The Legal Position of Correspondence from a Copyright Perspective
With Particular Focus on the Moment of Publication

Master’s thesis within Commercial Law (Intellectual Property Law)
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Jönköping December 2010
Abstract
Correspondence is written forms of communications, for example, SMS, E-mail, or letters, and when something is written, it may constitute a literary work protected by copyright. As there is no formal procedure for acquiring copyright, it is not always easy to determine when it exists and therefore know how to impose common rules.

In Sweden, the moment of publication of a literary work is when an author makes his work available to the public. This occurs when a work is presented publicly, displayed publicly, or when copies are distributed to the public. This moment is imperative due to the legal effects that enter into force when a work is published. Until the point in time when a work is published, an author has absolute rights to his work, meaning that it is not possible to use a work legally without the author’s consent.

As correspondence is a mean of communication, it is inherent in its nature to be transferred to someone else in order to fulfil its purpose. This means that an author has technically published his work the moment he sends it to someone else. However, arguments are raised in case law that a work cannot be published unless the author has intended it to be.

This thesis concludes that both assessments of when a work is published are in fact correct. The important aspect that has to be considered when assessing if a work is published or not, is the intended usage of the protected work. Consequently, one may use the results of this thesis either as an argument to apply unbiased provisions of law, in accordance to their wording, or to apply subjective assessments on a case-to-case basis, in order to find an optimal solution.
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Preface

I find copyright to be more fun and interesting than any other area of law I have yet encountered during my studies. Copyright is a very diverse subject. Large multinational companies as well as individuals can hold copyrights. The commercial value of copyrights may range from billions of dollars to nothing. Copyright is of international significance but is at the same time entirely a national right. This makes it hard to create rules that are applicable to all situations, covering all possible scenarios. It may be an impossible task to achieve, especially since copyright is a highly political area of law. However, this is in itself not a reason not to try. Critique needs to be aimed towards the areas where the legislation is unclear, or where no clear prejudice exists. This is one reason for why I picked this particular topic.

Another reason for why I selected this research topic is because the discussions we had in class, and in the seminars during the intellectual property law course at Jönköping International Business School (JIBS). The discussions often resulted in debate over the time when a work is made available to the public, what you are allowed to use, and what you are not allowed to use. Some of the questions was simply left ‘hanging there’, unanswered.

Therefore, this master’s thesis is an effort to investigate and clarify one uncertainty that seems to exist in Swedish copyright legislation. It is my hope that this thesis will help others understand how to protect their intellectual property. Hopefully this master’s thesis will help to provide answers that make this area of law a little bit clearer than it was before. Hopefully you who read this will gain a better knowledge of what you are allowed to use, and what you not are allowed to use. If this thesis helps to enlighten the understanding of copyright to any single one out there, it will have served its purpose.

Anders Saltin

December 8th 2010

Jönköping
Acknowledgements

First, I would like to thank LL.B. Solicitor and Doctorial candidate Edward Humphreys for his advice, criticism, and encouragement during the process of writing. I would also like to thank Linnea Theilkemeier, Johanna Bergström, and Rebecca Eriksson for their valuable contributions in form of feedback on my work. I will miss the discussions we had during our seminars.

Since this master thesis marks the end of my studies at JIBS, I would like to take this opportunity to say that I will always remember the time at JIBS with joy. When I now turn my attention away from studies towards new challenges, I will cherish the many happy memories from AR06 and all of my good friends I found there during my time in Jönköping.

Finally, I want to send a special thanks to my family for all the invaluable support over the years.

Thank you all!
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<thead>
<tr>
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<th>Description</th>
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<tbody>
<tr>
<td>Art.</td>
<td>Article</td>
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<tr>
<td>BC</td>
<td>Berne Convention of 1886, as revised in PARIS on July 24, 1971, and amended on September 28, 1979</td>
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<td>CDPA</td>
<td>Copyright, Designs and Patents Act 1988</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>edn</td>
<td>edition</td>
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<td>EU</td>
<td>European Union</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>JIBS</td>
<td>Jönköping International Business School</td>
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<td>MS</td>
<td>Member State</td>
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<td>NIR</td>
<td>Nordiskt Immateriellt Rättsskydd</td>
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<td>Prop.</td>
<td>Proposition</td>
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<td>SCA</td>
<td>Swedish Copyright Act, SFS 1960:729</td>
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<tr>
<td>SMS</td>
<td>Short Message Service</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>TRIPS</td>
<td>Agreement on Trade-Related aspects of Intellectual Property rights 1994</td>
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<tr>
<td>UCC</td>
<td>Universal Copyright Convention</td>
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<tr>
<td>UNESCO</td>
<td>United Nations Educational, Scientific, and Cultural Organization</td>
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<td>WCT</td>
<td>WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996</td>
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<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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1 Introduction

1.1 Background

The fact that most companies try to sell their products across borders makes it interesting and commercially relevant to identify, analyze, and explain differences in protection – in this case, the difference in how copyright applies to correspondence. Traditionally, ‘correspondence’ refers to communication between people by the exchange of letters. However, as the technological progress has brought new forms of worldwide communications the term has evolved. Today the word ‘correspondence’ also includes other kinds of communications, like E-mail or SMS. The common attribute between them is that all are of written character, and every time something is written, including any mean of correspondence, it may be a literary work protected by copyright.¹

In Sweden, the national legal provisions regarding copyright are contained in the Act on Copyright in Literary and Artistic Works² – the Swedish Copyright Act (SCA). According to the Swedish legislature, the moment of publication of a literary work is the moment when the author makes it available to the public. This occur when a work is presented publicly, displayed publicly, or when copies of the work are distributed to the public.³ When this happens, a work is considered to have been lawfully made available and it is considered as published.⁴

The moment a work is published is imperative due to the legal effects that enter into force the moment this occur.⁵ For example, it is from the moment of publication the term of copyright emanates, and it is only after a work has been published that it is possible to quote a work, make a copy for private use, or to be subject to legal seizure.⁶ Furthermore, and until the point in time when a work is published, an author has abso-

¹ For example, compare the BC, Art. 2, and the SCA, Art. 1, in regard to what may constitute a copyright protected work. Also, see section 3.4 regarding the criteria for copyright protection.

² The Act on Copyright in Literary and Artistic Works (Lagen om upphovsrätt till litterära och konstnärliga verk), Swedish Code of Statutes, SFS 1960:729, with a number of subsequent amendments.

³ SCA, Art. 2, section 3. Also, see section 4.2 regarding how a work is made available to the public.

⁴ SCA, Art. 8.

⁵ Compare for example the SCA, Art. 12, Art. 20, and Art. 42 e.

⁶ SCA, Art. 12, Art. 22, and Art. 42.
lute rights to his work, meaning that it is not possible to use a work legally without the author’s consent.\(^7\)

As correspondence is a mean of communication, it is inherent in its very nature to be transferred to someone else in order to fill its purpose. As the provisions in the law that regulate the time of publication, does not take into consideration the purpose behind a work; any mean of correspondence seems to fall within its scope. Therefore, by sending, for example, a letter, it should be considered as published. The consequences of this would be that an author’s sole right to the letter is subject to the limitations prescribed by law. Hence, only by sending a letter, the author would make it possible for others to use the content of the correspondence in accordance to law.

However, it seems to be an opinion of that a work cannot have been published unless the author intend it to be.\(^8\) This has come into expression in a ruling by the Swedish court of first instance. The ruling later entered in to legal force, without being appealed.\(^9\)

At first sight there seems to exist an abstraction in Swedish copyright law. This abstraction is expresses by a difference in between what is stated in the written law, and how the law is applied.

The uncertainty that appears to exist in Swedish legislation regarding how copyright is applicable to correspondence is relevant to examine out of two main reasons. Firstly, the scientific literature covering the legal area of copyright has not yet debated this problem in particular. Secondly, this constitutes a potential problem for someone outside the personal sphere of an author, if he or she wants to use, or publish a text that someone else has written.

As there is no formal procedure for acquiring copyright – it is not always easy to see when it exists and therefore how to impose common rules. How is it possible for a person to be aware of the existence of copyright in a work? Furthermore, is it so that even though a person has a letter in his possession, sent to him by the original author, he may nevertheless not be able to lawfully dispose of it, quote it, or sell it, as the author still

\(^7\) See section 4.1 regarding the right to make a work available to the public.

\(^8\) Compare Olsson, *Copyright* (8th edn, Norstedts Juridik 2009), p. 54; and T 7884-99.

\(^9\) T 7884-99.
possesses absolute right to the letter? Additionally, is a work considered as published still if the author does not want his work to be published, even if he already, technically, has published the letter by sending it to someone else?

1.2 Purpose
It has been suggested that there is a difference between what is stated in the written law and how the law is applied. This master’s thesis aims to clarify the legal position of correspondence in Sweden according to Swedish *de lege lata*\(^\text{10}\) from a copyright perspective. In order to answer the general purpose, this master’s thesis intends to answer the following questions:

i. How does copyright apply to correspondence?

ii. Concerning correspondence, when is a work considered as lawfully published?

1.3 Methodology and Material
The thesis is produced within the given framework in the course ‘Master Thesis in commercial and tax law’ given at Jönköping International Business School, autumn semester of 2010. The thesis is written primarily for the scholarly community. Therefore, an effort is made to put facts and analysis in a context that primary communicates to them.

The most logical choice of method, to achieve the descriptive parts of the thesis purpose, is to study legal sources of written character. The sources that are studied consist of international conventions, treaties, directives, legislature, case law, and scientific literature, all in which discussions has taken place regarding the developments of copyright. An essential part in achieving the purpose of this thesis is to examine and systemize the written data sources regarding copyright or copyright related aspects. The work of interpreting and systemizing the written data sources will allow the thesis to establish *de lege lata*. In the context, it refers to determine what the applicable law is, what its functions is, and how it does apply to correspondence.

An analysis of the presented material in the thesis is carried out gradually. However, a more conclusive analysis is also presented in a chapter of its own. The conclusions that

\(^{10}\) An explanation of the Latin phrase is given in Section 1.3 regarding the methodology used to produce this thesis.
Introduction

are presented in is based on the facts that are presented and analyzed. Both the analysis and the conclusions take into consideration the established legal hierarchy and framework that exists in Swedish law.

The systemization of the data sources is made in accordance with the acceptable jurisprudence science established by the Swedish academic society occupied within the legal field of expertise.\textsuperscript{11} This means that the material will be used in accordance with the legal hierarchal framework, i.e. this thesis uses the different sources of law according to their hierarchal framework in order to answers the set out purpose. For example, this thesis regards the written law as the primary source. If the answer cannot be found there, then explanations will be sought after in a source further down in the legal source hierarchy.

The international law and the SCA are intended to form the foundation of this thesis and are both considered as primary law. Furthermore, the preparatory work to the SCA is used to interpret the provision stated within the act. Case law is used as a supplement to the preparatory work. The scientific literature that is used in an assistive manner mainly to interpreted international conventions, the written law, and the preparatory work when it is needed.

To locate relevant material for the main body of this thesis, legal databases as well as scholarly databases was used. All material that was used in this thesis is obtainable through JIBS university library. The material and information must be considered as safe, secure and relevant due to its academic origin and nature.

When it comes to the selection of material, the international law that is presented has been selected because of its influence on Swedish copyright. This thesis compares the Swedish legislative acts on copyright, with the international legislative framework that surrounds them. The selection has been made with the aim to demonstrate the relation between national and international law. However, concerning the fact that the central focus of this master’s thesis is to investigate how copyright applies to correspondence in Sweden, the comparison will be used in a supporting manner. This means that the comparison of the SCA with the legislative framework will not be made in full. Only the

\textsuperscript{11} Bernitz, Heuman, Leijonhufvud, Seipel, Warnling-Nerrep, Vogel, \textit{Finna rätt: Juristens källmaterial och arbetstemoder} (11\textsuperscript{th} edn, Norstedts Juridik 2010), pp. 29-31.
Introduction

relevant provisions for this thesis purpose will be discussed. This applies to both the international framework and the Swedish legislative acts.

Regarding the methodology used to produce this thesis, and the way the source material is treated, one might say that this thesis administers a legal dogmatic method. To summarize the methodology; a descriptive method is used to present and produce facts, and a deductive method is used to conclude the analysis. The legal developments’ regarding copyright has been taken into consideration until November 2010.

