

Copyright litigation in Sweden: overview

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SOURCES OF LAW

1. What are the principal sources of law and regulation relating to copyright and copyright litigation?

The principal sources of law governing copyright and copyright litigation are the:

- Swedish Act on Copyright in Literary and Artistic Works (Copyright Act).
- Swedish Code of Judicial Procedure.

Other relevant legislation includes the:

- Copyright Regulation.
- International Copyright Regulation.
- Act on Mediation in Certain Copyright Disputes.
- Act on Protection of Topographies of Semiconductor Products.

The Copyright Act is based on the WIPO Berne Convention for the Protection of Literary and Artistic Works 1971 (Berne Convention) and is also the result of co-operation between the Nordic countries. The Copyright Act has also been influenced by and modified in accordance with EU legislation. Over the last decade, the Copyright Act has undergone several amendments as a result of the implementation of several EU directives, including:

- Directive 2001/29/EC on copyright and related rights in the information society (Copyright Directive).
- Directive 2004/48/EC on the enforcement of intellectual property rights (Intellectual Property Directive).

Sweden has acceded to a number of international treaties including the:

- Berne Convention.
- UN Universal Copyright Convention 1952.
- European Agreement on the Protection of Television Broadcasts 1960.
- WIPO Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 (Rome Convention).
- Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms 1971.
- WTO Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS).

Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) and the EFTA Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention) are also relevant for copyright matters concerning international private law.

If the codified legislation does not provide any clear guidance on a specific matter, the preparatory works to the legislation are often used as an aid to interpretation. Unlike common law jurisdictions, case law is not legally binding in the same way as the written law, although it is considered to be an important instrument for interpretation of the codified law. The judgments of the Swedish Supreme Court constitute binding precedent, although the courts can also seek guidance from decisions delivered by the lower courts. Legal doctrine also serves as a source of law in Sweden and is frequently relied on in judgments delivered in civil and arbitral proceedings.

The relevant sources of law therefore have the following order of priority:

- Codified law.
- Preparatory works.
- Case law.
- Legal doctrine.

COURT SYSTEM

2. In which courts is copyright enforced?

Copyright is enforced in the Patent and Market Court (at first instance) and the Patent and Market Court of Appeal. These are specialised intellectual property courts created on 1 September 2016. The following types of cases and matters fall under the jurisdiction of the Patent and Market Courts:

- Intellectual property law cases and matters (such as copyright, patent and trade mark cases).
- Marketing law cases and matters.
- Competition law cases.
- Cases concerning refusal of trade name registrations.

There is no separate governmental or administrative body that deals with copyright issues in Sweden. However, for works of applied art, there is an impartial expert body within Svensk Form (the Swedish Society of Crafts and Design), called the Svensk Form Copyright Panel. The panel is tasked with expressing an opinion on copyright protection for works of applied art.

3. Who can represent parties before the court?

The Code of Judicial Procedure does not contain any specific requirements on the level of education or vocational qualifications of a person representing parties before the courts in copyright litigation. The sole requirement is that the court must be satisfied that the person concerned is suitable. This can be satisfied by examining the person's honesty and level of knowledge. The representative must have a good command of the Swedish language.

In criminal cases, only members of the Bar Association can appear as publicly appointed defence attorneys.

4. What is the language of the proceedings? Is there a choice of language?

Proceedings are always conducted in Swedish. It is possible to engage an interpreter to assist the court where any foreign party or witnesses cannot understand or speak Swedish.

5. To what extent are courts willing to consider, or are bound by, the decisions or opinions of other national or foreign courts, or other national or international bodies, that have handed down decisions in similar cases?

The decisions of national courts are not legally binding. However, the lower instance courts follow judgments delivered by the Swedish Supreme Court. Decisions from other national courts can also serve as guidance for the courts, although such decisions are of persuasive authority only.

Due to Sweden's EU membership, judgments of the Court of Justice of the European Union (CJEU) serve as a source of law in national copyright proceedings. Swedish courts are not bound by other foreign decisions. However, Swedish courts can take into account the reasoning advanced in support of a foreign decision when adjudicating a similar case where such decisions are relied on by either of the parties. This applies mostly with respect to judgments from other courts within the EU.

SUBSTANTIVE LAW

6. What types of works can be protected by copyright?

The Copyright Act protects literary and artistic works including:

- Fictional or descriptive representations in writing or speech.
- Software programs.
- Musical or dramatic works.
- Cinematographic works.
- Photographic works.
- Other works of fine arts, architecture or applied art.
- Works expressed in some other manner.

The protection extends to a great variety of works, as protected works can be expressed in any manner. To satisfy the definition of a work under the Copyright Act, the work must fulfil the required standard of originality, which requires the work to be the result of an author's personal and creative effort.

Neighbouring rights (certain rights granted to performing artists, producers of recordings of sound and images, radio and television organisations and producers of catalogues and databases) are also protected by the Copyright Act.

It follows from Sweden's accession to several international treaties such as the Berne convention and TRIPs, as well as Sweden's membership of the EU, that the Copyright Act provides protection not only to works created by Swedish citizens but also to works created by nationals of countries that are parties to the relevant international treaties and other EU member states. Such nationals must always be treated in the same way as Swedish nationals in the application of copyright law.

