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Copyright in Social Media

A Preparatory Study in Access to Protected YouTube Clips

Bachelor's Thesis in Commercial and Tax Law (Intellectual Property Law)

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Abstract

Social media, such as YouTube, contain different types of information provided by the users. Because of the popularity and ability to reach out to others, corporations might want to use this information in its advertising. However, some of the information is copyright protected works. How can a corporation use the limitations in the copyright protection to its advantage? Even when it is allowed to use the work with regard to the limitations in the copyright protection, attention must be paid to personal information and marketing provisions. This bachelor's thesis disclosures the method by which a work or the information is legally accessed for advertising purposes.

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Abbreviations

BU – Berne Convention

Copyright Act - 1960:729 Act on Copyright in literary and artistic Work

EEA – European Economic Area

Marketing Act - 2008:486 Marketing Act

Names and Pictures Act - 1978:800 Act on Names and Pictures in Advertising

NJA – *Nytt juridiskt arkiv* New Legal Archive – the Official Journal for publication of cases from the Swedish Supreme Court

Personal Data Act - 1998:204 Personal Data Act

Prop. – *Proposition* Government bill

SOU – *Statens Offentliga utredningar* Swedish Government Official Reports

UCC – Universal Copyright Convention

1 Introduction

1.1 Background

In March 2011, a Swedish petrol retailer chain was sued for copyright infringement because of unauthorized usage of a picture extracted from a popular YouTube clip. This picture of a laughing baby was used in an advertisement campaign carried out as a vote for the funniest clip on YouTube. It was posted on the corporation's web page and was published in flyers. As a result, the complaint also concerned unlawful usage of a picture for advertising purposes.[1]

YouTube is an excellent example of social media because of its diversified content. Except for the common texts and pictures, there are film clips and sounds. The feature of social media is interaction. Because of the possibility to reach out to a specific target group, a corporation has many reasons to use social media for the purpose of advertising. It could also be regarded as a means of low cost advertising.[2] However, the petrol retailer chain did not appear on YouTube in connection to the clip, but extracted the picture from its context and used it to get attention to the advertising campaign.

Though a state's jurisdiction is limited to its territory,[3] YouTube does not submit to national limits. [4] National law applies only to persons who are residing in that state. But how is the residence of a YouTube user determined? Internet's global feature evokes and widens the copyright issues by making incredible amounts of works easily accessible. National copyright law has thus been harmonised to an extent that otherwise would be unthinkable.[5]

The dispute raises a number of legal questions regarding the applicability of the Swedish Copyright Act on the sphere of Internet, the requirements to obtain copyright protection and what copyright protection means. Would YouTube be entitled to sell the clips posted on its web page? Could the provisions of data protection or any of the marketing provi-

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[1] Persson, A, *YouTube-fenomen stämmer OKQ8*, Dagens juridik, 31 March 2011 and Hermele, B, *Skrattande bebisens pappa stämmer OKQ8*, Resumé, 30 March 2011.

[2] Akalp, N, *Social Media for Small Businesses: 6 Effective Strategies*, 14 April 2011.

[3] Edmar Forsman, M, *Internetpublicering En juridisk vägledning*, Norstedts juridik, Göteborg 2001, p. 81.

[4] Edmar Forsman, M, *Internetpublicering En juridisk vägledning*, Norstedts juridik, Göteborg 2001, p. 38.

[5] Edmar Forsman, M, *Internetpublicering En juridisk vägledning*, Norstedts juridik, Göteborg 2001, p. 21.

sions protect a YouTube user? However, it is even more interesting to turn the perspective around and see if these provisions could allow the usage of YouTube clips in advertising.

1.2 Purpose and Delimitation

The purpose of this bachelor's thesis is to find out how a Swedish corporation legally can use a YouTube clip in its advertising. This is a preparatory study not intended to provide an absolute answer applicable to a specific situation. Instead, the intention is to give an overview with emphasis on copyright. The purpose is studied from the perspective of a Swedish corporation that directs its advertising towards a Swedish market, it follows that the legal questions are studied from a Swedish perspective.

In this bachelor's thesis copyright is the most important legal area because the copyright protection hinders the free usage of creations. However, the copyright protection contains limitations that can be used to the corporation's advantage. Though, it cannot be overlooked that usage for advertising purposes may be hindered with regard to data protection or marketing provisions. These three legal areas interact. It is therefore possible that copyright protected works are also data protected or prohibited to be used in marketing.

As far as the bachelor's thesis is concerned, the user terms that apply to social media are identical.[6] The user owns his or her copyright protected works,[7] but the social media provider is entitled to a worldwide license which is necessary in order to enable the web site to function and provide its services.[8] The right to transfer this license is part of the clause designed to provide the service. Since it can only be transferred by the contracting party in turn if the contract expressly admits it,[9] it does not allow trade with clips posted by a YouTube user. The possibility of YouTube selling posted clips to a third party thus ruled out, it is only the relationship between the YouTube user and a third party that is relevant in this bachelor's thesis.

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[6] *YouTube Användningsvillkor för tjänsten* 14.6 compared to *Facebook Statement of Rights and Responsibilities* 15.1 and *Twitter Terms of Service*.

[7] 1960:729 Act on Copyright in literary and artistic Works (hereinafter Copyright Act) Article 27, paragraph 1.

[8] *YouTube Användningsvillkor för Tjänsten* 7.2 and 8.1.A.

[9] Copyright Act Article 27, paragraph 1.

1.3 Method and Material

For the purpose of this bachelor's thesis, social media is determined by comparing suggested definitions to each other. These proposals are developed by persons working with social media.[10] Of course, this does not make such definitions established, but the most important in this context is basic understanding of what is posted on social media and why a corporation is interested in using it. Since YouTube is merely used as an illustration for the phenomena of social media, the material used is YouTube's user terms and privacy policy.

