

# NORDIC/GERMAN NETWORK MEETING

LOFOTEN, NORWAY  
8-10 MAY 2014

THE IDEOLOGICAL ROOTS OF FINNISH  
COPYRIGHT LAW

THE CONCEPT OF PROPERTY

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# SETTING THE SCENE

- **The Finnish Copyright Act is a self-evident part of the Nordic "copyright family"**
  - Long-time common tradition, cultural and societal similarities, close relations between both rightholders' and users' organisations, inter-Nordic preparation of the present national Copyright Acts in the 1950's, established legislative cooperation since the 1960's, etc.
- **This is all true, but ...**
  - record of common Nordic history usually starts from the late 1920's
  - development of Finnish copyright legislation in itself before the Nordic period has remained very much uncharted territory in present-day research
  - it seems that the influences provided by prominent legal cultures (German, French, British) reached the Nordic countries at different times and in somewhat different forms

# PURPOSE OF THE STUDY

- **Topic of my research: protection of copyright as property under the Finnish Constitution, in particular in the digital domain**
- **Problem: no proper basic research available on copyright as property**
  - Very little attention given in the Finnish legal literature on copyright, civil law and constitutional law > thin doctrinal base
  - A lot of attention given to property in general or established categories thereof (e.g. land, chattels, easements) > specific characteristics of intellectual property not involved
  - Interpretation of the Constitution is (and has been) a prerogative of the Constitutional Committee of the Parliament: *ex ante* & *in abstracto* rulings relating to a bill as necessary > no *in concreto* case law by Courts
  - New Constitution promulgated in 1995/2000: a new system of civil rights introduced (although most existent rights *per se* remained intact) > no parliamentary "case law" as yet; slow development to be expected

# ALTERNATIVE WAYS FORWARD

- **Study of foreign doctrines?**
  - Interesting and useful but not necessarily relevant for a study on Finnish constitutional regime
- **Study of supra-national legal framework?**
  - Necessary as such but too vague and distant in view of conclusive argumentation on domestic law
- **Study of theoretical approaches on copyright as property?**
  - Necessary as a methodical backbone but not sufficient in itself to draw valid conclusions on the normative substance of law
- **Study of the legislative history of Finnish copyright law?**
  - An unexploited source of information but relevance to present-day research and value of the findings as legal arguments need to be demonstrated

# LEGISLATIVE HISTORY IN A NUTSHELL

- **1880: Decree Relating to the Rights of Writers and Artists in Respect of the Products of Their Labour**
  - Reproduction of literary works (broad concept including i.a. sheet music)
  - Translation of literary works
  - Performance of unpublished dramatic works (including accompanying music) and published works if rights withheld
  - Imitation of works of fine art in the same genre and mechanical reproduction thereof
  - General term of protection: 50 years P.M.A.
  - Photographs: special 5 year protection against reproduction if copyright notice made on every published copy
- **1927: Act on Copyright in Products of Intellectual Activity**
  - New types of works: architecture, works of applied arts, choreographic and cinematographic works
  - New types of entitlements: public performance of musical works or unpublished literary works or fixations thereof, and broadcasting thereof, public display of works of fine art
  - Separate law on the protection on photographs
- **1961: Copyright Act**
  - Neighbouring rights for performing artists, phonogram producers, broadcasters, and producers of catalogues

# BACKDROP OF THE 1880 DECREE

- **Finland was annexed to the Russian Empire in 1809**
  - Autonomous Grand Duchy, e.g. domestic (former Swedish) legislation and own legal institutions; Russian Emperor remained the Sovereign
  - No legislative activity in the following decades
- **National Assembly convened in 1863 (“Diet of the Four Estates”)**
  - Thereafter conventions in every 3-5 years
- **An intensive period of liberalization took place from early 1860’s until 1879**
  - From exhaustive regulation of the economy to almost unlimited freedom of trade
- **An initiative to pass a copyright law was made to the Assembly in 1872**
  - No evident connection to the on-going process of liberalization
- **In the meantime, first Nordic legal meeting (on copyright) was organized in 1872**
  - Resolution for future legislative goals adopted: reciprocal protection of authors between the Nordic countries (Sweden, Norway, Denmark); protection against illicit translations; highest possible unity of Nordic copyright laws
- **In 1873, the Senate of Finland nominated a committee to draft a Bill**
  - Chaired by civil law professor *Robert Montgomery* (study trips to European countries as of the 1860’s; “full-blooded” supporter of (Anglosaxon) libertarian thinking at that time; later turned towards the German doctrine)
  - Other members included philosopher *J.W.Snellman* and professor *Zacharias Topelius*