1.4 Delimitations

In order to narrow the scope of this thesis and channel in the sea of copyright law, the analysis will be based on some assumptions. For starters, the objective of this thesis is to clarify in what way copyright applies to correspondence according to Swedish legislation. Therefore, the discussion takes its origin in Swedish law, not international law.

Furthermore, it is not the aim of this thesis to provide a full analysis and comparison of the SCA and the international framework. The international law that is presented is intended as a mean of assistance, to clarify, and to show parallels. Thus, it is intended as support rather than an exhaustive review.

Additionally, issues regarding enforcements and sanctions of copyright infringements will not be discussed in this thesis, as they only matter after copyright has been established. Instead, this thesis focuses on the questions if, how, when, and why copyright applies to correspondence.

1.5 Outline

Chapter one contains an introduction to the subject, as well as a background and purpose of this master’s thesis, which specifies why an analysis of the subject is important. The chapter also gives an outline of the thesis as well as a review of the method and material used to produce the thesis, as well as how it is possible to retrieve the necessary data to achieve the purpose of the thesis.

The second chapter discusses the legal framework of copyright. As copyright is both an international and national subject it is important to establish the legislative framework that surrounds Swedish copyright laws. The chapter presents an overview of the international laws that is influential in the area of copyright, and directly affects Swedish na-
tional law. The principles established through the international legislation have largely shaped the Swedish copyright laws that are applicable today. As is it essential to be aware of the international legislative acts surrounding national copyright laws, in order to understand the nature of copyright legislation, they are presented first in the thesis. The purpose of this chapter is to clarify the relation between international- and national law, as well as to establish the legislative framework.

Chapter three explain and define copyright on a general level, following the principles established by the regulatory framework as they are manifested in Swedish law. The intention of this chapter is to establish the subject, and object of copyright. The chapter also intends to show how copyright operates, i.e. to show what is protected by copyright law and what is not. The main features of the current copyright legislation are examined in order to be able to apply the provisions of the law to correspondence.

In the fourth chapter, the right of making a work available to the public is examined. As the particular focus is set on the moment of publication, it is imperative to examine the rules governing when a work is considered published. The purpose of this chapter is to examine how the time of publication of a work is decided, and to establish what facts to consider in the assessment if a work is published or not.

With the fundamental principles of copyright explained, chapter five examines how copyright applies to correspondence. The aim of this chapter is to provide the foundation from which the conclusions of this thesis are to be deducted. The paper closes with the conclusions of the results presented in the thesis in chapter six.
2 The Regulatory Framework of Copyright

2.1 The Development of Copyright Legislation

Historically, Sweden has – as most other countries – only offered copyright protection to works with an immediate connection to the nation, i.e. works which originated from national citizens. To extend copyright protection to include works from other countries, separate agreements built upon the basis of reciprocity was required. Today the national laws of copyright are framed by international treaties and conventions, but it was not always so. Originally, copyright was a national matter.\textsuperscript{12}

However, as the economic prospects grow larger alongside the technological progress, the interest of copyright grew. During the first half of the eighteenth century, when literary and artistic works became subject to trade, it soon became evident that international cooperation was required to solve issues that could not be handled solely on a national level.\textsuperscript{13} Examples of such issues where how to protect works from piracy in other countries, and how to ensure authors rights to their work abroad. Some sort of uniformity and approach of how to deal with copyrights across borders became necessary. To ensure this, various international conventions was drafted and agreed upon over time.

The development of the Swedish copyright legislation is closely connected to the international developments in the field. The international conventions, central to copyright, are the \textit{Berne Convention for the Protection of Literary and Artistic Works (BC)}, the \textit{Agreement on Trade-Related aspects of Intellectual Property rights (TRIPS)}, the \textit{World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)}, and the \textit{Universal Copyright Convention (UCC)}. Furthermore, as EU legislation has become a substantial part of every MS’ law hierarchy, EU legislative acts harmonizing the area of copyright is also an integral part of the legislative framework.\textsuperscript{14}

\textsuperscript{12} For the historical background of copyright compare amongst others, NJA II, 1961, p. 4; or Fredriksson, \textit{Skapandets rätt} (Daidalos 2009), chapter 3. For a historical review in English regarding the developments of copyright see, Davies, \textit{Copyright And The Public Interest} (2\textsuperscript{nd} edn, Sweet & Maxwell 2002), pp. 19-23.


\textsuperscript{14} The Court of Justice of the European Union (CJEU) have through a series of decisions made it clear the law of the EU should receive presidency over national laws in the MS’. Compare to Case, 6/64 \textit{Flaminio Costa v E.N.E.L.} [1964] ECR 585.
2.2 The Berne Convention

The BC was established in 1886, last revised 1971. The countries that have ratified the BC form a union for international protection of copyright. The union, which is established through the BC mainly, exists to harmonize protection given to authors and their works, but also to set common clarifications and limitations to copyright. The main features established through the convention where:

- The establishment of the principle of ‘national treatment’ between the signatory countries.
- The BC forces the signatories to implement a number of certain minimum standards of protection into national legislation.
- Through the BC, the creator and his rights are put in the centre of copyright.
- Through the BC, union members have a possibility to impose some exceptions and limitation to copyright into national legislation.

The principle of national treatment means that the national citizens of other members of the BC shall receive at least the same protection as the country’s own citizens. It is not a requirement that a work is protected in the country of origin. For example, Swedish law has to grant the same protection to authors from the UK as it does to Swedish authors. This, irrespective of the work is protected in the UK or not. A union member shall not discriminate between its own nationals and nationals of other members of the union formed by the BC.

The second important aspect of the BC is that it obligates members of the convention to establish minimum standards of protection into national copyright legislation. The purpose of this was to ascertain creators a unified level of protection regarding rights of

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15 BC, Art. 1.
17 BC, Art. 5, section 1.
18 BC, Art. 5, section 2.
19 In Swedish law, the principle of national treatment can be found in Art. 1 of the International Copyright Regulation, SFS 1994:193.
The Regulatory Framework of Copyright

how to they may dispose of their literary and artistic works. The BC does not demand an upper limit to what extent a union member entitles protection. Members of the BC have the possibility – but are not obliged to – increase the level of protection entitled through copyright.

The BC has put the creators and their rights, in the centre of copyright legislation. For example, in addition to economic rights, union members must also entitle creators morals rights. Another example is the prohibition against any registration requirements to obtain copyright. Copyright automatically exists in a work and is not dependant on any formal requirements or registration procedures.

However, the BC also enables the possibility of allowing exceptions and limitations of the author’s sole rights of reproducing a work protected by copyright. The BC permits members of the union to set limitations and exceptions of copyrights into their respective national legislation. These limits aim to enable reproduction of works without the copyright holder’s permission. The BC provides some guiding principles when it might be appropriate to make such an exception. However, it is the national legislator’s task to specify when exceptions are to be made.

The BC was originally mainly an European instrument of copyright harmonization but today the convention has gained wide international application – 164 countries in 2010

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21 For example, BC, Art. 8, Art. 9, Art. 11, and Art. 12.


23 BC, Art. 6bis.

24 BC, Art. 5, section 2.

25 BC, Art. 9.

26 For example, BC, Art. 9, section 2, Art. 10, Art. 10bis; also compare to, MacQueen, Waelde, Laurie, Contemporary Intellectual Property (Oxford University Press 2008), p. 37.

27 BC, Art. 9, section 2. These guidelines are known as the three-step test. For example, see Cornish, Llewelyn, Aplin, Intellectual Property (7th edn, Sweet & Maxwell 2010), p. 408; or Olsson, Copyright (8th edn, Norstedts Juridik 2009), p. 124; also, see section 3.7 for more information regarding the three-step test.
and is administered by WIPO. Sweden has been a member since the year 1904 and has ratified the latest changes.

2.3 The Universal Copyright Convention

The UCC was founded in 1952, initiated by UNESCO. The UCC was originally intended as an option for countries not willing to sign the BC. The purpose of the UCC is twofold. Firstly, its original intention was to make it possible for countries with rather crude and undeveloped IP laws to participate in the international cooperation of copyright as a legal field. Secondly, its purpose was to lessen the contrast between the American countries and the European countries in their view of which function copyright should play. UNESCO also administers the UCC and Sweden has been a member since the year of 1961.

The general view is that the UCC impose less stringent conditions on what types of works that are protected and to what extent works receive protection. For example, there are no provisions regarding moral rights and the term of protection is lesser in comparison to the BC. In regard of the contents of copyright protection, the UCC obligates its members to follow the principle of national treatment. The principle of national treatment is expressed in the same manner in the UCC, as in the BC. Furthermore, the


32 Compare NJA II 1961, pp. 5-6; and Olsson, Copyright (6th edn, Norstedts Juridik 2009), p. 327-328.


35 UCC, Art. 2.
UCC introduced, and imposed the use of the © symbol. In order to receive copyright protection under the UCC, a notice of claiming copyright must appear in a work. This notice should consist of the symbol ©, the name of the copyright owner, and the year of first publication in order to give a reasonable notice of claim of copyright in the work. This approach is opposite to the BC approach, which emphasises that copyrights should not be dependant of any requirements.

The relationship between these two conventions is regulated in the UCC as well. If a member of the UCC is also a member of the BC, and its obligations according to the two conventions clash, it follows from article 17 in the UCC that the BC has superiority. This makes a substantial part of the UCC largely irrelevant today as most its members have adapted there national legislation to the BC.

2.4 TRIPS

The TRIPS agreement was established and introduced in connection with the establishment of the WTO during the last of the GATT negotiations rounds – the Uruguay round. The agreement comprises all main areas of IP law and much of its content is based on the Berne, Paris, Rome, and Washington conventions. However, the TRIPS agreement supplements these conventions with additional obligations. The WTO is the organization who administer the agreement. Sweden has been a member of the WTO since 1995 and the TRIPS agreement has been in force since 1996.

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36 UCC, Art. 3, section 1.
37 UCC, Art. 3.
38 UCC, Art. 17.
39 Compare UCC, Art. 17; and Olsson, Copyright (8th edn, Norstedts Juridik 2009), p. 325.
42 While GATT mainly dealt with trade in goods, the WTO and its agreements cover a wider range of subjects, not just goods. For example, the WTO also handles questions regarding trade in services and IP. Compare Prop. 2004/05:110, p. 42; Prop. 1994/95:35, p. 1; and see WTO website, http://www.wto.org/english/thewto_e/countries_e/sweden_e.htm [Accessed 2010-11-18].
The general purpose of TRIPS is to establish a reasonable degree of protection to IP rights. This is achieved by setting certain minimum standards of protection, which each member of the WTO has to provide to fellow members. However, it was the general view of the negotiating parties that the BC already fulfilled this role in a sufficient way. Therefore, the copyright protection, given by the BC, is recognized and used as a foundation for the TRIPS agreement. The BC also has supremacy compared to the TRIPS agreement as nothing in TRIPS shall derogate from the BC. In this regard, TRIPS do not directly set its own standards of protection.

Instead, the TRIPS agreement itself focuses on broadening the application of the BC and clarifying certain aspects in the convention. For example, TRIPS article ten extends copyright protection to computer programs. They shall be protected as literary works. Another example is that TRIPS extends the range of the Three-step rule. According to TRIPS, it shall comprise all the exclusive rights and not only the reproduction right, as in the BC. TRIPS also oblige the members of the agreement to provide an effective system of enforcement of rights and remedies for failing to apply the established minimum standards of protection.

The TRIPS agreement is one of the reasons for the diminished importance of the UCC, as nearly all members of the UCC are either members, or aspiring members, of the WTO. As such members, a country is obligated to accommodate its national legislation according to the TRIPS agreement, and thus apply the principles established by the BC.