The purpose of the bachelor's thesis is divided into different legal areas to clarify the disposition and make each legal aspect easier to understand. The legal areas are studied according to the traditional legal method using Swedish legislation and its attached legislative history. To avoid mistranslations, the vocabulary provided by ministries and government agencies in translation of the relevant legal acts is used. Case law is used to define concepts and understand how the legal areas are developing. Guidance to find legal sources of greater value is found in the legal literature. By comparing authors with each other, even deeper understanding is reached and the argumentation of this bachelor's thesis becomes stronger.

[10] *About Joseph Thornley*, ProPR, (14 May 2011), http://propr.ca/about/ and *Analyst Profile Anthony Bradley*, Gartner, (14 May 2011), http://www.gartner.com/AnalystBiography?authorId=29384 and *Ben Parr*, Mashable, (14 May 2011) http://mashable.com/author/ben-parr/.

2 Social Media and YouTube

Social media is intended for conversations worldwide. The typical feature is that all participants interact with each other. This is different from mass communication in other forms of media, which characteristically is a one-way communication.[11] From a linguistic point of view, each participating individual is constantly and alternately providing and receiving information. This is possible through user-friendly social software, that is to say software that can be used without any knowledge of how it works.[12]

It can also be said that social media emerge social structures through transparent and independent participation in a collective interest, the result of which is persistent. In other words, social media is about the social structures between individuals that gather around and develop a content they are mutually interested in. An important feature of this development is that it is independent among the participants, and that it remains open to the public.[13] In summary, social media is not a dialogue between a provider of information and its audience, but rather an ongoing and public "multilogue" concerning a shared interest.

These criteria are fulfilled by YouTube, the purpose of which is a worldwide sharing of whatever creations the users post.[14] In short, the clips consist of everything from films, pictures, music and sounds to texts. These types of information also occur, more or less, in other social media. That is why the scope of social media, in this bachelor's thesis, is narrowed down to YouTube.

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[11] Parr, B, *In 2009, Social Media Overtook Web 2.0*, Published 2009-12-31, 2011-04-13.

[12] Thornley, J, *What Is Social Media?*, Published 2008-04-08, 2011-04-13.

[13] Bradley, A J., *A New Definition of Social Media*, Published 2010-01-07, 2011-04-13.

[14] *About YouTube*, http://www.youtube.com/t/about_youtube, 2011-05-10.

3 Copyright

3.1 Applicability of the Copyright Act

Before looking in depth in the concept of copyright it is necessary to determine the applicability of the Copyright Act. Does it apply to clips posted on YouTube and how wide is its scope? A copy of a work is protected regardless of its form, method of publication or how permanent it is.[15] Because of this wide scope, it is established that a temporary copy can be made despite the copyright protection so that Internet can be used without infringing someone's copyright.[16]

For the purposes of this bachelor's thesis, applicability of the Copyright Act is determined with regard to the work itself since it as a rule is too difficult to find out who a YouTube user is and thereby determine applicability on this foundation.[17] The Copyright Act applies to works first published in Sweden[18] or in another member state of the (European Economic Area (EEA)[19] or member state of the Berne Union (BU)[20] or in another state signatory to the Universal Copyright Convention[21]. Furthermore it applies to works first published in another state than Sweden, a member state of the EEA or member state of the BU, provided that it is simultaneously published in one of these states.[22] The term simultaneously published means within thirty days.[23] In other words, the Copyright Act applies to a work that is first published in Sweden or in another state within one of the mentioned in-

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[15] Copyright Act Article 2, paragraph 2.

[16] Copyright Act Article 11 a, paragraphs 1-2.

[17] According to the same provisions referred to concerning the applicability on works, the criteria imposed on an author are basically a certain nationality or habitual residence. See the Articles in footnotes below.

[18] Copyright Act Article 60, paragraph 1, number 2.

[19] 1994:193 International Copyright Regulation (hereinafter International Copyright Regulation) Article 1, paragraph 2.

[20] International Copyright Regulation Article 2, paragraph 1, number 2.

[21] International Copyright Regulation Article 6, paragraph 1, number 4.

[22] Copyright Act Article 60, paragraph 1, number 2. See also International Copyright Regulation Article 2, paragraph 1, number 3.

[23] Copyright Act Article 60, paragraph 2. See also International Copyright Regulation Article 2, paragraph 1, number 3 .

ternational commitments, or to a work that was simultaneously published in one of those states.

In conclusion, the Copyright Act applies to works posted on YouTube if they are published in Sweden, EEA or BU or in a state signatory to UCC. The concept of published could be defined as the state where the user posted it or as the state where a person that is subject to the Copyright Act may access it. For the purpose of this bachelor thesis the latter definition is the most accessible. However, with regard to the Copyright Act's applicability to both works and authors, there is probably no actual need to choose one of them.

3.2 The Purpose of Copyright

The coin of copyright has two sides. It is intended to protect the creator's interests but also the interests of the society. By granting copyright to someone who creates a work, he or she has a right to protect the personal link to the work and may obtain more favourable working conditions.[24] At the same time, the society is guaranteed a certain access to the work because of the limitations in the copyright protection.[25]

To give a simplified picture of copyright protection, everything that is created is free to use but the Copyright Act establishes that works are exempted and may not be used freely.[26] The term work implies that there is a requirement of effort to fulfil to obtain copyright protection. Instead of formalities,[27] the requirements are independent creativity and originality. The concept of originality is dynamic in the way of being determined in the light of each type of work.[28]

In some types of works, the creator is not the only one with a legitimate interest in how it is used. Alternatively, the creator cannot fulfil the requirements to obtain copyright protection but the product is nonetheless protectable.[29] These interests are protected as neigh-

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[24] Kungl. Maj:ts proposition nr 17 år 1960 Förslag till lag om upphovsrätt till litterära och konstnärliga verk (hereinafter Prop. 1960:17), p. 31.

[25] Prop. 1960:17, p. 32.

[26] Copyright Act Article 1, paragraph 1.