7. What are the main acts that constitute primary and secondary infringement of copyright?

Primary infringement of copyright is by violation of the rights holder's exclusive right to exploit a work by making copies of the work and making the work available to the public. A work can be made available to the public in several ways including by:

- Communicating a work to the public.
- Public performances or exhibitions.
- Distributing copies of the work to the public.

Aiding and abetting an act that constitutes an infringement or a violation of a third party's intellectual property rights constitutes secondary infringement. This can include, among other things:

- Internet service providers.
- Storage services.
- Search engines.
- Online auctions.
- E-commerce sites
- Portals.
- Web hosting.
- Chat forums and other discussion and information services.

Secondary infringement can relate to both unauthorised disclosure to the public as well as unlawful reproduction.

8. Does your jurisdiction provide authors with moral rights?

Authors can assert their moral rights, such as, among other things, the right to be identified as the author of the work.

9. What defences are available to an alleged infringer?

Defendants often contend that the work does not fulfil the required standard of originality and is therefore not protected under the Copyright Act. In addition, it is quite common for defendants to argue that the claimed infringing object does not fall within the scope of protection of the claimant's work.

The doctrines of "fair use" or "fair dealing" do not exist under Swedish copyright law. However, there are specific limitations to the economic rights afforded by the Copyright Act. Under certain conditions, a protected work can be used freely and it may, among other things, be permissible to make temporary copies, copies for private purposes and copies for educational purposes. Further limitations to the exclusive economic rights follow from the "consumption principle" which entails that a copy of a work that has been transferred or published with the consent of its author within the EEA can be further distributed and publicly exhibited. In addition, there is a right to reproduce short quotations of works that have been made available to the public.

10. Is there a requirement for copyright registration?

Copyright protection arises automatically as soon as the work is created. There are no registration requirements under the Swedish Copyright Act.

11. How long does copyright protection last for the principal types of copyright work?

Copyright protection continues until the end of the 70th year after the year in which the author deceased. The protection in respect of a work that has been made public anonymously subsists until the end of the 70th year after the year in which the work was made public. Copyright in a cinematographic work subsists to the end of the 70th year after the year of the death of the last deceased of the:

- Principal director.
- Author of the screenplay.
- Author of the dialogue.
- Composer of the music specifically created for the work.

The duration of protection for neighbouring rights is 50 years, although the starting point varies depending on the right in question. For instance, protection for radio and television broadcasts subsists until the end of the 50th year from the year in which they were broadcast.

The duration of protection for catalogues and databases subsists until 15 years have elapsed from the year in which the product was completed.

The protection applies in perpetuity for:

- Titles (a literary or artistic work cannot be made available to the public under a title, pseudonym or signature where it is easily confused with a work that has previously been made available to the public).
- Classics (the prohibition on the performance or reproduction of a literary or artistic work in a manner that violates cultural interests).

12. How is copyright infringement assessed?

The Swedish Copyright Act prohibits unauthorised reproduction of a work. However, the right holder does not have to prove actual copying to establish infringement. If there is great similarity between the allegedly infringing object and the copyrighted work, there is a presumption that the defendant has reproduced the work.

The question of whether copyright infringement has been committed depends on the scope of protection granted to the work. The scope of protection is determined by the work's originality. Determining whether there is a risk of double creation is a supporting rule used to establish copyright protection and the reach of the protection. The assessment of copyright infringements is therefore performed on a case-by-case basis and differs depending on the type of work.

13. On what grounds can copyright in a work be declared invalid or unenforceable?

Copyright protection arises automatically, provided that the work has sufficient originality, and the Copyright Act does not contain any provisions governing invalidity. However, it is possible to contend that the requirements for copyright protection under the Copyright Act are not fulfilled in copyright litigation.

14. What limitation periods apply to copyright infringement actions?

The Copyright Act does not include any limitation period relating to the initiation of any civil infringement actions, and the general ten-year limitation period applies. However, a right holder may have impliedly waived its right to prevent infringement where the right holder is aware of an alleged infringer but has failed to take any action. Most cases turn on their own facts, but the duration of the right holder's awareness of the infringement and its passivity often prove decisive.

15. To what extent can the enforcement of copyright expose the copyright holder to liability for an anti-trust violation?

All intellectual property rights create, by definition, a monopoly situation, although this is not traditionally viewed as a violation of competition laws and copyright protection does not necessarily constitute a violation of competition law. However, copyright enforcement measures, such as in relation to concentration of copyrights in conjunction with abuse of a dominant position, can constitute infringements of Swedish and EU competition law. For instance, it has been alleged that the remuneration systems employed by the Swedish copyright organisations representing a number of artists have constituted an abuse of a dominant position (see the CJEU's judgment in *Kanal 5 and TV 4 v STIM* [2008], *Case C-52/07* and in *RTE and ITP v Commission* [1995], *joined Cases C-241/91 P and C-242/91 P*).

