IAJ THIRD STUDY COMMISSION QUESTIONNAIRE

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TOPIC 2012

Answer from the Swedish delegation

The infringement of copyright and other intellectual property rights, especially through the use of the internet

In today’s world the internet is an indispensable source of information to mankind. It is simply unimaginable how the world existed without it. The internet has been an important force in creating the global village and without it we would surely be at a loss.

In 1987 and 2003 the Third Study Commission discussed several aspects of organized crime, such as new methods of investigation and the gathering of evidence, safeguarding of human rights and the protection of witnesses. At the annual meeting in 2011 the Third Study Commission looked into another aspect of organized crime under the title “Organizations: Identification, Seizure and Forfeiture”. The Third Study Commission explored different legislative responses to what is considered to be a serious issue that transcends national borders.

This year the US Patent and Trade Office will host the IAJ annual conference. The questionnaire will enable the Third Study Commission - in cooperation with the US Patent and Trade Office - to examine whether, and how, legal systems of member countries cope with cybercrime relating to copyright and other intellectual property rights. The purpose of the questionnaire is to explore the extent to which member countries have implemented legislation that deals with this subject, and whether such legislation is effective in addressing these offences.

QUESTIONNAIRE

Question 1

- Does your country have specific legislation dealing with:

1.1. The violation of copyrights?

Yes, in the Act on Copyright in Literary and Artistic Works of 1960. The protection of Copyright gives artists, photographers, authors and other creators exclusive rights to control how their own creative works can be expressed, distributed and displayed. To be protected by copyright, a work must have a certain degree of originality or individuality, and it should come from the creator's personal, creative effort. The protection is valid for 70 years after the year of the creator's death. In Sweden there is no official registration system of copyrights and no authority holds a register of which works are protected by copyright.

1.2. Other intellectual property rights?
Yes, there are provision regarding patents, designs and trademarks.

According to the *Patent Act of 1967*, patents are granted for technical inventions. A patent is an exclusive right to use the protected technology in exchange for the invention being made public. Not only products, but also methods and uses, can be patented. To be able to get a patent, an invention must meet certain requirements, it must be industrially applicable, new and involve an inventive step. A patent means that the owner can prevent others from using the invention for up to 20 years.

The *Trademark Act of 1960* has recently been replaced by the new *Trademark Act of 2010*, which is based on EU legislation. A trademark is a distinctive sign or indicator (one or more words or a graphic symbol) which a company or person uses to differentiate their products and services from others. The right to a trademark means that only the owner of the trademark has the right to use it on their goods or services, in advertising or business documents, or in any other way. A trademark registration in Sweden is valid for 10 years and can then be extended by ten years at a time.

In the *Design Protection Act of 1970* there are provisions regarding the protection of designs. Design protection covers the appearance of a product, not the function or the technology. A protected design gives an exclusive right to manufacture, sell, import or hire out a product of a certain form or appearance. In order for a design to be protected, it must be new and have individual character. The term of protection is a maximum of 25 years.

**1.3. If so, could you specify to what extent?**

If someone uses a protected design, trademark, patent or copyright, a court can ban the infringer from continuing to use it and impose damages, fines or a prison sentence.

The Copyright Act, the Patent Act, the Design Protection Act and the Trademark Act all contain provisions regarding penalty and damages in cases of infringements.

Anyone who commits an act, which infringes the copyright of a literal or artistic work, a patent, design or trademark shall be punished by fines or imprisonment for not more than two years, if the act is committed wilfully or with gross negligence.

A court may also issue an injunction prohibiting, under the penalty of a fine, a person who infringes someone’s copyright, a patent, design or trademark to continue that act. If the plaintiff shows a probable cause that an infringement is taking place and if it can reasonably be expected that the defendant, through the continuation of the infringement, diminishes the value that the copyright confers, the Court may issue an interlocutory injunction until the case has been finally adjudicated or otherwise is decided.

Anyone who exploits a work in violation of the Copyright Act, the Patent Act, the Design Protection Act or the Trademark Act shall pay such compensation to the owner of the right as will constitute a reasonable remuneration for the exploitation. Furthermore, the infringer has to pay damages, including compensation for losses, mental suffering and other injury, if the infringement is being made wilfully or with gross negligence. Even if the infringing party has
not been acting negligently a patent holder has a right to compensation for the use of the invention.

1.4. Do specific rules exist for criminal investigation?
No, however, IP right owners can ask the courts, by way of a simplified procedure, to order third parties to disclose information that facilitates the investigation of a suspected infringement and the identification of a suspected infringer. As soon as there is reasonable suspicion of an infringement, the rights owner now has a means to obtain the information needed to take effective legal action. It is not possible to use the order to search for evidence that is not specified in the request.