[27] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p.21.

[28] Prop. 1960:17, p. 49.

[29] Prop. 1960:17, p. 34.

bouring rights, as the word implies they are considered to be closely linked to copyright.[30] Basically, neighbouring rights are granted to two types of commercial interests; the performing artists[31] and the corporations that convert the performances into commercial products.[32]

A variety in relation to the required commercial interests of neighbouring rights is the protection granted to photographic pictures.[33] This provision supplies a protection equivalent to copyright,[34] in all photographic pictures that are not works.[35] To emphasise the wide applicability, the concept of a photographer is defined in line with general linguistic usage meaning that the person who takes the picture obtain the neighbouring rights.[36]

3.3 Film Clips

Far from all film clips posted on YouTube are copyright protected. To determine if they are, it is important to understand the terminology of the Copyright Act. In the Swedish wording, the word "*filmverk*" gives the impression that any film is a work.[37] A work is a film based on a manuscript and is created one step at a time. Another feature is that there are many involved in the process. This refers to the functions such as scriptwriter, director, camera crew and editor, rather than the number of people appearing in it.[38]

However, this definition of a work is too strict in relation to the concept of originality.[39] Therefore films that are for example instructive, documentary or educating are works as well, provided that it is the result of an independent and creative effort. With regard to

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[30] Proposition 1994/95:58 Uthyrning och utlåning av upphovsrättsligt skyddade verk, m.m. (hereinafter Prop. 1994/95:58), p. 21.

[31] Prop. 1960:17, p. 34.

[32] Prop. 1960:17, p. 245.

[33] Copyright Act Article 49 a, paragraph 1.

[34] Proposition 1993/94:109 Fotografirättens integration i upphovsrättslagen (hereinafter Prop. 1993/94:109), p. 21.

[35] Prop. 1993/94:109, p. 22.

[36] Prop. 1993/94:109, p. 41.

[37] Copyright Act Article 1, paragraph 1, number 4.

[38] SOU 1956:25 Upphovsmannarätt till litterära och konstnärliga verk – Lagförslag av Auktorrättskommittén (hereinafter SOU 1965:25), p. 73.

[39] Prop. 1960:17, p. 42.

copyright not protecting ideas or facts, this means that such films must show creativeness and be well thought-out in more aspects than pedagogically. This is not intended to widen the scope of copyright too far. It is therefore ruled out to obtain copyright in a film that merely registers a course of events.[40]

It is not possible to give a general answer to what YouTube clips are works and which are not. It must be determined in each case. But private films are rarely considered to be cinematographic works because they simply register a course of events. In this context it does not matter how adorable the children are, how funny a film is or how high the sentimental value is. Consequently, a lot of YouTube clips are not copyright protected as cinematographic works, such as the film with the laughing baby already mentioned. Since copyright cannot be obtained with regard to content but to originality, most of the instructive films posted on YouTube are also excluded since they are too dependent on the ideas or facts that are conveyed. However, films cannot be dismissed as not being works based on being private. A film that is not just a registration of a course of events, but fulfils the criteria of being independent in relation to its subject matter and expresses more than its own idea is a cinematographic work.

The producer of moving images obtains protection in the form of neighbouring right.[41] Since it is not dependent on originality even a film that is not a work is protected.[42] However, the word producer indicates some sort of achievement. This is supported by the purpose of the provision to treat authors and producers equally with regard to common and social interests. Therefore the provision only applies to film producers[43].[44] This means that neighbouring rights do not protect all films but only those made by a corporation with a commercial interest. The legal literature is not unanimous. Levin extends the neighbouring rights to protect all films that are not works, without mentioning this probable limitation in applicability.[45] However, Olsson exemplifies moving images by listing films of commercial

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[40] SOU 1956:25, p. 74-75.

[41] Copyright Act Article 46, paragraph 1.

[42] Prop. 1994/95:58, p. 29-30.

[43] Ds. 2003:35 Upphovsrätten i informationssamhället genomförande av direktiv 2001/29/EG, m.m, p. 299.

[44] Prop. 1994/95:58, p. 34.

[45] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 104.

or social interests. Thereby he appears to support intention of protecting commercial interests, not those of private individuals.[46]

Consequently, if a film clip on YouTube is not a cinematographic work, it is neither protected by copyright nor as a neighbouring right. The reason is that the private person who posted it is not a producer within the meaning of the Copyright Act. Even though the creator is not easily identified, it would in most cases seem rather easy to determine if the clip is protected or not with regard to the content and style.

3.4 Pictures

Some YouTube clips contain a picture or an origami; other clips contain photographs. A photographic work or a work of fine arts is copyright protected; this applies to both two dimensional and three dimensional works.[47] The requirements that must be fulfilled are originality and creativeness. Though originality is determined with regard to the creator's personal achievement, it is not to be understood as a statically defined criterion universally applicable. A court is not an art critic and not supposed to become one. The aesthetic of a picture is not relevant in order to determine if it is a work.[48] Even a simple or trivial picture may be a work if it is part of a greater whole and it evidently expresses a clear artistic ambition.[49] A picture that is not a work of fine art is free to use.

Copyright in a photographic work is obtained with respect to the photographer's photographic knowledge of such as light and angles, but the method of producing the photograph does not matter. Any method comparable to photography may be used, even a picture extracted from a film is valued just like any other photograph.[50] If a photograph is not protected as a photographic work, it is protected as a photographic picture[51] regardless of who the photographer is.[52] Neighbouring rights even apply to photographs taken with a

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[46] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 278.

[47] Prop. 1960:17, p. 44.

[48] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 77 and 80.

[49] NJA 1990 p. 499.

[50] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 103.

[51] Copyright Act Article 49 a, paragraph 1.

[52] Prop. 1993/94:109, p. 41.

mobile phone.[53] In general, a photograph taken by a professional photographer is a photographic work while the neighbouring rights protect photographic pictures taken by amateurs.[54] Consequently, while both photographic works and photographic pictures are protected, the same cannot be said about works of fine art and other pictures. This makes it possible to use pictures that are not copyright protected or photographic pictures.