PARTIES TO LITIGATION

16. Who can sue for copyright infringement?

Copyright holder

The Copyright Act provides that civil proceedings for copyright infringement can be commenced by the author or their successors in title, or any party who has the right to exploit the work as a duly appointed licensee

A copyright holder can commence criminal proceedings for copyright infringements if the public prosecution service decides not to commence proceedings for infringement.

A licensee does not have to be registered to sue for copyright infringement.

Exclusive licensee

See above, Copyright holder.

Non-exclusive licensee

See above, Copyright holder.

Other

The public prosecution service can only commence criminal proceedings if an injured party has made a complaint or where prosecution is warranted on public interest grounds. Criminal proceedings are usually commenced for copying films and music. (See for example the *Pirate Bay* case, [2010] *Svea Court of Appeal case no. B 4041-09*.)

17. Can copyright collecting societies sue for copyright infringement to enforce their members' rights?

The Copyright Act does not give collecting societies an independent right to represent their members in legal proceedings.

A collecting society can only sue for copyright infringement if the member has empowered the society to legally represent it in court proceedings. In practice, many collecting societies include such mandates in their accession agreements with their members. The terms of the accession agreement (or any other agreement made by the member and the collecting society) determines whether the member retains a right to sue in a personal capacity. Parallel proceedings on the same subject matter are not allowed under the Code of Judicial Procedure.

18. Under what conditions, if any, can an alleged infringer bring proceedings to obtain a declaratory judgment of non-infringement?

The Code of Judicial Procedure allows a party to apply for a declaration on the existence of a legal relationship if the claimant considers that the relationship is uncertain and could expose the claimant to some form of detriment. A motion for a declaration can also be filed when the existence of a legal relationship constitutes a preliminary issue. Case law from the courts of appeal confirms that a declaratory judgment on non-infringement can also be requested on whether an action constitutes copyright infringement.

19. Who can be sued for copyright infringement?

The Copyright Act and the Swedish Penal Code contain provisions that allow both actual infringers and any persons who contribute to an infringement to be sued for copyright infringement. A person who attempts or prepares to commit an infringement can also be sued.

Both natural and legal persons can be sued for copyright infringement. However, legal persons cannot be a party to criminal proceedings.

Actions for copyright infringement are normally directed towards the company that has undertaken infringing actions. However, provided certain conditions are fulfilled, it is possible to sue company directors in a personal capacity for copyright infringement based on the directors' own personal involvement and actions.

20. How is the liability of intermediaries, such as internet service providers treated? Under what conditions can they be liable for copyright infringement? Are there any specific defences available to them?

There is no general rule governing liability for internet service providers (ISPs) in the Copyright Act. However, an ISP can be found liable for contributory copyright infringement as with any other intermediary (see Questions 7 and 19). The conditions governing such liability are still unclear. According to the preparatory works prepared in the course of implementing the Copyright Directive, an intermediary's pure operation and provision of services, or the supply of hardware or wire capacity for transmission, is not deemed to be sufficient for liability. It is also indicated that a hosting service provider can be liable for contributory infringement if the provider receives "concrete indications" that the server space is used in a way that implies infringement.

Case law from the Svea Court of Appeal suggests that these statements also apply to ISPs. In the *Black Internet* case ([2010] Svea Court of Appeal case no. Ö 7131-09), the court held that the ISP Black Internet could be deemed to be contributing to the infringements carried out by the users of The Pirate Bay by providing the The Pirate Bay website with access to the internet. Similarly, in the *Portlane* case ([2010] Svea Court of Appeal case

no. Ö 10146-09), the court held that the ISP Portlane contributed to infringement by providing internet access to certain trackers used for illegal file-sharing. In both cases, the Svea Court of Appeal held that liability for contributory infringement can arise if the intermediary is aware of the existence of illicit materials and then fails to prevent their distribution, even though preventive steps could have been easily taken.

A recent case from the Patent and Market Court of Appeal shows that an ISP can be subject to a blocking injunction, that is, prohibited from continuing to commit, or aid and abet, an act constituting an infringement or a violation of others IPRs, for allowing its customers access to a infringing website ([2017] Patent and Market Court of Appeal case no. 11706-16). The case also shows, among other things, that no contractual relationship (between the intermediary and the third-party infringer) or criminal liability (for aiding and abetting the users' infringements) is needed for the grant of an injunction against an intermediary. The court noted that it was possible for rights holders to obtain an injunction against an intermediary whose services are used to commit a copyright infringement, even if the intermediary only provides its customers with internet access.

21. Is it possible to add or remove parties during litigation?

It is possible to add parties during litigation, provided the court takes the view that this will assist proceedings. If the claimant decides to withdraw its claim against one of several co-defendants after the defendant has responded to the claim, a co-defendant can demand that the case be adjudicated on the merits.

ENFORCEMENT OPTIONS

22. What options are open to a copyright holder when seeking to enforce its rights in your jurisdiction?

Civil proceedings

A copyright holder can commence civil proceedings in Sweden to enforce its rights.

Criminal proceedings

The public prosecutor can only institute criminal proceedings for copyright infringement following a complaint by a party affected by the infringement or where proceedings are warranted on public interest grounds. Criminal proceedings can be commenced by the copyright holder if the public prosecutor has declined to do so.

The sanctions for infringement are fines or up to two years' imprisonment.

