Legal and Commercial Options for API Licences

# Background

This document has been created as part of the “Open API Licence for Companies” project, funded by VINNOVA. The aim of the project is to address issues and options arising for a company which is going to launch an API, with respect to the wording and content of the API licence. The project has addressed these challenges and produced the following documents as guidance for the API provider:

1. This document, which provides detailed background information relating to both the legal considerations which need to be taken into account when drafting an API licence due to statutory requirements (see section 4 below), and options of a more practical/commercial nature (see section 5 below).
2. Licence wording, which covers relevant options and considerations taken into account in this document. Since the wording is drafted differently depending on an individual API provider’s approach to a particular option, the licence wording is drafted in such a way as to allow the API provider to make an active choice from among a number of alternative provisions. In certain respects, the circumstances applicable to the provision of the licence are so individual that standard wording does not perform any real function. In these cases, the licence contains a placeholder, where the individual API provider can itself fill in relevant provisions. In some cases, reference is also made to a separate policy document, which must be drafted by the API provider itself.
3. Templates for policy documents. To give the API provider an idea of the (rough) content of each policy document to which the licence refers, we have created brief templates which can form the basis of the document to be produced by the API provider.
4. Brief instructions to the licence wording, where the various options are formulated as direct questions to the API provider, the intention of which is to serve as a “quick guide” to the licence wording.

All documents are provided on the website <http://apilicens.se/>. As stated on the website, to ensure an API provider makes conscious and correct decisions about the wording the provider will use in its own version of the licence, the provider is required to read and consider the matters in the brief instructions based on the more detailed information stated in this document.

# Content and limitations of the licence

The following clarifications and limitations apply as regards the types of APIs which may be provided under the licence, and the matters which are covered by the licence:

The licence covers:

* Internet-based APIs, implemented typically through technical protocols, such as REST and SOAP.
* APIs which both read and write information.
* APIs provided by companies.
* APIs which can be used free of charge, which are provided in exchange for a fee, or a combination of these two variants.

The licence does not cover:

* Tools, software code or code libraries which are based on the API.
* APIs which are provided by public authorities and other public bodies. These are subject to statutory requirements concerning publication and confidentiality, etc. which have not been taken into consideration in this project.
* APIs which support orders for, and/or purchases of, goods via the API itself. Orders for, and purchases of, goods by consumers in a digital environment make it necessary to include provisions regarding the duty to provide information, right of cancellation, etc., for which there is no scope within the framework of the project.
* Statutory requirements concerning the duty to provide information, which have to be satisfied when a company provides an API, but which need not be referred to in the wording of the licence itself, but instead on the website on which the API is provided. Examples of these requirements include sections 10-12 of the Swedish Electronic Commerce and Other Information Society Services Act (SFS 2002:562) and the information requirements contained in the Swedish Distance and Doorstep Sales Act (SFS 2005:59).

# Terms and conditions of use regarding the licence

Use of the licence is subject to the following terms and conditions:

* As stated in the “Background” section in the licence wording, the licence is drafted on the basis that each API user be required to actively approve the provisions of the licence (by ticking a box to grant his or her approval). The project recommends that the API provider require such active and trackable approval before granting the user access to the API.
* The licence is provided under a Creative Commons Attribution 3.0 licence (see <http://creativecommons.org/licenses/by/3.0/deed.en>) and is thus open, which means that the copyright holders (the project) will not bring any copyright claims in respect of the licence and that anyone will be able to use, distribute and modify the licence wording as their needs require.
* However, when using all or part of the published licence, reference must be made to the original licence by including the following wording: “this licence is based on the Open API Licence for Companies *(=hyperlink to* [*http://apilicens.se/*](http://apilicens.se/)), but has been adapted by [name of the API provider]”.
* Notwithstanding the fact that anyone is entitled to amend the licence wording, it is important to note that the licence has been produced for the particular circumstances, i.e. the limitations, options and approaches addressed in this document. If any additional changes are made, there is a risk that the licence wording will no longer be legally tenable.
* The documentation has been produced based on the project's best knowledge of the circumstances which generally apply in the provision of APIs. Since there is a limited amount of case law relating to API licences, and since there is no scope for including all conceivable types of information and circumstances in the provisions of the licence, the licence should not be regarded as comprehensive, but, rather, is to be used at the user's own risk and responsibility. If, as an API provider, you want to be certain that you have a licence in place which fully reflects your individual circumstances, you should have a lawyer review the proposed wording of your licence.
* The legal considerations which have been taken into account are based on the state of the law at the time of production of the documentation (Autumn 2013). Thus, any new case law, legislation and other changes in the law after this time are not reflected in the documents, unless the project or the person(s) managing the documents on behalf of the project decides to update the documents, e.g. by issuing a new, updated version of the licence.

