

NATIONAL DEVELOPMENTS

IN THE INTERSECTION OF
IPR AND COMPETITION LAW

FROM MAGLITE TO PIRATE BAY

Edited by Hans Henrik Lidgard

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NATIONAL DEVELOPMENTS IN THE INTERSECTION OF IPR AND COMPETITION LAW

The Swedish Network for European Legal Studies is happy to announce the third volume in this series of annual publications which acts as a forum for the publication of studies on European law by Swedish scholars. This year's annual focuses on competition aspects of intellectual property law, and contains peer-reviewed articles aimed at spreading Swedish legal research on European law to a wide international audience. The editor of the yearbook is Hans Henrik Lidgard. The articles in the volume are concerned with European law, its development, impact and reform. They are original, analytical contributions to doctrinal debates and questions, by legal researchers mainly, but not exclusively, connected with the Swedish universities.

Swedish Studies in European Law

Swedish Studies in European Law Volume 1, 2006
Edited by Professor Nils Wahl and Professor Per Cramér.

Swedish Studies in European Law Volume 2, 2007
Edited by Per Cramér and Thomas Bull

**National Developments in the Intersection of IPR and Competition
Law: From Maglite to Pirate Bay Volume 3, 2008**
Edited by Hans Henrik Lidgard

Introduction

HANS HENRIK LIDGARD

The Swedish Network for European Legal Studies is a national network comprised of several Swedish Universities focusing on highlighting recent legal developments within European Union Law. By joining forces the Universities have, for over a decade, supported legal research and education by organizing conferences, seminars, and generally supporting young researchers. The network also offers opportunities for publication at both national and international level. At national level the network is closely connected to the Swedish law journal, *Europarättslig Tidskrift (ERT)*, and also has its own international series, *Swedish Studies in European Law*. Each volume in the series offers a wide range of peer-reviewed contributions by Swedish scholars analysing different aspects of European Union Law. The book series serves as a platform for Swedish researchers making their contributions available to the international audience to provide a Swedish perspective on current discussions on European Union Law. This is the third volume.

In this volume, Swedish researchers with specific interests in European Market law – IPR, competition and marketing law – join forces to review recent Swedish legislative enactments and case-law developments of particular European interest in national Swedish Courts or the Court of Justice of the European Union (‘CJEU’). This volume also includes comments on general EU developments from a Swedish perspective.

I wish to thank Cecilia Cardner, coordinator of the Swedish Network for European Studies, for her helpful assistance in the production of this book. The Network is especially grateful to Robert M Schwartz Esq, who proofread the manuscript and contributed to the editorial work from his New York office.

In summary the different contributions to this edition address the following issues:

1. Swedish IP Case Law Development in a European Context: An Overview
by Marianne Levin, Stockholm University

Professor Levin begins the volume with an overview of IPR adjudication in Sweden since its accession to the EU and evaluates Sweden’s progress towards harmonization by a comprehensive briefing of important Swedish

cases involving copyright, design, Freedom of the Press, Patents, Trademarks and Trade Secrets. She comments on the effect of the paucity of IPR cases decided, compounded by their division among several courts with competence and few references to the CJEU. She concludes that this and the existing procedural system contribute significantly to harm delay, legal certainty and EU harmonisation. Levin notes that proposals for trying all IPR matters in one court have run into resistance due to the perceived lack of efficiency due to a small case-load and Nordic resistance to specialized courts with specialized judges. A commercial court would provide both speedy justice and judicial experience with IPR dispute resolution.

2. Dilemmas of Governance in a Multilevel European Patent System by Antonina Bakardjieva Engelbrekt

Antonina Bakardjieva-Engelbrekt's contribution analyses the efforts to find an adequate institutional solution for the dysfunctional European patent system. The relations between the European Union and the European Patent Organisation are far from clear, something vividly demonstrated in the field of biotechnology. She traces the origins of the system and looks closer at the EPO process. She identifies problematic aspects from the point of view of governance and examines proposals for a Pan-European patent judiciary reform, including the latest initiative for a Patent Court with a decentralised first instance and a centralised appeal level. The author argues for enhancing the independence of the judicial bodies of the EPO, and ensuring greater degree of accountability and public involvement in the decision-making process.

3. The Swedish Doctrine of Equivalence by Bengt Domeij, Uppsala University

Swedish case law, while moving away from the idea of a general inventive concept, has identified seven factors limiting the scope of patent protection from being extended past the literal wording of the patent's claims. This approach is designed as a means of determining the existence of patent infringement through a distinct and sophisticated interpretation of the patent's claims. These seven factors are identified, described and analysed. Bengt Domeij then examines whether or not there are any differences between the area covered by the seven exceptions and the practical application of patent law's doctrine of equivalence under the comparatively unique features of Swedish case law. The author concludes that a better practice would, in theory, be provided by a unified European approach to patent claim interpretation.

