

Sweden

Online rights and piracy fight make for a busy year

Over the last year, Swedish IP law has been much characterised by internet-related matters, in particular by the implementation of the EU IP Enforcement Directive and the judgment in the *Pirate Bay Case*. Further developments include proposed amendments to existing law as well as other interesting judgments – for instance, regarding copyright protection for works of applied art.

Amended laws and regulations

The IP Enforcement Directive

The Swedish implementation of the EU IP Enforcement Directive (2004/48/EC) came into force on April 1 2009. Swedish law already fulfilled many of the requirements set out in the directive, but some features of the directive called for changes.

One of the main features of the directive is the right for IP rights holders to obtain information regarding the origin and distribution networks of infringing goods and services (Article 8). This is designed to allow rights holders to secure evidence of IP infringements.

Under the new Swedish provisions, an obligation to disclose information arises after an examination and approval by a court of law. In order for a court to approve a petition, the applicant must show probable cause that an IP infringement has been committed. Only rights holders and licensees are entitled to receive the information. Persons that can be ordered to provide information include persons that have committed or contributed to an infringement, or persons found to be providing services, on a commercial scale used within the scope of infringing activities. The Swedish provisions set out a wider circle of persons that can be ordered to provide information than the directive. In addition, someone who has assisted in an infringing act can be ordered to provide information. The obligation to provide information cannot be imposed on someone who, by providing the information, would reveal a crime that he or she has committed.

In the *Promusicae Case* (Case 275/06) the European

Court of Justice concluded that Article 8 of the directive does not require member states to lay down an obligation to communicate personal data in order to ensure effective IP protection in the context of civil proceedings. In spite of this judgment, the Swedish legislature chose to allow IP rights holders to obtain information about the individuals behind IP addresses from internet service providers (ISPs). This has given rise to much debate in Sweden. The provisions have been motivated by the fact that it was previously extremely difficult for rights holders to address online IP infringements using civil remedies and the amendments give rights holders a possibility to use the civil remedies already existing under Swedish law. The legislature concluded that most individuals in Sweden use dynamic IP addresses (ie, randomly and irregularly changed addresses so that different IP addresses are used on different occasions). The legislature therefore concluded that providing information on the individual behind an IP address constitutes a limited restriction of the right to privacy. It has also been stressed that the principle of proportionality must be taken into consideration by the Swedish courts. A court may order an ISP to disclose information only when the reasons for this outweigh other interests, such as the right to privacy. As a consequence, an infringement must be of a certain scale in order for a court to grant a rights holder access to subscription information. As a general rule, this will be the case when someone has uploaded and made available to the public one copyright-protected work or has downloaded several copyright-protected works through file sharing on the Internet.

The implementation of the IP Enforcement Directive also entailed changes regarding interlocutory injunctions and conditional fine orders. Before April 1 2009 these measures could be imposed only on the party committing the infringement. Now, the measures can also be imposed on parties assisting in an infringing act, as well as on the basis of an attempt to infringe or preparation to infringe.

Swedish IP law now states that a court may order that goods found to be infringing, as well as materials and tools used to create or manufacture such goods, be pulled from the market. These corrective measures can also be used against those that prepare or attempt to commit an infringement.

The directive's implementation has further resulted in certain clarifications of the provisions on damages. The law now contains guiding principles on the aspects that a court shall consider when assessing claims for damages (eg, the rights holder's lost profits, any unfair profits made by the infringer and damages to reputation). However, a rights holder shall receive compensation for no more than the actual damage suffered as a result of the infringement.

A further amendment concerns publication of judgments. It is now stipulated that a court may order, upon the plaintiff's request, an infringer or an accomplice to pay for appropriate measures to disseminate information about a judgment (eg, by publishing the judgment in full or part).

New Trademarks Act

The Trademarks Act has been in force since 1960. Work on a new act has been ongoing for several years and a government bill is expected during Autumn 2009. Some of the amendments that the government is expected to propose in the bill include the following:

- The wording of the new act will be fully adapted to current EU law.
- The Swedish Patent and Registration Office will no longer examine trademark applications that conflict with older rights. An examination can be performed by the office at the request of the applicant.
- In order to implement a faster and less costly revocation system, it will be possible to file a revocation application with the office.
- The new act will follow the provisions of the Singapore Treaty on the Law of Trademarks, to which the government is expected to propose that Sweden accede.

