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# Swedish Software Law

As related primarily to EC Directives

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Jan Rosén

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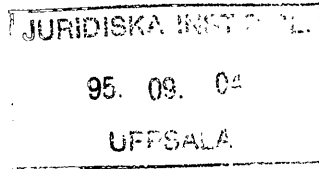


# Swedish Software Law

As related primarily to EC Directives

by

Jan Rosén



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I.

# Protection of Software as Intellectual Property



# 1. Copyright

## 1.1. Implementation of the EC Directive on Computer Programs

A computer program is a protected work according to an amendment, effective on 1 July 1989,<sup>1</sup> to Section 1 (1) of the Swedish Copyright Act (1960:729), provided that such a program fulfils the minimum requirements of the law for copyright protection.<sup>2</sup> However, computer programs were several years before the codification generally considered to be literary works within the rampart of copyright, and consequently the statutory law only confirmed what was already accepted, i.a. in case law.<sup>3</sup>

The EC Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEG)<sup>4</sup> became binding upon Sweden even before the adherence of Sweden to the European Union on 1 January 1995, as Sweden agreed to undertake the necessary adaptations to the Directive according to its obligations under the EEA agreement.<sup>5</sup> For various reasons the EEA agreement did not become effective until 1 January 1994, but the Swedish implementation of the Directive actually took place in the main exactly a year earlier. By then the statutory rules on computer programs of the Act already corresponded very much to those of the Directive, but certain changes were necessary relative e.g. to the object of protection, computer programs created by employees, the first sale-doctrine, private use and decompilation.

Accordingly, the copyright status of computer software, and more specifically computer programs, is cast by the values and standards of Swedish copyright law in a more traditional sense, thus enlarged and specified by the EC Software Directive. This dependance on international documents and tendencies is really nothing new to Swedish Copyright Law, or to any national legislation e.g. within the Berne Union; moreover, it was stated already in the preparatory works of the Act in relation to judging what is to be protected by copyright, that the distinct judgement on this matter was duly to be developed in legal science and by the courts, and “according to the international nature of

<sup>1</sup> See prop. 1988/89:85 and SFS 1989:396.

<sup>2</sup> See para. I. 2.3. *infra*.

<sup>3</sup> See about case law para. I. 1.3 *infra*. See also SOU 1985:51, Upphovsrätt och datorteknik.

<sup>4</sup> Henceforth “The Directive” or “the Software Directive”.

<sup>5</sup> See the supplements to the Agreement called Protocol 28 on Intellectual Property and Annex XVII Intellectual Property; prop. 1992/93:48 supplement 5 and 6.

this branch of law also the developments in other comparable countries”, i.e. as instruments for defining the standards of Swedish law.<sup>6</sup>

## 1.2. Statutory Provisions

Apart from the naked statements in Section 1 (1) of the Act, where different types of protected works are simply *exemplified*, among them computer programs as a potential type of work within the realm of copyright, a number of special statutory rules adhere only to computer programs. Among such specialties for computer programs we may particularly observe the following: Section 12 on private use, Section 19 on distribution rights, Section 26 (g) and (h) on a user’s correction of errors, observation, study or test of a program, Section 40a on programs created by employees and Sections 53 and 57a on sanctions.

The Copyright Act neither defines the signification of a computer program, nor does it indicate whether a program is a literary work or a work of art. However, it follows from the generally accepted concept of a literary work, as used in the Act and its preparatory works, that computer programs should be perceived as adhering to this category of works protected by copyright, what is also normally taken for granted. Hereby, Sweden is obviously following the worldwide trend, which started in the USA.<sup>7</sup>

This follows also from clear statements in the preparatory works<sup>8</sup>, all in line with the statement in Article 1 (1) of the Directive. Therefore, the ordinary and prevailing concept of a literary work has a bearing also on computer programs<sup>9</sup> just as all the general provisions of the Act on the protection and the exploitation of literary works are directly applicable to computer programs. *Mutatis mutandis* the general copyright rules on works of art are applicable in the case, knowingly not yet occurred, when a particular computer program is perceived as a work of art. At all events, the general provisions on adaptations (Section 4), joint authorship (Section 6), exclusive economic rights (Section 2) and transfer (Section 27 and 28), just as the general statutory limitations to the economic rights (assembled in chapter 2 of the Act), are relevant also to computer programs (although computer programs and software are in several ways

<sup>6</sup> See prop. 1960:17 p. 49.

<sup>7</sup> Cf. *Cohen Jehoram*, “The EC Copyright Directives, Economics and Author’s Rights”, IIC Vol. 25, No. 6/1994; *Geller*, “International Copyright. An Introduction”, § 2 [3][b], *International Copyright Law and Practice*, ed. Melville B. Nimmer and Paul E. Geller, Rel. 4, New York 1993.

<sup>8</sup> Cf. SOU 1985:51, Upphovsrätt och datorteknik, p. 90 et seq, p. 137; prop. 1988/89:85 p. 9 et seq.

<sup>9</sup> Cf. “computer software” in para. I. 2.1. *infra*.

shaped by special limitations, e.g. as concerns private use).

Principally, this is true also as moral rights are concerned. The basic moral rights on attribution and integrity are not transferable according to Section 3 (3) of the Act, but may be waived under certain limitations. However, the special statutory presumption rules on transfer from an employed author to the employer of the rights in a computer program created by the employee, unless otherwise provided by contract, takes a further step and lets the presumptive transfer include not only economic rights but “copyright” as a whole, thereby obviously comprising also moral rights, Section 40 a of the Act.<sup>10</sup>

As a basic principle, Swedish intellectual property and competition law offers so called cumulative protection by the different Acts on patents, trademarks, designs, trade secrets etc. This is expressly stated in Section 10 (1) of the Copyright Act as *registered designs* are concerned: “If a work has been registered as a design according to the rules applicable<sup>11</sup>, copyright may nevertheless be claimed in the work.” But a computer program as such is mainly protected only by copyright.<sup>12</sup> We must also note, that the topography of a *semiconductor product* is protected only by the special Act on such phenomena<sup>13</sup>, not by the Copyright Act, Section 10 (2) of the Act. Therefore, if a computer program is technically a part of such a semiconductor product, it is not protected as to the topography of that product, i.e. the three-dimensional pattern of the layers of which the semiconductor product is composed, but by the Copyright Act, provided of course that it matches the necessary requirements for copyright protection.

### 1.3. The Importance of Case Law

Even before computer programs were protected by statutory law the Swedish courts were open to the possibility of such creations to be works within the meaning of the Copyright Act. However, court practice was and still is very limited on the subject, even though the courts actually have supplied us with quite important answers to the general questions on protectability.

Much observed is a judgement by the Appeal Court of Gothenburg,<sup>14</sup> stating

<sup>10</sup> See para. I. 1.4. and I. 3.1.2. *infra*.

<sup>11</sup> The Design Protection Act (1970:485).

<sup>12</sup> See Chapter 2. *infra*.

<sup>13</sup> The Act on Topographies in Semiconductor Products (1992:1685); cf. prop. 1992/93:48 p. 64.

<sup>14</sup> See Hovrätten för Västra Sverige, 19 November 1987, DB 159 (NIR 1988 p 310, Broman); the case concerned possible copyright protection of three game programs, called “Archon”, “Summer Games” and “Hobbit”, and one calculation program, called “Calc Result Advanced”. All four programs were considered to be literary works protected by the Copyright Act. Cf. the comments on the case in the preparatory works, prop. 1988/89:85 p. 11.

that ordinary criteria for literary works should apply also to computer programs, what was later confirmed by the codification. The same conclusion may be drawn from other decisions on the Appeal Court level.<sup>15</sup> Up to now the Supreme Court of Sweden has not tried any case concerning the level of protection of a computer program.<sup>16</sup>

However, court practice hitherto has not given any answer to the difficult question whether the relevant criteria on a protectable computer program has *changed* since the implementation of the Software Directive, as a result of the Directive's demand only on "originality" for copyright protection.<sup>17</sup> Actually, we do not know yet, as there are no Supreme Court decisions on this particular matter after the implementation of the Directive, i.e. whether the minimum requirements of copyrightability now differ somewhat between the standard used up to now in Swedish copyright law and what might be the rationale of the Directive. A basic assumption is, however, further elaborated on below,<sup>18</sup> that the applied Swedish standard is on the level of the Directive as expressed also in other EC documents.

About court practice in general we may further observe, that there are a few but quite interesting decisions on the Appeal Court level about *transfer* of rights in computer programs from an employee to his employer<sup>19</sup>, about the interpretation of the scope of a software license<sup>20</sup>, and about *copying*, *rental* and *lending* of computer programs stored in and retrieved from a so called Bulletin Board System (BBS)<sup>21</sup>.

<sup>15</sup> See Hovrätten över Skåne och Blekinge, 21 February 1991, B 933/89.

<sup>16</sup> See Hovrätten över Skåne och Blekinge, 20 December 1990, B 381/90, *Listerud*. The case concerned the question whether a great number of certain quite ordinary game programs, adjusted to the capacity of the Commodore 64 PC, enjoyed copyright protection, what at least 180 of them did. The appeal to the Supreme Court was not accepted according to its decision of 26 February 1991.

<sup>17</sup> Cf. *Koktvedgaard/Levin*, *Lärobok i immaterialrätt*, 2nd ed., 1993, p. 76

<sup>18</sup> See para. I. 2.3. *infra*. Cf. the 1994 decision of the Appeal Court mentioned in n. 20 *infra*, where the "standard" originality criteria normally applied in Sweden were used, all in accordance with and with direct reference to those given in the preparatory works to the Swedish Copyright Act on computer programs, namely in prop. 1988/89:85 p 12.

<sup>19</sup> Svea Hovrätt, 18 March 1992, DT 15, T 696/90, *Pressens Pensionskassa*.

<sup>20</sup> Hovrätten över Skåne och Blekinge, 14 April 1993, DT 4149, T 197/92, *Blekinge Data*.

<sup>21</sup> Hovrätten över Skåne och Blekinge, 21 December 1994, DB 5243, B 1215-93, *Richt*. See about details in n. 56 *infra*.



## 1.4. National Specialities in Relation to the Directive

Generally, the Copyright Act literally fulfils the requirements of the Directive. However, we may notice some peculiarities e.g. among the sanctions. Private copying of a program is generally a restricted act in accordance with Article 7 of the Directive. As a reminiscence of the former order of the Copyright Act, it still states, though, that anyone who privately copies a computer program which is published or whereof copies have been transferred with the consent of the author, shall not be convicted, if the original for the copying was not used in a business or in public service and provided that the copier does not use the copy for other than private purposes, Section 53 (2) of the Act.

In short, this means that private copying is a restricted act, but that it shall pass unpunished under the said conditions. Other sanctions, not related to criminalization, such as damages, may very well be claimed also for unlawful private copying, Section 54 of the Act.

Another specialty in relation to the Directive concerns moral right. Section 40a of the Act states, just as Article 2 (2) of the Directive, that if a computer program is created by an employee in the execution of his duties or on the instructions of his employer, the latter shall be entitled, unless otherwise provided by a contract, to exclusively exercise all economic rights in the program so created.<sup>22</sup> However, the Act takes a further step and lets as a presumption not only economic rights be transferred to the employer but states that copyright as a whole is “conveyed”, thereby obviously comprising also moral rights, if not otherwise provided by contract. The Act uses the word “convey”, a novelty in Swedish legal language as transfers of intellectual property rights are concerned, to stress that a transfer of a special kind is in question. Nevertheless, its compliance with the minimum standards of the Berne Convention could be questioned.

Normally, moral rights are not very important to the authors under the conditions which computer programs are often created, i.e. by teams of authors and developed step by step and on commission by an employer. But the importance of paternity rights should not be underestimated and, further, the Swedish solution might cause difficulties in handling moral rights particularly in relation to subsequent transfers of rights in computer programs, licensing and relations with third parties. Equally it is unclear how a legal entity could dispose of a moral right.<sup>23</sup>

Thirdly, the Nordic “catalogue rule”, Section 49 of the Act, protects “Catalogues, tables, and similar compilations in which a large number of particulars

<sup>22</sup> See I. 3.1.2 *infra*.

<sup>23</sup> See *Rosén*, “Moral Right in Nordic Law – Statutory Rules and Relevant Court Practice”, JT N:o 4/1993-94, p 761 et seq.

have been summarized''. This provision, well aside of the protection of original literary or artistic works, affords protection only to Swedish subjects, Swedish corporations or persons who have their habitual residence in Sweden. The catalogue rule of the other Nordic countries are analogous on this point. Protection is afforded "the producer" for a period of only ten years after the year in which the production was published. This kind of protection presupposes a certain amount of mere labour, but not originality.<sup>24</sup>

However, catalogue protection is not an alternative to copyright protection of a computer program, as it is generally accepted that "compilations of particulars" should not be understood as a description on what a computer program represents.<sup>25</sup> The special catalogue protection may be claimed, though, for compilations of facts, instructions and the like, e.g. for supporting material within the concept of computer software. But it is obvious that this special kind of protection is of more importance to others than creators of computer software, preferably to owners or makers of *databases*.

Lastly, we may notice, that as a consequence of the principle of public access to official records, laws, decisions issued by public authorities, reports issued by Swedish public authorities and official translations of such texts are not subject to copyright, Section 9 of the Act. Accordingly, computer programs, created by or within a public authority and comprised by the authority's decision, which is certainly not a rare event, would not be protected. However, there are several exceptions to these rules, and among them we can see that computer programs, created under the said conditions but not comprised by the authority's decision, preserve their copyright status and must not be reproduced without the author's or his rightholder's consent, Section 26 (a) of the Act.<sup>26</sup>

<sup>24</sup> If a part of a catalogue expresses individuality, this part may of course be protected by copyright as a work, while the rest of it may be a protectable catalogue; see the Appeal Court decision of 22 December 1993, Hovrätten för Västra Sverige, DT 65, T 515/92, Sveriges Elgrossister (to be appealed).

<sup>25</sup> Cf. SOU 1985:51 p. 92.

<sup>26</sup> Cf. prop. 1988/89:85 p. 19.

## 2. Object of Protection

### 2.1. Literary Work

As was mentioned above a computer program is not defined in the Copyright Act, just as little as in most foreign copyright laws and in the Directive, neither is there a definition of “computer software”. It is stated in the preparatory works to the Act that it is not very practicable or simply not possible to give a comprehensive definition of a computer program as intellectual property is concerned.<sup>27</sup>

What a computer program has a reference to, however, is such a sequence of instructions needed to make a computer work. Hereby, the “source code” as well as the “object code” are possible forms of a computer program under copyright protection.<sup>28</sup> But the object of a computer program is even more comprehensive, in accordance with the Directive, since it comprises also a program’s “preparatory design material”, Section 1 (3) of the Act. This means, of course, that the concept of a computer program might comprise drawings, calculations, technical descriptions etc., provided that such phenomena are directly related to the design of a program, its object and task.

Preparatory design material was protectable also before the implementation of the Directive, namely as literary works; the novelty lies in the placement of such materials literally withing the definition of a computer program. The different rules of the Act specially related to “computer programs” are hereby equally valid also for such items. On the other hand “supporting material” – what might be needed to rightly understand or to use a program, but not being a part of its expression – is not comprised by the Act’s concept of a computer program.<sup>29</sup>

To conclude, what normally is called “computer software” comprises not only a computer program as such, meaning a sequence of instructions needed to make a computer work, irrelevant wether in the form of an object code or a source code, but also “program descriptions”, in the Directive and the Act known as “preparatory design material”, as well as “supporting material” in the form of handbooks and various kinds of informations facilitating the understanding of the program. All these phenomena are normally protected as literary works by the Copyright Act. But the last of the three just mentioned

<sup>27</sup> See prop. 1988/89:85 p. 9 et seq.

<sup>28</sup> See prop. 1988/89:85 p. 7 et seq, in particular p. 11 et seq.

<sup>29</sup> See prop. 1992/93:48 pp 112 et seq. Cf. *Brinnen*, På väg mot en digital europeisk informationsmarknad. Rättsproblem belysta i tre fallstudier, IRI-rapport 1993:4 p. 81 f.

objects is not covered by the Act's provisions specially related to "computer programs".

## 2.2. Freedom of Ideas, Principles, Algorithms, etc.

It is an old and undisputed principle of Swedish copyright law that it only protects literary or artistic *form*, not ideas, facts, principles or conclusions.<sup>30</sup> The copyright protection of a computer program therefore has a reference only to the form in which it is expressed by an author. In this sense Swedish copyright law is in full accordance with Article 1 (2) of the Directive.

We must notice, though, that the Directive does not exclude from protection e.g. logic, algorithms and programming languages, what arguably may cause a conflict with the Swedish law. But as Article 1 (2) of the Directive seems to afford protection only on the basic prerequisite of the existence of an "expression in any form", thereby not protecting "ideas and principles which underlie any element of a computer program", there is probably no definite contradiction between the Act and the Directive; at least it is not recognized by the Swedish legislature.<sup>31</sup> Therefore, algorithms in general (in the strict sense of mathematical expressions), programming languages, such as Algol, Fortran or Assembler, just as common formats, standards and principles of logic, can normally be used freely on the market.

On the other hand, it is sometimes argued, that this concept of copyright means that the only really relevant element of a new program remains outside the realm of protection. It is obvious that copyright may be found underprotective for the interests involved, and in the past serious doubts have been raised over the appropriateness of copyright for the protection of software. As pointed out by *Goldstein*, referring to the current wave of American court decisions, equally interesting from a European point of view, those decisions "have consistently restricted protection of computer programs to their authorially expressive – but least valuable – elements, and have systematically withheld protection from their most valuable, nonauthorial elements – their behavioral utilities."<sup>32</sup>

<sup>30</sup> See the decision of the Supreme Court, NJA 1965 p. 525 (NIR 1966 p. 250), Svensk Bokkatalog; cf. prop. 1992/93:48 p. 111 et seq.

<sup>31</sup> Cf. prop. 1992/93:48 p. 113.

<sup>32</sup> *Goldstein* in "Copyright and author's right in the XXIst Century", WIPO Worldwide Symposium on the Future of Copyright and Neighbouring Rights, 1 – 3 June, Paris 1994.

## 2.3. Requirement of Originality

The Swedish Copyright Act affords no specifications on the minimum requirements for protection. What might represent a “work” in the sense of the Act is in quite general terms expressed in its preparatory works, where it is also stated that future court practice, legal science and developments in other comparable countries must fill in and develop the concept of a protected work.<sup>33</sup> Court practice on the matter is rather scarce, though; after the Act’s enforcement there are only three decisions by the Supreme Court, in which the court more directly deals with the requirements of protection, none of them concerning computer programs or computer software.<sup>34</sup>

As computer programs, as well as supporting material within the area of computer software, according to the Act are guided by the same criteria for protection as other literary works, we may, however, state the following. A computer program, just as computer software, must be the result of a personal intellectual creation of one or several authors. It must not be copied from another program or simply derived from that. Further, it must also present a certain degree of individuality, thereby not being the result of a purely mechanical or technical routine, ordinary craftsmanship or mere chance. It is also clear that “quality”, in the sense of an apt, better or more clever solution to a problem, is not a relevant criterion. This has led to the requirement of a modest but clearly distinctive degree of *originality* as to the form or expression of the work.

As a helpful criterion to decide on originality is often used a type of hypothetical test, which is built on the notion that a protected work must not be such that two authors, independent of each other, could possibly arrive at the same result. If such a situation occurs, this is an indication on a too narrow a scope for creativity – an individualized work can’t be created under such circumstances, typically when a specific task is much governed by given parameters and solutions. However, this is not a conclusive instrument as the criterion of originality probably is related to the *subjective* state of the individual author, namely in the sense that he has not used or has not had the opportunity to use someone else’s work at the creation of his own work. At least from an academic point of view it is therefore possible, that two authors independent of each other do create (almost) the same computer program, which shows a sufficient amount of originality; if this happens, which for natural reasons may occur only in very

<sup>33</sup> See prop. 1960:17 p. 49

<sup>34</sup> See NJA 1965 p. 523, Svensk Bokkatalog (arrangement of book titles); NJA 1990 p. 499, Gotlandsmotiv (pictorial art); NJA 1994 p 74, Strawberries (pictorial art). The Supreme Court has also dealt with the question of originality, but not very fully, in several other copyright cases, lately notably in NJA 1993 p. 263, Architect’s drawings, and NJA 1993 p. 390, Journalist’s article.

exceptional cases, we have to accept, as the Swedish legislature has stated, that each one of the two authors is afforded protection for his program.<sup>35</sup>

To be afforded protection, a “series of instructions to a computer’s machinery” must therefore simply be a personal and individualized creation, principally on the same minimum level as other protected literary works. The fact that simple computer programs, only consisting of compilations of known techniques and solutions, are not even protected as catalogues according to Section 49 of the Act,<sup>36</sup> must not lower the minimum level of protection of a computer program as a literary work.<sup>37</sup> Simple compilations, results of ordinary craftsmanship and the like are not protected. Such general criteria, often relevant to computer programs, indicate however, according to the opinion of the Minister responsible for the 1989 amendments to the Copyright Act, that the minimum level of protection for computer programs should be placed “relatively high”; accordingly, protection should not be afforded if only one or a few solutions are actually available to reach the intended result.<sup>38</sup> Obviously, there are no grounds according to the Swedish copyright law for the application of the American “look and feel” concept.<sup>39</sup>

Against this background we may notice, that the automatization processes just as the level of standardization by the development of a program often have led the programmers to concentrate on a design phase. But this work has more rarely a bearing on the design of the source code or the object code, which usually are the starting points for a judgement on copyright protectability.<sup>40</sup> Therefore, such design work preferably results in “preparatory design material”, which nowadays is part of the concept of a computer program and therefore possibly protected as such. But automatization and standardization may very well accomplish, that larger parts of a “new” computer program is unprotected by copyright, e.g. if its design is the only possible solution or given by such standards.

At all events the requirements of originality seem to purport nowadays, that a protected computer program often must be seen as a composite work, if any, merely consisting of individual combinations of moduls.

