THE PATENT LITIGATION LAW REVIEW

Fifth Edition

Editor
Trevor Cook

THE LAWREVIEWS

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CONTENTS

PREFACE

Although patent litigators should always be mindful that patent litigation has, with some justification, been called the 'pathology of the patent system' – not so much as a criticism but more in recognition of how remarkably little patent litigation there is – when seen in relation to the ever increasing number of patents in force at any one time, patent litigation is also the anvil on which patent law is forged. This is because the 'black letter' law of patents tends to be terse by comparison to most other areas of law, and it is only with experience of how courts and tribunals interpret such law and apply it that one can start to appreciate its true scope and effect.

This, in part, explains how such similarly expressed statutory provisions as one finds in different patent laws can sometimes result in such different outcomes in different jurisdictions – disparities that are all the more evident when they concern the same product or process, and patents that, though in different jurisdictions, are all members of the same family, and are all intended to protect the same invention. As it becomes increasingly common for patent disputes to proceed in multiple jurisdictions, these differences in outcome have become ever more apparent.

Such disparities are not only a consequence of differing substantive laws, or differences in interpretation of similarly expressed laws, they can also be a consequence of the considerable procedural differences between jurisdictions, the nature of which is outlined in this Review. However, the Review does not only summarise patent litigation procedures: the respective contributors to it, as leading practitioners in each of their jurisdictions, also focus on recent developments in substantive patent law as demonstrated by the most important recent court decisions in their respective jurisdictions, meaning that this Review also provides insight into the current controversies that affect patent law generally.

The events of the past 18 months have not left patent litigation unscathed, and it will be interesting to see how the changes that the pandemic has brought, such as remotely conducted hearings, survive the much-hoped-for return to normality. Some indication of the strength of views engendered by this issue is provided by the arguments before the European Patent Office's Enlarged Board of Appeal in Case G 1/21 regarding the legality of mandating online hearings during the pandemic. In rejecting in July 2021 the challenge to the validity of this measure, the Enlarged Board was careful not to express a more general opinion about the legality of mandating such hearings.

The pandemic has also been used as a pretext for certain interests to push for a waiver of the patent and trade secrets provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights, of which discussions are now taking place in the World Trade Organization, despite it not being intellectual property that has impeded the roll-out of

vaccines, and the manifest need for effective patent protection to incentivise the continuing search for new and improved medical treatments.

In the European Union, the big news this summer came in June 2021 when the German Federal Constitutional Court made an order regarding the constitutional challenge mounted to German adherence to the Agreement on a Unified Patent Court (UPCA). The order has the effect of allowing Germany to participate in the UPCA and the Protocol on the Provisional Application of the UPCA. German participation in those measures is a necessary prerequisite to their entry into force.

This decision provides for the prospect of the UPCA entering into force in the second half of 2022. The UCPA will allow (but not as yet mandate) traditional European patents to be litigated in a single court covering much of the European Union.

Such entry into force will also trigger the entry into force of EU Regulations that establish a new type of European patent, the European patent with unitary effect, which will allow patentees following the European route to opt for a single patent covering all the EU Member States that participate in the UPCA, as opposed to the traditional European patent, which has effect as a bundle of national patents. Litigation over this new type of patent will only be possible in the Unified Patent Court.

However, not all is plain sailing as not only must the UPCA regain its lost momentum, but it also appears that its implementation will proceed without formal amendment of the UPCA, despite it containing provisions that assume UK involvement in it. As the United Kingdom, as a result of its withdrawal from the European Union, can no longer participate in the UPCA, this may be seen as introducing a measure of uncertainty in respect of its legal basis. We should, however, know much more by the next edition of this Review.

Trevor Cook
Wilmer Cutler Pickering Hale and Dorr LLP
New York
October 2021

Chapter 16

SWEDEN

Björn Rundblom Andersson and Petter Larsson[1]

I OVERVIEW

Sweden is consistently ranked as one of the most innovative countries in the world, which – together with its traditionally strong high-tech and pharmaceutical industry – has made it a frequent venue for large-scale patent litigation, despite being a relatively small market. Patent litigation has long been the domain of specialised courts comprising a panel of legal and technical judges. This specialisation was strengthened by a reform in 2016 that created specialised IP courts for all IP rights. Pharma-related cases are by far the most common patent cases in Sweden.

