140 YEARS LATER, LOOKING AHEAD

WHOSE RIGHT IS COPYRIGHT?

OWNERSHIP AND TRANSFER OF COPYRIGHT AND RELATED RIGHTS

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QUESTIONNAIRE

Response from The Swedish Copyright Society, SFU, group national de l'ALAI

I. INITIAL OWNERSHIP [SESSION 2]

A. To whom does your country's law vest initial ownership? (Please indicate all that apply.)

1 — The author (human creator) of the work

a. Does your country's law define who is an author?

Response: The creator of a literary or artistic work will always be the initial owner of copyright in that work, as said in Article 1 of the Swedish Copyrights Act of 1960 (SCA).

b. For joint works (works on which more than one creator has collaborated), does your law define joint authorship? What is the scope of each co-onauthor's ownership? (may joint authors exploit separately, or only under common accord)?

Response: Section 7 of the SCA stipulates that the person whose name or generally known preudonym or signature is stated in the usual manner on the copies of a work or when the work is made available to the public shall be rebuttably presumed to be its author.

Furthermore, under this provision, if the work is published without the name of the author being stated in the manner described, the editor, if he is named, or otherwise the publisher, shall represent the author until the latter's name is so stated in a new edition of the work or in a notification to the Ministry of Justice.

If a literary or artistic work has two or more authors whose contributions to the work do not constitute independent works, then the copyright in that work will belong to its authors jointly. However, each one of them may bring an action in case of infringement, Section 6 SCA.

2 — Employers

a. Under what conditions, e.g., formal employment agreement, in writing and signed? Creation of the work within the scope of employment?

Response: The fact that a work is made for hire does not in itself affect the copyright of the employee. Basically, his rights will be aleniated by reason of the employment only insofar as agreed. No explicit agreement is needed. If some rights in a work are retained or aleniated is a matter for interpretation of the agreement (executed orally or in writing or by factual action among the parties).

An exception from what is said above follows from Section 40 a SCA, stating that copyrights in a computer program, created by an employee as a part of his tasks as an employee or upon instruction by the employer, is transferred to the employer, unless something else is stipulated in an agreement between the employer and the employee. Somewhat surprisingly, this covers all rights in a work, also those moral rights vested in the work.

3 — Commissioning parties

a. All commissioned works, or limited to certain categories?

Response: There are no formal requirements applicable to transfers of rights. Hence, the agreement a commissioned work is based upon, again oral, in writing etc., will allocate rights among the parties following from the commission at stake.

b. Under what conditions, e.g., commissioning agreement, in writing and signed by both parties?

Response: See 3 a) supra.

4 — The person or entity who takes the initiative of the work's creation (e.g. Producers; publishers) of certain kinds of works, e.g., audiovisual works; collective works

a. scope of ownership of, e.g. all rights, or rights only as to certain exploitations; what rights do contributors to such works retain?

Response: As there are no formal requirements applicable, neither restrictions as to the scope of rights potentially being transferable (see below about moral rights, though), producer initiatives, the nature of a party's entity etc may of course have caused a

factual regulation in the contract, or, if not, may possibly open for interpretation of a contract eventually in regard of such phenomena as initiatives, instructions, financial resources etc.

5 — Other instances of initial ownership vested in a person or entity other than the actual human creator? (Other than 6, below.)

6 — If your country's law recognizes copyright in AI-generated works, who is vested with original ownership? (e.g., the person providing the prompts to request an output? The creator of the LLM model and/or training data? someone else?)

Response: AI-generated works are, as a matter of principle, not unlike any other potential literary or artistic work, that is, the human being considered to have created the work at hand is the initial copyright holder, what in the AI context typically relates to output from a computer aided process. Potentially, prompts to request an output is thus not totally banned from protection, but probably very unlikely, just as "creators" of LLM models are. Training data as such, derived from literary or artistic works, are normally being used in that context, thus hereby falling withing the exclusive rights of the copyright owner to those works.

[b. For presumptions of transfers, see II (transfers of ownership, below)]

B. Private international law consequences

1 — To what country's law do your country's courts (or legislature) look to determine initial ownership: Country of origin? Country with the greatest connections to the work and the author(s)? Country(ies) for which protection is claimed?

Response: If a dispute related to initial ownership of a work is to be tested in Sweden the matter will based on a valuation on the law in the country for which protection is claimed, typically Swedish law as the question is formulated.