Relative to the Software Directive the aforesaid probably don’t make a counterpoint. The EU Commission has always professed that it has generally refrained from solving really fundamental copyright problems through so called “horizontal provisions” in various directives, although broader and

<sup>35</sup> See prop. 1988/89:85 p. 28.

<sup>36</sup> See para. 1.4. *supra*.

<sup>37</sup> Cf. prop. 1988/89:85 p. 12.

<sup>38</sup> See prop. 1988/89:85 p. 27 et seq., where it is also stated, that Swedish law in this respect is in accordance with the Directive.

<sup>39</sup> Cf. *Brinnen*, note 29 *supra*, p. 86 et seq.

<sup>40</sup> Cf. SOU 1985:51 p. 90; prop. 1988/89:85 p. 8

fundamental copyright issues unavoidably have to be tackled during the elaboration of the various texts. The most fundamental provision of the Directive is in Article 1 (3): “A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.” This crucial definition of “originality” we find repeated for photographs in Article 6 of the Duration Directive<sup>41</sup>, and in the Database proposal<sup>42</sup>.

The Community seems to have made a choice between three existing requirements for copyright protection; firstly the common-law based requirements merely on “skill, labour and investment” and that a work is simply not copied from another source or originating from another author, secondly the requirement of *originality* as it is generally expressed in most of the Continental countries of Western Europe and, thirdly, the German approach which requires (or used to require) more than just personal expression, especially in the fields of design and computer software.<sup>43</sup>

Clearly, as is shown in the just quoted Article of the Directive, the Community chose “intellectual creation”, i.e. the intermediate position of Western Continental Europe, although the words “the author’s own” can be regarded as a formal bow to the common-law terminology of “original”. The further-reaching German requirement of qualitative tests is firmly rejected with the last sentence of “no other criteria shall be applied.” The final touch of the Continental personality approach to originality we find in Recital 17 of the Duration Directive, which speaks of “the author’s own intellectual creation *reflecting his personality*” (italics added). As we have seen, the Swedish approach is very close to this intermediary position of Continental Europe, therefore also in line with the Directive.

## 2.4. Interoperability, Interfaces and Reverse Analysing and Engineering

The word “interoperability”, as used in Article 6 of the EC Directive, is mentioned also in Section 26 (h) of the Act, where the word “samverkan förmåga” of the official Swedish translation of the Directive is used.<sup>44</sup>

<sup>41</sup> See Council Directive 93/98/EEC of 29 October 1993, harmonizing the term of protection of copyright and certain related rights, OJ EC L 290/24 (24 November 1993).

<sup>42</sup> See Amended Proposal for a Council Directive on the legal protection of databases, Com (93) 464 final SYN 393, Brussels, 4 October 1993; cf. the third consolidated text of 22 June 1994.

<sup>43</sup> Cf. *Cohen Jehoram*, “The EC Copyright Directives, Economics and Author’s Rights”, IIC Vol. 25, No. 6/1994, p 828 et seq.

<sup>44</sup> See prop. 1992/93:48 p 236.

“Interfaces” are not literally mentioned by the Act, neither are “decompilation” or “reverse engineering”.

However, as exceptions to the rights of the copyright holder the Swedish Copyright Act lets anyone who has a right to use a computer program, more or less literally in accordance with Articles 5 and 6 of the Directive, i.a. to observe, study or test the functions of the program and to obtain the information necessary to achieve the interoperability of an independently created computer program. This may be done under certain conditions stated in Sections 26 (g) and (h) of the Act. As will be dealt with in detail further on,<sup>45</sup> these exceptions are principally not related to the exclusive economic rights of the author – “examination” as such is not an act restricted by copyright – but are simply restrictions on his possibility to conclude an *agreement* contrary to the statutory exceptions with the lawful user of a program, a licensee or, possibly, a purchaser. However, in the case of computer software such minute examination of the coding of a program cannot be undertaken without reproduction of the original code, which may be a restricted act and therefore amount to an infringement of copyright.

<sup>45</sup> See para. I. 4.2. *infra*.



## 3. Authorship and Beneficiaries

### 3.1. Author of a Program

#### 3.1.1. Natural Persons or Group of Persons

Swedish copyright law accrues original copyright only to natural persons, which is at least indicated in Section 1 of the Copyright Act by its stating “A person who has created a literary or artistic work shall have the copyright therein...”. The copyright in a single work may also belong jointly to two or several natural persons, namely if their contributions to the work do not constitute independent works, Section 6 of the Act. If a person combines works or parts of works and thereby creates a new literary or artistic composite work, he has the copyright therein, which does not restrict the rights in the individual works so used, Section 4 of the Act.

Legal entities cannot be *initial* holders of copyright, neither can “creative” machines. A legal person can only acquire copyright by succession as provided in Chapter III of the Act. As for computer-generated works and so-called automatic programming the same principle remains, i.e. only if a natural person is possible to distinguish as a creator in such processes he is afforded copyright and may accordingly transfer his rights.

This means that not only the economic rights within the sole right of the copyright system accrues initially to the author or authors as soon as the work is created, which naturally demands no formalities, but also Moral Right. The latter right basically affords every creator of a work a position to claim a right of *paternity* and a right of *integrity*, Section 3 of the Act. The right of paternity means, that when the work is made available to the public, the name of the author must be stated to the extent and in the manner required by *proper usage*, Section 3 (1) of the Act. In practice this may vary from total lack of attribution to a very dominant exposure of the author’s name. Normally, every author of a computer program may claim to be mentioned within the software, for instance shown on the screen at the beginning of the running of a program, as well as in the handbook related to a program.<sup>46</sup>

The basic right of *integrity* basically relates to three different acts, namely the alteration of a work when it is copied, the alteration of an original copy and the use of an unaltered work in an unworthy context, Section 3 (2) of the Act. An author is protected against such acts only if they are “prejudicial to the author’s literary or artistic reputation, or to his individuality”. Generally, the

<sup>46</sup> Cf. NJA 1974 p. 94 (NIR 1975 p. 322), Rudling; NJA 1993 p. 263 (NIR 1993 p. 482), Ahlsén.

right of integrity seems not as relevant to authors of computer programs as the right of attribution, the latter being all the more important, though, which stems from the normally industrialized conditions under which programs are produced and the team-work streak.

The very special impact of integrity rights has knowingly never been tried by the Swedish courts as concerns computer programs or software products, but should not be underestimated in this branch.<sup>47</sup> As for the paternity right it must be of considerable importance basically to the authors, of course, but certainly also to software producing companies, using the name of the author as a quality and/or marketing device, thus not to be extinguished from copies of protected works. The special problems concerning “conveyance” of i.a. integrity rights to an employer are further dealt with in the following subsection.

### 3.1.2. Commissioned Works – Works Made for Hire

Economic rights within the realm of statutory copyright law are as a matter of principle transferable without limits, Section 27 of the Act. However, as a rule of presumption Section 28 states, namely in the absence of an agreement to the contrary, i.a. that a person to whom copyright has been transferred may not change the work or transfer the right to others. If it belongs to a business, it may, however, be transferred together with the entirety of the business or part thereof.

There is no general provision on commissioned works, employment or service contracts in the Copyright Act. Nor are there any mandatory provisions in the Act on transfer of copyright; on principle, the rules of general contract law guides the voluntary transfer of copyright from an author.<sup>48</sup>

However, as for computer programs created by an employee in the execution of his duties or following the instructions given by the employer, there is a presumption given by the lawmaker. As was already mentioned above, a new paragraph, Section 40a of the Act, in force as of 1 January 1993, was primarily designed to correspond to article 2 (3) of the Directive, whereby the employer is entitled, unless otherwise provided by contract, to exclusively exercise all

<sup>47</sup> See about the application by the Supreme Court of the integrity rights on other categories of works: NJA 1971 p. 226 (NIR 1971 p. 463), Carlsson; NJA 1974 p. 94 (NIR 1975 p. 322), Rudling; NJA 1975 p. 679 (NIR 1976 p. 325), Sveriges Flagga; NJA 1979 p. 352 (NIR 1979 p. 385), Svanberg.

<sup>48</sup> See *Karnell* in *International Copyright Law and Practice*; Sweden, § 4[1][b], n. 7 *supra*. The market and the courts have often settled for a solution whereby an employed or commissioned creator of a computer program transfers all his economic rights in a program to his employer or commissioner; cf. *Rosén*, *Upphovsrättens avtal*, Stockholm 1992, p. 128 et seq., cf. particularly the decision of Svea Hovrätt, the Court of Appeal of Stockholm, 18 March 1992, DT 15, in *Rosén*, loc. cit. p. 139.

economic rights in a program. But the Act takes a further step as the presumptive transfer comprises “copyright” as a whole; not only the economic rights but also moral rights are comprised in the transfer.

From a principled standpoint this seems to be an anomaly, since Moral Right as such cannot be transferred by contract according to Nordic standards. The lawmaker, naturally being aware of this dilemma, has sought to side step it. Starting from the notion that the employed author is the original holder of copyright in a computer program, the rights are not stated to be assigned or exclusively licensed to the employer, nor is there any kind of waiver of the author’s rights; instead copyright is “conveyed” with all its content. This verb is a novelty in Swedish legal language concerning transfers of copyright.

The meaning of the new expression gives rise to severe doubt. Apart from the fact that this change of terminology causes confusion, it solves nothing in handling the distinctive elements of *droit moral*. In particular, there are problems in relation to subsequent transfers of rights, licensing and relations with third parties and, of course, the intellectual problem of ascribing integrity rights – which in essence protect a natural person’s personality – to a legal entity. Equally, it is unclear how such an entity could dispose of a moral right.<sup>49</sup>

The lawmaker’s actual intension probably was more or less to pulverize Moral Right in computer programs created by employees, without facing the conflicts with the minimum standards of the Berne Convention. At all events a *waiver* of moral rights is explicitly accepted according to Section 3 (3) of the Act, but only in respect of uses of a work which are limited in nature and extent and sufficiently specified. Such waiving of moral rights must sometimes be allowed to a considerable extent, particularly in relation to computer programs created on commission or by employers. At all events Section 40a of the Act is of course a strong force towards the establishment of *contracts* between employed authors and their employers which regulates copyright matters, moral rights included.

## 3.2. Beneficiaries of Protection

### 3.2.1. Natural Persons or Group of Persons

Only a natural person or a group of natural persons can be initial beneficiaries of copyright protection. The importance and legal substance of Moral Right makes it a necessity to accrue it only to the creator or creators. However, as

<sup>49</sup> Cf. *Rosén*, “Moral Rights in Swedish Copyright Law – focus on waiver of rights and contract practice especially as concerns computer programs”, NIR 3/1993 p. 355 et seq.

we just have dealt with, Section 40a of the Act seems to have opened for the possibility of an author, as a presumption in this direction, to “convey” all his rights in a computer program to an employer. The principle is clear, though, inasmuch as a transfer is needed to make anyone else than the author of a work a holder of rights therein.

### **3.2.2. Legal Persons**

It follows from the aforesaid, that legal persons or legal entities are never “authors” of a work according to the Swedish copyright law. Such persons or entities can only acquire copyright, Moral Right excluded (at least as a principle), by succession, Section 27 of the Copyright Act.<sup>50</sup>

<sup>50</sup> Cf. *Karnell*, loc.cit. n. 48 supra, § 4[2].

## 4. Restricted Acts and Exceptions

### 4.1. Restricted Acts

#### 4.1.1. The Concept of Exclusive Rights

The exclusive right of an author includes the right to control the work by producing copies of it and by making it available to the public, be it in its original or a changed form, in translation or adaption, in other literary or artistic forms, or by other technical means, Section 2 of the Act. These basic economic rights, distinguished from moral rights expressed basically in Section 3 of the Act, may be more distinctively conceptualized in terms of the following exclusive rights:

- the making of copies of a work;
- the distribution of copies to the public;
- the translation and adaption of a work;
- the public performance of a work;
- the public display of a work.

These rights of the author of a work are designed to let the author participate in every action of exploitation of his work, and they are to be interpreted accordingly.<sup>51</sup> However, these basic rights of the author are limited by a great number of exemptions, contained in Chapter 2 of the Act, such as copying for private use and the various rules on the exhaustion of rights, which will be dealt with in subsection 4.2. *infra*.

The Software Directive aims not at identical provisions on computer software within the EU, accordingly the same has been valid also within the EEA area. The acts protected by the Swedish Copyright Act must be interpreted following the general scheme of rules and exceptions in Article 4 and 5 of the Directive and, fundamentally, the general purpose of the Directive.<sup>52</sup> As the Directive only sketches a set of basic rights, regarded as cornerstones of the copyright protection, the scope of protection may in fact vary somewhat compared to the rules of certain states within the EEA, at least until the Euro-

<sup>51</sup> See SOU 1956:25 p. 84 et seq. As a basis for interpretation of the scope of the various economic rights of an author is often used a statement by the responsible cabinet minister, confirmed by the parliamentary standing committee on legislation (första lagutskottet), prop. 1960:17 p. 60 and LIU 1960:41 p. 17, that the author should be reserved the exclusive right to “every economic use of his work of importance in practice”.

<sup>52</sup> Cf. the considerations of the Swedish Ministry of Justice in Ds 1992:13 p. 140.

pean Court of Justice has developed a more detailed concept for the copyright protection. However, the Swedish legislator has strived for an almost literal implementation of the just mentioned articles of the Directive.

#### 4.1.2. Reproduction

Section 2 (1) of the Copyright Act attributes to every author the exclusive right of all kinds of reproduction, which comprises permanent as well temporary copying, irrespective of medium, number of copies or the purpose or art of reproduction. Accordingly, “electronical” copies, perceivable only to machines, not to natural persons, just as different kinds of ephemeral copies and all those types of reproduction unknown to the legislator of the 1950’s, are also protected within the concept of reproduction.

This generous perception of what reproduction stands for, interpreted in the light of the general purpose of the copyright legislation, means that every action which effectuate the possibility of a contemporary or parallel use of a specific computer program, or a protected part thereof, in its original, adapted or translated form, is regarded as reproduction according to Section 2 (1) of the Act. Accordingly, reproduction comprise every single copy of a work as well as great numbers, comprehensive editions or the like. Furthermore, following the Directive, the Copyright Act now explicitly and generally prohibits all kinds of *private copying*, if not authorized by the author, Section 12 (2) of the Act.<sup>53</sup>

An important limitation, besides the statutory exemptions dealt with below,<sup>54</sup> is that reproduction must be separated from mere *utilization* of a program; the running of a program as such is neither an act of reproduction nor any other kind of use under copyright protection. Accordingly, loading of a program into a RAM, the implementation of it in a ROM and the making of a back-up copy are all restricted acts, whereas the running of it is free. Expressed differently, if the running or any other kind of factual “use” of a program necessitate some kind of reproduction, only the latter deed is comprised by the concept of reproduction and therefore constitutes a restricted act.

<sup>53</sup> As for statutory exceptions in respect of a lawful user’s copying of computer programs, see para 4.2.2. *infra*

<sup>54</sup> See para. 4.2. *infra*.

#### 4.1.3. Loading, Running, Viewing, Displaying, Transmission and Storage

As follows from the foregoing several acts noted in the headline must in relation to computer programs be regarded as protected acts. It is clear that *loading* of a program into a memory or any other kind of *storage* are acts of reproduction of the program, which need authorization of the copyright holder. The same is principally valid also for every *transmission* of a program, irrespective in what medium, which in fact results in the storage or a new fixation of a program, whether temporary or not.<sup>55</sup> Further, transmission may also bring about acts of *distribution* of computer programs, e.g. *rental*, if a compensation is claimed for a temporary use of an electronically transmitted copy of a program, or *lending* if the disposal is free of charge.<sup>56</sup> But as will be further dealt with in paragraph 4.1.4. below, no act of distribution may be carried out on the basis of a copy not lawfully made.

On the other hand, actual *running* of a program, not resulting in new or parallel reproduction of a program, is not covered by the exclusive rights of the author.

The *viewing* of a computer program on the screen of a terminal, which naturally would relate only to its source code, may also mean the application of the program; either way it may presuppose loading, storage or transmission activities covered by *copying*, which obviously comprises one or several protected acts. But the fact that the computer program as such is seen on a screen or otherwise perceived by a human eye through an ephemeral medium, which is relevant to software in a broader sense, only relates to an act of “viewing” which is not as such comprised by copyright. A single person having a look at a program in the just mentioned way is naturally not executing a protected act, as little as by reading a book.

Further, according to Swedish standards, it is probably clear that what

<sup>55</sup> Cf. prop. 1988/89:85 p 13 et seq.

<sup>56</sup> A quite recent and highly disputable decision of an Appeal Court, see Note 21 supra, leave to appeal is accepted by the Supreme Court, focuses i.a. on the acts of loading and distribution of computer programs, as well as the question of responsibility for such acts, as the use of a so called Bulletin Board System (BBS) is concerned: A private person had made his BBS available to about 700 users, letting them both load into it and retrieve from it any information of their choice. Thus, the owner of the BBS had no immediate control of whether protected objects were stored and retrieved from his BBS – he received about 1500 messages and about 500 program files a week. According to the file-lists of the hard-disc of the BBS, invoked by the public prosecutor in the case, at least 20 protected computer programs had been loaded into the BBS. The Appeal Court did not find the owner of the BBS responsible for the actual copying taken place in the BBS – possibly it didn’t see it as copying! – neither was the distribution from the BBS found covered by copyright as the group of persons which had without doubt had a possibility to receive the protected programs, about forty different users, did not show such openness which would have rendered the “public” criterion to the acts of distribution. An elucidatory decision of the Supreme Court is obviously highly desirable.

appears on a screen or the like is not in itself regarded as reproduction in the meaning of the Copyright Act.<sup>57</sup> However, as was noted above,<sup>58</sup> the *display* of a work is a protected act, provided that it occurs in public. Publicly placed terminals or screens addressing several persons outside the private or family sphere may therefore accomplish representation of the program, which accordingly may be comprised by the protected act of public display.

However, a *published* copy of a work may be displayed publicly without the consent of the author, as authorized publication leads to the exhaustion of the display right relative to the specific copies included in the publication, Section 20 of the Act. A lawfully published copy may therefore as a matter of principle be displayed on many screens by electronical means far from the used copy itself. A banal example of this phenomenon is a television broadcast from an art gallery, whereby TV-screens among the receivers display the paintings on the gallery walls.

This must of course be separated from other possible acts, protected by copyright, which are possibly involved in the *transmission* of a work, namely the acts of *public performance*, *reproduction* and/or *distribution* of copies. The display right is actually linked to a specific copy, and this right is exhausted only as the display of that very copy is concerned. As for a digitized copy, reproduced and stored in a computer or a database, it cannot be seen by the human eye, thus it can't be "displayed" by the terminological distinction of the Copyright Act. This means that the copy of the electronically stored work, whether lawfully reproduced or not, is not made available to the public by *display* when it is transformed to something which may be perceived by a human eye on screens placed in public premises; such a work is publicly *performed*. Accordingly, a page from a textbook, stored in a computer's memory, which is transmitted to the screen to be readable by the human eye, is not a representation of the digitized copy but of the work itself, namely the "spiritual content" of that page in another shape.<sup>59</sup>

As the display of software, in the wider meaning of the word – not just a computer program in itself or a digitized copy of a work – such as handbooks and written instructions to a computer program, certainly must be perceived as an economically important use of protected works, for example by video or scanner display in networks, it could be argued that the Swedish display right is too narrowly designed to match modern techniques for visualizing protected works, particularly as texts and works of pictorial art are concerned. The practical difference between a public display and a public performance, mainly due to the *exhaustion*<sup>60</sup> only of the former right as published or transferred copies

<sup>57</sup> Cf. *Rosén*, Digitaltekniken i juridiken, NIR 2/1993 p. 266 et seq (esp. p. 281 et seq).

<sup>58</sup> See para. I. 4.1. *supra*

<sup>59</sup> Cf. the statement by the former copyright commission of Sweden in SOU 1985:51 p. 64.

<sup>60</sup> Cf. para. I. 4.2. *infra* on exhaustion of distribution and display rights.



are concerned, is sometimes hard to explain, particularly as both acts of use may be executed on the same screen and under comparable conditions.

As will be further dealt with in paragraph 4.2. below, not only display but also the protected acts of reproduction as well as distribution of software are reduced by several and important exemptions, which comprise and occasionally goes beyond those given in Article 4 and 5 of the Directive.

#### **4.1.4. Adaption, Portation and Compatibility**

The implementation of the Directive on computer programs has not resulted in any particular alterations of the Swedish Copyright Act to match Article 4 (b) of the Directive. The Act, as it already fulfilled the requirements of Article 12 of the Berne Convention,<sup>61</sup> was “‘accordingly” considered to match also the Directive, it is argued in the preparatory works of the Copyright Act.<sup>62</sup> As we have indicated earlier<sup>63</sup> the basic economic rights of the author comprise not only the right to control his work by producing copies of it or making it available to the public in its original form, but also to have such control over the work in a “‘changed form, in translation or adaption, in other literary or artistic form, or by other technical means”, Section 2 (1) of the Act. This is fully valid also for computer programs.

As a result of the fact that private copying of a computer program is a restricted act, Section 12 (2) of the Act, it may seem as if adaptations, alterations and the like of a copy of a program is only available, without concession of the author, to a person who actually has a right to use the computer program and, if so, that this would basically amount only to what is covered by the explicit exceptions enumerated in the Act, Section 26 (g). The last mentioned rule purports that the lawful acquirer may alter the program, but only insofar as this is necessary for the use of the program in accordance with its intended purpose, including error correction.<sup>64</sup> Hereby, the Swedish Copyright Act is in full accordance with Article 5 (1) of the Directive, in its turn referring to Article 4 (a) and (b) of the Directive. However, Article 5 (1) of the Directive, just as Section 26 (g) of the Act, indicate that the author may restrict even such alterations by specific contractual provisions.<sup>65</sup>

On behalf of an owner (by sale, inheritance etc) of a copy of a computer

<sup>61</sup> Art. 12 of the Berne Convention reads: “‘Authors of literary or artistic works enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.”

<sup>62</sup> Cf. prop. 1992/93:48 p. 121.