# MAIN FINDINGS OF THE COMMITTEE

- The issue is about "applying the fundamental principle of the right of property"; "as an infringement of moral sentiment, depriving the fruits of intellectual labour of an author or an artist equals to dispossessing or causing damage to any other property"
- The object of a right of property can only be a tangible "thing" since only a thing can be "fully subjected to the rational will"
- Literary or artistic right of property lacks this characteristic; the author or artist will be legally protected "not only because his labour is attached to the (physical) subject-matter" but rather "because of his work in its capacity of an intellectual product, as an expression of his thinking or imagination"
- In order for this protection to be effective, it must survive irrespective of the physical carrier; indeed, the true object of the right is "the vivid context of thought, the form of the visual representation"
- Consequently, the entitlements forming the essence of the right of property and the literary and artistic right, respectively, are different; another difference is the permanence of the right which in respect of the right of property is limited "only by the durability of the object", whereas in respect of the products of writing and artistic activity the duration of the right had (conventionally) been restricted to a rather short period "in the general cultural interest"
- Hence, modern legal doctrine had rejected the conception of author's and artist's right as a right of property only to enhance conceptual clarity which is of great theoretical and practical importance herein; this is not to be considered an indication of abandoning or belittling this right
- The Committee proposed that the new legislative instrument be named "Decree Relating to the Rights of Writers and Artists in Respect of the Products of Their Labour"

# PROPOSAL FOR A BILL IN 1874

- **Main principles followed by the Committee:**
  - The person who has brought about the intellectual product shall have
    - the exclusive right to decide upon the time and form of its publication
    - an inviolable right to receive the property value ("förmögenhetsvärde") that may accrue to his work in consequence of others wishing to benefit from it or for any other purpose taking part thereof
  - Since the nature of the right is partly purely personal, equal *i.a.* to the right of freedom or of honour as a citizen, partly a property right of a special kind, it must be conceived and ruled upon in both directions of law
- **Main influences adopted by the Committee:**
  - The proposal was "an expression of the general underpinnings detectable in the most prominent contemporary jurisdictions, having thus become *jus gentium*"
  - No particular legislation had been followed in the drafting of the details because "such a case-by-case approach has never been the nature of Swedish-Finnish legislation" and because there was no need for detailed regulation "within our simple circumstances"
  - However, proposals on the protection of visual arts and photographs had been adopted from the recent laws of "the closely related cultural areas" of Denmark (1864/1865) and Sweden (1867) with a view *i.a.* "to bring about legal resemblance between Finland and these countries with which close contacts in the domain of literature and art would prevail also in the foreseeable future"



# DEBATE AT THE NATIONAL ASSEMBLY IN 1877

- **The Committee of Legal Affairs:**
  - New legislation is necessary in order to safeguard domestic authors and artists and to promote cultural aims; in addition, "the application of the forthcoming Swedish law to Finnish authors will require reciprocity on the Finnish part"
- **Intensive debates in the Estates' meetings on *i.a.***
  - mandatory registration of works
    - reification of rights is necessary to make them property (such as a debt)
  - term of protection (from 30 to 50 years P.M.A.)
    - a longer term would benefit only publishers and work against the public interest
  - right of translation
    - expected rise of Finnish-language literature called for authors to withhold translation rights from Finnish to Swedish
  - role of market forces
    - authors have an interest in disseminating their works instead of holding the rights
    - intricate speculations on the interplay between Swedish and Finnish language book markets
  - final result regarding the translation right:
    - full protection to Swedish ↔ Finnish translations (interest of national authors)
    - 5 year protection to translations from any other language to Swedish/Finnish and vice versa (interest of national culture – mercantilist approach!)

