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Copyright

Sweden

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1. General Information

1.1 Governing Copyright Statute

The primary legislation governing copyright in Sweden is the Act on Copyright in Literary and Artistic Works (SFS 1960:729) (the “Copyright Act”) (as amended), which is available in Swedish and in unofficial English translation.

The Copyright Act is complemented by, most notably, the Copyright Regulation (SFS 1993:1212), the International Copyright Regulation (SFS 1994:193), the Act on Mediation in Certain Copyright Disputes (SFS 2017:322) and the Act on Collective Management of Copyright (SFS 2016:977).

As a member of the European Union, Sweden is obligated to implement relevant directives and regulations in the field of copyright, most recently Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

The other principal sources of law governing copyright in Sweden are case law from the specialised Patent and Market Court of Appeal, the Supreme Court and the CJEU, as well as the preparatory works for the Swedish legislation.

As is likely the case in all European Union member states, the CJEU has recently come to play a larger role in the development of national copyright law and it is now fairly common for Swedish courts to seek guidance on questions concerning copyright from the CJEU.

Swedish copyright jurisprudence, like all other civil law jurisprudence, has traditionally relied heavily on preparatory works and authoritative commentaries for interpretation of national law. Another interesting trend over the last few years has been a move away from reliance on these sources, especially when these sources are contradicted by EU law and the case law of the CJEU. See, for example, the Patent and Market Court of Appeal’s decision in T 5537-14, where the court found that preparatory works for implementation of EU law in Swedish legislation lacked relevance, and the same court’s decision in PMÖÄ 435-18 (concerning trade mark rights) to simply allow more nuanced case law from the CJEU to overrule clear and unambiguous wording in national preparatory works.

1.2 Berne Convention

Sweden is party to several international treaties relating to copyright and neighbouring rights. Sweden has been a party to the Berne Convention since 1904 (and has ratified the text of Paris 1971), as well as the Universal Copyright Convention of 1952 and the WIPO Copyright Treaty of 1996. In relation to

neighbouring rights, Sweden is a party to the Rome Convention of 1961, the Phonograms Convention of 1971, the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty of 1996 and the Beijing Treaty on Audiovisual Performances of 2012. Sweden is a member of the WTO and a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

1.3 Foreign Copyright Holders

Foreign works entitled to protection under the international agreements and treaties to which Sweden is a party – eg, the Berne Convention and the WIPO Copyright Treaty – enjoy protection in Sweden under the International Copyright Regulation (SFS 1994:193) (as amended), which stipulates that the Copyright Act shall also apply to such works.

Foreign copyright holders must therefore not follow any special steps to secure protection in Sweden; foreign authors and their works are afforded the same protection as Swedish authors and their works.

2. Copyrighted Works

2.1 Copyright Protection: Essential Elements

The essential elements required for an expression to constitute a work that benefits from copyright protection in Sweden are that:

- the work is a physical person’s own intellectual creation, reflecting the personality of the author and expressing free and creative choices (the Swedish term *verkshöjd* has traditionally been used to describe expressions with this level of originality/individuality, but in recent years there has been a move towards the use of terms that more closely mirror those used by the CJEU); and
- the work is identifiable with sufficient precision and objectivity.

These general requirements for copyright protection apply across all types of works and for all authors. However, the level of originality required may, in practice, differ between different types of works, depending on the creative freedom afforded the author of that type of work. For example, works of applied art, where the author is commonly understood to have less creative freedom, may require a higher level of originality/individuality than other types of works in order to qualify for copyright protection (see, for example, the Patent and Market Court of Appeal’s decision in PMT 5885-18 regarding copyright protection for a wristwatch as a work of applied art).

The level of originality will also affect the scope of the copyright protection enjoyed by the work. Works showing a high level

of originality/individuality are generally considered to enjoy a wider scope of protection and vice versa.

2.2 Copyright Protection: Special Notice and Registration of Works

Under the Copyright Act, copyright protection is created at the same time as the work is created, which means that there are no formal requirements for a work to be protected by copyright, such as notices or registrations. Sweden does not have an official copyright register or similar.

2.3 Categories of Copyrightable Works

Under the Copyright Act, any literary or artistic expression that fulfils the general requirements for copyright protection and thus constitutes a work enjoys copyright protection, irrespective of the manner or form of expression.

Chapter 1 Article 1 includes a non-exhaustive list of such different types of works. These are:

- fictional or descriptive representations in writing or speech;
- computer programs/software;
- musical or dramatic works;
- cinematographic works;
- photographic works;
- works of fine art;
- works of architecture;
- works of applied art; or
- other types of works.

The Copyright Act does not include a fixation requirement in the generally accepted meaning of the word. However, since one of the general requirements for copyright protection is that the work must be identifiable with sufficient precision, and since copyright protection only applies to the expression of a work and not the idea behind the work, the work must be fixed in the sense that it is identifiable.