<sup>63</sup> Cf. para. I. 4.1. *supra*.

<sup>64</sup> See para. I. 4.2.2. *infra*.

<sup>65</sup> As we will notice below, there seems to be a clear discrepancy between Article 5 (1) and the statement in the preamble of the Software Directive, e.g. in that “‘the act of correction of ... errors, may not be prohibited by contract”.

program it could be argued, though, as the restricted acts of adaption, translations etc. are connected to *reproduction* and to make a work available to the *public*, according to Section 2 (1) of the Act, that the owner of a copy of the program, e.g. stored in a disc, could accomplish alterations to this particular copy of the program without copyright conflicts.<sup>66</sup> But only if he is not making new (unauthorized) copies of it. Obviously, this is an important restriction as he probably cannot use this copy of the program at all because all sorts of use normally require some kind of new or successive copying, e.g. by loading of the program into a RAM and thereby being able to accomplish the desired adaptations or alterations.

The importance of this also stems from the fact that it is not quite clear whether or not the subsequent transfer by sale of the altered copy, i.e. making it available anew to the public by marketing, would be in conflict with the author's rights in the copy of the original program, if the copy has previously been lawfully put on the market by sale, which accordingly has led to exhaustion of the distribution right.<sup>67</sup> Indeed, all limitations to the basic rights of an author, such as the restriction on further sale of a copy, must be exercised without other changes of the work than those which are "necessary for the permitted use", Section 11 of the Act. But this so called exterior rampart of *droit moral* is only applicable when the work is "reproduced publicly", which may not occur when altered copies are used after further transfer. A very hard interpretation of the relevant provisions of the Act, in the light of the Directive and Article 12 of the Berne Convention, makes it probable, though, that the subsequent public sale of altered copies of a computer program is covered by the author's right to make copies available to the public in the form he has chosen.<sup>68</sup>

However, it must not be neglected, that a restriction also appears in that adaptations and alterations may conflict with the moral rights of the author according to Section 3 (2) of the Act. Presumably, such infringements may also concern a copy of a program which is altered in private, even in a situation where it is perceived only by the adaptor himself. At least if there is a risk of the copy's possible subsequent availability to the public; then the author could probably dispose of copyright sanctions, e.g. make a request for the property to be destroyed according to Section 55 (2) of the Act. As a matter of principle an actual restriction lies in the fact that the author's rightholder, e.g. a software

<sup>66</sup> Cf. SOU 1956:25 p. 135.

<sup>67</sup> See para. I. 4.1.4. *infra*.

<sup>68</sup> The preparatory works indicate this, e.g. by stating that anyone may carry out an adaption; it is only when the work, in its adapted or altered state, is copied or *made available to the public* that the rights of the author are concerned; see SOU 1956:25 p. 135. However, we may also notice the lawmaker's statement, that "intensified access" to a copy of a work, i.e. more than the author has so far accepted, is at the author's disposal; SOU 1956:25 p. 96. Cf. *Karnell, Rätten till programinnehållet i TV*, 1970, p. 387 et seq.

producing company, cannot as such dispose over moral rights, if the author is not an employee.<sup>69</sup>

Finally, it must also be noted, that in the absence of an agreement to the contrary, the person to whom copyright has been transferred may not at all change the work to which this right adheres, Section 28 (1) of the Act. Accordingly, it is presumed by the Act, that the lawful acquirer of the rights in a computer program may only dispose over such rights on the condition that he is not altering the work. However, an acquirer of rights who diverges from this statutory presumption, without a specific contractual stipulation authorizing him to do so, does not violate copyright, only the law of the contract, provided of course that the alteration is not a violation of *droit moral* according to Section 3 of the Act.

To conclude, the author's exclusive rights in a computer program does not cover e.g. upgrade or update actions to specific copies, if this can be accomplished without the manufacture of one or several new copies and if the altered work is not made available to the public. Alterations are therefore, besides moral right aspects in a narrow sense, connected to acts of reproduction and marketing. This scarcity of the Act is probably not so important to the authors in the light of the scope and reach of the reproduction right, particularly as concerns computer programs, where it also comprises private copying. However, actions of portation or adaption to bring about compatibility which does not involve reproduction or, even more clear, which does not alter the ported program itself, using emulating programs around it and thereby changing or adapting only the calls of the program itself, are probably not covered by the Copyright Act.

#### **4.1.5. Distribution – First Sale Doctrine, Importation, Exportation, Rental and Lending**

Among the exclusive rights of an author we find, according to Section 2 (3) of the Swedish Copyright Act, the distribution of copies to the public. At a closer look this exclusive right to address others with a copy of a work comprises a great variety of acts such as sale, rental, lending, barter, pledge and gift, i.e. virtually every conceivable form of distribution of a copy of a work to the public. As a matter of principle there are no limits to this right, whereas the different acts just mentioned may be exercised exclusively by the author as long as the work is protected.

As is generally the case in intellectual property legislation, wherever it is found, that distribution rights are subject to so called *exhaustion* in different

<sup>69</sup> See para. I. 3.1.2. *supra*.

ways. This is valid also for the Swedish copyright law, and exhaustion is technically handled in statutory exemptions to the above mentioned paragraph, namely in Section 19 of the Act. As computer software is concerned these exemptions to the principal rule have been amended several times over the last years. From 1 January 1994 the following is valid.

Generally, distribution rights in copies of a literary work are exhausted when the copies are “published” with the consent of the author, Section 8 and 19 of the Act; further distribution by sale, rent or loan etc., are then beyond the copyright control of the author.<sup>70</sup> However, the exhaustion of the distribution rights in a copy of a computer program, which also includes preparatory design material,<sup>71</sup> is effectuated by all kinds of *final transfers*. Hereby, not only actual sale of a copy, but also barter and gift are comprised by what is called “överlåtelse” in Section 19 of the Act.<sup>72</sup> Consequently, copies of programs given away free of charge, e.g. for marketing purposes, execute exhaustion just as sale on the basis of full economic compensation, provided of course that those acts are performed with the consent of the author or his rightholder. Therefore, this exhaustion rule comprises not only the first sale doctrine of Article 4 (c) of the EC Directive, but goes somewhat further.

In line with the EEA Agreement the comprised acts of sale, barter and gift purport exhaustion within the whole EEA territory. This strictly regional exhaustion, explicitly stated in Section 19 of the Act, implies that the first sale of a copy of a computer program, e.g. in the USA, does not exhaust the rights to further distribution within the EEA area of that copy; but if it has been lawfully sold (or transferred) in one of the EEA countries, its further distribution by transfer within the EEA area cannot be stopped by copyright instruments.

Otherwise, the main exhaustion principle of Swedish copyright law is founded, or has been hitherto, on the assumption that global or international exhaustion follows the first lawful publishing of copies of a work anywhere in the world.<sup>73</sup> However, the adherence of Sweden to the EU seems to hinder that Sweden, as little as any other member country, may uphold international exhaustion. In a recently published commentary on the EC Directive 92/100/EEC on rental and lending it is accordingly assumed, which is however

<sup>70</sup> It has recently been proposed, however, that Section 19 of the Act should generally abandon the notion of “publishing” for the “transfer” of a copy as an executor of the exhaustion of distribution rights, i.e. any lawful transfer of any kind of a protected copy of a work would purport that its further transfer is lawful even without the consent of the author or his holder of the right; prop. 1994/95:58. These changes may come into operation, if at all accepted by the Parliament, on 1 April 1995 at the earliest.

<sup>71</sup> Cf. para. I. 2.1. supra.

<sup>72</sup> Cf. prop. 1992/93:48 p. 123

<sup>73</sup> Cf. prop. 1994/95:58 p. 36 et seq. This proposition also suggests that regional, i.e. EEA-wide, exhaustion shall be applied also for sound-carriers of literary, musical and cinematographic works as well as for certain neighbouring rights.

not following from the express wording of Article 9 (1) of that Directive, that the Member States nevertheless are prohibited from applying international exhaustion, thus obliged generally to maintain exhaustion only within the Community, i.e. following the first lawful sale in the Community of a specific copy.<sup>74</sup> In case this somewhat dogmatical assumption finds approval, the software “order” will in this respect be normative also to all other works protected by copyright.

Other distribution forms are treated differently. The right to control *rental* of computer software, as a phenomenon within the whole category of literal works, therefore not only comprising computer programs, is not exhausted by sale, previous rental or any other form of distribution, Section 19 of the Act. Also in this respect the Act not only matches Article 4 (c) of the Directive, but stretches further as to the object of the rental rights.

As for *lending*, which is not explicitly dealt with in the Directive, Section 19 of the Act states that copies of computer programs in *machine readable form*, i.e. discs and the like carrying the object code, must not be disposed for public lending without the consent of the author. This is of great importance i.a. to public libraries, which as lawful *owners* by purchase or gift of copies of programs cannot lend them to the public without due permission of the copyright holders. However, handbooks, program descriptions as well as “preparatory design material” may very well be objects of public lending, but not public rental, without a necessary consent of the author, namely after the point of exhaustion. Therefore, a copy of a machine readable disc tucked down in a pocket inside a book cover, e.g. offering applications of the books theme, is guided by other lending rules than the book itself.

These provisions of the Act apply also to programs created before January 1, 1994, but without prejudice to any acts concluded and rights acquired before that date. However, the rental right of software in its present shape, also in effect from January 1, 1994, purports a retroactive consequence in that copies made available to the market by sale etc. previous to that date, and therefore possibly already the object of the owners letting for hire, cannot be rented out without the author’s permission after the said date.<sup>75</sup>

In conclusion, as for computer software, but arguably the same is still not valid to other types of works, the already valid Swedish rights of distribution matches the demands of the EC Directive on rental and lending.<sup>76</sup> The proposed Swedish implementation of that Directive basically adds new rules only for cinematographic works and, of course, for neighbouring rights.

<sup>74</sup> See *von Lewinsky & Reinbothe*, The E.C. Directive on rental and lending rights and on piracy, London 1993.

<sup>75</sup> Cf. prop. 1992/93:214 p. 107

<sup>76</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

## 4.2. Exceptions to the Restricted Acts

### 4.2.1. Use of a Program

Already before the implementation of the EC Software Directive the Swedish Copyright Act comprised a few non-mandatory provisions on the lawful user's right to make such copies of a computer program and those alterations to a copy needed for the admitted use and to make back up-copies needed for safety reasons. These copies could neither be used for other purposes nor be used after the expiry of the right (licence) to use the program.<sup>77</sup>

The mentioned rules, clearly in favour of a rightful user, were placed in Chapter 3 of the Act, i.e. among the general rules on *copyright transfer*, principally a well motivated position in the Act. As was just mentioned these stipulations were all non-mandatory, just like all the other stipulations of the Act on contractual matters. Their purpose was to purport the practical and expedient use of copies of computer programs just as the rules were built on the assumption that the use of a program normally means the production of new copies and that such copies are moved between different units of a computer.<sup>78</sup>

This matched some of the statements in Article 5 (1) and (2) of the Directive, but was obviously not enough for adequate implementation of the whole Article. Against this background the Swedish legislature chose to almost literally transfer the words of Article 5 of the Directive into a new paragraph, Section 26 (g) of the Act, and went on with the same procedure as concerns decompilations of computer programs, Section 26 (h) of the Act, both paragraphs effective on 1 January 1993, placed in Chapter 3 of the Act, which is all about *limitations to copyright*.

It should be noted that these statutory limitations not entirely concern the exclusive rights of the author, but limitations on contractual provisions. It has already been stated that the use of a program, e.g. by *running*, as a matter of principle is not a restricted act within the realm of Swedish copyright, nor is *observation* or *testing*.<sup>79</sup> Accordingly, restrictions on an author's possibilities to limit a rightful user's actions after a transfer of rights are not automatically connected to copyright. However, the legislature of Sweden chose to fulfil the implementation of Articles 5 and 6 of the Directive by their almost literal insertion into the Act's chapter on limitations to copyright. The main reason for this actually seems to have been the mandatory nature of some of the stipulations to the benefit of a user, whatever the grounds he may have to use a program.<sup>80</sup>

<sup>77</sup> Section 40 (a) of the Act before the amendments of January 1, 1993.

<sup>78</sup> See prop. 1988/89:85 p. 20; cf. *Rosén*, "Enskilt bruk och avtal om utnyttjande av datorprogram", NIR 4/1990 p. 539 et seq.

<sup>79</sup> See para. I. 4.1.2. *supra*.

<sup>80</sup> See prop. 1992/93:48 p. 127.

### 4.2.2. Reproduction

According to Section 26 (g) of the Copyright Act anyone who has the right to use a computer program may reproduce it, without special authorization of the rightholder, within the limits of what is necessary for the program's intended purpose. However, this statutory limitation to the rightholder's exclusive right is not mandatory and may therefore be set aside by an agreement between the user and the rightholder.

A rightful user is also allowed to make *back-up copies* for safety reasons, again insofar as this is necessary for the intended use of the program, Section 26 (g) (2) and (4) of the Act. A person having a right to use the computer program may not be prevented by contract from making such a back-up copy; in accordance with Article 5 (2) of the Directive this exemption is mandatory.

As for the concept of "the right to use" a computer program, we may notice, that the Swedish legislator in this expression comprises all kinds of *transfers of rights* to use a program, i.e. all forms of sale, gift, barter, rental and lending of copies of a program,<sup>81</sup> whereby the basic assumption is that virtually all commercially relevant uses presuppose reproduction, i.e. a restricted act. From this point of view the above mentioned restrictions on the rightholder don't seem very appropriate, as he in all likelihood has already accepted them by the transfer he has authorized. These restrictions therefore show their importance primarily by *sale* of copies of programs, especially by further sales, where candid agreements on *use* are not always made.

In the light of this copies accordingly made out of "necessity" or for safety reasons may neither be used for other purposes, i.e. than those agreed upon or otherwise follow from the licensed use, nor be used at all after the expiry of the user's right to use the program. The last mentioned restriction should be interpreted literally; thus, the copies must not be erased after the term of rightful use.<sup>82</sup> Rather the opposite is valid as several Swedish laws demand the preservation of documents, e.g. the law on accountancy (1976:125), which demands the preservation of accounts, a phenomenon which also may comprise computer programs.

We may also assume, that the rightholder's sale, barter or gift of a copy and acceptance of the transferee's use of it comprises further transactions of this kind and the second or third transferee's use; thus the latter has also a "right to use" the computer program and accordingly he may benefit from the restrictions of Section 26 (g) of the Act.

As the right to further transfer is exhausted within the EEA area, if the first lawful sale takes place within the EEA, the rightholder's agreement on *restric-*

<sup>81</sup> Cf. prop. 1992/93:48 p. 127 et seq.

<sup>82</sup> Cf. prop. 1988/89:85 p. 20 et seq.

tions on a transferee to accomplish further sale, or the like, does not concern copyright as such; the transferee's further sale within the area is a violation of the contract but not of copyright, provided, of course, that the agreement is not actually to be seen as a contract on rental or is otherwise not possible to characterize as a *final* transaction. On this basis the question remains to be answered, if the rightholder's restriction on further sale, even though it cannot be forced through by copyright sanctions, is also a hindrance to a new copy owner's status of a "rightful user", if he is in good faith about his acquisition, taking over those rights to use as the transferor undisputedly had, and accordingly his right to refer to at least the mandatory rules of Section 26 (g) of the Act.

However, even if the transferee's acquisition of the copy is respected on grounds of good faith, the same is not automatically true about the right to use the program, which comprise the still valid right to i.a. *reproduce* the copy's inherent program. As a right to use is possible to restrict by contract to a certain user, and as the acquisition of intellectual property rights on the basis of good faith and tradition of a good is not accepted in Swedish law,<sup>83</sup> the further sale of copies is pointless, as the new owner's use is a violation of copyright under the just mentioned conditions.

The mandatory rights of a person who accordingly has a right to use a program comprise also the right to *observe*, *study* or *test* the functioning of the program, namely in order to determine the ideas and principles which underlie any element of the program, Section 26 (g) (4) of the Act. The Swedish text hereby presents a literal translation of Article 5 (3) of the Directive. Thus, such study etc. is permitted, Section 26 (g) (4) states, if the user does so while performing any acts of loading, displaying, running, transmitting or storing the program, to which he is entitled. For reasons already dealt with<sup>84</sup>, no lawful user will meet a conflict with Swedish copyright by the act of sheer studying etc. under the said conditions. Therefore, these provisions must be seen as restrictions on contractual freedom; terms of a contract which restrict the user's rights in those respects, mentioned in Section 26 (g) (5) of the Act, are accordingly null and void.

#### 4.2.3. Adaption

As was indicated before, the lawful user of a program is explicitly permitted to make such alterations to the program which are necessary for its intended purpose, error correction included, Section 26 (g) (1) of the Act. This particular

<sup>83</sup> See *Bernitz et al.*, *Immaterialrätt*, 4. ed. 1993, p. 165.

<sup>84</sup> Cf. para. 2.2. *supra*.



provision of the Act, just as Section 5 (1) of the Directive, is of a non-mandatory nature, whereas the rightholder may circumvent it if he so chooses. Obviously, this also concerns error correction, a possibility of a certain importance in case the author would have objections to an acquirer's own manipulations of any kind, also in order to correct defects of the acquired program.

The actual frame of this adaption right emanates from the opinion, that the acquirer of rights, whether by sale, licence, rental etc., shall be able to use his copy of the program in all those respects as he has been permitted by the author or his rightholder. Therefore, not only error correction is comprised by what may "freely" be done by a lawful purchaser, but also other types of alterations, which may be defined by the utilization right as expressed in the contract of transfer of rights.

However, the presumption inherent in this provision stretches probably not further than to alterations made necessary by the untroubled use of the program in its potential state by the date of the acquisition. This would mean that *update* or *upgrade* actions are not encompassed by the statutory presumption. Certain other acts of alteration, i.a. in the form of *maintenance*, are probably also reserved for the rightholder.

Generally, the presumption in Section 26 (g) (1) must be reconciled with the overall principle of copyright to protect a work virtually against all kinds of alterations, all in line with the provision in Section 28 of the Act, which states that an acquirer of rights in a work must not make alterations to it by the exercise of the rights. As the latter rule is non-mandatory, it supplements a contractual transfer of rights, it can't be said to conflict with the subject matter of the former provision.

#### **4.2.4. Portation or Emulation**

It follows from the foregoing that any act of portation or emulation which constitutes an alteration, adaption or translation of the code of a program, beyond the scope of alteration and correction presumed by Section 26 (g) (1) of the Act, and beyond the legitimate acts of decompilation, Section 26 (h) of the Act, dealt with below, is subject to the authorization of the copyright holder, at least if such an act purports the manufacture of new copies, whether of a temporary kind or not. By contrast, if techniques of so called soft portation are used, which do not touch upon the ported program as such, but only alter the calls of the program, no authorization seems to be needed.

However, as modifications of a program should be permissible if they are necessary for the intended purpose of the program, according to the just mentioned provision of the Act, the aforesaid must be evaluated on this basis

and be adjusted to the general demands of good faith. A subject of dispute may then occur if a portation, which changes the purpose of utilization of a program, for example changing a standard application program which presents a single user operation system, e.g. MS-DOS, to a multi user program, would demand authorization of the rightholder. A prudent evaluation of such a situation would probably often lead to an opinion in favour of the rightholder. But again, the Copyright Act's strong linkage to copying, and neutrality to "use", must not be neglected.

#### 4.2.5. Decompilation

As Article 6 (1) – (2) of the Directive is incorporated (after translation) into the Swedish Copyright Act, Section 26 (h), decompilation of a program is permitted without authorization of the copyright holder if it brings about interoperability between different softwares as well as interaction between software and hardware. Therefore, the rationale for this rule, as it appears also in Swedish law, is to enable all components of a computer system, originating from different manufacturers, to be connected; every lawful user of a program must be able to bring about all kinds of functional interconnection and interaction needed to make different software and hardware components work together.

Section 26 (h) of the Act, in force for two years by now<sup>85</sup>, has knowingly not yet been tried or interpreted by any court. The Swedish legislature made clear, though, stating that ideas and principles which underlie a program are not protected and therefore as a matter of principle available to anyone, that actual observations of such phenomena demands translation of a program's object code to its source code, which normally would bring about a restricted act of copying the literal form of the program.<sup>86</sup> Further, this means the legitimate use of *interfaces*, which are part of a program's protected form, "the form of the code", if the actual interoperability demands this use. However, such use must not go beyond those parts of the program which are necessary to establish interoperability, i.e. its interface, Section 26 (h) paragraph 1 (3), whereas the whole program must not be decompiled.

The intricate question whether a lawful user, in producing a non-infringing interoperable product, may hereby produce a product which is apt to *compete* with the decompiled program, has been answered in the affirmative by the Commission. The same answer seems not to be selfevident from a Swedish perspective, partly because the balancing of interests, the rightholder's and

<sup>85</sup> In January, 1995.

<sup>86</sup> Cf. prop. 1992/93:48 p. 129 et seq.

the lawful user's, is virtually not at all demonstrated in the preparatory works as concerns Section 26 (h) of the Act and partly in the light of the restrictive wording of this paragraph in respect of the enumerated limits for use of the decompiled information, e.g. that the obtained information must not be used i.a. for the marketing of a computer program substantially similar in its expression, Section 26 (h) second paragraph (3). The objective reference in Article 6 (3) of the Directive to the Berne Convention's generally restrictive rule on the interpretation of national limits to copyright (Article 9:2 BC), naturally "valid" also in Sweden, gives little or no guidance for the exploitation of a similar but yet *another* program.<sup>87</sup> Problems of unfair competition by the exploitation of a new work, not involving actual disposal of someone else's protected work, are not solved by the BC or the Swedish Copyright Act.

The same vagueness concerns several of the different restrictions on the right to accomplish a decompilation and to use the obtained information; the incorporation of Article 6 (1) and (2) of the Directive into the Swedish Copyright Act apparently brings no new light to such issues. This is troublesome in particular when we look at the restriction on the lawful user, that he may not decompile a program if the information sought for was previously readily available to him, Article 6 (1)(b) of the Directive, Section 26 (h) paragraph 1 (2) of the Act. Needless to say, such a person is not interested in decompilation if the rightholder e.g. publishes all information about interfaces of the specific program. But what if the rightholder makes such information fully available upon request and on pecuniary reward – is the user thereby prevented from reverse engineering? This question remains for the courts to answer.

