

# Preliminary injunctions in IP cases - Sweden

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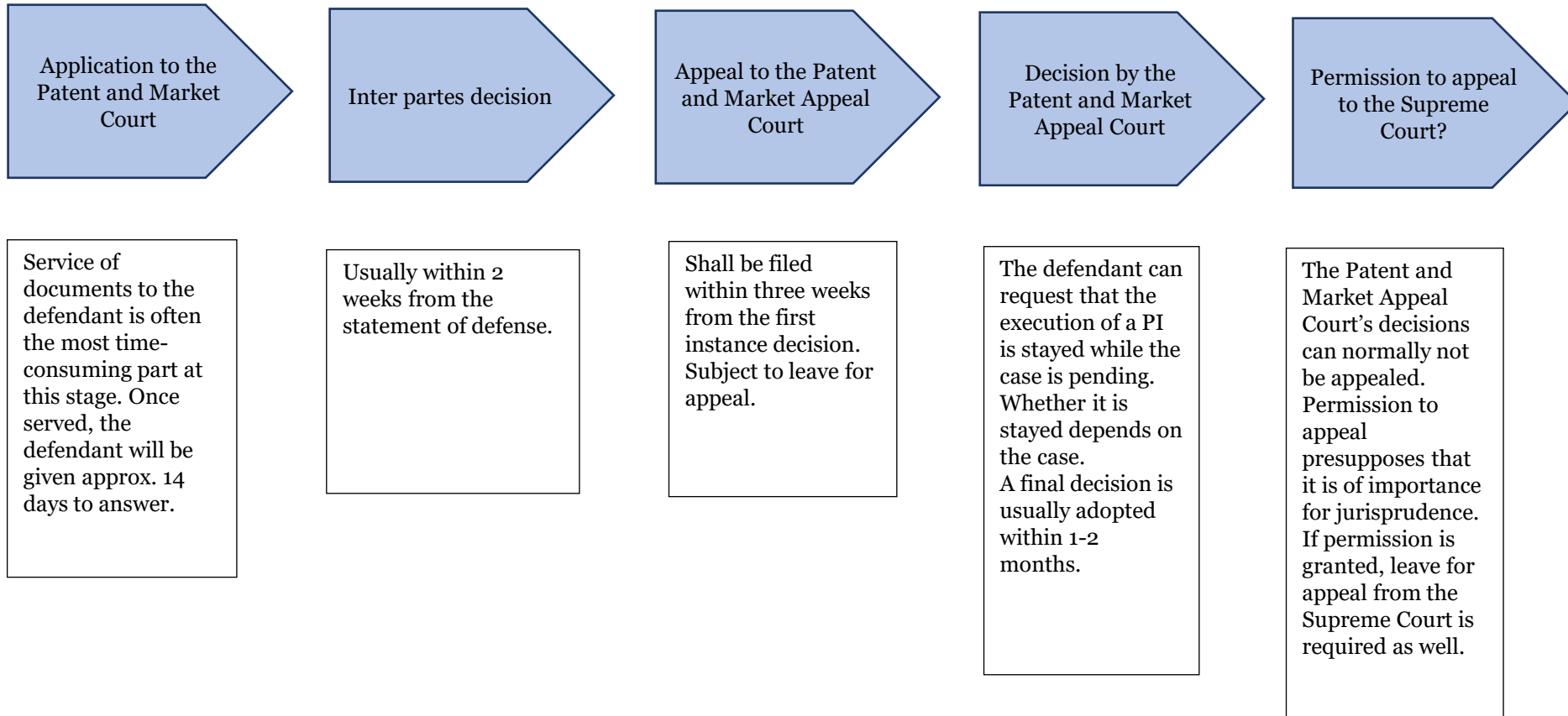
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## Procedure

Written procedure

- The procedure is written at the stage of preliminary injunctions. The court makes a preliminary assessment in its decision. A preliminary injunction is based on a summary (översiktlig) assessment and is not a substitute for a final judgment.
- Written evidence and witness statements are often submitted by the parties. Outside the realm of IP law, more precisely in marketing law, moving pictures and sound recordings have been submitted at this stage.



## Conditions for obtaining a preliminary injunction (PI)

General

- The first requirement is probable cause (sannolika skäl) for infringement (this applies also to complicity/aiding/abetting as well as to attempts and preparations to infringe).
- The second requirement is that it can reasonably be assumed that the defendant by continuing the infringement will reduce the value of the right (see for instance the decision of the Patent and Market Appeal Court in PMÖ 11561-20).
- Thirdly there is a proportionality test.

## Conditions for obtaining a preliminary injunction (PI)

Security required

- A security (often a bank guarantee) must be presented. It shall be enough to cover liability for all relevant damages. This applies to the size of the security but also to the conditions for realizing it (illustrated by the Patent and Market Appeal Court's decisions in PMÖ 8973-20 and PMÖ 9593-20).
- A foreign claimant domiciled outside the EU/EEA must often provide security for the defendant's litigation costs. On the conditions, see Ö 2628-17 "Tillräcklig säkerhet?" NJA 2017 s. 857.