Border measures

The Swedish Customs Authority can seize and confiscate goods that are suspected of infringing copyright protected works, either following an application to the Authority or on its own initiative. An application for border measures can relate to any or all EU member states. The application is valid for one year and can be prolonged by one year at a time. The Swedish provisions governing border measures are based on EC counterfeiting regulations.

23. Is interim relief available for the rapid removal of infringing content from the internet?

The fastest way to legally prevent copyright infringements on the internet is to apply for an interlocutory injunction, on an ex parte basis, if possible, against the infringing party (see Question 35 to Question 38). If the infringing party's identity is unknown, a court can, on application by the right holder, order the ISP to provide

information on the origin and distribution networks for the infringing content, such as the name and address of the person behind the IP address concerned. Alternatively, the right holder (or his licensee) can request an injunction prohibiting the ISP from allowing its customers access to the infringing website.

See *Question 20*.

24. Is it advisable to send a letter before action (cease and desist letter) to an alleged infringer before commencing copyright infringement proceedings?

The Swedish Bar Association's Code of Conduct and principles governing fair business practices dictate that cease and desist letters should be sent to an alleged infringer before the commencement of proceedings. There are exceptions where the claimant will be prejudiced unless prompt action is taken. Failing to send a cease and desist letter before commencing infringement proceedings can also result in the claimant having to bear both its own and the defendant's litigation costs in the event the defendant admits the claim following service of the summons application.

Any person who makes unjustified threats of copyright infringement or unjustified claims of ownership of copyright in a cease and desist letter can also be liable for unfair marketing practices under the Swedish Marketing Practices Act. Such letters may also result in liability for damages.

25. To what extent are your national courts able to grant cross-border or extra-territorial injunctions (preliminary or permanent)?

An injunction or order handed down by a Swedish court does not normally have any extra-territorial effect unless the injunction or order falls within the scope of any applicable international conventions and EU regulations. For instance, the Brussels I Regulation provides that any provisional or protective measures issued by a court in one member state will be recognised and enforced in other member states without special proceedings, unless the enforcement is contested.

26. To what extent are arbitration, and alternative dispute resolution (ADR) methods (such as mediation), available to resolve copyright disputes?

Arbitration

Arbitration can be used to resolve copyright disputes where there is an arbitration agreement between the parties. Alternatively, if the parties agree to use a mediator, the dispute can be resolved through mediation in accordance with, for example, the Mediation Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. However, arbitration and mediation are rarely used in practice outside contractual matters.

ADR

The Code of Judicial Procedure provides that a civil court must investigate the possibilities of, and encourage the parties to reach, an amicable settlement, to the extent appropriate considering the nature of the case and other relevant circumstances. Where the nature of the case dictates that it is more appropriate for mediation, the civil court can direct the parties to appear at a mediation session before a mediator appointed by the court.

PROCEDURE IN CIVIL COURTS

27. What is the format of copyright infringement proceedings?

The format of copyright infringement proceedings is governed by the Swedish Code of Judicial Procedure. The proceedings are commenced when the claimant files a summons application. The defendant then files a statement of defence within the requisite time limit. There then follows a further exchange of pleadings in which the parties invoke or respond to the factual circumstances and evidence submitted by the counterparty. A preparatory hearing is usually held to resolve the procedural aspects of the case before the main hearing.

An oral main hearing is held when the preparation stages are concluded. Written proceedings are only used in exceptional cases. At the main hearing, the parties present their claims and respond to those of the opposing party, followed by a presentation of the evidence. Once the evidence has been presented, the parties can present their closing arguments. Finally, the parties present motions for reimbursement of their litigation costs.

The Code of Judicial Procedure stipulates that a written judgment must be handed down within two weeks from the conclusion of the main hearing, unless extraordinary circumstances dictate otherwise. However, it is fairly common for judgments in civil cases not to be handed down until three to five weeks (and sometimes longer) after the main hearing. Delay can often be caused by the complexity of the case and the court's workload.

The jury system does not exist in relation to copyright issues. Contentious issues are determined by judges.

Judges with specialist legal expertise are required for copyright cases in the Patent and Market Courts. In most cases, three judges are involved. In certain cases, only one judge is required. In the majority of criminal cases, both legally trained judges and lay judges are involved in the adjudication process.

In main hearings in criminal cases, the general rule is that a district court panel consists of one qualified judge and three lay judges. The qualified judge and the lay judges decide the case together. Therefore, a lay judge has the same voting rights as the qualified judge and can adjudicate on both facts and law.

28. What are the rules and practice concerning evidence in copyright infringement proceedings in your jurisdiction?

Documents

Written submissions and various types of documentary evidence are frequently used in copyright litigation. Both parties must submit a schedule of evidence containing the oral and written evidence on which they intend to rely, and must also state the evidential theme or proof for each item of evidence.

Witness evidence

The use of witness statements drafted in contemplation of pending or contemplated proceedings was previously subject to stringent conditions, although recent amendments to the Swedish Code of Judicial Procedure have allowed parties in commercial cases to agree on the use of witness statements unless the court considers that their use would be inappropriate. Examination-in-chief, cross-examination and re-examination of witnesses is permitted under the rules, and the court is also entitled to ask witnesses additional questions.