2.4 Copyright Protection: Software

Software is explicitly mentioned as a type of copyright protectable work, subject to the same general requirements as other types of works (Chapter 1 Article 1 of the Copyright Act). Copyright may apply not only to the final version of the software, but also to preparatory design materials. The CJEU has clarified that the scope of protection for software is limited in some respects; the software's interface is, for example, not protected since it does not constitute a form of expression of the software (see C-393/09 BSA).

There are exceptions and limitations to copyright protection that only apply to software. These concern adaptations and back-up copies (Chapter 2 Article 26 g) and reverse engineer-

ing for the purposes of interoperability (Chapter 2 Article 26 h). There are also general exceptions to copyright protection that explicitly do not apply to software. These concern copies for private use (Chapter 2 Article 12), copies for certain public uses (Chapter 2 Article 16), temporary copies (Chapter 2 Article 11 a), exhaustion (Chapter 2 Article 19) and technological measures (Chapter 5 Article 52 c).

2.5 Copyright Protection: Databases

Databases enjoy protection as a neighbouring right under Chapter 5 Article 49 of the Copyright Act. In order to qualify for protection, the database must (i) include a large amount of data or (ii) be the result of a significant investment on behalf of the proprietor. The rights-holder in a database is given an exclusive right to make copies and make the database available to the public. Protection applies to the full database or a significant part thereof, and the period of protection is limited to 15 years.

2.6 Copyright Protection: Industrial Design

Industrial designs may constitute works protected by copyright under Chapter 1 Article 1 of the Copyright Act if they fulfil the general requirements for copyright protection. If the industrial design qualifies as a work, it is likely to be considered a work of applied art, but it is also possible that industrial designs are protectable as other types of works.

It follows from Chapter 1 Article 10 that an industrial design may be protected by copyright even if it is also a registered design that qualifies for design protection.

2.7 Copyright Protection: Distinct Categories

A wide variety of traditional and less traditional types of expressions may qualify for copyright protection in Sweden as works if they fulfil the general requirements of originality and being identifiable.

Fictional characters, advertising copy or product labels, websites, maps and TV formats are generally likely to be able to fulfil these requirements and qualify for protection as works, but it is difficult to specify the level of originality needed for such unusual types of works to fulfil the general requirements and qualify for protection.

As concerns sporting events, the Swedish Supreme Court in NJA 2015 page 1,097 found that these do not normally enjoy copyright protection as works, if they do not go above and beyond showing the actual events to such an extent that the broadcast is considered to constitute an independent intellectual creation that expresses originality. (Broadcasts of sporting events still enjoy a limited neighbouring right under Chapter 5 Article 48 of the Copyright Act.)

As concerns recipes that merely contain a list of ingredients and instructions on how to cook them, these are unlikely to fulfil the general requirements for protection as works, since copyright protects the expression and not the idea itself (the idea-expression dichotomy) nor any factual information included in the expression. However, it is possible that the expression of a recipe that includes more imaginative or elaborate descriptions, or includes other creative elements such as illustrations, could enjoy copyright protection, in the same way that a collection of recipes in a cookbook is likely to be able to fulfil the requirements for protection and constitute a literary work.

As concerns museum exhibitions and perfumes, these are similarly unlikely to fulfil the general requirements for protection as works due to the expression-idea dichotomy. In the case of perfumes, the general requirement of identification as set out in C-310/17 *Levola Hengelo* may be a particular problem but there is, to the best of the authors' knowledge, a lack of Swedish case law on whether these types of expressions may constitute works.

3. Authorship and Copyright Ownership

3.1 Authorship

The author is generally identified by name on the work (if applicable), but it is acceptable to publish under a pseudonym. Under Chapter 1 Article 7 of the Copyright Act, the person whose name or known pseudonym is stated on a copy of the work or when the work is made available to the public is presumed to be the author. That presumption can be overturned. If the author is not stated on the copy of the work, the editor or publisher, if applicable, may represent the author.

3.2 Joint Authorship

If a work is created by two or more authors and their respective contributions do not individually constitute independent works, the copyright to that work will belong to the authors jointly (Chapter 1 Article 6 of the Copyright Act). For a person to be considered a joint author, their contribution must go beyond following instructions and represent an individual creative effort. Questions of joint ownership are, by their nature, often complicated since it is not uncommon that it is difficult to ascertain after the fact which author contributed what to the work.

Exploitation of the work requires all authors' consent every time the copyright is to be exercised (eg. to grant a licence, print a new edition of a literary work or publish). However, each of the authors is entitled to bring an action for infringement individually.

3.3 Copyright Protection: Anonymous or Pseudonymous Works

The author is generally identified by name on the work (if applicable). But it is acceptable to publish under a pseudonym or anonymously. If the author's name is not stated on the copy of the work, the editor or publisher may act as a representative for the author (Chapter 1 Article 7 of the Copyright Act).

Works where the authors or, for joint works, some of the authors are not known or identifiable, despite a diligent search having been carried out, may, under certain circumstances, be considered orphan works under Chapter 2 Article 16 a-d of the Copyright Act. Certain institutions, such as libraries and museums, may produce copies of orphan works and communicate such works to the public under certain conditions specified in the legislation. If the unknown author(s) reveal themselves, the work is no longer considered orphan.