II TYPES OF PATENT

There are two kinds of patents that have effect in Sweden. The first are Swedish national patents, which are prosecuted at the Swedish Intellectual Property Office (SIPO). The second are European patents that designate Sweden, which are prosecuted at the European Patent Office (EPO) and subsequently validated in Sweden. The granting of national patents and European patents is preceded by examination at the respective patent office.

In Sweden there is no possibility of extending the term of a patent per se; however, supplementary protection certificates (SPC) may be granted for patents covering medicinal, veterinary medicinal and plant protection products. An SPC extends the protection for those products for a maximum of five years after the lapse of the basic patent. The grant of an SPC is subject to several conditions.

III PROCEDURE IN PATENT ENFORCEMENT AND INVALIDITY ACTIONS

In Sweden, essentially all patent-related disputes fall under the exclusive jurisdiction of the Patent and Market Court (PMC), which is a specialised IP court at Stockholm District Court. The PMC administers both litigation in civil disputes, such as infringement and validity cases, prosecution matters on appeal from the SIPO and criminal cases relating to IP infringement.

1 Björn Rundblom Andersson is a partner and Petter Larsson is an associate at Westerberg & Partners Advokatbyrå AB.

All licensees have standing to bring infringement proceedings.[2] Anyone who is prejudiced by a patent has standing to bring revocation proceedings.[3] However, if the revocation request is based on the patent being granted to someone who is not the inventor and who has not acquired his or her right to the invention from the inventor, standing is restricted to those who assert the right of ownership.[4] There is a requirement for a litigation bond to be provided by foreign claimants, but many nationalities are exempt from this requirement.[5]

There are pre-litigation notification requirements of which a claimant must be aware. Anyone who intends to bring proceedings for the revocation of a patent must give the SIPO, and all parties recorded in the patent register as licensees and pledge holders in respect of the patent, notice of the intention to do so.[6] A licensee who wishes to initiate infringement proceedings must first notify the patentee.[7]

Failure to comply with a notification requirement bars the proceedings from progressing, but the court will give the claimant the opportunity to remedy any omission in this respect.[8] It is common practice to send a warning letter before bringing proceedings.[9] Warning letters can in very particular circumstances give rise to liability under marketing law but the premise is that such letters are a natural element of a dispute.

Both infringement and revocation proceedings are initiated by the filing of a summons application.[10] A summons application must, among other things, specify the relief that the claimant seeks from the court.[11] The requirement for a specified statement of the relief sought means that a claimant who seeks monetary relief must state the amount in which the relief is sought already from the outset.[12] If the claimant is unable to specify that amount at this stage, it is possible to instead seek a declaration of liability, per se, for patent infringement.[13]

The respondent will normally be given between two and four weeks to respond to the summons application, depending on whether preliminary relief is sought. Extensions of deadlines fixed by the court may be granted upon a reasoned application.[14] A respondent in validity proceedings may request that the patent be maintained with a more limited scope of protection , in which case it must file amended claims.[15]

Preliminary injunctions may be sought from the court.[16] The preliminary injunction available under the Patents Act is sought in the scope of full merits proceedings. To seek such relief, the claimant must bring infringement proceedings and request that the injunction sought also be granted in the interim.

2 See, for example, Section 57b of the Patents Act.
3 Section 52 of the Patents Act.
4 ibid.
5 The Obligation for Foreign Claimants to Provide Security for Litigation Costs Act (1980:307).
6 Section 64 of the Patents Act.
7 ibid.
8 ibid.
9 Members of the Swedish bar organisation are as a main rule required under the bar's code of professional conduct to send warning letters before initiating legal proceedings.
10 Chapter 13, Section 4 of the Procedural Code.
11 Chapter 42, Section 2 of the Procedural Code.
12 Ekelöf, et al., *Rättegång V*, Juno v. 5, p. 26.
13 Declarations may be sought under Chapter 13, Section 2 of the Procedural Code.
14 Chapter 32, Section 3 of the Procedural Code.
15 Section 52 of the Patents Act.
16 Section 57b of the Patents Act, which is the provision governing all aspects of a request preliminary injunction.

