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# The XVII Nordic Copyright Symposium

## EU-rättsligt oreglerade områden

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# Topics

- The protection of “other photographs”
- New and independent work or an adaptation
- Works of applied art
  
- The rule in 2 § 4 paragraph of the Swedish copyright act (1960:729)

# Berne Convention, article 2.1

- “The expression “**literary and artistic works**” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as [...] **photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art;** illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.”

# EU Term Directive 2006/116

- **Article 6:** “**Photographs** which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.”
- **Recital 16:** “The protection of photographs in the Member States is the subject of varying regimes. A photographic work within the meaning of the Berne Convention is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. The protection of other photographs should be left to national law.”

# C-145/10 Painer p. 88-91

- "...an intellectual creation is an author's own if it reflects the author's personality."
- "That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices"
- "As regards a portrait photograph, the photographer can make **free and creative choices in several ways** and at various points in its production."
- "In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software."

# Example Sweden- Photographic picture, 49 a § URL

Anyone who has prepared a photographic picture has an exclusive right to make copies of the picture and to make it available to the public. The right applies regardless of whether the picture is used in its original form or an altered form and regardless of the technique used.

A picture that has been prepared by a process analogous to photography is also considered to be a photographic picture.

The right under the first Paragraph lasts until fifty years have elapsed after the year in which the picture was prepared.

The provisions of Articles 2, second–fourth Paragraphs, 3, 7–9, 11 and 11 a, 12, first and fourth Paragraphs, 16–20 a, 23, 24, first Paragraph, 25–26 b, 26 e, 23,26 k–28, 31–38, 41, 42, 42 a–42 g and 50–52 shall apply to pictures referred to in this Article. If such a picture is the subject of copyright, also this right may be claimed.

# New and independent work or an adaptation?

Article 4 Swedish Copyright Act:

- A person who has made a translation or an **adaptation** of a work or converted it into another literary or artistic form, shall have copyright in the work in the new form, but his right to exploit it shall be subject to the copyright in the original work.
- If a person, in free connection with another work, has created a **new and independent work**, his copyright shall not be subject to the right in the original work.

# Supreme Court in Sweden

## Case: NJA 2017 s. 75

- Whether a product is a work on its own is determined by how it is meant to be perceived by those who takes part of it. An overall assessment should therefore be made on the basis of the **subjective perception** that can be assumed shared by the majority.
- The painting must be considered in its entirety
- The painting has a completely different meaning than the photo. Instead of a strong close-up portrait the portrait appears an allegory that suggests criticism of mass media's need for scapegoats. The painting is therefore a provocation in the form of commentary.
- By the transformation of the photographic work the painter has created a **new and independent work** that expresses his individuality.

# Works of applied art?

- AG Szpunar C-683/17, ECLI:EU:C:2019:363, Cofemel (not available in English)
- p. 29 “Härav framgår enligt min mening klart att kriteriet att det ska vara fråga om upphovsmannens egna intellektuella skapelse, såsom det har utvecklats i domstolens praxis, är tillämpligt på alla kategorier av verk. Detta följer även av kravet på en enhetlig tillämpning av direktiv 2001/29 inom unionen. Alla skillnader mellan medlemsstaternas interna rättsordningar vad gäller de upphovsrättsliga bestämmelsernas tillämpningsområde äventyrar nämligen denna enhetliga tillämpning. Jag kan därför inte se några skäl för att inte, åtminstone som princip, tillämpa detta kriterium på formgivningar med avseende på deras upphovsrättsliga skydd.”

Acts of communication to the public is harmonized, but...

2 § 4 st upphovsrättslagen (1960:729)?

- "As acts of communication to the public and of public performance shall be deemed also acts of communication and performance that, in the framework of commercial activities, occur to or for a comparatively large closed group of persons."

Thank you for your attention  
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