



INTERNATIONELLA HANDELSHÖGSKOLAN
HÖGSKOLAN I JÖNKÖPING

Rätt till mjukvara och data- baser

Ur ett svenskt konsultingperspektiv

Magisteruppsats inom Immaterialrätt

Författare: Ola Nilsson

Handledare: Edward Humphreys

Framläggningsdatum 2009-05

Jönköping maj 2009



JÖNKÖPING INTERNATIONAL BUSINESS SCHOOL
Jönköping University

Rights to software and databases

From a Swedish consulting perspective

Master's thesis within Intellectual Property

Author: Ola Nilsson

Tutor: Edward Humphreys

Jönköping May 2009

Magisteruppsats inom Immaterialrätt

Titel:	Rätt till mjukvara och databaser
Författare:	Ola Nilsson
Handledare:	Edward Humphreys
Datum:	2009-05
Ämnesord:	Immaterialrätt, Immateriella rättigheter, Immateriella tillgångar, Mjukvara, Databaser, Konsulting

Sammanfattning

Under de senaste åren har företag blivit tvungna att bli mer och mer digitaliserade för att effektivt kunna sprida företagsinformation och underlätta kommunikation med klienter, konsumenter och sina egna anställda. Kunskapen att integrera mjukvara och slunga företaget ut i den digitala världen finns inte alltid inom företaget. Följaktligen anställer företag ofta konsultingföretag för att kunna göra detta åt dem. På grund av reglerna kring upphovsrätt tillhör mjukvaran inte helt och hållet företaget som beställde det; automatiskt tillhör upphovsrätten fortfarande konsultingföretaget som skapade det.

När konsultingföretag utelämnar detaljer kring immaterialrätt i konsultingkontraktet kliver standardreglerna i upphovsrättslagen och de internationella direktiven in automatiskt och ger konsultingföretaget fullständiga rättigheter till programmen som det har skapat, med några få undantag. Det anställande företaget får endast ändra mjukvaran så att det kan fastställa att det är kompatibelt med redan existerande mjukvara och operativsystemet som det använder. Även så kallad reverse engineering är tillåtet så länge informationen som framkommer endast används till att säkerställa kompatibiliteten.

Informationen i databaser är skyddad då det är kreativt arrangerat på ett systematiskt sätt av den som har signifikativt investerat i att få tag i, verifiera eller presentera informationen. Den signifikativa investeringen beror på den som har tagit risken att investera i databasen. Eftersom databaser sällan skapas av konsultingföretag på begäran av klienter och reglerna är tillräckligt klara på vem det är som äger databasen, finns det få problem kring databaser. Med anledning av detta skulle slutsatsen vara att de nuvarande rättsreglerna fungerar på ett betryggande sätt.

Ett av de mer bekymrande problemen när det gäller upphovsrätt är att trots att reverse engineering till största delen är olagligt så avgörs det på bevisningen och på vilka delar som är kvantitativt eller kvalitativt signifikant i det ursprungliga programmet. För tillfället finns det inget register över vilka verk som innehar upphovsrätt i Sverige och därför blir det svårt att avgöra vem som skapade programmet först om det skulle spridas. Tillverkare av mjukvara har uttryckt sin oro över detta och påstått ha lobbats för ett nytt direktiv som skulle ge mer skydd för tillverkare av mjukvara. Resultatet blev Direktivet om Patenterbarhet för Datorrelaterade Uppfinningar vilket föreslog att mjukvara borde ses som en uppfinning och därmed även patenterbart. Trots påtryckningar fanns det ett flertal anledningar till varför mjukvara inte skulle vara patenterbart, bland annat ökade kostnader för företag och väntetiden om flera år, och direktivet avvisades. Men oron bland konsultingföretag fanns kvar och det blev inget utökat skydd för skapare av mjukvara.

För närvarande finns det inget immaterialrättsligt system som skulle kunna ge upphovsmakarna det skydd de ville ha samtidigt som det är lika effektivt som upphovsrätt. I Sverige är lösningen för konsultingföretagen att fortsätta spendera tid och pengar på att skriva avtal med detaljerad information om immaterialrätten, att själva försäkra sig om att mjukvaran är kompatibel och att hålla programmets källkod så hemlig som möjligt.

Master's Thesis in Intellectual Property

Title:	Rights to software and databases
Author:	Ola Nilsson
Tutor:	Edward Humphreys
Date:	2009-05
Subject terms:	Intellectual Property Law, Intangible Assets, Intellectual Property, Software, Databases, Consulting

Abstract

In recent times companies have been forced to become more and more digitalized in order to spread company information and facilitate communication with clients, consumers and their own employees. The knowledge to integrate software and launch the company into the digital world cannot always be found within the company itself. Therefore, companies often resort to employing consulting companies to enable this for them. Because of copyright, the software created does not solely belong to the employing company – the intellectual property rights automatically stay with the consulting company that made it.

When the consulting company omits details concerning intellectual property rights in the employment contract, the standard rules in the Swedish Copyright Act and the international directives kick in and give the consulting company the full rights to the programmes that it has created – with a few exceptions. The employing company may only alter the software in order to ensure that it is fully compatible with the already existing programmes it utilises and the operating system it uses. Even reverse engineering is permitted as long as the information gathered is only used for ensuring the compatibility.

Information in databases is protected as it is creatively arranged in systematic or methodical way by the one that has made a substantial investment in obtaining, verifying or presenting the information. The substantial investment depends on the one that has taken the risk of investing in the particular database. As databases are rarely made by consulting companies on behalf of a client, and the rules are sufficiently clear as to whom the ownership of the database is, there are few questions concerning databases. Because of this, the assumption would be that the current legislation is working properly.

One of the more troubling issues in regards to copyright is that even though reverse engineering is illegal, proving infringement comes down to evidence and what parts that are quantitatively or qualitatively significant in the original programme. Currently, there is no registry of copyrighted works in Sweden and so there is not telling who made the programme first if the work happens to spread. The creators of software have expressed concern and allegedly lobbied for a new directive giving more protection to the original creators. The culmination of the lobby work was the Software Patent Directive, which proposed that software should be seen as an invention and therefore eligible for patenting. However, there were many reasons as to why software should not be patented, most notably increased cost and the years of waiting for the patent grant, and the directive was rejected. Still, the concerns persisted and no greater protection has been given to the creators of software.

At the present, there is no intellectual property system that would give to the creators the protection they desire while still having the efficiency of copyright. In Sweden, the solution is for the consulting companies to continue spending time and money on drafting contracts with detailed information about intellectual property, ensure the compatibility of the programme before selling and to keep the programmes' source code as secret as possible.

Table of Contents

Abbreviations	6
1 Introduction	7
1.1 Background.....	7
1.2 Purpose.....	8
1.3 Delimitations.....	8
1.4 Method	9
1.5 Outline.....	10
2 Case Study	11
3 Copyright and Database Right	12
3.1 Copyright.....	12
3.1.1 Introduction to Copyright.....	12
3.1.2 Definition and Scope.....	12
3.1.3 Rationale of Copyright	13
3.1.4 Requisites	14
3.2 Database Right.....	16
3.3 Observations	17
4 Legislation Concerning Rights	19
4.1 Swedish Copyright Act	19
4.2 Directive 91/250	20
4.3 Directive 96/9	20
4.4 Observations	22
5 The Impact of the Legislation	24
5.1 Time limit.....	24
5.2 Quantitative or Qualitative Parts of Works.....	25
5.3 Idea or Expression?	26
5.4 Reverse Engineering.....	27
5.5 Observations	28
6 Analysis	29
7 Conclusion	33
References	34
Appendices	39
Appendix 1	39
Appendix 2.....	41

Abbreviations

CDPA	Copyright Designs and Patent Act
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
EPC	Convention on the Grant of European Patents (European Patent Convention)
EPO	European Patent Office
EU	European Union
FAQ	Frequently Asked Question(s)
IEEE	Institute of Electrical and Electronics Engineers, Inc.
IT	Information Technology
LAN	Local Area Network
NJA	Nytt Juridiskt Arkiv (Anthology of judges made by the Swedish Supreme Court and of new legislation with preparatory works)
OECD	Organisation for Economic Co-operation and Development
OS	Operating system
Prop.	Proposition (Swedish preparatory work)
SOU	Statens Offentliga Utredningar (Swedish Government Official Reports)
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UK	United Kingdom
USPTO	United States Patent and Trademark Office
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

According to Pew Global Attitudes Study, Sweden topped the list in 2007 with 82 % using computers at work, home or anywhere else at least occasionally. Overall, the percentage of people using computers has in the 35 countries surveyed increased by almost 9 % since 2002.¹ With the increasing digitalization of our everyday life, duplication and reproduction has never been easier. Gigabytes of music, games, books, movies, pictures, and art – everything that can be converted into binary numerals – can also be copied in a matter of a few keystrokes. One of the downsides of the technological evolution is that copyright infringement has become just as prevalent.

The increase in computer usage has forced companies and authorities to expand, both online and offline, and to become more efficient digitally. The pressure of having more efficient, more visual and easy to work with software has become too much for the average company to handle. The required know-how for creating computer programmes and databases can no longer be found internally and often has to be outsourced to external companies specialised in IT solutions.²

IT consulting companies provide their services according to their clients' needs and desires. At times, the specifications of the clients are very detailed and demand that the end-product has to function in a certain way. Tailoring the product may give the client a competitive advantage over the competition, which is why the client in these cases would want to have the exclusive rights to the product.³ For if the product built with the specifications of the client is sold to rival companies, the competitive advantage previously enjoyed only by the client will be lost.

However, should the exclusive rights to the product be sold to the client, then the consulting company has sold the right to create similar software or databases, thus restricting the area of work possible to engage in. Of course it is in both the consulting company and the client's best interest to have the rights to the product. Problems due to copyright can be efficiently solved with a license agreement. But, as will be examined in the case study, consulting companies tend to omit even mentioning licenses so as not to draw attention to the subject. The trouble of working out a license agreement is sometimes too strenuous compared to the benefits of having one. At this point, one should note that it is the actual product that is covered by copyright and not the idea of how the programme should work.⁴ But when taking a closer look at the components of computer software or a database, one will notice that creating a completely new way of writing a block of data is rarely ever done, or even possible. The question is how much of the product that can be transferred or used

¹ The Pew Global Attitudes Project, *'World Public's Welcome Global Trade – But Not Immigration, 47-Nation Pew Global Attitudes Survey'* (2007) pages 73 – 74.

² James D Herbsleb and Deependra Moitra, *'Global Software Development'* (2001) Software, IEEE Volume 18 Issue 2 pages 16-20.

³ Interview with Jörgen Sandström, Project Manager, Trodon AB, (Gothenburg 28 September 2008).

⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), (Marrakech 15 April 1994), Art. 9 (2).

in another programme with similar functions and what happens when there is no agreement concerning copyright between the two parties.

1.2 Purpose

The main purpose of this thesis is, from a Swedish perspective, to ascertain the legal situation concerning the rights to software and databases when the product is created by the consulting company and sold to their client. The situation presented in the background will be analysed in connection with the case study. The ultimate ambition is to also provide a perspective *de lege ferenda* concerning the protection needed by the IT consulting companies today with special regard to recent intellectual property debates.

1.3 Delimitations

Since the purpose is to ascertain the legal situation from a Swedish perspective, only Swedish and EU law is taken into account.

The proximity to the other Nordic countries, as well as similar mentality, has contributed to the fact that the Nordic laws in the area of intellectual property are nearly identical.⁵ The close-knit relationship between the national laws and the shared linguistic and cultural atmosphere has led the Swedish courts to base their judgements on the outcome of similar cases in the other countries.⁶ Taking a detour of discussing other Nordic countries' judgements is not in the best interest of this thesis since it is written from a Swedish perspective. To be more focused on the purpose of this thesis is why these judgements are purposely overlooked.

One of the more fundamental pillars of Swedish contract law is the right to stipulate any conditions in a contract or agreement, as long as the terms are not deemed to be unreasonable, in which case they may be adjusted or left without regard.⁷ Licences are subject to Swedish contract law and may be of interest as they, for this very reason, resolve numerous problems. However, since the parties in the case study at hand had not signed a license agreement, the subject of licenses will not be dealt with in this thesis.

The fact that the computer consulting company in some cases has the copyright to the work their employee produces is discussed briefly. The subject of copyright possession in case of dismissal or resignation of the employee will on the other hand not be dealt with. The thesis focuses on business-to-business relationships.

In order to keep the thesis within the intended frame, the case of the consulting company dissolving, dividing, merging or in any other way ceasing to be the legal entity that originally had the copyright will not be discussed.

⁵ See e.g. the copyright laws in Norway (Lov 1961-05-12 nr 02: *Lov om opphavsrett til åndsverk m.v.*) and Denmark (*Bekendtgørelse af lov om ophavsret* - Lbk. nr. 763 af 30. juni 2006) for comparison.

⁶ Levin and Koktvedgaard, *Lärobok i Immaterialrätt* (Nordsteds Juridik, Stockholm 2007) pages 57 and 58. For an example of Inter-Nordic co-operation see also the Danish ruling in U 1978, page 42.

⁷ 36 § of the Swedish Contract Act (*Lag om avtal och andra rättshandlingar på förmögenhetsrättens område*, SFS 1915:218).

