

The development in the field of intellectual property and advertisement law in Sweden 2016–2018

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1. Introduction

This article provides an overview of the legal development in the field of intellectual property, trade secrets and advertisement law in Sweden between the XXXIII NIR meeting in Copenhagen in June 2016 and the XXXIV NIR meeting in Sigtuna in August 2018. The description of the legal development also includes the year of 2018 in its entirety.

The article is based on a selection of relevant new national legislation and national case law. Hence, judgments from the European Court of Justice (“CJEU”) are not presented, unless originating from a Swedish court. Furthermore, the presentation of case law in section 4 below is limited to judgments on the merits and requests for preliminary rulings from the higher court instances. Consequently, decisions regarding *inter alia* interim injunctions or orders to provide information as well as trade mark application matters are not included in the article. Within the field of design law, the Swedish Patent and Market Court of Appeal has only tried two cases, both regarding applications for orders to provide information.¹ Hence, there is no presentation of case law with regard to design law.

2. The new IP court system

Cases and matters relating to intellectual property, advertisement and competition law were previously dealt with by the general courts, the general administrative courts, the Patent Court of Appeal and the Market Court. Following a parliamentary decision and the enactment of the Patent and Market Courts Act (SFS 2016:188), all adjudication of cases and matters in Sweden relating to intellectual property, advertisement and competition law has been centralized at two specialized courts: the Patent and Market Court, as the first instance, and the Patent and Market Court of Appeal, as the second – and normally the final – instance. At the same time the Patent Court of Appeal and the Market Court have ceased to exist.

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¹ PMÖ 5678-16 and PMÖÅ 9614-17.

The judges of the Patent and Market Courts are either legally trained judges with specialist legal experience or specially appointed members with technical or financial expertise. In certain cases and matters only legally trained judges are involved, while in other cases and matters (normally concerning patents, advertisement and competition law) the Court comprises both legally trained judges and specially appointed members.

Decisions and judgments rendered by the Patent and Market Court may be appealed, provided that the Patent and Market Court of Appeal grants leave to appeal. Judgments and decisions rendered by the Patent and Market Court of Appeal can normally not be appealed except for judgments and decisions rendered in criminal cases. However, in certain cases, the Patent and Market Court can allow a judgment or decision to be appealed to the Supreme Court. In such event, the Supreme Court may hear the case, provided that a leave to appeal also has been granted.

The Patent and Market Courts have exclusive jurisdiction over cases and matters relating to intellectual property, advertisement and competition law. A procedural novelty in the Patent and Market Courts Act is that it is possible to handle cases and matters jointly. It is, for example, possible to handle a case concerning infringement of an intellectual property right together with a matter concerning the ability to register said intellectual property right. In connection with a case that falls under the Courts' exclusive jurisdiction, the Court may also handle an adjacent matter, even if it does not fall under the exclusive jurisdiction. For example a case under the Act on Trade Secrets, which does not fall under the exclusive jurisdiction, may be handled together with a case under the Copyright Act, which does fall under the exclusive jurisdiction.² An exception applies to labour law matters that may not be adjudicated by the Patent and Market Courts, regardless of whether they also concern e.g. intellectual property law issues. This provision has created practical difficulties from a procedural point of view.³

3. Legislation

3.1 New legislation. 3.1.1 New Act on Trade Secrets (SFS 2018:558). A new Act on Trade Secrets came into force on 1 July 2018. The Act implements and replaces the previous Act on the Protection of Trade Secrets.

The new Act is an implementation of EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.⁴ In addition to adjusting the protection for trade secrets in Sweden to better meet the requirements of the Directive, the new Act aims at providing a stronger protection for trade secrets. Hence, under the new Act additional forms of utilisation of trade secrets are considered

² See for example joint handling of cases concerning trademark infringement, copyright infringement and an attack on trade secrets in PMT 547-16, decided by the Patent and Market Court of Appeal.

³ See for example PMÖÄ 10350-16.