It is possible to obtain a preliminary injunction on an *ex parte* basis, but it requires extreme urgency and is rarely granted. It is not possible to file protective letters with the court to mitigate risk for *ex parte* decisions. The grant of a preliminary injunction requires that the claimant can show probable cause of infringement of a valid patent.[17] There is a rebuttable presumption of validity for the purposes of preliminary injunction requests.[18] The claimant must also file a bond or other appropriate form of security in an amount covering the financial harm that the preliminary injunction may cause the respondent in the event the respondent prevails on the merits.[19] Preliminary relief, such as seizure or injunctive relief, is also available under the Procedural Code and may be sought in advance of bringing full merits proceedings.[20]

While the court has the power to hold hearings on procedural issues, to which requests for a preliminary injunction belong, it will rule on those requests based on the documents on the case file – the reason being that the request shall be ruled upon in an expedited manner. The time from the application to the ruling is normally between a few weeks up to six months, depending largely on the urgency of the matter and number of submissions the parties file on the issue.

A respondent in infringement proceedings may enter a validity defence; however, the defence will be inadmissible unless the respondent also brings separate proceedings for the revocation of the patent in suit.[21] If a validity defence is argued, the court will order the respondent to initiate revocation proceedings within a time certain if the respondent wishes to maintain that defence.[22] While revocation proceedings are separate from the infringement proceedings, they are normally consolidated and heard together.

At an appropriate stage of the proceedings, the court will hold a case management hearing.[23] The purpose of the hearing is to identify any uncertainties in the parties' positions and to set a schedule for the subsequent proceedings, including the main hearing. A filing schedule will be fixed. The court will also endeavour to fix the length of the hearing by enquiring about the number of witnesses. A merits hearing can ideally be expected around 18 months after the start of the proceedings but that varies from case to case. The court is also required by law to explore whether there is a possibility of settling the dispute amicably, an issue normally discussed at the case management hearing.[24]

While the court expects the parties to abide by the schedule so determined, there are few sanctions for not doing so. The parties may, for example, adduce additional evidence after the final statement of evidence. The court will normally declare the case file closed by a specific date. After that date, new facts and evidence will be inadmissible unless there is a valid excuse for introducing it at this late stage or if allowing the new facts and evidence

17 ibid.

18 See, for example, the Patent and Market Court of Appeal's ruling on 29 June 2018 in Case PMÖ 4865-18.

19 Section 57b of the Patents Act.

20 Chapter 15 of the Procedural Code.

21 Section 61 of the Patents Act.

22 ibid.

23 Chapter 42, Section 12 of the Procedural Code.

24 Chapter 42, Section 17 of the Procedural Code.

will not substantially delay the proceedings.[25] A more stringent cut-off order may be entered against a party who fails to bring enough clarity to its case.[26] Such orders are rare and are normally reserved for more recalcitrant litigants.

The proceedings are adversarial, and with few exceptions there is no inquisitorial aspect of the court's function. It is for the parties to adduce evidence.[27] Witnesses of fact and expert witnesses are named in the parties' written submissions together with an indication of what the party intends to prove with the testimony of the witness or expert.[28] Written witness statements from a witness of fact are normally inadmissible in Swedish proceedings.[29] One exception from that rule is that it is permissible to rely on such written statements for the purposes of a preliminary injunction request.[30] The general rule for expert witnesses is the direct opposite, and a party who wishes to rely on expert testimony must thus submit an expert report.[31]

Witnesses of fact and expert witnesses give testimony at the hearing.[32] The parties hold an examination-in-chief of their respective witnesses and experts, and the other party is entitled to a cross-examination. The court may ask questions but will normally only do so to make sure it has correctly understood the testimony.[33]

Both parties may request document production.[34] Unlike in some jurisdictions with more general rules on disclosure or discovery, document production is sought in respect of specific, identified documents.[35] However, describing a category of documents or even an issue for which the documents sought would be relevant may be sufficient identification.[36]

There is a privilege for trade secrets.[37] Production of documents containing trade secret information can nevertheless be ordered, but only if there are exceptional grounds for doing so.[38] Determining whether there are exceptional grounds involves, among other things, an appraisal of how strong the requesting party's case is on the merits.[39]

An infringement investigation order, which may also be sought separately, before initiation of proceedings and granted *ex parte*, can be used to secure evidence about infringements by searching for objects and documents.[40] An order of this kind may be granted if the claimant can establish that there are reasonable grounds to assume that the party against whom the order is sought has committed an infringing act or contributed to such an act and the claimant provides a bond.