3.4 Collective Works

Collective works – that is, works where the author has combined works or parts of works to form a new individual work such as a literary anthology – may enjoy copyright protection under Chapter 1 Article 5 of the Copyright Act, if the expression of combining the works in this manner fulfils the general requirements for copyright protection.

The author of the collective work's copyright in the collective work does not affect the copyright to the individual works included in the collective work. The author of the collective work will thus need permission from any remaining copyright holder to such works in order to exploit the collective work commercially.

3.5 Corporate Authorship Rights of Physical Persons and Corporations

Only a physical person can be the author of a work under Swedish copyright law. That means that all economic and moral rights to a work are initially held by the physical person upon creation of the work. All or some of the economic rights in a work created by a physical person, including the right to exploit the work commercially, may be (and is, in fact, commonly) transferred to a corporation through explicit or implicit agreement between the parties. There are no formal requirements or standards on the form or content of such agreements. It is also possible for the parties to agree to have the economic copyright vest in the employee. Moral rights may not be transferred from the author to the corporation but they may be waived by the author.

Swedish employment agreements between a person and a corporation generally stipulate that any economic copyright (and other intellectual property rights) that arises as a result of the employment is automatically, and without formalities, trans-

ferred from the author (employee) to the employer (corporation) upon creation. If there is no explicit agreement on the transfer of the economic copyright in the employment agreement, the general principle from applicable case law is that the employer (through a teleological interpretation of the employment agreement between the employee and employer) is given a limited right to use works that are the result of the employee's work within the employer's normal course of business, for the purposes that could be anticipated at the time of the work's creation (the so-called Rule of thumb). Swedish copyright law does not differentiate between public and private entities as employers in this regard.

Freelance and Non-employee Persons

Swedish agreements between a freelance or other non-employee person and a corporation generally stipulate that any economic copyright (and other intellectual property rights) that arises as a result of the freelance work is automatically, and without formalities, transferred to the corporation upon creation. If there is no explicit agreement on the transfer of the economic rights in the freelance agreement, the general principle from applicable case law is that the employer is not given any right to use such works. The relationship between an employee and the employer on the one hand and between the freelance contributor and corporation is thus regarded as fundamentally different for these purposes. But this is a contentious issue where the outcome may vary greatly depending on the circumstances of the case. Circumstances such as explicit instructions from the corporation to the freelance contributor to produce works that are clearly meant to be used by the corporation, and a failure to object to the corporation's subsequent use of the works, have, in recent case law, been found to establish an implicit agreement to transfer those economic rights from the freelance contributor to the corporation (see the Labour Court's decision in A 69/18).

Teachers and Researchers

There are no specific provisions in the Copyright Act concerning teachers or researchers at universities or other educational institutions. The parties can freely agree on any transfer of economic rights in works created by the teacher to the educational institution. In the absence of such explicit agreement, a different interpretative framework has been established by applicable case law (the so-called Teacher's exception). Under this case law, copyright arising out of employment between a teacher and an educational institution remains with the teacher, not the educational institution. The Teacher's exception does not, however, cover works created by the teacher in his or her administrative tasks (eg, acting as prefect or principal); the educational institution is considered to have obtained the economic rights to such works.

Software

The Copyright Act includes an explicit presumption in Chapter 3 Article 40 a that copyright in a software created by an employee as part of their work or following instructions from their employer is transferred to the employer. The exception is only applicable to employment relationships, not freelance relationships. For purposes of clarity, an IP transfer clause is commonly included in employment as well as freelance agreements even if the work to be created is software.

4. Scope of Copyright Protection

4.1 Economic Rights of the Copyright Owner

According to Chapter 1 Article 2 of the Copyright Act, the copyright owner has the exclusive right to (i) make copies of the work and (ii) to make the work available to the public (in original or altered form, in translation or adaptation, in another literary or artistic form, or in another technical manner). This principle applies equally to all types of works. The duration of the economic right is 70 years after the death of the work's (last surviving) author.

According to Chapter 3 Article 33 of the Copyright Act, an author who has granted a publisher the right to reproduce a literary or artistic work may recapture that right if the publisher is found to be at fault for not having (i) published the work within a reasonable time, (ii) distributed the work in a reasonable way, or (iii) capitalised on market demand by issuing additional printings of the work. The effect of an author exercising their rights in this way is that the publishing agreement is terminated and the publisher may be held liable for damages.

According to Chapter 3 Article 34, the author may recapture the rights, even without fault on the part of the publisher, if the work has not been published within two years (or four years if the work is a musical work).

According to Chapter 3 Article 40, the same rule is applicable to film works. If the right to use a literary or musical work for a film, which is intended for public display, is transferred, the transferee shall record the film and make it available to the public within a reasonable time. If the work is not made available to the public within a reasonable time, the author is entitled to cancel the contract and keep the compensation received. If the author has incurred damage that is not covered by the compensation, such damage shall also be compensated. If the film work has not been recorded within five years, the author is entitled to cancel the contract and keep the compensation received, even if there is no fault on the part of the transferee.