2.5 The WIPO Copyright Treaty

The WCT is a so-called special agreement under the BC. The primary aim of the WCT is to update the BC in certain aspects to keep copyright legislation up to date with society’s technological progress. Primarily the WCT is an attempt to solve any issues arising

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43 TRIPS, Art. 1.
44 The provisions regarding moral rights are excluded. TRIPS Art. 9; and Hannu Wagner, Verkningarna av TRIPS-avtalet på upphovsrätten och de närstående rättigheterna, NIR 1995, p. 384.
45 TRIPS, Art. 2, section 2.
46 Compare the BC Art. 9, section 2; and TRIPS, Art. 13.
47 TRIPS, Art. 62.
48 The WCT have no connection to any other of the international acts. Compare the WCT, Art. 1; and the BC Art. 20.
The Regulatory Framework of Copyright

ing from the collision between copyright, the IT area, and the development of the Internet.49

The WCT contains provisions regarding digital services and new ways of how to deal with the right of communication. The main effect of the provisions set down in the WCT, is that it increases the range of articles found in the BC. For example, when work is being communicated to the public, the WCT increase the range of article 14 BC to include uses that occur on demand, or are downloaded.50 Furthermore, the WCT clarifies that software and databases should be protected by the BC.51 The treaty also introduced two new aspects of the economic rights into the international framework, i.e. right of distribution, and the right of rental, rights that previously were not provided by the BC.52

As the WCT is a special agreement under the BC, nothing provided for in the WCT shall derogate from the BC.53 The WCT was adopted in 1996 and signed by Sweden 1997.54

2.6 EU Harmonization Efforts on Copyright

In contrast to other areas IP law within the EU, harmonization efforts regarding copyright have evolved rather slowly.55 The harmonization efforts on copyright can be traced back to the year 1988 and have from then proceeded slowly up to today.56 The main driving forces that have pushed the development for harmonization efforts within the

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50 Compare BC, Art. 14; and WCT, Art. 8.

51 WCT, Art. 4, and Art. 5.

52 WCT, Art. 6, and Art. 7.

53 WCT, Art. 1, section 2.


EU are the increasing value of copyrights, the development of new technology, and the differences in national protection. However, except in certain specified areas, there is still no unitary approach to copyrights protection within the union.

This lack of harmonization within the EU is in contrast to other areas of IP law, for example, trade marks and designs. In these areas the EU have achieved harmonizing by a common system on community level, supported by a parallel system harmonization the national laws in each MS. Unfortunately, this approach is not as easy to impose in the area of copyright.

There are a number of reasons for why copyright is not as an easy area to harmonize. One reason is that, unlike trade marks and designs, copyrights automatically subsist independent of any registration. Not only on national level, but also on community level, as well on international. Another reason is the different opinions of the underlying principles that govern national copyright legislation throughout the union. As the MS’ have divergent opinions of the role and justification of copyright, this has resulted in different interpretations and approaches of the legal framework. However, a number of successful harmonization efforts have been carried out.

The harmonization that is achieved within the area of copyright has been achieved through a number of directives adopted by the European commission. As directives are binding for the MS to which they are addressed, national authorities are obliged to implement the directives into the MS’ national laws. How this is to be executed is a task for each MS to decide. At present, the following key areas of copyright have been harmonized throughout the EU:

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59 For example, BC, Art. 5, section 2.

60 See section 3.2 about the justifications of copyright.

61 TFEU, Art. 288.
The contents of the economic rights in copyright are harmonized i.e. the right to reproduction, the right to communication, and the right to distribution.\textsuperscript{62} The term of copyright. This is the lifetime of the author, plus 70 years.\textsuperscript{63} The protection for software.\textsuperscript{64} The protection of databases.\textsuperscript{65} The protection regarding technological protection measures.\textsuperscript{66} The limitations and exceptions to copyright that are allowed in national copyright laws.\textsuperscript{67}

Via Sweden’s membership in the EU, the nation is committed to promote a uniform interpretation and application of the provisions laid down by EU legislation. In this regard, it is not possible for the national legislators to make statements regarding how the rules laid down by the directive should be interpreted. At least not in connection with preparatory work or committee reports which forms the ground for the implementation into national law.\textsuperscript{68} Overall, the different directives regarding copyright have until today, gradually been implemented into the SCA.

A directive of particular importance, and the directive with the greatest impact on Swedish copyright legislation, is the Information Society (Infosoc) Directive – Directive 2001/29/EC. The Infosoc directive addresses questions concerning copyright and neighbouring rights in relation to the information society. Its primary aim is to harmo-
nize the copyright laws of the MS’ in order to facilitate trade of goods and services across borders. Furthermore, the Infosoc Directive also seeks to adapt and supplement existing laws in the MS’ concerning copyright and related rights.\textsuperscript{69}

As the name suggests, the directive concerns copyright in relation to the increasing technology in society, and the growing importance of the digital environment. The directive covers a wide and diverse range of subject matters. It does not only address issues relating to the core of copyright – the sole rights of the copyright owner – but also the balance towards society and its interests. Altogether, the Infosoc directive aims to precise the copyright owners’ position and interests towards society and its interests. Mainly concerning the disposal of works, the relation to other works, and how to adapt copyright to the digital environment.\textsuperscript{70} Even though the directive focuses on digital use, it is not limited to digital issues alone.

The Directive is largely based on principles already established in the SCA, but it also contains some new elements. For example, that national law shall provide protection for technological protection measures.\textsuperscript{71} The Infosoc directive was implemented in to Swedish legislation and entered into force 2005.\textsuperscript{72}

\section*{2.7 National legislation}

Even with the international harmonizing efforts, two major conceptualizations of the fundamental functions of copyright exist.\textsuperscript{73} This is manifested through the difference in approach to copyright, within various national legal systems and traditions, as national legislators put different philosophical emphasis on the role of copyright in society.\textsuperscript{74}

\begin{flushleft}
\textsuperscript{69} See the preamble of the Infosoc Directive.
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\textsuperscript{71} The expression "technological measures" means any technology, device or component that, in the normal course of operation, is designed to prevent or restrict acts, which are not authorised by the copyright holder of any copyright. Compare, the Infosoc Directive, Art. 6; and Prop. 2004/05:110, pp. 47-48.
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\textsuperscript{72} Prop. 2004/05:110, p. 3.
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\textsuperscript{73} Olsson, \textit{Copyright} (8\textsuperscript{th} edn, Norstedts Juridik 2009), p. 31.
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\textsuperscript{74} See section 3.2 about the justifications, or purpose, of assigning copyrights.
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There is the Continental system built on the principle of *droit d’auteur*, and there is the Anglo-American based on the principle of ‘copyright’.  

In the Anglo-American or common law system, there is an emphasis on the economic role of copyright. The ideas central to this tradition are formed out of commercial interests and focuses on the exploitation of works. The founding idea is that copyright is a necessity; copyright is a measure to avoid market failure. For example, if there were no copyrights, people would be able to reproduce a work lawfully with relative ease, with much less effort, and at much lower costs in relation to what its original creator invested. Consequently, this makes it possible to undercut the original creator, as they do not have to recoup with the expenses of its initial production.

With this approach, copyright mainly exists as a mean to control copying. It is a mean to decide who are allowed to make copies. Copyright should therefore be treated as a form of economic property that enables the right holders to exploit a work themselves, or allowing them to transfer rights.

In contrast, the Continental system, or civil law system, emphasizes the creator and his personal rights. This tradition focuses on the individual’s creative act, instead of the possible economic incentives. The founding thought of the civil law tradition is that copyright is associated with personal rights of the individual creator. This is also reflected by the very word used to describe the rights entitled to a creator. Civil law uses the phrase *droit d’auteur*, which translate to ‘author’s right’ or ‘author’s law’ instead of ‘copyright’.

Under a *droit d’auteur* concept, copyright may be licensed, or partly transferred on to others, but it can never entirely be assigned outright to others.

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Regarding the Nordic countries, they have adopted a mixture of the two traditions, although, the droit d’autor approach is emphasised. Historically, Sweden has adopted a similar tradition concerning the role of copyright.

In Sweden, the national legal provisions are enclosed in the Act on Copyright in Literary and Artistic Works. The act has been subsequently amended over the years in order to meet Sweden’s international obligations, as international treaties need to be implemented into national legislation in order to be applicable within Swedish jurisdiction. Two additional provisions also belong to the copyright legislation of Sweden. One is the Copyright Regulation that contains certain details about the implementation of the SCA itself. The other one is the International Copyright Regulation that contains specifics about the protection that Sweden is obliged to give to foreign authors and their works.

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83 NJA II 1961, p. 7.
86 SFS 1993:1212, later amended.
87 SFS 1994:193, later amended several times due to Sweden’s international obligations.
3 Defining Copyright

3.1 Copyright as Intellectual Property

Copyright is a part of the legal area known as intellectual property (IP) law.\(^88\) An IP law refers to the legal rules that assign property rights and protects creations of the human intellect.\(^89\) Ideas, inventions, signs, patterns, and information are all examples of such products. IP can be owned and subject of trading with \textit{i.e.} it may be assigned, sold, bought, licensed, etcetera.\(^90\) However, unlike tangible property, IP only constitutes property in a legal sense since it cannot be possessed in a literal meaning due to its incorporeal nature.\(^91\)

In opposite to physical objects there are some difficulties in defining the boundaries and limits of an IP since it only exists by law. Property rights in material objects are defined by their natural boundaries and physical markers that exists in the object, characteristics that do not exist in an IP.\(^92\) Therefore, to be able to identify the object of an IP and to what limit an IP should be protected; IP law has developed its own parameters to define what IP is.\(^93\)

IP consists of two mechanisms: IP assets and IP rights. IP assets are the intangible creations, such as the invention, the brand name, the formula, or the literary work. IP rights are the legal protections that secure each IP asset its legal protection from unauthorized use by others than the rights holder. In order to refer to correspondence: a particular letter will constitute an IP asset. The copyright in the letter is the IP right entitled to the author.\(^94\)


\(^90\) SCA, Art. 27.


\(^93\) As for copyright which is defined in this chapter. Also compare to Bently, Sherman, \textit{Intellectual Property Law} (3rd edn, Oxford University Press 2009), p. 7.

An example to help illustrate these facts: if a person writes a letter and sends it to another person, a copy of the letter has been transferred from one owner to another. This is a transfer of ownership of a tangible object. The recipient of the letter, the new owner of that particular copy of the letter, may want to discard, burn, store, sell, or give it away and is entitled to do so. The recipient has the property right in the specific copy of the letter as a normal physical object. However, even if the original author of the letter no longer has the property right to the physical copy, he retains the IP right that exists in the letter as an IP asset. The result of this is that he still possesses the rights of ownership that is entitled to him by IP law, even if he does not own a physical copy of the work.

The term Copyright aims towards the IP laws that entitles creators of works, i.e. authors, artists, filmmakers, painters, and composers, to IP rights to what they have created. Copyright are the rules that provide a creator of a literary or artistic work the exclusive right to control the manner how their work should be exploited. Copyright offers protection to every production in the literary and artistic domain, whatever the mode or form of expression. A writer receives copyright to his novel. Picasso originally had the copyrights to his paintings. The musician gets the copyright to the music and lyrics he has composed.

If a work is protected by copyright, it is the copyright holder of a work that may decide how, when, where, and by whom, lawfully may use the work in question. Copyright can be explained as the creator’s sole right to his creation. One characteristic that copyright share with the other forms of IP rights is that copyright is essentially negative i.e. copyright prevents others from using the creation. IP rights is what makes it illegal

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96 For example, SCA, Art. 1; and BC, Art. 2.
97 SCA Art. 1, and Art. 2; and NJA II 1961, p. 38.
for pirates, counterfeiters, imitators and sometimes even third parties who have independently accomplished the very same creation, from exploiting works without permission from the owner of the IP right in question.

3.2 Justifications of Copyright

Since there is a choice whether to grant copyrights or not, copyright is a highly political area of law. Today copyright is a vividly debatable subject and not everyone agrees that the existence of copyright is justified. The opinions that are often raised against copyright, argues that copyright legislation provides a legal framework for anti-consumer- and anti-competitive conduct. Other arguments are that copyright has grown into a failed business model, and that copyright is working for the interests of lobbyists, rather than the authors. Instead of adapting copyright to new technologies, the copyright industry rather litigate than innovate in order to persevere the status quo. These issues constitute some of the obstacles that modern copyright laws will have to overcome in order to last.