3.5 Music or Sounds

There are clips on YouTube where users share their own music or play covers. Though musical works are copyright protected, it is not defined in the legislative history since it was considered to be unnecessary to define what music is. With regard to case law and the legal literature, this opinion is not shared. A musical work is not to be evaluated by its length. The originality of a composition may be found in just a few notes. Though the possibilities to create a song in theory are infinite, it must be acknowledged that some genres are more restricted than others. With regard to commercial interests and the audience, originality may be achieved even if the composition is rather trivial. In order to determine if a song obtains copyright protection, the overall impression must be weighed-in from the audience's perspective. What is considered is whether the song instrumentally and melodically is distinct and original enough to be regarded as a work.[55]

Except for music it is not uncommon that users post clips that contain other sounds. Sound recordings are protected as neighbouring rights.[56] The provision refers to the recording as such whether it is independent in relation to other sounds or not. It is by no means the sound that is determinative for the protection; it could be anything from a concert to children's laughter.[57] Consequently, the recording is protected regardless if the sound is also copyright protected. However, the concept of a producer of sound recordings is not intended to apply to private individual's interests. Instead it refers to record produc-

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[53] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 102.

[54] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 295-297.

[55] NJA 2002 p. 178.

[56] Copyright Act Article 46, paragraph 1.

[57] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 227-228.

ers[58] and similar corporations with commercial interests.[59] This relates to the purpose of neighbouring rights, to treat the producers and authors equally since they share the same economic interest.[60] Not even Levin denies that the provision is designed to protect a producer's commercial interest.[61] Consequently, if the sound posted on YouTube is not a musical work it is not protected at all because a private individual is not a producer within the meaning of the Copyright Act.

3.6 Texts and Commentaries

Some clips posted on YouTube contain poetry or speeches potentially considered to be literary works but one must not forget about the commentaries. These may well be copyright protected. The expression "literary work" is a strictly legal term, not to be misinterpreted into appreciating its content.62 Copyright is obtained without regard to the length or quality of the work, but the creativity of the author.63 A phrase or even a single word may be copyright protected.64 Originality is the key to copyright protection, but it is not defined what that means.65 In the legal literature, a criterion has developed saying that a work is original if two persons, independently, would not use the same way to express an idea.66 The Supreme Court states that this criterion is only a way of determining the matter of proof and limitation of the copyright protection in a work. It does not in itself provide an answer to the matter of originality.67 Originality is rather about determining that the work is individually created and originates from its author's own imagination. As long as

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[58] Ds 2003:35 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m., p. 299.

[59] Prop. 1994/95:58, p. 21.

[60] Prop. 1994/95:58, p. 21 and 33-34.

[61] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 113.

[62] SOU 1956:25 p. 67.

[63] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 68; 71.

[64] Carlén-Wendels, T, *Upphovsrätt i reklam och media*, andra upplagan, Studentlitteratur, Lund 2010, p. 36.

[65] SOU 1956:25, p. 66.

[66] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 52.

[67] NJA 2004 p. 149.

this is objectively true, it does not matter if the work resembles another.68 Consequently, texts or clips that are not literary works are not copyright protected.

3.7 Rights in Copyright

3.7.1 The Author

Though copyright protects the work, the rights in copyright are carried out by the author.[69] An author is the natural person who created the work.[70] This follows by the wording of the Copyright Act and from the requirement of creativity.[71] The author is the person who created the work, even if someone else owns the copyright of the devices used in that process. There is no connection between authorship and legal capacity. Nothing prevents a child from being recognised as an author.[72]

The creator of a work published under pseudonym is acknowledged if that name for sure refers to the author,[73] and the signature appears on the copy according to customary designation.[74] However, it is a presumption, not a fact etched in stone. If the real author can prove his or her legitimate claim of authorship, that person is consequently the author.[75] Should the signature be missing or the author is unknown, it is considered to be an orphan work. This does not mean that such work is not copyright protected, but rather that the author is represented by the publisher or someone else that is identifiable.[76]

It is possible that a work has more than one author. They are equally acknowledged and own the copyright jointly provided that the work is a result of their mutual efforts.[77] Of

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[68] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 77-78.

[69] Prop. 1960:17, p. 52.

[70] Prop. 1960:17, p. 84.

[71] Copyright Act Article 1, paragraph 1.

[72] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 73.

[73] Prop. 1960:17, p. 83.

[74] Copyright Act Article 7, paragraph 1.

[75] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 112.

[76] Copyright Act Article 7, paragraph 2.

[77] Copyright Act Article 6.

crucial relevance is that all co-authors participate in the process of creating the work in a way that makes their contributions inseparable.[78] The co-authors are considered as an entity with the consequence of being co-dependent in relation to the usage of their work. This means that all decisions concerning the work, except bringing an action for infringement,[79] must be unanimous. However, if the work consists of separable works by different authors or someone has simply assisted the author, they are not co-authors.[80]

3.7.2 Economic Rights

An author is granted the exclusive right to exploit his or her work. This is accomplished by making copies of it or making it available to the public.[81] These two rights are exhaustive and are supposed to comprise all exploitations of economic relevance.[82] The same applies to a photographer,[83] by reason of integrating the protection of photographs in the Copyright Act to simplify the understanding among the public and to protect the photographer's interests.[84]

What is a copy and when is it made? A copy is a legal term[85] referring to any object that reflects the original, no matter how it is made.[86] By the wording of the provision, a copy is made when the work or photograph is reproduced, entirely or in parts, in whatever mode and of any degree of permanence.[87] The right to make copies has an extensive scope, and is supposed to have. Even a temporary copy that occurs in a computer is a copy within the meaning of the Copyright Act.[88] It is necessary to obtain permission in order to make a

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[78] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 76-77.