Expert evidence

Both the court and the parties can engage experts in copyright proceedings. Parties frequently engage experts who possess a professional knowledge of copyright.

29. To what extent is survey evidence used?

Survey evidence is rarely invoked in Swedish copyright proceedings. Exceptionally, surveys are commissioned by the parties to support their contentions. However, it is for the court to determine the strength of the survey evidence. The court is more likely to attach greater significance to a survey performed by an independent professional survey company.

The costs incurred depend on the size and nature of the survey. Costs are recoverable from the losing party according to the general rule that costs follow the event.

30. Is evidence obtained for criminal proceedings admissible in civil proceedings, and vice versa?

There is no exclusionary rule to prevent the same evidence from being adduced in both civil and criminal proceedings.

31. Is evidence obtained in civil proceedings admissible in other civil proceedings?

The general rule is that the court evaluates everything that has occurred. However, if the court finds that a circumstance that a party offers as evidence is irrelevant to the case, the court will reject that evidence.

32. To what extent is pre-trial discovery permitted and what other mechanisms are available for obtaining evidence from an adverse party or third parties?

Pre-trial discovery

The Copyright Act allows a court to issue an order for an infringement investigation to secure evidence of infringements or violations of copyright. An investigation order can be issued either before or following the commencement of infringement proceedings. The court will only issue an investigation order if it is reasonably satisfied that an infringement has been committed. In addition, the grounds in favour of granting the order must outweigh the potential detriment that may be suffered by the prospective defendant. The claimant must provide some form of security to cover any damage that may be caused to the defendant, although this requirement can be dispensed with where the claimant is unable to provide such security. An investigation order must contain information about the purpose of the investigation, what types of objects and documents can be seized, and which venues can be searched. The investigation order is executed by officers of the local enforcement authority.

Evidence of infringement can also be acquired by copyright holders through the procurement of information on the infringing goods and services' origin and distribution networks. A disclosure obligation only arises if the claimant shows probable cause that a copyright infringement has been committed. An order is only issued if the balance of convenience is in the claimant's favour.

Swedish civil procedure does not include the concept of pre-trial discovery, although there are certain provisions that are analogous. A party can submit an application to the court for the preservation of evidence. The court can order the preservation of specific evidence in the form of witness examinations, expert opinions, judicial review or written evidence, if there is a risk that a party's legitimate rights might be lost or rendered more difficult to obtain unless an order is granted, and no trial on the rights is pending.

Other mechanisms

Following the commencement of an action, a party can request that the court orders either a counterparty or a third party to disclose written documents. A general requirement is that the information requested can be assumed to be of importance as evidence. In criminal cases, an obligation to produce evidence cannot be imposed on the suspect or any person related to him

The requesting party cannot undertake a fishing expedition but must be able to clearly state what the documents are intended to prove and to specifically identify all the requested documents or categories of documents and the purpose of their disclosure. It is also possible to request production of documents to achieve the future preservation of evidence, subject to the conditions set out above.

During the preparatory stages of the proceedings, and on request by the other party, a party must indicate what additional items of written evidence is in its possession, although this duty is not subject to any sanctions for non-compliance.

33. What level of proof is required for establishing infringement?

In general, the claimant must prove that the defendant has committed copyright infringement. However, for civil law liability, the Supreme Court has established a rule for situations where an allegedly infringing product has a striking similarity to the claimant's copyrighted work. In such situations, the defendant must prove with a certain degree of probability that the allegedly infringing product was created independently from the claimant's work.

The standard of proof is higher in criminal proceedings, where the prosecution must prove beyond reasonable doubt that the defendant has committed the crime in question.

34. How long do copyright infringement proceedings typically last?

Expediting proceedings

The proceedings before a court of first instance generally last between 12 and 18 months from the claimant submitting the summons application until the judgment being handed down. This varies according to the nature of the case and the caseload of the court. By centralising IP hearings in the new Patent and Market Courts, the efficiency and standards of these proceedings have been improved.

A case is normally determined following a main hearing. There are exceptions to this general rule, for instance where the parties agree to the case being determined on the basis of written submissions, or when one party consents to a concession in respect of a claim.

It is also possible to conduct a main hearing in simplified form. Such hearings are seldom used in copyright proceedings since the expedited procedure is more suitable for minor cases. The expedited procedure requires the consent of the parties, unless the court considers that the resolution of the dispute is quite self-evident.

It is normally viewed as unrealistic to anticipate that copyright infringement proceedings will be resolved without a main hearing. The best means of expediting the process is for the parties to act effectively and to co-operate wherever possible without prejudicing their positions.

Delaying proceedings

A defendant seeking to delay the proceedings may adopt various tactics such as:

- Advancing statements or objections that are unfounded and/or ambiguous.
- Attempting to withhold evidence.
- Consistently requesting extensions of time for filing submissions.

Staying proceedings

A court can order a stay where it is important for the adjudication of the case that a matter in another court proceeding, or type of proceeding, is determined first. This also applies where some other form of substantial impediment arises.