Perhaps the most difficult challenge for copyright nowadays is the technological progress. The rise of Internet and the swift development of new technology have put a trend in progress where areas and technologies, which before had distinct limits and functionalities, now evolve and overlap each other. This phenomenon is sometimes referred to as convergence. The result of convergence is that when different areas integrate and change, the old norms and rules grow inadequate or obsolete. Historically, the development of new technology seems to have been the prime concern for the established copyright owners.

In response to the sceptics, various fundamental principles, or functions of copyright, are used as argument to justify copyright. These principles are applied in most, if not all, of the legal systems that recognize copyright as a mean of justification for assigning

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101 For example, see Patry, Moral Panics and the Copyright Wars, (Oxford University Press 2009), pp. xv-xxiv. Also, see Olsson, Copyright (8th edn, Norstedts Juridik 2009), pp. 28-29.

102 See the opinions in the scientific literature. For example Olsson, Copyright (8th edn, Norstedts Juridik 2009), p. 28; and MacQueen, Waelde, Laurie, Contemporary Intellectual Property (Oxford University Press 2008), pp. 223-228.

103 Olsson, Copyright (8th edn, Norstedts Juridik 2009), p. 28.

104 Patry, Moral Panics and the Copyright Wars, (Oxford University Press 2009), pp. xv-xxiv.
Defining Copyright

IP right. However, different legal systems give varying emphasis to each of them.

The principles used to justify copyright are often described as:

- Natural law;
- Reward;
- Stimulus to creativity, and;
- Social requirements or cultural purposes.

(Natural law) By natural law, or natural rights, copyright is justified because creations emanate from an author, i.e. IP is borne from the mind of a creator. The main argument is that an author is entitled to the rights of the property that is the result of his own labour. With a pure natural law approach to copyright, the creator of a work is always the original owner as it is an expression of his mind and personality. Today this principle is perhaps most reflected by the assignment of Moral right in a work. However, natural law is also apparent in arguments used for increased terms of copyright protection.

(Reward) As for the second principle, reward, copyrights are assigned because it is a just reward for labour – copyright is granted because it is fair. This approach reflects the economic role of copyright. When copyright is assigned as a reward, copyright is not only entitled to creators of works. It can also be entitled to entrepreneurs, producers, and others who have put considerable investments into the creation of a work. With this approach, copyright applies to works created either by personal investments, or by financial investments. If creativity is worthwhile, creators deserve to be remunerated when their creation is exploited.

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108 Compare to section 3.6.2 regarding moral rights.
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(Stimulus to creativity) Furthermore, as reward for labour also provides a form of stimulus to creativity, these two principles are closely connected. However, the central idea of copyright acting as stimulus to creativity has nothing to do with concepts of justice towards the efforts put into creativity. Instead, the main idea is a belief that authors, producers, and others have to be entitled rights to their work. Otherwise, the progress of knowledge and science would suffer because people would be less willing to invest the sufficient resources required to create and develop new works.112

(Social requirements or cultural purposes) The last principle, or principles as they are a mixture of two, argues that the purpose of copyright is a mean to protect the cultural heritage and act as a source of inspiration for creativity.113 The fundamental idea of copyright in this role is that works ought to be shared as quickly as possible as the advance of society is driven forward by creativity. Furthermore, copyright should lead to enrichments of the cultural heritage in society. If copyrights are assigned to works, which achieve that, copyright act as encouragement to commit, and develop more creative and cultural works. This, in its turn, will expand the literary and artistic influence of their respective countries.114

These four principles are cumulative and interdependent of each other and the relationship between them changes over time.115 To generalize, one might say that our modern copyright laws stress the economic and social arguments.116 Even with widespread harmonizing efforts, through the BC and TRIPS two major conceptualizations of the role and functions of copyright exist.117 The fact that different legal systems give different emphasis to these functions makes it difficult to achieve harmonization, not merely on a global level but on a European level as well.


113 Davies, Copyright And The Public Interest (2nd edn, Sweet & Maxwell 2002), p. 16.

114 Davies, Copyright And The Public Interest (2nd edn, Sweet & Maxwell 2002), pp. 16-17.


117 Compare to section 2.7 regarding the civil- and common-law traditions.
3.3 Subject Matter of Copyright

3.3.1 Expression vs. Idea

A fundamental principle of copyright legislation is that copyright only protects the form in which an idea or a concept is expressed. This principle is expressed repeatedly in the legislative framework.\(^{118}\) The meaning of this principle is that Copyright does not protect the idea itself or the concept behind a work.\(^{119}\) In this aspect, copyrights are different in opposite to priority rights, such as patents and trade marks.\(^{120}\) It is the individual interpretation of an idea that is expressed in a work that may receive copyright protection, not the idea itself. This suggests that facts, plots, and alike, falls outside the scope of copyright legislation.

For example, an idea for a new TV program is not protected by copyright but the way the idea for the TV program is played out may be protected. Moreover, consider the number of novels including crime fighting police inspectors, talking animals, or super heroes there are, many of them that are almost the same. Furthermore, compare the concepts of books. There are numerous examples of works that recount the life stories famous persons, for example, Churchill, Hitler, Diana, Napoleon, or the Kennedys. Even if the same idea already has been done before, a creator may still receive copyright to the work as long as it is not copied from a work that already exists.\(^{121}\)

The form in which a work is expressed can be divided into an inner form and an outer form.\(^{122}\) The outer form is the author’s expression of an idea. The inner form of a work is the work expressed in other outer forms.\(^{123}\) For example, a book or a letter written in Swedish is still protected even when it is translated in to English, and a novel is still

\(^{118}\) For example, TRIPS, Art. 9, section 2; and WCT Art. 2. As for national legislation, see NJA II 1961, p. 15.

\(^{119}\) In Swedish legislature, this concept is expressed by NJA II 1961 p. 15. Also, compare to Berniz, Karrnell, Pehrson, Sandgren, Immaterialrätt (11th edn, Jure 2009), p. 48.

\(^{120}\) Levin, Lärobok i Immaterialrätt (9th edn, Norstedts Juridik 2007), pp. 174-175.

\(^{121}\) See section 3.4.3 regarding originality.

\(^{122}\) NJA II 1961, p. 15; and SOU 1956:25, p. 69.

\(^{123}\) Compare NJA II 1961 p. 15; and Olsson, Copyright (8th edn, Norstedts Juridik 2009), pp. 66-67.
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protected even if it is translated in to other media formats, likes a screenplay, or a theater performance.124

3.3.2 Fixation

The legislative framework enacts that it is “a matter for national legislation to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”.125 In Sweden, there is currently no requirement for fixation, however in other countries there is. For example, it is a requirement in UK copyright law, that a work must be fixed in material form in order for it to attract copyright protection.126 A speech, for example, does not qualify for copyright protection unless it is written down or recorded.

In Sweden, copyright arises automatically. There is no fixation of a work required.127 Neither are there any formal requirements, as a need to register a work in order to receive copyright protection. This follows the founding principle as suggested in the BC.128 This means that copyright to a work automatically arises the moment it is created, given that it is an original work.129 As for the term, ‘created’, it should not be interpreted as a work actually has to be finished before copyright arise. Copyright may also exist in the early stages in a creative process; i.e. early models of works, such as sketches, models, and drafts may be protected, if they can be considered works on their own.130

124 Compare BC Art. 2; and the SCA, Art. 4.
125 BC, Art. 2 (2).
126 CDPA, Art. 3, section 2 provides that copyright does not exists in a literary, dramatic or musical work unless it has been fixed in some form.
127 NIA II 1961, p. 16; and SOU 1956:25, p. 70.
128 BC, Art. 2, section 2.
129 See Section 3.4.3 regarding originality as a thresholds for protection.
3.4 Threshold for Copyright Protection

3.4.1 Substantive Conditions

There is an important difference between a creation and a work, namely that only works are protected by copyright. In order for a creation to qualify as a work, and through this receive copyright protection, it must fulfil certain criteria. As the international legislative acts governing the field have left it up to national legislators to define these conditions, these conditions vary in different national laws.

In Sweden, article one of the SCA sets out the substantive conditions that act as a threshold for copyright protection. The article regulates whom that may receive copyrights and for what. The article provides that “[a]nyone who has created a literary or artistic work shall have copyright in that work regardless of whether it is a fictional or descriptive representation in writing or speech, […] or …] a work expressed in some other manner”. In short, article one of the SCA provides the prerequisites for copyright in Sweden. In order to fall within the scope of the SCA and receive copyright protection, there are two general requirements that have to be fulfilled. The criteria to receive copyright protection are:

- It must be a literary or artistic creation;
- The creation must constitute a work.

3.4.2 Literary or Artistic Work

The first criterion aims towards the expression: "[…] a literary or artistic […]”. The BC sets out a non-exhaustive, illustrative list of examples of what may constitute a literary or artistic work. The Swedish legislator has adapted a similar approach.

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131 Compare SCA, Art. 1, section 1; and NJA II 1961, p. 12.
132 SCA, Art. 1, section 1.
133 SCA, Art. 1.
134 BC, Art. 2, section 1.
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The different kinds of literary or artistic works that may qualify for copyright protection under Swedish legislation according to the SCA are:

1. a fictional or descriptive representation in writing or speech,
2. a computer program,
3. a musical or dramatic work,
4. a cinematographic work,
5. a photographic work or another work of fine arts,
6. a work of architecture or applied art,
7. a work expressed in some other manner.

The list above should only act as examples of what may constitute a literary or artistic work. The last category is intended to act as a reference to that fact that works may appear in different forms other than the mentioned categories. As for the term ‘literary’, it refers to all works of linguistic character, or works that are descriptive in its nature, e.g. addresses, dictionaries, fictional and non-fictional literature, poems, and other descriptive representations, including correspondence. The literary works referred to in the articles are all language works, e.g. literature and other descriptive representations, including computer programs. The term ‘artistic’ aims towards a more versatile group of works. ‘Artistic’ works are musical works, works of art, works of architecture, applied art, on-stage and film works. The artistic works are mainly musical works, works of art and works of architecture and of applied art. Both terms – literary and artistic – shall be interpreted in a broad sense.

Despite the broad definition of which works is to be included, the Swedish legislator did not want to exclude any potential creations from the possibility to constitute a work. This is reflected by category seven. Category seven makes it clear that everything may constitute a ‘literary or artistic’ work under Sweden legislation. In Sweden, a creation

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135 NJA II 1961, p. 33.
136 Compare BC, Art. 2; and NJA II 1961, p. 11.
137 Compare BC, Art. 2; and NJA II 1961, p. 11.
Defining Copyright

falls within the scope of the SCA and may be protected regardless of how it was intended or how it is expressed.\textsuperscript{139}

\subsection*{3.4.3 Originality}

The second criterion lies in the word ‘work’. In order for a creation to be considered as a work a creation has to possess a level of originality – the creation must be unique. The legislative text itself offers no guidance regarding which creations that may constitute a work or not. However, in the preparatory acts of the SCA there are some indications as for how the word ‘works’ shall be interpreted.

The preparatory acts emphasize two conditions that a creation must fulfil in order to be deemed as a work. Firstly, the creation must exhibit a degree of individual character – the creation has to be made by the creator himself, and be an expression of the creator’s personality. Secondly, the creation must represent the result of the creator’s own intellectual creativity – the creation must be independently achieved and not be too similar compared to what already exists.\textsuperscript{140} The prior criterion is the requirement that a work must be unique in some way while the later criterion can be defined where two persons, independent of each other, would not have expressed a literary or artistic work the same way.\textsuperscript{141} If a creation fulfils these criteria, it is considered an ‘original’ work.

The purpose for which, or why, a work is created is indifferent concerning the assessment if original or not. How it was created is not of importance neither. Dedicated and single-minded creativity receives the same protection as creations made by accident. The threshold for originality does not concern the quality or quantity of a work.\textsuperscript{142} If a creation shows enough originality, it is protected from the moment it come into existence.

The exact interpretation of when a work is considered as original, is somewhat different depending on the various literary and artistic categories. The overall impression of the

\textsuperscript{139} NJA II 1961, p. 33; and Levin, \textit{Lärobok i Immaterialrätt} (9th edn, Norstedts Juridik 2007), pp. 71-72.

\textsuperscript{140} NJA II 1961, pp. 12-13. A definition that later have been verified by case law. Compare to NJA 2002, p. 178.

\textsuperscript{141} NJA 2002, p. 178.