25 Chapter 42, Section 15a of the Procedural Code.
26 Chapter 42, Section 15 of the Procedural Code.
27 Chapter 35, Section 6 of the Procedural Code.
28 Chapter 42, Section 8 of the Procedural Code.
29 Chapter 35, Section 14 of the Procedural Code.
30 AD 1982 No. 28.
31 Chapter 40, Sections 7 and 19 of the Procedural Code.
32 Chapter 35, Section 8 and Chapter 36, Section 16 of the Procedural Code.
33 Chapter 36, Section 17 of the Procedural Code.
34 Chapter 38, Section 2 of the Procedural Code.
35 See, for example, the Supreme Court's decision in NJA 1998 p. 590.
36 ibid.
37 Chapter 38, Section 2 and Chapter 36, Section 6 of the Procedural Code.
38 ibid.
39 The Supreme Court, NJA 1986 p. 398.
40 Sections 59a–59h of the Patents Act, which governs all aspect discussed in this paragraph.

The enforcement authority, which carries out the investigation, may photograph and record audio and video of the objects that it is instructed to search for in the order and may make copies of documents covered by the order. It may not seize specimens of infringing products or observe processes. The documentation obtained must be made available to the parties.

An information order may be granted if the claimant is able to establish probable cause for infringement or contribution to infringement.[41] The subject matter of the order is information about the origins and the distribution network of the infringing goods or services, information on the number of sold products and the products in stock as well as prices and gross margins.[42]

Infringement and revocation proceedings are not barred by ongoing opposition proceedings before the SIPO or the EPO, and the courts are normally reluctant to stay court proceedings pending the outcome of such administrative procedures unless both parties agree on the stay.

The court's judgment will normally be preceded by a merits hearing. At that hearing and the subsequent deliberations, the court will sit as a panel, which normally comprises two legal and two technical judges.[43] At the hearing, the parties will each give an opening statement intended to present the facts and written evidence to the court.[44] This will be followed by the examination of witnesses and experts. The hearing will conclude with closing statements.[45]

The court will deliver a written judgment between three weeks and a few months after the hearing. Costs will be awarded in the judgment, and the general rule is that the prevailing party will be compensated for its litigation costs insofar as they are deemed reasonably motivated to protect the party's interests.[46] The rules on litigation costs give the courts power to impose sanctions for negligent conduct of proceedings or the bringing of unnecessary proceedings by making the responsible party liable regardless of the outcome or even holding the parties' directors or counsel jointly and severally liable for costs.[47] However, those powers are rarely used.

IV SUBSTANTIVE LAW

i Infringement

For there to be an infringement, an invention claimed by a patent must be used in such a way that it falls within the scope of the exclusive right conferred by the patent. The first issue is thus to establish the scope of protection of a patent and determine whether the infringement object falls within that scope. If so, it must be determined whether any measures falling within the exclusive right have been taken in respect of that object.

41 Sections 57c–57f of the Patents Act.

42 ibid.

43 Chapter 4, Section 1 of the Patent and Market Courts Act (2016:188).

44 Chapter 43 of the Procedural Code.

45 ibid.

46 Chapter 18, Sections 1 and 8 of the Procedural Code.

47 Chapter 18, Sections 3, 6 and 7 of the Procedural Code.

Scope of protection

There is a use of the patented invention if a product or process corresponds to all elements of a patent claim either literally or, exceptionally, by equivalent means. The scope of protection is determined by the patent claims, and the description may be consulted to inform the understanding of the claim.[48]

The Swedish courts must observe Article 69 of the European Patent Convention and the Protocol on the Interpretation of Article 69.[49] That means, in essence, that the courts endeavour to find a construction that strikes a balance between a strict literal reading of the claim and a more liberal description-oriented construction, and accordingly to combine fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties. The scope of protection must be determined in light of the inventive idea, as it is conveyed by the patent, and with reference to what was known in the art on the application (or earlier priority date).[50]