According to Chapter 3 Article 27 third paragraph, these recapture provisions only apply to the extent there is no other agreement to the contrary.

4.2 Alienable Rights

The economic rights in works are alienable, in whole or in part, according to Chapter 3 Article 27 of the Copyright Act. There are no formal requirements or limitations for a transfer, license or sale of economic rights to be valid and recognised. Unless specifically agreed, transfer of copyright does not include a right to alter the work or to transfer the copyright to a third party (Chapter 3 Article 28 of the Copyright Act). Licensors are thus recommended to exercise caution in drafting licence agreements that may be interpreted by Swedish courts.

Under Swedish case law, copyright assignment agreements are normally given a narrow interpretation. Such agreements are commonly interpreted by courts to only cover such uses that are clearly mentioned in the assignment. Lack of clarity in the agreement or underlying circumstances is commonly interpreted to the benefit of the person assigning the copyright.

4.3 Transmissible Rights

According to Chapter 3 Article 41 of the Copyright Act, general rules governing inheritance also apply to the deceased's copyright interests. An administrator of a deceased's estate may not, without the consent of the heirs, exploit the work in another manner than that in which it has previously been exploited. The author may also govern the future exercise of the copyright in his or her will.

4.4 Transfer of Rights

There are no provisions under Swedish law that specify a minimum age or other requirements relating to competency to transfer copyright. The general rules on legal competency apply. That means underage persons – that is, persons under the age of 18 – and persons placed under, for example, state guardianship, and thus lacking individual legal competency, cannot dispose of property including copyright. Such persons would therefore not be able to enter into legally binding assignment agreements relating to copyright.

4.5 Copyright Exhaustion Doctrine

Sweden has a copyright exhaustion doctrine. As set out in Chapter 2 Article 19 of the Copyright Act, when a copy of a work has been put on the market within the European Economic Area (EEA) with the consent of the copyright holder, the copyright in that copy of the work is exhausted. Sweden does not recognise global exhaustion, and copyright holders may thus oppose imports to the EEA from countries outside this area.

However, exhaustion does not confer a right to make copies of:

- works (with the exception of buildings and works of applied art) available to the public through rental or similar acts; or
- software in machine-readable form or cinematographic works through lending.

4.6 Moral Rights of the Copyright Owner

Authors of works enjoy two distinct moral rights (Chapter 1 Article 3 of the Copyright Act).

- When copies are made of a work, or when the work is made available to the public, the name of the author shall be stated. This only applies to the extent and in the manner required by “proper usage” and may thus be different between different types of works depending on the customs and practicalities of those works and that market.
- A work may not be changed in a manner that is prejudicial to the author's literary or artistic reputation, or to his individuality, nor may a work be made available to the public in such a form or in such a context as is prejudicial in this manner. The term “prejudicial” in this context refers to what is objectively prejudicial.

Moral rights have the same duration as economic rights (70 years). In contrast to economic rights, moral rights are not fully alienable since they have such intimate connection with the author's person. According to Chapter 1 Article 3 of the Copyright Act, an author can only validly waive his or her moral rights in relation to uses that are limited as to their character and scope. This is an important difference between Swedish copyright and some foreign legal systems. This means open-ended transfer of moral rights is not possible. Moral rights are transmissible upon death (Chapter 3 Article 41 of the Copyright Act).

5. Copyright Management Systems

5.1 Anti-circumvention Right

It is prohibited to circumvent any digital or analogue lock that prevents or limits the making of copies of a work protected by copyright, to circumvent a technological process such as encryption that prevents or limits the making available to the public of a work protected by copyright, or to circumvent any other technological measure that prevents or limits such acts of making the work available, without the consent of the copyright holder (Chapter 6 Article 52 d of the Copyright Act).

Products or components that are promoted or intended for the circumvention of such technological measures are similarly prohibited (Chapter 6 Article 52 e of the Copyright Act).

5.2 Legal Remedies for Copyright Management Information

It is prohibited to remove or alter any electronic rights management information relating to a work protected by copyright, and to exploit a work protected by copyright (or a copy) that has been unlawfully altered in this respect by distributing it, importing it for the purpose of distribution or communicating it to the public, without the copyright holder's consent (Chapter 6 Article 52 g of the Copyright Act).

6. Collectives

6.1 Collective Rights Management

There is a well-established system for collective rights management in Sweden, governed by the Act on Collective Management of Copyright (SFS 2016:977) implementing Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. Under this system, the right to form a collecting society is not subject to a state-sponsored monopoly.

Under Chapter 3 Article 1 of the Act on Collective Management of Copyright, a collecting society may represent such rights, categories of rights, types of works or other protected matter as the members appoint the society to represent.

6.2 Collecting Society

Collecting societies' primary function is to work to commercialise their members' copyrights, for the sole benefit of the members, while fulfilling the demands of, for example, transparency and international co-operation set out in the Act on Collective Management of Copyright.