The new act is expected to come into force in July 2010, at the earliest.

Strengthened protection of trade secrets

As reported in *IP Value 2009*, a state commission has presented a proposal (SOU 2008:63) to strengthen the protection of trade secrets. Its main purpose is to remedy existing deficiencies in the Act on the Protection of Trade Secrets (eg, by expanding the circle of individuals that can be found criminally liable for

misappropriating trade secrets). The proposal is expected to result in a government bill during 2010.

Key cases

The Pirate Bay Case

The Stockholm District Court delivered its judgment in this case on April 17 2009. The court found the four individuals behind the Pirate Bay website guilty of contributory copyright infringement and sentenced them to one year's imprisonment. The criminal trial was combined with claims for damages amounting to Skr117 million by 13 major entertainment companies. The court ordered the four men to pay jointly Skr30 million in damages to the plaintiffs.

The Pirate Bay is one of the world's largest file-sharing websites and enables individual users to search for and download BitTorrent files, which contain information necessary to find and download files from other users on peer-to-peer networks (P2P).

The court initially established that Pirate Bay users committed copyright infringement by making copyright-protected work available to the public through the P2P networks. Further, the court stated that it is not necessary to identify the actual infringer in order to charge someone with complicity in copyright infringement.

The court found that the defendants, by making available a website where BitTorrent files could be uploaded and stored, and where users could easily search such files and contact the file sharers, facilitated and promoted copyright infringement. It also found that the infringements were promoted intentionally, since the defendants must have been aware of the fact that copyright-protected works were being shared through the BitTorrent files, but had taken no measures to remove the illegal material. The individuals had participated in Pirate Bay's activities in different ways. However, the court ruled that they had cooperated as a team to operate the website and to develop it further.

When determining the length of the prison sentence, the court considered that the case concerned an extensive number of copyright-protected works. The Pirate Bay is a popular website with many users and some works had been accessible for several months. The length of the sentence was also influenced by the fact that the website is partially financed through advertising revenues and thus operates commercially.

Under the Copyright Act, rights holders are entitled to reasonable compensation for the exploitation of their works and compensation for additional harm caused by infringing acts. As regards reasonable compensation for exploitation, the Nordic-based film companies based their claims on a hypothetical licence fee for the right

to make the films available for downloading free of charge (taking into account, among other things, that films were made available without copy protection, the large number of downloads expected on the popular site and that the regular film market would decrease if a licence were given to the Pirate Bay). The court deemed this method reasonable and awarded the claimed compensation. Other plaintiffs used a method where each download of the works was multiplied by the price of a legal download. However, this method was dismissed by the court as not completely reliable. The court simply established that reasonable compensation for these plaintiffs should be based on half the number of claimed downloads.

The claims for compensation for additional harm were all based on inter-company loss and the loss of sales and goodwill. The court stated that the plaintiffs appeared to have claimed compensation for damages to the entertainment business in general and that the plaintiffs should be compensated only for losses caused by the illegal file sharing in this specific case. The compensation for additional harm was set to half the amount sought for exploitation of the copyright-protected works.

The judgment has been appealed by both defendants and plaintiffs before the Svea Court of Appeal.

Mini Maglite – copyright in design

The Supreme Court has held that the design of the Mini Maglite flashlight is sufficiently original to qualify for copyright protection as a work of applied art. In this judgment, which was handed down on April 9 2009, the court overturned a judgment of the Skåne and Blekinge Court of Appeal.

The owner of the Mini Maglite flashlight design, Mag Instruments, Inc, claimed that Ikea had infringed copyright in its design for the Mini Maglite. First, the Supreme Court addressed the balance between the required standards to qualify for copyright protection and the scope of protection. With regard to works of applied art, the threshold of originality may in some cases be relatively low considering the limited possibility for variation. According to the court, the risk that copyright protection within the field of applied art may impede competition and product development shall be taken care of by restricting the scope of protection for the work.

The court began its assessment of the Mini Maglite by stating that products consisting of different parts previously known may qualify for copyright protection if the design as a whole meets the threshold of originality. In some aspects the design of the Mini

Maglite was found to be similar to other flashlights of the same type. However, the court established that the Mini Maglite gave a different overall impression from other flashlights. The distinctive features combined with the flashlight's decorative elements gave the impression that the Mini Maglite was something more than just a practical flashlight. Moreover, it was found to be suited to a different environment from other flashlights of the same type. The Mini Maglite was therefore found to have a sufficiently original design. The Supreme Court obviously took into consideration the fact that the scope of variation is limited in the design of functional products. The court also appears to have been influenced by an opinion from the Svensk Form Copyright Panel (a nationally acknowledged expert body within the Swedish Society of Crafts and Design). In its opinion, the panel stated that the Mini Maglite met the requirements for copyright protection.

The court concluded that the Mini Maglite flashlight passed the threshold of originality and qualified for copyright protection. At the same time, the court emphasised that the flashlight's scope of protection was limited.

The case was remitted to the court of appeal and the question as to whether copyright infringement had been committed is yet to be decided.

Mag Instruments, Inc has also brought an action in the Swedish Marketing Court, claiming that Rusta's marketing of a flashlight constitutes unfair marketing under the Marketing Practices Act (misleading imitation and taking unfair advantage of Mini Maglite's reputation). However, the Marketing Court did not find that misleading imitation had occurred, since the flashlights conveyed different overall impressions. Neither did Rusta's flashlight take unfair advantage of Mini Maglite's reputation, since the flashlights were sold in different types of packaging and Rusta's flashlight did not draw an association between it and the Mini Maglite in a manner which could be deemed as having taken unfair advantage.

Patents – requests to price generics are not infringing

On December 23 2008, the Supreme Court handed down a decision clarifying that a request to price a generic pharmaceutical does not constitute an infringing 'offer' under the Patents Act.

The plaintiff claimed that the defendant had infringed the plaintiff's supplementary protection certificate by filing a request with the Swedish Dental and Pharmaceutical Benefits Agency to price an undisputedly infringing generic pharmaceutical product. Under the Swedish reimbursement scheme for

pharmaceutical products, pharmacies become automatically bound by prices accepted by the agency following a pricing request by a generic pharmaceutical company.

The Supreme Court concluded that the term ‘offering’ is not clearly defined and that, in academic publications, it has been argued that every action that expresses a willingness to offer a product on commercial terms constitutes an offer. However, the court found that

filing a pricing request with the Dental and Pharmaceutical Benefits Agency (which is a governmental entity that does not itself purchase any pharmaceutical products) cannot be deemed to have a commercial purpose of the nature required to constitute an infringing offer under the Patents Act.

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Per Josefson
Partner, Stockholm
Tel +46 8 505 763 15
Email pej@msa.se
Mannheimer Swartling
Sweden

Per Josefson is a partner in Mannheimer Swartling’s specialist practice for intellectual property, marketing and media. He sits on the editorial council of the *Nordic Intellectual Property Law Review* and is a member of the IP Policy Group of ICC Sweden. He has extensive experience of all types of IP-related issues and his specialist areas are litigation and licensing.



Stefan Widmark
Partner, Stockholm
Tel +46 8 505 764 67
Email swi@msa.se
Mannheimer Swartling
Sweden

Stefan Widmark is a partner and head of Mannheimer Swartling’s practice group for intellectual property, marketing and media law. He is a member of the IP Rights Policy Group of ICC Sweden and the Marketing and Advertising Policy Group of ICC Sweden. He has extensive experience of a wide range of both contentious and non-contentious IP-related matters and is frequently ranked as one of the leading IP rights lawyers in Sweden.



Niklas Sjöblom
Partner, Gothenburg
Tel +46 31 355 16 98
Email nsj@msa.se
Mannheimer Swartling
Sweden

Niklas Sjöblom is a partner in Mannheimer Swartling’s specialist practice for intellectual property, marketing and media. He joined the firm as an associate in 2000, including some in-house work at AB Volvo in 2003 to 2004, and became a partner in 2008. He has extensive experience of a wide range of both contentious and non-contentious IP-related matters, including but not limited to traditional intellectual property, marketing and information technology.



Caroline Ekström
Associate, Stockholm
Tel +46 8 595 065 45
Email cst@msa.se
Mannheimer Swartling
Sweden

Caroline Ekström is an associate in Mannheimer Swartling’s specialist practice for intellectual property, marketing and media. She joined the firm in 2004 and worked as a court clerk at Stockholm District Court from 2005 to 2006.