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By Peter Kenamets and Fabian Edlund, Awapatent

What options are open to a patent owner seeking to enforce its rights in your jurisdiction?
No government institutions outside the court system are authorised to enforce patent rights. A patent owner must thus turn to the courts to enforce its rights if it cannot resolve the situation amicably.

Are parties obliged to undertake mediation/arbitration prior to bringing a case before the courts? Is this a realistic alternative to litigation?
Not unless they are bound by an agreement. Mediation or arbitration is relatively unusual in patent cases. One reason for this is that patent validity is not considered to be an arbitrable question under Swedish law.

Are there specialist patent or IP courts in your jurisdiction? If not, what level of expertise can litigants expect from the courts?
All patent cases are tried by the same department of the Stockholm City Court. On appeal, patent cases are tried by the Svea Appeal Court in Stockholm. These two courts are composed of both legally trained judges and technical experts who are well versed in patent law. To date, few cases have been tried by the Supreme Court. Swedish court judgments in patent cases are generally well reasoned and based on a good understanding of the technical and legal issues.

The Swedish government plans to establish a new specialised court to handle patent and other IP disputes. The aim is to make the management of such disputes more focused and uniform. The new court is expected to commence operations in July 2015.

Are validity and infringement dealt with together, or does your country have a bifurcated system?
As a formal matter, patent infringement and validity issues are tried in separate proceedings, although the courts have discretion to decide whether they should be heard simultaneously. Generally, the cases are joined and heard together; but there are exceptions.

Who may represent parties engaged in a dispute?
Specialist representation is not formally required in patent cases in Sweden and there is no bar monopoly. A party is usually represented by one lawyer with patent litigation experience and one patent attorney.

To what extent is pre-trial discovery permitted in cases?
The concept under Swedish law most similar to pre-trial discovery is the infringement investigation, which stems from the Agreement on Trade-Related Aspects of IP Rights. Under these rules, a patent owner or licensee that can show probable cause for infringement can obtain a court order allowing it to access the premises of the alleged infringer in order to search for and preserve evidence. A rule of proportionality also applies.

A patent owner or licensee can also apply for a court order for disclosure of
information. This also requires probable cause for infringement, although the infringer’s identity need not be known. Such an can be issued not only against an accused infringer or a party which has contributed to the infringement, but also against other parties related to the infringement. Information subject to such an order might include names and addresses of producers and wholesalers, as well as prices and quantities of the offending products or services.

Is cross-examination of witnesses allowed during court proceedings? If so, what form does this take?
Witnesses may be cross-examined to test the credibility of statements made during the direct examination. As long as the questions are relevant to the case, they will generally be admissible. When the attorney for the party calling a witness has finished the direct examination of the witness, the attorney for the other party can ask questions of the witness.

What use of expert witnesses is permitted?
Expert witnesses can be appointed by the court or by either party; the latter is more common. Expert witnesses are frequently used by the parties, especially regarding technical and scientific issues, but sometimes also regarding legal questions. Weight will be given to the expert witness’s testimony depending on his or her relation to the party that called the expert witness and prominence in his or her field of expertise.

Is the doctrine of equivalents applied by courts in your jurisdiction? If so, what form does it take?
The doctrine of equivalents is recognised under Swedish patent law. A patent owner relying on the doctrine of equivalents will normally succeed, but there are exceptions. The Swedish courts may further consider the prosecution history of a patent application in order to assess the scope of the granted patent. Any statement made during prosecution may thus limit the scope of the granted patent. However, the court will carefully consider the context within which such a statement was made.

Are there problems in enforcing certain types of patent relating to, for example, biotechnology, business methods and software?
Swedish patent law is intended to be harmonised with the practice of the European Patent Office (EPO), so all granted European patents should be enforceable in Sweden. In the case of software-related inventions, the Swedish courts have closely followed the EPO standards of patentability. This means, for example, that claims directed to a computer program product are enforceable. However, it also means that the validity of business method patents may be difficult to defend after the EPO developed its practice of non-technical hindsight.