# OVERVIEW OF THE 1880 DECREE

- **A representative mix of contemporary normative solutions and legal conceptions built on a solid theoretical underpinning**
  - overview of the most recent European legislations with an emphasis on Nordic and German law, supported by relevant philosophical axioms
  - no direct adoption of any existing legislation as such
- **Demonstrated a libertarian overtone in the wake of the general "freedom of trade" policy objective**
  - market sensitivity, broad freedom of contract, pursuit of public interest goals through the operation of market forces, etc.
  - implied labour-desert theory with certain utilitarian undertones; significance of author's personality is acknowledged but not as a direct natural rights argument
- **Coordinated with the common Nordic goals of the 1872 resolution "behind the scenes"?**
  - unity of legislation, reciprocal treatment, right of translation
- **Although formally a separate endeavour, the Decree seemingly managed to establish itself a position as a "remote" member of the Nordic copyright family**

*VSV*  
*1880. № 124. 10 918*

СТАТСЪ СЕКРЕТАРИАТА  
НАШЕГО КОМИТЕТА  
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STATS SECRETARIATETS  
För När Föreningen  
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*Landhagsproprietionens  
förfallare och konduktörer  
sitt till aktens af sin verk  
konst.*

Наше  
Комитет

*Arvidet utkom den 15 December 1880  
Almgrens Stat. den 14/11 Februari 1881*

# A PERIOD OF "QUIET LIFE"

- **Increasing turmoil in the political front**
  - Russian oppression from 1899 onward to abolish Finland's autonomy
  - World war I 1914–1918, independence of Finland 1917, civil war in Finland 1918
  - Political restlessness in the following years
- **Meanwhile in the Finnish copyright front ...**
  - Initiative at the National Assembly in 1897 to amend the 1880 Decree (architecture, applied arts, photographs)
  - Draft bill by the Law drafting committee (serving the Senate) in 1905 (in addition to 1897 initiative, performing rights of music and literature) > did not lead into new legislation
  - General Russian copyright law promulgated in 1911 > Finnish legislation to be "harmonized" > firm resistance
  - Very little legal literature on copyright published > no doctrinal development
  - No (major) litigations on copyright > no case-law development
  - Limited interaction with foreign doctrines?
    - Berne Convention 1886, 1896, 1908
    - *Kohler* 1880/1897, *von Gierke* 1895
- **... and in the Nordic copyright front**
  - Norway: Law on author's and artist's right (1893)
  - Denmark: Law on author's and artist's right (1902/1912)
  - Sweden : Law on artist's right (1897); Laws on the protection of literary and musical works, works of visual art, and photographs (1919)

# LAW DRAFTING COMMITTEE BILLS OF 1920

- **Two draft bills in accordance with the German model:**
  - literary and musical works
  - works of fine art (including works of architecture and applied arts) and photographs
- **Justification of author's right:**
  - "the product of intellectual labour, a spiritual image, conveys an expression of the author's self; also this side of the individual merits protection; hence, the author shall gain the honour from his work and he shall have the right to decide upon the time and form of its publication"
  - "however, this protection (of author) as an individual will not suffice to secure him the fruits of his labour; there is also a property side at issue and the author shall reap the material benefit accruing to his work, on the condition that general societal interests are not violated"
  - "this particular right is not a common real right on property, because a work is not a tangible object but an intellectual product external from man; this intellectual product, too, has property value of which the author may benefit when making the work available to the public either by reproducing and distributing it or by performing it directly"
- **Dominance of the property interest:**
  - "it is the author's property interest above all that shall be protected through specific legislation; it is noteworthy, though, that this protection frequently also encompasses the protection of the individual"