⁴ The implementation of the Directive into Swedish law is described and analyzed by Domeij in NIR 2018 p. 539 ff.

as unauthorized and may result in a liability to pay damages. Furthermore the protection of trade secrets in court proceedings is strengthened.

Reporting serious irregularities at the workplace (so-called whistle blowing) is however still considered as authorized and consequently falls outside the scope of the Act. Furthermore, it is clarified that the definition of trade secrets shall exclude the experience and skills gained by employees in the normal course of their employment. The employee shall thus be free to use the obtained knowledge in the course of a new employment.

3.1.2 Updates and new provisions in the Trade Marks Act (SFS 2010:1877) and a New Company Name Act (SFS 2018:1653). On 1 January 2019, updated and new provisions in the Trade Marks Act entered into force in order to implement EU Directive 2015/2436 to approximate the laws of the Member States relating to trade marks.⁵ The purpose of the amendments is also to approximate the Swedish national trade mark legislation to the trade mark law in other EU countries, as well as to the rules applicable to EU trademarks.

Registration of new types of trade marks, such as animated trade marks, is facilitated under the new provisions. Another change is that the Customs may intervene against goods suspected of infringement, also in the event the goods are not targeting the Swedish market.

At the same time, the previous Trade Names Act was replaced by a new Act on Company Names. In the new act the notion "trade name" (Sw: "firma") has been replaced by the notion "company name" (Sw: "företagsnamn").

A new Act on the Protection of Designations of Agricultural Products and Foodstuffs (SFS 2018:1654) has also entered into force on January 1, 2019.

3.1.3 A new Act on Collective Management of Copyright (SFS 2016:977). A new Act on Collective Management of Copyright came into force on 1 January 2017. The Act implements EU Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.⁶

3.1.4 A new Act on Mediation in Certain Copyright Disputes (SFS 2017:322). The previous Act on Mediation in Certain Copyright Disputes has been replaced by a new Act with the same name and which entered into force on 1 July 2017. The Act is applied in the event of a dispute regarding the conclusion of a contract which serves as a prerequisite for certain extended collective licenses. Under the new Act, the administrative handling of the mediation is a task reserved for the Patent and Market Court instead of the Government.

3.1.5 New provisions on droit de suite in the Copyright Act (SFS 2018:604). New provisions on droit de suite (artists' resale royalty) came into force on 1 July 2018.

⁵ The implementation is described and commented on by Ahlgren in this issue of NIR.

⁶ The first proposal for a new Swedish Act on Collective Management of Copyright is described and analyzed by Axhamn in NIR 2015 p. 675 ff.

The new provisions provide for an obligation for professional art dealers to report sales that give rise to a duty to pay the royalty, upon request from the collecting society that administers the collection of the royalty.

3.2 Pending legislation. 3.2.1 An inquiry on Gross Copyright Crime and Gross Trademark Crime (SOU 2018:6). In the inquiry it is proposed that two new criminal denominations are introduced: copyright criminal offence and trademark criminal offence.⁷ In both cases the offence might be qualified as "gross" if particularly serious. It is also proposed that maximum sentences are increased from two years to six years imprisonment and that all property – not just tangible objects – may be seized. This means *inter alia* that domain names that have been used for copyright or trademark infringement could be seized to ensure subsequent confiscation. The amendments are proposed to enter into force on 1 July 2019.

3.2.2 Inquiries on new marketing methods. In the field of advertisement law, the legislator has shown particular interest in new marketing methods, e.g. in social media. In the inquiry "*A Change of the Advertising Landscape – Consumer Protection and Supervision in a Digitized World*" (SOU 2018:1) it is analyzed whether existing advertisement legislation provides adequate protection for consumers in view of the major changes that have occurred in the advertising landscape. The inquiry came however to the conclusion that there is no reason to suggest any amendments to the current legislation in this regard.

In another legal inquiry – "*Alcohol Advertising in Social Media*" (SOU 2017:113) – it is proposed that commercial advertising in social media must not be used in the marketing of alcohol beverages. The amendments are proposed to enter into force on 1 September 2019.

