Notwendigkeit, ISPs, die nur eine Verbindungsdienstleistung herstellen, von denjenigen zu unterscheiden, die auch für Web-Sites verantwortlich sind, sowie für eine formale Modernisierung des schwedischen Urheberrechtsgesetzes. Er legt Wert auf Bildung einer offeneren Haltung bei der Auslegung der gesetzlichen Bestimmungen über Ausnahmen und Einschränkungen in Bezug auf die neue Rolle des Urheberrechts in den allgemeinen Bereich des Rechts des geistigen Eigentums, dabei hindeutend unter al. an eine Urheberrechtsausnahme für die freie Nutzung zu experimentellen Zwecken.

**Sommaire**
Dans une perspective générale, le droit suédois, par la mise en œuvre des Directives européens relatives aux droits d'auteur et droits voisins etc. ainsi que l'introduction déjà tôt de son Acte sur les Tableaux de Bulletins Électroniques, semble raisonnablement bien équipé pour un traitement équilibré des situations y afférentes impliquant les FAI et autres intermédiaires de l'Internet. De nombreuses exceptions détaillées aux droits exclusifs à des œuvres d'auteur et droits voisins, sans l'appui formel de ce qu'on appelle le test en trois étapes et pas complété par une doctrine d'utilisation équitable, permettent, directement ou par l'interprétation, la numérisation et l'utilisation de formats numériques dans des situations expressément limitées, comme pour les bibliothèques/archives ou à des fins d'information plus générales. Ils doivent à présent être complétés/modernisés, comme on peut prévoir de se produire à la suite des procédures révisionnistes efficaces de travail gouvernemental en cours. Quelques rares dispositions statutaires de couverture limitée facilitent déjà l'accès aux œuvres de titulaires de droits inconnus ou trop difficile à atteindre aux marchés. Cependant, il peut être prévu que les travaux législatifs en cours de révision résultera en des solutions à ces problèmes – ainsi qu'aux problèmes liés à la numérisation de divers autres induits par les situations complexes d'accessibilité d'œuvres etc. – par l'introduction de provisions nouvelles sur ce qu'on appelle « licences collectives étendues ».

Ce rapport exprime des souhaits particuliers pour les développements qui ont trait à la nécessité de distinguer ceux qui offrent uniquement un service de connexion sur l'Internet à partir de celles responsables également pour les sites Web, ainsi que d'une modernisation formelle de la loi sur le droit d'auteur suédois. Il insiste également sur la formation à l'interprétation des dispositions sur les exceptions et limitations d'attitudes plus ouvertes au nouveau rôle du droit d'auteur dans le domaine plus général du droit de la propriété intellectuelle, ce qui suggère inter al. une exception du droit d'auteur pour la liberté d'utilisation à des fins expérimentales.