## Conditions for obtaining a preliminary injunction (PI)

Ex parte – without hearing the defendant

- The defendant shall be heard before an injunction is delivered, unless a delay would cause risk of damage.
- This rule was applied by the Patent and Market Appeal Court in PMÖ 9563-22. The Appeal Court referred to the requirement of irreparable damage in article 9.4 of directive 2004/48. Further references were made to national case-law on qualified risk for sabotage (NJA 2005 s. 29).

## Availability of PI pre grant

- An action for infringement can, depending on the circumstances, be brought before an IP right is granted. But the assessment should be made separately from the possible future conditions for an interim prohibition before the patent is granted (Patent and Market Appeal Court decision in PMÖ 5185-22).
- It thus seems like an open question whether a PI can be given pre grant.
- A trademark can be protected through use before it is registered, but the claimant will have to present probable cause for such protection.

## Validity/existence of right – burden of proof

Probable cause and presumptions

- The rightholder must present probable cause for the existence of the right (NJA 2012 s. 975).
- If the defendant argues that a patent should be revoked and initiates such an action, the claimant must, in the context of an action for a preliminary injunction, present probable cause that the patent is valid. There is a presumption that a granted patent is valid (RH 2016:68).
- Similar presumption for supplementary protection certificate (Patent and Market Appeal Court's decision in PMÖ 12172-18).
- The presumption does not apply in the same way to national trademarks (see the Patent and Market Appeal Court's decision in PMÖ 11215-17).
- EU trademarks are as a starting point presumed valid, see art 127 of Reg 2017/1001.



## Impact of pending oppositions in national registrations offices/EPO

- If a patent has been revoked by the patent authority, there is no longer a presumption for the existence of the right, even if the decision has not yet become final. Then the claimant must present probable cause that the patent will be upheld after appeal (RH 2016:88).
- Absent a revokation the patent is still presumed valid.

## Defending a PI based on invalidity arguments

Presumptions and  
evidentiary value

- There is a presumption that a granted patent is valid, but the presumption can be broken. The defendant must make it look probable that the patent will be revoked, based on new facts or by highlighting shortcomings in the patent authority's decision (illustrated by the Patent Market Appeal Court's decisions in PMÖ 3565-17, PMÖ 10991-18 and PMÖ 12172-18).
- A trademark registration has strong evidentiary value as regards the existence of the right, but the defendant can offer facts and evidence that reduce that value (see the Patent and Market Appeal Court's decision in PMÖ 15429-21).

## Use of experts (expert judges, court-appointed experts, parties' experts)

The parties can use  
expert evidence

Courts use expert judges

There can be court  
appointed experts

- Legally trained judges always sit in the IP cases in the Patent and market courts, but the composition can also include expert judges in patent cases (3 kap. 1 § and 4 kap. 1-3 §).
- Parties are free to consult experts and submit written statements from such experts in the context of litigation on a preliminary injunction.
- There can be court appointed experts (40 kap. rättegångsbalken), but this is quite rare.

## Scope of the injunction – can the court decide on a more narrow prohibition?

Courts can decide on more narrow prohibitions, but there are limits to this too

- The Patent and market courts consider themselves empowered to decide on a more narrow injunction than what is claimed. The claim forms the outer frame of the proceedings. Still, there will be instances when a claim cannot form the basis for a more narrow prohibition (see the Patent and Market Appeal Court decisions in PMÖ 9082-18 and PMÖ 9865-20).

## Impact of foreign rulings on validity/invalidity

- Rulings from courts in other Member States are often submitted to Swedish courts. Generally speaking, the value of such rulings depend partly on the strength of the reasoning set out by the other court, and partly on whether the other court was addressing the same issues. If different interpretations have been made by courts in the EU/EEA, this will sometimes indicate that there are questions of principle involved.

## How is the PI enforced/ is there a security/ how is it set

Specific performance (to refrain from certain action, coupled with a conditional fine. The fine can be imposed if the decision is not adhered to

- The injunction is set under penalty of a conditional fine. The fine is quantified to an amount that is considered high enough to make the defendant comply with the injunction. If the defendant fails to comply, the claimant (rightholder) will have to initiate separate court proceedings to have the fine imposed. Such a claim is managed under the rules of criminal proceedings.
- When the court decides whether the fine should be imposed, it will also test whether the injunction is lawful. For example, an injunction that is too unprecise cannot be enforced (see the Patent and Market Appeal Court's judgment in case B 12904-20 with references to case-law).

## Liability in damages

Judgment from Attunda tingsrätt in April 2021 in case T 6267-19

- Patent litigation, the patent was eventually revoked by the EPO's BoA
- Meanwhile there had been an interim prohibition in Sweden for parts of 2015 and 2016
- Claim for damages (approx 10 million SEK) for the harm caused by the interim prohibition
- 7,5 million SEK awarded by Attunda tingsrätt
- References in the judgment to Case C-688/17 Bayer Pharma

## Trends

Issues on how to draft preliminary injunction decisions

- Difficulties when parties are basing the same set of PI-claims on both IP-law and law on trade secrets or marketing law. Not only does the wording of the legislations differ, but the concepts are also of different origin and can differ in substance (Patent and Market Appeal Court decision in PMÖ 9865-20).
- Parties are asking for PI's that are rather wide, while the courts are often strict and limit their scope.