1.4 Method

This thesis is built on the investigation of the Swedish Copyright Act⁸, and for deeper understanding, the preparatory acts leading up to the Copyright Act. The directives that are relevant to the subject of copyright in software and databases are Directive 96/9/EC⁹ (Database Directive) and Directive 91/250/EEC¹⁰ (Software Directive). Directives have indirect effect on a Member State's national law, which means that they have to be implemented in the national law to take effect. When having trouble interpreting the implemented law, the law will then be construed in the light of the directives.¹¹ As a contracting Member State of the European Community (the EC), Sweden is obligated to implement the directives that are issued. The Software and Database Directives are further investigated in chapter 2.

Comparisons are made with patent law because of the heated discussions in the area between those who believe that the interests of IT-companies are better protected with a sort of computer programme patent and those who believe that there is no other alternative to copyright. The debate has mainly focused on the European Union Directive on the Patentability of Computer-Implemented Inventions (Software Patent Directive) which is discussed in the final analysis of the thesis.

The Swedish sources are handled according to the traditional Swedish hierarchy of legal sources, where legal statutes are given the highest source value and are primarily referred to. When legal statutes are unclear or do not give enough guidance, preparatory works, case law and literature is then consulted and are referred to respectively. Literature and articles provide vital analytical arguments, which is why these are of great importance. These arguments also reflect or incorporate the discussions in the preparatory acts.

The subject of the thesis was suggested by an IT consulting company in Gothenburg, Trodon AB, which agreed to provide technical information and information on business customs, and is consulted continuously during the writing process. The problem is exemplified in a fictional case study based on facts also provided by Trodon AB. The reason for using a case study is for analytical purposes and to reflect upon the subject from a non-theoretical perspective. The case study is formed to appeal to consulting companies and their everyday projects, which is why the final analysis and the preceding investigations are more focused on the copyright of computer programmes.

The appendices are two contracts that are typical in the computer consulting business. These contracts offer guidance particularly when investigating the difference *de lege lata* and *de lege ferenda*.

When interpreting national legislation in the light of the Directives, there is a risk of information being lost in translation. Therefore, even though it is written from a Swedish per-

⁸ The Swedish Act on Copyright in Literary and Artistic Works (*Lag om upphovsrätt till konstnärliga verk*, SFS 1960:729).

⁹ Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the Legal Protection of Databases.

¹⁰ Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs.

¹¹ C-14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR I-1891, see also Arts 10 and 249 EC and the Vienna Convention on the Law of Treaties (VCLT), Art 32(1).

spective, it proved prudent to write the thesis in English. Yet another justification to write in English is that not only is the Swedish position affected by an analysis of the legal situation, but the position of all Nordic countries.

1.5 Outline

The introductory chapter is followed by the chapter that presents the case study on which the legal issues are based. While completely fictional, the typical problems that computer consulting companies run into are exemplified here.

The next section, chapter three, presents the requisites and rationale concerning *sui generis* database rights and specifically copyright. The chapter is then concluded with remarks concerning the case study.

Chapter four presents the Swedish legislation and the European Directives from a factual perspective. The section includes some clarifications of a few points that are requisites in the Database Directive. This Directive is the more interesting area of legislation to discuss from the case study perspective, and so deserves a larger portion of the chapter.

The chapter called 'The Impact of the Legislation' provides an analysis of the effects of the legislation, particularly in connection with the case study. For example, how much of works protected by copyright and database right may be copied or used without permission.

Chapter six includes the executive analysis of the aforementioned aspects and speculates on whether or not copyright and database right are the most optimal forms of legislation from a Swedish consulting company perspective.

The last chapter gives the final conclusion of the thesis.

Finally, the appendices are two contracts that represent 1) the standard contract in consulting jobs without further detailed information about intellectual property and 2) the more detailed contract that might be used in certain circumstances when the need for rules concerning intellectual property is great.

2 Case Study¹²

DataComp is the leading computing company in Sweden made by gamers¹³ for gamers. The company rates the latest computer games, hardware and software in their magazines, which is also available on their website and can be subscribed to as podcasts. Besides ratings, the magazine includes recommendations of websites and retailers where the products may be sold. The company also organises different events with special guests and competitions. The greatest event is an annual two-week convention that hosts many LAN tournaments between gamers and FAQ sessions with renowned computer experts.

DataComp would like for these events and conventions to be available on their website as well. The only problem is that they have not yet found a programme which allows for easy streaming¹⁴ of these events and that is stable enough to support the many simultaneous video/audio streams. The programmes that are already on the market are not efficient enough to meet the needs of the company.

After hours of research and debating, the DataComp executives finally decide to hire IT Solutions AB (ITS) to tailor a programme that is stable, efficient and easy to use. DataComp also decides that they would like ITS to make a programme that is compatible with their score board at the conventions that would automatically gather the scores from the tournaments and file them in a database that would be available on the DataComp website in real-time¹⁵.

ITS had recently finished a job for the Swedish government which now left them with time and money to start working on a new project, and so they accepted the task given to them by DataComp. The ITS legal department discussed briefly whether to send the standard employment contract or to make a new one with details on the ownership of intellectual property. Finally, the standards forms were sent for the DataComp executives to sign. The forms included among other things the type of work that was to be conducted and a non-disclosure clause. As the contract was formed to cover any type of consulting service, details on intellectual property was on the other hand not included.

DataComp's foremost concern is how they are allowed to use the software. If there are adjustments that have to be made, does ITS have to be hired yet again? Could the software be used as a source of inspiration when creating programmes of their own, or could some parts or the programmes be directly copied? If problems were to arise, what would happen to the intellectual property rights? And does current copyright legislation suit the company in the best possible way?

¹² The case study is completely fictional but based on factual parameters. The standard contract can be found in Appendix 1. Also, a contract specifically designed for dealing with intellectual property can be found in the appendix, labelled 'Appendix 2'.

¹³ Oxford Dictionaries: AskOxford.com, 'Gamer' – a participant in a computer or role-playing game <http://www.askoxford.com/concise_oed/gamer?view=uk> viewed on 22 March 2009.

¹⁴ Oxford Dictionaries: AskOxford.com, 'Streaming' – a method of relaying data (especially video and audio material) over a computer network as a steady continuous stream <http://www.askoxford.com/concise_oed/streaming?view=uk> viewed on 22 March 2009.

¹⁵ Oxford Dictionaries: AskOxford.com, 'Real-Time' - (of a system) in which input data is available virtually immediately as feedback to the process from which it is coming, e.g. in a missile guidance system <http://www.askoxford.com/concise_oed/orexxaltime?view=uk> viewed on 22 March 2009.

3 Copyright and Database Right

3.1 Copyright

3.1.1 Introduction to Copyright

Since the first copyright act enacted in the United Kingdom in 1709,¹⁶ European national and international legislations have founded their copyright rules on the creators' rights to their creations.¹⁷ It may seem natural that the creator should be accredited with the work due to the labour that has been invested in it. The rights of the creator go beyond that of the economic rights that can be exploited,¹⁸ and confers on the creator certain moral rights that cannot be made over. These rights correspond with the rights laid down in the Berne Convention¹⁹ - the foundation of international copyright.²⁰

The requisites of copyright identify the essential points that decide whether or not the creation is eligible for copyright. The points in themselves determine the novelty, the actual worthiness of protection and the concept of idea or expression, as seen below²¹. According to Swedish law, the creator of a literary or an artistic work has copyright in the work irrespective of whether it is:

... a fictional or descriptive representation in writing or speech, a computer program, a musical or dramatic work, a cinematographic work, a photographic work or another work of fine arts, a work of architecture or applied art or, a work expressed in some other manner.²²

3.1.2 Definition and Scope

3.1.2.1 Economic rights

According to the Swedish Copyright Act, copyright is a negative enforcement in the sense that it prevents other creators from claiming the moral and economic rights of a work.²³ The original creator is not granted any more rights than he or she had from the start.

The economic rights entail the right to grant or prohibit anyone from copying the work and the exclusive right to make the work available to the public in whatever form, which

¹⁶ The UK Copyright Act of 1709.

¹⁷ MacQueen, Waelde and Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008) page 42.

¹⁸ See e.g. the Swedish Copyright Act (Lag om upphovsrätt till litterära och konstnärliga verk, SFS 1960:729), 3 and 27 §§.

¹⁹ The Berne Convention of Literary and Artistic Works, as amended on 28 September 1979.

²⁰ Art 6^{bis}(1) of the Berne Convention, as amended on 28 September 1979.

²¹ See section 3.1.4.

²² 1 § of the Swedish Copyright Act (Lag om upphovsrätt till litterära och konstnärliga verk, SFS 1960:729), English version tr Henry Olsson, the Ministry of Justice.

²³ 2 and 3 §§ of the Swedish Copyright Act.

comprises information in computer memory, translations and in other works, whether permanently or temporarily.²⁴ Economic rights may be licensed or made over to others.²⁵

The Copyright Act lists four different ways in which a work may be made available to the public.²⁶ The first way is by transmission from a place where the public does not have access to a place where the public can access it. This also includes on-demand access, where individuals may retrieve the work at a place and time that they choose.

The second way is through public performance, which is limited to the cases where the work is made available with or without technical accessories at the very same place where the public can access the work. Some common forms of public performances are theatrical displays, concert performances and museum exhibits.

The third means in which a work may be made available to the public is public display. Public display is very similar to public performance: however, it only includes the work that is displayed publicly without technological accessories at the same place where the public can access it. Had technological accessories been involved, the work would then have been made available by public performance.

The fourth and last way is when the work is distributed to the public. This includes selling, renting out or lending out the work or copies of it to the public.

3.1.2.2 Moral rights

In Sweden the moral rights include the right to be named as the creator, the right to refuse alterations of the work, which may lead to defamation of the creator, and the right to refuse the presentation of the work in a way which may lead to defamation of the creator.²⁷ Contrary to the economic rights, moral rights cannot be transmitted or sold although they may under certain circumstances be waived. The waiver is only efficacious if the usage of the work, due to its surrounding conditions, is limited.

3.1.3 Rationale of Copyright

3.1.3.1 Moral Justification

The three main rationales for copyright are moral, economic and cultural reasons.²⁸ While copyright can be divided into two parts, the moral and economic rights, the rationales are intrinsically the justification for copyright. The concepts of rights and justification are related and one should take care not to confuse the two.

‘... [T]he sweat of a man’s brows, and the exsudations of a man’s brains, are as much a man’s own property, as the breeches upon his backside...’²⁹ wrote Laurence Sterne in the

²⁴ 2 § 1 st of the Swedish Copyright Act.

²⁵ See chapters 3 and 3a of the Swedish Copyright Act.

²⁶ 2 § 3 st, p 1-4 of the Swedish Copyright Act.

²⁷ 3 § of the Swedish Copyright Act.

²⁸ MacQueen, Waelde and Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008) page 41 and 43.

²⁹ Laurence Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, (1st edn R. and J. Dodsley, London 1761) Vol 3, page 159.

mid 1700's and this can be seen in copyright law. The creator's creativity is so tightly connected with her personality that copyright recognises this authority and grants protection.³⁰ The fruit of the creator's labour is thus seen as an expression of her individual personality and the creator should receive full protection as if it were a part of her. In Swedish law this is of such importance that it is written in the constitution³¹, the body of fundamental principles according to which Sweden is governed.³²

3.1.3.2 Economic Justification

As seen in section 3.1.4.2, a work is something of an original. Following the demand-and-supply³³ curve, that which is rare has often a higher price. It stands to reason that goods of value are at risk of being stolen, since there is a profit to be made when receiving economic compensation for goods acquired at a smaller price. The smaller the cost of the goods, the larger the profit will be. The same reasoning can be applied creative works. The only one that should profit from the work is the creator. With copyright the works created are protected by law and no matter how much time, money or labour is put into the work, the one that may reap the benefits is the one that invested in the production – the creator. Whether the creator decides to sell the product or the rights to it, if there is a profit to be made, there is also an incentive for creators to keep producing.

3.1.3.3 Cultural Justification

Both the moral and the economic justifications are reasons to provide an incentive by the state to keep producing works because it is in the individual's interest to be accredited as the originator or to make profit on the product. But the cultural justification is a reason to provide protection in the interest of the people.³⁴ By being able to freely distribute the work without the fear of someone else exploiting the hard work invested in the product, the people can access the work more easily and be further inspired to create work of their own. With more works disseminated, the cultural heritage is enriched which has been shown to be a positive economic and social impact on society.³⁵

3.1.4 Requisites

3.1.4.1 Works

Even though copyright is vastly harmonised, it is still up to the Member States themselves to decide what groups of works that are protected by copyright.³⁶ In the name of the law it-

³⁰ MacQueen, Waelde and Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008) page 42.

³¹ Oxford Dictionaries: AskOxford.com, 'constitution', <http://www.askoxford.com/concise_oed/constitution?view=uk>, viewed on 10 November 2008.

³² 2 kap. 19 § of Swedish Constitutional Law (Regeringsformen, SFS 1974:152).

³³ James Denham-Steuart, *An Inquiry into the Principles of Political Economy*, (Millar and Cadell, the Strand 1767), chapter 2 describes at length the concepts of 'supply and demand' in print for the first time.

³⁴ MacQueen, Waelde and Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008) page 42.

³⁵ John C Gordon and Helen Beilby-Orrin, 'International Measurement of the Economic and Social Importance of Culture' (OECD Report, Statistics Directorate of the OECD 2006).