Section 26 (h) of the Act is mandatory in the sense that contract terms *limiting* the lawful user's right to reproduce the code and to translate its form, with due respect for the specific conditions enumerated in this section, are null and void, Section 26 (h) paragraph 3 of the Act, accordingly all in line with Article 9 (1) of the Directive.

In Sweden, as in most EEA countries, one must come to the conclusion that in spite of the restrictive provisions in Section 26 (h) it is probably licit to develop a computer program as a result of a decompilation of another program, provided that the former is a new creation which does not make use of the latter one's literal form. A skilled programmer, to whom a program's source code is available, could probably "translate" it to another equivalent code, in a form which from a copyright perspective does not show any likeness with that of the original program.<sup>88</sup> To bear the necessary evidence of an infringement in such a case may be very difficult. The element of competition

<sup>87</sup> Section 26 (h) of the Copyright Act may also be questioned purely on semantic and logic grounds; cf. *Brinnen*, loc. cit. n. 29 supra, p. 89 et seq.

<sup>88</sup> Cf. prop. 1992/93:48 p. 130.

law, particularly in Article 6 (2) (c) of the Directive, Section 26 (h) paragraph 2 (3) of the Act, is from a Swedish point of view, where normally a legalistic interpretation of statutory law is decreed on copyright matters, probably not possible to dispose against non-infringing computer program.<sup>89</sup>

#### **4.2.6. Maintenance**

Maintenance in the form of upgrade or update actions, just as translations and other forms of alteration, fall within the exclusive rights of Section 2 of the Act, in any case if an act of reproduction and/or publication is accomplished.<sup>90</sup> Accordingly, any contract concerning not only the use but also the maintenance of a computer program should cover the alteration of copies of the program.

The statutory rule on a presumption against any alteration of a work, when exclusive rights are disposed by a transferee, according to Section 28 of the Act, has of course to be interpreted not only to the benefit of the copyright holder but on the basis of the particular circumstances in the individual case.<sup>91</sup> Hereby, a legitimate user may sometimes be allowed to modify a program in order to dispose over the functions and applications which the contract purports.

#### **4.2.7. Use by Public Libraries**

As the exclusive rights in computer software comprise i.a. rental as well as lending, though the latter right is limited to computer programs in machine readable form, Sections 2 and 19 of the Act,<sup>92</sup> the normal activities of a library are potentially possible to control by the copyright holder. There are no statutory exceptions to these rights neither for public libraries or libraries working on a non-profit basis nor for any other kind of library or archive.

The EC Council Directive 92/100/EEC on rental and lending is not yet implemented into Swedish law<sup>93</sup>, but as follows from what has just been stated, the present Swedish rules don't conflict with this Directive as concerns computer programs. However, it may be noted, that the Copyright Act's current definition of "rental" seems to be wider than that of the Directive, as

<sup>89</sup> Cf. the Supreme Court decisions NJA 1986 p. 702 (NIR 1/1987 p. 89) and NJA 1993 p. 263 (NIR 2/1993 p. 482).

<sup>90</sup> See para. I. 4.1.3. *supra*.

<sup>91</sup> Cf. para. I. 4.2.3. *supra*.

<sup>92</sup> Cf. para. I. 4.1.4. *supra*.

<sup>93</sup> This was scheduled to occur on 1 January 1995, but the full implementation is somewhat postponed, presumably to be executed on 1 April 1995, as was indicated *supra*.

the former comprises all cases by which the user, directly or indirectly, gives some compensation for the (temporary) use, delay fees and booking costs excluded, whereas the Directive's definition of "lending" comprises also a temporary use at a charge only compensating for a lending institution's operative expenses. If the Swedish Act will be adjusted to the wider concept of the Directive's definition of lending, this accordingly opens for more possibilities to introduce statutory exceptions to the lending right provided for in Article 5 of the Directive.

Apart from controlling rental and lending the rightholder of a computer program may of course also impose his *reproduction* right relative to a library and its borrowers. For the rightholder this right is fully intact, or will soon most probably be so, also relative to libraries and archives. In order to accomplish a correct implementation of the Directive on computer programs some amendments to the Copyright Act, already effective from 1 May 1994, expressly prevents archives and public libraries to make copies of computer programs, Section 16 of the Act.<sup>94</sup> Other types of works may be copied by archives and libraries (only public institutions are comprised by this exemption, not private or company owned institutions), i.a. for the purposes of preservation, completion or scientific research, mainly by reprographic means, whereas non-reprographic reproduction is allowed only for use by in-house optical or microfilm readers, Section 16 paragraph 1 (1)(2)(3) of the Act.

The loading of a software into a RAM is normally qualified as an act of reproduction, whereas the lender from a public library needs a licence to do so. A copyright holder and a public library must therefore adjust their contract on lending rights to the fact that lending of copies of machine readable programs does not only involve an act of distribution by the library, but also (normally) an act of reproduction by the borrowers. On a correct contractual basis of this kind those persons may then have a "right to use" a program and, accordingly, be able to make use of the limitations to the rightholders exclusive rights already dealt with above.

This purports of course that also a library's *indoor utilization* of a computer program must be submitted to a necessary rights clearance. The contract between the rightholder and the library may very well limit the library's use of certain programs or copies of programs to indoor activities, whereas other copies may be licit for lending and the borrower's temporary copying in order to be able to run the program. Again we must stress, though, that the ban on copying for libraries as computer programs (in any form) are concerned is absolute, whereas copying is not even allowed for in-house use e.g. by microfilm readers or the like.

<sup>94</sup> See prop. 1993/94:109 p. 5, 35 et seq.

### 4.3. Infringement and Sanctions

During the last decade the sanctions of the Copyright Act, just as the sanctions in the other Acts on intellectual property, have been sharpened and made more differentiated in order to counteract modern sophisticated methods of infringement. The authors of software or their successors in title are basically furnished with the same instruments against infringers as other rightholders in the copyright field, comprised in Chapter 7 of the Act.

Generally, any person who institutes an act regarding a literary or artistic work which infringes the copyright enjoyed in the work according to chapter 1 or 2 of the Copyright Act, or, after the death of the author, violates directions given in his will, risks the punishment of *fines* or *imprisonment* for a maximum period of two years, if he acts wilfully or with gross negligence, Section 53 of the Act. This concerns any act of non-authorized reproduction of a work or making the work available to the public as well as such acts which exceeds the limits of the exemptions in Chapter 2 of the Act. As was just mentioned this has full relevance also for all kinds of protected software.

It is also clear that any person who exploits a work shall compensate the author or copyright owner with a *reasonable remuneration* and, in case of wilful or negligent infringement, also pay damages for losses other than lost remuneration, for mental suffering and other injury.

Further, any person who institutes an act involving an infringement or a violation, as mentioned in Section 53 of the Act, shall *surrender*, if considered reasonable, to the author or his successor in title, for a ransom, the property involved in the infringement or the violation, Section 55 of the Act. In stead of surrender a court may decide that such property shall be *destroyed* or *altered* in specific ways or that other measures shall be taken to prevent unauthorized use. Such a request may also be made by the public prosecutor. However, these rules do not apply in respect of persons who have acquired the property or a right in it on good faith.

Furthermore, if there is reason to believe that a criminal violation under the Act has occurred, the property mentioned in Section 55 of the Act may be taken into *custody*, whereby the general rules governing custody in criminal actions shall apply, Section 59, paragraph 3 of the Act.

Damages, surrender or destruction of copies etc. are important instruments also in the light of what was noticed in paragraph 1.4. *supra*; a person who privately copies a published or licitly transferred computer program shall not be convicted, if the original for the copying was not used in a business or in public service and provided that the copier does not use the copy for other than private purposes, Section 53 (2) of the Act. As such private copying is not criminalized, the sanction of custody is neither available; thus, the new special sanc-

tion of an injunction under the penalty of a fine, see below, has a profound interest to rightholders.

Article 7 (1) of the Directive lets national legislation provide for “appropriate remedies” against the acts listed in subparagraphs (a) – (c). Generally, the Swedish Copyright Act is in line with the remedies mentioned in the Directive. However, “possession, for commercial purposes” is not as such a criminal violation of copyright according to Section 53 of the Swedish Copyright Act, as the remedies are linked i.a. to unlawful reproduction and distribution. But as *attempts* as well as *planning* of such acts are criminalized, Section 53 (3) of the Act, with reference to the provisions of Chapter 23 of the Criminal Code, the standards of the Directive were considered by the Swedish legislator to be met without any amendments to the Act.<sup>95</sup> It remains, though, that a person under certain circumstances may in good faith possess and keep his copies of a computer program, even if the copies e.g. are made without due authorization by someone else.

*Importation* to Sweden of copies of a work for distribution to the public is also a restricted act, if such copies have been produced outside Sweden under such circumstances that a similar production within Sweden would have been punishable, Section 53 (3) of the Act. This provision has no bearing on contractual restrictions on a distribution right; it only concerns copies made without due authorization, e.g. on the basis of a foreign compulsory license without an opposite number in Sweden.<sup>96</sup>

In 1994 the sanctions were rendered more power as the possibility of an injunction under penalty of a fine was introduced to the Copyright Act, namely against anyone who infringes or violates copyright, according to Chapter 1 and 2 of the Act, and directed towards his continuation of such actions. If the author or his rightholders present probable evidence of an infringement or a violation he or they may also claim for an interim order, if there are good reasons to fear that the defendant by the continuation of his actions would depreciate the values of the copyright involved. Such an interlocutory injunction provides that the author or his rightholder leave security for the possible damages to the defendant caused by the interim decision of the court, Section 53 (a) of the Act, valid from 1 June 1994.<sup>97</sup> This novelty, since long much coveted by the authors and their rightholders, will probably prove to be a strong instrument in the prosecution of illicit reproduction and distribution of software.

Finally, Section 57 (a) of the Act criminalize any act of circulation, possession for commercial purposes etc of any means which facilitate the unauthor-

<sup>95</sup> See prop. 1992/93:48 p. 133.

<sup>96</sup> Cf. *Rosén*, “Parallellimport av fonogram och den amerikanska tvångslicensen”, Uppsatser i medierätt, Juridiska fakulteten i Stockholm; Skriftserien no. 42, 1993, p. 90 et seq, esp. p. 102 et seq.

<sup>97</sup> Cf. prop. 1993/94:122 p. 11, 44 et seq.

ized removal or circumvention of a technical device which may have been applied to protect a computer program, all in line with the provisions of Article 7 (c) of the Directive.



## 5. Term of Protection

According to Section 43 of the Act, copyright shall subsist until the end of the fiftieth year after the year in which the author died or, in the case of works which have two or more authors whose contributions do not constitute independent works, Section 6 of the Act, fifty years after the year in which the last surviving author died. In the case of a work made available to the public without attribution of the author's name or generally known pseudonym or signature, Section 44 of the Act states that the copyright shall subsist until the end of the fiftieth year after the year in which it was published. If the work consists of two or more continuous parts, the term shall be calculated from the year in which the last part was disseminated.

Considering the way in which software is often developed, namely as works in the meaning of the last mentioned paragraph, a lengthy potential for protection seems often to be afforded software. Naturally even more so when the EC Council Directive 93/98/EEC, harmonizing the term of protection and certain related rights, will be implemented by Swedish law. This is scheduled to take place on 30 June 1995 and encloses all literary and artistic works (and certain neighbouring rights), thus also software.<sup>98</sup> Hereby the protection period is prolonged to seventy years post mortem auctoris, or, as the case may be also as computer programs are concerned, seventy years after the year in which the work was published without attribution of the name of an author – but if the author clears away the anonymity within the said period, the ordinary term of protection shall be valid. There are also other novelties proposed; if the work consists of two or more parts, the term of protection shall be calculated for each part, irrespective of whether such parts are continuous. Furthermore, protection ends after 70 years from the date of the creation of the work if it is anonymous and unpublished during that period, Article 1 (6) of the Directive.

The probably most important feature of the EC Directive on the term of protection is that it brings about that a work of an author, who is a national of a EU country, will be protected for seventy years from the year after his death in each of the EU countries, irrespective of whether the work is protected or not today in some of those countries, i.e. the Directive may effectuate a potential revival of rights in some countries.

Among the transitional rules now proposed we may observe, that copies made of a work while unprotected, but later on revived by the new term of

<sup>98</sup> Cf. Ds 1994:127, De upphovsrättsliga skyddstiderna. Article 8 of the Software Directive, affording only temporary rules on the term of protection for computer programs, should accordingly be rescinded; see para. 26 of the preamble to the Directive on the term of protection.

protection, may freely be *distributed* and *displayed* also after the date by which the new rules came into force (presumable 30 June 1995) – but new copies cannot be made without due permission, neither can public performance. However, Article 10 (3) of the Directive makes clear, that it shall not have an effect on uses accomplished before the national enforcement became active, which conversely suggests that it does so after the said date as uses covered by copyright are concerned. Let alone that this rule is enforceable at all events by Swedish courts, its incompatibility with the proposed transitional rule suggests that the latter should be deleted and, for the sake of clarity, be replaced by a literal implementation of Article 10 (3) of the Directive.

Further, the new rules shall not be applied on *actions taken* or *rights acquired* before the coming into force of the new regulation. This does not only indicate a ban on retroactive criminalization but also a statement of the legislature that the new term of protection does not effectualize an automatic prolongation of contracts related to the former rules on the term of protection. It may also be observed that, according to para. 3 of the proposed transitional rules, that it is not necessary for a person who “takes action” in relation to an unprotected work, e.g. a few days before its protection is revived, to be of “good faith” in relation to such action to avoid an obligation to pay for the use, which is however indicated in preamble 27 of the Directive. The negative effects of such use, from an author’s point of view, are considerably eased, though, by the application of the above mentioned Article 10 (3) of the Directive. Finally, the special rules on lending and rental, Section 19 of the Act, are proposed always to be applied, also on revived Works.

## 6. Relation of Copyright to other Rights

As we have noticed before copyright protection of software does not exclude the application of any other specific rights in or protection of industrial or intellectual property.<sup>99</sup> This general principle of cumulation is to some extent expressly stated in Section 10 (1) of the Copyright Act and is based on the fact that the different intellectual property rights are focused on different objects, which purports that different possibilities of protection may be combined and that there is, as a matter of principle, no competition between different intellectual property rights. The topography of a semiconductor product may be protected as such by the Act on Topographies and Semiconductor Products, whereas a computer program, technically a part of the same semiconductor product, may be protected as a literal work by the Copyright Act.

However, in certain very rare cases conflicts may occur between different laws and particularly by the application of specific provisions. An example of this is that the special protection of trade secrets is directed towards any person who i.a. illicitly supplies himself with such secrets,<sup>100</sup> and that this kind of protection may be applied by a copyright holder to prevent his opponent from decompilation or study of *interfaces* which the rightholder accordingly declares to be trade secrets. However, this particular case would probably be solved by the application of the special provisions in Section 26 (g) and (h) of the Copyright Act as a *lex specialis*.

<sup>99</sup> Cf. para. I. 1.2. *supra*.

<sup>100</sup> See Section 3 of the Act (1990:409) on Trade Secrets.

## 7. Special Issues

### 7.1. Video Games, Computer Art and Screen Displays

It is obvious that a video game or such a game stored in a CD-ROM for display on a screen, which now seems to be the fastest growing form on the market for electronic games, may carry a computer program which is protected according to Section 1 of the Copyright Act.<sup>101</sup> Naturally, this must be kept apart from other types of works inherent in a video game for which copyright protection may be claimed, such as a *cinematographic work* if the video game presents a sequence of (audio)visual expression sufficiently individualized to be regarded as a protected work of that kind.<sup>102</sup> Many video games, at least of the simple “built in” type, probably display a too short or simplistic sequences, guided by a few standardized patterns at the disposal of the players, to visualize a cinematographic work.<sup>103</sup>

Nevertheless, there are other possibilities in protecting a video game, namely its images and figures as *works of art* as well as its sound track as a *musical work* or displayed or spoken texts as *literary works*. Furthermore, the sound-track of a video game may be reproductions of an artist’s performance and therefore it might be protectable as a *neighbouring right* at least against further reproduction, Section 45 of the Act, or as a producer’s recording, Section 46 of the Act. As film producers are also protected against reproduction according to Section 46 of the Act, they are afforded a legal instrument against unauthorized reproduction of sequences from ordinary movie films, which might be used as components in a video game, especially in the new high capacity CD-ROM format. The protection of artists, fonogram producers and filmproducers is soon to be enlarged, thus comprising also distribution rights, at least rental and lending as indicated by the EC Directive on such rights<sup>104</sup>, and, if a proposed amendment to the Copyright Act is accepted by the Parliament, also a general right to make recorded material available to the public, e.g. by public performance.<sup>105</sup>

<sup>101</sup> Cf. para. I. 1.3. n. 14 – 16 *supra* about court practice on game-programs.

<sup>102</sup> See para. I. 2.3. *supra*.

<sup>103</sup> Cf. a statement of the Finnish Copyright Council (1992:3) in NIR 3/1992 p. 410 et seq.; videogames from Nintendo were not considered to display cinematographic works – in which case they would have a strong protection against i.a. parallel importation, which was of a certain interest in this matter – but consisted of protected computer programs, musical works and pictorial works.

<sup>104</sup> See n. 76 *supra*.

<sup>105</sup> See prop. 1994/95:58.

If *photographic pictures* are used in a video game, e.g. as stills from a movie, such pictures are protected against reproduction and, however eroded by many statutory limitations, against public display by the Copyright Act.<sup>106</sup> Similarly, there are possibilities to claim protection of the *title* of a video game, Section 50 of the Copyright Act, or of its *trademark* according to the Act (1960:644) on Trade marks

As for *computer art*, whether executed by the use of a computer and a program as tools of the author or as a computer generated work, protection always presupposes that an author has expressed his originality as a personal intellectual creation resulting in such a phenomenon. The same may be said about *computer images*, *computer graphics* etc. Computer generated works, taken literally, are therefore as a matter of principle no original creations of an author. It may be said, though, that if the creator of the used computer program has anticipated the artistic *form* of the “products” resulting from the running of the program, that form may be conceived as his creation. But then again it is not really a matter of a “computer generated” work.

In connection to what has just been said *screen displays*, e.g. menus, windows, masks or textual or graphical displays, which appear on the screen during the running of a program, may be protectable as works of art, as literary works – preferably within the borders of Section 1 (2) of the Copyright Act, protecting “maps, works of a descriptive nature executed as drawings, engravings, or three-dimensionally” – as photographic pictures or, probably on rare occasions, as cinematographic works. For all but for photographic pictures the requirements of originality must be fulfilled in order to lay the necessary foundation for protection. Generally, the standardization of screen displays may leave little or no room for protection or, due to a low level of originality, may be afforded a very narrow scope of protection, which says little or nothing about the protection level of the corresponding computer program generating the displays.

It must be stated again, that screen “displays” of purely electronical copies, meant to be generated by a computer program, thus not perceivable by a human eye until shown on the screen, are as a matter of fact no displays within the meaning of the Copyright Act, but performances. The importance of this, when a work is shown *publicly* on a screen, lies of course in the distinction between the display right, which is exhausted as published or transferred copies are concerned, and the performance right, which is not exhausted.<sup>107</sup>

<sup>106</sup> The recent integration of the protection of photographic pictures into the Copyright Act (on 1 July 1994), makes a division between photographic pictures as works of art and other photographic pictures, not matching the criterion of originality, as a neighbouring right. The latter group is afforded a shorter period of protection and a slightly thinner kind of protection; see prop. 1993/94:109.

<sup>107</sup> See para I. 4.1.2. *supra*.

## 7.2. Electronic Data Banks and Compilations

The presumptive EC Directive on the protection of databases will, as it stands now, grant copyright as well as a *sui generis* protection against unfair extraction for databases. Its possible implementation into Swedish law, if the Database Directive will at all be carried out, remains at present an open question. As the Swedish Copyright Act may afford protection e.g. to literary works as selections or compilations of facts, an electronic database normally is protected in those respects against copying and against acts which makes the database available to the public. The general prerequisite of originality must of course be at hand in what is extracted from a database, which is the dilemma of the owner of a database which presents e.g. brief and updated “information” rather than complete works.

However, the Swedish “catalogue rule”, Section 49 of the Act, which protects “catalogues, tables, and similar compilations in which a large number of particulars have been summarized” affords “the producer” a protection for a period of ten years after the year of publication against reproduction of such a compilation.<sup>108</sup> There are no requirements on originality; if a catalogue, or a part of it, is an original creation, e.g. as an original selection, it may very well be protected as a literal work, parallel to the catalogue protection. Accordingly, the unfair extraction rule of the suggested EC Directive is to a considerable extent covered by Section 49 of the Swedish Copyright Act, linked to competition law as it is.<sup>109</sup>

<sup>108</sup> See para. I. 1.4. *supra*

<sup>109</sup> Cf. *Karnell*, “The Nordic Catalogue Rule”, *Protecting Works of Fact. Copyright, Freedom of Expression and Information Law*, Information Law Series, No 1, ed. *Dommering/Hugenholtz*, Deventer, Boston 1991, p. 67 et seq.

## II.

# Protection of Software as Industrial Property





# 1. Patent Protection

Section 1 (2) of the Swedish Patent Act (1967:837, last amended 1994:1511) expressly states that a computer program as such, which “merely is a program for computers”, shall never be regarded as an invention in the sense of the Act; accordingly it is excluded from patent protection. The model for this rule, in force since 1 July 1978, is of course Article 52 (2)(c) of the EPC, but already before that date the Swedish courts with great strictness refused patentability for processes for computerization.<sup>110</sup>

The basic reason for this lies in the assumption that computer programs as such do not comprise technical acts, susceptible of industrial application, of the kind traditionally pertaining to patent law. In respect of this i.a. the estimation of novelty causes severe problems. Generally, copyright law is considered to afford proper, exhaustive and adequate protection for computer programs.