[79] Copyright Act Article 6.

[80] Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 113-114.

[81] Copyright Act Article 2, paragraph 1.

[82] Prop. 1960:17, p. 53.

[83] Copyright Act Article 49 a, paragraph4.

[84] Prop. 1993/94:109, p 22-23.

[85] Prop. 1960:17, p. 61.

[86] Prop. 1960:17, p. 53.

[87] Copyright Act Article 2, paragraph 2.

[88] Proposition 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m. (hereinafter Prop. 2004/05:110), p. 54.

copy that preserves the original's essence even if the actual copy bears little resemblance to the original.[89] Another aspect is the irrelevance of a copy's length. No matter how small part that is copied, it is still a copy within the meaning of the Copyright Act.[90] In conclusion, a copy of a YouTube clip is made every time the work or photographic picture is watched. Furthermore, a copy is made if a picture is printed or the clip is downloaded.

When is a work or photographic picture made available to the public? By the wording of the provision, the work or photographic picture is made available to the public when transferred, wired or not, to the public from another place than where the public can access it.[91] The provision is intended to apply to all transfers from a distance; this refers especially to the transfer of a work posted on a web page on Internet.[92] In fact, no other definition of the concept of "making available to the public" is applicable to a work published on Internet. To be a performance it is required that the public is present. A display is performed expressly without the aid of assistive technology and distribution requires physical copies.[93]

The term public is important but how is the concept defined? It is a wide concept that by its wording includes an indeterminable number of persons.[94]Furthermore, it includes every occasion that is not a private event.[95] It even includes public assemblies which may appear to be private, for instance by required membership. Once a single copy is given to someone outside the nearest family and nearest friends, it is communicated to the public.[96] What is public on Internet must be determined with regard to the circumstances at hand. It is not supposed to be circumvented by using a technical method that creates an illusion of private assembly.[97] In conclusion, a work is made public when it is published on Internet and thereby is transferred to the public.

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89 Carlén-Wendels, T, *Upphovsrätt i reklam och media*, andra upplagan, Studentlitteratur, Lund 2010, p. 31.

90 Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 84.

91 Copyright Act Article 2, paragraph 3, number 1.

92 Prop. 2004/05:110, p. 70.

93 Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p.138-139.

94 Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 150.

95 NJA 1986 p. 702.

96 Prop. 1960:17, p. 62-63.

97 Prop. 2004/05:110, p. 74.

Olsson argues with reference to case B 6731-00 ruled by *Stockholm Tingsrätt* (Stockholm District Court) in 2003 that a work published on the Internet is made public only if the public actually has access to it. This means that a distinction is drawn between works with regard to how it is published. If it can be found by using a search tool such as Google it is made public, but not if only accessible with knowledge of an exact site address which is not commonly known.[98] The legislative history does not contradict this approach, it is not the technology used that is determinative but if the work is available to the public.[99] As long as the public actually can access the work, it is of no relevance whether it does. The work has been made public even if no one takes part of it.[100] In conclusion, works and photographic pictures posted on YouTube are made public if the user does not change the criterion for access in a way that hinders the public from accessing the clip.

But what does it mean that a work is made available to the public? A work that is made available to the public in such manner is "made public".[101] In theory, the concept of the terms available to the public and made public are two separate steps, despite the fact that they take place at the same time.[102] The legal effect of a work being made public is that the limitations of the copyright protection enter into force.[103]

3.7.3 Moral Rights

Both authors and photographers[104] are given the benefits of moral rights.[105] New technology makes photographic pictures more accessible and as a result more exposed to the risk of being changed. For this reason it is suitable to provide photographers with the same rights as authors.[106] The two moral rights are paternity and the right to object to prejudicial treat-

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98 Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 89.

99 Prop. 2004/05:110, p. 70.

100 Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 92.

101 Copyright Act Article 8, paragraph 1.

102 Levin, M, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 152.

103 Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 69 and 71.

104 Copyright Act Article 49 a, paragraph 4.

105 Copyright Act Article 3, paragraphs 1-2.

106 Prop. 1993/94:109, p. 23.

ment.[107] Moral rights are justified with regard to the personal relationship between the author and work,[108] or the photographer and photographic picture.[109]

Paternity is the right to be named as the author or photographer. The right of paternity is exercised with regard to proper usage which determines its extent and manner.[110] By referring to proper usage, the provision was intended to be dynamic and develop in case law with guidance from expert witnesses.[111] An author's or photographer's interest in being named has an economic aspect since it would be difficult to market oneself and build a reputation without paternity. This interest remains regardless of whether the usage is unauthorized, admitted by the Copyright Act or licensed.[112] With regard to the author or photographer, paternity must be mentioned if a copy is used in a context of importance to him or her, and it does not impose any difficulties to respect the right.[113] Proper usage also contains the right to be anonymous.[114] To avoid that the public consider the wrong person to be named as the author or photographer, paternity requires that his or her pseudonym is mentioned instead of the real name if such signature is used.[115] In conclusion, if a work or photograph posted on YouTube is used by a third party, the right to paternity should be respected if that is proper usage.

The right to object to prejudicial treatment contains of three parts. The author or photographer may object to prejudicial changes in the work or photograph, to measures that are prejudicial to the author or photographer and to the work or photograph being used in a prejudicial context.[116] For the purposes of this bachelor's thesis, the prejudicial changes and the prejudicial context are the most interesting. Prejudicial measures refer to the situation

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[107] Copyright Act Article 3, paragraphs 1-2.

[108] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 80.

[109] Prop. 1993/94:109, p. 25.

[110] Copyright Act Article 3, paragraph 1.

[111] Prop. 1960:17, p. 64-65.

[112] SOU 1956:25, p. 116.

[113] NJA 1996 p. 354.

[114] Prop. 1960:17, p. 71.

[115] SOU 1956:25, p. 117-118.