4. Distinctive Character in Compound Trademarks

by Per Jonas Nordell, Stockholm University

Jonas Nordell discusses compound trademarks against a background of recent linguistic research. This background, in combination with a review of the relatively extensive European case law, from the CJEU and the General Court, provides a platform for analysing the question of whether, and to what extent linguistics and jurisprudence should interrelate in interpreting compound trademarks. The author's conclusion, after referring to developments in the case law, is that the CJEU has been a bit too strict in interpreting compound trademarks. The author suggests that the CJEU take a position lying somewhere between the lenient position taken in its *Baby-dry* case and the stricter interpretations taken in some of the more recent cases.

5. Protection of Non-Registered Trademarks in Sweden and the EU

by Erika Lunell, Karlstad University

Erika Lunell deals with the protection of non-registered trademarks in Sweden and the EU. Is the protection of non-registered trademarks a purely national concern? How has Community law influenced the protection of non-registered trademarks in Sweden? Is there a continued need for non-registered trademark protection whether as it exists today or in a modified form? She addresses protection requirements, the scope of protection and the range of signs that can be protected through registration versus qualified use. A central question is the obstacle raised by the requirement of graphic representation, especially regarding unconventional trademarks, such as scents, sounds, etc. In a final section the role of bad faith provisions for the protection of non-registered trademarks is discussed.

6. Swedish Soda Club Dispute – Competition Law and IPR Intersection

by Ulf Maunsbach, Lund University

Ulf Maunsbach focuses his contribution on a recent dispute highlighting the intersection between trademark law and competition law. The dispute brings into play the relationship between abuse of a dominant position and IPRs in general. This case is the first example of the Swedish Competition Authority intervening in a civil infringement dispute under the Swedish equivalent of Regulation 1/2001. A final resolution of the case may well require a referral seeking a guiding opinion from the CJEU.

7. Copyright Contracts – EU solutions or National Concern? A Swedish Proposal to Amend the Copyright Act on Individual and Collective Contracts
by Jan Rosén, Stockholm University

Jan Rosén provides an account of the EU's difficulties to harmonize Copyright law and extended collective licensing in a digital age without an *acquis communautaire*. He summarizes his efforts under a government mandate to analyse Sweden's Copyright laws and his Inquiries' proposals for deep revisions to modernize them as well as to harmonize them with Community law and European Commission initiatives regarding individual and extended copyright licensing by licensing organizations. He examines the issues from the points of view of the interested parties, agencies and solutions from other Nordic countries. The author suggests that his proposed changes made using a Nordic model would be helpful in harmonizing these issues on an EU-wide basis.'

8. Swedish Copyright Evergreens Mini-Maglite?
by Hans Henrik Lidgard, Lund University

This article sheds light on the recent Swedish Supreme Court judgement which extended copyright protection to the shape of a flashlight. The Mini-Mag now enjoys far reaching protection in Sweden, beyond the term of its patent protection. The article contrasts the Swedish case with other European decisions concerning extending IPR protection for the Mini-Mag. It concludes that since IPRs are exceptions in a free market to unfettered competition they should be applied restrictively. This requires harmonization of copyright legislation on a European level.

9. Swedish Copyright Law Ends the Pirate Bay
by Jonas Ledendal, Lund University

Jonas Ledendal outlines the recent decision in the 'The Pirate Bay' case which has received so much attention in the media. There, four individuals were found guilty of secondary copyright infringement for having provided a haven where others could make protected material available for downloading over the internet. The case involves an analysis of primary, contrasted with secondary, liability for copyright infringement as well as a discussion of the offense of preparing to commit such a crime. The matter is presently under appeal.

10. Illicit File Sharing and Intermediary Services Within the Framework of the E-Commerce Directive

by Kristoffer Schollin, Gothenburg University

The 'Pirate Bay' case highlights some of the difficulties in legislating on copyright infringement. Kristoffer Schollin analyses liability issues and points out that the E-Commerce Directive which aims at enabling the provision of internet services creates some conflicts with the protection of intellectual property, specifically with the IPR Enforcement Directive. The article investigates whether this friction stems not from a lack of legal instruments to battle secondary infringers, but rather, from a discrepancy between the behavioural norms of internet users and entities protected by copyright law.

11. The Unfair Commercial Practices Directive and the Legislation Implementing it in Sweden: A Comparison

by Professor Ulf Bernitz, Stockholm University

The EU's 2005 Unfair Commercial Practices Directive was transposed into Swedish law by the Marketing act of 2008. Is the Swedish implementation correct as to its choice of legislative structure, its assessment of misleading advertising, its assessment of passing off and its mechanisms for supervision and enforcement? Ulf Bernitz concludes that the Swedish implementation has been fairly smooth. These results from the fact that the Directive finds common ground with Swedish legislation and legal tradition which both favour strong consumer protection and protection of competitors linked thereto. From a Swedish point of view Bernitz finds that the primary weaknesses of the Directive are the vague concept of 'the average consumer' and lack of strong enforcement mechanisms.

12. Two Novelties in Swedish Competition Law: Fine Order and Trading Prohibition – A Critical Review

by Lars Henriksson, Stockholm School of Economics

Procedural changes were made by the 2008 Swedish Competition Act. Most notable was the introduction of a fine order to permit swifter and more efficient resolution of competition infringements. However, according to Lars Henriksson, the fine order is a half measure and there are better alternatives. He advocates an organisational change, whereby the Swedish competition authority, in line with the powers of the EU Commission, becomes the decisional body of first instance for finding competition infringements. Henriksson also discusses the Act's introduction of a debatable 'disqualification order' against executives of infringing undertakings intended as a compromise alternative to penal sanctions.