However, there are still possibilities for patent protection, if not for computer programs as such, namely for programming acts as a component in a process to enact a technical solution. Typically, this takes place when a computer program is a part of a defined technical process or a part of a hardware. Decisive for the patentability of an invention related, in this sense, to a computer program, which in itself is not of a technical nature, is that the basic algorithm, whether expressed in a programming language or not, must bear a causal connection to the invention's otherwise described ways to reach the technical effect, which entails the industrial usefulness, and which results in an invention which as a whole shows a technical character.<sup>111</sup>

A decision of the Supreme Administrative Court from 1990 marks a radical break of the tendency to restrictiveness of the courts as concerns patent protection for innovations connected to computer programs.<sup>112</sup> The case concerned an application for patent protection for a process apt to determine the pitch of human voices, whereby this determination was realized with the aid of a computer program and a conventional computer hardware. The invention translated a chosen period of such a signal of a human voice to digital form and was, after a series of frequency components which reduced buzzing and jam, able to identify human voices. Both the Patent Office of Sweden and the Patent Appeal Court refused the patent on the ground that the innovation lacked technical character. The Supreme Administrative Court arrived at the opposite

<sup>110</sup> See RÅ 1974 ref. 11 (NIR 1974 p. 311). Cf. RÅ 1983 2:25; RÅ 1984 ab 283; RÅ 1987 note 483.

<sup>111</sup> Cf. *Schmidt*, Teknologi og Immaterialrett, Copenhagen 1989, p. 268 et seq, part. p. 306.

<sup>112</sup> RÅ 1990 ref. 84 (NIR 3/1990 p. 468), Talsignal.

conclusion. Accordingly, patentability could not be refused with reference to Section 1 (2) of the Swedish Patent Act. At a closer look this decision purports that Sweden, in line with the quite liberal practice of the EPO, has markedly widened the possibilities of patentability for computer program.

This decision, which has attracted great attention in Nordic doctrine, also expresses a clear standpoint in favour of an interpretation of Swedish Patent Law closer to the texts of the EPC as well as an ajustement to EPO practice.<sup>113</sup>

<sup>113</sup> Cf. *Bernitz* in JT 3/1990-91 p. 480; se also *Levin*, NIR 1/1991, p. 197 et seq. and *Randes*, *Patentering av programvara*, Skrifter utgivna av Institutet för immaterialrätt och marknadsrätt vid Stockholms Universitet, N:o 74, 1993. It is thus to be expected, that e.g. the leading *Vicom* case, *Vicom Systems Inc's Application*, Decision T208/84 (1987) Off. J. EPO 14, will be invoked in forthcoming Swedish court practise, just as the Guidelines on protection of inventions relating to computer programs, published in 1985 by The European Patent Office.

## 2. Chip Protection

As a direct result of the law from 1984 on the protection of “mask works” in the U.S.A., which called for reciprocity to protect foreign topographies, Sweden enacted a special law (1986:1425) on the protection of topographies in semiconductor products. However, a new Act on semiconductor chips (1992:1685) is effective from 1 January 1994, as a result of the EEA Agreement, and which effectuates an implementation of the EC Directive 87/54/EEC.<sup>114</sup> By and large it literally follows the text of the Directive, but the details of the somewhat terse provisions of the Act will presumably be gradually more sharply contoured by EC practice.

According to the Swedish Act the protection of a chip does not presuppose application for registration but is afforded when the topography is created (“skapad”). As for the subject matter of protection, Section 1 of the Act is more or less a direct translation of Article 2 (2) of the EC Directive. The topography, or the pattern of the layers, may as such not be afforded copyright protection, Section 10 (2) of the Copyright Act.<sup>115</sup> The exclusive rights are modelled very close to the actual wording of the Directive. Among the limitations to the rights in a chip we may notice that Section 5 of the Act provides for the admissibility of reverse engineering.

The term of protection starts on the day of the “creation” and comes to an end ten years from the end of the calendar year in which the topography was first commercially exploited anywhere in the world. But the protection expires fifteen years after the year of creation if the topography has by then not yet been exploited commercially, Section 4 of the Act.

The rights in a chip may be awarded natural as well as legal persons. Such rights are exhausted for the whole EEA area, when the chip has been distributed to the public within this area by the rightholder or with his consent, Section 6 of the Act.

<sup>114</sup> See prop. 1992/93:48 p. 44 et seq.

<sup>115</sup> See about the protection of a computer program as a part of a chip, para I. 1.2. *supra*.

### 3. Unfair Competition

As a principal rule of Swedish intellectual property and competition law stands out the assumption that anybody may copy or commercially use achievements, distinctive features or marks which are not protected by intellectual property law. It is true, however, that Article 10 bis of the Paris Convention for the Protection of Industrial Property lays every member country under an obligation to assure businessmen protection against unfair competition, but it is doubtful if Swedish law actually fulfils this obligation at present.<sup>116</sup> Swedish court practice has not developed any protection against unfair competition without statutory support. Accordingly, where such legislation lacks, it is principally licit to cause a competitor an economical damage by competition measures. This is based on the special Swedish principle of law that pure economical loss, arising in non-contractual relations, shall be compensated only if the tortfeasor has caused the loss by commission of a crime.<sup>117</sup>

However, there are a few statutory rules on unfair competition, though split up in different laws. The most general rules on unfair competition are found in the Marketing Practices Act (1975:1418), soon to be replaced by a new Act<sup>118</sup>, which is applied by a sole and special court of law, the Market Court.<sup>119</sup> This law is mainly directed to consumer protection, but it has also a chief aim to counteract “improper marketing which adversely affects ... tradesmen”, Section 1 of the Act. The main acts of improper marketing concerns misleading or discreditable advertising and improper comparison. As this Act is not pertaining to civil law, but to public law, its sanctions mainly are prohibition and injunction under penalty of a fine.<sup>120</sup> However, sanctions, particularly as concerns damages, are being more effectively designed in the proposed new Act on marketing practices.

As for *slavish imitations*, *copying* and identical or almost identical *reproduction* of computer programs, not constituting infringements of patent or copy-

<sup>116</sup> A proposed bill on a new Act on Marketing Practices, prop. 1994/95: 123, Ny marknadsföringslag, attaches greater importance to tradesmens' protection against slavish or otherwise unfair copying, which will, when accepted by the Parliament, fully match the obligations of the Paris Convention. The new legislation on marketing practices is scheduled to be active from 1 July 1995. Cf. SOU 1993:59.

<sup>117</sup> Cf. Chapter 2, Section 4 of the Swedish Tort Liability Act; see also *Bernitz*, Otillbörlig konkurrens mellan näringsidkare, Stockholm 1993, p. 101 et seq, and *Hellner*, Skadeståndsrätt, 4th ed., Stockholm 1985, p. 49 et seq.

<sup>118</sup> See n. 116 supra.

<sup>119</sup> The proposed new Act on Marketing Practices also suggests a new order of two instances, the District Court of Stockholm, the decisions of which may be appealed to the Market Court.

<sup>120</sup> See *Bernitz*, Svensk Marknadsrätt, 1993, for details about punishable practices.

right law, such acts are principally licit, as was just noticed, but may under quite special circumstances conflict with the Act on Marketing Practices. This presupposes that the copying etc. purports a severe risk of confusion between the original and the copy, that the copy is made by misuse of knowledge received confidentially and that the copying is done systematically and comprises the competitors goods, trademarks and trade symbols as a whole.<sup>121</sup>

Obviously, these criteria could easily be found as computer software is concerned. However, it must also be stressed, that slavish imitations of goods, as to their *technical* or *functional* capacity, are licit as a chief rule, if not protected by intellectual property laws, a conclusion drawn from the Market Court's application of the Act on Marketing Practices.<sup>122</sup> Accordingly, copying of the *looks* of a competitors good, its aesthetical appearance, well aside of its technical or functional conditions, may sometimes amount to an illicit action according to the last mentioned Act. This distinction of the Market Court will be confirmed by statutory law by the new Act on Marketing Practices.<sup>123</sup> But the character of this protection leaves little room for the support of software producers.

As for misuse in marketing of another tradesmen's *packages* and *symbols*, purporting false indication of commercial origin, the tendency is quite the opposite; normally the Act on Marketing Practices is a very apt instrument against such acts, provided that the original is distinctive, well known on the market, firmly associated with a certain tradesman and if there is a risk of confusion. The claim for distinctiveness indicates, however, that the Market Court does not take measures against a mainly functional product or such elements in it, such as a package designed to fulfil functional demands.<sup>124</sup>

<sup>121</sup> See *Bernitz et al.*, *Immaterialrätt*, 4th ed., Stockholm 1993, p 178 et seq. Cf. MD 1983:3, 1983:23 and 1985:4.

<sup>122</sup> See MD 1977:25 and 1981:2.

<sup>123</sup> See § 8 of the proposed new Act on Marketing Practice; cf. prop. 1994/95:123 p. 58 et seq.

<sup>124</sup> See MD 1981:2 (NIR 1983 p. 452), *Conex*, and MD 1977:25 (NIR 1978 p. 243), *Fiskars*; cf. MD 1974:5 (NIR 1974 p. 330), *Blomin*; MD 1990:3 (NIR 1990 p. 290), *Liljeholmens stearinljus*.

## 4. Protection of a Title of a Software

According to Section 50 of the Swedish Copyright Act, thus not a part of an industrial property protection, a literary or an artistic work may not be made available to the public under such a title, pseudonym or signature that the work or its author easily may be confused with a previously disseminated work or its author. This kind of protection applies to all literary or artistic works, regardless of their origin, Section 60 (3) of the act. It is unlimited as to time and does neither presuppose an act of registration nor establishment on the market as a trade mark, though its construction is very much influenced by the concepts of trade mark and competition law.<sup>125</sup>

Section 50 of the Copyright Act is designed to hinder confusion between titles of works, between authors or between titles and authors, but not between e.g. a title of a software and a trademark. A trademark which is confusingly similar to a title of a literary or an artistic work may not be registered as a trade mark, Section 14 paragraph 5 of the Act on Trade Marks,<sup>126</sup> but according to the last mentioned Act there are no obstacles to the actual use on the market of such a trade mark.

The protection of titles is more limited to its scope, as compared to the protection against confusingly similar marks according to the Trade Mark Act,<sup>127</sup> which mainly follows from the fact that the application of Section 50 of the Copyright Act presupposes that confusion must occur “easily” to be stopped.<sup>128</sup> Further, if a title is used confusingly, it does not justify compensation, irrespective of good faith, comparable to a “reasonable remuneration”, stated in Section 54 (1) of the Act, which is valid only for *uses* of a literary or artistic work; in this context remuneration presupposes a wilful or negligent act involving a violation of the protection of a title, Section 54 (3) of the Act.<sup>129</sup> This is due to the fact that the protection of titles is not a right of disposition, accordingly not to be handled as the ordinary exclusive rights of the copyright holder, but construed in the same way as moral right, therefore neither an object for licencing.<sup>130</sup>

A person who commits an infringement upon the rights in a title is liable to penalty and shall also pay damages for economic losses, other than lost remuneration.

<sup>125</sup> Cf. *Westerlind*, “Titelskydd”, NIR 1972 p. 261 et seq.

<sup>126</sup> See RÅ 1965 H 23 (NIR 1965 p. 358), Svarta Rudolf.

<sup>127</sup> See para. II. 5 *infra*.

<sup>128</sup> Cf. NJA 1974 p. 403, Skotten i Dallas.

<sup>129</sup> See para. I. 4.3. *supra*.

<sup>130</sup> Cf. NJA 1986 p. 226 (NIR 1986 p. 97).

neration, and for mental suffering and for other injury; by and large the sanctions are parallel to those according to Sections 53 – 55 of the Copyright Act.

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## 5. Trademark Protection

The Swedish Trade Mark Act (1960:644, last amended 1994:1509) is as of 1 January 1993, adjusted to the EC Directive of 21 December 1988 to approximate the laws of the Member states relating to trade marks, 89/104/EEC, and therefore in full accordance with the demands of the EEA agreement,<sup>131</sup> at least as from 1 January 1995 as the commitment to adhere to the Madrid Protocol on international registration of trademarks was accomplished.<sup>132</sup>

On this basis Swedish trademark law provides a complementary protection for computer programs and software products, as any other person than the proprietor of a trademark is excluded from using it or a confusingly similar symbol for his goods in a commercial activity, whether it be on the goods or on their packaging, in advertising or in documents or in any other way, including verbal use, Section 4 paragraph 1 of the Trade Marks Act. Further it is also a restricted act to make a reference to another party's symbol, in connection with the sale of spare parts, accessoires or the like adapted for use together with the goods of the other party, if this creates a false impression of a particular commercial origin, Section 4 paragraph 2 of the Act.

The possibility to register a trade mark now presupposes a sign capable of being represented graphically, Section 1 paragraph 2 of the Act, and naturally it is possible to establish it on the market, both for a computer program as a physical *product* and for the *service*, e.g. on accounting, it accomplishes; in the latter case the disc or the cassette which carries the program may function as service components.

As the Trade Mark Act affords protection against *commercial use* of a trade mark, i.e. by a trader in his profession, it does not cover acts of *removal* of symbols from goods or the use of other get-ups or packages than those originally used, which, however, might be covered by contractual obligations. It is an infringement, though, to use a protected get-up or a package, furnished with a trademark, for another good than the original one.<sup>133</sup> To neutralize acts of piracy this makes it important to the software industry to insert their trademarks

<sup>131</sup> See prop. 1992/93:48 p. 67 et seq. Cf. generally *Koktvedgaard/Levin*, *Lärobok i immaterialrätt*, 2nd ed. 1993, p. 263 et seq. The Nordic legal coherence is not quite as well realized in trade mark law as it is in other sectors of intellectual property, but a joint Nordic revision of the Trade Mark Laws is now in progress.

<sup>132</sup> See about the adherence to the Madrid Protocol in prop. 1994/95:59. Also some other important novelties are accomplished by the said proposition, valid as from 1 January 1995, namely a broadening of the scope of protectable trademarks on the basis of use or establishment on the market and that registration shall be executed before opposition may occur.

<sup>133</sup> See NJA 1988 p. 183 (NIR 1989 p. 76), Sodastream.



e.g. in the coding of a program, thus to “hide” it skilfully by technical means, thereby making it less vulnerable to pirate copying. Illegal copying of software for private use cannot, however, be prosecuted under the Trademark Act, as the trademark is then not used within commerce or trade.

## 6. Protection of Trade Secrets and Know-How

Protection of *trade secrets* is in the main possible in two forms according to Swedish law; by application of the quite new Swedish Act on the Protection of Trade Secrets (1990:409)<sup>134</sup> or on a pure contractual basis within the frames of i.a. an employee's special duty of loyalty to his employer or provisions on secrecy and non-competition between contracting parties.<sup>135</sup> There are also some statutory rules on trade or business secrets in the Code of Judicial Procedure (Rättegångsbalken), in the main relating to matters of proof in court procedures, the Act on Competition (1993:20) and the Act on Occupational Safety and Health (1977:1160)(Arbetsmiljölagen); none of those provisions is of particular interest to the world of software.

However, the statutory provisions on trade secrets may only play a subsidiary role concerning the protection of software. This is due to the subject matter of protection as defined in Section 1 of the Act on the Protection of Trade Secrets. Firstly, it relates to "information" of a technical or economical nature. Secondly, the trader (who claims protection) must keep the information secret, which means that it must not be available to persons outside a limited and identified group of persons, normally within the traders company, possibly also to a licensee or a subcontract producer, but certainly not to anybody taking an interest in the information. This also means that the information must not be uniquely kept within only one trader's company; two or more companies may very well keep the same information as a secret. Thirdly, the exposure of the information must be liable to cause damages to the trader as regards competition, i.e. to have a negative influence on the trader's ability to match competition on the market.

Obviously, software put on the market seldom fulfil these requirements of the Act on Trade Secrets, even though "technical information" may without doubt comprise e.g. the source code of a computer program. The sanctions of the Act are directed towards espionage, i.e. against anyone who illicitly supplies himself or others with a trade secret, Section 4 of the Act, against misuse of a trade secret in a business relation, Section 6 of the Act, and against misuse of a trade secret in an employment situation, section 7 of the Act. The

<sup>134</sup> In english this Act (lag om företagshemligheter) is sometimes called "The Business Secrets Act"; cf. Swedish Law, ed. Tibergh & Sterzel, Stockholm 1994.

<sup>135</sup> The signification and scope of an employee's duty of loyalty is developed in labour law, often in collective agreements and particularly by the Court of Labour Law (AD); see *Bernitz*, Otillbörlig konkurrens mellan näringsidkare, 1993, p. 199 et seq; *Fahlbeck*, Företagshemligheter, konkurrensklausuler och yttrandefrihet, 1992; AD 1983:93, REPE; AD 1991:38, Henryson; AD 1992:9, Nordström.

last mentioned offence must occur during the period of employment; when the service has ended the former employee is normally free to use those trade secrets he might have learned about during his employment, Section 7 (2) of the Act. But the Act is built on the presumption, that the former employee may be tied up by more far reaching *contractual* obligations.<sup>136</sup>

As for *know-how*, this specific term is applied also in Swedish linguistic usage, it is normally attributed to non-protected knowledge which is specific for a certain tradesman, i.e. beyond the scope of intellectual property. "Protection" is therefore afforded solely by the law of contract. But if such knowledge pertains to "information" in the sense it is used in the spectrum of the Act on Trade Secrets, protection may of course be derived from this Act. In the latter case, *licences* about know-how has a basis in statutory law. However, Swedish know-how licences are more frequently based solely on contract law, though they may be combined (as is often the case) with patent licences and licences on trade secrets. Know-how-licencing is therefore normally thrown upon the possibilities which the freedom of contract offers.<sup>137</sup> The new Swedish Act on Competition (1993:20), which renders much of the EC competition law, i.a. its group exceptions for know-how licences, hardly limits the freedom of contract in this field.

Following the implementation of the Software Directive, software is of course protected as intellectual property by copyright, which does not include know-how in the sense just pointed out, although Article 9 of the Directive in principle permits know-how protection. Thus, software must be differentiated from such know-how which might be helpful in designing a computer program or handling it in practice. Again, a combination of a software and a know-how licence must identify and reveal the different components of the licenced objects as intellectual property, a secret or a confidence or neither.

<sup>136</sup> See AD 1977:167, Rejlers Ingenjörbyrå; cf. AD 1984:20, Wiro, about non-competition contracts. See generally, *Bernitz et al.*, Immaterialrätt, 4th ed., 1993, p. 191 et seq.

<sup>137</sup> Cf. *Karnell*, Inledning till den internationella licensavtalsrätten, 1985; see also prop. 1987/88:155, p. 21 et seq., p. 30 and p. 42 et seq.

## 7. Criminal Law

As we have already noticed Swedish copyright law offers the most important sanctions against illicit use of computer programs and other software, even though the sanctions of patent law – in those relatively few cases where a computer program is part of a phenomenon which is afforded patent protection – should not be underestimated, particularly as the latest amendments to the Patent Act bring the sanctions of that Act to the same level as those of the Copyright Act.<sup>138</sup> Anyone who wilfully or with gross negligence institutes a patent infringement risks the punishment of fines or imprisonment for a maximum of two years, and any attempt to commit such acts are also punishable according to the Criminal Code, Section 57 of the (amended) Patent Act.<sup>139</sup>

Generally, the sanctions of the most important intellectual property laws, i.e. the Copyright Act, the Patent Act, the Act on Registered Designs, the Act on Trade Marks, the Act on the Protection of Topographies in Semiconductor Products etc., are now harmonized and amended in order to render these sanctions a more homogeneous status. The intention of the legislature is hereby to promote the efficiency of the disciplinary powers in their actions against intellectual property infringements, not least software piracy.<sup>140</sup> What is said about fines, imprisonment, damages etc. in para 4.3. *supra* is therefore by and large valid also for intellectual property sanctions seen as a group.

The Swedish Criminal Code (Brottsbalken) provides a variety of provisions directed against crimes, which might of course be committed with the aid of a computer or by disposal of a computer program. But there are no particular provisions on “computer fraud” or “hacking” etc. in that code.<sup>141</sup> Again, the restriction on putting into circulation or possession for commercial purposes of any means which facilitates unauthorized removal or circumvention of a technical device which protects a computer program is the important criminalization aside of the field of intellectual property rights, paradoxically contained in the Copyright Act, as was noticed above para. I. 4.3.

Empirically, the most common kind of “computer crime” or computer abuse, besides infringement of intellectual property rights, probably is

<sup>138</sup> See para I. 4.3. *supra*.

<sup>139</sup> See prop. 1993/94:122, p. 14 et seq.

<sup>140</sup> See prop. 1993/94:122, p. 37 et seq.

<sup>141</sup> A radical change may soon be effectuated by a pending bill on amendments to i.a. the Criminal Code; see SOU 1992:110, Information och den nya informationsteknologin – straff- och processrättsliga frågor m.m.

embezzlement.<sup>142</sup> However, in this context must be mentioned the Act on Data (1973:289, last amended 1994:1485), which lays down restrictions on the computerized storing of information on natural persons, illicit access to such registers and on false or non-accurate information from or to such a register.<sup>143</sup> The Act on Data places at disposal a variety of sanctions, i.a. imprisonment for a maximum of two years is among the possible penalties for these types of “data-crime”, Section 21 of the Act.

<sup>142</sup> See *Solarz*, *Datorteknik och brottslighet*, 1985, part. p. 90 et seq.

<sup>143</sup> See the valuation of the Act in SOU 1991:61, *Skärpt tillsyn – huvuddrag i en reformerad datalag*.



# III.

## Computer Contracts





# 1. Hardware Contracts

As contracts on “automatic data processing” ADP (ADB-avtal) normally comprise widely differing phenomena, such as machines, spares, maintenance support, development orders etc., not to mention the flurry of database contracts, software and computer programs are only components of a comprehensive and generally heterogeneous contractual context.<sup>144</sup> However, the contracts on the hardware involved, typically computers and surrounding equipment, are often characterized and structured by purchase, hire, lease and/or service and maintenance agreements, which normally seem not to cause any specific civil law problems, at least not of another kind than those often connected to any type of hardware.