[116] Copyright Act Article 3, paragraph 2.

where a work or photograph is changed but presented as an original.[117] This refers in particular to the risk of a copy made in another form than the original to be mistaken as the original.

The author's and photographer's rights have little to do with their personal opinion; such disputes are to be settled by criminal law. Instead, it is the personality expressed in the work or photograph that is regarded. Determinative are the circumstances at hand and the importance of the work or photographic picture. If there is an artistic or literary importance, any changes are more likely to be prejudicial.[118] The author's or photographer's right to object to prejudicial changes does not prevent the work or photograph from being subject to parody or travesty.[119] Artistic or literary importance may not be likely to be found in a YouTube clip. However, it must be kept in mind that the prejudicial changes are regarded objectively. With regard to YouTube's feature of personal commitment, it is possible that the personality expressed in the work or photographic picture is considered to be of greater importance than in another context.

A prejudicial context refers to the usage of a work or photographic picture in an undesired situation. It is not permitted to use a work or photographic picture in an advertisement if such usage is derogatory to it.[120] This does not prevent commercial usage of a copyright protected work in general. If there is a link between the advertisement and the work or photographic picture and it is objectively obvious that they are independent in between themselves, it is not illicit. It is not prejudicial to use such copyright protected work if the purpose differs from that of the author or photographer and it is not intended to be derogative.[121]

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[117] SOU 1956:25, p. 123.

[118] Prop. 1960:17, p. 65.

[119] SOU 1956:25, p. 124.

[120] Prop. 1960:17, p. 66.

[121] NJA 1985 p. 807

3.8 Limitations in the Copyright Protection

3.8.1 Exemptions Regulated in the Copyright Act

The limitations in the economic right to make copies are designed to enable normal usage of the work or photographic picture. They are not intended to be too intrusive in the author's or photographer's rights.[122] Despite these limitations the moral rights are preserved.[123] The right to paternity is thus not disturbed since it is limited in itself with regard to proper usage. However, the work or photographic picture may be altered, though not more than necessary.[124] The wording of the provision is designed to protect the moral rights instead of requiring the author's or photographer's consent in each particular case. Someone who wishes to use a work or photographic picture must respect both the moral rights provided with regard to copyright and to the moral rights expressed in connection to the copyright limitations.[125]

It may be tempting to use a work or photographic picture posted on YouTube, claiming distribution of a copy that has been transferred within the EEA with the author's or photographer's consent.[126] However, this generous limitation in the copyright protection is false, at least for the purposes of this bachelor's thesis. Though the word transferred is used in English, in Swedish the word is "*överlåtits*", which means that the copy must have been bought, swopped or given away with the effect of the author or photographer losing his or her possession of the specific copy.[127] Despite the fact that a user transfers the copyright when creating an account on YouTube, it is done without giving up his or her ownership in the copy.[128] For this reason, publishing a work or photograph on YouTube does not make this provision applicable since a copy has not been transferred within the meaning of this provision.

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[122] Prop. 2004/05:110, p. 82.

[123] Copyright Act Article 11, paragraph 1.

[124] Copyright Act Article 11, paragraph 2.

[125] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p, 127.

[126] Copyright Act Article 19, paragraph 1.

[127] Prop. 1994/95:58, p. 59.

[128] *Youtube's Terms of Services* 7.2; 8.1.

For the purpose of this bachelor's thesis the limitations in the economic rights that admits quotation is of particular interest. The quotation of works of art and photographic pictures[129] is regulated separately. It is limited to quotations on account of scientific publication, critical presentations or reports on current news events.[130] The provision is intended to strengthen the author's and photographer's rights and shall therefore be literary interpreted.[131] A scientific publication is not required to have a scientific value but it must have as a purpose to make a scientific tribute and be kept scientific.[132] Pictures may be quoted in a critical presentation to an extent defendable with regard to proper usage and the purpose of the presentation.[133] Quotation of pictures in reports on current news events requires that there is a link between the picture and the news. With regard to proper usage it is not permitted to quote more pictures than necessary to illustrate the report.[134] However, it may be questioned if an advertisement designed in accordance with these requirements will fulfil its purpose.

Similar to quotation is the provision which allows exploitation of pictures where works of art or photographic pictures[135] figures in the background or forms an insignificant part.[136] However, it is required that the original copy has been transferred by the author or photographer, or that it has been subject to an act of publication.[137] The provision enables the usage of pictures in which other protected pictures occur, provided that they are not prominent. Rather, it refers to the possibility to picture an interior.[138] Within the meaning of this provision, anyone is entitled to make a copy of a protected work or photographic picture. The problem, with regard to the possibility to use a YouTube clip, is that the Supreme

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[129] Copyright Act Article 49 a, paragraph 4.

[130] Copyright Act Article 23, paragraph 1.

[131] Proposition 1992/93:214 om ändringar i upphovsrättslagen (hereinafter Prop. 1992/93:214), p. 97.

[132] Prop. 1992/93:214, p. 116.

[133] Prop. 1992/93:214, p. 96.

[134] Prop. 1992/93:214, p. 97.

[135] Copyright Act Article 49 a, paragraph 4.

[136] Copyright Act Article 20 a, paragraph 1.

[137] Copyright Act Article 20 a, paragraph 2.

[138] Prop. 2004/05:110, p. 197-198.

Court considers it to be uncertain if the concept of publication is applicable to clips made available on Internet.[139]

Cinematographic, literary and musical works can be quoted if it fulfils three requirements. The work must have been made public and the quote must comply with proper usage and not exceed what is necessary for its purpose.[140] Would it be proper usage to quote a work in advertisements? The legal literature is not unanimous. While Olsson states that it is not allowed,[141] Carlén-Wendels is convinced of the opposite provided that the requirements of the provision are respected. This means that the design of the advertisement and the circumstances under which it is produced are of relevance.[142] If there is a link between the underlying circumstances concerning the quotation and the advertisement it is even more likely to be accepted. Especially if it is clear that this link is not between the quote and advertisement, but between each one of these and the underlying circumstances.[143] In order to determine how a quotation may be used for the purpose of advertising, the general requirements of proper usage must be studied.