13. Refusal to Supply in the EU Pharmaceutical Sector under the Rule of Reason

by Tu Thanh Nguyen, Xavier Groussot,
and Timo Minssen, Lund University

A refusal to supply by a dominant undertaking on the pharmaceutical market does not *per se* violate Article 102 TFEU. In addition, dominant companies have the right to a reasonable and proportional degree of self-protection of their interests. The authors argue that the CJEU is now moving from a *per se* rule of liability to ‘rule of reason’ for such decisions. In cases of potential abuse of dominant position, the rule of reason promotes a more flexible approach where the factual and economic context of the specific case may be taken into account. They also analyse the role of national competition authorities in the procedure for preliminary rulings.

Hans Henrik Lidgard

Abbreviations

AG	Attorney General
BoA	Board of Appeal of OHIM's Trademarks and Design Registration Office
BGH	Bundesgerichtshof (Federal Court of Justice Germany)
BTMO	Benelux-Merkenbureau
B2B	Business to business
B2C	Business to consumer relations
CA	The Swedish Competition Act (SFS 1993:20) as amended to (SFS 2008:579)
CDDA	UK Company Directors Disqualification Act of 1986 as amended
CJEU	Court of Justice of the European Union as of December 1, 2009
CMIR	Regulation (EC) No 2868/95 of 13 December 1995 implementing TMR as amended
CTM	Community Trademark
CTMR	Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark
DRM	Digital Rights Management
ECN	European Competition Network
ECR	European Community Reports
EFTA	European Free Trade Area
EHCR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EPC	European Patent Convention
EPO	European Patent Office
EU	European Union
ITC	United States International Trade Commission

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NCA	Swedish Competition Authority (Konkurrensverket)
NOU	Norwegian Government Official Report
OFT	UK Office of Fair Trading
OHIM	Office for Harmonization in the Internal Market
OJ	Official Journal of the European Union
PBR	Swedish Court of Patent Appeals
PIA69	Protocol on the Interpretation of Article 69 EPC
Prop	Proposed law
R&D	Research and Development
SOU	Swedish Government Official Report
TMR	Regulation 40/94/EC on the Community Trademark of 15
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	World Intellectual Property Organization

Explanations and Definitions

In all documents we will try to adhere to the nomenclature of the Lisbon Treaties – eg the EUFT rather than EC Treaty and EUCJ rather than ECJ - and use the Article numbers of EUFT (even in older quotations? Then with a # sign added after the number to indicate that in the original text a different article number has been used.)

BitTorrent (protocol)	A peer-to-peer (P2P) communications protocol for file sharing
CJEU	Before December 2009 the Court of Justice of the European Union (ECJ)
Directive 89/552/EEC	Directive 89/552/EEC of the European Parliament and of the Council of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services
E-Commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market
EFTA Court	Court established under the Agreement on the European Economic Area of 2 May 1992
EHCR	European Convention for the Protection of Human Rights and Fundamental Freedoms
General Court	Before December 2009 the Court of First Instance of the European Communities
German Copyright Law	Gesetz vom 8.5.1998 zur Änderung der Urheberrechtsgesetzes und verwandte Schutzrechte (Urheberrechtsgesetz) vom 9.9.1965 zuletzt geändert durch Artikel 7 vom 22.7.1997

Högsta Domstolen	Swedish Supreme Court
Hovrätten	Swedish Court of Appeals
ITC	United States International Trade Commission
Konsumentombudsmannen	Consumer Ombudsman and Director General of the Consumer Protection Agency
Konsumentverket	Swedish Consumer Protection Agency
Market Court	Swedish Court with jurisdiction over violations of Swedish Marketing Act
MCAD	Directive 2006/114/EC, 2006 Directive on Misleading and Comparative Advertising
Mönsterskyddslag	Swedish Design Registration Law (SFS 1970:485) incorporating Directive 98/71/EC last amended (SFS 2009:112)
Paris Convention	Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised
Paris Union	Member States acceding to the Paris Convention
Swedish Competition Act	Konkurrenslag (SFS 2008:579)
Swedish Copyright Act	Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk Ändringar införda t.o.m. (SFS 1995:1274)
Swedish Design Act	1899 års lag om skydd för vissa mönster och modeller, (SFS 1899:59) as amended
Swedish Marketing Act	Marknadsföringslag (1995:450) Ändringar införda t.o.m. (SFS 1995:1472), (SFS 2008:486)
Swedish Trademarks Act	Varumärkeslag (SFS 1960:644) as amended
Tingsrätt	Swedish District Court
Trademark Directive	Directive 84/104/EEC, replaced by Directive 2008/95/EC December 1995 as amended
UCPD	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

UWG	German Unfair Competition Law Gesetz gegen den unlauteren Wettbewerb; (Änderung durch Art. 25 G v. 25.10.1994 I 3082)
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