\textsuperscript{142} SOU 1956:25, pp. 68-69; NJA II 1961, p. 13; and Bernitz, Karnell, Pehrson, Sandgren, \textit{Immaterialrätt} (11th edn, Jure 2009), pp. 52-53.
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Supreme Court's decisions regarding originality is however, that all categories share the same principal concept of what is considered as ‘original’. However, the level of originality a creation needs to possess to pass this threshold varies between different categories of works.\(^{143}\) For example, in the case of applied art, it is a fairly high threshold, whilst regarding literary works, it is fairly low threshold. These are merely general exemplifications, but they act as a general benchmark of how the Supreme Court assesses originality in a potential work. A general view is that the Supreme Court has grown less rigid over time in their evaluation if works are considered to be original enough.\(^{144}\) However, the assessments of originality must be made on a case-to-case basis.

3.5 Ownership of Copyright

The ownership of the rights that copyright consists of falls to the person who created the work or to his employer. The general rule is that the creator is considered to be the first owner, but there are exceptions to this rule. In some legal systems there are specific rules regarding copyright and works created by employees. For example, the general position in the UK, is that when copyright protected works are created by employees, in the course of their employment, the employer will automatically become the first owner of the copyright that exists in that work.\(^{145}\) In Swedish legislation there is a similar exception regarding software and computer programs.\(^{146}\)

Regarding ownership, the SCA recognizes the creator of a work as the original owner, irrespective of what kind or in which context. This is expressed in Swedish legislation through article one of the SCA by the wording “[a]nyone who has created […].”

It is a fundamental principle within copyright legislation that the creator, or the creators, must be a particular individual or a specific group of persons.\(^{147}\) The creator must be a physical person, or a group of specified physical persons to fall within the scope of the

\(^{143}\) Compare, NJA 1921, p. 579 (letters), NJA 1994, p. 74 (applied art, pattern on cloth), NJA 2002, p. 178 (Musical works), and NJA 2004, p. 149 (blueprints). Also, see Levin, Lärobok i Immaterialrätts (9th edn, Norstedts Juridik 2007), p. 86.

\(^{144}\) For literary works, compare NJA 1921, p. 579; NJA 1985 p. 893; NJA 2004 p. 149. Also, see Levin, Lärobok i Immaterialrätts (9th edn, Norstedts Juridik 2007), pp. 86-87.

\(^{145}\) CDPA 1988, Art. 11, section 2.

\(^{146}\) SCA, Art. 40 a.

\(^{147}\) Compare NJA II 1961, p. 93. Joint author is also possible and established through SCA, Art. 6. Also, compare to NJA II 1961, p. 85.
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SCA. For example, if a monkey creates a picture, it is not a work protected by the SCA, as the work is made by an animal, not a person.\textsuperscript{148} In addition, an abstract group of persons such as a company, or any other judicial person, cannot either be considered as creators.\textsuperscript{149}

Even if judicial persons cannot be considered as creators according to Swedish legislation, ownership of the economic rights may sometimes fall to a judicial person under certain circumstances, for example, when works are created in the course of employment.\textsuperscript{150} According to the SCA there is only one scenario explicitly expressed when this occurs. It is a special case regarding the development of software within employment.\textsuperscript{151} In all other cases, if there are no contractual agreements regulating the issue, a rule of thumbs is used to decide if copyright is transferred on to an employer.

The rule of thumbs states that, \textit{an employer may use a work, which is the result of an employee’s commitment towards the employer, within his area of expertise and within his normal field of operation}. The rule of thumbs has been developed through the scientific literature and has later been confirmed by case law.\textsuperscript{152}

This suggests that when an employee creates a work in his employment, the employees will channel their economic rights to their employer. Moral rights are on the other hand almost never transferred to the employer. These rights always stay with the creator, unless in a few special cases prescribed by law.\textsuperscript{153}

3.6 Contents of Copyright

3.6.1 Exclusive Rights Limited in Time

Copyright can be described as a temporary privilege originally given the creator of a work to control how a work is exploited. The right is temporary because the rights given are limited in time, and it is a privilege because copyright constitutes a sole right to de-

\textsuperscript{148} Levin, \textit{Lärobok i Immaterialrätt} (9\textsuperscript{th} edn, Norstedts Juridik 2007), p. 79.

\textsuperscript{149} NJA II 1961, p. 93.

\textsuperscript{150} NJA II 1961, pp. 28-29, and pp. 213-214.

\textsuperscript{151} SCA, Art. 40 a.

\textsuperscript{152} For example compare Bernitz, Karnell, Pehrson, Sandgren, \textit{Immaterialrätt} (11\textsuperscript{th} edn, Jure 2009), p. 101; Olsson, \textit{Copyright} (8\textsuperscript{th} edn, Norstedts Juridik 2009), p. 219; and AD 87/2002.

\textsuperscript{153} For example when Software is created in the course of employment. Prop. 1992/93:48 pp.114-115.
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cide how a work shall be used. Copyright is essentially a monopoly right for the author to exploit his work.

Generally, protection under copyright law lasts for the lifetime of the author, plus 70 years after the year of his death.\textsuperscript{154} Regarding works that has no known creator – so called orphan works, anonymous works or works published under pseudonyms – it is seventy years from the year when they were lawfully published.\textsuperscript{155} After the term of protection has expired, a work may be used freely by anyone who wishes, as if it never was protected at all. This means that anyone may use a work after this time period, without permission, and without having to compensate anyone financially for using it.\textsuperscript{156}

Regarding international legislation, the term required by the BC, the minimum protection given to literary and artistic works is the life of the author plus 50 years after his death.\textsuperscript{157} The harmonized EU position regarding the duration of copyright protection is 70 years after the year of the creator’s demise.\textsuperscript{158}

The content copyright can be separated into two categories, economic rights and moral rights.\textsuperscript{159} The substance of these two categories of rights is twofold. The economic rights consist of an exclusive right to reproduce a work, and to make it available to others. The contents of the moral rights entitle authors to claim ‘authorship’, to a work and prohibit others from making changes to the work.\textsuperscript{160}

3.6.2 Moral Rights

Moral rights (\textit{droit moral}) are the non-economic interests that are protected in a work. The concept of moral rights are based on the relationship between a creator and a work.

\textsuperscript{154} SCA, Art. 43, compare to Art. 1 of the Term Directive – Directive 2006/116/EC. This is a more generous term than the period established by the international framework. Compare to The BC, Art. 7, section 1.

\textsuperscript{155} SCA, Art. 43.

\textsuperscript{156} Bernitz, Karnell, Pehrson, Sandgren, \textit{Immaterialrätt} (11\textsuperscript{th} edn, Jure 2009), p. 65.

\textsuperscript{157} BC, Art. 7.


\textsuperscript{159} SCA, Art. 2 and 3.

\textsuperscript{160} Compare SCA, Art. 2; and NJA II 1961, p. 38, regarding economic rights; and SCA, Art. 3; and NJA II 1961, p. 59, regarding moral rights.
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This is expressed by the fact that the moral rights are personally linked to the creator and usually remains with the creator, irrespective of who possesses ownership of the economic rights.\(^{161}\) This means that a creator may continue to exercise his moral rights even after his economic rights in a work have been transferred to someone else.\(^{162}\) According to the Swedish legislation, there are two expressed moral rights, i.e. the right of paternity (droit á la paternité), and the right of integrity (droit au respect).\(^{163}\)

The right of paternity entitles a creator to claim ‘authorship’ to his work. It is a right to be identified as the creator of a work, regardless of who owns the economic rights in the work. Hence, the creator of a work has a right to be acknowledged when his work is being used, whatever the context.\(^{164}\)

The right of integrity protects a work from being altered or distorted without the consent of its creator. The creator has a right to object to derogatory treatment. This entitles the creator to object to any distortion, mutilation or other modification of his work. Consequently, the creator has the right to prohibit the use of his work in a way that he finds offending. This right does not only include changes in the work itself, but also the way a work is made accessible to others.\(^{165}\) The point of origin in this assessment is what the creator finds offensive. However, his opinion of what constitutes an infringement shall be assessed in an objective way.\(^{166}\)

Historically, the issue regarding an author’s moral rights has probably been the greatest divergence between the civil- and common-law traditions.\(^{167}\) Until recently, the moral right within the common-law tradition was none existent.\(^{168}\) The contents of moral rights within different national legislative acts, if they exist at all, are not harmonized. Not even within the EU.

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\(^{161}\) In Swedish law, there is one exception regarding software. See the SCA, Art. 40 a.

\(^{162}\) Compare SCA, Art. 3; and the BC, Art. 6\(^{bis}\).

\(^{163}\) SCA, Art. 3. Author’s resale right in his work is referred to as a moral right (droit de suite). Compare to the SCA, Art. 26 n-26; BC, 14\(^{ter}\); and SOU 1956:25, pp. 141-119.

\(^{164}\) Compare SCA, Art. 3, section 1; NJA II 1961, p. 59; and NJA 1994, p. 94.

\(^{165}\) SCA, Art. 3, section 2; and NJA II 1961, pp. 62-62; and NJA 1994, p. 94.

\(^{166}\) SOU 1956:25, p. 123; and NJA 1979, p. 352.

\(^{167}\) Davies, Copyright And The Public Interest (2\(^{nd}\) edn, Sweet & Maxwell 2002), p. 332.

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Of interesting for this thesis’ purpose is the fact that in some legal systems a creator is given the right to decide when the moment of publication is at hand, i.e. the creator has a right to determine whether a work shall be made available to the public or not (droit de publier). The creator has an explicit right to decide when a work is to be published. The reason for stating this right explicitly as a moral right, is if the publication of a work have consequences for the authors personal life, or is of special personal interest. For example, the publication of diaries, memoirs or other works of intimate and personal character.\textsuperscript{169}

In the preparatory work of the current SCA, it was discussed if a droit de publier entitled to a creator should be introduced in the legislation. The discussion evolved around if such a provision should be explicitly stated in the SCA, entitling a creator absolute right to his work before it is lawfully published, i.e. the work is made available to the public with his consent.\textsuperscript{170} However, it was argued that a creator already is entitled a form of droit de publier through his the economic rights; and that the general rule is that a work cannot be made available unless the creator has intended it to be published.

Because of the wide scope of the economic rights, an expressed moral right to decide if a work is published or not would not possess any independent importance. Mainly due to the fact that a creator already has the possibility to intervene against unauthorised use through his economic rights.\textsuperscript{171} Hence, an explicit right that entitles a creator to determine the moment of publication did not fulfil any purpose, and it was therefore excluded from the final proposal of the SCA.\textsuperscript{172}

In Sweden, moral rights last as long as the economic rights, i.e. 70 years plus life.\textsuperscript{173} As mentioned, moral rights cannot be transferred but a creator can waive them. This means that the creator willingly can refrain from them, hence making it possible for others to use his work without having to specify whom the creator is.\textsuperscript{174}

\textsuperscript{169} NJA II 1961, p. 70; and SOU, 1956:25, p. 129.
\textsuperscript{170} Compare to section 4.2 regarding how a work is published.
\textsuperscript{171} NJA II 1961, p. 70; and SOU 1956:25, p. 129.
\textsuperscript{172} Compare to SOU 1956:25, p. 108.
\textsuperscript{173} Compare to section 3.6.1 regarding the term of copyright protection.
\textsuperscript{174} SCA, Art 3; and NJA II 1961. pp. 68-69.
3.6.3 Economic Rights

The economic rights are the exclusive rights in a work that represents the creator’s possibility to gain financially of his creativity, i.e. the rights that form the basis of making money of the exploitation of a work. This is possible either by the creator exploiting the rights by himself or the creator can transfer these rights on to others by either selling or licensing his rights. The contents of the economic rights are the copyright owners sole right to reproduce a work, and to make it available to the public.

A copyright owner has the sole right to:

- the right of reproduction, i.e. to produce copies of the work, and;
- the right of communication and distribution, i.e. to make a work available to the public.

The right of reproduction is a copyright owner’s sole right to authorize or prohibit anyone from making reproductions of the work, i.e. copying the work. The right to make a work available to the public actually includes several different rights, all of which focuses on different ways of how a copyright owner has the sole right to dispose of a work. This section will explain the right of reproduction as the following chapter will focus solely on the creator’s right to make a work available to the public.