# DRAFTING OF THE "SETÄLÄ BILL"

- **The 1920 bills did not proceed to legislative process**
- **Sense of growing urgency in view of a membership of the Berne Union**
- **In 1925 professor *E.N.Setälä* was appointed as the Minister of Culture**
  - Setälä made the drafting of a new copyright act his personal project
  - Contact with Norwegian copyright lawyers in a Nordic legal meeting > inspired by the Norwegian 1925 bill ("Innstilling til lov om vern for åndsverker")
  - Setälä abandoned the 1920 bills and rewrote the entire draft by himself: partial adoptions of the Norwegian bill, partial inclusions of the 1920 bills, a new layout by Setälä
  - No detailed preparatory works were attached – there weren't any
  - In the general introduction of the bill it was suggested that in terms of subject matter the bill was "quite closely related" to the 1920 draft bills – however, Setälä denied this years later
- **In 1926 Setälä became the Minister of Foreign Affairs but he continued to be in charge of the *dossier***
- **The final bill was submitted to the Parliament in December 1926**

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# "SETÄLÄ BILL" IN THE PARLIAMENT 1927

- **Several amendments were made by the Committee of Legal Affairs**
- **Setälä defended the bill:**
  - "the proposed amendments are a change for the worse since they mainly restrict the author's right without serving any public interest"
  - "the point of departure shall be the ever more universally acknowledged principle descending from the legislators of the French revolution that both the intellectual and the material right of the author and the artist to his work shall be protected by the law as fully as a right to the result of any other labour"
  - "hence, an author and an artist shall have all suchs rights to and powers over his work the divestment of which is not required by compelling societal needs"
- **The Chairman of the Committee of Legal Affairs rejected this approach:**
  - "the point of departure has not been a theoretical principle of author's rights as natural right, comparable to the right of property; in the positive law author's right has not been acknowledged as an *a priori* recognized right encompassing any and all entitlements which can be theoretically derived thereof and which have not been expressly excluded"
  - "on the contrary, this right has gradually gained ground in the law so that legal protection has been recognized to one entitlement after another, at different times in different countries, in differing order and for different categories of authors"
  - "therefore, it would hardly be correct to say that author's right is a natural right with an independent existence and that it would not have been created by the positive law"



# REPERCUSSIONS OF THE 1927 COPYRIGHT ACT

- **Article 1 was the key element: "Author of an intellectual product has, within the confines of this law, an exclusive right to make his work available to the public."**
- **Early on, an understanding of a close relationship between the Norwegian (1930) and Finnish Copyright Acts started to develop within the Nordic doctrine**
  - *Gösta Eberstein* (1927): "article 2 of the Finnish Act fully coincides with article 2 of the Norwegian bill" (open-ended list of types of works); "in article 1 of the Norwegian bill a modern approach to the scope of author's right had been adopted" (general definition of entitlements), whereas "article 1 of the Finnish Act settles for making a reference to article 4" (where the entitlements had been enumerated)
  - *Ragnar Knoph* (1937): "the Finnish Act followed the Norwegian model both in its external structure and in many of its detailed provisions"; "the Act forms one entity where both the concept of work and the scope of the right have been defined on a general level"; "Finnish and Norwegian legislations are fairly close to each other and in terms of their basic principles and structure they fully coincide"
- **In 1928, the Bulletin of the Berne Union reviewed the new Finnish Copyright Act:**
  - There are two distinct categories of copyright laws: the French model ("monopole vraiment complet") and the German model ("des prérogatives déterminées")
  - Article 1 places the Finnish doctrine under the French model ("C'est donc la théorie française qui a prévalu.")