³⁶ 2 § of the Swedish Copyright Act.

self one requisite is already stated – it has to be a literary or artistic work.³⁷ As seen in the introduction of chapter three, the range of productions included in the list of literary and artistic works is broad due to the non-exhaustive list of works in Swedish law.³⁸

[I]f a production is dependent upon surrounding materials such that it is rendered meaningless or its utility largely disappears when taken apart from the context in which it is disseminated, then that component will instead be merely a part of a work.³⁹

This extract from a Canadian ruling in 2002 indicates that a work is something that complete all on its own and still has meaning or utility. However, the same ruling came to the conclusion that key phrases also were subject to copyright. Compared to the case *Coffey v Warner*⁴⁰, three years later, the constituent parts were not considered as being sufficiently separable from the rest of the production to have individual copyright.⁴¹ Even though key elements may attract copyright it was held in the case *Sweeney v Macmillan Publishers Ltd*⁴² that incorporated into a larger work, the work as a whole was regarded as the copyrighted production.

3.1.4.2 Originality

Another requirement for copyright is originality. Compared to e.g. patent law, the requirement of originality does not impose an obligation on the creator to express an original or inventive idea,⁴³ but does require the work to have been made by the creator as a result of a personal creative effort.⁴⁴ This requirement means that ‘*no two persons independently of each other would have expressed the ideas, facts or circumstances etc. in the same way*’⁴⁵. For this reason, e.g. news and later editions of the same book cannot have copyright. The Swedish law has no exact conditions of what must be fulfilled for a work to be original, which was the intention of the legislator. In the preparatory acts of the Swedish Copyright Act the legislator purports that it is natural that the wording concerning this area of copyright is general and somewhat vague.⁴⁶ However the legislator concludes that a production should be construed as a work only if the creation has been elevated to a certain degree of independence and

³⁷ See e.g. 1 § of the Swedish Copyright Act or Art. 2(1) of the Berne Convention as amended 28 September 1979.

³⁸ The list in 1 § of the Swedish Copyright Act is non-exhaustive because of the wording in point 7, ‘a work expressed in any other manner’.

³⁹ *CCH Canadian Ltd v Law Society of Upper Canada* [2002] 4 FC 213 (CA) at 260 (para 66).

⁴⁰ *Coffey v Warner* [2005] FSR 34.

⁴¹ MacQueen, Waelde and Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008) page 45.

⁴² *Sweeney v Publishers Ltd* [2002] RPC 35.

⁴³ See arts. 54 and 56 of the Convention on the Grant of European Patents (EPC) concerning novelty and inventive step respectively.

⁴⁴ Levin and Koktvedgaard, *Lärobok i Immaterialrätt* (Nordsteds Juridik, Stockholm 2007) page 77.

⁴⁵ ‘Copyright: A brief overview of the Swedish copyright system’, The Ministry of Justice (Edita, Stockholm 2005) ISBN 91-38-315572.

⁴⁶ SOU 1956:25, page 66.

originality.⁴⁷ Since the goal of copyright is to protect works from being reproduced and exploited without authorisation, it is also natural that what qualifies as reproduction is highly subjective. The fact that a work is similar to another does not suffice as grounds for a claim of copyright infringement. Since 1995 more weight has in Swedish rulings been put on the test of whether or not another person independently of the creator could plausibly produce the same creation.⁴⁸

The originality requisite can clearly be applied to human works, but may also be applied to works created by man-made machines.⁴⁹ The reasoning behind this lies in the creating process. The ones that have added a personal creative element to the work may be protected by copyright law. The only one that has contributed with a personal creative element to a work, e.g. art, made by a machine is the one who constructed or programmed it.⁵⁰

3.1.4.3 Fixation

The last requirement for a creation to attract copyright is fixation. It is up to the national legislation to decide if a work or a group of works should be obligated to be fixed in some *material* form.⁵¹ It stands to reason that there may be discrepancies between different countries' legislations of what is understood by being fixed in material form, and also what types of works that should be required to be fixed in material form. While Swedish legislation is content by stating that simply being expressed in *any* form is enough to enjoy copyright, UK legislation states that the work should be recorded 'in writing or otherwise'.⁵² The meaning of 'in writing' has been determined, but 'otherwise' has not, which may lead to a work having copyright in Sweden but is allowed to be reproduced in the UK. The common denominator however, is that ideas should not have copyright while this is exclusively reserved expressions of ideas.⁵³ Fixation is one step towards defining the difference between ideas and expressions.

3.2 Database Right

The notion of protecting databases was incorporated in Swedish law in 1960 (with the original Swedish Copyright Act)⁵⁴, where the protection was granted to products that had

⁴⁷ SOU 1956:25, page 81.

⁴⁸ NJA 1995 s. 256, (Swe. 'dubbelskapandekriteriet').

⁴⁹ Compare man-made machines to animals in e.g. arts and crafts. The machines are directed by a human will to produce the end-product, thus giving the person directing the machine copyright to the work even if the machine operates randomly and seemingly on its own. Animals are part of nature and are explicitly not covered by the Swedish Copyright Act. See the discussion in Levin and Koktvedgaard, *Lärobok i Immaterialrätt*, in Chapter 2, parts C 1 and D 2.

⁵⁰ Levin and Koktvedgaard, *Lärobok i Immaterialrätt* (Nordsteds Juridik, Stockholm 2007) page 78-79.

⁵¹ Art. 2(2) of the Berne Convention.

⁵² 2 § of the Swedish Copyright Act and the Copyright Designs and Patents Act 1988 (CDPA) s 3(2).

⁵³ Art 9(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C of the Marrakesh Declaration of 15 April 1994.

⁵⁴ Database right has been classified as an intellectual right by several authors and scholars e.g. Thakur, 'Database Protection in the European Union and the United States: The European Database Directive as an Optimum Global Model?' *Intellectual Property Quarterly* (Sweet & Maxwell, 2001) page 114, Karnell, 'The European Sui Generis Protection of Data Bases: Nordic and U.K. Law Approaching the Court of the European Communities – Some Comparative Reflections', *Journal of the Copyright Society of the USA* (2002), page 998.

been greatly invested in with both time and money and was therefore not granted to many creations at all.⁵⁵ Since the Copyright Act did not cover the many different types of databases the legislation would not seem to have had any wide-spread impact. It was therefore with Directive 96/9 that the Swedish legislation became what it is today and protects all catalogues and similar works that have compiled a vast quantity of data or that have been substantially invested in.⁵⁶ The one that is protected by database right is the one that has taken the initiative and the risk of investing, and is therefore entitled to the reproduction of the work and the decision of accessibility to the public.⁵⁷

3.3 Observations

IT is a broad area of expertise that can be used for many things. The versatility requires great know-how and personal creativity in order to adapt and adjust to all of these areas of usage. The production of software is in this regard no different from e.g. a cutting-edge machine or an architectural creation – they all require an adaptation to the needs and the usage of the product. The creation process is personal and has a unique point-of-view, and fulfils the moral justification of being granted protection, as a bit of the creator's personality can be found in the creation.

In general, consulting companies are a part of the knowledge-intensive industry mainly because the material assets do not adequately represent the true value of the company. The value of the personnel and their knowledge cannot be measured, yet they are what makes the company function and generate income. Considering this, the software that these highly valued workers produce is greatly coveted by the companies that do not have the same knowledge internally. The money invested in the making of computer software does not only include wages and the hardware required, but also years of education and training of the employees. As discussed above, that which is worth having is also worth stealing. Therefore, for the protection of their livelihood and of the act of personal creation, computer software should be protected as intellectual property.

In Swedish law, computer programmes expressly enjoy protection under copyright law. The consulting company's programmes are therefore automatically protected *per se*. Somewhat misleadingly, databases are stated to also be protected under the same law. However, databases are in fact protected by *sui generis* database rights, and not copyright.

In the case study, the client wonders how they are allowed to use the products that they have ordered. The computer programmes are both protected by Swedish copyright law, and the database is protected by the database rights. In the Swedish Copyright Act it is the one who has created a literary or artistic work that has copyright to the work, no matter what the form.⁵⁸ This applies directly to the computer programmes that are expressly listed as one the works protected. The one that has created the software in this case is the consulting company, ITS. All parts of the computer programmes and the right of reproduction and distribution belongs to ITS. Since the consulting company has sold the programmes to their client, DataComp, it has also sold the right to use the product to DataComp even

⁵⁵ Prop. 1960:17.

⁵⁶ 49 § of the Swedish Copyright Act.

⁵⁷ Recital (41) of the preamble in the Database Directive.

⁵⁸ § 1 of the Swedish Copyright Act.

though the copyright is still intact and belongs to ITS. What DataComp may do is copy the programmes and make changes in them in order to use the programmes in the way that they were intended.⁵⁹

⁵⁹ § 26g of the Swedish Copyright Act.

4 Legislation Concerning Rights

4.1 Swedish Copyright Act

From the title of the Swedish Copyright Act one could assume that the rules only apply to literary and artistic works, but with the wide-spread co-operation with the EU and many other foreign countries the law has been widened to include an array of different types of works. The EU directives aim to harmonise the copyright rules of the Member States and these have been implemented in the Swedish legislation. The relevant directives are further discussed below in 4.2 and 4.3.

The Swedish copyright legislation's applicability is confined to Sweden, which is the main rule and can be seen throughout Swedish legislation. So where does the limit go? According to the Copyright Act, both works that are produced within the Swedish borders and the works made by Swedes abroad are subject to the legislation which means that Sweden in this case utilises both the nationality and the territorial principle.⁶⁰ However because of increasing international influences the Copyright Act has been widened by the International Copyright Act⁶¹ that grants authors copyright protection no matter what country she is from.

As one of the Member States of the EC, Swedish legislation has been influenced by the continental European point of view and was formed by the idea of protecting the moral rights rather than the economic rights of the creator. The threshold for what creations are works according to Copyright legislation is thus fairly low and covers most types of works – even unfinished ones.⁶²

Computer programmes are in the Copyright Act expressly stated as one of the types of works protected by it.⁶³ The inclusion of computer programmes was due to Directive 91/250. Computer programmes that derive from the labour of employees in the course of their employment are according to Swedish law the employer's to use as its own creation.⁶⁴ However, the moral and economic rights to the work are still intact and belong to the employee.⁶⁵

Databases are compilations of information and are also protected by copyright as a literary work.⁶⁶ Because of the increase in digital databases over the last decade Council Directive 96/9/EC was introduced to harmonise the rules concerning these. However, a database need not be digital to enjoy copyright protection under the directive. An example of such a database could be the Yellow Pages because it is arranged in such a way that its contents '*constitutes the author's own intellectual creation*'⁶⁷. The directive also states that no other criteria

⁶⁰ 60-62 §§ of the Swedish Copyright Act.

⁶¹ The Swedish International Copyright Act (*Internationell Upphovsrättsförordning*, SFS 1994:193).

⁶² Levin and Koktvedgaard, *Lärobok i Immaterialrätt* (Nordsteds Juridik, Stockholm 2007) page 71.

⁶³ 1 § 1 st p. 2 of the Swedish Copyright Act.

⁶⁴ 2 a kap 40 a § of the Swedish Copyright Act.

⁶⁵ 1 kap 3 § and of the Swedish Copyright Act.

⁶⁶ 5 § of the Swedish Copyright Act.

⁶⁷ Art. 3.1. of the Council Directive 96/9/EC.

may be used to determine whether or not a compilation is in fact a database. Swedish legislation has not been modified in any significant way following the introduction of the directive, simply because the legislation already coincided with what was determined.⁶⁸

4.2 Directive 91/250

Also widely known as the Computer Programme Directive, Directive 91/250 has ensured that the copyright rules concerning copyright to computer programmes are fully harmonised throughout Europe.⁶⁹ Even though computer programmes were in Swedish law already covered by the Copyright Act since 1989,⁷⁰ the legislators decided to change the existing law to explicitly include them for the sake of clarity.⁷¹

The major discrepancy between the directive and the Swedish Copyright Act has been whether or not the computer programme qualifies as a work or not. Swedish tradition has been to reflect upon if the same creation could come from another completely independent source or not.⁷² The directive, on the other hand, clearly states that:

... [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.⁷³

As seen from the excerpt, the threshold of qualification for the creation being a work under copyright law is slightly lower according to the directive. However, the discrepancy between national and international legislation has not involved any serious trouble in the Swedish courts' judgements since the computer programmes have in each case been tested with the surrounding circumstances as a whole, usually in connection with copyright infringement claims.⁷⁴ Reasonably, with more European rulings in copyright to computer programmes, the old Swedish traditions are expected to become obsolete and be abandoned.

4.3 Directive 96/9

In connection with copyright law, databases are all collections of data or other materials that are 'arranged in a systematic or methodical way and individually accessible by electronic or other means'⁷⁵. Databases would thus include e.g. a collection of information

⁶⁸ Compare the Council Directive 96/9 with the contemporary Swedish Copyright Act amended as of January 1996.

⁶⁹ Art 10.1. of the Council Directive 91/250.

⁷⁰ See the amendment made to the Swedish Copyright Act (Lag (1989:396) om ändring i lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk).

⁷¹ See §1 of the amendment made to the Swedish Copyright Act (Lag 1992:1687) om ändring i lagen (1960:729) om upphovsrätt till litterära och konstnärliga verk).

⁷² NJA 1996 s. 79. In this case HD does not comment on the reasoning of either TR or HovR, but simply states that the computer programmes enjoy protection under the Swedish Copyright Act.

⁷³ Art. 1.3. of the Council Directive 91/250.

⁷⁴ Levin and Koktvedgaard, *Lärobok i Immaterialrätt* (Nordsteds Juridik, Stockholm 2007) page 97.