# Legal considerations

## Intellectual property rights

### Copyright protection

The Swedish Copyright in Literary and Artistic Works Act (SFS 1960:729) grants a person who has created a literary or artistic work the exclusive right to produce new copies of the work and to make it available to the general public, in all cases other than for purely private use.

Literary or artistic works can include a text, photograph, computer program or musical work, provided the text, photograph, computer program or musical work is sufficiently original.

As in any other case where a company wishes to distribute material which may be copyright-protected, the provider of an API must therefore check whether the API returns any material to which a party other than the provider of the API has copyright, or to which the API provider itself has copyright and wishes to impose limitations on the use of.

Therefore, a company that provides an API should avoid displaying images, software code and other works in an API if there is uncertainty as to whether the copyright holder’s approval has been obtained to distributing the work in this way.

Occasionally, the right to use a copyright-protected work is subject to conditions, such as an image provided under a licence which states that the copyright holder must be mentioned when the image is copied or distributed. In order to comply with such conditions, an API provider should give the users (i.e. the developers who are granted access to the API) the information they need to prevent them from violating the copyright to any work, by communicating the terms and conditions governing the works which are provided via the API.

Since these terms and conditions will vary from case to case, it is not possible to insert this information in the licence wording produced within the scope of the project, but the licence wording has been provided with scope for the API provider to describe any terms and conditions governing copyright-protected material.

In cases where the users themselves can generate information for the API, the API provider should make it clear that the user him/herself is responsible for ensuring that he or she is entitled to distribute any copyright-protected works (see section 5.5.2 below).

### Trademark protection

The Swedish Trademarks Act (SFS 2010:1877) grants a person who has registered or established on the market a trademark the exclusive right to use the trademark in business activities.

Examples of trademark-protected material include logos, trade names and symbols, provided they constitute a unique trademark.

As in the case of copyright-protected material, the provider of an API is not entitled to permit its users to use a trademark which does not belong to the API provider. Therefore, a company which provides an API should refrain from including trademark-protected marks in an API if there is uncertainty as to whether the holder’s approval has been obtained to permitting third parties to use the trademark.

As in the case of copyright-protected material, if the API provider has obtained the right to permit its users to use a third-party trademark, the API provider should inform its users of any terms or conditions governing the use of the trademark.

It may also be the case that the API provider wishes to require the user to make reference to the provider’s own trademark or company name when the user publishes information to which it gained access via the API.

Some API providers may also wish to acquire the right themselves to refer to the user’s trademark or company name to advertise who uses the API. The use of trademarks in these situations is addressed in section 5.4 below.

#### Options in the licence

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| Will the API disclose material subject to intellectual property protection, such as material covered by copyright or trademark protection? | **Yes:** Retain section 2.2 of the licence wording and insert desired information.  **No:** Delete section 2.2 of the licence wording |

## Personal data protection

### Background

The Swedish Personal Data Act (SFS 1998:204) (PUL) sets out the conditions for automated processing of personal data in activities which are not of a purely private nature.

“Personal data” is defined in PUL as “all kinds of information that directly or indirectly may be referable to a natural person who is alive”, which may include:

* A natural person's name
* A natural person’s email address
* An IP number which can be linked to a natural person
* A username in a social network.

“Processing” means essentially any measure taken with respect to personal data, including collection, recording, organisation, storage, adaptation, alteration, use, disclosure by transmission, dissemination, compilation, blocking, or deletion.

