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**COPYRIGHT AND THE VISUALLY IMPAIRED PEOPLE:
THE DANISH EXPERIENCE**

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The present situation

Authors and other rightsholders have as a starting point an exclusive right to control use of their works by reproduction and by making them available to the public (including communication to the public), of course in line with the Berne Convention and other international copyright conventions.

This exclusive right is, in the Danish Copyright Act, limited in certain ways for visually and hearing handicapped people as well as for certain other groups.

Limitations to the rightsholders' exclusive right for the benefit of visually impaired people and, in general, handicapped persons were introduced in the Danish Copyright Act of 1961.

Back then the limitation only allowed reproduction in Braille as well as photocopying for the educational use for certain handicapped persons. The law also contained a legal license for non-commercial talking books.

The provision has undergone certain changes throughout the ages. The group of people who can benefit from the provision has been enlarged, and the scope of the limitation has been widened. Significant amendments took place in connection with the adoption of a new Copyright Act in 1995 and further in 1996. Changes were also made in 2002 when Denmark transposed the European Union Directive 2001/29 of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereinafter referred to as the "Infosoc Directive").

The present Danish Copyright Act is consolidated in Act No. 164 of March 12, 2003 (see <http://www.kum.dk/sw4550.asp>).

The relevant provision is section 17 which reads as follows:

17.–(1) It is permitted to use and distribute copies of published works if the use and the distributed copies are specifically intended for the blind, visually impaired, the deaf and sufferers from speech impediments, and besides persons who on account of a handicap are unable to read printed text. The provision of the first sentence shall not apply to the use or distribution of copies for commercial purposes.

(2) The provisions of subsection (1) do not apply to use which consists solely of sound recording and distribution of copies by rental to the public.

(3) Any person who acquires a copy of works produced by others in accordance with subsection (1) may produce such copies on the basis of the acquired copy, including safety copies, which are necessary for the acquirer to use the copy in accordance with its purpose. The produced copies must not be used in any other manner. The right to use them shall lapse if the acquired copy is made available to the public. This shall not, however, apply in the case of lending and rental of acquired copies made by governmental or municipal institutions and other social or non-profit institutions.

(4) For the purpose of lending to the blind, the visually impaired, dyslectic persons, backward readers and others unable to read ordinary books, it is permitted to make sound recordings of published literary works if this is not done for commercial purposes. The author shall be entitled to remuneration for such recordings.


(5) Governmental or municipal institutions and other social or non-profit institutions may for the use of visually handicapped and hearing-impaired persons by sound or visual recording make copies of works broadcast on radio and television provided the requirements regarding extended collective license according to section 50 have been met. Such copies may be used only for the purpose of activities covered by the agreement presumed in section 50.

The general justification of section 17 is that it is of crucial significance for the visually and hearing impaired people to have the opportunity of getting access to protected works also through modern technology. Handicapped persons shall have the same possibility to get access to protected works as other people; neither more nor less. The essential interest of the rightsholders is to control that the use of their works in this field is only directed towards that particular group of people with special needs for copies of talking books etc. and is not accessible to the general public or in the form of piracy.

Section 17 does not make any distinction between analogue and digital copies. Consequently, the provision also allows the making of digital copies within its framework.

According to section 17(1) it is permitted to use and distribute copies of published works when intended for the blind, visually impaired, the deaf and sufferers from speech impediments, and also persons who on account of a handicap are unable to read printed text. This provision contains a general exemption from the exclusive right of the rightsholders.

Section 17(1) does not distinguish between different kinds of works – i.e. all kinds of works are as a starting point included in the provision. Also all kinds of exploitation are comprised (except for rental, as stated in paragraph 2).

Besides Braille, an example of a use ed by section 17(1) is communication to the public via the Internet, i.e. uploading works on websites for visually impaired person.

Commentaire : Det danske begreb jævntor findes ikke på engelsk, og "confer" bruges ikke i praksis. Det bør derfor efter min mening også luges ud af den "semiofficielle" engelske oversættelse af OHL. Afhængigt af konteksten kan man bruge "section XX notwithstanding," "subject to," "see," "as stated in" og andre vendinger, men ikke cf.

The condition for being able to benefit from section 17(1) is that the handicapped person, due to his or her handicap, cannot read etc. a work in a usual way, and that this can be documented.

The produced material shall be intended specifically for the use of the visually impaired people. This means that it is only lawful to use works by way of reproduction, communication to the public etc., when there is a clear basis of assuming that the purpose solely is to serve the visually impaired people. If the reproduction is made by others than the visually impaired people themselves, or institutions that have as their particular purpose to serve this group of people, it is a precondition that it clearly appears that the use is specifically arranged for visually impaired persons. The copy may, for example, be adapted to be used in connection with a computer program that makes it possible to read the work by using a particular reading instrument. Section 17(1) also makes it possible to enlarge the text for screen reading or to transform the text to synthetic speech etc.

Section 17(3) is a supplement to paragraph 1 regarding back-up copies etc. The aim of the provision is to counteract piracy and other unauthorised use of the copies made in accordance with paragraph 1 or 3.

It appears from section 17(2), as an exception to 17(1), that the provision does not apply to use that consists solely of sound recordings. This means that talking books are not covered by the free use in paragraph 1 but is instead covered by the legal license in paragraph 4.



Commentaire : A "compulsory license" er en licens, som rettighedshaveren er forpligtet til at give, og hvis han ikke gør det, kan en domstol eller lign. gøre det for ham. Når loven siger, at brugen kan finde sted mod vederlag, giver den selv licensen, og det er så en "legal license."