Reference may also be made to the prosecution file when construing ambiguities in the claim, but only to limit the scope of protection.[51]

The application of the doctrine of equivalence does not mean that the issue of infringement should be determined without regard to the patent claims. All elements of the invention must be present, either literally or by equivalent means. If there is a discrepancy between the patent claim and the object of the infringement insofar as one or more features are concerned, an equivalency test will determine whether there can be infringement, this notwithstanding.[52]

The test examines whether: the object of the infringement uses the inventive idea entirely; it – regardless of the literal discrepancy between the object of the infringement and the patent claim – achieves the same technical result as the invention; the discrepancies are close at hand for a person skilled in the art; and the solution used by the object of the infringement is equivalent with that claimed. The nature of the invention is also relevant as the room for extended protection based on equivalence might be substantial for a pioneering invention, whereas it will be very limited for a more ordinary invention.

Acts of infringement

Infringement may be direct or indirect. Direct infringement is the making, offer for sale, putting on the market or use of a patented product as well as importing to Sweden or the stocking in Sweden of the product for any the mentioned purposes.[53] There is also direct infringement if any of those acts are undertaken in respect of a product directly obtained from a patented process. Finally, the use of a patented process is direct infringement, as is the offer of the process for use in Sweden, provided that the infringing party knows or it is obvious in the circumstances that the process is not permitted without the consent of the patentee.

48 Section 39 of the Patents Act.

49 The Supreme Court, NJA 2000 p. 497.

50 The Patent and Market Court of Appeal's judgment on 10 July 2017 in Case PMT 6900-16.

51 The Supreme Court, NJA 2002 p. 660.

52 The Patent and Market Court of Appeal's judgment on 17 November 2016 in Case PMT 744-16.

53 Section 3 of the Patents Act sets forth the infringing acts, direct and indirect.

Indirect infringement is the supply or offer in Sweden of means, relating to an essential element of the invention, for putting the invention into effect in Sweden, with the knowledge, or if it is obvious in the circumstances, that the means are suitable and intended for putting the invention into effect.

Only acts that are made in Sweden can infringe a Swedish patent; however, a transaction with an international dimension can still infringe a Swedish patent. The courts have considered that an offer issued from Sweden by a company incorporated in Sweden to a buyer in Finland was an infringing act in respect of a Swedish patent, regardless of the fact that the goods offered were delivered directly from the United Kingdom to Finland.[54]

Non-commercial acts are exempt from patent infringement liability, but the supply or offer of means to a non-commercial party will still be indirect infringement, notwithstanding that the putting into effect of the invention is exempt.

Assisting or otherwise furthering direct or indirect infringement by deed or advice (contribution) is also a cause of action.[55]

Imminent infringement (i.e., if someone is taking preparatory steps for an act of infringement) can be injuncted. The challenge in this context is often to establish that the intention with the steps was to carry out the infringing act notwithstanding the existing patent protection.[56]

ii Invalidity and other defences

Invalidity

A respondent who wishes to rely on invalidity as a defence in the infringement proceedings must also bring separate revocation proceedings against the patentee. It is thus not possible to rule on validity with effect solely between the parties.

A patent shall be invalidated by the courts if any of the following conditions are met:[57]

a the patent was granted despite the requirements for patentability set out in the Patents Act not being met;

b the invention is not described so clearly as to enable a person skilled in the art to carry out the invention;

c the patent covers a subject matter that did not appear from the application on the date it was filed; or

d the scope of protection of the patent has been extended after grant.

The first item in the list above incorporates lack of novelty and obviousness but also other aspects of patentability; thus, the patent is invalid if the subject matter does not qualify as an invention, belongs to a non-patentable category, lacks technical effect or industrial application.

54 Svea Court of Appeal, judgment given on 12 December 1990 in Case T 1253-89.

55 For example, in Section 57 b of the Patents Act, contribution is not expressly mentioned in Section 58, which governs liability in damages, but the legislator considered it clear that contribution was covered by the language of the provision without such mention, see NJA II 1968 p. 93.