It may also be noted that even when Swedish copyright is at issue, the nonmandatory contract rules of the SCA will apply only to entirely foreign transactions affecting ownership of that copyright if general choice-of-law rules require Swedish law to govern the entire contract as such. Similarly, the right of a foreigner to invoke e.g. the Swedish Act on Contracts will depend on such general choice-of-law rules.

II. TRANSFERS OF OWNERSHIP [SESSION 3]

A. Inalienability

1 — Moral rights

a. Can these be granted to the grantee of economic rights? To a society for the collective management of authors' rights?

Response: Moral rights in literary and artistic works cannot as such be transferred – they are vested in the author (a natural person) of a work - but merely be waived with regard to clearly specified uses of the work, Article 3(3) SCA. A collective organisation may only have a mandate to enforce moral rights on behalf of the author, just as relatives to an author after his or her passing, Article 59 SCA.

b. May the author contractually waive moral rights?

Response: As moral rights may only waived with regard to clearly specified uses of the work, this means that there is always a hard kernel of moral rights that stays with the author, irrelevant if some (other) elements of moral rights have been waived. The rule of prohibiting transfer, and allowing only specifically worded waivers, of moral rights may still apply to a foreign contract purporting to affect such rights in Sweden, even though a per se valid choice-of-law clause purports to avoid this result.

2 — Economic rights

a. May economic rights be assigned (as opposed to licensed)? May an author contractually waive economic rights?

Response: Copyright (except for moral rights) may be transferred entirely or partially, Article 27 SCA. The author, just like any rightsholder, may fully waive economic rights.

b. Limitations on transfers of particular economic rights, e.g., new forms of exploitation unknown at the time of the conclusion of the contract.

Response: Contracting parties are free to include or dismiss any element of economic rights in their agreement, thus potentially covering also future rights (formed by the legislator eventually), or rights to be e.g. in a work in progress. See, though, our response under III below.

B. Transfers by operation of law

1 — Presumptions of transfer:

a. to what categories of works do these presumptions apply?

Response: Presumptions exist in the SCA for computer programs (by work for hire) and databases, Article 40 a) and 49 (3) SCA, and for transfer of the right to a producer of a film having gained rights to the filming as such - the producers' right – to show the eventually produced film by movie houses, television and any form of making available to the public, and to translate recorded spoken words to other

languages, Article 39 SCA. The last mentioned article has no bearing on musical works.

b. are they rebuttable? What must be shown to prove that the presumption applies (or has been rebutted)?

Response: Those presumtions are not rebuttable; see, though, below for film producers' rights.

c. Scope of the transfer: all rights? Rights only as to certain forms of exploitation?

Response: For computer programs produced in employment all rights are transferred to the employer, as mentioned above. As databases are concerned terms of an agreement *broadening* those exclusive rights afforded by the legislator to the producer of a database are null and void. The film producers' right could, as a matter of principle, be waived on the basis of freedom of contract underlying the rules of economic rights of the SCA, but of course very unlikely.

It may also be noted that a transfer of a right to communicate a work (of any kind) to the public or to perform it publicly must not be valid for more than three years and shall not be exclusive, Article 30 SCA. This norm is totally rebuttable and it is mainly aimed at triggering clear contractual regulations in the individual case.

d. Conditions for application of the presumption (e.g. a written audiovisual work production contract; provision for fair remuneration for the rights transferred)?

Response: No. About remuneration, see below.

2 — Other transfers by operation of law?

Response: The SCA has many and very well elaborated norms on extended collective licensing, so called ECL licenses, see mainly Chapter 3 a) of the SCA, and Articles 42 a) – 42 k), which mandates transfers with an extended effect (including works of authors being non-parties to an agreement), what may come about due to this intervention by the legislator.

C. Transfers by contractual agreement

1 — Prerequisites imposed by copyright law to the validity of the transfer, e.g., writing, signed, witnessed, recordation of transfer of title?

Response: No formalities in Swedish copyright law.

2 — Do these formal requirements include an obligation to specify what rights are transferred and the scope of the transfer?

3 — Does your country's law permit the transfer of all economic rights by means of a general contractual clause?

Response: Yes. But such a contract may be tried e.g. upon a general clause on fairness of a contract, Article 36 of the Swedish Law on Contracts, or specific norms of that nature in the SCA.

4 — Does your country's law permit the assignment of all rights in future works?

Response: Yes. But, again, see the response in the previous paragraph.

D. Private international law

1 — Which law does your country apply to determine the alienability of moral or economic rights and other conditions (e.g. the country of the work's origin)? The country with the greatest connections to the work and the author(s)? The country(ies) for which protection is claimed?