6.3 Synchronisation Rights

As in many other jurisdictions, synchronisation rights are not explicitly set out in the Copyright Act. Instead, the understanding of synchronisation rights as being a separate right subject to specific licence in Sweden has grown organically in the national and international entertainment industry. It is not a question that has been subject to extensive legal scrutiny by the Patent and Market Court of Appeal or the Supreme Court.

Although not mentioned explicitly in Chapter 1 Article 1 of the Copyright Act, synchronisation rights are commonly understood to constitute part of the right of making copies of works; in practice, the initial combination of a music work with a cinematographic work when creating a cinematographic work set to music.

Synchronisation rights are fully recognised in Sweden and entered into with the copyright holder, or the collecting society representing the copyright holder. A somewhat controversial part of Swedish synchronisation right jurisprudence is the custom of production companies to include synchronisation rights in extended collective licences, which foreign copyright holders may strongly object to since that removes the usual element of individual negotiation regarding their synchronisation rights.

7. Exceptions to Copyright

7.1 Fair Use Doctrine/Fair Dealing

Swedish law does not recognise a general "fair use doctrine". Chapter 2 of the Copyright Act provides a list of the statutorily recognised exceptions and limitations to copyright, complemented by one additional exception established in case law.

The exceptions in Chapter 2 include the following:

- physical persons may make one or a few copies of publicly available works for private purposes;
- works may be copied for the purpose of enabling persons with disabilities to enjoy the works;
- publicly available works may be quoted, in accordance with proper usage and to the extent necessary for the purpose of the quotation;
- temporary copies of certain works may be made if the temporary copies form an integral and essential part of a technological process, and the temporary copies are transient or only have secondary importance;
- archives and libraries may make copies of certain works for purposes of preservation, completion or research, or for use in libraries (including in reading devices);
- orphan works may be copied;
- publicly available copies of certain works may be publicly performed; and
- works may be used in radio and TV reporting of current events, to the extent that is justified by the purpose of the reporting.

Chapter 2 of the Copyright Act does not include a satire, parody and travesty exception. However, such an exception follows from the legislative history of the Copyright Act and is established in case law.

Chapter 3 a of the Copyright Act also includes extensive provisions on extended collective licences for various kinds of uses of works. This is a form of licensing highly favoured by various markets and the legal system in Sweden. Although these do not formally constitute exceptions or limitations to copyright since they require remuneration to collective management organisa-

tions, they should be mentioned in this context since they may impact on foreign copyright holders that, for whatever reason, do not wish to see their works used in Sweden.

As the Copyright Act implements Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, case law from the CJEU has impacted, and will continue to impact, the interpretation of these exceptions and limitations.

As a general rule, the exceptions do not limit the author's moral right to be named in connection with the use subject to an exception. When a work is used publicly in accordance with one of the exceptions, the source shall be stated to the extent and in the manner required by good practices, and the work may not be altered more than necessary for the purpose of the use.

7.2 Private Copying

Under Chapter 2 Article 12 of the Copyright Act, physical persons are entitled to make one or a few copies for private purposes of works that have lawfully been made public. This is considered to include a right to share such copies with family and close friends but excludes private copying for commercial gain.

Literary works may only be copied in part, unless the work is of a limited scope, in which case such a work can be copied in full. The private copying exception does not include a right to construct a work of architecture, make copies of software or make digital copies of digital databases. Furthermore, it does not provide a right to engage another person to make private copies of musical or cinematographic works, works of applied art or sculptures, or to copy a work of fine art by means of artistic reproduction, which is an expression of the understanding that private copying of works should not be done for commercial gain.

7.3 Reproductions of Cultural Goods/Buildings

Cultural goods that constitute works of fine art – for example, sculptures – may be depicted (ie, made copies of) if they are permanently located at a public place. They may also be depicted if the purpose is to advertise an exhibition or a sale of the works, but only to the extent necessary for that purpose. If the works form part of a collection, they may be depicted in catalogues.

The Supreme Court found in NJA 2016 page 212 that this limitation to copyright is quite narrow. This limitation only covers the making of copies and crucially does not include a right to make the works available to the public over the internet.

Buildings may be freely depicted, although it is not obvious whether that right is limited in the same way concerning the act

of making such works available to the public over the internet as in NJA 2016 page 212.

7.4 Activities Carried Out by Intermediaries

Intermediaries, such as internet service providers, generally benefit from the exception relating to the making of temporary digital copies in Chapter 2 Article 11 a of the Copyright Act. Under this exception, temporary copies of certain works may be made if the temporary copies form an integral and essential part of a technological process, and the temporary copies are transient or only have secondary importance. The exception applies only if the sole purpose of the making of the copies is to enable a transmission in a network between third parties or a lawful use of the work, provided that the copies do not have any independent economic value. Furthermore, the intermediary cannot make any modifications to the information.