56 The Patent and Market Court's decision on 13 July 2017 in Case PMT 8260-17.

57 Section 52 of the Patents Act.

Novelty is examined by establishing the contents of the relevant prior art and then comparing it with the patent in suit to find whether the prior art anticipates all features of the invention claimed by the patent.[58]

In determining whether an invention was obvious on the application date, the courts apply the problem-and-solution approach. This means establishing what distinguishes the invention claimed by the patent from the closest prior art. The technical effect of those distinguishing features is then used to formulate an objective technical problem, and it is examined whether a notional person skilled in the art would arrive at the invention when solving that problem.[59]

The common general knowledge of the person skilled in the art (CGK) is important when determining novelty and obviousness as the skilled person's understanding of prior art and the teaching of the patent, his or her capacity to solve the objective technical problem and various other issues are influenced by the CGK.[60]

A claim to priority can be challenged in the context of novelty and obviousness by arguing that the invention claimed by the patent is not directly and unambiguously disclosed in the priority application or that the priority cannot be claimed based on that application for other reasons.

Failure to provide an enabling disclosure is a ground for invalidity. The CGK is of great importance in determining whether the disclosure is sufficient.[61] For a patentee, this may present a dilemma as a great deal of reliance on CGK for enablement may be a problem in respect of obviousness and vice versa.

A patent is invalid if it comprises added subject matter. Such added matter arises from amendments made during prosecution, and the test is whether information has been introduced in the patent claim that the person skilled in the art, guided by his or her CGK, could not directly and unambiguously gather from the application on the filing date.[62]

The fourth ground for invalidity relates to post-grant amendments of the claims, which result in a wider scope of protection.

Other defences

Non-infringement

The non-infringement argument is usually the first line of defence and may be challenging for a patentee to overcome as the burden of proof for infringement rests on the claimant.

58 See, for example, the Patent and Market Court of Appeal's judgment on 21 April 2017 in Case PMT 4063-16.

59 See, for example, the Patent and Market Court of Appeal's judgment on 28 March 2019 in Case PMT 360-18.

60 See, for example, the Patent and Market Court of Appeal's judgment on 31 January 2020 in Case PMT 5945-18.

61 See the Patent and Market Court's judgment on 17 April 2020 in Case PMT 15230-18, which currently is on appeal.

62 The Patent and Market Court of Appeal, judgment given on 21 June 2018 in Case PMT 7239-17.

Laches/estoppel and limitation.

Claims for damages are time-barred if proceedings are not initiated within five years from the time when damage occurred. An exception applies in connection with grant and opposition proceedings.[63]

Apart from this general time-bar, there is no duty for a patentee to act on infringement, and an infringer cannot defend itself by invoking a failure of the patentee to act on a known infringement;[64] however, there is always a possibility to invoke communications between the patentee and the infringer to construe a contractual defence involving the patentee's acceptance of certain otherwise infringing acts or waiver of claims.

Licence and exhaustion

If the patentee has consented to the use of the invention by way of a licence (express or implied), that use will not be infringing;[65] however, a licence only gives the licensee the right to use the invention within its scope.

The patent right is exhausted in a specimen of a patented product that has been put on the market in the European Economic Area (EEA) by the patentee or with the consent of the patentee.[66] The exhaustion is regional; thus, an infringement occurs when a specimen put on the market outside the EEA is imported into Sweden.

Prior use right

Anyone who used the invention commercially in Sweden or has undertaken essential measures to use the invention commercially in Sweden when the patent application was filed has a prior use right.[67] The right is limited to the general nature of the use at the application date.

The Bolar exemption and other exemptions

Sweden has implemented a *Bolar* exemption that allows studies, trials, investigations and other practical measures with a reference medicinal product, if those uses of an invention relating to the reference medicinal product are necessary to obtain marketing authorisation of a medicinal product.[68]

There is also an exemption for use of the invention in experiments carried out on the invention as such. The preparation of medicinal products at pharmacies pursuant to a doctor's prescription in individual cases and subsequent measures in respect of such medicinal products are exempt from infringement. Private and non-commercial uses of an invention are also exempt.

Competition law

The enforcement of patent rights by a dominant undertaking may, in specific circumstances, be an abuse of the dominant position. It is clear from the Court of Justice of the European Union's preliminary ruling in Case C-170/13 (*Huawei Technologies*) that seeking injunctive

63 Section 58 of the Patents Act.

64 See Stockholm District Court's judgment on 15 May 2013 in Case T 20502-10.

65 Section 3 of the Patents Act.

66 ibid.