Response: As already said, if a dispute related to initial ownership of a work is to be tested in Sweden the matter will based on a valuation on the law in the country for which protection is claimed, thus, typically, Swedish law as the question is formulated.

It may also be noted that even when Swedish copyright is at issue, the nonmandatory contract rules of the SCA will apply only to entirely foreign transactions affecting ownership of that copyright if general choice-of-law rules require Swedish law to govern the entire contract as such. Similarly, the right of a foreigner to invoke e.g. the Swedish Act on Contracts will depend on such general choice-of-law rules.

III. CORRECTIVE MEASURES, SUBSEQUENT TO TRANSFERS OF RIGHTS, ACCORDED TO AUTHORS OR PERFORMERS IN VIEW OF THEIR STATUS AS WEAKER PARTIES [SESSION 4]

1 — Does your law guarantee remuneration to authors and performers?

a. By requiring payment of proportional remuneration in certain cases (which)?

Response: No, more general: If a transfer of rights to a commercial entity has come about, the author (the natural person) has a right to appropriate

remuneration, Article 29 SCA. The form of payment has no significance, a fair level of remuneration, based on the implementation of the DSM Directive, is guided by the Directive's basic concept of "adequate and appropriate remuneration", Article 29 SCA.

b. By a general requirement of appropriate and proportionate remuneration?

Response: Yes, the SCA indicates a "fair remuneration" for the author, by commercial contracts, whereas the DSM Directive uses a broader wording. However, the Swedish implementation is considered hereby to fully match the demands of the DSM.

c. By adoption of mechanisms of contract reformation (e.g., in cases of disproportionately low remuneration relative to the remuneration of the grantees?

Response: Yes, the SCA, just as the general clausel in Article 36 of the Act on Contracts, offers revision of unfair terms, such as remuneration, as well as a contract reformation or total lifting of the contract.

d. By providing for unwaivable rights to remuneration in the form of residual rights?

Response: The right to fair remuneration is as a matter of principle mandatory, but the expression "fair" may in the individual case be considered to mean no remuneration at all, namely according to the factual circumstances.

2 — Does your law require that the grantee exploit the work?

a. Does your law impose an obligation of ongoing exploitation? For each mode of exploitation granted?

Response: Yes, if there is "non-use" by the transferee for a "reasonable period of time", upheaval if possible combined with the keeping of money already received, Article 29 d) SCA, all in line with the DSM Directive.

b. What remedies are there if the grantee does not exploit the work?

Response: Lifting of the contract plus keeping of money received, Article 29 d) SCA.

3 — Does your law impose a transparency obligation on grantees?

a. — What form does such an obligation take (accounting for exploitations, informing authors if the grantee has sub-licensed the work, etc)

Response: Articles 29 a) – 29 c) SCA offers a transparency regime – a "right of information" for the author of a work regarding transfers of rights and their uses.

b. — What remedies are available if the grantee does not give effect to transparency requirements?

Response: This right to information, thus being an actual right by law, can be executed by a court order.

4 — Does your law give authors or performers the right unilaterally (without judicial intervention) to terminate their grants?

a. Under what circumstances?

i. After the lapse of a particular number of years?

Response: By non-use of the transferred rights for a 'reasonable period of time' the author may terminate the contract and keep front money received, Article 29 d) SCA.

ii. In response to the grantee's failure to fulfil certain obligations, under what conditions?

Response: Such a matter falls under general norms of contract law and is not regulated specifically for copyright contracts.

iii. As an exercise of the moral right of "repentance"? (Examples in practice?)

Response: A factual right of repentance does not exist in Swedish copyright law. However, moral rights may, on rare occasions, offer something of that kind, e.g. if the content of a book, already published upon a correctly drafted contract, no longer reflects the author's thoughts and convictions, thus not available e.g. for a new edition, which the publisher de facto may have an agreed right to publish. Also the economic rights of the author may offer at least a basic right to control the (first) publishing or the making available to the public of a work. Ownership of a copy does not render the owner a right to reproduce or publish that copy without due consent of the author.

But basically this question may be guided by general norms of contract law, following from e.g. 'changed circumstances' relative to those prevailing when the contract was entered.

IV - STREAMING, TRANSFER OR RIGHTS, AND THE MANAGEMENT OF LARGE CATALOGUES [SESSION 5]

1 — Applicable statutory right

a. What specific statutory right applies to licensing the streaming of works and performances?

i. Is it the right of communication to the public modelled after Article 8 of the WCT for authors, and the right of making available modelled after Articles 10 and 14 of the WPPT for performers and phonogram producers?