7.5 Satire and Parody

The Copyright Act does not include an explicit exception or limitation relating to satire, parody or travesty. However, such an exception has long been established through case law and can be derived from preparatory works dating back to 1956.

Parodies have traditionally been considered to be new, independent works under Swedish law. This likely explains why they have not merited inclusion as one of the recognised exceptions or limitations in Chapter 2 of the Copyright Act. However, in light of the CJEU's recent interpretation of the parody exception in C-201/13 Deckmyn, which does not require that the parody is sufficiently original to constitute an independent work, Swedish courts have moved away from this view (PMÖD's judgment in PMT 1473-18) to align the Swedish parody exception with the view of the CJEU.

7.6 Copyright: Freedom of Speech/Right of Information

Sweden has a strong tradition of protecting freedom of speech, right of information and other fundamental human rights. The Copyright Act provides an exception for use of copyright-protected works in relation to news reporting, where the balancing of a copyright holder's interests against the public's interest and fundamental rights is of importance when establishing whether the use at issue is justified. These issues have grown in importance at the same time as the media landscape has changed in recent years.

Case law from the CJEU, including the recent developments regarding the balancing between copyright and fundamental rights such as freedom of speech, is also becoming more and more important in the Swedish legal setting.

8. Neighbouring/Entrepreneurial/ Copyright-Related Rights

8.1 Neighbouring Rights

Under Chapter 5 of the Copyright Act, neighbouring rights are established for performing artists, producers of recordings of sound and moving images, and photographers, as well as for sound radio and television broadcasts.

Performing artists are given exclusive rights to exploit their performance by:

- fixing the performance on a record, film or another device from which it may be reproduced;
- making copies of a fixation of the performance; and
- making the performance or a fixation of it available to the public.

The duration of these rights is 50 years from the year the performance took place or, if a fixation of the performance has been published or made public within 50 years from the performance, from the year when the fixation was first published or made public. Copies of fixations are subject to exhaustion.

Producers of recordings of sounds and images have exclusive rights to exploit their recordings by:

- making copies of the recording; and
- making it available to the public.

The duration of these rights is 50 years from the end of the year in which the recording was made. If a sound recording is published or made public within this period, the exclusive rights instead last until the expiry of 70 years after the recording was first published or made public. If a cinematographic recording is published or made public within this period, the exclusive rights instead last until the expiry of 50 years after the recording was first published or made public. Copies of the recording are subject to exhaustion.

Radio or television organisations have exclusive rights to exploit their broadcasts by:

- fixing them on a device from which they can be reproduced;
- making copies of the fixation;
- distributing copies of the fixation;
- permitting re-broadcast or a communication to the public in places accessible to the public against an entrance fee; and
- permitting that the fixation of the broadcast is communicated to the public on demand.

These rights last until the expiry of 50 years from the year in which the broadcast took place. Copies of fixations are subject to exhaustion.

Producers of databases have exclusive rights to exploit their databases by:

- making copies of the database; and
- making it available to the public.

These rights last until the expiry of 15 years from the year in which the database was completed. If the database has been made available to the public within 15 years from the completion of the product, the right shall last until 15 years have elapsed from the year in which the product was first made available to the public.

Photographers are given an exclusive right to exploit photographic pictures that do not meet the originality requirement for photographic works in Chapter 1 Article 1 of the Copyright Act, by:

- making copies of the photographic picture; and
- making it available to the public.

This right applies regardless of whether the photographic picture is used in original or an altered form and regardless of the technique used. The photographers' rights last until the expiry of 50 years after the year in which the photograph was taken.

8.2 Transferring/Licensing/Sale of Neighbouring Rights

No specific types of contracts are required in order to transfer or assign neighbouring rights.

8.3 Copyright Exceptions Applicable to Neighbouring Rights

The exceptions and limitations in Chapter 2 of the Copyright Act are generally applicable also to the relevant neighbouring rights in Chapter 5. Each of the provisions establishing a neighbouring right explicitly lists the exceptions or limitations that apply for that neighbouring right. Some exceptions (for example, the right to make copies for private use) are applicable to most neighbouring rights, while other exceptions are only applicable for some of the neighbouring rights.

9. Copyright Infringement and Litigation

9.1 Types of Copyright Infringement

A work enjoying copyright protection in Sweden is infringed if a third party exploits the exclusive rights vested in the copyright holder without the copyright holder's consent. The exclusive rights are exploited by:

- making copies of the work; or
- making the work available to the public,

unless any of the applicable exceptions or limitations to those rights in Chapter 2 of the Copyright Act is applicable.

9.2 Defences against Copyright Infringement

The copyright holder (or licensee) can file claims of copyright infringement in a civil court.

The defences available in a civil court against copyright infringement include injunctions, preliminary injunctions, orders for information, infringement investigation, order for production of documents, property forfeiture, seizure and destruction, as well as claims for damages.

The copyright holder (or licensee) can also file claims for remuneration based on copyright infringement in criminal proceedings, where the public prosecutor has decided to prosecute for copyright infringement. The prosecutor has investigatory police powers.