Counteracting delay to proceedings

The Code of Judicial Procedure provides a court with methods to counter the delaying tactics of a defendant. For example, during the preparatory stages the parties are directed to appear at a preparatory hearing, and if a party fails to do so a default judgment can be issued against it. Another form of practice direction that is designed to counter delaying tactics is to set a final date on which a party must finally determine their defence and state the evidence that they invoke. The court can take measures such as preclusion, where that is warranted by an unco-operative party's earlier conduct in the proceedings. In addition, the Code of Judicial Procedure provides that a party in a civil action, an aggrieved person in a criminal case, or an intervener in a case who attempts to delay the litigation will be sentenced to a fine. However, this provision is very rarely applied. The procedural rules provide that any party who has deliberately delayed the case or otherwise caused additional costs for the counterparty will also be subject to an adverse costs order.

PRELIMINARY RELIEF

35. Is preliminary relief available, and if so what measures are available and under what conditions?

It is possible to apply for preliminary injunctions under the Copyright Act. An injunction application can be submitted in connection with, or after the filing of, the summons application. It is not necessary for the matter to be extremely urgent. Preliminary injunctions can be granted not only for "imminent" infringements, but also for attempts or preparation. The claimant must show probable cause that an act constituting an infringement or a contribution to it is occurring or is being prepared or attempted, and that it can reasonably be expected that the defendant will thereby diminish the value of the copyright. A preliminary injunction is issued subject to a default fine and remains valid until the final adjudication of the case or until further order. A further requirement is that the claimant is required to deposit security with the court for any damage that may be caused to the defendant.

However, the court can dispense with the requirement for security if satisfied that the claimant is unable to provide it due to its limited financial resources.

The court can also order a provisional seizure of the infringing product.

36. Can a protective writ be filed at the court at which an ex parte application may be filed against that defendant?

In general, the defendant must be given the opportunity to respond to an application for a preliminary injunction. However, an injunction can be issued on a without-notice basis where speed is

of the essence and a delay would result in a risk of damage. Ex parte relief is rarely used in copyright proceedings in Sweden.

It is not possible to file protective writs in Swedish copyright proceedings. However, it is possible to regularly check the court dockets to find out whether ex parte proceedings have been initiated, although this is unusual.

37. What is the format for preliminary injunction proceedings?

General

Speed is important in preliminary injunction proceedings and the application is usually heard on a written submissions basis. Although the parties can request a hearing, hearings are hardly ever scheduled in preliminary injunction proceedings.

Level of proof

The claimant must show probable cause that an infringement is being committed or is being prepared or attempted, and that it can reasonably be expected that the defendant will diminish the value of the copyright by continuing its course of conduct. In addition, if the claimant submits an ex parte application for an injunction, it must satisfy the court that there is a risk of damage.

The court will carefully examine both the validity (existence) of the claimed copyright and the allegedly infringing act. As the court's investigation is quite comprehensive, the preliminary proceedings can be compared with a small trial.

Evidence

All types of evidence can be invoked in preliminary injunction proceedings. The courts are generally more inclined to accept written witness statements in preliminary proceedings than in ordinary proceedings.

Copyright validity

A defendant can challenge the validity of a copyright during preliminary injunction proceedings. The defendant usually argues that no infringement exists because the claimant's work does not fulfil the legal requirements for copyright protection.

Length of proceedings

The proceedings usually last from between a few days up to two weeks or even longer. Ex parte relief is normally granted within a few days.

38. Where a preliminary injunction is granted, is it necessary to start main proceedings to confirm the preliminary injunction, and if so, what is the deadline?

Preliminary injunctions under the Copyright Act are only granted if main proceedings have already been commenced. The preliminary injunction is valid until trial or further order. When the case is concluded the court then determines the continuation or lifting of the injunction.

39. What remedies are available in a copyright infringement action?

Permanent injunction

The court can issue an injunction subject to a default fine to prohibit a party from continuing to commit, committing, or contributing to an act constituting an infringement. An injunction can also be issued to prohibit an attempted or prepared infringement.

Monetary remedies

Right holders can obtain damages in the form of reasonable compensation for the exploitation of their works and compensation for other losses caused by the infringing act.

Penalties can be issued in the form of fines or imprisonment for a maximum term of two years. Penalties are only imposed where an infringement has been committed intentionally or with gross negligence.

Delivery up or destruction of infringing goods

Infringing property and its monetary value, profits emanating from violation and/or any tools used in connection with a violation and so on can be seized and subsequently declared subject to forfeiture.

A court can order that any infringing property, as well as items used or intended to be used in connection with the infringement, to be altered or destroyed or that other relevant measures are taken.

Publication of the decision

In some cases, the court can, at the request of the claimant, order a party that has committed or aided and abetted the infringement to pay compensation for appropriate measures taken to distribute information about the judgment in the case.

Recall order

A court can order that any infringing property as well as items used or intended to be used in connection with the infringement to be withdrawn from all commercial distribution networks.

Declaration of infringement and validity

A court can issue an order requiring an infringer to defray the cost of appropriate measures to disseminate information about a judgment in a copyright case.

Others

If an applicant demonstrates a likelihood that someone has committed an infringement, the court can order one or several of the parties to provide information to the applicant concerning the origin and distribution networks for the goods or services in respect of which the infringement has been committed, under penalty of a fine.