The provisions of PUL are aimed at the controller of personal data, i.e. the body which, either alone or together with other parties, decides the purpose and means of processing personal data. PUL lists a number of requirements which are imposed on the controller of personal data, including:

* requirement for certain information for registered persons;
* requirement to take appropriate technical and organisational measures to protect the personal data being processed;
* requirement that the controller of personal data may not transfer personal data to a third party country (i.e. a country outside the EU/EEA) without legal grounds to do so.

### Obtaining personal data

Many API providers require that users register certain information about themselves (such as their name and email address) in order to gain access to the API. The API provider is to be regarded as the controller of personal data in respect of personal data collected in this manner and, as a result, must comply with PUL’s requirements relating to a controller of personal data.

Some of these requirements fall outside the scope of the project, but to give an idea of what information a controller of personal data should provide to registered persons (i.e. to users who have registered their information in order to gain access to an API), the licence contains a reference to a personal data management policy. The project recommends that an API provider provide, at a minimum, the information set out in the Personal Data Processing Policy template.

#### Options in the licence

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| Will the API user need to register certain personal data (e.g. their email address or name) in order to gain access to the API? | **Yes:** Retain section 3.1 of the licence wording.  **No:** Delete section 3.1 of the licence wording |

### Disclosure of personal data

When a company wishes to disclose information containing personal data through an API, the assumption is generally that the company is the controller of personal data according to PUL, and that the disclosure of the data is to be regarded as personal data processing.

PUL states that there must be a legal basis for every act of processing (e.g. disclosure to an API user), which can either consist of the controller of personal data having obtained the registered individual’s consent to the processing, or the processing being necessary to enable performance of an agreement with the registered person, to enable the controller of personal data to perform a legal obligation or suchlike. (see section 10 of PUL).

Therefore, when an API is about to be launched, the provider must, as an initial step, check whether the information which is to be disclosed contains any personal data. If so, the provider must check that it has a legal basis for disclosing the information to the API users, for example by having obtained the consent of the registered users to doing so.

Since API users who receive the personal data will, in turn, become controllers of personal data in respect of their processing of the data, the project recommends that the API provider inform the users that they are responsible for ensuring that their own processing of personal data takes place in accordance with PUL.

In cases where users themselves can generate information for an API, the API provider should make it clear that the user him/herself is responsible for ensuring that he or she is entitled to distribute any personal data made available by the user in the API (see section 5.5.2 below).

### Options in the licence

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| Will the API disclose personal data? | **Yes:** Retain section 3.2 of the licence wording.  **No:** Delete section 3.2 of the licence wording. |

## Requirement that the licence be capable of being reproduced

The Swedish Electronic Commerce and Other Information Society Services Act (SFS 2002:562) (the “E-Commerce Act”) contains a number of requirements as to the information a provider of “information society services” is permitted to disclose to its users.

As is clear from the limitations which have been imposed on the project, we have concluded that most of these information requirements need not be satisfied in the wording of the licence itself, but, rather, can be stated elsewhere on the website on which an API is being provided.

However, section 13 of the E-Commerce Act contains a requirement that “contractual terms and conditions must be made available to recipients in a way that allows them to store and reproduce them”.

Therefore, the project recommends that API providers provide their licence wording in a public version management system (e.g. GitHub.com), as a PDF or in an equivalent format which makes it possible for API users to store and reproduce it.

In cases where an API provider has modified a provision in its licence wording, the company should publish a new version of the licence in a format which can be stored and reproduced by the users. As regards communicating changes to the licence wording to users, see also section 5.6 below.

### Implication for the licence

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| See section 7.2 of the licence wording. |

# Commercial options

## Technical requirements and limitations

It may be important from a commercial perspective how the API users will be able to cache, store and copy the information obtained via the API.

Some information is very time-critical (such as financial or traffic-related data) which means that storage can risk creating a poor experience for the end user. Other information is rarely updated, which reduces the risk associated with locally-stored data. Local storage of the API's users can also reduce the strain on the systems on which the API is used.