9.3 Proceedings Available to the Copyright Holder

Civil and criminal proceedings are available in cases of copyright infringement, as outlined above. As a practical matter, copyright holders regularly pursue copyright infringement in a civil court instead of through public prosecution in a criminal court, due to, among other things, the amount of control of proceedings afforded a party in a civil case, as opposed to the significantly limited control of proceedings afforded an injured party in a criminal case being prosecuted by a public prosecutor.

There is no legal obligation for a copyright holder to provide notice before filing suit against copyright infringement. However, the Swedish Bar Association's Code of Conduct in most circumstances imposes a requirement on the lawyer to send a cease and desist letter before initiating court proceedings (not applicable in interim injunction proceedings).

9.4 Jurisdiction for Copyright Proceedings

The Patent and Market Court, part of and co-located with the Stockholm District Court, has exclusive jurisdiction over dis-

putes under the Copyright Act in Sweden. The Patent and Market Court's decision may be appealed to the Patent and Market Court of Appeal, part of and co-located with the Svea Court of Appeal in Stockholm. Leave to appeal is mandatory but fairly often granted. The Patent and Market Court of Appeal's decision may, under exceptional circumstances, be appealed to the Supreme Court. Leave to appeal is similarly mandatory but rarely granted.

There is an exception to the above concerning cases relating to physical persons' employment. If claims under the Copyright Act are made against a physical person in the context of that person's current or former employment, these cases are handled by the specialised Labour Court in Stockholm. The Labour Court's decision may be appealed to the Svea Court of Appeal in Stockholm. Leave to appeal is mandatory but fairly often granted. The Svea Court of Appeal's decision may, under exceptional circumstances, be appealed to the Supreme Court. Leave to appeal is similarly mandatory but rarely granted.

Disputes relating to agreements covering copyright may be handled by the general courts if the claims are based solely on general contract law (eg, breach of contract) rather than on the provisions of the Copyright Act.

9.5 Necessary Parties to Copyright Infringement Proceedings

The necessary parties to copyright infringement proceedings in Sweden are:

- the party whose rights to a work have allegedly been infringed; and
- the alleged infringer.

Infringement proceedings may be brought by the copyright holder or by a licensee or sub-licensee. Holders of both exclusive and non-exclusive licences may, according to Chapter 7 Article 53 b of the Copyright Act, bring infringement proceedings, as long as the licence gives the licensee a right to use the work in a way that has been infringed by the alleged infringer. This is an additional reason why copyright holders should pay close attention to the formulation of licence agreements with Swedish licensees.

9.6 Third Parties to Copyright Proceedings

Third-party involvement in copyright infringement proceedings will largely depend on the status and actions of the relevant third party.

A third party who has aided in the infringement may be held liable for contributory infringement and subject to claims for

an injunction and damages. A third-party physical person may, under such circumstances, be subject to criminal law sanctions.

A third party that is a licensee of the copyright holder with a loss of profit due to an infringement could be entitled to damages from the infringer. This may be the case, eg, where a foreign (parent) company is the holder of intellectual property rights, but a Swedish group company is a licensee and responsible for sales on the Swedish market.

Intermediaries may specifically be subject to so-called blocking injunctions on the ground that their supply of internet services constitutes contributory copyright infringement. (The interpretation of contributory infringement is traditionally broad in Sweden, and may need to be reined in; see C-610/15 *Ziggo*, where what in Sweden would likely have been considered contributory copyright infringement was instead found to constitute regular infringement.) In case PMT 7662-18, the Swedish Patent and Market Court recently issued its first dynamic blocking injunction (appealed). The availability and form of such dynamic injunction is not yet set but will likely be the subject of significant litigation in the years to come.

9.7 Urgent Measures

The copyright holder may request the court to issue a preliminary injunction, prohibiting the continued infringement under penalty of a fine for the duration of the infringement proceedings. A preliminary injunction may be ordered where the claimant shows probable cause for infringement and that the continuation of the infringement diminishes the value of the copyright. The claimant is also required to provide security for any damage the defendant may suffer as a result of an injunction that is lifted when examined on the merits. A request for a preliminary injunction is made as part of the main proceedings.

Preliminary injunctions may also be granted *ex parte* – ie, without the infringer being heard – if a delay would entail a risk of damage. In practice, this is fairly uncommon but possible in cases of particularly egregious infringement.

Swedish law does not include any formal requirements relating to urgency (eg, that an action is filed within a certain time after the copyright holder has learned of the infringement) for a preliminary injunction to be granted, or for a case to be brought at all. However, if the copyright holder has been aware of infringement and does not request a preliminary injunction until a considerable time has passed, this may, as a practical matter, be taken into account by the court when assessing whether the requested injunction is proportionate.

Under the Copyright Act, certain measures to gain access to evidence to be used in the infringement proceedings are also available to the copyright holder. These measures include:

- infringement investigation, wherein the premises of the alleged infringer are searched;
- orders for information, wherein the infringer is ordered to provide information on the origin and distribution network of the infringing goods; and
- orders to produce documents.