Where it can reasonably be assumed that someone has committed, or aided and abetted, an infringement, the court can order an investigation into objects or documents of importance for the inquiry to preserve evidence.

40. How are monetary remedies assessed against a copyright infringer?

The Copyright Act stipulates the factors for a court to take into account when adjudicating claims for other heads of damage. When determining quantum, the court considers:

- The right holder's lost profits.
- Any unfair profits made by the infringer.
- Damage caused to the reputation of the work.
- Moral damage.
- The interest of the right holder in infringements not being committed.

However, the basic premise is that a right holder is only compensated for the actual damage suffered by an infringement. Punitive damages are not available under Swedish law.

In civil proceedings, liability and damages are often assessed jointly, although they can also be determined in separate

proceedings. If a joint assessment is performed, the court deals with liability first and then assesses quantum. Criminal proceedings relating to copyright infringement can be combined with civil claims for damages.

APPEAL REMEDIES

41. What routes of appeal are available to the unsuccessful party and what conditions apply?

The provisions governing appeals in the Code of Judicial Procedure apply to appeals against judgments in main proceedings in both civil and criminal cases. Judgments and decisions issued by the Patent and Market Court can be appealed to the Patent and Market Court of Appeal, which is a division of the Svea Court of Appeal. In almost every case, the Patent and Market Court of Appeal must grant leave to appeal before the court conducts a more complete examination of an appealed case or matter. An appeal must be made in writing and filed with the Patent and Market Court within a period of three weeks after the judgment was delivered. Unless the appeal is dismissed on procedural grounds, such for failure to comply with the time limit, the Patent and Market Court sends the appeal documents to the relevant Patent and Market Court of Appeal.

Permission to appeal is granted only under specific conditions including, among other things, when the Court of Appeal is uncertain whether the judgment of the district court is correct, or when there are other extraordinary reasons to hear the appeal.

Generally, decisions reached in the Patent and Market Court of Appeal cannot be appealed, except for in criminal cases. In some cases, the court can grant leave for a judgment or decision to be appealed to the Supreme Court. If so, the Supreme Court would also need to grant leave to appeal before the case can be heard. If a party wishes to appeal a Court of Appeal judgment, this must be in writing and the appeal documents must be submitted to the Court of Appeal within four weeks from the date of the judgment. Unless the appeal is dismissed on procedural grounds (such as for a failure to comply with the time limit) the Court of Appeal sends the appeal documents to the Supreme Court. Permission to appeal is always required for the Supreme Court to hear an appeal. Permission is only granted where:

- It is of importance as a matter of precedent and guidance that the Supreme Court hears the appeal.
- There are extraordinary reasons, such as grounds for relief due to judicial error.

For appeals against decisions relating to preliminary injunctions, the Copyright Act refers to the Code of Judicial Procedure, which provides that issues relating to preliminary injunctions constitute immediately enforceable decisions that can be appealed to a Court of Appeal. Since decisions relating to preliminary injunctions are final decisions, it is possible to appeal them separately from the judgment in the main proceedings. An appeal must be made in writing and filed with the district court within three weeks from the date of the decision.

The appeal proceedings in the Court of Appeal typically extend over a period of one to two years. If permission to appeal is granted by the Supreme Court, at least one additional year can be expected before the case is finally decided.

If a preliminary injunction is appealed, the time period varies depending on whether the Court of Appeal decides to direct the respondent to provide a written submission, which is a legal requirement if the court intends to set aside the original decision. The respondent's submission is usually filed within seven days.

If the court finds that the original decision should be upheld, it can rule on the matter without involving the respondent. If so, the court normally issues its decision within a week.

LITIGATION COSTS

42. What level of cost should a party expect to incur to take a case through to a first instance decision, preliminary injunction proceedings and appeal proceedings?

The costs for legal representation depend on how long the case continues, but also on the complexity of the matter and the parties' positions, arguments and evidence. From a case management and costs perspective, it would be reasonable to allocate between EUR50,000 to EUR250,000 to take the case through to a first instance decision and at least an additional EUR80,000 to take the case through to a decision in any appeal proceedings. Costs in relation to counterfeiting cases are normally much lower.

The general rule in the Code of Judicial Procedure is that costs follow the event, that is, that the loser pays the winner's litigation costs.

REFORM

43. What are the important developing and emerging trends in your country's copyright law?

The newly established Patent and Market Courts are a result of the centralisation of intellectual property hearings to improve the efficiency and standard of the proceedings. All adjudication of cases and matters relating to intellectual property law, competition law and marketing law originating from the general courts and administrative courts have been centralised at these new courts.

The legislator is still facing a number of unresolved legal issues relating to mass digitisation, such as cross-border distribution of copyrighted works through the internet. The copyright debate

focuses primarily on this uncertainty and the need for international harmonisation to:

- Provide a high level of protection for right holders.
- Encourage investments in innovative services and products.
- Stimulate multi-territorial licensing of online rights.