Response: Yes, those WCT and WPPT norms are implemented also in the SCA.

ii. Another right or a combination of rights?

Response: The SCA offers what is said in Article 10 WCT, but covers also other means of communication to the public than what directly follows from the said article, such as making available, performance and display to the public.

c. For authors, does this right cover both musical and audiovisual works? For performers, does this right cover both performances fixed in phonograms and audiovisual fixations?

Response: Yes, as both questions are concerned.

2 – Transfer of rights

a. Are there any regulations in your country's law that limit the scope of a transfer or license to the forms of use already known at the time of the transfer or license?

Response: No such regulations – copyright may be transferred partly or as a whole, as said supra.

b. If there are such regulations, when the statutory right referred to in section 1 was introduced into your law, was it considered a new form of use to which the limitation in subsection 2a. above applies?

Response: No.

c. Are there any cases in your country's law when the statutory right referred to in section 1 is presumed to have been transferred to the producer of a phonogram or audiovisual fixation?

Response: Transfer of the right to make a film on the basis of a work is presumed to comprise also the right to make the work (as used in the film) available to the public, e-g-

in movie houses, on television etc, Article 39 SCA. This presumption, it is stated, does not cover musical works at all, neither non-audiovisual recordings of any work.

3 — Remuneration

a. Are authors/performers entitled to remuneration for licensing the streaming of their works/performances?

Response: Yes, the principle of fair/equitable or adequate and proportionate remuneration prevails, Article 29 SCA, cf. Article 18 the DSM Directive, also for transferred rights concerning streaming or any other uses within the frames of an author's economic rights.

b. Do authors and/or performers retain a residual right to remuneration for streaming even after licensing or transferring the statutory right referred to in section 1?

Response: Yes, a fair remuneration may be claimed years after the entering of the contract if the agreed remuneration eventually shows to be unproportional, relative to the licensee's incomes from his factual use of the transferred rights, Article 29 (2) SCA. Such claims may be raised relative to contracts being entered long before this enactment became valid (2023.01.01), but shall not cover agreements entered prior to 2003.01.01., i.e. twenty years before the enactment of Article 29, hence it has a retroactive effect.

4 — Collective management

a. In your country's law, is collective management prescribed or available for managing the right referred to in section 1? If so, what form of collective management is prescribed (e.g. mandatory or extended)?

Response: The SCA regulates a great number of different types of uses to be handled by collecting societies (specified strictly by the law), namely on the basis of so called extended collective licenses, ECLs, Articles 42 a – 42 k SCA. The nature of a 'representative' CMO is defined in the special enactment of the Law (2016:977) on Collective Management of Copyright. The SCA contains 9 different areas, plus a general one to potentially be agreed upon, for such licenses to be executed, among them e.g. for educational purposes, broadcasting and press publications, provided an agreement is entered between a CMO and a user (such as a broadcasting entity).

b. If authors and/or performers retain a residual right to remuneration (ss 3 b.), is collective management prescribed for managing this residual right to remuneration?

If so, what form of collective management is prescribed (e.g. mandatory or extended)?

Response: Those remunerations collected by an CMO according to what is said in the 4 a response, are distributed likewise to all concerned authors (also foreign authors) all according to the agreement. Further, authors may claim remuneration from the CMO for still not remunerated uses for a period of up to 3 years after the use of their work by the contracted user actually occurred, 42 a) SCA.

5 — Transparency and the management of large catalogues

a. Does your law (or, in the absence of statutory regulations, industry-wide collective agreements) guarantee that authors and performers regularly receive information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights? If yes, what is the guaranteed periodicity and content of such information?

Response: According to the new rules on an author's right to 'information', now to be found in Articles 29 a) – 29 c) SCA, all authors and performers are guaranteed a right to get at least a yearly statement from any user, including e.g. a CMOs collection of revenues based on an ECL, which shall be 'taking into account the specifities of each sector, up to date, relevant and comprehensive information on the exploitation of works and performances', cf. Article 19 of the DSM Directive.

b. Are you aware of any case law where the complex chains of copyright titles, typical of large streaming catalogues, have made the management of works or performances non-transparent or otherwise challenging, such as, for example, the case of Eight Mile Style, LLC v. Spotify U.S. Inc. **(**https://casetext.com/case/eight-mile-style-llc-v-spotify-us-inc-1)?

Response: No, not in the Swedish or Nordic context.

For the Swedish Copyright Society, SFU

Jan Rosen

Professor of Private Law, Stockholm University