To what extent are courts obliged to consider previous cases that have covered issues similar to those pertaining to a dispute?
Since Sweden has a codified system rather than a case law system, the courts are not formally bound by previous decisions. However, in practice, the courts normally follow the decisions of a higher court.

To what extent are courts willing to consider the way in which the same or similar cases have been dealt with in other jurisdictions? Are decisions from some jurisdictions more persuasive than those from others?
The parties will often refer to decisions or opinions of foreign courts relating to, for example, foreign counterparts of Swedish patents at issue in infringement or invalidity lawsuits. The Swedish courts are not formally bound by such decisions or opinions. However, if there is a well-reasoned foreign decision based on facts that are comparable to those of the Swedish case, one can assume that this will have some influence on the Swedish court. It is difficult to say whether decisions from any particular jurisdiction are regarded as more persuasive than others. The Swedish courts further frequently refer to EPO Board of Appeal decisions.
and the EPO Guidelines for Examination, based on the argument that Swedish patent law is intended to be harmonised with the European Patent Convention with respect to patentability.

What realistic options are available to defendants seeking to delay a case? How might a plaintiff counter these?
A party seeking to delay court proceedings may reply late and continually add new arguments, facts and evidence. While such behaviour may slow down the process, it can prove to be a dangerous tactic. For reasons of procedural efficiency, the court may order that no new matter from an obstructing party may be considered. Delay tactics may also result in lost credibility. If the obstructing party is deemed to have been negligent, this might also be reflected in the litigation costs. The plaintiff can counter by continually requesting the court to speed up the procedure, which may have some effect. However, no formal expedited procedure is available.

Under what circumstances, if any, will a court consider granting a preliminary injunction? How often does this happen?
Preliminary injunctions are fairly common in Sweden. We have reviewed all patent cases started between mid-2009 and 2014; of these, 64 were infringement cases. The court decided on a request for a preliminary injunction in 10 of these cases, granting the request in eight and dismissing it in the other two. There were also cases where a request for a preliminary injunction was filed, but withdrawn before the court could make a decision.

A preliminary injunction is available for a patent owner or licensee that can establish, with a sufficient degree of certainty, that infringement is ongoing may reasonably be expected to depreciate the value of the patent. The plaintiff must also post security that is sufficient to protect the defendant and to prevent abuse.

The orthodox view, although not codified, is that the time limits for filing a request for preliminary injunction are not critical. The patent owner can generally file such a request at any time.

How much should a litigant budget for in order to take a case through to a decision at first instance?
We have reviewed all patent cases decided by the Stockholm City Court by a judgment on the merits and after hearing the case between mid-2011 and 2014. The review shows that the costs in infringement cases tend to range from €39,000 to €390,000, with an average of approximately €160,000. First-instance costs in invalidity cases tend to range from €41,000 to €670,000, with an average of approximately €270,000.

How long should parties expect to wait for a decision to be handed down at first instance?
The normal timeframe from filing of a lawsuit to a judgment is about two years, but there is considerable variation in this (between one and four years). There is no formal expedited procedure, but the parties’ manner of pursuing and defending the claim can have an impact on the timetable.

To what extent are the winning party’s costs recoverable from the losing party?
The losing party generally pays the winning party’s costs. However, in practice the winning party is normally not awarded its full costs. Our above-mentioned review of Swedish patent cases decided in the last few years indicates that, on average, roughly three-quarters of requested costs are awarded.

What remedies are available to a successful plaintiff?
The typical remedies for patent infringement in Sweden are injunctions and damages, which are calculated as a reasonable royalty and compensation for further loss.

Other available remedies include:
- fines or imprisonment;
- forfeiture of infringing articles;
- payment of the costs of publication of the judgment; and
- destruction or withdrawal from the market of infringing and similar articles.