There is no general legislation in Sweden comparable e.g. to the German Act governing standard business conditions. The freedom of contract is of course a basic principle also in Sweden, although there are specific exceptions in many areas, most significantly as consumer protection is concerned with extensive mandatory legislation, making divergent provisions void. However, generally speaking, i.a. the Act on the Sale of Goods (1990:931) is without doubt applicable on the purchase of hardware, e.g. its scheme concerning the responsibility for defects or vices. Correspondingly, in different forms of transfers from an enterprise to a consumer, the Act on Consumer Sales (1990:932), the Act on Consumer Services (1985:716) and other statutory norms in the field of purchase, hire and lease, may very well be applicable on computer hardware contracts. It may be observed, that the two last mentioned Acts, just as other recent enactments on consumer protection, contain mandatory private-law provisions on the legal position of the consumers, which is furthermore placed on a high level of protection.

On an international level The United Nations Convention on Contracts for the International Sale of Goods (CISG) was ratified by Sweden in 1987, which served in many ways as a model for the new Swedish Sale of Goods Act. Thus, for international sales the CISG applies, with exceptions for part II, on the formation of contracts, for which Sweden made a reservation under Article 92(1) of the Convention.<sup>145</sup>

<sup>144</sup> See *Rosén, Upphovsrättens avtal*, 1992, p. 128 et seq.

<sup>145</sup> Cf. *Swedish Law*, Stockholm 1994, ed. Tibergh & Sterzel, para. 3.3.2.1.

## 2. Software Contracts

### 2.1. Sales Contracts

Computer software delivered to the market as off-the-shelf products or as objects within different standardized operating systems may as a matter of principle be equalled to other types of goods. Therefore, such goods may be treated under civil law in the same way as other physical objects and items. Accordingly, the general Sale of Goods Act is applicable on the purchase of every physical copy of a computer program, as generally on all kinds of personality, e.g. also to the sale of enterprises, stocks, shares and negotiable instruments, if the individual transaction bears the characteristics of a sale, i.e. the transaction upon compensation must be final and completely transform the ownership of a good, thus, it must not be limited as to time or ownership.<sup>146</sup> The same application is also valid for those enactments on the protection of consumers, among which the already mentioned acts on consumer sales and consumer services certainly are relevant to the distribution of software on the market.

At a closer look, we may notice that the Sale of Goods Act is even more comprehensive as it is valid also for an order of a good which is supposed to be produced, if the orderer is not himself obliged to place the necessary material to the other party's disposal, Section 2 of the Act. Therefore, also a programmer's preparation and delivery of a computer program upon an order may lie within the borders of the Act, provided that this agreement is not mainly to be regarded as a service contract or a construction contract.<sup>147</sup> Further, the Act is directly applicable, at least as a matter of principle, also to conveyance of *intellectual property rights*, in so far as such transfers are complete and final and not merely indicate limited grants of disposal.<sup>148</sup>

Probably, the scheme of the Act on the Sale of Goods has its most practical impact on program *defects*, vices, viruses etc, thus on the non-functioning of a computer program. Defects and faults in a licensed program, in the medium which carries the software, such as a diskette or a streamer, or in the documentation, or the complete non-delivery of an adequate documentation are to be solved by the means of the known instruments of the Act as relating to contractual malperformance. The same may be said about standardized off-the shelf software. Program defects may thus lead to claims to amend the software

<sup>146</sup> Cf. Hellner J., Ramberg J., *Speciell avtalsrätt I. Köprätt*, 2nd ed. 1991, p. 37 et seq.

<sup>147</sup> For further details see Hellner J., Ramberg J., loc. cit. p. 42 et seq.

<sup>148</sup> Cf. Hellner J., Ramberg J., loc. cit. p. 40.

or to a reduction of the price or rescission of the contract. Furthermore, damages may also be claimed if a defect results in indirect consequential damage. As defects may also be regarded e.g. lack of compatibility of a program for a hardware with a central processing computer just as defects and omissions in a user handbook. Similarly, it is possibly qualified as a defect of a computer program if the software cannot be adapted, updated or maintained or does not fulfill previously announced functions. All this must be separated from the matter of damages on persons and objects, other than the product itself, but caused by the said product, which is handled according to the rules on product liability, dealt with in para. IV 2.1. below.

It is obvious, though, as a result of the idiosyncracies of copyright, that an author cannot “sell” his rights in the true sense of the Act on the Sale of Goods, which, however, is possible for other owners of rights than authors.<sup>149</sup> Neither must it be neglected, that copyright contracts, as well as other agreements on intellectual property, often are regarded as contracts *sui generis*, upon which the optional Sale of Goods Act, just as other non-mandatory statutory rules of the quite shattered rules of general contract law of Sweden, does not inflict its rules.<sup>150</sup>

Accordingly, in cases of conflict, the courts are probably prone to accomplish a quite strict interpretation of the terms of the individual contract rather than making references to the Sale of Goods Act. But if a sales contract on software is actually concluded between tradesmen, there are no legal obstacles to submit the buyer e.g. to a duty to examine the software and to lodge an objection relating to defects in order to retain his possibilities of claims according to Sections 31 – 32 of the Act.<sup>151</sup>

At all events, and irrespective of how a software is conveyed to a user by a final transfer, such as sale, barter or gift,<sup>152</sup> exhaustion of the distribution right is effected by the first lawful transfer of this kind by virtue of Section 19 of the Copyright Act. The copyright holder may subsequently not determine the terms of any further sale or equivalent transfer of copies on the basis of copyright, let alone that his rights in i.a. reproduction and rental and lending are not exhausted. Consequently, the minimum rights of every acquirer of software normally include the right to load and run the program, to make a back-up copy, to correct errors, to undertake adaptations within the scope of the program’s intended use, and further to resell, barter and give away the acquired

<sup>149</sup> See *Rosén*, loc.cit. n. 144 supra, p. 42 et seq., for a more elaborated view on the application of the Sale of Goods Act on copyright contracts.

<sup>150</sup> Cf. *Hellner J.*, *Lagstiftning inom förmögenhetsrätten*, Stockholm 1990, esp. chapter 5. See also *Hellner J.*, *Ramberg J.*, *Speciell avtalsrätt II. Kontraktsrätt. 2 häftet. Allmänna ämnen*, 2nd ed. 1993, p. 24 et seq.

<sup>151</sup> Cf. *Hellner J.*, *Ramberg J.*, loc. cit. p. 197 et seq.

<sup>152</sup> Cf. para. I. 4.1.4. supra.

program, insofar as every second-hand buyer etc. probably is a legitimate user in the sense of Sections 26 (g) and (h) of the Copyright Act. However, the back-up copy in each case must be resold (or alternatively destroyed) together with the resale of the relevant copy of a program as joint accessories, as it must neither be kept by the former owner or transferred separately.

This purports that *prohibition on resale* between contracting parties, which as a matter of principle may be valid inter partes, are not effective against third parties. As for such restrictions inter partes and by subsequent sale, their legitimacy may probably be questioned from case to case, if not as an interpretation of the main objective of the special restrictions of the Copyright Act,<sup>153</sup> as an unreasonable stipulation of a contract according to the general clause in Section 36 of the Act on Contracts (1915:218) or, if the prohibition on resale was agreed in a *standard form* contract, on the basis of one of the two Acts on Contract Terms, namely in Consumer Relations (1994:1512), which has replaced the old Act (1971:112), and between Tradesmen, (1984:292). Both are based on a general clause, this being the only substantive provision of the latter.<sup>154</sup> Such restrictions may also conflict with the Act on Competition (1993:20), which basically reflects i.a. Articles 85 and 86 of the EEC Treaty.

As for the Act on Contract Terms in Consumer Relations, it does not in the main deal directly with *individual* market transactions, such as purchases, performances of services etc. Consequently, individual consumers cannot initiate claims based on the general clause of the Act. However, as from 1 January 1995 the amendments to the Act, following the implementation of the EC Directive on unfair terms in consumer contracts, also a civil law solution is introduced.<sup>155</sup> The Act on Contract Terms for Tradesmen is modelled in the market law way, thus not a direct civil law instrument. Accordingly, the first Act thrive at collective protection of consumers and to omit improper standard terms, whereas the latter has the last mentioned purpose. The application of both Acts are entrusted the special Market Court, while Section 36 of the Contracts Act is applied by the ordinary courts.

<sup>153</sup> Cf. *Rosén*, "Enskilt bruk och avtal om utnyttjande av datorprogram", NIR 4/1990 p. 539 et seq. part. p. 556 et seq. and *Blomquist*, *Overdragelse af ophavsrettigheder. Retsoverdragelsen og dens fortolkning*, Copenhagen 1987, p. 105.

<sup>154</sup> See *Rosén*, loc.cit. in n. 144 supra, p. 47 et seq. Cf. *Bernitz*, *Standardavtalsrätt*, 6th ed., 1993, p. 21, 93 et seq. with a supplement of 1995.

<sup>155</sup> See further para III. 7 infra.

## 2.2. Copyright Licences

The word “licence” (licens) has not a very distinct legal meaning in Sweden, although it is often used in contracting practice. Normally it stands for a limited transfer of intellectual property rights, especially as concerns patents, which however, when copyright is concerned, just as often is called a grant (upplåtelse) or, if not limited but complete and final, just transfer (överlåtelse).<sup>156</sup> The Copyright Act consequently uses the word “överlåtelse” for all kinds of transfer of rights, whether final, total or limited. Generally, the Swedish law of contracts and torts is not built on model type contracts, as is the case e.g. in German law, which indicates that there is considerable liberty in the search for Swedish norms which may be found apt in the individual case.<sup>157</sup>

Accordingly, Section 27 of the Copyright Act states that copyright may be “transferred entirely or partially”, subject only to the limitations of Section 3 of the Act, i.e. as rights are concerned the author may with a binding effect only waive his right and this only with regard to clearly specified uses of the work. In this somewhat terse wording of the Act lies the whole spectrum of the very deliquate contractual divisibility of copyright as to time, place, content and purpose, which promote the basic aim of copyright, stressed in the preparatory works of the Act, to ensure the author or his rightholder adequate remuneration from use of a work in all economically relevant sectors of the market.<sup>158</sup> Therefore, the holder of rights in a software protected by copyright may grant an exclusive or non exclusive “licence” to a licensee to use the software in any manner chosen by the parties,<sup>159</sup> with due respect of course for moral rights<sup>160</sup> and, as computer programs are concerned, for the mandatory provisions on the lawful user’s right, i.a. to make alterations and back-up copies.

All other rules of the Act on contractual transfer of rights are not only optional, but also quite few, in the main concerning publishing contracts, film contracts and public performance contracts. The permissive nature of these rules also include Section 28 of the Act, mentioned above, which indicates that a person to whom a copyright has been transferred may not change the work or transfer the copyright to others,<sup>161</sup> as well as Section 40 (a) of the Act on the transfer of copyright in a computer program from an employee to his employer.

<sup>156</sup> Cf. *Karnell*, Inledning till den internationella licensavtalsrätten, Stockholm 1985, p. 25 et seq. See generally *Rosén*, Förlagsrätt. Rättsfrågor vid förlagsavtal, Stockholm 1989, p 126 et seq.

<sup>157</sup> Cf. *Bengtsson*, Särskilda avtalstyper, 4th ed. 1976, p. 18 et seq. *Hellner J.*, *Ramberg J.*, Speciell avtalsrätt II, Kontraktsrätt, 1:a häftet. Särskilda avtal, 2nd ed., Stockholm 1993, p 23 et seq.

<sup>158</sup> Cf. SOU 1956:25 p. 104.

<sup>159</sup> For further details see *Blomquist*, loc. cit. in n. 153, p. 71 et seq.; *Rosén*, Förlagsrätt, p. 136 et seq.

<sup>160</sup> The specialties of moral rights as concerns employment contracts has already been dealt with, para. I. 1.4. and 3.1.2. supra; see also para III. 6 infra.

<sup>161</sup> See para. I. 4.1.3. supra.

Finally, there are no demands whatsoever on copyright contracts to be set out in writing to be valid.

The fundamental prerequisite for a valid copyright licence, which is the basic concept of all forms of valid agreements, is its foundation on a *consensus* between the contracting parties. Therefore, so called *shrink wrap licences* are as a matter of principle not qualified as valid as they are perceived as one-sided decrees, not agreements; the opening of a shrink wrap at home or at a dealer's shop does not bring about a licence contract or particular obligations of the kind mentioned on or inside the package. Neither is a contract established by the touching of the "enter" key of a computer by which a so called "enter- or return contract" is supposed to be effectuated. Thus, concordant expressions of wills must be manifest.<sup>162</sup>

Nevertheless, the purchase of software, e.g. from the shelves of a store, normally imply not only a transfer of ownership of a certain good, but also a "licence" for the purchaser to use the software and the enclosed computer program, i.e. if nothing else has been actually agreed.<sup>163</sup> More far-reaching terms of this contract, e.g. on the possible right for the purchaser to use the program not only for himself but also by others in a network, must typically be agreed upon separately. This is actually an outflow of the idea, that the scope of a transfer is influenced by a purpose-of-grant theory, whereby the intended use or purpose of a computer program attains decisive significance.<sup>164</sup> Generally, a restrictive interpretation of the scope of a copyright transfer, i.e. to the benefit of the copyright holder, particularly if he is the author himself, is to be expected from the courts and is at least normally recommended in the doctrine and is also mentioned in the preparatory works of the Act.<sup>165</sup> If there is no contract in writing, it is generally assumed, that an agreement on transfer of rights in a computer program does not comprise more rights linked to the use

<sup>162</sup> For further details, i.a. on the possible Nordic incoherency in this matter, see *Rosén*, loc.cit. in n. 153 supra, p. 552 et seq. See also NJA 1939 p. 592; NJA 1949 p. 645 (NIR 1949 p. 252); *Ljungman*, NIR 1962 p. 55; *Bernitz*, "Otillbörligt ingripande i avtalsförhållande", Festskrift till Lars Welamson, Stockholm 1987, p. 54 et seq.

<sup>163</sup> See generally about solutions by standard contracts for computer software and/or consulting services – such as the often used Agreement 90, in *Mosesson E.* (ed.) *Software Procurement*, Nordic Yearbook of Law and Informatics 1992, part. the articles by *Andersen*, p. 55 et seq., *Bing*, p. 63 et seq., *Nørager-Nielsen*, p. 81 et seq. and *Wahlin*, p. 85 et seq.

<sup>164</sup> Cf. *Rosén*, Upphovsrättens avtal, p. 61 et seq.

<sup>165</sup> See SOU 1956:25 p 310; *Rosén*, Upphovsrättens avtal, p. 62 et seq. for further references. Note the express demand for specification of a copyright transfer according to the Danish and Norwegian Copyright Acts.

of the program than to meet the user's normal needs, other rights stay with the transferor.<sup>166</sup>

However, as a starting point, every lawful user of a computer program must be allowed to carry out such reproduction (loading), adaption and correction of errors, which clearly are in accordance with the program's intended use, as is indicated by Article 5 of the Software Directive. Accordingly, every copyright licence on a computer program has to match these restrictions on the otherwise almost total contractual freedom. Further, as an outflow of the scope of the distribution rights in a software, particularly the broad Swedish concept of the first sale doctrine, a copyright licence must be very precise about i.a. rental, relative to sale, barter, gift and lending.

## 2.3. Patent Licences

Similar considerations apply to licences of software patents as they do to patents relating to other subject matter, as the Swedish Patents Act contains no provisions specifically relating to the licensing of computer software and as, at all events, a computer program must be linked to a technical solution to form the object of a patent.

Concerning the European Antitrust Law there exists a very detailed body of law on the granting of a licence deriving from the Commission Regulation No. 4349/84<sup>167</sup> on the application of Article 85 (3) of the Treaty to certain categories of patent licensing agreements.

## 2.4. Other Licence Contracts

Software licences may comprise a right for the licensee, besides copyright and patented objects, to use a trademark, to dispose of a title<sup>168</sup> and, possibly, to use trade secrets and know-how and to fulfil service engagements. In such

<sup>166</sup> A clear example of reasoning along these lines is found in a recent decision of an Appeal Court on the scope of a software licence; Hovrätten över Skåne och Blekinge, 1993-04-14, DT 4147, T 197.92, Blekingefiskarens Centralförening; appeal to the Supreme Court not accepted, Supreme Court, 1993-10-14, T 1988/93.

<sup>167</sup> Of July 23, 1984; see also Commission Regulation No. 418/85 of December 19, 1984 on the application of Article 85 (3) to categories of research and development.

<sup>168</sup> The protection of titles cannot actually be licenced; more accurately, he who is protected may contractually accept not to raise claims against the opponent's use of a confusingly similar title. See para. II. 4 supra.

cases software licensing often relates to a “package” of intellectual property rights as well as unprotected objects and specific information or obligations in what may be called a “licensing program”.<sup>169</sup> In general, parties are free to license these objects on any terms they choose, subject only to the idiosyncracies of copyright law mentioned above and to general considerations applying to all contracts. It is obvious, however, that the licensor as well as the licensee ought to get a clear idea of what each of the different “objects” of the agreement actually means to each of the contracting parties with reference to protection, administration and financing, and this before the contract is concluded as well as during its full term. This indicates that a clear and unambiguous copyright licence for a computer program as such must not indicate an implicit permit to the licensee’s disposal of other rights as well. But if some kind of “licensing program” is without doubt desired by the contracting parties, it is of great importance to state clearly in the contract the permissions and reservations as to the different objects.

As for licensing under Article 85 (article 53 of the EEA) the EU Commission has recently presented a new draft on technology transfer block exemption, which may be expected to come into force in 1995. If it does, it will presumably replace the patent and know-how regulations 2349/84 and 556/89. Probably also trade mark, design and copyright (including software) licensing will be covered.

<sup>169</sup> Cf. *Karnell*, Inledning till den internationella licensavtalsrätten, p. 35.



### 3. Public Domain Software

Public domain software stands for objects not protected by an intellectual or industrial property right. The disposal of such objects are free to everyone. This means not to say that unprotected computer programs and adherent back up material cannot form the objects of contractual stipulations. Normally, acquisitions of such software are legally qualified as sales contracts and simply refer to a transition of ownership of goods for ready money, but may of course, though probably on rare occasions, be based on royalty arrangements. As no support is gained from intellectual property law the parties are obliged to regulate all further details of their agreement and this subject only to general contract law. Therefore, public domain software may be handled contractually very much in the same way as know how, i.e. often linked to another contract based on transfer of intellectual property.<sup>170</sup>

<sup>170</sup> Cf. para. II.6 supra.

## 4. Maintenance Contracts

The maintenance of a software is as a matter of principle exclusively reserved primarily to the copyright holder, as we have noticed above. On this basis he may therefore choose the kind of contract he may find apt as concerns upgrade or update actions.<sup>171</sup>

However, apart from the implementation of a program, simple elimination of defects etc, which the lawful user may himself accomplish, the licensor may have accepted the obligation to carry out error corrections, elimination of defects etc., stipulations which certainly are valid from a general contract law perspective.

Further, if a sales contract is at hand, the norms on i.a. delivery, errors and error correction of the Act on the Sale of Goods may be applicable. We must notice, though, that the copyright norms on alteration of a work and adhering moral right standards may actually conflict with those set out in general contract law and the Act on the Sale of Goods, preferably when the author himself is a contracting party. The same problem occurs also if a maintenance contract, which normally must be perceived as a service contract, not a contract of sale, possibly adheres to still another contract category. As we have noticed above there is no predesigned scheme to all differing types of contracts in Swedish law and consequently a variety of norms, elaborated in court practice, doctrine and by analogous application of quite shattered statutory provisions are the legal instruments available.<sup>172</sup>

<sup>171</sup> Cf. para. I.4.1.3 and I. 4.2.3. *supra*.

<sup>172</sup> Cf. in general *Smitt et al.*, *Databranschens standardavtal. Computer Standard Contracts in Sweden*, 1992, p. 118 et seq

## 5. Back-up and Escrow

So called back-up contracts normally are concluded to assure a licensee the technical functioning of a computer system at quite extraordinary circumstances, i.a. against breakdown because of a fire and in other situations in which the licensee's back-up copies are not available any more to him. Similarly, escrow, source code deposit contracts, are sometimes concluded to guarantee the licensee's access to the source code under special circumstances, particularly as concerns bankruptcy of the licensor, the software house, or its total loss of the source code.

In intellectual property matters priority as to time normally is decisive relative to third parties. Still, the deposit with a notary public – there is no particular organisation in Sweden which may offer such services as concerns computer software<sup>173</sup> – may facilitate the licensee's access to codes which are necessary to him and in regard of which the creditors of the software house lay claims.

Both types of agreements are far from implied as a result of an ordinary licence contract, but must be set out in a special contract or expressly be added to a licence contract.

<sup>173</sup> We may notice, however, that there is one optional registration procedure available. Under Section 7 (1) of the Copyright Act, it is possible, without paying any fees or other charges, to register voluntarily a notification with the Ministry of Justice that makes known the name of the author of a work published anonymously or under a pseudonym.

## 6. Employment Contracts

As we have noticed before<sup>174</sup> there is a statutory presumption by virtue of Section 40 (a) of the Copyright Act, which indicates that not only all economic rights but also moral rights in a computer program, created by an employee in the execution of his duties or following the instructions given by his employer, shall be *conveyed* to the employer unless otherwise provided by contract. The presumption actually forwards a transfer of copyright in its entirety, not a waiver of Moral Right as is paradoxically the overall contractual rule for moral rights. However, it still remains unclear how paternity and integrity rights may be disposed by the employer, e.g. by subsequent transfers of rights. The cabinet minister responsible for the bill to the Parliament was of the opinion,<sup>175</sup> though, that by subsequent transfer of rights in a computer program Section 28 of the Act would be applicable,<sup>176</sup> whereby neither any alterations of the work nor a further transfer of rights may be accomplished without a special agreement with the author.<sup>177</sup>

As for the economic rights, unless otherwise provided by contract, the employer at all events enters the position of the author, i.e. the rights in the computer program originally pertains to the author, but is conveyed to his employer if the prerequisites of Section 40 (a) are at hand. This stipulation is valid only under the terms of a pure employment, not for software production on commission. Neither is the presumption valid for software production as a by-product to what is definitely produced within the employment, but merely for the production of computer programs as a natural consequence of an employee's duties.<sup>178</sup>

Even before Section 40 (a) was applicable, a few decisions by the courts indicate an inclination to interpret contracts of employment, not specifically regulating the transfer of rights in computer programs created by the employee, to the benefit of the employer.<sup>179</sup> Court practice is too scarce, though, to form a basis for more precise statements on the scope of software transfers from an

<sup>174</sup> See para. I. 3.1.2. *supra*.

