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Sweden
IP law develops to keep pace with changing times

Since the publication of *IP Value 2008* there have been a number of key developments in Swedish IP law, including the introduction of less stringent requirements for the translation of European patents, as well as a number of proposals for changes to existing law, including a simplified trademark registration process and the strengthened protection of trade secrets. In addition, the recent adoption of a new Marketing Practices Act may affect the way in which businesses market their valuable IP rights.

Amended laws and regulations

New Marketing Practices Act

The new Marketing Practices Act came into force in Sweden on July 1 2008. To a large extent, the new law is based on the previous law, but a few amendments and novelties should be highlighted.

The act implements the EU Unfair Commercial Practices Directive (2005/29/EC) and regulates all marketing practices, as well as contact between businesses and consumers, and covers all forms of media. It is therefore a vital piece of legislation for every company that wishes to market its products, trademarks or other IP rights.

The purpose of the act coincides with the aim of the directive, which is "to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests", although the act also aims to protect businesses from other businesses' unfair commercial practices.

The implementation of the directive has not necessitated a great number of amendments to Swedish legislation in the area of marketing practices, which is unsurprising given that the directive was to some extent inspired by the former Swedish Marketing Act. Thus, the new law is rather similar to the old. For example, the structure of the new act is basically the same, with various general clauses followed by a number of explicit marketing practices that are always prohibited.

The act contains three general clauses. The first is very similar to the (only) general clause in the old act, stating in principle that all marketing practices should be coherent with good marketing customs. However, the new act also contains two additional general clauses: one that prohibits aggressive marketing practices (including harassment, compulsion, physical violence or other aggressive means of pressure, such as unwanted and repeated phone calls), and one that prohibits misleading marketing practices.

As mentioned above, the new act still contains a number of explicitly prohibited marketing practices, now gathered together in a blacklist by reference to an exhibit of the directive. The number of prohibited marketing practices has been slightly extended in the new act – for example, the blacklist now expressly prohibits 'bait advertising' (the practice of marketing a product for a certain price where it is not feasible for a business to deliver a reasonable amount of the product at that price in due time).

In order for a marketing practice to be prohibited under the general clauses, the legislature has introduced an express threshold which varies slightly depending on which of the three general clauses the practice falls under. However, generally a marketing practice needs to have an effect on the consumer in order to be prohibited – the marketing practice in question should influence the receiver to make a different decision from that which he or she would have made if the particular marketing practice had not existed; whereas any marketing practice that falls under the blacklist will be deemed unlawful, regardless of the effect it has on consumers.

One of the most noteworthy changes in the act is the scope of application, which has been widened so it also

encompasses unfair commercial practices that occur after the transaction between the business and the consumer has been completed. The old law covered only marketing practices that took place prior to and during the transaction. This will obviously have implications for businesses in their marketing, as the regulations and prohibitions in the law now apply to all contact with consumers. Among other things, it will prevent businesses from giving consumers false information about their rights to make complaints about a product.

It remains to be seen what effect the new act will have on marketing practices and whether it will succeed in harmonising Swedish marketing practices with the rest of Europe.

Implementation of IP Enforcement Directive postponed

The Swedish implementation of the EU IP Enforcement Directive (2004/48/EC), which harmonises enforcement standards for IP infringement in Europe, has been further delayed. The original deadline for implementation was April 29 2006 and Sweden's failure to implement on time recently caused the European Court of Justice (ECJ) to find it guilty of breaching its treaty obligations (Case C-341/07). Sweden also failed to meet the new deadline of July 1 2008 and implementation is now scheduled for January 1 2009.

Although most of the minimum enforcement standards set out in the directive are already met by existing laws, a few features require the legislature's attention. The main feature which has apparently caused the delay in implementation is the right of IP rights holders to obtain information regarding the origin and distribution networks of infringing goods (Article 8). Sweden stated that it needed to await the ECJ's decision in the *Promusicae Case* (Case 275/06), which considered whether the provision was an absolute requirement imposed on member states to ensure this right.

The ECJ rendered its decision in *Promusicae* in January 2008, finding that Article 8 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. However, the court declared that Community law does require that, when transposing the directive, the authorities and courts of the member states not only interpret their national law in a manner consistent with the directive, but also ensure that they do not rely on an interpretation which would be contrary to those fundamental rights or other general principles of Community law, such as the principle of proportionality.

Sweden also claimed that Article 8 of the directive is hard to interpret and hence difficult to implement; however, according to ECJ case law these are not valid excuses for failure to implement a directive in due time.

Other required amendments include:

- amendments to the provisions on civil search orders to facilitate the protection of confidential information and enable orders to be sought in respect of anticipated IP infringements; and
- a new power for the courts to order the recall of infringing goods and the publication of judicial decisions and corrective notices.

Electronic patent applications

New legislation has now made the filing of patent applications more convenient. In order to facilitate the application process, the Swedish government has decided to enable electronic applications. This innovation is a step towards the government's aim of reducing administrative expenses for companies. The necessary amendments to the Patents Act came into force on August 1 2008.

London Agreement ratified

On May 1 2008 Sweden ratified the London Agreement by a number of amendments to the Patent Act. The London Agreement, an optional agreement for the countries that are contracting states to the European Patent Convention, is aimed at reducing the costs relating to the translation of European patents. Countries that ratify the agreement commit to waiving, entirely or largely, the requirement for translations of already granted European patents in their national language if the application is filed in one of the three official languages of the European Patent Office (EPO) (ie, English, French and German).