67 Section 4 of the Patents Act.

68 Section 3 of the Patents Act, which provides all the exemptions discussed in this paragraph.

relief against infringement of a standard-essential patent may amount to abuse if conditions relating to the offer of a fair, reasonable and non-discriminatory (FRAND) licence have not been observed before seeking injunctive relief. It also follows from the ruling that damages for infringement are not generally abusive. The ruling pertains to EU law, which is directly applicable in Sweden. The Swedish courts are yet to rule on any FRAND cases.

V FINAL REMEDIES FOR INFRINGEMENT

Injunctive relief is a remedy for infringement. Intent or negligence is not a prerequisite for the grant of such relief, and the right to an injunction is essentially absolute. Injunctions are granted on pain of an administrative fine.[69] The injunction will be limited to the object of the infringement, which is typically identified by a specific exhibit to the judgment that demonstrates the properties of the object in question.

Corrective measures can also be sought against a patented product that has been manufactured without the consent of the patentee.[70] Owing to oversight when implementing the enforcement directive, corrective relief is, however, not available in relation to other infringing acts, such as import, sales or use.[71]

Measures that the courts are empowered to order include recall from the market, modification, storage for the rest of the patent term or destruction of the products. The court may also order other measures that it considers appropriate, which, for example, could be the transfer of infringing products to the claimant. The respondent usually disburses any costs associated with the corrective measures, and the party who has suffered infringement cannot be ordered to compensate the party against whom the measure is directed. The court may order anyone who has infringed a patent or contributed to infringement to fund appropriate measures to publicise information about the court's judgment.[72]

A patentee is entitled to reasonable compensation for the use of the invention and any further losses caused by the infringement provided that the infringement was intentional or negligent.[73] The reasonable compensation is normally determined based on what would be a reasonable licence fee for a voluntary licence.[74] The additional damages normally comprise profit on sales lost because of the infringement.

The Patent Act lists several factors to be considered when determining the quantum of damages. The factors include both financial and non-financial aspects. The purpose of these factors is not to compensate the patentee in excess of the actual financial harm it has suffered.[75]

Commercial parties are expected to advise themselves of patents pertaining to their field of operations; thus, a respondent cannot normally defend itself by citing a lack of knowledge of the patent, and negligence will accordingly follow from either the failure to respect a patent or the failure to comply with the duty to be aware of the patent right. In the case of infringement in good faith, the patentee is entitled to reasonable compensation only if and to the extent equitable.

69 Section 57b of the Patents Act.

70 Section 59 of the Patents Act.

71 The Patent and Market Court of Appeal's judgment on 18 December 2021 in Case PMT 8135-19.

72 Section 57h of the Patents Act.

73 Section 58 of the Patents Act.

74 Judgment from the Supreme Court; NJA 2019 s. 3.

75 Gov't bill 2008/09:67 p. 235 et seq.

The most notable award of damages in Swedish patent litigation, at least in recent years, was a judgment in 2017 for approximately 200 million Swedish kronor in lost profit.[76] However, the judgment was overturned on a finding of invalidity by the Patent and Market Court of Appeal (PMCA).[77]

VI OTHER TYPES OF PATENT PROCEEDINGS

There are several types of patent proceedings other than infringement and revocation.

i Declaratory proceedings

Declaratory relief in respect of infringement or non-infringement may be awarded.[78] The parties with standing are essentially the same as for infringement and invalidity. It is not possible to seek declarations to the effect that a specific product was known or obvious before the application (or priority) date of a patent.

ii Criminal law

Intentional or grossly negligent patent infringement is a crime punishable by a fine or a prison sentence of a maximum of two years.[79] There is an aggravated crime that carries a prison sentence of between six months and six years.