# "STATUS REPORT" OF THE 1930'S

- **In retrospect, the post-1927 Copyright Act doctrinal status seems somewhat blurred**
  - Swedish laws (1919) had served as a model for the bills of 1920; they were, in turn, "closely related" to the laws of Denmark (1902/1912) and Norway (1893) and "first and foremost" to the German law (1901)
  - The Norwegian bill (1925), drawing its inspiration from the French law, had served as the main model for the "Setälä bill" (1925)
  - The Parliament had favoured a strictly positivist approach and rejected Setälä's natural law arguments but nevertheless passed the law essentially in the form proposed by Setälä (in view of ensuring membership of the Berne Union)
  - A developing Nordic doctrine considered the Finnish law as closely resembling the Norwegian law (which was confirmed only much later in the 1953 Finnish committee report)
  - A distinguished international legal opinion placed the Finnish doctrine under the French model of copyright legislation
- **Towards the end of the 1930's, copyright law became under critical scrutiny**
  - Exercise of the new (performing) rights introduced in the 1927 Copyright Act caused irritation on the market
  - Initiatives of MP's (1934, 1938) to restrict or balance the rights
- **Swedish invitation in 1938 to explore the possibilities for inter-Nordic preparation of copyright legislation may have come as a welcomed "way out"?**

# TOWARDS INTER-NORDIC PREPARATION OF LAW

- **Exploratory expert meeting in May 1938**
  - Conformity of national copyright laws achievable under the Berne Convention is limited – a deeper unity should be strived for within the unified Nordic cultural area
  - Fundamental questions of "principled and structural nature" on the agenda:
    - in delineating the object and scope of author's right, should a method of enumeration (as in Sweden) be applied or rather a summarized general representation (as in Norway and Finland and partly in Denmark) be presented?
    - the advent of phonograph, cinematography and broadcasting had amounted to a turning point in the history of copyright, making authors and artists increasingly dependent on public interest (broadcasting) and the "large-scale industrial element" (phonograph, cinematography); hence, the legal regulation thereof would become significantly more complex than before
    - Nordic right holders had requested that a process of law-making be initiated promptly, holding the unity of Nordic legislations as an objective
- **First meeting of Nordic national committees in May 1939**
- **Intensive working period as from 1946 until mid-1950's**
  - National committee reports: Norway (1950), Denmark (1951), Finland (1953), Sweden (1956)
- **National laws adopted: Sweden (1960), Denmark, Norway, Finland (1961)**

# CONCLUDING REMARKS 1

- **The nature of copyright as property has been one of the most debated issues in the course of the legislative history of Finnish copyright**
- **The Committee report of 1874 laid the foundations:**
  - Systemic level: structural and operational distinction from the general right of (real) property
  - Ideological level: equality of intellectual property vis-à-vis tangible property
  - Theoretical level: implied labour-desert justification without clear commitment to natural law origin
- **Later on, development towards abstract structural concepts:**
  - From enumeration of types of works (codification in retrospect) towards an open concept
  - From enumeration of entitlements (attached to types of works) towards general entitlements
  - Emerging markets define the actual scope of rights? Who sets the limits?
  - Challenge to the positivist approach: a "forward looking law" resembles the natural law approach? Abstractivity as a rational or an ideological concept?
- **Distinction between pre-modern / modern IP law (Sherman & Bently 1999)**
  - "Pre-modern law tended to respond to particular problems as and when they were presented to the law"; "in contrast, modern intellectual property law tends to be more forward looking"
  - A conceptual shift in British law around 1850

# CONCLUDING REMARKS 2

- **Changing of policy perspectives:**

- The 1880 Decree characterized an active ("business-oriented"?) author; later on a somewhat nuanced more personality-based image (e.g. "artistic value" or "reputation") but the libertarian undertone remained; very few references to the concept of "Romantic author" can be found
- The 1897 initiative at the National Assembly and the draft bill of 1905 reflected increasing economic expectations aimed at the products of applied arts (architecture, consumer goods, etc.)
- The 1880 Decree set national cultural and language considerations as major public interest objectives (term of protection as the primary tool); the emphasis shifted towards a "citizen perspective" as from the 1920's (limitations and exceptions gaining growing importance)
- A "hidden" Nordic agenda in the 1870's? An effort to underline proximity to Western cultural sphere under restricted political conditions?
- Revival of the Nordic approach and relations in the 1920's (Setälä's personal activity)