The government's special commissioner has recently proposed a number of revisions to the Copyright Act. The proposal is primarily intended to redraft the Act to provide greater clarity, but also to modernise the provisions on copyright contracts, especially the provisions regarding extended collective licences. In January 2017, a new act regarding collective management of copyright was implemented, as a result of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. Among other things, the act aims to ensure that rights holders are guaranteed transparency in the organisation's activities and that the terms of the licence agreements concluded between collective management organisations and users are reasonable. The new provisions reflect, in particular, the ongoing challenges of internet use and cross-border licences.

In addition, the Swedish courts have shown an increased interest in, and have taken a stricter attitude towards, the responsibility of intermediaries. This is shown both by the recent blocking injunction decisions and the increased number of issued information orders (which may be a result of the Intellectual Property Directive). Therefore, it is possible for rights holders to obtain an injunction against intermediaries, even if the intermediary only provides its customers with internet access. Information orders can be issued by the court if a rights holder can prove probable cause for infringement or a violation is demonstrated. Such an order can be issued on a motion by the author, the author's rights holder or a party entitled to exploit the work under a licence.

ONLINE RESOURCES

Government Offices of Sweden

W www.government.se

Description. Official, up-to-date.

Swedish Association within the international Association for the Protection of Intellectual Property (AIPPI)

W www.aippi.se

Description. Official, up-to-date.

Swedish Association for Intellectual Property Rights (SFIR)

W www.sfir.se

Description. Official, up-to-date.

World Intellectual Property Organisation (WIPO)

W www.wipo.int

Description. Official, up-to-date.

Practical Law Contributor profiles



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Professional qualifications. LL.M, Attorney-at-law

Areas of practice. Intellectual property law, marketing law, media law.

Recent litigation and out of court disputes

- Successfully represented an international food company in complex trademark infringement litigation (2017).
- Successfully represented Sweden's largest tobacco company in comprehensive marketing law litigation (2016).
- Successfully represented an international toy manufacturer, out of court, against an infringer of the manufacturer's design rights and copyrights in several famous children's products (2017).
- Currently (2017) representing several right holders, both in litigation and out of court, within the areas of copyright (a major Swedish book publisher), trade marks (a leading insurance company) and marketing law (an association of corrugated board manufacturers).

Languages. Swedish, English

Professional associations/memberships. Swedish Bar Association; Swedish Association for the Protection of Intellectual Property (SFIR); Swedish Copyright Association (SFU) International Trademark Association (INTA); International Literary and Artistic Association (ALAI); Association for the Protection of Intellectual Property (AIPPI)

Publications

- *Upphovsrättslig övervakningsplikt för mellanhänder – Ett dåligt förslag i kampen mot "värdegapet" på den digitala inre marknaden (Tackling the "Value Gap" through the Introduction of Copyright Monitoring Obligations for Intermediaries – a Bad Proposal)*, *Ny Juridik* 2017:1, Karnov Group.
- *Creative Commons - en introduktion (Creative Commons: An introduction)*, *BrandNews* 5/2016.
- *Länkning och ideell rätt; hur bör 3 § upphovsrättslagen tolkas? (Internet Linking and Moral Rights; How Should Section 3 of the Swedish Copyright Act be Interpreted?)*, *Ny Juridik* 2016:1, Karnov Group.
- *Geolokalisering på internet – vissa immaterialrättsliga konsekvenser (Internet Geolocalization - Some Intellectual Property Law Implications)*, *Ny Juridik* 2015:2, Karnov Group
- *Copyright Litigation, Jurisdictional comparisons, 2nd edition 2015, Chapter on Swedish Copyright Litigation, pp. 411 – 432, Thomson Reuters.*
- *Användningstvång och ändringsomfång. En uppdatering (Genuine Use and Scope of Alteration of Trade Marks in Europe and Sweden. An Update)*, *NIR* 2013:6.
- *Användningstvång och ändringsomfång (Genuine Use and Scope of Alteration of Trade Marks in Europe and Sweden)*, *NIR*



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Professional qualifications. LL.M; B.Sc. in Electronics; Attorney-at-law.

Areas of practice. Intellectual property; marketing law.

Recent litigation and out of court disputes

- Successfully acted in a complex trademark dispute between Orkla Foods and Nestlé Sverige Aktiebolag and Société des Produits Nestlé.
- Representing Swedish Match in a case with complex trade mark issues related to a 3 D mark.
- Successfully acted for Seamless Distribution AB where Seamless was sued by Accumulate AB claiming patent infringement regarding a method for secure mobile payments.
- Acting for Hästens Sängar AB in a protection of 3D chequered pattern matter for beds and bed fabrics/linen.
- Successfully acted for Stokke and Peter Opsvik in several cases regarding the copyright protection in relation to the chair TrippTrapp as work of applied art.
- Acting for Alfa Laval Corporate AB against SWEP International.

Languages. Swedish, English

Professional associations/memberships. Swedish Bar Association; Swedish Association for the Protection of Intellectual Property (SFIR); International Trademark Association (INTA); Association for the Protection of Intellectual Property (AIPPI); appointed as the Swedish Bar Association's member of the CCBE task group concerning UPC related questions and has authored the consultation response regarding the UPC on behalf of the Swedish Bar Association.

2005:2.