⁷⁵ Art 1.2. of the Council Directive 96/9.

cards about plants and racehorse information.⁷⁶ The width of what may be protected would by the wording be exceptionally broad. '[D]ata or other materials'⁷⁷ does not have any boundaries as 'other materials' may include even tangible materials and 'accessible by electronic or other means' includes every accessible way. However, the objects in the database must be independent of each other and arranged in a systematic or methodical manner, which would exclude random collections of data.⁷⁸

The database right is granted when the creator has created '...a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents...'⁷⁹. From the *Fixtures* cases⁸⁰ the conclusion is that investments may be economic, material or human resources.⁸¹ However, the threshold of what should be deemed as a *substantial* investment has not been set by the court, while indications show that the threshold should be set quite low.⁸² As for the wording 'obtaining, verification or presentation' of the contents of the database, the ECJ has come to the following conclusions:

Obtaining material for the use in databases only means the collection of data. This would thus not include the production of data used in databases. The difference being that e.g. horseracing times and results from research would not be protected since the data has been created.⁸³ If the substantial investment in creating the data and obtaining the data is inseparable, then the work will not gain protection under database rights.

Verification of the material in the database demands that at least a part of the substantial investment that has been made has been dedicated to ensure the reliability of the information that is in the database and to uphold the accuracy of that information in the course of the process.⁸⁴

The substantial investment in presenting the information in the database means 'the resources used for the purpose of giving the database its function of processing information,

⁷⁶ The Swedish case NJA 1985 s 813 and European case C-203/02 *British Horse Racing Board v William Hill Organization Ltd* [2004] ECR I-10415 respectively.

⁷⁷ Art. 1 of the Database Directive.

⁷⁸ Four related rulings from the ECJ have supported this conclusion: C-444/02 *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podofairou* [2004] ECR I-10549, C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus AB* [2004] ECR I-10365, C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497 and 203/02 *British Horseracing Board Ltd v William Hill Organisation Ltd* [2004] ECR I-10415.

⁷⁹ Art. 7.1. of the Database Directive.

⁸⁰ Cases C-444/02, C-46/02 and C-338/02 concerning *Fixtures Marketing Ltd* (n78).

⁸¹ Recital (40) of the preamble in the Database Directive.

⁸² See sections 48 and 49 in the Opinion of the Advocate General in case C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus AB* [2004] ECR I-10365 and later also verified in C-545/07 *Apis-Hristovich EOOD v Lakorda AD*, 15 January 2009.

⁸³ Section 24 in the case C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497.

⁸⁴ C- 338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497 and also Derclaye, 'Database *Sui Generis* Right: The Need to Take the Public's Right to Information and Freedom of Expression into Account' *New Directions in Copyright Law, Volume 5* (University of London, 2007).

that is to say those used for the systematic or methodical arrangement of the materials contained in that database and the organisation of their individual accessibility'.⁸⁵

The Database Directive, Council Directive 96/9, was enacted in order to harmonise the copyright to databases.⁸⁶ *Sui generis* iterates the fact the databases (which may normally not be qualified to receive protection under copyright law) all receive special protection. That being said, there is still a possibility for a database to enjoy protection from both the copyright legislation and the *sui generis* database rights, however this would require the database being an original intellectual creation as well as fulfilling the criteria for being a database.

4.4 Observations

In the case study, the computer consulting company, ITS, has sold a programme which allows their client to more easily present, gather and verify data. The product sold is thus in fact not a database, but rather a database *enabler* and would not enjoy protection from the *sui generis* database rights, but from the copyright legislation.⁸⁷ However, it is interesting to see what happens with the database that is created with the programme that has been sold to the client, DataComp.

According to the Database Directive there is no need for there to be any creativity involved in the making of a database, and so there is no actual need to identify the creator as is not the case with copyright. However, in the case study the problems that may arise would demand that the creator be determined. The database that is created by the computer programme is specifically designed to gather data and in a clear manner methodically arrange it in a way that would facilitate for anyone who wishes to access it. The very definition in the Database Directive of what a database is would thus clearly be fulfilled.

The data is individually accessible via the DataComp website and is updated in real-time, in other words, as soon as the data is altered. The collection of data and the verification of the same all depends on the computer programme that was created by ITS. In this case an analogy may be drawn with copyright and the making of artistic works.

As previously discussed, a piece of art that has been made by a machine is protected by copyright.⁸⁸ The copyright does not automatically belong to the maker of the machine, but to the one who has added a personal creative element. In the case study, the database has been created by a machine and the rights to the creation should then belong to the one who has contributed with a personal creative element. The only party who has provided any personal creative element (to both the computer programme and the database) would

⁸⁵ C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497.

⁸⁶ The Directive harmonised the Member States' legislation concerning copyright protection for databases, but also excluded databases from the list of works protected with the new requirements of originality (requirements that earlier were higher or lower in several Member States including Sweden and the UK).

⁸⁷ From discussions with the case study provider, it would appear that most computer consulting companies do not provide data that are used in databases but limits their services to only sell programmes that may facilitate the collection of the data. The case study is formed to appeal to consulting companies and their everyday projects, which is why the final analysis and the preceding investigations are more focused on the copyright of computer programmes.

⁸⁸ See section 3.1.4.2 *Originality*, paragraph 2.

be ITS. Arguably, ITS should have the rights to the programme and to the database that it has created no matter where the information has been gathered, or who has provided it.

The Database Directive, on the other hand, clearly states that the maker of a database is the one that has taken the initiative and the risk of investing. ITS did not take the initiative to make the database, or the programme that facilitates the making. Nor has ITS taken any risks in the making of the programme since they will receive economic compensation from DataComp no matter what the effects of the database are. The initiative and the risks all belong to DataComp.

Furthermore, ITS may also be construed as a subcontractor⁸⁹ since they are hired by DataComp to perform a specific task and service. The Database Directive explicitly declares that subcontractors in particular are excluded from the definition of maker in terms of the creation of a database.⁹⁰ This is also one of the major differences between *sui generis* database rights and copyright law, since subcontractors usually retain copyright to the work unless the contract stipulates otherwise.

Also worth mentioning is that employees are generally not seen as subcontractors. This can be compared to the Swedish test of whether the worker is an employee or a subcontractor where there are certain steps that the Swedish Tax Authorities take in order to determine the worker's status.⁹¹ The latest change made in the legislation concerning the decision of whether or not a firm is a subcontractor, has been to give extra attention to what the parties have agreed upon, the scale of independence of the firm and the position the firm has in the company.⁹²

In short, the client DataComp and its database should be protected by the Database Directive.

⁸⁹ Oxford Dictionaries: AskOxford.com, 'Subcontractor' – a firm or person that carries out work for a company as part of a larger project <http://www.askoxford.com/concise_oed/subcontractor?view=uk> viewed on 8 April 2009

⁹⁰ Recital (41) of the preamble in the Database Directive.

⁹¹ Since the Swedish tax legislation is so closely linked, there is no one statute that gives a complete overview of the issue at hand. However, special attention may be paid to 13 kap of the Swedish Tax Payment Act (SFS 1997:843) concerning the issuing of an F-tax slip that distinguishes the worker as an independent firm. See also the Tax Assessment Act (SFS 1990:324) and Income Tax Act (SFS 1999:1229) for more information.

⁹² Prop. 2008/09:62 and Income Tax Act 13 kap. 1 §.

5 The Impact of the Legislation

5.1 Time limit

In the world of intellectual property law, there are different time frames during which the works made are protected, depending on what type of protection the work is covered by. The time frame for copyright is set out in the Berne Convention and later also in the Council Directive 06/116⁹³. The time frame set out generally in the Berne Convention for copyright works is the creator's life-time plus an additional 50 years.⁹⁴ The rationale behind this was to grant the creator as well as the two following generations copyright protection to the work. However, life expectancy in the EU has increased⁹⁵ to the extent that 50 years of protection would no longer suffice in order to protect the next two generations. The time frame was therefore extended with the implementation of Council Directive 06/116 to the creator's life span plus an additional 70 years. Where the death of the creator is unknown or non-applicable, the 70 year term begins when the work has lawfully been made available to the public.⁹⁶ Another reason for increasing the term of protection was the harmonisation process in the EU. Since the time-frame was different in different countries, it was decided that it was better to extend the time-frame to comply with the countries that had the most generous term of protection rather than restricting it.⁹⁷

As for databases, the time limit of protection according to Swedish legislation is 15 years after the point at which the work was made available to the public, which is also the time frame that is set out in the Database Directive.⁹⁸

A quick comparison with patent rights reveals that the time frame of exclusivity is very different. Swedish legislation states that a valid patent grants the patent holder up to 20 years of protection from the date of filing of the application, which is also the term set out in the European Patent Convention⁹⁹.¹⁰⁰ Of course, it is up to the creator to decide whether or not she would like to apply for a patent. In exchange for the invention being patent pro-

⁹³ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.

⁹⁴ Art. 7(1) of the Berne Convention as amended the 28 September 1979.

⁹⁵ Europa, 'Europeans are living longer' Statistics for life expectancy in the EU 1972 compared to 2004 <http://europa.eu/abc/keyfigures/sizeandpopulation/older/index_en.htm> viewed on 18 March 2009 and Central Intelligence Agency, 'The World Factbook: European Union' Statistics for life expectancy in 2008 <<https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html#People>> viewed on 18 March 2009.

⁹⁶ Recitals (6) and (12) of the preamble in the Council Directive 2006/116.

⁹⁷ Silvestro, 'Towards EC Harmonisation of the Term of Protection of Copyright and So-Called "Related" Rights', *Entertainment Law Review* 1993, 4(3), pages 73-79.

⁹⁸ 5 kap. 49 § 2 st of the Swedish Copyright Act and Art 14 (5) of the Database Directive.

⁹⁹ Convention on the Grant of European Patents.

¹⁰⁰ 4 Kap 40 § of the Swedish Patent Act (*Patentlag*, SFS 1967:837) and art. 63 of the European Patent Convention.

tected, the creator would have to fully disclose all information concerning the technical details of the protected invention.¹⁰¹

Because of the high development rate of computer programmes and electronic databases, a shorter time frame should not have any significant impact on the security of the protection. In connection with the case study and the relevant area of business, the works would normally be deemed redundant or too inadequate for anyone to profit from reproducing them after the creator's demise or 15 years after it has been released to the public. In the case of computer programmes, a protection period of 20 years after the work has been created (as with patents) would be enough to secure full use of the exclusivity that copyright or a patent would bring.

5.2 Quantitative or Qualitative Parts of Works

As previously discussed, the maker of a computer programme or database has the exclusive right to reproduce and use the works in any way she sees fit. But as we begin to break the work down in smaller pieces, how small do the pieces need to be for it to no longer qualify for copyright or database right protection?

‘History is a nightmare from which I am trying to awake.’¹⁰²

The sentence above is an extract from a work that at the time of republishing still was copyright protected. The James Joyce estate that was the owner of the copyright claimed that the republishing of the famous book *Ulysses* was an infringement of copyright law. Furthermore, it was argued that every chapter and even every sentence was protected by copyright. The Court in the UK came to the conclusion that there might be copyright protection in every sentence of the work, but that the novel as a whole should be the work protected – not the individual components.¹⁰³ Compared to another English case where two percent of a computer programme was admittedly copied, strictly quantitatively there was no infringement of copyright law. The two percent copied had to be examined in relation to the investment that had been put into the copied part. When determining a significant qualitative portion of a work, one has to look at the investment that has been put into that portion, for these are closely connected. If the majority of the resources invested in a project had gone to determining the most efficient way of writing a particular string of data code, copying that string would be an infringement of copyright law due to the string being a significant qualitative portion of that work.¹⁰⁴

Copyright and database right are in this area very similar. Quantitatively, the portion that has been copied or extracted must be put in comparison with the work that it has been copied or extracted from, as a whole. This only applies if the work as a whole qualifies for protection under *sui generis* database right. The quantitative part then has to be put in rela-

¹⁰¹ 8 § of the Swedish Patent Act.

¹⁰² Joyce, ‘*Ulysses*’ (Shakespeare and Company, Paris 1922).

¹⁰³ *Sweeny v Macmillan Publishers Ltd* [2002] RPC 35.

¹⁰⁴ *Cantor Fitzgerald International v Tradition UK Ltd* [2000] RPC 95.

tion to the qualitative investment that the maker has put into the part copied or extracted – the qualitative investment being a human, technical or financial investment.¹⁰⁵

5.3 Idea or Expression?

While discussing copyright, the difference between idea and expression can be seen as the difference between authorship and the actual copyright. That which the author put out into the world encompasses both the idea and the expression of the work, whereas the only thing that is protected is the expression of that idea.¹⁰⁶ The logic behind this is that while the expression is quite clear in most pieces of work (and can therefore be protected) it is not always objectively clear what the idea behind the work is.¹⁰⁷ Drawing a parallel once again to copyright in art, one can see that abstract art as an expression is tangible in a way that would more easily be protected than the idea behind it. The idea could stem from any source of inspiration and the creator would have to be consulted as to where the idea derives from. The matter of protecting ideas would be highly subjective and would undermine the legislation since it produces uncertainty in what is and what is not protected. This uncertainty would then go against the economic and cultural justifications for copyright.