How are damages awards calculated? Is it possible to obtain punitive damages?
Damages for patent infringement under
Swedish law are calculated as a reasonable royalty and compensation for further loss.

The patent owner is always entitled to a reasonable royalty in case of infringement without showing that it suffered any loss. A reasonable royalty should reflect what the patent owner and the infringer would have agreed on had they concluded a licensing deal before the infringement started.

If the patent owner can show that it suffered loss as a result of the infringement, it is also entitled to compensation for that loss. This compensation normally relates to reduced sales and lost orders, but can also concern loss caused by price pressures and similar.

- In order to comply with the EU IP Rights Enforcement Directive (2004/48/EC), the Patents Act provides that the following five factors should be considered in determining the amount of damages:
  - the patent owner’s lost profits;
  - the infringer’s profit from the infringement;
  - the harm done to the reputation of the invention;
  - the non-economic loss; and
  - the patent owner’s interest in preventing patent infringement.

### Contributing profiles

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Fabian Edlund is a European patent attorney and the managing partner of Awapatent’s Gothenburg office. He drafts and prosecutes patent applications for many different clients, primarily before the European Patent Office. Mr Edlund acts as a strategic adviser for small and medium-sized IT companies, focusing on software development to help them improve their business with the support of intellectual property.

Mr Edlund is active in Awapatent’s practice group for patenting software and business methods, and has given numerous lectures in the United States, Japan and Sweden on European practice and the patenting of software inventions in Europe. He is secretary general of UNION-IP (www.union-ip.org) and a member of the association’s software commission.

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Peter Kenamets is an attorney at law and partner at Awapatent’s Gothenburg office. His practice principally concerns IP disputes and he represents clients before the Swedish courts (especially in patent disputes). Mr Kenamets also provides assistance in connection with patent disputes outside Sweden, particularly in the fields of medical technology and implants.

Mr Kenamets’ practice further includes assisting clients in relation to contractual IP issues (eg, licensing), M&A and due diligence investigations. He also advises on issues relating to infringement and validity assessments, R&D collaborations, employee inventions and contracts in general.
Punitive damages (e.g., treble damages) are not available.

Finally, a patent owner can claim compensation only for the five years immediately before it started its infringement action before court.

**Under what circumstances might a court grant a permanent injunction? How often does this happen? Does the losing party at first instance have an automatic right of appeal? If not, under what circumstances might leave to appeal be granted?**

A permanent injunction is generally awarded to a successful patent owner or licensee. There is no need for the patent owner or licensee to show that it is not adequately compensated by damages. Such injunctions are generally issued under penalty of a fine. The court sets the amount of the fine high enough to ensure that the injunction is effective.

Since Autumn 2008, the losing party in a first-instance case must seek leave to appeal. In order to obtain leave to appeal, one of the following criteria must be fulfilled:

- There is reason to doubt the accuracy of the district court’s decision.
- It is not possible to assess the accuracy of the district court’s decision without leave to appeal.
- The case has precedential value.

The chances of obtaining leave to appeal in a patent case are normally good.

**Is it possible to take cases beyond the second instance?**

In theory, patent cases can be appealed to the Supreme Court, but the chances of being granted leave to appeal are slim.

**To what extent do the courts in your jurisdiction have a reputation for being pro-patentee?**

Although there are no exact figures, a patent owner has reason to be fairly optimistic about its chances of success in a patent infringement and invalidity case in Sweden.

**Is your jurisdiction a signatory of the London Agreement on Translations?**

Yes; the text of a European patent must be available in English or Swedish and the claims must be translated into Swedish.

Swedish law is also being revised to allow applicants to file national Swedish patent applications in English, with no need to translate the claims.

**Has your jurisdiction signed the Agreement on the Unified Patent Court? If so, when do you expect it to be ratified?**

Sweden has signed the Agreement on the Unified Patent Court, which was ratified on June 5 2014.

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