<sup>175</sup> See prop. 1992/93:48 p. 118.

<sup>176</sup> Cf. para. I. 4.1.3. and I. 4.2.4. *supra*

<sup>177</sup> See *Rosén*, "Moral Right in Swedish Copyright Law – Focus on Waiver of Rights and Contract Practice Especially as Concerns Computer Programs", NIR 3/1993 p 355 et seq. about the possible inconsistencies of this regulation.

<sup>178</sup> This is made quite clear by the preparatory works, cf. Ds 1992:13 p. 149; prop. 1992/93:48 p. 116.

<sup>179</sup> See a decision of Svea hovrätt, the Court of Appeal of Stockholm, 18 March 1992, DT 15, T 696/90; cf. *Rosén*, *Upphovsrättens avtal*, p. 118.

employer to his employee, particularly as the immediate circumstances of the individual cases probably vary very much. But in the light of the Copyright Act's presumption rule a clear tendency to the benefit of the employer is obviously manifest, hereby entailing a deviation from what is otherwise normally assumed for copyright contract.

If there is a formal contract of employment, which a transition of copyright as such not necessitates, it often contains provisions relating to *confidential materials* or to maintain confidentiality and, normally, to *subsequent competitive employment*. However, covenants restricting disclosure of information about software or competitive employment *after leaving* are, as far as the Act on Trade Secrets is concerned, only covered if there are "extraordinary reasons" for this, Section 7 (2) of the Act.<sup>180</sup> If the former employee is free to dispose of his "experience", gained from his former employment, then so is a competing company which has "bought" him over. Thus, very much depends on a pure contractual binding if confidential material is concerned, not to mention competitive acts.<sup>181</sup>

It is clear, of course, that an employee is subject to a profound demand on loyalty to his employer in these matters during the term of employment, and that this demand is particularly strong for leading officials or specialists, which is reflected i.a. in labour law and in the Swedish Tort Liability Act.<sup>182</sup> Covenants which restricts competitive employment, e.g. for a period of 24 month after an employment, are per se valid according to Swedish law, which follows from Section 38 of the Contracts Act. The same may be said about covenants on secrecy. Both types of restrictions may be built on a contractual penalty of a fine<sup>183</sup> in the case of breach of contract. But neither must stretch further than what is considered fair in the individual case; if not, such stipulations may be set aside or modified by application of the just mentioned Section 38 of the Contracts Act or the "general clause" of that Act, contained in Section 36.<sup>184</sup> There are also several collective agreements, guided by labour law, in the field of application and content of competition clauses, some of which may very well have a bearing on employed persons in software production.<sup>185</sup>

<sup>180</sup> Cf. para. II. 6. *supra*.

<sup>181</sup> See para. III. 8. *infra* about clauses on non-competition according to the Competition Act and the EC competition rules.

<sup>182</sup> Cf. *Schmidt*, Löntagarrätt, rev. ed. by *Tore Sigeman*, Stockholm 1994, p. 257 et seq; *Lunning*, Anställningsskydd, 7th ed. 1989.

<sup>183</sup> Cf. the decisions of the courts in notes 135 and 136 *supra*.

<sup>184</sup> See prop. 1975/76:81 p. 148 et seq.; cf. *Adlercreutz & Flodgren*, Om konkurrensklausuler i anställningsavtal och vid företagsöverlåtelse, Handelsrättslig skriftserie, Lund 1992; *Bruun*, NIR 1/1988 p. 71 et seq; *Moberg*, Företaget och sekretessen, 1981; *Wallin*, "Konkurrensklausuler vid företagsöverlåtelser", TSA 1982, p. 218 et seq.

<sup>185</sup> Cf. the Agreement (1969) between the Swedish Employer's Association (SAF) and the Association for the Salaried Employees of the Swedish Industry (SIF), printed in SOU 1983:42, p. 413 et seq.

## 7. Relevance of the Legal Control of Standard Terms

Legal control of standard terms in Sweden is built on a co-operation between different types of statutory rules and principles developed by the Supreme Court and, to some extent, the Market Court. Among the statutory rules there are mainly four<sup>186</sup> different instruments for the control of standard clauses:

- 1) general optional rules, such as those of the Act on the Sale of Goods;
- 2) compulsory rules, generally in support of “the weaker party”, normally a natural person/consumer;
- 3) adjustment and setting aside of unfair terms by application of general clauses in civil law legislation, especially Section 36 of the Act on Contracts;
- 4) intervention with prohibition on a tradesman’s future use of unfair terms, “the Market Law Model”.

The first category has its impact as a normative force, as standard contracts quite often seek to evade such norms, e.g. in the form of *restrictive interpretation*, i.a. of covenants aiming at circumvention of the obligations and liabilities of the optional rules. Generally, such covenants, especially restrictions on liability, must be articulate, moderate and objectively motivated to be legally tenable.

The quite comprehensive regime of *compulsory rules*, the second category, is focused on the contractual relation between professional enterprises and natural persons, generally as an outflow of the consumer protection philosophy of recent legal thinking. Such statutory rules are often directed against standard forms and particularly against restrictions on liability. As typical examples we may notice the provisions of the Consumer Insurance Act (1980:38), the House-to-House Sales Act (1981:1361)<sup>187</sup>, the Consumer Services Act (1985:7169), the Consumer Sales Act (1990:932) and the Consumer Credit Act (1992:830). Some of the just mentioned Acts may of course be of importance to the software trade, i.e. by the sale of software directly to the households or by entering service or maintenance contracts on standard terms. As for those rules of the said Acts which are of a compulsory nature, not all of the stipulations are, the mandatory force is consequently to the benefit and support of the consumer. Of mainly the same kind are the new provisions of the Copyright

<sup>186</sup> Cf. the civil law remedies within the antitrust system, para III. 8 *infra*.

<sup>187</sup> Now adjusted to the EC Directive 85/577/EEC.

Act, which in favour of a “user” of a computer program, actually a customer, restrict the possibilities of contractual evasion from certain “rights” of such a user.<sup>188</sup>

Mandatory rules cannot be circumvented by contract or “exchanged” for certain favours, unless specifically provided by the relevant Act.<sup>189</sup> Therefore, it is not possible, e.g. in exchange of a very generous guarantee, to insert covenants limiting a consumer’s right of cancellation or to claim damages, contrary to the Act’s compulsory rules. Nowadays, there is actually little room for individual solutions by standard forms, at least as concerns consumer sales.<sup>190</sup>

By the application of a *general clausel* on the adjustment or setting aside of unfair terms, mentioned under n:o 3 *supra*, quite the opposite is valid, as the *balancing of interests* and the overall effect of the contract then may be decisive.<sup>191</sup> In these matters there is a tendency in modern Swedish law to an *open control* of standard contracts of this kind, rather than the use of a so called *covert control* on the basis of i.a. a restrictive interpretation of one-sided made up standard forms, interpretation *contra stipulatorem* or *proferentem* and that ambiguities are to be interpreted against the offerer, just as other well-known general formulas of the same kind. Normally, when Swedish courts are in doubt, all data possibly relevant to the interpretation of the contract in question are taken into account.<sup>192</sup> Furthermore, there is no clear Swedish counterpart to the parole evidence rule in the common law systems.

The fourth type of standard form control is based on the application of the Act (1994:1512) on Contract Terms in Consumer Relations (AVLK) and the Act (1984:292) on Contract Terms between Tradesmen (AVLN), both basically destined to bring about fair and balanced covenants in future standard forms.<sup>193</sup> As the general clausel in Section 36 of the Act on Contracts, mentioned in the previous passage, is applied by the courts in civil procedure, its applications is very *concrete*. AVLK and AVLN, on the other hand, are applied exclusively by the Market Court, mainly dedicated to policy making, which generally leads to an *abstract* application in the sense that it is disengaged from the circumstances of every particular case. Therefore, the fairness of a certain type of standard contract term as such is measured, which makes the judgements of the Market Court more typified and less nuanced. This is

<sup>188</sup> Cf. para I. 4.2. *supra*.

<sup>189</sup> See e.g. Section 3 (1) of the Act on Consumer Sales.

<sup>190</sup> Cf. *Bernitz*, Standardavtalsrätt. 6th ed. 1993, p. 55 et seq.

<sup>191</sup> Cf. *Ramberg*, Allmän avtalsrätt, third ed. 1993, p. 126 et seq., p. 201 et seq.

<sup>192</sup> Cf. Swedish Law. A survey, ed. *Tiberg & Sterzel*, Stockholm 1994, para. 3.5.5.2.

<sup>193</sup> Cf. para. III. 2.1. *supra* in fine. It should be recalled, that the application of the AVLK is done by the Consumer Ombudsman (the Board for Customer Policies) and the Market Court, not individual customers. As for the AVLN, the Consumer Ombudsman is not involved in such contracts; applications to the Market Court can be made by associations of entrepreneurs or the particular entrepreneur concerned. Cf. loc. cit. n. 192 *supra*, para. 3.5.5.5.

very obvious as for the application of the Act on Contract Terms in Consumer Relations, whereby the consumers often are seen upon as a homogeneous group. However, by the application of the AVLN, the Market Court seems more inclined to take under consideration diversities between different lines of business, kind of business relation etc., which makes it more difficult for the Court to express a general opinion on a certain type of provision.<sup>194</sup>

So far, the Market Court has had no opportunity to test the terms of standard forms for software contracts. But the typical application of the general clausel of the Act on Contracts just as the AVLK and the AVLN – although very little case law is developed under the latter Act – would be a test of clauses excluding any warranty for defects or vices of a software, the exclusion of any responsibility for fault or negligence of an offerer, the scope or deafting of guarantees or, generally, extensive waivers of civil responsibility, just as unduly strict restrictions on the possibilities of the use of a program.<sup>195</sup> It may be assumed, that the AVLN is of greatest significance as a weapon to refer to in negotiations on contract terms between trade associations.

The implementation of the Directive 93/13/EEC of April 5, 1993, concerning unfair terms in consumer contracts,<sup>196</sup> has not changed fundamentally the AVLK, neither the civil law remedies. The Directive chooses a definition which covers a wide range of possibilities, as an unfair term shall “cause significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer”. Moreover, the unfairness of a contractual term shall be assessed taking into account, the nature of the goods or services for which the contract was concluded, the circumstances attending its conclusion and all the other terms of the contract or of another contract on which it is dependent. The remedy to such unfair and unbalanced covenants still is the general clausel in Section 36 of the Act on Contracts; no amendments were considered necessary in order to implement the Directive in this respect.

But as for standard terms of consumer contracts, not individually negotiated, the AVLK has actually been ajusted to the Directive’s requirement of transparency and clarity of all wordings in standard terms, Article 5 of the Directive, which purports that ambiguities are to be interpreted against the offerer and to the benefit of the consumer, Section 10 of the AVLK, which also comprises oral terms etc. This principle of contract interpretation was applied also before the new AVLK came into force, although not present in statutory law. Possibly, the codification may lead to a more intensified application.<sup>197</sup>

<sup>194</sup> Cf. *Bernitz*, loc. cit. n.190 supra, p. 107.

<sup>195</sup> Cf. in general *Smitt et al.*, *Databranschens standardavtal*. Computer Standard Contracts in Sweden, Stockholm 1992, p 33 et seq.

<sup>196</sup> See O.J.E.C. L 95/29.

<sup>197</sup> Cf. *Hellner*’s criticism of this rule, “Tolkning av standardavtal”, *Jussens Venner*, 1994 p. 266 et seq.



The Directive's listing of 17 dubious clauses is not expressed in Swedish statutory law, a special act of implementation or incorporation was not considered necessary, it is just discussed in the preparatory works of the AVLK.<sup>198</sup> However, it is to be assumed that it may add some strength to the application of the general clause in Section 36 of the Act on Contracts, and this mainly as consumer contracts are concerned.

<sup>198</sup> See prop. 1994/95:17, Oskäliga avtalsvillkor mm.

## 8. Antitrust Law

The relation between intellectual property rights and antitrust law, particularly restrictions on competition, is complicated and not very thoroughly analysed in Swedish law relative to the new Act (1993:20) on Competition. However, the Act literally renders much of the EC competition law, which therefore was fundamental to the application and interpretation of the Swedish competition law also before Sweden became a EU member.<sup>199</sup> Use of the specific contents of an industrial or intellectual property right is therefore fully admissible from an antitrust standpoint and there is no tendency to a disposal of the antitrust instrument to cut back the scope of protection of the specific industrial or intellectual property rights. Accordingly, all clauses representing a restriction on competition but which do not exceed the specific contents of an industrial or intellectual property right are admissible from an antitrust standpoint.

What may fall under the Act, if we focus on intellectual property rights, are basically restrictions on competition by the terms of a licensing agreement or other *contracts* on the use of e.g. copyright, on the one hand, and abuse of a *dominant position*, on the other, Sections 6 and 19 of the Act on Competition. Both groups of rules are designed from the pattern of Article 85 and 86 of the Treaty of Rome.

As for restrictions on competition by the terms of a contract the Competition Act lays out a civil law structure in that it, apart from its competition rules, applied by the special Market Court, also comprises rules on civil invalidity and on the rights to claim damages, applied by the civil courts. For example, all contracts or contract terms, which are prohibited by the enumeration in Section 6 of the Competition Act, literally covered by Article 85 of the Treaty of Rome, are null and void, provided of course that the contract in question or the stipulations therein aim at or actually purport a considerable restraint on trade, not covered by a group exemption or an individual exemption.<sup>200</sup> Hereby, it should not be overlooked, that the Commission Regulation no. 556/89 concerning pure know-how-agreements does not apply, according to its Article 5 n. 4, to licence contracts concerning software.<sup>201</sup>

As we have already observed, contractual terms which are covered by copy-

<sup>199</sup> See *Bernitz*, Den nya konkurrenslagen, 2nd ed. 1993, p. 57 et seq.; *Carlsson, K., Göransson, L., Schuer, L.*, Konkurrenslagen och EES konkurrensregler, 1993. See also a more elaborated study, *Wahl*, Konkurrensförhållanden. Om förhållandet mellan EGs konkurrensrätt och nationell konkurrensrätt, Rättsvetenskapliga Biblioteket nr 4, Stockholm 1994.

<sup>200</sup> The EC group exemptions are almost literally incorporated into the Swedish Competition Act, (SFS 1993:72-80), with a reference in Section 17 of the Act.

<sup>201</sup> See O.J.E.C. 1989, L 61 p. 1.

right, such as contractual provisions defining the use of a software, regularly do not infringe antitrust law. But clauses such as site-licences or tie-in agreements concerning a certain hardware, specific machines etc., or those excluding totally the resale of an exhausted program according to Section 19 of the Copyright Act, thus not covered by copyright, are possibly to be qualified as infringing Section 6 of the Act on Competition. But the licensor may certainly impose upon the licensee restrictions as to the content, territory or time concerning the resale or the sublicense of a program which is covered by copyright (or any other intellectual or industrial property), as this is safeguarded and necessary to maintain economic participation of the software author.

By virtue of Section 19 of the Act on Competition market dominating enterprises are subject to the supervision of the cartel authorities, insofar as these enterprises abuse their dominating position on the market for a good or commercial services, similarly as under Article 86 of the Treaty. As long as a market dominating enterprise does not step over the boundaries drawn by copyright or any other intellectual property right, an abuse is hardly imaginable and if so only in extreme and therefore quite solitary cases.<sup>202</sup> By contrast, such conduct as dumping, tying-in, discrimination, refusal to deal, sales below costs, predatory strategies to bring about monopoly may of course amount to infringement. A more difficult issue is the control of maintenance, updating and other program service contracts, which requires a complex balancing of interests.

According to Section 33 of the Competition Act competitors and contracting companies have a right to claim damages, if adequate causality is at hand relative to a tradesman's wilful or negligent violation of the Act, a right which is not afforded to consumers.<sup>203</sup>

<sup>202</sup> Cf. *Wahl*, loc. cit. n. 199 supra, p. 64 et seq. However, typical abuses in software licensing, including refusals to supply, ties, discrimination and refusal to grant licences should probably be seen in the light of the much awaited decision of the EC Court in the *Magill TV-Guide* case. So far, the Commission's decision in the case, *Magill TV-Guide* (1989) EGT L 78/43, purports that it seems deliberately to have avoided to make sure of what a negative effect on trade would consist. Its decision has in stead been based on the assumption that an exception was not necessary for the company to fulfil its tasks. The judgements of the Court of First Instance in re *Magill* (of July 1991) were triggered by the Commission's decision to impose compulsory licences on copyright owners of the programme listings concerning BBC, ITP and RTE (Irish) television broadcasts. According to the Court, the broadcasting corporations had exercised their copyrights with the aim of preventing the introduction on the market of a new product, i.e. a "comprehensive" TV guide. This conduct was considered inconsistent with the "essential function of copyright". Since refusal to grant licences to *Magill* clearly affected the consumer market, the conduct of BBC, ITP and RTE amounted to an abuse of a dominant position in the sense of Article 86 of the Treaty. Therefore, the decision of the European Commission was upheld. If upheld in second instance, the *Magill* judgements may have far-reaching consequences for various segments of the information industry. "The *Magill* doctrine" is reflected in Article 11:1 of the proposed Database Directive.

<sup>203</sup> See prop. 1992/93:56 p. 96 et seq.

An effect of the EEA Agreement is that all the EEA states apply just about the same competition rules as those of the EC, controlled by the EFTA Surveillance Authority (ESA). The competition rules of the EEA agreement were incorporated with the Swedish law (SFS 1992:1317) by the status of a Government Ordinance (SFS 1993:1070). If a restriction on competition affects the Swedish market and simultaneously affects the trade between Sweden and one or several other countries within the EEA, both the EEA rules and the Competition Act are applicable. But according to Section 5 of the Swedish Competition Act it has a subsidiary position relative to the EEA competition rules.<sup>204</sup> Thus, the adherence of Sweden to the EU on 1 January 1995 has not made necessary any material changes to Swedish competition rules.

<sup>204</sup> See prop. 1992/93:56 p. 68 et seq.; prop. 1991/92:170, Part I, p. 164 et seq.

# IV.

## Liability



# 1. Contractual Liability

## 1.1. Contractual Liability in General

According to the Swedish law contractual liabilities for infringement and breach of a software contract, as generally for all contracts, follows from an analysis of the legal status of the contractual performance in the individual case and from the rules adhering to the particular type of contract. As for the statutory rules neither the basic Acts on the Sale of Goods and on Contracts nor any other enactment completely regulates the obligations of the contracting parties or the sanctions for breach of a contract. In the great variety of types of contracts, also in the relatively limited field of software contracts, and overlooking an ocean of terms or types of contractual terms – freedom of contract is of course fundamental also in Sweden – much is not regulated at all by statutory law.<sup>205</sup> It should also be noted, that the Swedish law on contracts considerably lacks a factual and logical uniformity.<sup>206</sup>

Generally, an obligation to achieve a result (“obligation de résultat”) is sanctioned on the basis of strict liability, whereas an obligation to strive for a result with due care (“obligation de moyen”) only rests on a liability for lack of such care, i.e. for default. Along the same line of thinking we may observe that, normally, a genus debtor is strictly liable, irrespective of default, if his performance occurs too late or shows defects, while a species debtor is liable only on default on his side; the stronger liability for the former is related to his opportunity to actually choose how to fulfil his obligation.<sup>207</sup> However, as for the Acts on the Sale of Goods<sup>208</sup> they express a transition to a general liability for lack of control, i.e. each party bears the risk for events within his own sphere of control, expressed i.a. in Sections 27, 40 and 57 of the Sales Act and Section 14 and 30 of the Act on Consumer Sales.

Thus, the software contracts may lead to a wide range of contractual liabilities, normally on default or non-performance and, more generally, because of lack of adequate care in the performance of a contract. In these respects general contract law is equally applicable to software contracts.

<sup>205</sup> See *Hellner*, *Speciell avtalsrätt II. Kontraktsrätt*, 2 häftet. Allmänna ämnen, 2nd ed. 1993, p. 98 et seq.

<sup>206</sup> See *Bengtsson*, “Om civilrättens splittring”, *Festskrift till Grönfors*, 1991, p. 29 et seq.

<sup>207</sup> Cf. *Ramberg*, *Allmän avtalsrätt*, third ed. 1991, p. 123 et seq.

<sup>208</sup> Cf. para. III. 7. *supra*.

## 1.2. Breach of Contract

The concept of breach of contract has not been used very long in Swedish statutory law, and its concept formation differs from e.g. that of the German law. However, as for the United Nations Convention on Contracts for the International Sale of Goods (CISG), directly valid in Sweden in its original wording, breach of contract is fundamental. The Swedish concept simply emanates from the notion of a contractual relationship, built on either party's obligations. Failure to fulfil such an obligation is a breach of contract.

This must be separated from the *consequences* of a breach of a contract, i.e. the sanctions available to an opponent, which may follow from distinctions in different laws. The classification of responsibilities for either party is connected to their obligation to be active; principally, there are sanctions available only if the non-fulfilment "depends on" one of the parties, which is the vocabulary of i.a. the CISG as well as the Swedish Acts on the Sale of Goods.<sup>209</sup>

## 1.3. Culpa in Contrahendo and Warranties

Culpa in contrahendo appears in the main as a contracting party's liability for incorrect, insufficient or deceptive information connected to the conclusion of a contract. If negligence or default hereby may be held against a contracting party, different sanctions may be triggered off, primarily the opposite party's rightful claim of damages, but also e.g. a right of cancellation. The relevance of this to software contracts is apparent when we focus on pre-contractual information on i.a. interoperability of hardware and software and adaption to the specific requirements of a buyer or customer interested in a computer system. However, culpa in contrahendo must of course be tested against the knowledge of both parties and if and how the buyer, the licensee or the like expresses his needs, e.g. relative to the functioning of an interface with regard to a specific application software. The impact of "adequate pre-contractual information" is obviously linked to the status and personalities of the contracting parties.