The right of reproduction is not very complex. It is simply the copyright owner’s right to produce copies of a work – including the original. The reproduction right covers any production of a copy of the work, no matter how it is multiplied. The reproduction right covers the work in whole and in part, meaning that even if a part of a work is duplicated, it will constitute a copy. Furthermore, any item in which a work is fixed, is a

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175 NJA II 1961, p. 36, and p. 52.
176 SCA, Art. 2, and 27.
177 SCA, Art. 2. Also compare to the BC, which also recognizes transferable economic rights, for example, BC, Art. 9, and Art. 14 (the right of reproduction). The economic rights are harmonized to a certain extent in the EU.
178 SCA, Art. 2, section 1, and section 2.
179 SCA, Art 2, section 1, and section 3.
180 See chapter 4.
181 NJA II 1961, p. 53.
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copy irrespective of what the technique used to manufacture it. This also includes temporary or ephemeral copies, for example with in a computer memory or even a cache memory.\textsuperscript{183}

The reproduction right is far reaching as it includes all copies, in part or in whole. Every copy that is made must be with the creators consent, unless there it is a justified exception or limitation to the copyright in the work.

### 3.7 General Limitations of Copyright

The fundamental principle of copyright is that the creator of a work should be reserved the right to benefit financially from his work, or at least have the sole right to all acts of exploitation that may have potential of doing so.\textsuperscript{184} Albeit, there are some restrictions to a creator’s sole right of his work, i.e. so called limitations and exceptions.\textsuperscript{185} These infringements in copyright make it possible of others than the copyright owner to use a works, despite the existents of exclusive rights of exploiting a work. The reason for imposing restriction on copyright is often motivated out of cultural and social needs, for example to avoid impeding on the development of society.\textsuperscript{186}

Chapter two of the SCA expresses that even if a work is protected by copyright there are limitations to the copyright owner’s sole right to a work. These limitations enact that a work may be used without the permission of the copyright holder and sometimes even used freely.\textsuperscript{187} However, this is only legal under the special conditions specified in the articles of chapter two. All other uses must be with the consent of the creator.

However, in order for the limitations to copyright to be applicable on a work and to make it possible for others to utilise them, it is a requirement that a work must have


\textsuperscript{184} NJA II 1961, p. 52.

\textsuperscript{185} See section 3.2 regarding the justifications of copyright; and NJA II 1961, p. 52. Also, compare to Olsson, *Copyright* (8th edn, Norstedts Juridik 2009), p. 80.

\textsuperscript{186} Compare to section 3.2 regarding the justifications of assigning copyrights.

\textsuperscript{187} See SCA, Art. 12, and Art. 22 for examples of free uses. Compare to Art. 18, when works may be used without an authors consent, although he is entitled to remuneration.
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been published. Furthermore, the SCA only allows exceptions to the economic rights of copyright. Moral rights must always be observed, unless the creator has waived them.

In the international framework, there is only one explicitly expressed limitation (the Infosoc Directive excluded). That is that members of the BC must implement the right of quotation. Otherwise, the legal frameworks only give general guidelines, when it is suitable to set exceptions or limitations to copyright, for example, article ten of the WCT, article nine of the BC, or article thirteen of the TRIPS agreement. All these articles set out the so-called three-step test. On EU level, the three-step test is stated in the InfoSoc Directive article five, section five.

It is called the three-step test, as it is build upon three different steps to test whether an exception is well suited in comparison to the copyright owner’s interest of having his sole rights absolute. The three-step test provides that limitations and exceptions shall only be provided in “[1] certain special cases [2] which do not conflict with a normal exploitation of the work or other subject matt [3] and do not unreasonably prejudice the legitimate interests of the right holder.”

Traditionally, this test was designed as an instrument for national legislatures to apply when considering to adopt provisions regarding exceptions to the reproduction right of copyright. The three-step test was introduced in the BC and was originally only applicable to the right of reproduction. However, when the three-step test was introduced in the TRIPS agreement the negotiators made it applicable to all of the economic rights of copyright.

The EU has also adopted the three-step test. Through the Infosoc Directive, the EU made an effort to harmonize the limitations in the MS’ national laws. The directive itself set out a number of limitations that act as the outer limit for the types of limitations

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188 SOU 1956:25, pp.163-164.
189 Compare section 3.6.2 about moral rights.
190 BC, Art 10, section 1.
that are allowed in national law.\textsuperscript{193} However, the starting point in the directive is the three-step test, as the test shall be used as a guideline for when, and if, to allow exceptions.\textsuperscript{194}

Otherwise, concerning limitations and exception, the Infosoc Directive only sets out one exception that is mandatory to implement into national law. A MS must allow the reproduction of copies that are transient or incidental.\textsuperscript{195} Other than that, MS’ are free to choose from the limitations suggested in the Infosoc Directive as they are optional for the national legislators to implement, if it is justified by the three-step test.\textsuperscript{196}

\textsuperscript{193} Infosoc Directive, recital 32, and 33, preamble.
\textsuperscript{194} Compare Infosoc Directive, Art. 5, section 5; and Prop. 2004/05:110, p. 47.
\textsuperscript{195} Infosoc Directive, Art. 5, section 1.
\textsuperscript{196} Infosoc Directive, Art. 5, section 2-4.
4 The Moment of Publication

4.1 The Right to Make a Work Available to the Public

The right to make a work available to the public is the second of the two main features of the economic rights entitled to a Creator. The content of this right is often described as the right of distribution, and the right of communication.\footnote{The current wording of the SCA, Art. 2, was established when the SCA was amended in order to implement the Infosoc Directive. This was done through Prop. 2004/05:110. Compare the Infosoc Directive Art. 3, and Art. 4; SCA Art. 2, section 3; and Prop. 2004/05:110 p. 57, and p. 63.} In Swedish legislation, it is the general opinion that the right to make a work available is a compliment to the reproduction right; as the creator of a work is entitled to decide over the reproduction of the work as well as what happens to the copies later on.\footnote{NJA II 1961, p. 40; and Levin, Lärobok i Immateriellrätt (9th edn, Norstedts Juridik 2007), p. 139.} The right to make a work available to the public is important out of two aspects. Firstly, it is the creator’s right to control how his work is used. Secondly, it decides the moment when a work is published.\footnote{SCA, Art. 2, and Art. 8.}

A work is considered as published when it is made available to the public.\footnote{SCA, Art. 8. Also, compare, SOU 1956:25, p. 162.} The moment of publication is linked to the moment when a work is made legally available to the public for the first time.\footnote{SCA, Art. 2, Art. 8; SOU 1956:25, p. 162; and NJA II 1961, p. 70.} Before a work is published, a work belongs to the creator’s personal sphere, and he has absolute right to his work.\footnote{NJA II 1961, p. 70; and SOU 1956:25, p. 130, and p. 163.} This means that a work is still protected by copyright; however, the work is not yet subject to the limitations of copyright set by law. For this reason, the work may only be used with the authors consent.

However, after a work is made available to the public, and hence published, the creator has to acknowledge some limitations to the copyrights in his work.\footnote{See section 3.7, regarding limitations of copyright.} This means that the author loses some of the control he previously possessed. Consequently, a work may now be used in certain contexts without the creator’s consent, for example, usage which
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fall within the private sphere.\footnote{Compare to section 4.3.3 regarding the difference between the private and the public.} Once a work has been published, it cannot be reversed from this state.\footnote{SCA, Art. 2, and Art. 8; also compare to SOU 1956:25, p. 162; and NJA II 1961, p. 94.}

Furthermore, in order for a work to be considered as published, a work must be made available to the public in a lawful way, i.e. it is only works that are legally made available to the public that is considered as published. The meaning of this is that a work is only legally published when it is made available by the creator himself, with his consent, or by the support of law. However, it is the creator himself that must be the initiator of making a work available.\footnote{Compare, NJA II 1961, p. 54, and pp. 94-96; NJA 1986, p. 252; and T 1096-98.} In addition, if an assessment has to be done, whether a work is made available or not, consideration shall be taken to the authors will in the matter.\footnote{NJA II, 1961 p. 39; and T 1096-98.}

\section*{4.2 How a Work is Made Available}

The exclusive right of making a work available to the public is divided into four sub-categories. The creator of a work has the sole right to (1) public communication, (2) public performance, (3) public display, and (4) the right of distribution of his work to the public. By making a work available to the public, in original or in an altered form, in translation or adaption (it is independent of how it is accomplished), a work is considered as published.\footnote{SCA, Art. 8; NJA II 1961, p. 55; and SOU 1956:25, p. 162.}

According to the SCA, a work is made available to the public, and hence published, in the following four cases:

1. when a work is communicated to the public;
2. when a work is publicly performed;
3. when copies of a work is publicly displayed, or;
4. when copies of a work are placed on sale, rented, lent, or otherwise distributed to the public.\footnote{SCA, Art. 2, section 3.}
4.2.1 **Communication to the public**

Communication to the public refers to all transfers, or communications, of a work to the public that takes place from a distance. The means used to transfer a work does not matter; the decisive factor is instead that the work needs to be transferred from one place to another where a receiver takes part of it.\(^{210}\) A picture displayed on TV, or songs played on the radio are both examples of when this occurs.

Communication to the public also includes acts where a work is transferred in such a way that the work is accessible by members of the public from a location and time individually chosen by them.\(^{211}\) For example, this is what occurs when a text or picture is posted on an Internet website. The important issue in the example is that the distribution of a work, to the public, takes place on demand (supply by request).\(^{212}\)

4.2.2 **Public Performance and Public Display**

Making a work available through public performance includes all occasions where the work is being made available to the public at the same place as the one where the public may access the work.\(^{213}\) It does not matter if it is with or without the help of technical devices. The decisive factor in this category is that it takes place on the same location; this is contrary to when a work is being communicated to the public.\(^{214}\) This right mainly matter to work of musical or scenic character, as the public needs to be in the same location. For example, a work is publicly performed when it takes place on stage within a concert hall.

Similar to public performances, public display only occur if a work is made available to the public at the same place as where the public can enjoy it. However, unlike a public performance, the concept of public display only includes cases where a work is being made available without the use of technical devices. If a technical device is being used,

\(^{210}\) SCA, Art. 2, section 3(1). Compare to Infosoc Directive, recital 23, preamble; Prop. 2004/05:110 p. 70; and the WCT, Art. 8.

\(^{211}\) SCA, Art. 2 section 3 (1); and NJA 2000, p. 292.

\(^{212}\) Compare SCA, Art. 2, section 3(1); Infosoc Directive, Art. 3(1), and recital 23, preamble; and WCT Art. 8.

\(^{213}\) SCA, Art. 2, section 3(2).

\(^{214}\) SCA, Art. 2, section 3(2); and Prop. 2004/05:110 p. 79.
the act is measured as a public performance instead of a display.\textsuperscript{215} The right to display a work is most vital regarding works of visual character. The term ‘display’, aims towards when a copy of a work is being viewed directly, for example, when the public displays a painting or a sculpture displayed at an exhibition, or when a book is placed up front (displayed) in a shop-window.