Quotes are allowed if used in an independent work to emphasize or to make a point. What is an accepted length of a quote is dependent on the circumstances in each case. However, it is not allowed to quote an entire work or use it just to compensate for the lack of own creative brilliance. The purpose with the quote must be loyal to its source. As noticed, there is a fine line between what is undesirable and what is an admitted usage of quotation sprinkles.[144] It is not permitted to use several quotes from the same source to vitalize one's own work. If the quotation goes beyond spicing the work and head towards the originality itself, it is not accepted.[145] This relates to the unacceptable use of quotes for the sole purpose of

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[139] NJA 2010 p. 135.

[140] Copyright Act Article 22.

[141] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 168.

[142] Carlén-Wendels, T, *Upphovsrätt i reklam och media*, andra upplagan, Studentlitteratur, Lund 2010, p. 78-79 and 81.

[143] NJA 1985 p. 807.

[144] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 168-170.

[145] NJA 1996 p. 712.

getting attention to an advertisement. Such usage does not fulfil the requirement of proper usage.[146]

3.8.2 The Unregulated Exemption to Copyright

The limitations in the economic rights established in the Copyright Act are supposed to be exhaustive.[147] Strictly speaking parodies and travesties are changed copies of a work. Nonetheless, they are considered to be works or their own.[148] To be regarded as a parody the purpose must be foreign to the original work and intended to be humorous. This is not determined with regard to resemblance but whether there is a purpose that differs from that of the original.[149] However, if the changed version lacks the character of a parody and is changed with regard to a purpose that is foreign to both the original and the Copyright Act, it is an infringement.[150] Nothing prevents a corporation from using a YouTube clip in a parody, though it is important to make sure that the advertisement is considered to fall within the scope of a parody or travesty.

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[146] Carlén-Wendels, T, *Upphovsrätt i reklam och media*, andra upplagan, Studentlitteratur, Lund 2010, p.79.

[147] Olsson, H, *Copyright svensk och internationell upphovsrätt*, åttonde upplagan, Norstedts Juridik, Stockholm 2009, p. 125.

[148] Carlén-Wendels, T, *Upphovsrätt i reklam och media*, andra upplagan, Studentlitteratur, Lund 2010, p. 32.

[149] NJA 2005 p. 905.

[150] NJA 1975 p. 679.

4 Other Limitations in the Usage of YouTube Clips

4.1 Data Protection

Processing of personal data must not violate people's personal integrity.[151] Since YouTube does not trade with either the clips posted on its web page[152] or the information collected concerning its users,[153] it is of no interest to this bachelor's thesis whether such processing falls within the scope of the 1998:204 Personal Data Act (Personal Data Act). Instead, the question is if the Personal Data Act is applicable to a third party browsing for clips to use in advertising campaigns. This argumentation is based on the condition that the corporation does not purchase the YouTube clip from an advertising agency but singles it out itself.

To answer these thoughts it is necessary to determine what personal data is. The definition is wide and includes any information that refers to a living natural person. It does not matter what kind of information or if it only indirectly can be associated with the person.[154] Therefore some of the clips posted on YouTube constitute personal data.

In this context, processing of personal data is understood to be an automatic mean to operate personal data in the meaning of collecting, alternating, using and making it available.[155] The scope thus includes all operating actions.[156] However, the Personal Data Act is not intended to prevent everyday operating of personal information not formed in a structured collection.[157] If there is no purpose to evidently simplify operating actions,[158] the personal information may be operated in means that are not violating a person's personal integrity.[159] The scope of violating is referring to operating with a feature of intended viola-

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[151] 1998:204 Personal Data Act Article 1.

[152] See footnotes 8 and 9.

[153] *YouTube Privacy Policy*, Published 8 December 2010 (14 April 2011).

[154] 1998:204 Personal Data Act Article 3, Personal data.

[155] 1998:204 Personal Data Act Article 3, Processing (of personal data).

[156] Proposition 2005/06:173 Översyn av personuppgiftslagen (hereinafter Prop. 2005/06:173), p. 11.

[157] Proposition 2005/06:173, p. 18.

[158] Prop. 2005/06:173, p.21.

[159] Prop. 2005/06:173, p. 26.

tion, such as disgrace the person or spread classified information.[160] Since personal integrity is a dynamic concept it is sufficient to declare that it refers to a personal right to protect a physical and psychological sphere.[161]

In conclusion, some clips posted on YouTube contain personal information. A corporation that uses it is operating personal information even though there is no intention to collect the clips to make it easily accessible. However, unless the advertisement is practically intended to be hurtful to the person, such use cannot be considered to be violating the person's personal integrity.

4.2 The Marketing Act

The 2008:486 Marketing Act (Marketing Act) establishes a requirement of good marketing practice.[162] The concept of marketing practice refers to measures developed in customary law to protect both consumers and traders in the area of marketing.[163] This may give the appearance of applicability to any design of advertisements. However, the advertising measures targeted by the Marketing Act concern the prevention of marketing that is unfair.[164] In other words, the Marketing Act is applicable to the question how one may market oneself. As long as the advertisement's content is not improper or intended to anguish the consumer,[165] the Marketing Act does not apply to the question regarding what material may be used.

4.3 Names and Pictures in Advertising

In order to use a name or picture of a person in an advertisement, that person's consent is required.[166] The provision was introduced with regard to the discomfort that may be expe-

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[160] Prop. 2005/06:173, p. 29.

[161] Prop. 2005/06:173, p. 15.

[162] 2008:486 Marketing Act (hereinafter Marketing Act) Article 5.

[163] Proposition 2007/08:115 Ny marknadsföringslag (hereinafter Prop. 2007/08:115), p. 69.

[164] Marketing Act Article 1, paragraph 1.

[165] Prop. 2007/08:115, p. 71.