A court order to produce evidence can be sanctioned with a penalty of a fine, or enforced through executive measures taken by the Enforcement Authority

1.5. If not, is any such legislation under consideration?
Not to my knowledge.

Question 2

- Does your country have specific legislation dealing with:

2.1. Trademark
Yes, see question 1.2

2.2. Patent
Yes, see question 1.2

2.3. If so, do these laws include specific punitive measures?
Yes, see question 1.3

Question 3

- Does your country have specific legislation dealing with:

3.1. The protection of copyrights based on the use of internet?

Copyright applies in the same way on the Internet as it does for other forms of publishing. Just as for copyright in other media, it is the personal design of text and images that is protected, and not the factual information or underlying ideas. The copyrights are protected also if the infringement takes place on the Internet.

The right to make a work accessible on the Internet is expressly included in the author’s (or other rights holder’s) exclusive right to make a work available to the public. There is also an explicit prohibition against the copying of a work which has been made available on the Internet to the public without permission of the rights holder.
3.2. If so, could you specify and give a concrete example?

When a work is posted on the Internet anyone will be able to copy it or use it in other ways. In this situation it is difficult for the rights holder to control the use of the work. Encryption or various other measures are frequently used to protect the work against unauthorised use. There are provisions in the Copyright Act to prevent circumvention and manipulation of such measures without the authorisation of the author. Thus it is prohibited to circumvent any encryption or other protection measure or process without consent.

**Question 4**

- Does your country have specialized agencies to investigate and identify the violation of copyrights and other intellectual property rights, especially through the use of the internet?

No.

**Question 5**

5.1. To what extent does your country have jurisdiction over issues of, for instance, intellectual property theft?
Under Swedish national rules and according to various conventions and EU regulations the Courts in the state where an intellectual property right is registered have exclusive jurisdiction over proceedings concerned with the registration or validity of such right.

In particular in patent cases, as an infringement claim is often so closely intertwined with the question of the right's validity, it is unclear whether a court is required to decline jurisdiction where it appears the issue of validity will play a principal role in the infringement dispute. This question has not yet been settled in national or EU(ECJ) case law.

5.2 Should the principle of universality apply for specific types of cybercrime relating to the infringement of copyright and other intellectual property rights?

An offense relating to text, audio or visual material, etc., as in activities abroad are generally made available in this country through the internet or a similar system for the dissemination of information shall be deemed committed in Sweden, if the material has a special relationship to this country.

5.3. Is there a need to establish rules of international criminal law to regulate these aspects of cybercrime?

Only if the already existing international rules are insufficient.

5.4. Should there be an international authority to handle the violation of copyright and other intellectual property rights through the use of the internet?

It is hard to foresee that such an authority could be established.

**Question 6**
6.1. Did your country sign and/or ratify international agreements or treaties relating to the violation of copyright and other intellectual property rights through the use of the internet?

Sweden has adopted the latest revision of the so-called Paris text of the Berne Convention for the Protection of Literary and Artistic Works (administered by WIPO).

Sweden has also ratified the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

Sweden has also entered the Universal Copyright Convention and the Convention on Cyber-Crime.

6.2 Does your country participate in any other form of international cooperation relating to this subject?

Sweden is a member of the European Union which has adopted legislation and other measures to fight cybercrime.


The Anti-Counterfeiting Trade Agreement (ACTA), was however recently rejected by the European Parliament.

**Question 7**

7.1. Is it your opinion that your country could and/or should be more active in dealing with this issue?

The personal integrity issues involved in investigating violations of IP rights through the use of internet are still the object of bitter political debate in Sweden. The legislation merely provides for an obligation to supply existing information, it creates no obligation to keep records. This gap may be filled when/if Sweden implements yet another piece of EU legislation: the Data Retention Directive.

**Question 8**

8.1. Is it your opinion that you could and/or should be more active in dealing with this issue as a judge?

A Swedish judge cannot take initiatives in these issues. All judges must however take responsibility for their own competence, to make sure they participate in training and keep themselves updated on this area of law so that the courts can fulfil their role in providing an effective protection of intellectual property rights in Sweden.
8.2. Do you have sufficient means – instruments and qualifications – to address the violation of copyright and other intellectual property rights through the use of the internet?

Yes.

8.3. Is addressing this issue in Court considered to be a specialisation?

In Sweden we have a specialized court, the Court of Patent Appeals which reviews decisions by the Patent and Registration Office in matters concerning patents, trademarks and designs.

When it comes to violation of rights however, Sweden has no courts that specialise solely in IP matters. Thus, the general courts have authority to deal with issues concerning intellectual property. As an exception, the Stockholm District Court is the exclusive venue for patent litigation and exclusively handles proceedings involving Community trademarks. All proceedings are subject to the general Swedish Code on Judicial Procedure.

In practice, since Stockholm is the centre of commercial activity in Sweden, a considerable number of all IP cases arising each year are adjudicated by this court at first instance. All IP matters brought before the Stockholm District Court are handled by a certain division, with the result that only a limited number of judges are recurrently involved in these matters. Thus, as professional judges serve in this division they become particularly experienced and knowledgeable in this area of law. To a certain degree, this is also true of the other two major commercial centres in Sweden: Gothenburg and Malmö.

**Question 9**

**Is there any other comment on the subject that you would like to make?**

No.

Submitted by Märit Bergendahl, Deputy Director of the Swedish Judicial Academy