Some companies need to be able to prevent large portions of their data being copied, since otherwise the entire existence of the company may be at risk. However, a prohibition on storage may be viewed by the API’s users as an obstruction, for example where the developer already has a server infrastructure which it wants to use or where the information needs to be processed before being shown to final users. For other developers who develop services which are very similar to the structure of the API, direct use without the need to establish its own server infrastructure may be viewed in a positive light.

If the API owner obstructs API users from storing data, this may also prevent the development of certain types of services (services which one could perhaps not even have conceived of developing from the outset), such as services where statistics are compiled and presented based on different types of real-time data.

In light of these types of considerations, the API user should determine whether it wants to impose any limitations on the user's right to cache, store and copy information from the API, and, if so, whether the user should be responsible for updating stored data.

It is up to the individual API provider to determine precisely which technical limitations and possibilities should be offered to the user, but the project recommends that a provider provide the information set out in the Technical Documentation template.

### Options in the licence

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| Are there any technical limitations on how the user can use the API content, e.g. applicable caches, storage, copying and updates in respect of the API content? | **Yes:** Retain section 4.1 of the licence wording and delete any limitation which is not relevant.  **No:** Delete section 4.1 of the licence wording. |

## Payment for access to the API

An important issue for API providers is in what way the API should be profitable. In some cases, this may only involve increasing in the number of services which means that more customers or other interested parties can be reached on platforms and in connections which match their preferences. In other cases, the company may be the owner of information which is otherwise difficult or impossible to get hold of, and which the company wants to get paid for. In still other cases, a hybrid model may be applied where there is a “free level” and one or more “pay levels” (where the developer gains access to additional information or more calls per given amount of time).

In cases where the content of the API is either wholly or partly subject to a fee, the project recommends that the licence refer to a separate price list.

### Options in the licence

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| Do you want to charge a fee for the use of the API? | **Yes:** Retain section 5.2 of the licence wording.  **No:** Delete section 5.2 of the licence wording. |

## Commercial use of information from the API

Making possible commercial use of an API is often something which makes it more attractive for the API users to develop services on the API, but in some cases an API provider would not want external developers to design services which profit from the provider’s information.

If an API provider wishes to limit the possibility to use information from the API for commercial purposes, it is important to establish clear limitations as to what is to be regarded as commercial use. For example, can users of the API develop a service which contains adverts?

### Options in the licence

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| Are there any limitations as regards the commercial use of information from the API? | **Yes:** Retain one of the options in section 5.3 of the licence wording or include a separate limitation.  **No:** Delete section 5.3 of the licence wording. |

## Reference to source

Specifying where information from the API has been obtained, for example by using the API owner's logo, can (depending on the service) generate both positive and negative effects for the API owner. Many API owners choose to provide specific trademarks or guidelines for this situation, such as “Powered by XXX”. However, it may be unreasonable to require the API user to specify this information, for example if the service uses a large number of data sources that impose the same requirements, resulting in the entire service being flooded with source information.

It is important to draft an API licence in a way that ensures that reasonable requirements are imposed in this respect. The licence should state clearly which requirements are imposed as regards referring to the source. This may typically involve the following:

* No reference is permitted to be made (i.e. the data source must be completely anonymous).
* The name/logo/link to the data source must be displayed to the end user in a way that makes it clear which data sources are being used.
* Each and every portion of the data which comes from the API must be labelled in such a way that the end user understands precisely where the relevant quantity of data comes from.

The user's obligation to refer to the data source should no longer apply when/if the user’s licence to use the API terminates (*cf.* section 8.4 of the licence wording).

Certain providers of APIs may also wish to acquire the right to refer to the user's trademark or company name to advertise who uses the API.

### Options in the licence

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| Will the API user be obligated to refer to the data source? | **Yes:** Retain Option 1 in section 2.3 of the licence wording and insert desired information. Delete Option 2. Also retain the highlighted wording in section 8.4 of the licence wording.  **No:** Retain Option 2 in section 2.3 of the licence wording. Delete Option 1. Also delete the highlighted wording in section 8.4 of the licence wording. |
| As an API provider, do you want to have the right to refer to the API user’s trademark/company name? | **Yes:** Retain section 2.4 of the licence wording.  **No:** Delete section 2.4 of the licence wording. |

## Quality and accuracy

### Reporting errors and omissions

For API providers who wish to maintain high quality and accuracy in data provided by the API, the project recommends that a specific channel of contact for reporting errors in data be provided, such as an email address to which the API’s users can report any errors or omissions in data obtained. However, this is of course only applicable if the user actually has the resources to read and follow up the reports made.