In the area of computer software, the definitions of idea and expression have been debated.¹⁰⁸ *Prima facie* the object of what is protected may seem clear or even obvious. Any expression of computer programmes is protected by the Computer Programme Directive, which includes the preparatory design material.¹⁰⁹ But when discussing the concept of idea versus expression, the debate usually delves deeper into the software, and the topic shifts slightly. It can be difficult to discern what part of a computer programme is an idea, and what an actual expression of the idea is.¹¹⁰ When software is analysed in order to discern the idea behind it, the topic becomes reverse engineering, or even decompilation¹¹¹ of the programme.

¹⁰⁵ Art. 7 of the Database Directive and also case C-545/07 *Apis-Hristovich EOOD v Lakorda AD*, 15 January 2009.

¹⁰⁶ See Art. 1 (2) and various recitals in the preamble of the Computer Programme Directive. In many other countries the same decision of what is protected has been made, e.g. USA where ideas etc are pointedly not protected under copyright legislation: 'In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work', 17 U.S.C.A. § 102 (b).

¹⁰⁷ Drassinower, *A Rights Based View of the Idea/Expression Dichotomy in Copyright Law*, Canadian Journal of Law and Jurisprudence, Vol. 16, January 2003.

¹⁰⁸ See e.g. the case *Baker v. Selden* 101 US 99 (1879), *University of London Press v University Tutorial Press* [1916] 2 Ch 601, Case T-201/04 R, *Microsoft Corp. v Commission of the European Communities* [2007] but also *Nichols v. Universal Pictures Corporation* 45 F.2d 119 (2d Cir. 1930) for a general idea/expression debate.

¹⁰⁹ Art. 1 (1) of the Computer Programme Directive.

¹¹⁰ *Whelan Assoc. Inc. v Jason Dental Lab. Inc.* 797 F.2d 1222 (3d cir. 1986).

¹¹¹ WordWeb Online, *Decompile* – (computing) convert executable (ready-to-run) program code into some form of human-readable higher-level programming language, <<http://www.wordwebonline.com/en/DECOMPILE>>, viewed on 13 April 2009.

5.4 Reverse Engineering

When computer programmes are written, they are first written in readable form which is a high-level code, also called source code¹¹². In order for the computer to understand and be able to interpret the source code it is processed by a compiler that converts the source code into a lower level code, called object code¹¹³. The latter is often seen as ones and zeroes and would be unintelligible to humans. If the high-level source code can be seen as having copyright protection, then reverse engineering would be an infringement of copyright law. Yet if source code is not protected, it would be legal to reproduce it (and consequently the entire programme). The Computer Programme Directive has therefore set out special rules concerning reverse engineering.

Reverse engineering, stems from the right to use the acquired software which is protected by copyright, in the way that it was intended. Usually, in order for the acquired software to function properly with already existing software, some reverse engineering is required and is permitted by the Computer Programme Directive.¹¹⁴ Had it not been permitted, the buyer would then be risking constant malfunctions when trying to execute the software or the original OS, because there is no way of ensuring interoperability¹¹⁵. Buying a computer programme would therefore involve a great risk for the buyer and potentially also those that come in contact with the buyer. Because of this, small and medium-sized companies have feared that putting restrictions on reverse engineering would give the larger companies a greater competitive advantage over them, since larger companies, e.g. Microsoft, do not have to worry about interoperability.¹¹⁶

The larger companies' answer to the fear expressed by the smaller companies was to point out that there is a difference between reverse engineering and decompilation, which has been taken into account in the Computer Programme Directive.¹¹⁷ Only authorised persons and persons with the right to use the programme may decompile the programme, and only in order to ensure interoperability with other software. The information acquired in this

¹¹² See 'source code' under the subtitle 'Definitions Of Terms Used In This Annex' in Council Regulation (EC) No 1167/2008 of 24 October 2008 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology.

¹¹³ See 'object code' under the subtitle 'Definitions Of Terms Used In This Annex' in Council Regulation (EC) No 1167/2008 of 24 October 2008 amending and updating Regulation (EC) No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology.

¹¹⁴ Art. 6 of the Computer Programme Directive.

¹¹⁵ Oxford Dictionaries: AskOxford.com, 'Interoperable' – (of computer systems or software) able to operate in conjunction < http://www.askoxford.com/concise_oed/interoperable?view=uk> viewed on 16 April 2009. See also Johnsson-Laird, 'Reverse Engineering of Software: Separating Legal Mythology from Actual Technology', 5 Software Law Journal 340 (1992).

¹¹⁶ Ehrlich, 'Fair Use or Foul Play? The EC Directive on the Legal Protection of Computer Programs and its Impact on Reverse Engineering', 13 Pace Law Review 1003 (1994).

¹¹⁷ Compare the texts in Art. 5 (3) with Art. 6 of the Computer Programme Directive. Reverse engineering has been pointed out to be examining the programme while loading, displaying, running, transmitting or storing it. Art. 6 refers to the issue of decompilation where the programme code needs to be reproduced and translated (object code to source code and vice versa).

process may then not be given to anyone else or used for any other purpose other than to ensure the interoperability of the software.¹¹⁸

5.5 Observations

The software that DataComp has bought from ITS will be copyright protected for at least 70 years in their capacity of computer programmes. The database on the other hand will only be protected 15 years into the future, since it is protected under database right. Considering the rate of technical evolution, ITS (which is the copyright owner) would reasonably not be at any great risk of having their products used in any unauthorised way. One of the questions that DataComp has raised is what they are entitled to do with the software they have acquired.

As previously discussed in this chapter, DataComp is restricted to using the products only in the way they were intended. The intension may be debated, but should include making back-up copies of the software assuming that the copies are only used as actual back-ups and not used for e.g. redistribution. Partial reproduction of the software may as well be allowed, but only if the parts do not qualify as a quantitatively significant portion of the work. Neither may the partial reproduction be a qualitatively significant portion of the work, bearing in mind the time, money and knowledge invested.

Using reverse engineering is only allowed to ensure the interoperability of the software, but since ITS has already custom fitted the software to DataComp's OS, there is no justification for DataComp to engage in reverse engineering.

DataComp may, for the next 70 years, have made a back-up copy of the software provided by ITS. They may also have used the acquired software as a source of inspiration if they ever attempt to make software themselves in the future. This does not include reverse engineering as there is no justification for DataComp to do so. The database, on the other hand, is protected by the *sui generis* database rights and belongs to DataComp. The database will be protected for the next 15 years, and may only be reproduced or otherwise exploited by DataComp and other authorised persons.

¹¹⁸ Art. 6 (1) and (2) of the Computer Programme Directive.

6 Analysis

The main reason for creating rules concerning copyright and database right is to protect the creator in her unique position as the one who has put effort into expressing an idea in a personal way. Development in the area has given the creator means of economically benefiting from their unique creations, which has become another reason to why the creator should be protected. Ideally, the creator alone should be the one to gain full credit as the maker of a work and any economic winnings that are procured from that work. If the creator feels protected from exploitation, then both she and the society as a whole would enjoy the full benefits that the creation brings with it. Modern legislation and recent case law have proven that protecting all creations is cumbersome at best.

The Swedish Copyright Act mentions computer programmes as an example of works that are protected by that law. This means that the general rules for copyright also applies in the case of computer programmes. Similarly in the Computer Program Directive, computer programmes are stated to be interpreted as literary works within the meaning of the Berne Convention, and are also protected by the general rules of the Convention. Databases, on the other hand, are seen as a special category of works and are protected by the *sui generis* database rights.

The question of what is and what is not protected by the *sui generis* database right has been answered, most noticeably in the *Fixtures Marketing* cases. The databases that have required substantial investment in the obtaining, verification or presentation of the contents of the database are protected, and the one who has substantially invested in the making of the database is the one that benefits from that protection. The database rights are specifically formed to protect databases and to that aim they have performed well. But should there be protection for databases at all? It is not in the creation of the information in the databases that qualify for protection, which implies that the information is already available. It may seem ludicrous that available information is protected by database right simply for being arranged in a specific way or for being verified on a regular basis. However, the acts of obtaining, verifying and presenting information comes from the creativity and labour of an individual. The moral, economic and cultural rationales as previously discussed all apply here. The threshold for whether or not there has been substantial investment in the database is set at an appropriate level in order to keep the rules from being abused or exploited.

From the perspective of the computer consulting company from the case study, the most beneficial rules are the ones that apply automatically and therefore do not have to be specified in a contract. The company retains all the rights to the software it has sold, and does not draw attention to intellectual property rights. However, the client might decide to claim the software as its own as well as the rights to it. Not having stipulated in the contract anything about intellectual property rights might imply that the consulting company has only acted in a consulting manner, and not produced the software that was in fact sold. The client may also subject the software to reverse engineering or decompilation and sell the information to competitors. Both of these cases are in violation of copyright legislation but ultimately rely on evidence, which a contract may provide. What the consulting company needs is a set of rules that apply automatically and provides sufficient protection in case of disputes.

The creators of computer programmes require special rules to more accurately be protected, which was acknowledged by the creation of the Computer Program Directive. These programmes are considered as literary works and qualify for copyright, but given the digital format of the creations there are other ways of infringing the principal idea of copy-

right without directly copying the content which is why software demands special rules of protection. Have computer programmes then not become a special category of works that require some sort of *sui generis* software right? Considering the current agreements and regulations and the lack of proposed a *sui generis* software copyright, that which may possibly be used instead of copyright for computer programmes is patents.

‘...patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.’¹¹⁹

Disregarding the fact that all regulatory texts unanimously state that computer programmes shall be protected as literary works, should they not be patentable as inventions? Even though the proposal was rejected by the Parliament in 2005, some believe that European software companies would have been better off if it had adopted the Software Patent Directive.¹²⁰

Since software inventions have become such an integral part of our daily lives, software creators should be able to enjoy the same protection and incentive as any other inventor. Patents would ensure that the ideas behind the software are protected without having more rules that allow or forbid e.g. reverse engineering. Fewer rules mean less likelihood of misinterpretation. If software patents were to increase the protection, it would then also increase the incentive to invest more in research and development which in theory would be beneficial for the world-wide economy. However, the rejection of the Software Patent Directive could partly have been based on the opinion that there is already sufficient protection for computer programmes due to national copyright acts and the Computer Program Directive.

As soon as the creation rises to the level of a work within the meaning of the law, it is protected by copyright without any need for registration or fees. Although copyright may be registered for the sake of evidence, Sweden has chosen not to have a registry of copyrighted materials. The threshold of qualification is fairly low and would encompass even the simpler computer programmes which would not necessarily meet the inventive step criterion for patents. Adopting software patents would open up a new discussion concerning where the line should be drawn for when a computer programme has gone beyond the next logical step.

The effect of copyright is immediate and therefore very beneficial to companies, especially in areas of business where the products undergo extreme development in a relatively short period of time. Patents would in this regard be less beneficial since the works have to be registered. The registration application requires detailed information about the function of the work which in itself takes time. The patent applicant also has to choose whether to apply and pay for a patent in each of the individual Member States in the EU or to apply and pay for a single European patent which immediately applies to all the Member States. The cost of a European patent including the cost of the EPO grant procedure, representation by a patent attorney, translation and validation and the renewal fees amounted to circa

¹¹⁹ Art. 27 (1) of the TRIPS agreement.

¹²⁰ E.g. Tom Bakos Consulting Inc. and Markets, Patents and Alliances LLC who together have published *Insurance IP Bulletin*, a paper in favour of software patents.

EUR 32 000 in 2005.¹²¹ The cost and time of patent registration may be deemed as worth the increased protection that the software gains. All other software inventions that are too similar to the claims in the patent infringe the patent protection. But even if the cost of the patent may be worth the protection, companies that have spent time and money on the patent process would have to cut resources on other areas of the software production, which could lead to a decrease in research and development and negate the benefits, or be directly detrimental, to the world economy.

A problem that may arise is that the wording of the claims in the patent application may be different from the wording a software programmer may use to describe the work. This affects the patent in two instances, the first being in the process of writing the original patent application. The application may not accurately describe the software as it functions which would lead to having a product that works in a certain way and a patent with claims that protect a differently functioning product. The other instance at which the linguistic differences between legal wordings and programming jargon may affect the patent is when determining if there is already existing software that may cause the patent application to fail in the clearance process. Having a software patent system would inevitably cause problems before e.g. certain key words or terms have been agreed upon.

Even if the patent is worth the cost and the effort of applying for, and the application process is revised in order to sufficiently handle software, the time that a patent application takes to be granted might be too long. In 2007, the average time for a patent to be granted in the area of computer architecture, software and information security by the US Patent and Trademark Office was almost four years.¹²² In 2008, the average time for a patent to be granted in Europe was also almost four years.¹²³ The comparison would imply that it is common for any patent to take several years before being granted. After three or four years the software would likely be redundant or completely remodelled and so the patent would have little or no effect.

Finally, between patents and copyright there is another distinct difference. Copyright seems to have a higher rank of importance than patents. In the case *Allen and Hansbury's Ltd v Generics UK Ltd*¹²⁴ the movement of goods was claimed to have been restricted because of a patent. The court found that 'a prohibition on importation cannot be justified' which means that in some cases patents do not give the full protection that the patent holder may seem to have. Compared to the case *Warner Brothers v Christiansen*¹²⁵ where video-cassettes had been distributed without the consent of the creator, the rights conferred on the creator by copyright were still intact and are not prohibited by the articles on free movement of

¹²¹ EPO, 'The cost of a sample European patent - new estimates: Cost of a European Patent (Euro-direct) – Model Calculation' <http://www.european-patent-office.org/epo/new/cost_analysis_2005_en.pdf>, viewed on 2 May 2009.