Therefore, it is often necessary to supplement this rule, based on default and negligence, with the rules on a contracting party's liability for warranties, which fundamentally sharpen the commitment and the liability; a contractor who has given a warranty, which may also be implied, is not pardoned by

<sup>209</sup> Cf. Article 80 of the CISG; Sections 22, 30 and 51 of the Sales Act and Sections 16 and 24 of the Consumer Sales Act.



admitting his mistake about the commitment of the warranty.<sup>210</sup> Further, a liability for damages arise where such would otherwise not occur. Generally, a warranty purports a strict liability for damages.<sup>211</sup>

The term “warranty” (*garanti*) is quite often used in standard forms for software contracts, hereby normally referring to a transfer of intellectual property rights. As always, reality itself reins the world of contracts, and experience shows that the value and impact of such a term must often be carefully scrutinized in order to reveal what comprises a *commitment*. Thus, a “warranty” may actually express e.g. a far-reaching detachment from liability for damages.<sup>212</sup> As the software market is very segmented and transfers of rights often occurs in long chains, a standard warranty may comprise a licensor’s right to grant the licensee e.g. the disposal of copyright in a computer program and to free him from claims of third persons, to pay the costs of a legal process or to effect a reconciliation. However, the right to claim damages mainly appears as the foremost sanction in the wake of a warranty. But the intricate machinery of tender and accept, the coordination (or lack of coordination) of series of contracts, and the obscurity of information liability<sup>213</sup>, i.a. as an implied warranty, often disturbs the straight application of warranties.

## 1.4. Program Defects or Vices

Lawsuits regarding “computer defects” cannot be handled so easily as certain other types of defects or vices, as the defects appear under unpredictable conditions during a complex process of computer use. Furthermore, the essence of a computer system, the information, appears very different from the physical materials dealt with by computer use. This implies that one and the same contract may be subject to different legal regimes. If a contract includes an obligation to e.g. develop a software, this part must be sorted out and treated by the applicable law relating to construction, performance, service or labour contracts or the like.<sup>214</sup>

As for hardware and the media part of a computer system, such as discs and streamers, they normally fall within the Sales Act, which is generally true about

<sup>210</sup> See *Hellner*, loc.cit. n. 205 supra, p. 108 et seq. Cf. e.g. Section 40 (3) of the Sales Act and Section 30 (3) of the Consumer Sales Act.

<sup>211</sup> See *Hellner* loc. cit. p. 195 et seq.

<sup>212</sup> Cf. *Hellner* loc. cit. p. 109; *Seipel*, Databasrätt. Focus på upphovsrätt och avtal, IRI-rapport 1990:6, p. 62 et seq.

<sup>213</sup> Cf. NJA 1987 p. 692; The Supreme Court found a real estate broker liable for his information about possible future occupation by buildings on a site.

<sup>214</sup> Cf. para. III. 2.1 supra

pure *functional aspects* of a computer program, i.e. where it fulfils exactly the same purposes as any other technical device.<sup>215</sup> As potential defects in the sense of the Sales Act must probably be regarded i.a. a lack of compatibility of a program and a central processing computer or insufficient memory capacity of a computer, just as defects and omissions in a user handbook.

However, the fact that there is a defect in the product does not imply that the purchaser (user) disposes all possible sanctions, mainly because there is a major distinction in Swedish law between substantial and minor defects. A contract may only be cancelled if a defect is substantial.<sup>216</sup> In respect of other remedies, the legal consequences of a defect in goods under Swedish law depend, as sales are concerned, on whether the defect occurs in a consumer sale, in a merchant sale or in another kind of sale. A differentiated regime on the vendor's obligation to repair the product, to re-deliver it, on reduction of the purchase price corresponding to a decreased value caused by the defect, rescission of the contract and damages,<sup>217</sup> emanates from the type of purchase, closely related to aspects of time and the factual actions of the contracting parties.<sup>218</sup>

<sup>215</sup> Cf. *Bryde Andersen*, "Acquisition of Computer Programs", *Software Procurement*, Nordic Yearbook of Law and Informatics 1992, p. 57 et seq.

<sup>216</sup> See Section 39 (1) of the Act on the Sale of Goods. Cf. The Decision of the Danish Supreme Court in U 1988 p. 535 H.

<sup>217</sup> See Sections 34 – 40 of the Act on the Sale of Goods.

<sup>218</sup> For further details see *Hellner J.*, *Ramberg J.*, loc.cit. n. 146 supra, p. 163 et seq.

## 2. Tortious Liability in General

### 2.1. Product Liability

Initially, we may note that Swedish market law affords a certain demand on *product safety* in general, as a part of the legislation on consumer protection. According to the EEA Agreement the Directive 85/374/EEC on product liability was part of the *acquis communautaire* and therefore to be implemented by Sweden as an EFTA country at the time. However, the Act on Product Safety (1988:1604) was actually harmonized to the Directive long before – only minor changes were necessary in order to implement the new EC Directive 92/59/EEC of 29 June 1992 on product safety.

This Act comprises *products* and, unlike the last mentioned Directive, *services*,<sup>219</sup> which are supplied to *consumers* or normally used by consumers. The Act is primarily applied by the Consumer Ombudsman and the special Market Court. Thus, it is drafted in a way similar to the Marketing Practises Act.<sup>220</sup> The Act on Product Safety empowers the Market Court, in certain cases the Consumer Ombudsman, to prohibit future sales of a dangerous product and to require the use of adequate safety information and warnings. In serious cases the Market Court may order the recall of a dangerous product or put a ban on its exportation, something which has not yet occurred.

Further, the Act (1992:18) on *Products Liability*,<sup>221</sup> in force since 1 January, 1993, which also relates to the Directives from 1985 and 1992 on product safety in general, adds some important features to the legal scheme principally for hardware, but which may actually be applied also to software. Liability according to the Act on the Sale of Goods does not comprise losses other than those the buyer has suffered as related to the purchased good.<sup>222</sup> However, the Swedish Act on Products Liability lays down a strict liability, thus well aside of contractual liability, for producers, sellers, importers and others – e.g. those who put the good on the market or uses their trade marks for it – for dangerous and defective products, namely for damages mainly on *persons* and *objects*, other than the product itself, but caused by the product. A further requisite is that the product in question was intended for and, at the time of the damage,

<sup>219</sup> Cf. SOU 1993:88, Produktsäkerhetslagen och EG. Delbetänkande av Produktsäkerhetsutredningen, p. 90 et seq.

<sup>220</sup> See para. II:3 *supra*.

<sup>221</sup> See prop. 1990/91:197.

<sup>222</sup> Cf. *Ramberg*, Inledning till köprätten, Stockholm 1993, p. 28 et seq., 77 et seq. See also *Wilhelmsson*, “Köprätten och produktansvaret”, JFT 1994 p. 627 et seq.

was used primarily for private purposes, e.g. defined as a consumer good. Liability is related to damages caused by a deficiency of security.<sup>223</sup>

Neither Article 2 of the Directive 85/374/EEC nor the Act refers explicitly to software in their definitions of “product”. There are no reasons to doubt the application of the Act on “machineware”, i.e. not only a computer as such but also all movables of “physical objects”<sup>224</sup> connected to computers. But the EC Commission has, answering a special request, *expressis verbis* included software into the terms of movable object and product.<sup>225</sup> As a matter of principle, every producer et al. of hardware and software must therefore be held liable if his product, also as software packages supplied on discs or plug-in boards by retail are concerned, contains a defect stemming from construction, manufacture, instruction or insufficient market surveillance after the sale of his product.

However, this does not apply to pure information providers, and would thus not appear to apply to independent software houses. At all events, a damage caused by a logical error of a computer program does not as such, being a matter of series of instructions, consequently not movables, give reason to the application of the Act on Products Liability.<sup>226</sup> Liability may in such cases be tried on the basis of the general Act on Tort Liability (1972:207).

On the other hand, it seems clear, that a systems program as well as an application program, making a product of any kind work, may cause liability according to the Act on Products Liability, if the product causes a damage. This is true irrespective of the fact that the computer program, as the case may be, is the material reason for the malfunctioning of the product. It is irrelevant for the application of the Act, namely, whether the damage is caused by the product from a defect of a mechanical art or e.g. by a logical error of a computer program. Certainly, computerized functions of a car or a washing machine may cause damages for which the Act may be applied. Furthermore, the same must be valid also as an application program stored in e.g. a disc is concerned, a disc certainly being a product in the meaning of the Act. The use of such a disc, normally available on the market for numerous fields of use, purports of course its loading into different types of memories of hardware. In such cases the producer, irrespective if he is the creator of the program, is liable for the product which constitutes the medium which the program is stored into. Liability is on the other hand limited by the fact that the damage must follow from a

<sup>223</sup> It should also be added, that according to Section 31 of the Act on Consumer Sales, unlike the Act on Sales, liability may also occur for damages on another good than the purchased one, owned by the buyer or a member of his household, but which are caused by the purchased good, which must be a consumer good.

<sup>224</sup> This is stated in the preparatory works to the Act on Products Liability, Ds 1989:79, *Produktskadslag*, p. 242 et seq.

<sup>225</sup> See O.J.E.C. C 11/42 of May 8, 1989.

<sup>226</sup> Cf. Ds 1989:79 p. 243.

lack of security of a product, which, as described in the last example, has a bearing on the medium in which the program is stored.

To conclude, these general categories of liability are to be applied also to computer programs, at all events as an element of another good.<sup>227</sup> Thus, it seems that in addition to pure hardware products, at least software is included by the Act as a possible tortious product. The application of the Act is more certain if an operative system or an application program is stored in a machine or if it is actually difficult to separate from such a product which is supplied, and makes it operate defectively, i.e. a type of firmware.<sup>228</sup>

But it is very doubtful whether the Act is applicable as purely *economical damages* are concerned, not directly related to persons or goods, e.g. caused by on-line services or forwarded by a CD-ROM or other information products.<sup>229</sup> As a matter of principle the Act does not comprise purely economical damages, but the difficulty lies mainly in the problem of defining such a damage. The importance of this becomes clear as liability for economic loss is usually the focus of a claim related to software, outside the sphere of contract. So far there has been no case law relating to software to clarify this matter.

In short, the producer, importer or anyone else – entrepreneurs from the public sector included<sup>230</sup> – who supplies a “product” to the market for personal use, is liable for *personal* damages caused by the product because of its lack of security (“säkerhetsbrist”) or, for the same reason, damages to other *goods* used for *private purposes*, if the user handled the product mainly according to its particular purpose, Sections 1 and 6 – 8 of the Act. If a defective program is built-in, the legislation provides machinery for imposing liability upon a third-party supplier.

As was mentioned above there is a *strict liability* of the producer or whoever is found responsible, e.g. a group of persons on the basis of a joint responsibility, but only for costs exceeding 3500 SEK, Section 9 of the Act. Further, according to an amendment to the Act, damage costs may be modified according to what is found reasonable, if the plaintiff shows contributory negligence in relation to the damage, Section 10 of the Act.<sup>231</sup> Generally, the responsibility should rest on the one who has the best qualifications to avoid the risk of damages, preferably the producer.<sup>232</sup>

<sup>227</sup> See Section 2 of the Act, Article 2 of the Directive.

<sup>228</sup> Cf. prop. 1990/91:197 s 92 et seq.

<sup>229</sup> Cf. *Seipel*, Databasrätt, IRI-rapport 1990:6, p. 65 et seq. See generally about the difficulties adhering to the somewhat blurred definitions of damages to “goods” as separated from damages of a pure economical status and the resilient court practice on the subject, *Kleineman*, “Begreppsbildningen och den skadeståndsrättsliga analysen – en renässans för begreppsjurisprudensen?”, JT 1993-94 N:o 4, p. 718 et seq.

<sup>230</sup> Cf. *Hellner*, SvJT 5-6/1994 p. 541.

<sup>231</sup> See prop. 1992/93:38 p. 1.

<sup>232</sup> See prop. 1990/91:197 p. 19.

As the signification of a product's "lack of security" depends on what could *reasonably be expected*, taken into account its expected use, how it is placed on the market, its accompanying directions for use, the point of time it was put on the market and other circumstances, Section 3 of the Act, there are a lot of aspects necessary to contemplate by the application of the Act on software. But the scope and importance of the Act should not be overestimated in the field of software; risks of the use of a computer program, i.a. to a hardware or a computer system or network used for private purposes, unknown according to the state of the art in technology at the moment of the program's sale on the market, clearly fall aside of the Act.

## 2.2. Crimes and their Relevance to Civil Law Claims

As we have noticed above penalties for infringement or violation of certain provisions under the Copyright Act and certain other Acts on intellectual property, as well as for illegal imports of software, are fines or imprisonment for not more than two years, provided the illegal act was wilful or grossly negligent, while attempts to commit illegal acts, as well as the planning of such acts, are equally punishable. Any act in contravention of the Copyright Act<sup>233</sup>, which is undertaken wilfully or negligent, will form the basis for a claim for damages or losses, mental suffering or other injury caused by the act. Any exploitation of a work in violation of rights or provisions set forth in that Act may rightfully cause a claim for at least reasonable remuneration.

Claims for remuneration may be raised in either a criminal case or a civil case. Thus, an attorney must start an investigation if he receives notice of facts which give adequate reason to suspect the existence of an offence. These criminal investigations may be used as informational material by the plaintiff of a civil law suit or by seeking an interim desist order according to the new Section 53 (a) of the Copyright Act.<sup>234</sup>

Generally, according to the existing general statutes on limitation, the Act on Periods of Limitation (1981:130),<sup>235</sup> a right to damages will expire ten years after the unlawful act giving rise to it. A time bar is also provided for debts in a large number of special provisions for special kinds of contracts or special claims. The general time bar is interrupted by the debtor's acknowledgement of his debt, express or implied, e.g. through instalment or interest payment, or by the creditor's written notice of claim, reminder of the claim or by certain

<sup>233</sup> With certain exceptions the same is valid also for other intellectual or industrial property laws.

<sup>234</sup> See para. I. 4.3 *supra*.

<sup>235</sup> See particularly Section 2 of the Act.

procedural measures. After interruption, a new period commences.

A criminal suit must commence within five years after the act on which it is based, and no judgement may be rendered later than fifteen years after that act. Fines not paid within five years of judgement will be abolished, as will sentences of imprisonment with an execution pending more than ten years.

## 3. Procedure and Proof

### 3.1. Pre-Trial Disclosure of Software

Swedish procedural law offers nothing like the anglo-american institution of pre-trial disclosure of information of importance to determine the occurrence or provenance of e.g. an infringing software. The above mentioned novelty to the Swedish Copyright Act, an interim order under penalty of a fine against anyone who infringes or violates copyright, Section 53 (a) of the Act, must not be confused with a pre-trial disclosure, as the plaintiff must show probable evidence for such an interlocutory injunction.<sup>236</sup>

### 3.2. Software as Evidence

It is made clear by the Supreme Court of Sweden that copyright in a work may not be an obstacle for the inspection of a protected work referred to as evidence by a party.<sup>237</sup> Accordingly, an inspection order may be issued by a court concerning software to be scrutinized as evidence, in spite of its protection by copyright, Section 5 Chapter 39 of the Code on Judicial Procedure (1942:740). As general procedural rules are valid also for software litigation, an obligation to present such an object for inspection is not possible to impose on a suspect in a criminal procedure. Further, if a reference to a software as evidence would lead to the exposure of a *trade secret*, the reference will be dismissed, unless extraordinary reasons speak for the opposite, Section 2 Chapter 38 and Section 6 Chapter 36 of the Code on Procedure.

### 3.3. Burden of Proof

There are no explicit rules on the allocation of the burden of proof in copyright or intellectual property litigation, not even in the Code of Judicial Procedure. As criminal procedure is concerned, it is however made clear, i.a. by the Supreme Court, that the burden of proof is on the prosecutor for every element

<sup>236</sup> See para. I. 4.3. *supra*.

<sup>237</sup> See NJA 1981 p. 791, Kvarteret Järnet; cf. NJA 1992 p. 307.



in the description of the crime – the prosecutor has to prove not only the criminal act but also the subjective requirements.

In civil procedures, based on a potential infringement of intellectual property involved, it is a general assumption that the plaintiff has to show that an infringement of e.g. copyright has occurred. Section 7 of the Copyright Act states, that the person whose name or generally known pseudonym or signature is stated on copies of a work, or when the work is made available to the public, shall be deemed to be the author, “in the absence of proof to the contrary”, which forms a natural starting point for a practical consideration. In consistency, matters on infringement are often solved by the use of “principles” like *res ipsa loquitur*.<sup>238</sup> The plaintiff’s burden to prove that an infringement has occurred may at any event be quite heavy, particularly as computer programs are concerned, due to the factual problem of making visible the protected work relative to the infringing object.

However, in a case concerning likeness between designs on cloth, protected by copyright, the Supreme Court recently confirmed the just mentioned basic rule. But the Court added, which is certainly worthy of remark, not the least as software is concerned, that in cases of one to one copy or very high degrees of similarity the defending party should prove evidence of non-infringement.<sup>239</sup>

<sup>238</sup> Cf. *Koktvedgaard M., Levin M.*, *Lärobok i immaterialrätt*, 2nd ed. 1993, p. 127.

<sup>239</sup> See NJA 1994 p 74 (NIR 1994 p. 143), Borås Wäfveri.

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# Abbreviations

AD	(Arbetsdomstolen) The Labour Court
AVLK	The Act (1994:1512) on Contract Terms in Consumer Relations
AVLN	The Act (1984:292) on Contracts Terms between Tradesmen
BBS	Bulletine Board System
BC	The Berne Convention for the Protection of Literary and Artistic Works
BU	The Berne Union
CISG	The United Nations Convention on Contracts for the International Sale of Goods
EC	The European Community
EEA	The European Economic Area
EPA	The European Patent Authority
EPC	The European Patent Convention
EPO	The European Patent Office
EU	The European Union
JT	Juridisk Tidskrift
NIR	(Nordiskt Immateriellt Rättsskydd) The Nordic Journal on Intellectual Property
NJA	(Nytt Juridiskt Arkiv, avd I) The Supreme Court's Reports
OJ	The European Union's Official Journal
PCT	The Patent Cooperation Treaty, 1970 prop. The Government's proposal to the Parliament
PRV	(Patent- och registreringsverket) The Patent Office
RR	(Regeringsrätten) The Supreme Administrative Court
SFS	(Svensk författningssamling) The Official Statutes Publication
SOU	(Statens Offentliga Utredningar) The Official Report Series of Legislative and Investigations Commissions
SvJT	(Svensk Juristtidning) The Swedish Law Journal
URL	The Act (1960:729) on Copyright in Literary and Artistic Works



**COUNCIL DIRECTIVE of 14 May 1991 on the legal protection of computer programs (91/250/EEC)**

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply;

Whereas, for the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the

preparatory work is such that a computer program can result from it at a later stage;

Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces';

Whereas this functional interconnection and interaction is generally known as 'interoperability'; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged;

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

Whereas, in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive;

Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

Whereas, for the purposes of this Directive, the term 'rental' means the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof; whereas this term does not include public lending, which, accordingly, remains outside the scope of this Directive;

Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer;

Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of

correction of its errors, may not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs;

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

Whereas an objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together;

Whereas such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program;

Whereas, in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death or, in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published;

Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) should be null and void;

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a domin-

ant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;

Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardization in the field of information technology and telecommunication;

Whereas this Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive,

HAS ADOPTED THIS DIRECTIVE:



## Article 1

### *Object of protection*

1. In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

## Article 2

### *Authorship of computer programs*

1. The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation. Where collective works are recognized by the legislation of a Member State, the person

considered by the legislation of the Member State to have created the work shall be deemed to be its author.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

## Article 3

### *Beneficiaries of protection*

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

## Article 4

### *Restricted Acts*

Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be

subject to authorization by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

## Article 5

### *Exceptions to the restricted acts*

1. In the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.

3. The person having a right to use a copy of a computer program shall be entitled, without the authorization of

the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

## Article 6

### *Decompilation*

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

## Article 7

### *Special measures of protection*

1. Without prejudice to the provisions of Articles 4,5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the acts listed in subparagraphs (a), (b) and (c) below:

(a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(b) the possession, for commercial purposes, of a copy of a computer

program knowing, or having reason to believe, that it is an infringing copy;

(c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program.

2. Any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State concerned.

3. Member States may provide for the seizure of any means referred to in paragraph 1 (c).

## Article 8

### *Term of protection*

1. Protection shall be granted for the life of the author and for fifty years after his death or after the death of the last surviving author; where the computer program is an anonymous or pseudonymous work, or where a legal person is designated as the author by national legislation in accordance with Article 2 (1), the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public. The term of protection shall be deemed to begin on the first of January of the year following the abovementioned events.

2. Member States which already have a term of protection longer than that provided for in paragraph 1 are

allowed to maintain their present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

## Article 9

### *Continued application of other legal provisions*

1. The provisions of this Directive shall be without prejudice to any other legal provisions such as those concerning patent rights, trade-marks, unfair competition, trade secrets, protection of semi-conductor products or the law of contract. Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void.
2. The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date.

## Article 10

### *Final provisions*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

## Article 11

This Directive is addressed to the Member States.

Done at Brussels, 14 May 1991.

For the Council  
The President

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## Swedish Software Law

Swedish Software Law elaborates comprehensively on the wide variety of legal matters related to computer programs, preparatory design material and supporting material in the form of handbooks and information facilitating the use and understanding of a computer program.

Swedish Software Law focuses on the protection of software as intellectual property, on the idiosyncrasies of computer contracts and on contractual and tortious liability, all of which are related to the pertinent EC Directives.

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