#### Options in the licence

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| Will the API’s users have the opportunity to report errors or omissions in the information which has been obtained? | **Yes:** Retain section 6.1 of the licence wording and insert desired information.  **No:** Delete section 6.1 of the licence wording. |

### Warranties

A question that often comes up for API providers is who is responsible for the quality and accuracy of the API information. This is often a question of who can be held responsible if, for example, an API returns incorrect information which then has an adverse effect on the end user (i.e. the party using the API user’s services).

The responsibility can partly apply to the information which the API provider has generated, and partly to the information which has been generated by the API's users, provided the API permits information to be written back to the API provider.

It is a purely commercial issue whether the API provider should undertake responsibility for the information it has itself generated, and a decisive factor is often whether or not the API is provided in exchange for payment, since a user who pays for access to an API can be regarded as having reasonable grounds for having higher expectations as regards the quality of information than someone who gets the information for free.

However, the project recommends that providers be careful about promising too much, and that, if they provide any warranties at all as regards the quality, reliability, etc. of the API content, they should only promise SLA levels or provide warranties regarding accuracy, etc. which they are certain they can satisfy.

As stated in section 6.3 of the licence wording, the project recommends that an API provider exclude liability for indirect loss, such as loss of profit, etc. because such loss is very difficult to predict and, consequently, to “budget for” . The API provider should also impose a monetary cap on its liability.

In cases where the API’s users can generate information for the API, the licence should specify that the user is responsible for ensuring that he or she has the necessary rights to the information which the user makes available (in respect of e.g. copyright and trademarks), and that the user is otherwise entitled to distribute the information, for example by the user having a legal basis for distributing any personal data which is transferred.

### Options in the licence

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| Will any warranties be provided as regards the quality and accuracy of the information? | **Yes:** Retain Option 1 in section 6.2 of the licence wording and insert desired information. Delete Option 2.  **No:** Retain Option 2 in section 6.2 of the licence wording. Delete Option 1. |
| Will the API user be able to generate information for the API? | **Yes:** Retain section 6.4 of the licence wording.  **No:** Delete section 6.4 of the licence wording. |

## Handling modifications to the API

When managing open APIs, modifications must be handled in a structured manner, in terms of both technical modifications to the API itself and modifications to prices and the licence wording.

The structure for handling modifications should be communicated to the API users to create realistic conditions for the way in which a developer will be able to use the API.

The conditions for handling modifications tend to vary between different API providers and require relatively detailed explanations, but the project recommends that a provider provide, at a minimum, the information set out in the Modifications Policy template.

### Implication for the licence

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| See section 7.1 of the licence wording. |

## Damage and suspension

An API provider may wish to limit the use of the API by specifying that the API is not permitted to be used to develop services which prejudice the API owner, for example where the service in question is contrary to the API owner’s values or runs counter to the API owner’s business.

To ensure that this type of wording is understandable to the API users, it is important that it is made clear what is meant by the API provider’s values and what is to be regarded as damaging to the API provider’s business.

### Options in the licence

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| Do you want to limit the use of the API for purposes which risk damaging your business? | **Yes:** Retain section 5.4 of the licence wording and insert desired information.  **No:** Delete section 5.4 of the licence wording |

## Termination

In cases where a user has paid a fee to gain access to the API (for example, by means of a subscription), the API provider may wish to impose limitations on the user's right to terminate the agreement, by prescribing that they have to give a certain number of weeks’ notice of termination or by permitting the user to terminate his or her connection with immediate effect but, if so, requiring that he or she compensate the provider for the remaining term of the contract.

### Options in the licence

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| Will there be limitations on the user’s right to terminate the licence? | **Yes:** Retain Option 1 in section 8.3 of the licence wording and insert desired information. Delete Option 2.  **No:** Retain Option 2 in section 8.3 of the licence wording and insert desired information. Delete Option 1. |