¹²² USPTO, Performance and Accountability Report Fiscal Year 2007 – Other Accompanying Information: Table 4: Patent Pendency Statistics <http://www.uspto.gov/web/offices/com/annual/2007/50304_table4.html> viewed on 6 May 2009.

¹²³ EPO, The Patent Process: Examination Work <<http://www.epo.org/about-us/office/annual-reports/2008/business-report/patent-process.html#pru>> viewed on 6 May 2009.

¹²⁴ C-434/85 *Allen and Hansbury's Ltd v Generics UK Ltd and Gist-Brocades NV and others and the Comptroller-General of Patents* [1986] RPC 203.

¹²⁵ C-158/86 *Warner Brothers v Christiansen* [1988] ECR 2605.

goods in the EEC Treaty. The creator's rights to control the distribution of her work entitled her to deny the renting-out of the video-cassettes in question even if this was claimed to restrict the free movement of goods. These cases imply that the copyright holders are guaranteed their rights no matter the circumstances, whereas patent holders may have their rights restricted due to other legislation, such as the free movement of goods.

7 Conclusion

In the case study, the client DataComp was uncertain of what rights it had in terms of the copyright to the computer software it acquired and the right to the database that was later created by the software. The current legislation that controls database rights and computer software right can be found in national legislation as well as in the Computer Program and Database Directives.

The main issue in relation to database rights is determining who has made a substantial investment in the database, which is often the one who has taken the initiative or taken the risk of investing time, money or human resources. As the rules concerning databases are relatively clear and pose few questions, the conclusion to be drawn is that the system with *sui generis* database rights is functioning properly and needs no adjustment. The database right in the case study belongs to DataComp who has taken the risk of investing, compared to ITS who has invested in human resources, but has taken no risk at all since the company will be financially compensated for the invested time and knowledge no matter the usefulness of the database.

The proposal of a Software Patent Directive indicates that something is lacking in the current legislation and that there is a wider demand of more intellectual property protection for, among others, IT consulting companies. Reverse engineering and decompilation of computer programmes is illegal when the information is used in any other way than when assuring the compatibility with other software. The problem is the evidentiary aspect of copyright in IT. Since there is no registration of copyrighted material, computer programmes are vulnerable to having core information extracted and reused in other software. Patents, on the other hand, are straightforward in the sense that if another programme functions within the claims of the patent application, then that programme has infringed the patent rights. However, since there are many downsides with patents, such as the cost and time consumption of the application process, patents is not an advisable approach in increasing the protection for consulting companies. Although IT copyright has flaws which need to be worked out, there is no other system at the present time that would provide better protection as well as maintaining the efficiency of copyright. Even though it may stump the evolution of IT, the solution may be for the consulting companies to ensure the compatibility of the programme themselves, and to keep the source code as secret as possible.

References

Legislation

Treaties

Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakech 15 April 1994 (TRIPS)

Consolidated Version of the Treaty Establishing the European Community, Official Journal C321E of 29 December 2006 (EC-Treaty)

Conventions

Vienna Convention on the Law of Treaties, Vienna 23 May 1969

Convention on the Grant of European Patents, 5 October 1973 (EPC)

The Berne Convention of Literary and Artistic Works, as amended on 28 September 1979

Regulations

Council Regulation No 1167/2008 amending and updating Regulation No 1334/2000 setting up a Community regime for the control of exports of dual-use items and technology, 24 October 2008

Directives

Directive 91/250/EEC of the European Parliament and the Council of 14 May 1991 on the Legal Protection of Computer Programs

Directive 96/9/EC of the European Parliament and the Council of 11 March 1996 on the Legal Protection of Databases

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights

National legal acts

Sweden

Swedish Contract Act (Lag om avtal och andra rättshandlingar på förmögenhetsrättens område, SFS 1915:218).

Swedish Act on Copyright in Literary and Artistic Works (Lag om upphovsrätt till konstnärliga verk, SFS 1960:729)

Swedish Patent Act (Patentlag, SFS 1967:837)

Swedish Constitutional Law (Regeringsformen, SFS 1974:152)

Swedish Tax Assessment Act (Taxeringslagen, SFS 1990:324)

Swedish International Copyright Act (Internationell Upphovsrättsförordning, SFS 1994:193)

Swedish Tax Payment Act (Skattebetalningslagen, SFS 1997:843)

Swedish Income Tax Act (Inkomstskattelagen, SFS 1999:1229)

Other

The U.S.C.A., (US)

The UK Copyright Act of 1709, (UK)

Lov 1961-05-12 nr 02: *Lov om opphavsrett til åndsverk m.v.*, (N)

Copyright Designs and Patents Act 1988, (UK)

Lbk. nr. 763 af 30. juni 2006: *Bekendtgørelse af lov om ophavsret*, (DK)

Preparatory acts

Proposition 1960:17 om ändring i lagen om upphovsrätt till litterära och konstnärliga verk

SOU 1956:25

Case law

European

C-14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR I-1891

C-434/85 *Allen and Hansbury's Ltd v Generis UK Ltd and Gist-Brocades NV and others and the Comptroller-General of Patents* [1986] RPC 203

C-158/86 *Warner Brothers v Christiansen* [1988] ECR 2605

C-46/02 *Fixtures Marketing Ltd v Oy Veikkaus AB* [2004] ECR I-10365

C-203/02 *British Horse Racing Board v William Hill Organization Ltd* [2004] ECR I-10415

C-338/02 *Fixtures Marketing Ltd v Svenska Spel AB* [2004] ECR I-10497

C-444/02 *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podofairou* [2004] ECR I-10549

T-201/04 R, *Microsoft Corp. v Commission of the European Communities* [2007]

C-545/07 *Apis-Hristovich EOOD v Lakorda AD*, 15 January 2009

National Cases

Swedish

NJA 1985 s 813

NJA 1995 s. 256

Other

Baker v. Selden 101 US 99 (1879) (US)

University of London Press v University Tutorial Press [1916] 2 Ch 601 (UK)

Nichols v. Universal Pictures Corporation 45 F.2d 119 (2d Cir. 1930) (US)

Whelan Assoc. Inc. v Jason Dental Lab. Inc. 797 F.2d 1222 (3d cir. 1986) (US)

Cantor Fitzgerald International v Tradition UK Ltd [2000] RPC 95 (UK)

Sweeny v Macmillan Publishers Ltd [2002] RPC 35 (UK)

CCH Canadian Ltd v Law Society of Upper Canada [2002] 4 FC 213 (CA)

Coffey v Warner [2005] FSR 34 (UK)

Literature

Books

Denham-Steuart, *An Inquiry into the Principles of Political Economy*, (Millar and Cadell, the Strand 1767)

Joyce, *Ulysses* (Shakespeare and Company, (Paris 1922)

Levin and Koktvedgaard, *Lärobok i Immaterialrätt* (Nordsteds Juridik, Stockholm 2007)

MacQueen, Waelde and Laurie, *Contemporary Intellectual Property: Law and Policy* (Oxford University Press, Oxford 2008)

Sterne, *The Life and Opinions of Tristram Shandy, Gentleman*, (1st edn R. and J. Dodsley, London 1761) Vol 3

Articles

The Pew Global Attitudes Project, 'World Public's Welcome Global Trade – But Not Immigration, 47: *Nation Pew Global Attitudes Survey*' (2007)

Derclaye, 'Database *Sui Generis* Right: The Need to Take the Public's Right to Information and Freedom of Expression into Account', *New Directions in Copyright Law, Volume 5* (University of London, 2007)

Drassinower, 'A Rights Based View of the Idea/Expression Dichotomy in Copyright Law' *Canadian Journal of Law and Jurisprudence*, Vol. 16, January 2003

Ehrlich, 'Fair Use or Foul Play? The EC Directive on the Legal Protection of Computer Programs and its Impact on Reverse Engineering', 13 *Pace Law Review* 1003 (1994)

James D Herbsleb and Deependra Moitra, 'Global Software Development', *IEEE* Volume 18 Issue 2 (2001)

Karnell, 'The European Sui Generis Protection of Data Bases: Nordic and U.K. Law Approaching the Court of the European Communities – Some Comparative Reflections', *Journal of the Copyright Society of the USA* (2002)

Silvestro, 'Towards EC Harmonisation of the Term of Protection of Copyright and So-Called "Related" Rights', *Entertainment Law Review* 1993

Thakur, 'Database Protection in the European Union and the United States: The European Database Directive as an Optimum Global Model?' *Intellectual Property Quarterly* (Sweet & Maxwell, 2001)

Internet articles

Insurance IP Bulletin, < <http://www.bakosenterprises.com/IP/B-10152005/prior-issue-links.html>>, 2009-04-30

Reports

The European Patent Office, 'The cost of a sample European patent - new estimates: Cost of a European Patent (Euro-direct) – Model Calculation' <http://www.european-patent-office.org/epo/new/cost_analysis_2005_en.pdf>, 2009-05-02

The European Patent Office, 'The Patent Process: Examination Work' <<http://www.epo.org/about-us/office/annual-reports/2008/business-report/patent-process.html#pru>> 2009-05-06

The Ministry of Justice 'Copyright: A brief overview of the Swedish copyright system', (Edita, Stockholm 2005) ISBN 91-38-315572

United States Patent and Trademark Office, Performance and Accountability Report Fiscal Year 2007 – Other Accompanying Informaion: Table 4: Patent Pendency Statistics <http://www.uspto.gov/web/offices/com/annual/2007/50304_table4.html> 2009-05-06

John C Gordon and Helen Beilby-Orrin, 'International Measurement of the Economic and Social Importance of Culture' (OECD Report, Statistics Directorate of the OECD 2006)

Other sources

Interview with Jörgen Sandström, Project Manager, Trodon AB, (Gothenburg 28 September 2008)

Internet sources

Europa, 'Europeans are living longer' Statistics for life expectancy in the EU 1972 compared to 2004 <http://europa.eu/abc/keyfigures/sizeandpopulation/older/index_en.htm>, 2009-03-18

Central Intelligence Agency, 'The World Factbook: European Union' Statistics for life expectancy in 2008 <<https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html#People>>, 2009-03-18

Oxford Dictionaries: AskOxford.com, <www.askoxford.com>

WordWeb Online, <www.wordwebonline.com>

Appendices

Appendix 1

AVTAL OM KONSULTTJÄNSTER

Detta avtal har träffats [datum] mellan följande parter.

PARTER

- (1) [Namn på konsulten], [org.nr], [adress], faxnr: [nr], e-post: [adress] ("Konsulten")
- (2) [Namn på köparen], [org.nr/personnr], [adress], faxnr: [nr], e-post: [adress] ("Köparen")

BAKGRUND

Konsulten har en gedigen bakgrund rörande []. Köparen har behov av sådana tjänster.

Köparen och Konsulten har enats om att Konsulten skall biträda Köparen i frågor inom ovannämnda områden på sätt som framgår av detta avtal.

Uppdrag

Konsulten skall tillhandahålla Konsulter för att utföra [] för Köparen i enlighet med uppdragsspecifikationen, Bilaga 1.

I förhållande till Köparen är Konsulten och Konsulterna självständiga uppdragstagare. Konsulterna skall aldrig utge sig för att vara ställföreträdare för eller anställda hos Köparen.

Uppdragsperiod

Avtalet löper från och med den [] till den [] om inte avtalet sagts upp dessförinnan i enlighet med punkten 7 nedan.

Omfattning

Konsulten skall tillhandahålla Konsulterna i den omfattning som anges i uppdragsspecifikationen, Bilaga 1.

Konsulterna skall inte ta annat arbete eller andra konsultuppdrag under avtalstiden. Förutsatt att Konsulterna inte på något sätt blir inblandade i något annat företags, annan organisations eller annan persons verksamhet som konkurrerar med Köparens aktiviteter eller som skulle kunna ha en skadlig effekt på Köparens affärer, är Konsulten dock fri att ta andra konsultuppdrag.

Betalning

Under avtalstiden skall Köparen betala Konsulten ett arvode för Konsulterna i enlighet med Bilaga 2.

Konsulten ansvarar fullt ut för betalning av skatter, försäkringar och andra avgifter som belöper på utbetalningar från Köparen och som avser Konsulterna. Konsulten skall dessutom tillse att Köparen hålls skadelöst såvitt avser sådana ersättningskrav som kan uppkomma med anledning av utbetalningar från Köparen.

Sekretess

Konsulten och Konsulterna skall varken under sitt uppdrag under detta avtal (om det inte krävs för att kunna utföra de åtaganden som följer av avtalet) eller senare efter avtalets upphörande (utan tidsbegränsning), i vilket sammanhang frågan än uppkommer, direkt eller indirekt för egen eller annan persons, annat företags eller annan organisations räkning använda, eller till någon person, företag eller annan organisation, avslöja

någon Köparen tillhörig affärshemlighet eller annan konfidentiell information som har samband med Köparen.

Konsulten ansvarar för att alla eventuella handlingar eller andra uppgifter hänförliga till Köparens verksamhet bevaras enligt Köparens anvisningar och återlämnas till Köparen efter uppdragets slutförande.

Utförande av uppdraget

Konsulten skall under detta avtal tillse att tjänsterna i görligaste mån utförs av Konsulterna personligen och kan inte överlåta eller utse någon annan person, annat företag eller annan organisation för tjänsternas utförande utan skriftligt medgivande från Köparen.