[166] 1978:800 Act on Names and Pictures in Advertising (hereinafter Names and Pictures Act) Article 1, paragraph 1.

rienced if being used in an advertisement without any knowledge or compensation paid.[167] It is prohibiting the usage of names or pictures in a manner that is designed to profit from that person's reputation, credibility or good name.[168] The provision is applicable to both celebrities[169] and ordinary people, with no regard to nationality.[170] However, it is limited to persons who were alive at the time when the advertisement was published. It is not considered that the indignity of a deceased's family is comparable to that of the person who is exposed.[171]

The provision is not intended to protect all names from figuring in commercials. Instead, the concept of a name is targeting distinguished names, pseudonyms or those of artists, where it is evident who the advertisement refers to.[172] Equivalent to names are indications of a person.[173] This is not to be understood as including any sort of rewrite of a person's features or experiences. Only a title that evidently singles out a specific person is prevented from being used in advertisements.[174] It must be kept in mind that the prohibition refers to the person behind the title, not the title in itself.[175]

Even though the picture's quality may be affected by which technique is used to produce it, it is not determinative to the applicability of the Names and Pictures Act. If it is possible to identify the person, consent is required. As long as it is evident who the person is by looking at the picture as a whole, the requirement of identification is considered to be fulfilled. Consequently, if it is not possible to identify the person, the picture falls outside the scope of the provision.[176]

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[167] Proposition 1978/79:2 med förslag till lag om namn och bild i reklam, beslutad den 15 juni 1978 (hereinafter Prop. 1978/79:2), p. 3.

[168] Prop. 1978/79:2, p. 56.

[169] Prop. 1978/79:2, p. 58.s

[170] Levin, Marianne, *Lärobok i immaterialrätt*, nionde upplagan, Norstedts Juridik, Stockholm 2007, p. 105.

[171] Prop. 1978/79:2, p. 20.

[172] Prop. 1978/79:2, p. 19.

[173] Names and Pictures Act Article 1, paragraph 1.

[174] Prop. 1978/79:2, p. 19.

[175] Prop. 1978/79:2, p. 73.

[176] Prop. 1978/79:2, p. 19.

The provision is also applicable to caricatures because of the requirement of identification.[177] Though the determinative feature is if it is evident who the person is, the picture may be used nonetheless provided that the presence of the person is of insignificant subsidiary to another motive.[178] This does not open to circumvention by tampering with the picture in a way that highlights the presence of a certain person.[179] Whether the presence is of insignificant subsidiary to a more prominent motive is determined with regard to the likelihood of the presence being used as a demonstration or an argument to purchase.[180] Anything that may indicate that a picture is used because of a certain person's presence is considered to reduce the feature of insignificant subsidiary and increase the feature of prominence.[181] The fact that there is a close link between the person and the advertisement does not mean that the person's consent is not required. On the contrary, that would make it obvious that the picture is used just to get attention using that person's fame.[182]

The provision applies if the usage is conducted in a commercial context.[183] Advertising is defined as any measure taken to obtain a commercial purpose if there is a commercial relation between the object and its presentation. It could be designed as either a mass communication or be directed at a specific and limited target group[184].[185] A measure that is intended to increase the interest in the corporation and its supplies is an action with a commercial purpose.[186] The same applies to a measure that is an evident part of a corporations marketing.[187] If the information that is required in an advertisement is inserted in close relation to

[177] Prop. 1978/79:2, p. 54.

[178] Prop. 1978/79:2, p. 19.

[179] Prop. 1978/79:2, p. 20.

[180] Prop. 1978/79:2, p. 57.

[181] Prop. 1978/79:2, p. 56.

[182] RH 1993:20.

[183] NJA 1999 p. 749.

[184] Prop. 1978/79:2, p. 73.

[185] Prop. 1978/79:2, p. 72.

[186] RH 1993:20.

[187] NJA 2003 p. 25.

the picture, it is an indication of a commercial use. In the end, it is the overall impression that determines if it is an advertisement or not.[188]

[188] NJA 1999 p. 749.

5 Conclusion

Because of the differences in how a YouTube clip may be protected, the question of permitted usage for the purpose of advertising must be answered one step at a time. Whether it is a work or not is determined with regard to the requirement of originality as it is defined in the context of a cinematographic work, work of art, photographic work, musical work or literary work. If the clip is found to fall within the scope of either category it is copyright protected and the author has an exclusive right to make copies of it and is entitled to enforce his or her moral rights. Photographic pictures are protected as neighbouring rights with the effect of a protection equivalent to copyright protection.

Despite the copyright protection, cinematographic work, musical work or literary work may be quoted in an advertisement provided that it is conducted in accordance with proper usage and the moral rights are respected. Works of art, photographic work and photographic pictures may also be quoted, but the restrictions are stricter and the possibilities to design an advertisement in accordance with the requirements are limited. The accepted alternatives to quotation are to create a travesty or parody.

Should the YouTube clip not fulfil the requirements of copyright protection nor be protected as neighbouring rights, it can be used in an advertisement. The relevant categories are films, pictures such as drawings, sounds and texts. Besides, ideas expressed in a work are not protected. The author cannot prevent a corporation from creating an advertisement based on the same idea as long as it is expressed in another way.

When designing the advertisement containing an acceptable quotation of a work or clip from a category that is not protected, it is important to use it in a way that is not violating the personal integrity within the meaning of the Personal Data Act. It is also necessary to take care not to choose a clip that violates the provisions of the Marketing Act. Finally, the advertisement must not contain a picture or name identifying a living person. In this context it is not proper usage to name the author of the quoted clip. This means that the possibilities to use a work posted on YouTube in an advertisement are limited to quotations of a work and parodies or travesties. Other YouTube clips are free to use if it is just a drawing, sound or a text. Film clips can be used as well, but with regard to the Names and Pictures Act a corporation's actual possibilities to use such clips in its advertising are limited.

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