Public prosecutors may indict patent crimes on certain conditions. No such indictment has been brought since the entry into effect of the Patents Act on 1 January 1968.[80] The victim of a crime has a subsidiary right to bring indictments before the court. Such indictments have been brought in respect of patent infringement from time to time, but it is very rare.[81]

iii Border measures

Patents are covered by Regulation No. 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation No. 1383/2003. A right holder may apply to the customs authorities to enable them to make customs seizures in respect of a specific patent.

iv Compulsory licence

Compulsory licences may be granted on a number of grounds, such as failure to exploit the invention, dependent invention and pressing public need.[82] For each case, the grant of a compulsory licence is subject to several conditions, and the party seeking the licence must prove that it has first sought a voluntary licence from the patentee.[83]

The covid-19 pandemic has led to one – still pending – request for a compulsory licence in relation to a patent in the field of biotechnology.

76 The Patent and Market Court's judgment on 15 December 2017, in Case PMT 7403-15, etc.

77 The Patent and Market Court of Appeal's judgment on 28 March 2019 in Case PMT 360-18.

78 Section 63 of the Patents Act.

79 Section 57 of the Patents Act.

80 Government Report (SOU) 2015:41 p. 198.

81 The subsidiary right to indict is provided in Chapter 20, Section 8 of the Procedural Code.

82 Sections 45 to 48 of the Patents Act.

83 Sections 49 of the Patents Act.

v Entitlement – invalidity or transfer of ownership to patent

If a patent has been granted to someone who was not entitled to the patent because of lack of inventorship (i.e., not being the true inventor or his or her successor in right), the true owner may bring an entitlement action requesting that ownership of the patent be transferred.[84] Such an action can also pertain to partial ownership with the patentee.

An entitlement action for transfer of ownership must be brought no later than one year from the date when the claimant became aware of the patent grant and the other facts on which the claim is based. If the patentee was unaware of the inventorship issue and did not have reason to be aware of it, no action can be brought later than three years after the patent grant.

The entitlement ground may also be entered as a ground for invalidity; however, a patent may not be revoked based on the proprietor being entitled only to a share in the patent.

VII APPEAL

The PMC's judgment, as well as some other rulings made during the proceedings there, may be appealed to the PMCA, which is part of Svea Court of Appeal in Stockholm. Special conditions must be met for an appeal to be heard at the appellate level. Patent cases will normally meet those conditions.

The case before the appeals court entails a complete re-examination of the case insofar as it is within the scope of the appeal. No new facts or evidence are admissible at the appellate level, but there are exceptions. The PMCA will normally sit as a panel of three legal and two technical judges.

The judgment of the PMCA may only be appealed to the Supreme Court if the PMCA gives leave to appeal, which it very rarely does. Even if appeal is permitted, the Supreme Court must decide to hear the appeal, which it only does if the case involves a legal issue for which precedent is needed.

VIII THE YEAR IN REVIEW

Several interesting cases have been decided by the Swedish courts in the past year. The PMCA has clarified that the alleged availability of a compulsory licence is not a defence against a request for a preliminary injunction.[85] Finding the language of the Patents Act not to support the broad scope of corrective measures under the Enforcement Directive, the PMCA has found itself unable to grant corrective measures against property not alleged to be manufactured without the consent of proprietor.[86]

The PMCA also ruled that a patent licence without a specified term will be for the duration of the patent unless it can be proven that the parties intended otherwise.[87] The consequence is that patent licences without a specified term will usually be treated as a definite-term agreement, which cannot be terminated for convenience before the term has expired.

84 Section 53 of the Patents Act.

85 The Patent and Market Court of Appeal's decision on 21 December 2021 in Case PMÖ 11561-20.

86 The Patent and Market Court of Appeal's judgment on 18 December 2021 in Case PMT 8135-19.

87 The Patent and Market Court of Appeal's judgment on 12 October 2021 in Case PMT 3243-19.

In a judgement that was not appealed, the Attunda District Court ruled that the Court of Justice of the European Union's *Bayer Pharma* judgment did not preclude objective liability for subsequently revoked preliminary relief.[88]

IX OUTLOOK

The way is now clear for Germany to ratify the Agreement on a Unified Patent Court (UPC) and its protocol on provisional application. The UPC is thus much closer to opening its doors. The UPC Preparatory Committee has communicated that it foresees that this will take place in mid-2022. Continued progress in setting up the UPC will be followed closely.

Sweden is a participant in the in UPC and has, together with the Baltic countries, set up a regional division seated in Stockholm.

88 Attunda District Court's judgment on 23 April 2021 in Case T 6267-19.

Appendix 1

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