

INTELLECTUAL PROPERTY FOCUS

Managing
Intellectual
Property

THE
GLOBAL IP
RESOURCE

PUBLISHED IN CONJUNCTION WITH
VALEA

Europe

2014
IP FOCUS



SWEDEN

Unifying Sweden's litigation system

Anna Maria Lagerqvist, Thomas Ernby and Björn Pettersson of Valea explain what effect the new Patents and Market Courts Proposal will have on the judicial review process of IP cases

Provided that the new proposal from the Department of Justice entitled Patents and Market Court leads to legislation, from July 1 2015 Sweden will receive a new IP judicial system. It will deal with all IP, marketing and competition law cases in a common court called the Patents and the Market Court (PMC) at first instance and the Patent and Market Superior Court (PMSC) on appeal. After completing the round of referrals during the spring of 2014, the proposal will be prepared in the usual way. It is expected that some adjustments will be made depending on the comments received from the consulting bodies.



SWEDEN



Unifying the judicial process

In Sweden, the judicial review of IP marketing, commercial and competition law cases is spread out among various public, general administrative and specialised courts. Such cases make up some of the most complex and comprehensive cases heard in court, and often require specialist skills. However, there is a relatively small number of such cases per year determined in the courts. The fragmentation of the trial, along with the low case numbers, means that quality and efficiency are often lacking.

Patent law cases (about 50 registration cases and about 20 incoming civil cases per year) are distributed among the Court of Patent Appeals (CPA) and general courts, most of them at the Stockholm District Court. There are often common issues shared by cases which are handled in separate courts. Thus, the issue being dealt with, such as novelty, is often the same in registration cases and litigation cases, and there are some similarities in the assessment of patentability and scope of protection. The type of technical expertise needed in different types of case often converges, which is evidenced by the fact that the technically competent patent councils of the CPA also participate as technical experts in the Stockholm District Court and the Svea Court of Appeal. A comprehensive review would therefore lead to a more uniform practice and streamlined use of the technical competences available.

Trade mark law cases (about 110 received registration cases and 60 incoming civil cases per year) and design legal cases (about 10 registration cases and five civil cases per year) are distributed

The fragmentation of the trial, along with the low case numbers, means that quality and efficiency are often lacking



Anna Maria Lagerqvist

Anna Maria Lagerqvist works in all areas of IP law, with a focus on infringement queries, litigation and business related IP issues such as structuring and negotiating licensing agreements and other commercial contracts for the protection and commercialisation of IP rights. She also provides strategic advice on trade mark and design questions such as strategies, policies, investigations and agreements. Anna Maria has considerable experience in the areas of IT law and domain name issues and she is an experienced lecturer in IP matters.

Anna Maria has worked in intellectual property since 1998. She joined Valea in November 2006 and is the manager of the firm's legal department. Previously, she worked at a law firm specialised in IP litigation providing advice on IP and marketing law; at an American IT company as an IP counsel providing advice on digital brand management; and, at one of Sweden's largest law firms providing advice on IP and international commercial law.

between the CPA and general jurisdictions. Within the general court, these cases are heard in different district courts, but the majority is concentrated at the Stockholm District Court. As with patent cases, there is a strong correlation between the matters being handled in the CPA and general court (for example, assessing the distinctiveness of a brand).

Criminal IP cases regarding patents, Community trade marks and Community designs are handled by the Stockholm District Court. Other criminal cases related to intellectual property may be adjudicated by any district court.

Marketing law cases, which are distributed between the Market Court and general court (a total of about 40 cases per year), also demonstrate strong similarities. In trade mark and design cases, the issues could to a great extent be the same as in cases of misleading marks or passing off. However, a party who wishes to sue for alleged trade mark infringement and deceptive advertising is directed to parallel processes. Therefore, there are strong reasons, not least for procedural economy, to bring the trial to a single court.

For competition law, there is no need to retain the existing system of review in different courts. The point of contact with IP cases is asserted when a court has to consider whether the exercise of intangible exclusive rights is in compliance with aspects of competition law.

It is important that the judicial review of the above-mentioned areas of law is governed by the highest standards of quality and efficiency, and that Sweden manages to install a unified process. In practice, it is also of great importance that market participants have access to a comprehensive judicial review that meets their requirements and clarifies their legal position in case disputes must be settled by the courts.

Swedish Minister for Justice, Beatrice Ask, has emphasised the need for change in the courts in light of the problems associated with the existing regime. The fragmented court hierarchy implies a higher risk of disparate outcomes, as similar matters may end up being tried in different courts.

A new proposal

In order to overcome difficulties associated with the existing arrangements in Sweden, the Justice Department has submitted a proposal for a new court organisation for IP rights and market and commercial cases (including antitrust) to come into force on July 1 2015. Finland has already introduced a similar law, although the Swedish proposal goes further in that it includes criminal IP cases.

The proposal establishes the PMC, which will be the Stockholm District Court, and the PMSC, which will be the Svea Court of Appeal, and the Supreme Court will be the highest court of appeal. As a consequence of the proposal, the CPA and the Market Court will cease to exist and the Supreme Administrative Court will no longer be the highest court of appeal.

The two new courts will be given the exclusive jurisdiction to deal with all IP rights, market law and competition law cases and decisions appealed from the Swedish Patent and Registration Office (PRO). The courts will be under the existing general courts and will effectively act as special departments within the Stockholm District Court and the Svea Court of Appeal. Although existing case types should be given priority over other cases, it is intended that the new courts will also deal with other cases. In deciding between the general administrative and general court, the inquiry recommended the general court, for the reason that examination of cases with a criminal or civil nature should be made by a general court.

Further, by choosing the Stockholm District Court, it will be possible to take advantage of the expertise that already exists among the judges, since this Court is an exclusive forum for patent litigation and cases relating to EU rights.