Uppsägning

Köparen har rätt att säga upp detta avtal med omedelbar effekt om Konsulten eller Konsulterna:

- (i) gör sig skyldiga till ett väsentligt brott mot någon av bestämmelserna i detta avtal;
- (ii) försummar eller vägrar utföra tjänsterna; eller
- (iii) agerar på något sätt som väsentligt skadar Köparens intressen eller något till Köparen knutet företag.

I händelse av strejk, lockout, krig, eldsvåda, olyckshändelse eller andra händelser utanför parternas kontroll som leder till att uppdraget förhindras, har parterna rätt att förlänga detta avtal i skälig omfattning. Part som gör gällande rätt till sådan förlängning, skall meddela den andra parten senast [7] dagar efter att den händelse, som berättigar till förlängning, har inträffat.

Övrigt

Detta avtal regleras av svensk lag. Tvister med anledning av detta avtal skall avgöras av allmän domstol.

Detta avtal har upprättats i två originalexemplar varav parterna har tagit var sitt.

FÖR [KONSULTEN]

Underskrift:

Textat namn:

FÖR [KÖPAREN]

Underskrift:

Textat namn:

Ovanstående egenhändiga namnteckning bevitnas

Som ovan

Som ovan

Namnförtydligande:

Namnförtydligande:

Appendix 2

AVTAL OM KONSULTTJÄNSTER

- UTVECKLING -

Detta avtal har träffats [datum] mellan följande parter:

PARTER

- (1) [Namn på konsulten], [org.nr], [adress], faxnr: [nr], e-post: [adress] ("Konsulten")
- (2) [Namn på beställaren], [org.nr/personnr], [adress], faxnr: [nr], e-post: [adress] ("Beställaren")

1. Definitioner

Arbete: Såväl arbetsprestation – inklusive utredning och projektering – som därvid använda hjälpmedel, material och varor.

Kontraktssumman: Överenskommen ersättning för utförande av kontraktarbetena, exklusive mervärdesskatt, angiven i Bilaga 1.

Kontraktarbetena: De arbeten som enligt detta avtal ingår i Konsultens åtagande.

Produkten: Det resultat av uppdraget som är beskrivet i Uppdragsbeskrivningen.

Produktspecifikation: Den specifikation av Produkten som Konsulten skall ta fram enligt detta avtal.

Tidplan: Överenskommen tidplan för Kontraktarbetena; se Bilaga 2.

Uppdragsbeskrivning: Det underlag som utvisar de funktionella och andra krav som Beställaren ställer på Produkten; Uppdragsbeskrivningen är bilagd som Bilaga 3.

2. Konsultens allmänna förpliktelser

- 2.1 Konsulten skall vara ekonomiskt oberoende av leverantörer och andra som kan påverka hans objektivitet. Om uppdraget innebär att Konsulten erhåller ersättning i någon form från annan än Beställaren eller om uppdraget kan komma att beröra företag, annat uppdrag eller ärende i vilket Konsulten har egna eller har att tillvarata andras intressen skall Beställaren omedelbart underrättas härom.
- 2.2 Uppdraget skall utföras enligt från tid till annan gällande och på uppdraget tillämpliga lagar och förordningar. Ändringar i lagar m.m. efter avtalets ikraftträdande, som väsentligt påverkar uppdragets utförande, skall medföra rätt till justering av arvode enligt nedan.
- 2.3 Såvida annat inte är avtalat skall Konsulten – i tillämpliga delar – uppfylla krav enligt kvalitetssystem ISO 9000. Beställaren har rätt att genom auktoriserad revisor eller annan person med erforderlig kompetens och yrkesansvar ta del av och undersöka av Konsulten tillämpade policies, instruktioner, säkerhetsrutiner och dylikt.

3. Kontraktshandlingarna m.m.

Uppdraget bestäms och regleras av detta avtal. Avtalet ersätter alla eventuella tidigare överenskommelser mellan parterna beträffande uppdraget. Förekommer mot varandra stridande bestämmelser i avtalet gäller de, såvida omständigheterna uppenbarligen inte föranleder annan bedömning, sinsemellan i följande ordning:

- 01 Detta dokument
- 02 Bilagor till detta dokument
- 03 Ramkontrakt
- 04 Beställning

4. Uppdragets omfattning

- 4.1 Konsulten skall, baserat på Uppdragsbeskrivningen, ta fram en detaljerad skriftlig specifikation avseende Produkten och därefter utveckla en produkt i enlighet med Produktspecifikationen. Såvida annat inte är avtalat ingår i Konsultens uppdrag att utarbeta användardokumentation för Produkten i minst en uppsättning. Användardokumentationen skall, såvida annat inte har avtalats, vara på engelska. Konsulten svarar vidare för allt annat som erfordras för uppdragets genomförande i enlighet med detta avtal.
- 4.2 Konsulten svarar för att uppdraget genomförs på ett fackmässigt och professionellt sätt med iakttagande av god sedvänja inom branschen samt åtar sig att tillhandahålla de resurser och den kompetens som erfordras härför. Konsulten svarar för och bekostar den utrustning som behövs för uppdraget. Konsulten är skyldig att ta de initiativ som kan behövas för att erhålla erforderliga kunskaper och förståelse för uppdraget och dess fullgörande. I Konsultens uppdrag ingår även att inhämta eller uppmärksamma Beställaren på att Beställaren bör inhämta de yttranden, begära de godkännanden eller tillstånd samt göra de anmälningar som erfordras för uppdragets genomförande.
- 4.3 Det åligger Beställaren att till Konsulten lämna det underlag och den medverkan i övrigt som erfordras för uppdragets genomförande.
- 4.4 Konsulten är skyldig att på Beställarens begäran medverka vid såväl Beställarens interna som externa information och utbildning avseende uppdraget.

5. Uppdragets genomförande

- 5.1 Konsulten skall påbörja uppdraget med att, baserat på Uppdragsbeskrivningen, ta fram Produktspecifikationen för godkännande enligt nedan. Såvida annat inte har avtalats får Konsulten inte påbörja arbetet med att ta fram Produkten innan godkännande av Produktspecifikationen föreligger enligt nedan.
- 5.2 Beställaren och Konsulten skall, inom ramen för överenskommen projektorganisation, utse ansvariga projektledare. Konsultens projektledare skall ansvara för den dagliga ledningen av uppdraget och vara behörig att på Konsultens vägnar ta emot meddelanden och information om uppdraget. Beställarens projektledare skall företräda Beställaren gentemot Konsulten och samverka med dennes projektledare.
- Varken Konsultens eller Beställarens projektledare har behörighet att göra några ändringar i avtalet.
- 5.3 Part som önskar göra ändring i sin projektorganisation skall meddela motparten i god tid innan ändring sker. Ny person i projektorganisationen skall ha motsvarande erfarenhet och kvalifikationer som den föregående.
- 5.4 Konsulten är skyldig att utan dröjsmål skriftligen till Beställaren anmäla behov av arbete som inte ingår i uppdraget eller behov av nya eller ändring av direktiv. Beställarens godkännande skall föreligga innan åtgärd vidtas.
- 5.5 Konsulten får inte av annan än Beställaren mottaga eller inhämta direktiv för uppdragets genomförande. Beställaren är ansvarig för samordningen av uppdraget med andra aktiviteter inom Beställarens organisation.
- 5.6 Konsulten skall, då uppdraget är indelat i etapper, inhämta Beställarens godkännande innan arbete med ny etapp påbörjas.
- 5.7 Tillägg, godkännanden eller underrättelser skall framföras skriftligt eller genom anteckning i protokoll eller motsvarande handling.

6. Godkännande av Produktspecifikation

- 6.1 Konsulten skall inom den tid som framgår av överenskommen Tidplan tillstålla Beställaren Produktspecifikation för godkännande.
- 6.2 Eventuella anmärkningar mot Produktspecifikationen skall framställas senast 30 dagar efter mottagandet. Har anmärkningar inom denna tid inte gjorts anses Produktspecifikationen vara godkänd.
- 6.3 Har Produktspecifikationen inte godkänts enligt ovan och kan parterna inte komma överens om en godkänd Produktspecifikation får respektive part säga upp avtalet till omedelbart upphörande, varvid Konsulten har rätt till överenskommen eller annan skäligen ersättning för arbetet med Produktspecifikationen.

7. Tidplan och tidsförlängning

- 7.1 Konsulten skall utföra uppdraget enligt överenskommen Tidplan.
- 7.2 Uppgifter, undersökningsmaterial, handlingar och dylikt som Beställaren skall tillhandahålla enligt detta avtal skall tillställas Konsulten enligt härför upprättad Tidplan. Om Tidplan är ofullständig skall Konsulten i god tid meddela när uppgift m.m. erfordras.
- 7.3 Konsulten har rätt till erforderlig tidsförlängning om Konsulten försenas eller hindras att fullfölja uppdraget på grund av förhållande som Konsulten inte vållat genom fel eller försummelse och som han inte kunnat förutse och vars inverkan han inte rimligen kunnat undanröja.
- 7.4 Part skall utan dröjsmål underrätta motparten sedan han fått kännedom om förhållande som kan medföra ändring av Tidplanen för uppdragets genomförande. Konsulten skall utan dröjsmål efter det att han kunnat beräkna erforderlig tidsförlängning underrätta Beställaren om denna. Parterna skall söka överenskomma om den tidsförlängning vartill Konsulten kan anses berättigad.
- 7.5 Är Konsulten berättigad till tidsförlängning enligt ovan har han rätt till ersättning för uppkomna merkostnader.

8. Leveransdagar och acceptansprov

- 8.1 Avtalad leveransdag är den dag enligt Tidplanen då Produkten skall uppfylla Produktspecifikationen. Detta skall ha kunnat kontrolleras av Beställaren under en acceptanskontrollperiod omfattande, om annat inte särskilt framgår av Tidplanen, 30 dagar före avtalad leveransdag. Konsulten har rätt att närvara vid sådan kontroll som, om konsulten begär, skall genomföras av en därtill lämpad tredje man som Beställaren skall utse. Motsvarande skall i förekommande fall tillämpas för kontroll att milstolpe i Tidplanen har uppnåtts.
- 8.2 Testprotokoll över acceptanskontrollen liksom över kontrollen av att milstolpar har uppnåtts skall upprättas av Beställaren och tillställas konsulten senast tre veckor efter slutförd acceptanskontroll. Om Beställaren och konsulten har träffat överenskommelse om testspecifikation för slutleverans respektive för milstolparna skall godkännande anses föreligga vid uppfyllelse av krav enligt testspecifikationerna.
- 8.3 Effektiv leveransdag är den dag
- Produkten godkänts av Beställaren eller
 - då acceptanskontrollperioden upphör utan att Beställaren gjort befogad anmärkning mot Produkten eller
 - Produkten uppfyller Produktspecifikationen eller i förekommande fall testspecifikationen efter det att konsulten har avhjälp av Beställaren befogad anmärkning mot Produkten. Motsvarande skall i förekommande fall gälla för uppfyllande av milstolpe.
- 8.4 Avvikelser från Produktspecifikationen som inte har betydelse för Produktens avsedda användning och som inte innebär olägenhet för Beställaren skall inte påverka fastställandet av effektiv leveransdag. Produkten skall trots sådan avvikelse anses uppfylla Produktspecifikationen.
- 8.5 Under acceptanskontrollperioden får Beställaren på egen risk använda Produkten för avsett ändamål.
- 8.6 Konsultens ansvar efter effektiv leveransdag för avvikelser från Produktspecifikationen framgår nedan.

9. Anlitande av underkonsult

Om Konsulten önskar anlita underkonsult som rådgivare eller för att genomföra viss del av uppdraget skall Beställarens godkännande inhämtas innan åtgärd vidtas, såvida det inte är **fråga om arbetsuppgift av rutinmässig art eller mindre betydelse**.

10. Säkerhet, sekretess

- 10.1 Konsulten åtar sig att följa Beställarens vid var tid gällande säkerhetsföreskrifter och eventuella lokala föreskrifter. Om ändring i säkerhetsföreskrifter skulle ske efter avtalets ingående och detta väsentligt försvårar uppdragets utförande, är Konsulten berättigad till ersättning för den merkostnad som ändringen medför.

- 10.2 Konsulten får inte utan Beställarens godkännande i sin verksamhet nyttja eller till tredje man lämna ut handlingar eller på annat sätt återge eller röja uppgift som utgör Beställarens företagshemlighet, t.ex. interna affärs- eller driftsförhållanden och teknisk ”know-how”, i annan utsträckning än vad som erfordras för uppdragets utförande eller vad som eventuellt följer av lag. Konsulten skall genom tystnadsförbindelse eller genom andra lämpliga åtgärder tillse att sekretess iakttas av anställda och underkonsulter. Sekretess gäller dock inte för sådan information som Konsulten kan visa har blivit känd för Konsulten på annat sätt än genom uppdraget eller som är allmänt känd. Den sekretess som skall iakttas enligt denna bestämmelse gäller även om avtalet i övrigt skulle upphöra att gälla.