Section 17(4) implies that, for the purpose of lending to the blind, the visually impaired, dyslexic persons, backward readers and others unable to read ordinary books, it is permitted to make sound recordings of published literary works, if this is not done for commercial purposes. The author shall be entitled to remuneration for such recordings. Originally, the size of the remuneration was determined by the Danish Copyright License Tribunal; today, it is covered by an agreement between the Danish Writers Association and the Danish National Library for the Blind which administers the scheme.

Section 17(5) gives an opportunity for governmental and municipal institutions to make copies of works broadcast on radio and television, i.e. recordings from radio and television, provided the requirements regarding extended collective license have been met. Thus, the provision has not character of being a limitation, but can be considered part of the exclusive right, as extended collective license is a particular way of administering copyrights in the form of collective administration. The provision is of no importance in practice, as no agreements at present have been entered into between the rightsholders and the governmental or municipal institutions.

Commentaire : Her afholder jeg mig bevidst fra at kommentere.

The Infosoc Directive

The Infosoc Directive was transposed into Danish law as of December 22, 2002.

The transposition of the Directive resulted in several amendments of the Danish Copyright Act. Regarding section 17, the relevant provision in the Directive is Article 5(3)(b) that reads as follows:

3. Member States may provide for exemptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

[...]

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability

Member States are only allowed to let non-commercial uses be covered by a limitation for the benefit of the visually and hearing handicapped people. Denmark had to amend section 17(1) accordingly; see the second sentence stating that the said provision shall not apply to the use or distribution of copies for commercial purposes.

Further, the Directive regulates the important question concerning technological protection measures – a question that to some extent has influence on the rules concerning visually impaired people.

Before the implementation of the Directive, the Danish Copyright Act did not regulate the question concerning technological protection measures (except as regards computer programs). Therefore, a new provision was introduced to the Danish Copyright Act in order to implement Article 6 in the Directive:

Section 75c reads as follows:

75 c.–(1) It is not permitted to circumvent effective technological measures without the consent of the rightholder.

(2) It is not permitted to produce, import, distribute, sell, rent, advertise for sale or rental, or to possess for commercial purposes devices, products or components that

(i) are promoted, advertised or marketed for the purpose of circumvention of effective technological measures;

(ii) have only a limited commercially significant purpose or use other than to circumvent effective technological measures; or

(iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of effective technological measures.

(3) The provision of subsection (2) shall apply correspondingly to services.

(4) The expression effective technological measures in subsections (1) and (2) shall mean any effective technological measures that, in the normal course of their operation, are designed to protect works and performances and productions, etc. protected under this Act.

(5) The provisions of subsections (1)-(4) shall not apply to the protection of computer programs.

(6) The provisions of subsections (1)-(4) shall not prevent research into cryptography.

To ensure that limitations in the exclusive right in order to protect the visually impaired people etc. were not to be eliminated as a consequence of the rules concerning technological protection measures, a new section 75d in the Danish Copyright Act was adopted (transposing Article 6(4) of the Directive). Section 75d reads as follows:

75 d.—(1) The Copyright License Tribunal, established under section 47(1), may, upon request, order a rightholder who has used the effective technological measures mentioned in section 75 c(1) to make such means available to a user which are necessary for the latter to benefit from the provisions of [...] section 17(1)-(4) [...]. If the rightholder does not comply with the order within 4 weeks from the decision of the Tribunal, the user may circumvent the effective technological measure, notwithstanding the provision of section 75 c(1). The provisions of the first and second sentences shall apply only to users with legal access to the work or the performance or the production, etc.

(2) The provision of subsection (1) shall apply only to the extent that the rightholder has not, by voluntary measures, including agreements with other parties concerned, ensured that the user may benefit from the provisions mentioned in subsection (1) notwithstanding the use of effective technological measures.

(3) The provision of subsection (1) shall not apply to works and performances or productions, etc. made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them, as indicated in the second division of section 2(4)(i).

It is yet to be seen how sections 75c and 75d will work in practice regarding visually impaired persons' use of works according to section 17. No cases have until now been submitted to the Copyright License Tribunal.

The future

The question of how to regulate the visually impaired persons' access to copyright works is often debated in Denmark, not least in the light of the technological development.

A current topic, raised by the publishers, is whether others than just the handicapped persons in fact take part in the free use of works according to section 17. If copies are also distributed to other groups, especially in the case of digital copies, it is to the detriment of the rightsholders. The publishers have pointed out that at present there is no legal obligation to encrypt the copyrighted material.

On the other hand, the Danish National Library for the Blind has questioned the relationship between paragraphs 1 and 4 of section 17. Why is there a legal license (i.e. with a duty to pay remuneration to the rightsholders) regarding talking books (paragraph 4), whilst multimedia products can be produced without any payment to the rightsholders (paragraph 1)? The same institution has also asked whether it would be possible to extend section 17(4) to online distribution of talking books as the physical distribution (lending) of sound recordings, at least to some groups of recipients, is not appropriate; this proposal highlights the question of control and security.

Finally, the Danish National Library for the Blind has raised the question of the dyslexics. These people are, in principle, covered by section 17 but it can be difficult to use the provision in practice; for instance, how can one document dyslexia and which special reading materials are needed for these reading impaired persons? Due to this difficult situation, it is often chosen not to offer the same opportunities to the dyslexics as to the blind and deaf people. For that reason, it is necessary to discuss how to deal with this problem.

These issues raised by the publishers and the Danish National Library for the Blind will be the subject of a series of meetings that the Ministry of Culture will commence later in November 2003.

Regarding the relationship between limitations to the exclusive right (including section 17) and the technological protection measures, the Danish Parliament will, in its 2005-2006 session, have the opportunity to evaluate the 2002 legislation in this field. The Ministry has announced that it will organise a mid-term evaluation in the first half of 2004.

[End of presentation]