The proposal to exempt registrations for firms and disputes over trade secrets from the new arrangement has faced criticism from several commentators and it remains to be seen to what extent the criticism will lead to changes in future legislation.



Thomas Ernby

Thomas Ernby's expertise lies within the field of mechanics. He works on many IP related issues, including patentability investigations, patent drafting and prosecution, oppositions as well as validity and infringement analyses. He has an MSc degree from Chalmers University of Technology and is a European patent attorney. Before joining Valea in August 2005, Thomas worked as a technical analysis consultant, mostly for the automobile and energy industries.

Court of composition

The existing rules in the Code of Judicial Procedure – which generally requires three legal members – is proposed to continue to apply to IP cases, with the exception of patent cases.

Patent law cases

At the main hearing in patent law cases, the court should be composed of two legally qualified judges and two technical experts. When examining patent court matters, it is proposed as a general rule that the court must be composed of a judge and a member with technical expertise. The proposal regarding the examination of court matters has been criticised by the CPA, who believes that the existing arrangements should be maintained in these cases (that is, three members, two of whom should be technical experts). According to the CPA, it is important that the trial of first instance of appeal registrations from the PRO is made by a highly qualified panel.

Market law cases

With regard to market and commercial cases, the proposal suggests that the court of first instance should be composed of a legally trained judge and a financial expert and only in special circumstances should the court consist of three members.

The proposal has been criticised by several commentators who believe that it will lead to a weaker process. According to critics, the court should not be in

a position where its factual and legal expertise may be questioned. A more effective composition would therefore be at least three legally qualified judges and two economic experts, with the exception of cases of a simple nature, where the proposal in the memorandum can be adopted.

Swedish Minister for Justice, Beatrice Ask, has emphasised the need for change in the courts

Cumulation and consolidation of cases

A major advantage of the new scheme is that multiple cases can be handled in one joint trial. For the parties involved, this means a more transparent and effective process, where trial material can be concentrated and presented in its proper context.

In some respects, the applicable provisions of the Code of Judicial Procedure have to be altered in order to allow for the cumulation of cases. This applies, for example, to the cumulation of a trade mark case with a marketing case, which are dealt with under different procedural rules (parties to a trade mark case, unlike a market case, can be reconciled on the merits). An obvious advantage of the cumulation of these cases is the possibility of bringing an end to free riding through trade mark or marketing law in one judicial process.

Importantly, it is the court that decides whether the cumulation of cases and court matters is advantageous and appropriate. Where these criteria are not fulfilled, there is no need for a cumulation. For example, a cumulation that would result in an excessive and cumbersome procedure that unnecessarily prolongs the processing time compared to if the cases are determined individually, would not be granted.

The investigation has concluded that cumulation is not appropriate in cases that require different expertise, such as the cumulation of a patent legal case or matter containing technical expertise, with a marketing legal case or matter in which economic expertise is needed. In practice, it would seem that the need to combine a patent case with a market case is not great.

A major advantage of the new scheme is that multiple cases can be handled in one joint trial



Björn Pettersson

Björn works in all fields of Intellectual Property Law with focus on strategic advice for trademark and design, which among other things includes the handling of infringement cases, and designing strategies, oppositions and agreements. He also works with business related IP issues such as commercialization of different security rights and provides advice and prepares agreements for example licensing, privacy, and transfer agreements. He is an experienced lecturer in the IP field within business law.

Björn joined Valea in September 2010 and has worked with intellectual property law since 2006. Before that, Björn gained experience in banking and finance working as a banking and corporate lawyer.

Preclusion in processing

Preclusion refers to provisions limiting the ability of parties to, after a certain time, refer to new facts or evidence. The aim is to speed up processing, to discourage dishonest behaviour and to ensure that no new process materials will be submitted in the appeal courts.

In relation to the existing regime, a tightening of the cases that are now handled by the Market Court and the CPA is proposed. According to the report, parties in the CPA process commonly submit new evidence or rely on new circumstances at a very late stage of the proceedings.

Criminal cases are exempt from the proposal because of special considerations.

Appeals

For appeals of judgment in the first instance, existing rules for leave to appeal are maintained. The idea behind the appeal is that the emphasis of justice is to be in the first instance and the appeal should be granted only when there are grounds for review or modification of the judgment or if there is precedent interest.

For market law cases which, in the existing legal system, are determined by the Market Court as the first and last instance, the proposal may result in a slower and more expensive process, as pointed out in the official response from the Market Court.

All-round benefit

The proposed introduction of a new and unified court organisation for the various categories of IP, marketing and competition law has generally received a positive reaction. It is an appealing and long-awaited solution to allow one and the same court to examine and deal with issues that have previously been dealt with separately. Specialisation creates favourable conditions for an efficient procedure and uniform practice, which will also benefit the parties. Positive comments have also been heard from judges, and the new courts are expected to be attractive workplaces with opportunities to work in both IP and marketing law.

Your Preferred Partner in Sweden and Europe

Intellectual property rights – A business opportunity

Patents • Trademarks • Design • Domain Names
Legal Services • Post-grant / Enforcement Strategic
Counseling • Annuities & Renewals
Since 1894



ANNA MARIA LAGERQVIST
Attorney at Law, LL.M.

Anna Maria Lagerqvist works in all fields of Intellectual Property Law with a focus on infringement queries, litigation and business-related IP issues. Anna Maria Lagerqvist also has considerable experience within IT Law and she is an experienced lecturer in the IP field. Anna Maria Lagerqvist has been working in the IP field since 1998 and is the head of the legal department at Valea.



Europe

IP FOCUS 2014



**Managing
Intellectual
Property**

THE
GLOBAL IP
RESOURCE