The impact of German copyright law on copyright law in the Nordic countries yesterday, today and tomorrow

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The impact of German copyright law on copyright law in the Nordic countries – yesterday, today and tomorrow

- **Historical and international context**

- **Establishment and early development** of copyright law in the Nordic countries: 1880 – 1950

- **Era of close Nordic cooperation**: 1960 – 1990

- **Era of EU harmonisation**: 1990 – present

- The **future**?
Historical and international context

- No explicit recognition of “copyright” in Roman Law
- **Royal privileges** developed in the 16th and 17th centuries
- 18th century: Introduction of copyright law in **Great Britain** (1710) and later in **France** (1791)
- 1837: Introduction of copyright law in **Prussia**

- Major copyright systems: **continental** (droit d'auteur), **anglo saxon** "copyright"
Main differences between continental and anglo saxon traditions of copyright

- Justification of copyright protection and the notion of the work:
  - The work is an expression of the spirit of the author
  - The protection of the work represents a protection for the labor (investment) underlying the creation of the work

- Initial author/rightholder

- Contractual relationship between author and producer (exploiter)

- Scope and possibility to waive moral rights

- Protection of neighbouring/related rights
International Copyright Treaties

- **Berne Convention** for the Protection of Literary and Artistic Works (1886)
- (**Universal Copyright Convention**) (1952))
- **Rome Convention** for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961)
- **WIPO Copyright Treaties** (WCT and WPPT) (1996)
- **Beijing Treaty on Audiovisual Performances** (2012)
- **Agreement on Trade Related Aspects of Intellectual Property Rights** (TRIPS) (1994)
Developments of the Berne Convention

• 1886 Berne Convention
• 1896 Paris Act
• 1908 Berlin Act
• 1914 Berne Additional Protocol
• 1928 Rome Act
• 1948 Brussels Act
• 1967 Stockholm Act
• 1971 Paris revisions to Berne Convention
• 1979 Amended version of Berne Convention
International norms on copyright protection in the international conventions

• **Works** and neighbouring rights
• **Economic rights**: Reproduction and communication to the public etc.
• **Moral rights**: Right of attribution and right of integrity

• Exceptions and limitations

• Term of protection
• Enforcement

• But **great flexibility** has been given to national lawmakers!
Nordic cooperation

- Nordic countries:
  - First copyright legislations established in the 19th century
  - Relatively small countries
  - To a large extent common traditions, values, languages, cultures etc.
  - Possibility to share competencies in legislative work, as well as case law and legal scholarship
  - Long tradition of Nordic cooperation in the area of private law in general
German influence on the development of copyright law in the Nordic countries

- Establishment and early development of copyright law in the Nordic countries: 1880 – 1950
- Era of EU harmonisation: 1990 – present
- The future?
Establishment and early development: 1880 – 1950

- Prof. Josef Kohler (1849 – 1919)
- Hegel
- Kant
- Fichte

- Frequent visits by Nordic scholars to universities in Germany
- Prof. Gösta Eberstein

- Since the 1930s – Nordic Intellectual Property Law Review (Nordiskt Immateriellt Rättsskydd, NIR)
Establishment and early development: 1880 – 1950

- **German influence** on the establishment and early development of copyright law in the Nordic countries:
  - The rationale for copyright protection
  - Notion of the "work"
  - Scope of exclusive rights
  - Range of exceptions and limitations
  - The **contractual relationship** between the author and the publisher

- Legislation, case law, legal scholarship

- New and very similar copyright Acts in the Nordic countries in the beginning of the 1960s, based on cooperation between national committees


- 1970s and 80s – Common Nordic legislative committees (coordinated by the Nordic Council of Ministers):
  - Repography
  - Satellite broadcasting
  - Cable retransmission

- Development of the ”Nordic” Extended Collective Licensing Model

- Era of Scandinavian realism

- German influence on Nordic discussion on the notion of ”the work”
  - Verkshöhe, Leistungshöhe – ”Verkshöjd”

• **Similar legislation** and to a great extent also **similar preparatory works**

• **Court decisions** from one country could be considered as "authoritative" or at least as "inspiration" when deciding similar cases in other countries

- **Legal scholarship:**
  - Possible to describe and systematise a **Nordic copyright** (to a great extent)
  - **Strong influence by German legal traditions and scholars**
EU harmonisation: 1990 – present

- TRIPs Agreement (1994)
- WIPO Copyright Treaties (1996)
- EU harmonization

- The level of copyright protection within the EU is higher/stronger than required by the international conventions

- Copyright has become an instrument in trade
  - Common rules within the EU to take down trade barriers
  - EU seeks to increase the level of copyright protection in countries outside the EU
EU Directives on copyright

- **Computer Programs** Directive (1991/250)
- **Rental and Lending** Directive (1992/100)
- **Satellite and Broadcasting** Directive (1993/83)
- **Terms of Protection** Directive ((1993/98) 2006/116)
- **Database** Directive (1996/9)
- **InfoSoc** Directive (2001/29)
- **Resale** Rights Directive (Droit de suite) (2001/84)
- **Extension** of term of protection Directive (2011/77)
- **Orphan works** Directive (2012/28)
- Directive on **collective rights management** (2014/26)
- Directive 2017/1564 on uses for the benefit of persons who are **print-disabled**
- Directive 2019/789 on online **transmissions and retransmissions**
- Directive 2019/790 on **Copyright in the Digital Single Market**
- **Enforcement** directive (2004/48)
EU harmonization of copyright

- Although harmonized to a great extent, **some differences remain between the Member States**.
  - **Scope**: Areas not influenced by EU harmonization
  - **Level of harmonization**: Areas where EU directives leave flexibility to the Member States
EU harmonisation: 1990 – present

- **EU is in the driver’s seat** – less room for national or regional/Nordic initiatives
  - **Germany** and other EU Member States have strong influence during the negotiations on EU legislation

- Also **less time/resources for common Nordic initiatives**

- **No joint Nordic committees since the end of the 1980s**
  - Cooperation during EU **negotiations**
  - Cooperation during **implementation** of EU directives
EU harmonisation: 1990 – present

- Less similarity in national legislation due to different implementations of the EU Directives
  - Less room for possibility for national courts to be "inspired" by court cases from other Nordic countries and Germany

- Preliminary rulings from the CJEU
  - Cases originating from Member States
  - Possibility for Member States to submit written interventions

- Duty of consistent interpretation
  - Interpretations and methodology developed by the CJEU:
    - Autonomous interpretation
    - Textual, contextual and purpose
EU harmonisation: 1990 – present

- Examples of **preliminary rulings** (interpretations) provided by the CJEU
  - Notion of a **work**
  - Broad interpretation of the **exclusive rights**
  - The ”balancing” function of **exceptions and limitations**

- **The influence of German copyright traditions is strong in the case law of the CJEU**, although the CJEU holds that it provides EU-autonomous interpretations
EU harmonisation: 1990 – present

- Legal scholarship:
  - Less room for the argument that there is a "Nordic copyright unity"
  - Exchange between researchers – establishment of a Nordic IPR Network, where also leading German IPR scholars participate
Is there a Nordic copyright?
On the impact of EU law and the scope for national specificity

- Perspectives on the interface between EU and national law.
- What does EU law require? Is the situation similar in the EEA countries?
  How have the different Nordic countries faced these demands?
- Are there any parts of copyright which are not affected by EU law?
The future?

• The recently adopted EU Directive (790/2019) on Copyright in the Digital Single Market
  - Includes elements of both German and Nordic origin (among others)

• After Brexit
  - Possibility for the EU to develop copyright more based on German and other continental European copyright traditions

• The core aspects of Nordic copyright law has its origins in German copyright traditions, while the current and possible future influence will be more indirect
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