11. Ansvar

- 11.1 Konsulten är skyldig att avhjälpa fel i Produkten som består i att den inte uppfyller Produktspecifikationen. Konsultens ansvar omfattar inte fel som är utan betydelse för Produktens avsedda användning.
- 11.2 Konsultens ansvar för att avhjälpa fel omfattar inte a) fel förorsakade genom Beställarens användning av Produkten med annan än av Konsulten föreskriven utrustning eller tillbehör på ett sätt som påverkar dess funktion, b) fel förorsakade genom av Beställaren företagna ändringar eller ingrepp i Produkten som inte skett i enlighet med Konsultens instruktioner eller c) fel förorsakade genom Beställarens användning av Produkten på ett annat sätt än som framgår av Kundens dokumentation eller genom försummelse av Beställaren, dess personal eller en tredjeman eller genom andra omständigheter utom Konsultens kontroll.
- 11.3 Avhjälpande av fel sker genom rättelse eller genom anvisning av kringgående av felet. Konsulten ansvarar endast för fel som påtalas inom tolv månader från effektiv leveransdag.
- 11.4 Om Konsulten inte avhjälpel fel med den skyndsamhet som omständigheterna kräver får Beställaren skriftligen ge Konsulten en slutlig och skälig frist för avhjälpande. Är inte felet avhjälpel när fristen går ut har Beställaren rätt till sådant avdrag på ersättningen för utveckling av Produkten som svarar mot felet.
- 11.5 Konsultens skadeståndsansvar omfattar endast ersättning för s.k. direkt förlust. Det omfattar således inte s.k. indirekt förlust. Konsultens ansvar omfattar heller inte skada som beror på Beställaren, t.ex. att Beställaren har lämnat felaktiga förutsättningar eller uppgifter eller utan Konsultens godkännande ändrat i av Konsulten tillhandahållna programvaror.
- 11.6 Vid försening gäller bestämmelserna. Ansvarsbegränsningarna i denna punkt, med undantag för vad som följer av punkt 11.4, och i punkt 12, gäller såvida inte uppsåt eller grov vårdslöshet föreligger.
- 11.7 Konsultens sammanlagda skadeståndsskyldighet till följd av uppdraget är begränsat till 50 procent av kontraktssumman eller, om fast pris inte har avtalats och såvida annat inte följer av avtalet, 3 000 000 kronor. Denna begränsning gäller inte vid personskada, då ansvaret skall bedömas enligt allmän lag.
- 11.8 Beställarens godkännande av Konsultens förslag, åtgärder eller handlingar befriar inte Konsulten från ansvar för sådana fel som varken har eller bort ha upptäckts av Beställaren.
- 11.9 Konsultens ansvar för fel är begränsat till det ovan sagda såvida inte uppsåt eller grov vårdslöshet föreligger.

12. Försening

- 12.1 Försening föreligger när effektiv leveransdag för Produkten och, i förekommande fall, för milstolpe inträder efter avtalad leveransdag. Vid försening av hela eller viss del av uppdraget utgår vite. Såvida annat inte är avtalat, utgår vite med 0,5 procent av kontraktssumman per påbörjad förseningsvecka alternativt, vid försening i förhållande till milstolpe, med 0,5 procent av den del av kontraktssumman som Konsulten vid uppnåendet av milstolpen ifråga ägt lyfta, per påbörjad förseningsvecka. Om fast pris inte är avtalat och annat inte följer av avtalet, är vitet 100 000 kronor per påbörjad förseningsvecka. Beställaren är, utöver avtalat vite, inte berättigad till annat skadestånd på grund av försening, såvida inte uppsåt eller grov vårdslöshet föreligger.
- 12.2 Har Konsulten rätt till tidsförklängning är han i motsvarande mån befriad från skyldighet att erlägga vite.
- 12.3 Om vitesberättigande försening uppstått som en oundviklig följd av annan vitesberättigande försening skall endast högsta ifrågakommande vite utgå.

13. Rätt till dokumentation och resultat av uppdraget

- 13.1 Resultatet

Beställaren erhåller i och med framtagandet fullständig äganderätt till samtliga resultat av uppdraget, dock inte till vad som i särskild bilaga till avtalet förtecknats som standardprogramvara eller standardmodul.

13.2 Immateriella rättigheter

13.2.1 Äganderätt m.m.

Beställaren erhåller i och med framtagandet fullständig ägande- och förfoganderätt till samtliga Konsultens immateriella rättigheter, såsom t.ex. patenträtt, upphovsrätt, rätt till mönster, rätt till kretsmönster i halvledarprodukter, rätt till fotografisk bild, rätt till konstruktioner samt till metoder, vilka upp- och tillkommit eller införskaffats för Beställarens räkning i samband med utförande av uppdraget, dock inte till vad som i särskild bilaga till avtalet förtecknats som standardprogramvara eller standardmodul. För sistnämnda material erhåller dock Beställaren – såvida annat inte har avtalats – en tidsobegränsad, världsomfattande, icke exklusiv rätt att utan särskild ersättning nyttja materialet.

13.2.2 Biträde vid registrering m.m.

Konsulten förbinder sig att bistå Beställaren vid upprättande och undertecknande av sådana dokument som kan erfordras för att Beställaren skall kunna registreras som innehavare av patent, mönster eller annan immateriell rättighet. Konsulten skall tillse att Beställaren underrättas om immateriell rättighet, vilken bedöms vara registrerbar. Ersättning utgår för sådant biträde om uppdraget inte utförs till fast pris.

I fråga om uppfinning som tillkommit väsentligen såsom resultat av uppdraget för Beställarens räkning förbinder sig Konsulten att med sina anställda – eller i förekommande fall med annan personal som Konsulten anlitat för genomförandet av uppdraget – ha träffat sådana överenskommelser som krävs för att patent eller annan immateriell rättighet kan överföras till Beställaren utan annan ersättning än den som avtalats mellan parterna.

13.2.3 Ändringar och överlåtelse

Beställaren äger, utan Konsultens tillstånd, utföra ändringar i resultat av uppdraget samt även överlåta förvärvade rättigheter; Beställaren äger dock ej ändra ett verk eller en fotografisk bild så att upphovsmannen eller fotografens litterära eller konstnärliga anseende eller egenart kränks.

Konsulten förbinder sig tillse att upphovsmannen eller fotografen avstår från sin rättighet att anges som upphovsman eller att nämnas som källa samt dessutom att med sina anställda – eller i förekommande fall med annan personal som Konsulten anlitat för genomförandet av uppdraget – ha ingått sådan överenskommelse som krävs för att tillse att Beställaren kan erhålla de rättigheter som framgår av denna punkt.

14. Intrång

14.1 Konsulten garanterar att nyttjande av utvecklat, anskaffat eller tillhandahållet resultat av uppdrag inte innebär intrång i patent eller annan tredje man tillkommande immateriell rättighet. Konsulten skall hålla Beställaren skadeslös avseende anspråk från tredje man grundade på intrång i patent eller annan tredje man tillkommande immateriell rättighet. Beställaren skall snarast underrätta Konsulten om sådana anspråk framförs.

Befinnes ovan angivet intrång slutgiltigt föreligga eller om det är troligt att sådant intrång föreligger, skall Konsulten på egen risk och bekostnad endera tillförsäkra Beställaren rätt att använda resultatet, eller ersätta det med annat motsvarande, vars användning ej innebär intrång, eller ändra sådant resultat så att intrång inte föreligger.

14.2 För Konsultens ansvar enligt punkt 14.1 ovan gäller inte ansvarsbegränsningarna i punkt 12.

15. Ersättning

15.1 Konsultens ersättning består av arvode enligt Bilaga 4.

15.2 Vid ändring av uppdraget på grund av något av följande skäl skall arvodet justeras.

(i) Konsultens uppdrag utökas eller ändras och detta har meddelats Beställaren i enlighet med vad som anges i punkt 5 ovan.

(ii) Tidplanen förskjuts och detta beror på omständigheter som inte Konsulten är ansvarig för.

(iii) Oförutsedda händelser hänförliga till beslut eller åtgärder av myndigheter som i väsentlig grad ändrar förutsättningarna för uppdraget.

Arvodet justeras på basis av ett överenskommet eller annars skäligt timarvode.

16. Betalning

- 16.1 Konsulten äger rätt att uppbära dellikvid högst en gång per månad för den del av ersättningen som svarar mot värdet av beställt och redovisat arbete respektive, i förekommande fall, havda kostnader.
- 16.2 Betalning sker mot faktura. Av faktura skall framgå arten och omfattningen av det arbete som utförts jämte, i förekommande fall, havda kostnader under den tidsperiod som fakturan avser samt om fakturan avser dellikvid eller slutlikvid. Om ersättning begärs för rörligt arvode skall dessutom anges antalet arbetstimmar jämte timsättningen för var och en av de personer som har sysselsatts med uppdraget.
- 16.3 Faktura förfaller till betalning 30 dagar efter mottagandet.
- 16.4 Konsulten skall senast inom tre månader efter uppdragets slutförande, såvida inte annat anges i betalningsplan, till Beställaren översända faktura upptagande samtliga fordringar avseende uppdraget. Senare framställt krav medför inte annat än kvittningsvis rätt till ersättning.

17. Kontroll

Beställaren har rätt genom av Beställaren utsedd auktoriserad revisor eller annan person med motsvarande kompetens och yrkesansvar undersöka riktigheten av Konsultens fakturering. Om granskningen ger anledning till anmärkning som föranleder kreditering skall Konsulten svara för granskningskostnaden intill ett belopp motsvarande det krediterade.

18. Force Majeure

Part är fri från ansvar när förlust, skada eller försening orsakats av lagbud, krigshändelse, strejk (såväl avtalsenlig som avtalsstridig), lockout, blockad eller annan omständighet som part inte skäligen kunde förväntas ha räknat med och vars följder part inte heller skäligen kunde ha undvikit eller övervunnit. Om avtalets fullgörande till väsentlig del förhindras för längre tid än tre månader på grund av ovan angiven omständighet äger vardera parten, utan ersättningsskyldighet, skriftligen häva avtalet.

19. Avbeställning och hävning

- 19.1 Beställaren får avbeställa Konsultens uppdrag såvitt avser inte genomförda delar, varvid ersättning skall utgå för utfört arbete och styrkt nödvändig kostnad. Om avbeställningen sker av annan anledning än hävning enligt punkt 19.2 eller force majeure enligt punkt 18 skall Beställaren utöver ovan nämnda ersättning utge ersättning för eventuell visad förlust som åsamkas Konsulten på grund av avbeställningen.
- 19.2 Beställaren får med omedelbar verkan häva uppdraget såvitt avser återstående delar om Konsulten brutit mot avtalet eller på annat sätt misskött uppdraget och detta avtalsbrott är av väsentlig betydelse eller om Konsulten är på obestånd. Konsulten skall därvid erhålla ersättning endast i den mån resultatet har däremot svarande värde.
- 19.3 Konsulten äger med omedelbar verkan rätt att häva uppdraget såvitt avser återstående delar om Beställaren inte fullgör sina skyldigheter eller om uppdraget väsentligen ändras eller utökas och sådan omständighet är av väsentlig betydelse eller om Beställaren vidhåller begäran av innebörd att Konsulten skall efterge kraven på god yrkessed, eller Beställaren är på obestånd.
- 19.4 Då avtalet hävts enligt punkt 19.1 eller 19.3 ovan är Konsulten skyldig att senast då betalning erlagts redovisa och överlämna resultatet av utfört arbete. Då avtalet hävts enligt punkt 19.2 föreligger denna skyldighet omedelbart efter det att hävning skett.

Beställaren har rätt att utnyttja arbetsresultatet som om uppdraget fullföljts.

20. Försäkringar och säkerhet

- 20.1 Hos Konsulten eventuellt förvarade handlingar, databärare och dylikt som tillhör Beställaren, skall förvaras på ett säkert sätt. Konsulten skall under uppdragstiden ha brand-, inbrotts- och vattenskadeförsäkring till betryggande belopp för sådan hos Konsulten förvarad egendom.

20.2 Konsulten skall under ansvarstiden ha gällande ansvarsförsäkring, omfattande utökat skydd med ren förmögenhetsskada vid konsultverksamhet, till betryggande belopp som säkerhet för fullgörandet av skadeståndsskyldighet enligt gällande rätt och dessa allmänna bestämmelser. Konsulten skall på begäran av Beställaren tillställa denne försäkringsbrev eller annat bevis om att försäkringen gäller under ansvarstiden.

21. Överlåtelse, upplåtelse

Beställaren äger rätt att överlåta eller vidareupplåta rättigheter och skyldigheter enligt detta avtal till annat bolag inom den koncern som Beställaren tillhör.

22. Uppdrag för konkurrent

Anställd hos Konsult eller hos Konsult anlitad underkonsult som har arbetat med uppdraget äger rätt att utföra arbete för konkurrent till Beställaren tidigast ett år från att ifrågavarande person upphörde att arbeta med uppdraget.

23. Tillämplig lag

Detta Avtal skall tolkas och tillämpas enligt svensk materiell rätt.

24. Tvist

Tvist angående tolkningen eller tillämpningen av detta avtal skall slutligt avgöras genom skiljedom enligt reglerna för Stockholms Handelskammars Skiljedomsinstitut. Därvid skall reglerna för förenklat förfarande tillämpas såvida inte institutet finner att tvisten, med hänsyn till belopp, art, omfång, svårighetsgrad eller andra omständigheter, anser att detta är olämpligt. Om de förenklade reglerna inte skall tillämpas skall skiljenämnden bestå av en skiljeman om inte Stockholms Handelskammars Skiljedomsinstitut anser detta olämpligt av ovannämnda skäl.

Skiljeförfarandet skall äga rum i Stockholm.

Detta avtal har upprättats i två originalexemplar varav parterna har tagit var sitt.

FÖR [KONSULTEN]

Underskrift:

Textat namn:

FÖR [KÖPAREN]

Underskrift:

Textat namn:

Ovanstående egenhändiga namnteckning bevitnas

Som ovan

Som ovan

Namnförtydligande:

Namnförtydligande: