



# **The Legal 500 Country Comparative Guides**

## **Sweden**

### **PATENT LITIGATION**

#### **Contributor**

Westerberg & Partners



#### **Wendela Hårdemark**

Partner | [wendela.hardemark@westerberg.com](mailto:wendela.hardemark@westerberg.com)

#### **Björn Rundblom Andersson**

Partner | [bjorn.rundblom.andersson@westerberg.com](mailto:bjorn.rundblom.andersson@westerberg.com)

#### **Ludvig Holm**

Partner | [ludvig.holm@westerberg.com](mailto:ludvig.holm@westerberg.com)

This country-specific Q&A provides an overview of patent litigation laws and regulations applicable in Sweden.

For a full list of jurisdictional Q&As visit [legal500.com/guides](https://legal500.com/guides)

## SWEDEN

# PATENT LITIGATION



### 1. What is the forum for the conduct of patent litigation?

The Patent and Market Court (PMC) has exclusive competence in matters relating to intellectual property rights, market law and competition law. The PMC resides at the Stockholm District Court. The PMC will rule by a panel of legal judges with expertise in patent law and technical judges.

The Patent and Market Court of Appeal (PMCA) has exclusive competence for appeals of judgments and decisions by the PMC. The PMCA resides at Svea Court of Appeal in Stockholm. Leave to appeal is required for a case to be heard by the PMCA, and typically leave to appeal is granted in patent cases. The PMCA will rule by a panel of legal judges, experienced in patent law, and technical judges.

The PMCA is, as the main rule, the last instance in non-criminal law matters relating to patents and the Court's judgments and decisions cannot be appealed. However, the PMCA may, if the questions are of importance for the guidance of the application of the law, grant permission to appeal its decision or judgment to the Supreme Court. In order for the case to be heard by the Supreme Court, it further has to grant leave to appeal.

The PMC and the PMCA also have exclusive competence in criminal cases relating to patent law. The Courts will in such case consist of a legal judge and three lay judges. Leave to appeal is not required.

### 2. What is the typical timeline and form of first instance patent litigation proceedings?

The form of a first instance patent litigation proceeding follow the civil procedural laws in Sweden comprising as an outline the parties' exchange of submissions, a case management meeting, and a concluding oral hearing. To start proceedings before the PMC, an application of summons must be filed. This shall include the specific

relief requested, the grounds and circumstances for the grant of such relief and a preliminary indication of the evidence to be invoked (the details follow the Code of Judicial Procedure, SFS 1942:749, and the Patent and Market Courts Act, SFS 2016:188). Once the PMD has issued the summons, the defendant will be given the opportunity to submit a defence within a certain time, usually four weeks from service, on pain of a default judgment (however, default judgments cannot include an injunction with a penalty of a fine).

The case management meeting is often scheduled within six months of the summons. At that meeting the details of the subsequent management of the proceedings are set. For example, the main hearing is often scheduled at the case management meeting, including dates for any subsequent and concluding submissions. The Court will normally also determine a date by which the preliminary phase of the proceedings will close. Submission of new facts or evidence after that date will only be allowed if a party can present a valid excuse for why the fact or evidence had not been invoked before.

At a Swedish hearing on the merits, all requests, circumstances, and written evidence must be presented orally during opening statements, with the possibility to just refer to certain sections of written evidence if the Court agrees. Examinations of witnesses and experts are conducted including both direct examination and cross-examination. Accordingly, hearings in Sweden may extend for a long period of time, in some cases weeks, depending on the scope of the case. After having heard the case, the Court will render a judgment within four to six weeks if the case is of normal complexity. Overall, a patent dispute is usually decided upon within 12 to 24 months in the first instance. The time range depends on whether the validity of the patent is also challenged.

Infringement and invalidity actions are formally separate cases before the Patent and Market Courts. Still, they will normally be heard together, whereby submissions and the hearing may effectively cover both cases simultaneously. A question of invalidity of the patent is typically tried first and if the patent is found invalid by the PMC, the PMC will usually make a hypothetical

assessment on infringement. This ensures that infringement is not ruled upon for the first time on appeal, should the PMCA reverse the invalidity finding. As a result of this practice, claim construction is an integral part of any invalidity and infringement action and will be aligned by the Court. In most instances, the plaintiff will request a declaratory judgment on liability for damages as a result of infringement and in a subsequent case request the Court to order payment of the damages, at which point the quantum will have to be established.

### 3. Can interim and final decisions in patent cases be appealed?

Interim and final decisions in patent cases may be appealed. If it relates to a decision of the PMC, the decision is appealed to the PMCA. As mentioned above, a decision of the PMCA will usually not be possible to appeal.

A decision becomes final and binding if not appealed within the applicable time. An appealed decision becomes final once the appeal is ruled upon without any further appeal being possible. Interim decisions are usually enforceable immediately unless otherwise specified. An interim decision by the PMC may be suspended by the PMCA, should reasons therefore exist.

### 4. Which acts constitute direct patent infringement?

According to section 3 first paragraph item 1 - 3 of the Swedish Patents Act, direct patent infringement consists of making, offering for sale, putting on the market, using a product protected by a patent, or importing or storing a patent protected product for any of the above stated purposes, without the consent of the patentee. For process claims, direct infringement is the use of a process protected by a patent, if the infringer knows or it is obvious from the circumstances, that the process cannot be used without the consent from the patentee. The offer for sale, putting on the market, use of a product which has been manufactured through a patented process, or the importing or storing of such product for any of the aforesaid purposes, also constitute direct infringement.

### 5. Do the concepts of indirect patent infringement or contributory infringement exist? If, so what are the elements of such forms of infringement?

Indirect patent infringement or contributory infringement are infringing acts in Sweden. According to section 3 second paragraph of the Swedish Patents Act an indirect infringement occurs if:

- a party, without the consent of the patentee, exploits the invention by offering or supplying the means to use it in Sweden;
- the means are attributable to an essential element of the invention; and
- the party making the offer or providing the means knows, or in light of the circumstances, it is obvious, that the means are suitable and intended to be used in conjunction with the use of the invention.

When the means are a generally available commercial product, an indirect infringement will only occur if the party offering or supplying the means attempts to induce the third party to undertake an act of direct infringement.

### 6. How is the scope of protection of patent claims construed?

The scope of patent protection of a patent is determined by the patent claims. These are construed in light of the description of the patent and the drawings (see section 39 of the Patents Act). In accordance with Article 69 of the EPC and its accompanying protocol, the Patent and Market Courts determine the scope of protection as defining a position between a strict, literal interpretation of the patent claims and treating the patent claims as mere guidelines for the scope of protection, which combines a fair protection for the patent proprietor with a reasonable degree of legal certainty for third parties.

There is a doctrine of equivalents under Swedish law. In this respect the Patent and Market Courts apply Article 2 of the Protocol on the Interpretation of Article 69 EPC, albeit restrictively. This means that if literal infringement cannot be established, the patentee may assert infringement by equivalent means. Infringement by equivalent means requires that the following requirements are met:

- (i) the core of the invention in the patent must be utilized completely by the infringing subject matter;
- (ii) the infringing subject matter, despite differences between such subject matter and the invention according to the patent, achieves the same technical result as the invention according to the patent;
- (iii) the differences between the invention according to the patent and the infringing subject matter are obvious

for the skilled person; and

(iv) the infringing solution is equal to the solution according to the patent.

The patentee's actions during the prosecution of the patent may restrict the application of the doctrine of equivalents; however, they do not immediately constitute a bar against the extension of the scope of protection. For example, an amendment by the patent applicant limiting the claim to overcome a prior art objection (novelty or inventive step) may restrict the patentee's possibility to extend the scope of protection to such equivalents – i.e. a version of prosecution history estoppel.

## 7. What are the key defences to patent infringement?

The main defences to patent infringement are non-infringement or invalidity. A validity defence requires that the defendant files a counterclaim and initiates an action requesting revocation patent. Notably, it is not possible to only rely on an invalidity argument as a defence without such an action except for in interim proceedings.

In cases of asserted non-infringement, the defendant can rely on different defences, often in combination with each other. The primary position is to show that the allegedly infringing product or method falls outside the scope of protection of the patent. The secondary position, and in particular important in cases where the infringing product fulfil all the features of the independent claim, is to show that the exploitation is not subject to the patentee's exclusive right. That would, for example, entail showing non-commercial use, exhaustion of rights (where the product protected by the patent has been placed on the market within the EEA with the consent of the patentee), use for experimental purposes or application of the Bolar exemption, prior use rights or the application of a previously granted compulsory license.

## 8. What are the key grounds of patent invalidity?

The Patent and Market Courts may declare a patent invalid in part or its entirety. According to section 52 of the Patents Act, a patent shall be declared invalid if the patent has been granted, even though the conditions of sections 1 and 2 of the Patents Act are not satisfied, i.e. for lack of patentability (invention, industrial application, novelty and inventive step).

A patent shall also be declared invalid for *lack of enabling disclosure*, or *added matter*, if the patent covers subject matter which was not disclosed by the application as filed or, *extension of the scope*, if the scope of patent protection has been extended after the patent was granted.

The Swedish courts follow the case-law of the EPO with respect to questions of patentability. Thus, the Patent and Market Courts apply the problem-solution approach to assess inventive step. According to the problem-solution approach, the first step is to determine the closest prior art. The second step is to establish the objective technical problem solved, and the third step is to consider if the claimed invention, starting from the closest prior art and the objective technical problem, would have been obvious for the skilled person.

## 9. How is prior art considered in the context of an invalidity action?

Anything that was known prior to the date of the patent application (cf. state of the art Article 54 (1) and (2) of the EPC) could be applicable as prior art. Prior art may therefore consist of anything that was publicly available, anywhere in the world, by means of writing, lectures, exploitation, or otherwise. Even the content of a patent application submitted in Sweden or before the EPO prior to such date, may be submitted as prior art if the application becomes publicly available through publication after the priority date, even though it was not publicly available on the priority date (see also Article 54(3) of the EPC). Novelty is assessed by the same standards as by the EPO. The prior art must accordingly disclose all elements of the invention directly and unambiguously. Combination of documents is not permissible for novelty but is for inventive step. The common general knowledge of the notional skilled person is usually of rather limited relevance for the assessment of the disclosure for novelty purposes but will often be important for inventive step. The Swedish courts apply the principle of free consideration of evidence and are in general permissive when it comes to evidence. Evidence of prior art may therefore be submitted in writing or by means of witness or expert examinations.

Prior art is considered both in the assessment of novelty and inventive step and the same document may as a general rule be asserted for both grounds. There is one exception relating to patent applications submitted in Sweden or before the EPO prior to the priority date, but only disclosed after, where the information cannot be invoked as prior art in view of inventive step.

## 10. Can a patentee seek to amend a patent that is in the midst of patent litigation?

A patentee may request that the patent be upheld in amended form in revocation proceedings. That is the only way for the patentee to amend the patent if opposition proceedings before the EPO or revocation proceedings in Sweden relating to the patent are pending (cf. section 40a, third paragraph of the Patents Act). Such request require that the patentee specifies the sought amendments and shows support for the amendment in the application as filed. An amendment is only permissible if it results in a limitation of the scope of protection. Furthermore, the patentee may only request amendments which would overcome the alleged invalidity of the patent. Since amendments requested in patent litigation will always result in a limitation of the scope of protection, third parties are in general not allowed to intervene in the proceedings. If a third party considers that the patent in its amended form should be revoked, that third party must initiate its own invalidity proceedings.

## 11. Is some form of patent term extension available?

A patent has a 20-year term from the day of the application, if the annual fees are paid. Certain patents relating to medicinal and plant protection products can, upon application by the patentee, be granted an extension of the term in the form of a Supplementary Protection Certificate (SPC). The maximum term of an SPC is five years and starts upon the expiration of the patent's term if all fees are duly paid. An application for an SPC shall be filed within six months from the date of the first marketing authorisation under the provisions of EC Regulation No 469/2009 concerning the supplementary protection certificate for medicinal products. Medicinal products may also be granted an additional six-month extension of the term if a pharmaceutical company submits and agrees to a paediatric investigation plan whose aim is to collect clinical data on the use of a medicine in children (Article 36 of the EC Regulation No 1901/2006 of the European Parliament and of the Council of 12 December 2006 on medicinal products for paediatric use and amending Regulation (EEC) No 1768/92, Directive 2001/20/EC, Directive 2001/83/EC and Regulation (EC) No 726/2004).

## 12. How are technical matters considered in patent litigation proceedings?

The Patent and Market Courts will review any technical matters arising in a patent litigation based on the

parties' submissions and evidence. As mentioned above, the Court consist of legal judges specialising in patent law and technical judges with specific experience in the technical field to which the patent belongs. That means the Court will have some expertise in assessing the technical questions in dispute. However, the Court may only rule based on the material duly submitted by the parties and may only apply its expertise to evaluate the case as argued by the parties. Party appointed experts are typically crucial for proving technical issues that are contentious. An expert retained by a party must submit a written opinion before the close of the preparatory phase and will also be subject to examination, including cross-examination, during the hearing. Commonly, both parties appoint several technical experts to address different technical questions in more complex cases.

The Courts may appoint its own technical expert but that is essentially unheard of.

## 13. Is some form of discovery/disclosure and/or court-mandated evidence seizure/protection (e.g. saisie-contrefaçon) available, either before the commencement of or during patent litigation proceedings?

There are several ways of obtaining evidence before and during a patent litigation. Before proceedings have been initiated, there are two remedies: infringement investigation and information order. The Patent and Market Courts may order an infringement investigation upon request by the patentee or its licensee to secure evidence of the infringement (see sections 59a – 59 h of the Patents Act). A decision granting such a request requires that the patentee shows that it reasonably can be expected that a person or entity has committed infringement or been complicit in an infringement. The order may involve carrying out the infringement investigation at the allegedly infringing party's premises to search for objects or documents which may be expected to be significant to an investigation regarding the infringement. However, the actual infringing product may not be seized, nor may an infringing process be filmed. An order for an infringement investigation may only be issued if the reasons for the measure outweigh the inconvenience or injury that the measure would otherwise entail for the person subject to the order or for any other opposing interest. It is also possible to request an infringement investigation if the patentee suspects attempted infringement or preparation for infringement. The enforcement of an infringement investigation shows similarities with a *saisie-contrefaçon*, with the difference that infringing products only may be copied or



photographed.

An order to provide information is available if the applicant (the patentee, or the licensee), can show probable cause that another party has committed patent infringement. The information order is expressed as an injunction under penalty of a fine to provide the applicant with information regarding the origin and distribution network for the goods or services to which the infringement pertains. It may extend not only to the allegedly infringing party but also to certain third parties (see Section 57c of the Patents Act). An order to provide information may only be issued if the information is likely to facilitate the investigation of an infringement relating to the goods or the services and the reasons for the measure outweigh the inconvenience or other harm caused by the measure to the person affected by it or to any other opposing interest. The obligation to provide information does not include disclosing information which would reveal that the informant or a person close to the informant has committed a criminal offence.

When merits proceedings have been initiated, it is possible to request that specific physical and digital written documents be presented to the Courts, i.e., a request for the production of documents according to Chapter 38 Section 2 of the Code of Judicial Procedure. The order may refer to documents in the possession of an opposing party or a third party. As a main rule, a party has an obligation to comply with such a request and order. However, there are a number of privileges which are exempt from the duty to produce documents, such as attorney-client communications and trade secrets. With respect to the latter privilege, the Court may nevertheless order production if it finds exceptional cause for doing so. It is possible to request examination of a witness in aid of a document production request.

#### **14. Are there procedures available which would assist a patentee to determine infringement of a process patent?**

In contrast to many other European jurisdictions, Sweden has no statutory reversal of the burden of proof for patented processes. However, the Courts nevertheless apply less stringent burdens of proof for infringement of process from time to time.

Other procedural means to assist the patentee in determining infringement in a process patent could be an order to produce documents, presuming that there is a document describing the process and with the limitations of such an order, or to request an infringement investigation searching for documents relating to the used process. In theory, it is also possible

to request an inspection of the process used by means of the Court.

#### **15. Are there established mechanisms to protect confidential information required to be disclosed/exchanged in the course of patent litigation (e.g. confidentiality clubs)?**

Under Swedish law, proceedings before the Courts are public. Therefore, every document submitted to the Courts will be considered public unless it falls under a confidentiality restriction. Confidentiality restrictions could, for example, be granted if specific information in a piece of evidence or submission is considered a trade secret. Notably, a confidentiality restriction will not prevent an opposing party in the litigation from having access to the document, but other types of restrictions may be ordered, although this power is rarely used in practice. A party which receives a trade secret in court proceedings may not use or disclose that information without having valid cause (which would be, for example, to protect its interest in the proceedings).

#### **16. Is there a system of post-grant opposition proceedings? If so, how does this system interact with the patent litigation system?**

Upon grant of a patent application, a nine-month opposition period starts, during which anyone can file an opposition of the patent. To overcome the opposition, the patentee will be allowed to provide an answer with arguments and evidence, including auxiliary requests limiting the granted claims. Typically, the IPO decides on the matter based on written submissions, but it is possible for the parties to request an oral hearing. The decision by the IPO can be appealed to the PMC.

An invalidity action could also be initiated before the PMC. If an invalidity action has been commenced before the PMC in parallel with an opposition before the IPO (or the EPO), the PMC and PMCA have the opportunity to await the decision from the IPO or the EPO. However, the Swedish proceedings are rarely stayed.

After the opposition period, the only way to request revocation of the patent is to initiate proceedings before the PMC.

#### **17. To what extent are decisions from other fora/jurisdictions relevant or**

### **influential, and if so, are there any particularly influential fora/jurisdictions?**

The Patent and Market Courts have since long established that case law from the EPO will be applied in Swedish patent cases. However, this does not mean that a decision from the EPO relating to a particular patent necessarily will be followed slavishly. It is the principles of law applied by the EPO, not the decisions as such, which the Courts follow. Instead, the Patent and Market Courts honour their independence and will make their own assessment of the facts of the case. The same applies in cases where a foreign member of the same patent family as the patent in suit has been ruled upon in a foreign jurisdiction. There is no way to determine to what extent the Courts are persuaded by foreign judgments since they essentially never reason about such judgments. However, there is reason to assume that well-reasoned judgments from major patent jurisdictions such as the UK and Germany will be considered to some extent, if such judgments are based on essentially the same facts.

### **18. How does a court determine whether it has jurisdiction to hear a patent action?**

The Patent and Market Courts have jurisdiction over disputes relating to Swedish patents, including the Swedish designation of a European patent. Once the transitional period of the UPC Agreement has ended the PMC and the PMCA will no longer have jurisdiction over European patents.

Under the Brussels Ia Regulation, the Patent and Market Courts also have infringement jurisdiction relating to non-Swedish patents over any defendant who is domiciled in Sweden. Validity of non-Swedish patents can never be heard on the merits by the Patent and Market Courts as that issue is reserved exclusively for the courts where the patent is granted (or designated). The CJEU is currently considering whether infringement jurisdiction can be retained once validity is contentious and the exclusive validity jurisdiction under Article 24.4 is activated.

In disputes with respect to the entitlement to an invention, for which an application for a European patent has been filed, Swedish courts have jurisdiction following the Act implementing the EPC Protocol on Jurisdiction and the Recognition of Decisions in respect of the Right to the Grant of a European Patent (see Article 71 of the Brussels Ia Regulation). The general rules on jurisdiction under the Brussels Ia Regulation apply for entitlement to patents not covered by the Protocol, meaning that Swedish courts have jurisdiction with respect to

defendants domiciled in Sweden.

### **19. What are the options for alternative dispute resolution (ADR) in patent cases? Are they commonly used? Are there any mandatory ADR provisions in patent cases?**

There are no direct options, and clearly no mandatory provisions, for the parties in a patent dispute to use alternative dispute resolution measures such as arbitration or mediation under Swedish law. In general, the Courts are required to explore the possibility of settling a case amicably and may refer the dispute for mediation with the consent of both parties. The parties are, of course, free to resolve a dispute the best way they see fit and may agree on the use of mediation or arbitration. However, arbitration is of limited practical relevance in non-contractual patent disputes in light of legal doubts whether validity as a question is arbitrable. For these reasons, ADR is rarely or never used.

### **20. What are the key procedural steps that must be satisfied before a patent action can be commenced? Are there any limitation periods for commencing an action?**

An action relating to patent infringement or revocation of a patent may be initiated without any particular preceding procedural steps. However, it is common practice to send a warning letter as this is required by the code of professional conduct of the Swedish Bar Association in non-urgent cases. Sending a warning letter may also avoid unnecessary litigation, which is relevant for the award of costs in the proceedings.

Before initiating a revocation action, the claimant must provide a notice of the application to the IPO, any licensees, and any pledge holders. A licensee who wishes to initiate infringement proceedings must first inform the patentee.

There are, in general, no statutes of limitations for initiating an infringement or a revocation action and, thereby, no limitation period within which an action should be commenced after the opponent has received a cease-and-desist letter. In general, there is no requirement of urgency or doctrine of laches but there are situations where extended periods of inactivity may be given relevance. The statute of limitation for an action requesting damages is five years before the date of institution of the proceedings. That means that the request for damages may only include damages which have occurred during the five years preceding the

action. There is also a statute of limitation for an action for entitlement to a patent. In such cases, the person asserting title to a patent must file its action within one year from the date the person became aware of the patent.

There is no formal limitation period for seeking a preliminary injunction; however, significant delays in bringing an action may be used against an argument for expediting the proceedings.

## **21. Which parties have standing to bring a patent infringement action? Under which circumstances will a patent licensee have standing to bring an action?**

The patentee, or a licensee of the patentee who has informed the patentee in advance, may bring a patent infringement action.

A public prosecutor will have standing in the rare cases relating to patent infringement as a criminal offence.

## **22. Who has standing to bring an invalidity action against a patent? Is any particular connection to the patentee or patent required?**

Anyone prejudiced by the patent may initiate a revocation action against a granted patent. Consequently, the plaintiff in a revocation action must provide some explanation why the existence of the patent prejudices the plaintiff to have standing. In practice, the threshold for standing is low.

## **23. Are interim injunctions available in patent litigation proceedings?**

Preliminary injunctions (PIs) are available and common in patent proceedings in Sweden. A request for a PI, under a penalty of a fine, may be submitted prior to or during the main infringement action. It should be noted that a main action will always be necessary, even though in very urgent cases, a PI may be requested before the summons application has been filed.

The PMC or the PMCA may issue an injunction under a penalty of a fine until the case has been finally adjudicated if the claimant shows 1) probable cause that an act involving infringement or being complicit to infringement is taking place, or that steps are taken with the purpose of infringing the patent, and 2) it can reasonably be assumed that the defendant, through the

continuation of the act or contribution to the continuation of the act, diminishes the value of the exclusive right in the patent. Furthermore, the preliminary injunction must 3) be proportionate, whereby the inconvenience of the alleged infringer is outweighed by the patentee's interest in safeguarding its rights. Finally, 4) it is a requirement that the plaintiff lodges a security with the Court for any loss which the defendant might incur if infringement is ultimately not found (including due to invalidity of the patent). In cases where the plaintiff cannot lodge such security, the Court may release the plaintiff from that obligation, but it is rare in patent cases.

It is possible to request that a PI be granted ex parte if a delay would cause irreparable harm. Ex parte relief is exceedingly rare in patent cases. Instead, the defendant is generally provided the opportunity to respond within a short period of time.

The Patent and Market Courts may consider a validity defence in the decision of a PI. The Patent and Market Courts apply a presumption of validity which the defendant will have to rebut to succeed with that defence.

A preliminary injunction is usually granted within three to six months, depending on the complexity of the case, or shorter in clear and urgent infringements.

## **24. What final remedies, both monetary and non-monetary, are available for patent infringement? Of these, which are most commonly sought and which are typically ordered?**

Injunctive relief is central in patent litigation. The patentee is also entitled to monetary relief in the form of actual damages (no punitive damages are available) or reasonable compensation. Damages are available in cases of wilful or negligent infringement. If no damage can be proven, the patentee is still entitled to reasonable compensation for the use of the invention, which often is based on a hypothetical license fee. The patentee is furthermore entitled to compensation if and to the extent it is reasonable in cases of infringement which is not wilful or negligent.

There are corrective measures such as recall of infringing products or seizure of such products in the defendant's possession. An infringer can also be ordered to pay for publication of information about the Court's judgment.

It is for the patentee to take action against any failure to



comply with an injunction. This is done in separate proceedings and any penalty decided will be payable to the Swedish state.

## **25. On what basis are damages for patent infringement calculated? Is it possible to obtain additional or exemplary damages?**

The patentee is always entitled to reasonable compensation for the unlawful exploitation of the patent. Reasonable compensation is usually calculated as a hypothetical reasonable licence fee. In cases where the infringer negligently, or with intent, has exploited the invention unlawfully, the claimant may also request additional compensation in the form of damages. The Court will then take into consideration e.g. lost profits, profits made by the infringer, goodwill damage and the patentee's interest of non-infringement (see section 58 of the Patents Act). In practice, the Patent and Market Courts tend to focus on lost profits.

## **26. How readily are final injunctions granted in patent litigation proceedings?**

A final injunction is essentially always granted if the Patent and Market Courts find that a valid patent has been infringed. However, the Courts are diligent in defining what the scope of the final injunction should be and the specific wording of the injunction. It is not possible to grant an injunction that extends beyond the product or infringing acts that have been proven, and the wording of the injunction must be sufficiently clear and precise to enable the infringer to comply with the injunction and to enable any possible subsequent enforcement.

## **27. Are there provisions for obtaining declaratory relief, and if so, what are the legal and procedural requirements for obtaining such relief?**

Declaratory relief is available in Sweden but is only admissible to the extent it seeks to establish rights or obligations, or lack thereof, in a legal relationship. It is thus possible to seek declaratory relief to infringement or non-infringement. It is also possible to seek declaratory relief as to entitlement to a patent. Arguments with respect to the scope of protection, such as the Formstein or Gillette defence, are elements of the case and as such formally admissible (a different matter is whether it would be granted) in declaratory proceedings relating to infringement or non-infringement. It is not possible to establish a fact, such

that a specific product or process would have been obvious at a certain point in time. Arrow declarations are thus not available in Sweden.

Finally, it is common practice to seek declaratory relief regarding liability in damages per se for infringement. The reason for this practice is the costs associated with proving what the reasonable compensation and additional damages should amount to.

## **28. What are the costs typically incurred by each party to patent litigation proceedings at first instance? What are the typical costs of an appeal at each appellate level?**

The major component of the parties' litigation costs are counsel's fees. Fees for any patent attorney which assists counsel will also be included in the litigation costs. Expenses, most notably for expert evidence, may also be a significant part of the costs. The work that a party itself, through its employees, does in the case counts as litigation costs. There are court fees for bringing proceedings in Sweden but they are nominal, currently around EUR 250.

A claim regarding either invalidity or infringement may, in the first instance, cost between EUR 200,000 and EUR 600,000, but can vary depending on the complexity of the claim. In the PMCA, the costs are, as a rule of thumb, two-thirds of the costs in the PMC and even less in the Supreme Court.

## **29. Can the successful party to a patent litigation action recover its costs?**

The main rule is that the losing party shall fully compensate the winning party's reasonable litigation costs. Therefore, at least in principle, it should be possible for the successful party to recover all costs associated with litigation. However, the Courts decide if the requested costs have been reasonably necessary for the defence of the party's rights, and we have seen a tendency that the PMC and the PMCA arbitrarily reduce the requested amount on several occasions.

There are exceptions to the main rule should the parties each be partly successful or if the successful party has acted negligently or initiated an unnecessary trial. In the first case, the Courts will apportion the litigation costs awarded in relation to the success of the successful party. In the latter case, which is very uncommon in patent disputes, the successful party may be ordered to reimburse the losing party's litigation costs.

### 30. What are the biggest patent litigation growth areas in your jurisdiction in terms of industry sector?

We continue to see strong growth in the Life sciences sector encompassing pharmaceuticals, but more importantly, we see a growing market for medical devices. We have also seen the first FRAND-cases within telecommunications litigated and decided in Sweden and are expecting more to come.

### 31. How has or will the Unified Patent Court impact patent litigation in your jurisdiction?

The UPC agreement came into force as of the 1st of June 2023, and Sweden is one of its contracting parties. Sweden and the Baltic countries have formed a regional division in Stockholm. We expect the UPC to be an enforcement option that will be considered on a case-by-case basis by sophisticated patentees going forward. We also expect that the case-law of the UPC will be persuasive for the Swedish national courts.

### 32. What do you predict will be the most

### contentious patent litigation issues in your jurisdiction over the next twelve months?

During the next twelve months we will see the CJEU hand down a preliminary judgment on jurisdiction over foreign patents which will be highly significant for cross-border patent litigation.

### 33. Which aspects of patent litigation, either substantive or procedural, are most in need of reform in your jurisdiction?

We would welcome further clarifications from the PMCA on the application of doctrine of equivalents.

### 34. What are the biggest challenges and opportunities confronting the international patent system?

The enactment of the Unitary Patent system and the implementation of the UPC is the most significant change to the international patent litigation system for a long time. In its wake, the enactment of a unified supplementary protection certificate is pending. The reform on Standard Essential Patents will likely also stir up the international patent system.

## Contributors

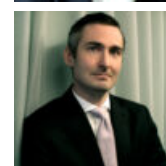
**Wendela Hårdemark**  
Partner

[wendela.hardemark@westerberg.com](mailto:wendela.hardemark@westerberg.com)



**Björn Rundblom**  
**Andersson**  
Partner

[bjorn.rundblom.andersson@westerberg.com](mailto:bjorn.rundblom.andersson@westerberg.com)



**Ludvig Holm**  
Partner

[ludvig.holm@westerberg.com](mailto:ludvig.holm@westerberg.com)