Countries such as Sweden that do not share their national language with one of the official EPO languages have the right to require a translation of the patent claims into one of their official languages. Thus, Sweden requires that the claims be supplied in Swedish and the specification be available or supplied in English.

Simplified trademark registration process proposed

In an official memorandum (DS 2008:28) the government proposed simplifying the process for registering trademarks. At present, the Swedish Patent and Registration Office scrutinises new trademark applications in order to find any conflicts with older registered trademarks. It is now proposed that this material examination be abolished, although applicants will still be able to request examination. Instead, it will be up to rights holders to report infringements caused by new registrations.

The change will speed up the registration process and is also a step towards what is common practice in many other

EU member states and for Community trademark applications. Moreover, the memorandum suggests that Sweden should become a signatory to the Singapore Treaty on the Law of Trademarks. The objective of the treaty is to create an international framework for the harmonisation of administrative trademark registration procedures.

At the time of writing, the memorandum has been referred to various instances for consideration.

Strengthened protection of trade secrets proposed

The Swedish state is considering a proposal (SOU 2008:63) to increase the protection of trade secrets. While many companies are now more dependent on information and knowledge than industrial production, modern techniques have made it easier to store and transfer information. Hence, trade secrets are at risk.

It is therefore proposed that the Act on the Protection of Trade Secrets be supplemented with a new penalty regulation to criminalise the revelation or misuse of a trade secret to which someone has gained access as an employee or in a similar position.

Furthermore, in order to enhance the collection of evidence, a new security measure has been proposed: if it is suspected that a trade secret has been compromised, the victim can obtain a court order for the suspect's house to be searched.

Key cases

Commercial breaks may violate directors' moral rights

The Supreme Court recently ruled that commercial breaks in films violate directors' moral rights in those films. Although similar judgments have been rendered previously by lower courts in other EU member states, this is thought to be the first judgment of its kind to be rendered by the high court of an EU member state.

The plaintiffs, two directors, entered into director agreements with film companies Sandrews and SF, which in turn licensed the right to broadcast the films to TV4, the largest Swedish commercial Television network. The plaintiffs brought an action for damages against TV4 on the grounds that the respondent had infringed the directors' moral rights by showing the films on a commercial, advertising-financed television channel and by inserting commercial breaks in the films.

TV4 argued that its broadcasting of the films had not constituted a violation of the directors' moral rights, and claimed that the directors had waived their moral rights in relation to the broadcasts at issue.

The Supreme Court initially established that inserting commercial breaks in a film changes the film since the inclusion of advertisements breaks up the film, preventing the audience from viewing it in a continuous manner. Furthermore, the changes made by adding the commercial breaks were deemed to violate the directors' moral rights by affecting their individuality, since the rhythm of the films was disturbed. The Supreme Court also found that the directors had not waived their respective moral rights in this respect.

Thus, the Supreme Court sided with the plaintiffs and ordered TV4 to pay damages.

This is thought to be the first time that the potential conflict between moral rights and commercial breaks in films or television programmes has been considered by a high court in any EU member state. Therefore, the judgment is of great interest to many market players in the media sector at both national and international level.

The primary effect of this judgment is that in future, television channels broadcasting in Sweden will have to request clear representation from film companies that all rights holders have given their consent to the addition of advertisement breaks to television broadcasts of their works.

However, in its ruling the district court made statements in regard to imposing limitations on waivers of moral rights in relation to the insertion of commercial breaks into films, which were later confirmed by both the court of appeal and the Supreme Court. The district court implied that even if the directors had given their consent to commercial breaks, any general waiver for commercial breaks would be too broad to fall within the limited scope permitted by law. Thus, in order for consent to commercial breaks in a film to be lawful and have legal effect, it may be that the basis for such consent must be specified. Factors such as naming the specific channel on which the film will be broadcast, as well as the number and nature of commercials allowed in a film, may need to be specifically regulated.

Since director agreements are always entered into long before the details of commercial breaks are decided, in practice it would not be possible to abide by such limitations. Therefore, clarification is needed in relation to the findings made by the district court, and supported by the higher courts, regarding the limitations for legally relevant waivers of moral rights in relation to commercial breaks in films.

Rights holders given new hope in struggle against file sharers

The downloading and file sharing of illegally distributed copyright material for private purposes has been illegal in Sweden since 2005, but whether the law can be enforced effectively has been a matter of debate. Although there have been a handful of criminal proceedings against file

sharers, to date they have all ended with the offenders being fined.

This has been a thorn in the side of the music industry and other anti-piracy organisations, since the low penalties have prevented the police from securing evidence efficiently. According to the Swedish Code of Judicial Procedure, a search warrant can be issued only if a crime reaches a certain level of severity (in practice, the crime must punishable by imprisonment).

However, a district court decision of May 2008 has given hope to rights holders. A 31-year-old man received a conditional sentence for making 30 films and 4,500 songs available for download on the Internet. Although the judgment came from a district court, it is interesting as the verdict was not appealed and thus has acquired legal force. This more severe sentence should enable the police to search houses for copyrighted material, which will surely facilitate the battle against illegal file sharing.

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