9.8 Role of Experts in Copyright Proceedings

The Swedish Code of Judicial Procedure provides for both court-appointed expert witnesses and expert witnesses invoked by the parties. Courts very rarely appoint expert witnesses in copyright proceedings. Parties may invoke expert witnesses both in relation to factual issues (such as the state of the art at the time of creation of the work) and legal issues. Expert witnesses shall provide written statements and be heard in person during the main hearing, if a party requests it (unless in-person examination is clearly unnecessary) or the court considers it necessary. Expert witnesses on factual matters are usually required to give testimony in person, while legal experts usually only provide written statements.

9.9 Counterfeits and Parallel Imports

Customs seizure of counterfeits is available under Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights. Copyright holders may file an application with the customs authority, requesting enforcement of their rights.

If such an application is granted, the customs authority will suspend the release of suspected infringing goods and notify the copyright holder of the infringement as well as the owner of the goods. If the alleged infringer agrees to the destruction of the goods, the goods may be destroyed under customs control without a need to confirm infringement; eg, in court proceedings. If the alleged infringer does not agree to destruction and the copyright holder initiates infringement proceedings, the customs authority shall detain the goods.

Successful customs enforcement in Sweden often demands additional work in helping the customs authority identify counterfeits efficiently. The customs authority is generally positive to receive such information and even in-person training.

9.10 Remedies and Sanctions

The Copyright Act stipulates both civil and criminal sanctions for copyright infringement.

The most commonly used civil law remedy is injunctions prohibiting continued infringement under penalty of a fine. According to case law from the Swedish Supreme Court, the right to a permanent injunction is, in principle, absolute when it is established that infringement has occurred (even in cases where the infringement has ceased at the time of the decision).

Upon request of the copyright holder (or a licensee who has initiated infringement proceedings), the infringer may also be ordered to disseminate information regarding the judgment. Traditionally, this has been done by ordering the infringer to purchase advertising space in newspapers, but the Patent and Market Court of Appeal has recently ordered an infringer to post such information on relevant social media (see Patent and Market Court of Appeal's decision in PMT 5885-18). Moreover, the court may decide that infringing property shall be recalled from the market, be altered or destroyed, or that any other appropriate measure shall be taken in respect of it.

Property that has been found to be infringing or that has been used as a tool in connection with copyright infringement may be declared forfeited. The Swedish Supreme Court has found that even a domain name that has been used to run an illegal file-sharing site constituted property that could be forfeited to the state (see Supreme Court's decision in B 2787-16).

The infringer is liable to pay damages in the form of reasonable compensation for the infringing use as well as compensation for additional damages (eg, lost profits or goodwill damages).

The criminal sanction for copyright infringement is a fine or imprisonment.

9.11 Copyright Infringement as Administrative or Criminal Offences

Copyright infringement does not constitute an administrative offence under Swedish law. Criminal liability arises for infringement of literary or artistic works that is committed wilfully or with gross negligence, and is punishable by fines or imprisonment for up to two years, or for gross copyright infringement, imprisonment for between six months and six years. Gross copyright infringement was introduced in 2020, after a review of longer imprisonment for serious intellectual property infringements.

Criminal cases of copyright infringement are prosecuted by the public prosecutor.

9.12 Appellate Procedure for Copyright Proceedings

The Patent and Market Court's decisions may be appealed to the Patent and Market Court of Appeal, part of and co-located with the Svea Court of Appeal in Stockholm. Leave to appeal is mandatory but fairly often granted. The Patent and Market Court of Appeal's decision may, under exceptional circumstances, be appealed to the Supreme Court. Leave to appeal is similarly mandatory but rarely granted.

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9.13 Costs of Copyright Litigation

In civil litigation, the losing party is generally liable to compensate the winning party for their reasonable litigation costs, including all costs necessary to safeguard a party's rights, such as attorney fees, court fees, expenses and compensation for the party's own work and expenses. The court will ultimately determine what costs were reasonably necessary in order to safeguard the winning party's rights.

9.14 Alternative Dispute Resolution

Infringement proceedings and other types of non-contractual claims are usually resolved through court proceedings. Licence agreements and other agreements relating to copyright sometimes include arbitration clauses.

For disputes relating to the conclusion of an agreement on an extended collective licence or cable retransmission, parties may apply for mediation under the Act on Mediation in Certain Copyright Disputes.

Westerberg & Partners is an IP and litigation boutique in Stockholm. The IP team consists of around 20 lawyers covering all areas within IP, including copyright, trade marks, patents and related areas such as media and entertainment law, and marketing law. The IP practice includes both contentious and non-contentious work, including portfolio management. By number of lawyers and width and depth of the experience

of the members of the team, Westerberg & Partners is a leading firm in the Swedish IP market. Several of the lawyers in the IP team are focused on copyright, whereas others focus on patents or trade marks. Members of the team are continuously ranked as leading in their respective focus area. Some of the younger members of the team are ranked as rising IP stars.

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