\textbf{4.2.3 Copies Otherwise Distributed to the Public}

According to the SCA, the distribution of a work takes place when copies of the work are placed on sale, leased, lent, or otherwise distributed to the public.\textsuperscript{216} The CJEU, on the other hand, has established that distribution of works to the public always requires a transfer of ownership. It is not enough only to grant the public the opportunity to use reproductions of a work, nor is it enough only to exhibit a work to the public without actually granting a right to use it.\textsuperscript{217} The CJEU held that, “\textit{it follows that the concept of distribution to the public, otherwise than through sale, of the original of a work or a copy thereof, for the purpose of Article 4(1) of [the Infosoc] Directive 2001/29, covers acts which entail, and only acts which entail, a transfer of the ownership of that object}”.\textsuperscript{218}

The Swedish legislation provides a wider definition of distribution of a work to the public, as the right is solely restricted by the principle of exhaustion, not defined by it. The fundamental principle of the distribution right in Swedish legislation is to provide an author with the ability to control when, and how, his work is to be used, as well as to decide if it is to be published or not.\textsuperscript{219} According to scientific literature, the Swedish approach does not oppose the CJEU judgment, as the exhaustion principle established in the Infosoc Directive imposes minimum conditions on the level of protection a MS is obligated to implement.\textsuperscript{220}

\textsuperscript{215} SCA, Art. 2, section 3(3).
\textsuperscript{216} SCA, Art. 2, section 3(4).
\textsuperscript{217} Case C-456/06. Peek & Cloppenburg KG v Cassina SpA. Judgment of the Court (Fourth Chamber) of 17 April 2008.
\textsuperscript{218} Case C-456/06. Peek & Cloppenburg KG v Cassina SpA. Judgment of the Court (Fourth Chamber) of 17 April 2008, Para 36.
\textsuperscript{219} Compare Prop. 2004/05:110, p. 59; and NJA II 1961, pp. 41-43.
\textsuperscript{220} Bernitz, Karnell, Pehrson, Sandgren, \textit{Immaterialrätt} (11\textsuperscript{th} edn, Jure 2009), p. 75.
However, regardless if a transfer of ownership is required or not, the distribution right always refers to distribution of physical copies of works, for example, audio recordings on a CD, or a hard copy of a written letter. The right of distribution is therefore closely connected to the right of reproduction, as it requires a physical copy to act as carrier of a work in order to be able to be ‘distributed’.\textsuperscript{221} Otherwise, the transfer of the work will fall within the scope of the right of communication, performance, or display.\textsuperscript{222} The distribution right includes all copies of a work, the original as well as all following copies; the numbers of copies is not essential.\textsuperscript{223}

The creator’s sole right to distribute a work is limited by the principle of exhaustion.\textsuperscript{224} Normally, the right of distribution includes the right to control all measures of the distribution of a work, the first as well as all following measures of distribution, unless the copy is subject to exhaustion.\textsuperscript{225} Exhaustion of the right of distribution means that when a copy of a work has been transferred, with the consent of its creator within the EEA, that copy may be further distributed without the consent of the creator.\textsuperscript{226} Hence, the creator can no longer control how the work is distributed further.\textsuperscript{227}

However, there are exceptions to this principle. The creator’s right to control rental of a work to the public is never exhausted, except in case of works of applied art, and buildings.\textsuperscript{228} Moreover, the distribution right in copies that has been transferred outside the EEA, is not exhausted, which means that so-called parallel imports is not allowed with-

\begin{itemize}
\item \textsuperscript{221} NJA II 1961, pp. 40-41; and Prop. 2004/05:110, p. 59.
\item \textsuperscript{222} Compare to sections 4.1.1 to 4.1.3.
\item \textsuperscript{223} Prop. 2004/05:110, p. 59.
\item \textsuperscript{224} WCT Art. 6, Section, 2; Infosoc Directive, Art. 4, section 2; and SCA, Art. 19.
\item \textsuperscript{225} Compare to the Infosoc Directive, Art. 4, section 2; and WCT Art. 6, section 2.
\item \textsuperscript{226} SCA, Art. 19. Also, compare to the Infosoc Directive, Art. 4, section 2.
\item \textsuperscript{227} Concerning the principle of exhaustion, the effect of Art. 4, section 2 of the Infosoc Directive is that it prevents MS’ from retaining (as in Sweden’s case) or adopting international exhaustion. This was held by the CJEU in Case C-479/04 Laserdisken.
\item \textsuperscript{228} SCA, Art. 19, section 2(1).
\end{itemize}
out the consent of the copyright owner.\textsuperscript{229} Furthermore, the principle of exhaustion does not exhaust the creators lending rights in software or cinematographic works.\textsuperscript{230}

4.3 ‘To the Public’

The right to make a work available to the public sets the outer limits for a creator’s exclusive rights in a work, as the right only covers usage of a work that constitutes transfers to the public.\textsuperscript{231} Communications, performances, exhibitions, and distributions of works, which occurs within the private sphere is therefore not covered by the creators exclusivity rights. Consequently, all transfers that occur within the personal sphere may therefore be carried out without restraint and without the consent of the creator – if the work already has been published.\textsuperscript{232}

The criterion for when a work is published is considered to be, as mentioned, when a work is made publicly available. This occurs when a work is communicated, performed, displayed, or distributed to the public.\textsuperscript{233} However, the problem is therefore to define who is considered to be included in ‘the public’.

The international framework does not provide any specification of when a work is considered as ‘public’. Neither does the legislative acts originating from the EU. Therefore, the definition is to be found in national law as it falls to the national legislator to define who the public is.

4.3.1 The Supplementary Rule

The most immediate definition of public stated by copyright legislation is given in section four of article two, of the SCA. It follows from the article that acts of communication and performances of a work that occur in relation to commercial activities, before comparatively large and closed (or selected) groups of people shall be deemed as acts of communications to the public. This provision is referred to as the supplementary rule; as the provision increases the scope of article two, section three.

\textsuperscript{229} SCA, Art. 19. Also, compare to Infosoc Directive, Art. 4, section 2, and recital 28.

\textsuperscript{230} SCA, Art. 19, section 2(2).

\textsuperscript{231} Compare SOU 1956:25, p. 103; NJA II 1961, p. 39, and 48; and Prop. 2004/05:110, p. 73.

\textsuperscript{232} See the introduction of this chapter, section 4.1 about absolute rights.

\textsuperscript{233} SCA, Art. 2, section 3, and Art. 8.
The main objective of the supplementary rule is to make acts of communications, and performance which take place within the framework of, or is organized in association with, commercial activities, to fall within the scope of a creator’s exclusive right. This also applies if such events occur within a selected group of individuals, i.e. circumstances that are normally deemed to fall within the private sphere.\textsuperscript{234} The reason for this is that the creator alone, or the copyright owner, should be able to benefit from the work, if it is of commercial value.

Within the supplementary rule, it is also implied that the exhibition of a work is included.\textsuperscript{235} The supplementary rule also covers transfers to groups not directly engaged in commercial activities, it is sufficient that people engage in such activities indirectly. One example of a situation where the supplementary rule is applicable is to so-called industrial music, i.e. music that is played in industries, or other workplaces. In these cases, speakers make the music available to the public, namely the workers. Another example of a similar situation is the situation when a restaurant owner organizes a music performance in the dining room for a dinner party.\textsuperscript{236} The decisive factor is that a work is exploited with a commercial purpose, or is a part of such a purpose.\textsuperscript{237}

4.3.2 Groups of Individuals
The Swedish Supreme Court has expressed that performances and communications, which do not occur within completely closed groups of individuals, should be considered public.\textsuperscript{238} A work that has been made available only within a closed circle of individuals should therefore not be considered as published. The preparatory works and case law has defined a closed circle as a group, which consists of particular individuals, with defined relationships between each other.\textsuperscript{239}


\textsuperscript{235} Prop. 2004/05:110, p. 203-204.

\textsuperscript{236} Compare to NJA II 1961 p. 55, and p. 162; and NJA 1988, p. 715 for similar cases.

\textsuperscript{237} SOU 1956:25, p. 106; and NJA II 1961, p 57.

\textsuperscript{238} Compare, NJA II 1961 p. 47, p. 54 and, p.57; NJA 1967, p. 150; and NJA 1980, p. 123.

Furthermore, if a work is performed within a closed circle of persons, and it is possible for everyone to gain access to such an event; the work is considered as ‘available to the public’, as the event obviously is not closed. The same applies for events, which are formally dependent on certain requirements, if the requirements can be fulfilled by anyone who wishes. Example of such an event is an event open only to members of a club. Another example is an event where only people with a formal invitations gain access. The point is, when the opportunity to attend to a performance is open to everyone or when everybody have the chance to attend to such a performance, the event is considered as ‘available to the public’.

The main rule is that the creator of a work should be entitled the right to convey his work to ‘larger’ groups of individuals; if it is of commercial relevance, the creator ought to benefit from his work. However, the phrase: ‘group of individuals’ has no clear definition, for example, the preparatory work for the SCA define a ‘group of individuals’ as – precisely – a group of individuals.

This is obviously an unsatisfactory definition, however, a more distinct definition of the concept does not appear possible to construct. The committee that presented the original proposition for the SCA, expressed that it would be an overly rigid approach to give a fixed number of what constitutes a group, for which the threshold should amount. Instead, the legislator stated that an assessment must be done in each individual case.

4.3.3 The Private Sphere

The exclusive right of an author to make his work available to the public only includes public transfers of the work; usage that takes place within the private sphere is therefore excluded. The preparatory works to the SCA defines the private sphere as everything that occurs within the limits of one’s personal life. That is what happens within the

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243 Compare SOU 1956:25, p. 106; and NJA II 1961, p 57; and section 3.2 regarding the justifications of assigning copyright.
244 NJA 1961, p. 55.
walls of one’s home and includes the private circle of friends and an author’s immediate parts of the society. The private sphere may therefore also include smaller businesses, firms, or even small industries.

The borderline between public and private is not definitive. It is fluctuating and it varies from case to case. Anyhow, a general principle is that events, places, and environments in close connection to the private life of a person, falls within the definition of the private sphere.

246 Compare NJA II 1961, p. 39 and p. 49.

247 Compare NJA II 1961, p. 39 and 50.
5 Analysis of Copyright and Correspondence

5.1 The Relation between International- And National Law

The legal area of copyright has grown more and more internationalized over the last century, and there are both international and European aspects to consider for national legislators. Today most, if not all, legislative developments are agreed internationally or on EU level. This makes the scope for pure national initiatives very limited. Moreover, as copyrights only stretches as far as to the geographical border within each nation, international cooperation efforts and instruments are the key to both current and further developments of copyright.

However, even with the different harmonization efforts that have been made to bridge the differences between national laws, there is presently no fully harmonized regional or international view on copyright. The reason for this seems to be the contrast between two major philosophical approaches to copyright – the civil- and common-law traditions. Nevertheless, there have been a number of efforts to create international standards that has been fairly successful.

The common factor of the international framework is that it establishes certain concepts that are agreed upon, e.g. it is a work that is protected, and it is the expression of a work that is protected, not the idea itself. As the legislative framework mainly is intended as a mean of cooperation and a beginning of creating harmonized rules, it does not provide any further definitions of the agreed concepts. This has left the national legislators to fill in the blanks the international framework left open. As a result, there are inevitably variations between different national copyright laws as the meaning of words and concepts are given different meanings. Examples of this are when defining what creations that constitute a ‘work’, categories of work, threshold of originality, the need of fixation of a work, who is the owner of copyright, which exceptions of copyright to allow, but also, the key principle of national treatment.
Another main function of the international instruments is that they establish minimum standards that national copyright legislation has to maintain and enforce. Even if there is a strong relation between the different international legislative acts (the UCC is perhaps excepted), the importance of the BC cannot be emphasized enough. This is mainly expressed by the other international conventions, as they take starting point in, or from the BC.

The lack of complete harmonization, both globally and in the EU, can be explained by the different opinions that are derived from different philosophies of the underlying principles of copyright. However, as long as the key instruments to cooperation are observed there is perhaps no reason to rush such an agreement. Nevertheless, the EU has put energy into establishing common norms and definitions of certain concepts of copyright. However, the differences in approach to copyright within the MS’ of the EU have obstructed the development. Still certain key areas of copyright are to some extent harmonized throughout the union.

Regarding Sweden’s domestic legislation, the SCA originates from the year of 1960, but it has been amended frequently over the years. This is mainly due to Sweden’s various international commitments. Since Sweden has ratified all of the important international conventions regarding copyright, Sweden has been obligated to adapt its national legislation to the international framework. Therefore, international principles have largely shaped current Swedish copyright legislation.

5.2 How Copyright Applies to Correspondence

5.2.1 Reflections of the Fundamental Aspects of Copyright

The SCA, similar to copyright laws in general, is designed with the aim to be of general application, to all kinds of creative works. Regarding issues in specific situations, such as copyright and correspondence, the law leaves plenty of room for individual assessments. An important aspect in the discussion of how copyright applies to correspondence is that it is inherent in the very nature of any mean of correspondence to be distributed from one person to another.

The fact that correspondence may be subject to copyrights as a literary work is evident. However, the most difficult assessment is to determine whether a creation is protected or not as copyrights arise automatically at the same moment as the work is created, i.e. a
letter or an E-mail is protected from the moment it is written, if original enough. No registration or other formality is required in order for a work to be protected under copyright law. This makes it difficult to know whether a work is protected by copyright, as not all creations are protected by copyright. Even though, there are no clear definitions of when a work has fulfilled the criteria, and thereby constitutes a work, there are guidelines for the assessment.

According to Swedish law, a creation only constitutes a work if it has an individual character, it has a level of independence, and originality; the work should possess an extent of the creator’s individuality. However, there are no requirements regarding a creation’s literary or artistic quality, even a work of ‘bad’ quality is a work.

In relation to correspondence, many messages and forms of communication would possess the required level or originality, but certainly not all. Personal letters and E-mails are perhaps most likely transcending the threshold of originality and independence. SMS and other similar forms of short communication, would on the other hand most likely not meet the criteria. Mostly due to its limited quantitative qualities as short creations is less likely to be original. Furthermore, it does not matter if it is an ordinary letter or an E-mail. Creations in the electronic environment are subject to the same conditions. The assessment is indifferent of the physical carriers of a work.

Furthermore, copyright only protects the form in which a work is manifested. Copyright does not protect the idea behind the work. However, copyright protection extends to both the inner and outer form of a work. This means that as long as the inner form of a work is maintained, although, expressed in a new outer form, it will constitutes an infringement of the creators sole right to his work. An example of such an infringement is when a letter is translated into other languages, or when a text is recited on the radio, or in a television program.

However, copyright does not protect the information that a work contains. Nevertheless, it would be misleading to claim that the information a work may hold is unprotected. As a work’s inner form also is protected and not only the work’s external form (in which a work is expressed), also the concept as such is protected even if the abstract idea is not, but only to the individual design the creator has given the work. The physical form of a work, i.e. a letter, is only a carrier of the intangible object that is protected by copyright;
as copyright protects the expression of a work, the physical carrier of a work does not matter.

Correspondence is assessed by the SCA in the same way, as any other creation would have been. However, the assessment, if a work is original enough, has to be done on a case-to-case basis. Creations that fail to attain the required level of originality will not constitute a work, and as a result, fail to receive copyright protection. Furthermore, The SCA has a wide scope and does not distinguish between the character, and purpose of different creations. If a work is created within a purely private context, or if it is work related is indifferent.

The central idea behind copyright is to stimulate creativity. Copyrights main role is to help improve the social, cultural, and economic development of society. To achieve this, society provides creators with monopoly rights at the expense of the rest of society, in order to encourage creativity, and inspire the creation of additional works, which in the end will benefit society even more. This relation is shown by the public’s interest in having fair access to works, next to, the public’s interest in minimizing restrictions on their property rights, and their freedom of being able to do whatever they want with their property. Thus, it is necessary to find a balance of the benefits of copyright in relation to the cost of society.

What the protection encloses depends on the work in question. However, the general contents of copyright are the right to produce copies of the work and the right to make the work accessible to the public. Copyright is constructed as an exclusive right. The fundamental idea is to protect a creator’s possibility to control how his or her work is being exploited, and to prevent a work from being treated, or exposed in ways a creator finds offensive. All rights included in copyright belong on the outset to the author. However, it may thereafter be transferred to others to certain degrees.

Copyright includes both economic and moral rights. The economic rights consist of the right to multiply a work and the right of making it publicly accessible. An author’s moral rights consist of the right to be recognized as the author of a work when his work is used, as well as the right to object to certain ways his work is being used which he finds offensive. Generally, copyright lasts for life, plus seventy years after the creator’s year of death.
The view on moral rights seems to be one of the important historical divergences between civil law and common law countries. The explanation to this is also the difference of philosophical approach to the underlying justifications of copyright. This is shown by the approach adapted in the international framework that often leaves the concept of moral rights optional for the signatory countries.

In relation to an author’s individual interests, there are society’s interests, or the public interest, in its ability to be able to exploit a work in order to promote progress and prosperity. In order to achieve a level of reasonable balance between these interests, there are limitations to the economic rights of the copyright holder. However, the limitations only apply to published works, as the author has absolute rights in unpublished works. In general, the limitations that are set to copyright reflect the need to maintain the balance between the right holder and the public interest. As we have seen, the international framework leave much of the decisions to the national legislators when to, and when not to, allow limitations in copyrights.

5.2.2 Reflections Regarding Copyright as ‘Property’

There are two fundamental systems of copyright which stress different roles of copyright in society. This is possibly a reflection of the philosophical difference in approach between the two systems. However, there is also a difference of how to approach copyright as ‘property’. Copyright may be seen either as ‘ownership’, or as a concession given by society.

Historically, ownership to IP has never been recognized, other than perhaps the right to be recognized as the creator of a work, (if that may be considered as ownership). The main problem by considering copyright as a form of ownership is where to draw the borderline between creations, as it is more difficult to assess the boundaries in an IP than within property of physical character. This refers to, mainly the problem of defining if a work possess originality, but also to establish the scope of copyright protection. Why should certain creations be worthy of legal protection whilst others are not? Furthermore, why should ownership of this kind (IP) be limited in time? In addition, why should ownership of an IP be considered as more important, than the other forms of ownership? As an IP stipulates conditions over how others may utilize their physical property, IP must be considered of higher value.
If a legal system instead chooses to define copyright as a concession given by society, entitled to the individual creator to achieve a specified objective instead of ownership, one do not have these problems. However, if you choose ownership you might have trouble finding justifying arguments for making a difference between various kinds of properties, as there apparently are differences compared to common ownership. Since copyright potentially has the ability to inhibit the way people may interact with each other, or how to use objects that hold IP rights, it is important that the idea of copyrights is constantly reassessed and its legitimacy is questioned. More specifically, we need to ask whether, and why, copyright is desirable.

5.3 The Moment of Publication

5.3.1 How Correspondence is Made Available

According to the Swedish legislature, the moment of publication is when a work is legally made available to the public. This occurs when a work is performed in public, communicated to the public, displayed in public, or when a copy, or copies, is distributed to the public. When this occurs, a work is considered to have been lawfully made available and it is considered as published.

In relation to correspondence, classic letters in hardcopy will be subject to the distribution right, as it is the actual copy that is transferred. As for the author, he loses some control over his work when this happens. For example, when copies are distributed to the public they are usually subject to exhaustion upon sale or other transfer of ownership. This means that, after the copyright owner has sold or otherwise transferred ownership of a particular copy of a work, the new owner of that copy may dispose of it without the copyright owner’s further permission, for example, by giving it away or even by reselling it. However, concerning E-mail and SMS and similar, electronic means of communications are deemed as acts of communications to the public.

Furthermore, by legally made available it is suggested that a work is made available by the author or with his consent. As correspondence is a mean of communication, it is always transferred to someone else in order to fill its purpose, i.e. the work is distributed or communicated to another person. In this regard, correspondence is always legally made available as it is transferred from the author. As the provisions that regulate the time of publication, do not take into consideration the purpose behind a work, the author
technically, publish his work upon transfer to someone else, at least according to the wording of the law.

From the provisions in the SCA that governs when a work is published, it is clear that a letter, E-mail etcetera, is considered as published the moment it is sent, and hence distributed. Furthermore, of special interest is that the CJEU has held that distribution to the public always requires a transfer of ownership, something that certainly occurs when a letter is transferred to another person.

5.3.2 Is it Public?

According to the preparatory work and the established case law in the subject, there are numerous variables to consider when making the assessment if considered as published or not. These variables are:

- Who are the corresponding parties?
- In what context has the correspondence occurred?
- What is the purpose behind the correspondence?
- What was the will of the author?

Usages of a purely private nature do not count as public. Hence, a work cannot be made available if it is transferred to one personal sphere to another. This means that a work is not published if it is sent from the authors home, to another person’s private home as these areas do not constitutes areas that are considered as public. As the borderline between the personal area and the professional area sometimes is hard to establish, therefore the context and purpose behind the reason for the correspondence grow even more important when making the assessment if a work is published or not.

To profit from others’ works is of course illegal, and so should it be. However, this is also the reason why it is important to consider how, a work is conveyed to others, if it is in relation to commercial interests, for example. In relation to private correspondence, the purpose behind it has never been to earn money. The creator’s right and possibility to make money of his creation should be considered as a mean, not an objective. However, it is a mean reserved for the author. Therefore, if there are commercial interests behind the correspondence, it argues for that a work is published.
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However, concerning the private sphere, if a person receives a letter, he will then possess the ownership of it. If the same person later on sells the particular copy, he gains something financially – more often than not anyway. This could possibly be considered as it is of commercial interest, and that it is likely that the receiver is intruding on the economic rights of a copyright owner. However he does not infringe the copyright owners rights as, the distribution right is exhausted to that particular copy. Copyright, and the sole rights within, protects the different forms of a work, not physical copies of it.

Furthermore, an author’s intentions and will has to be considered. If it never was an author’s intention to make his work accessible, and it is reflected by the other circumstances, the work is not considered as published. One can ask about which interest society might have of gain access to the personal letter of individuals. However, there are of course exceptions to this as well. Certainly, society might have an interest to know about the personal relations regarding people in positions of power in society. Therefore, no absolute rules can be formulated to define when a work is published or not. The assessment has to be made on a case-to-case basis.
6 Conclusions

6.1 How Does Copyright Apply to Correspondence?
Copyright applies to correspondence in the same manner as copyright apply to any other work of literary character. However, the fact that correspondence is transferred on to others in order to fulfil its purpose, have caused some confusion regarding the moment of publication. The main issues regarding copyright and correspondence is that as there is no formal procedure for acquiring copyright – it is not always possible to see when it exists and therefore how to impose common rules. As creations expressed in a trivial manner are not protected by copyright, it is hard to know for both the sender and the receiver of correspondence to know if copyright legislation and its provisions are applicable.

If an author possesses absolute rights of a work, it should be understood, as it is not possible to apply the provisions of the SCA regarding the limitations of copyright to a work. It should not be understood that it is not possible to use a work at all. If one possesses a copy of a work not yet published. It is still possible to exercise the ownership rights that apply to properties in general, as long as the usages do not constitutes an infringement of the sole rights entitled to the copyright owner.

6.2 Concerning correspondence, when is a work considered as lawfully published?
There are a number of important factors to consider when making an assessment if a work is to be deemed as published or not. From the written law, it is clear that the moment of publication occur when its author sends a mean of correspondence to another person. However, as the copyrights of a person only cover activities aimed towards the public, it must be send to someone who is defined as ‘the public’.

The borderline between public and private is not definitive and the basis for this discussion is something that is not defined by law. The boundary of this concept is fluctuating and it varies from case to case. Anyhow, a general principle is that events, places, and environments in close connection to the private life of a person, falls within the definition of the private sphere. The public is everyone outside the author’s personal sphere. However, this sphere is not a defined concept. Anyhow, the written law defines some episodes that are always to be regarded as transfers to the public.
Conclusions

It is important to remember that the physical carriers of a work do not matter when defining the moment of publication. Distribution, display, communication or performance is indifferent. Furthermore, it is no difference in between if the correspondences occur electronically or if it is hardcopy. This is only a difference of how a work is transferred to the public. Hence, in which way a work is transferred is of little importance when assessing the moment of publication, in comparison to whom it is sent, and in which context.

It is dangerous to make a statement that defines any form of transfer of correspondence as a part of an author’s exclusive right and deem it to be a form of publishing. On the other hand, it is equally dangerous to do the reverse, and ascertain that sending correspondence by definition never can constitute a mean of making it available to the public. As a fundamental principle and point of origin, it is not always the practical procedure of how something is done that decide the outcome. It is at least equally important what the consequences are and how it appears to others.

The important aspect to decide the moment of publication is if you are more likely to apply unbiased provisions of law in accordance to their wording, or apply subjective assessments on a case-to-case basis. By case law and preparatory work of the SCA there seems to exist an opinion that there is an unlegislated droit de publier, as the intention of the author matter in the assessment whether a work is published or not. However, it is above else the purpose of the intended usage of the correspondence that matters most in the assessment.

As there are vague boundaries, which is a necessity in order to maintain the wide scope of copyright law, its consequence will be that we do not really know what will constitute an infringement until we see it. Therefore, as long as the legislation is of general application there will always be an implied risk of making something that was not intended to be illegal, as illegal.
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