4. Judgments and decisions

4.1 Copyright. 4.1.1 A painting based on a photograph was a new and independent creation and not an adaptation of the photograph (NJA 2017 s. 75). An artist used, without the photographer's permission, a photograph of a former suspect in the murder case of the Prime Minister Olof Palme, as a model when he created an oil painting named "Swedish scapegoats". The photograph had been extensively used in Swedish media. In addition to the image of the former suspect, the painting pictured a scapegoat and a desert landscape.

The issue before the Supreme Court was whether the painting was an adaptation of the photographer's existing work of art, or a new and independent work of art under Section 4 in the Copyright Act (1960:729).⁸ In its judgment the Supreme Court provided guidance on how this assessment should be made. Decisive for whether there is a new and independent work of art is if the alleged new and independent work meets the threshold of originality. This should be determined by making an overall assessment, based on the subjective perception

⁷ The main elements and proposals of the inquiry is outlined by Persson in NIR 2018 p. 244 ff.

⁸ The case is summarized and commented on by Nordell in NIR 2017 p. 293 ff.

that could be assumed to be shared by a majority. It is also relevant whether the new product has a different meaning than the original work.

The Supreme Court held that although the image of the former suspect was the central motif of the painting, the dominant composition of the painting differed from the photograph. The painting also communicated a different meaning. While the painting was an allegory that criticized media's need for "scape-goats" and a commentary on society today, the underlying photograph was a strong, photographic portrait. The artist had thus transformed the photograph in such a way that he had created a new and independent work, expressing his individuality as an artist. Consequently the artist's use of the photograph did not infringe the photographer's rights.⁹

4.1.2 Passive storage of a computer software program after the expiration of the license period was not considered to constitute copyright infringement (NJA 2018 s. 725). A municipality had acquired a computer program, protected by copyright, from a software company. After termination of the agreement, the municipality kept *inter alia* a back-up copy of the computer program, however without making any copies or other use of it. The question to be considered by the Supreme Court was whether the municipality's passive storage of the computer program, after termination of the agreement, constituted copyright infringement and, if so, how compensation for such use should be calculated.

The Supreme Court found that merely storage, without producing any copies, was not a copyright infringement. The Supreme Court referred to Section 26 g in the Copyright Act which entitles anyone who has acquired the right to use a computer program to make such copies of the program which are necessary in order to use the program for its intended purpose and to make back-up copies of the program, if this is necessary for the intended use of the program. Under said provision such copies may not be used when the right to exploit the program has expired. With reference to the preparatory works the Supreme Court asserted that there is however no requirement to delete such backup copies when the right to exploit the program expires. Neither is there any requirement to pay compensation under the EU Computer Programs Directive 2009/24/EC. Consequently, the municipality's passive storage of the computer program was not a copyright infringement and the municipality did not have to pay any compensation in that regard.

4.1.3 Other judgments and requests for preliminary rulings by the Supreme Court. In *NJA 2017 s. 446* the Supreme Court considered the penal value for copyright infringement and held that copyright infringement is normally not a crime of such nature which typically gives reason for imprisonment.

⁹ It may be mentioned that since June 2016 another judgment relating to intellectual property rights to a photograph has been rendered by the Patent and Market Court of Appeal, see PMFT 1257-15.

In *NJA 2016 s. 490* the Supreme Court held that the inherent characteristics of certain cell phones in terms of technical capacity, user friendliness and other properties made them suitable for private copying, and hence subject to levies.

In *NJA 2017 s. 1164* the Supreme Court found that cell phones and external memory cards distributed and sold as one unit were subject to private copying levies. The level of compensation established in the Copyright Act based on storing capacity was slightly reduced due to the multifunctionality of the units.

The Supreme Court has made requests for preliminary rulings from the CJEU in three copyright cases. One case (C-572/17) concerns the right of distribution under Section 4 of the InfoSoc Directive (2001/29/EG) and whether the right of distribution covers preparatory acts for the sale of a copyright protected work, including warehouse storage. The CJEU handed down its ruling on 19 December 2018. According to the ruling, storage by a retailer of goods bearing a motif protected by copyright on the territory of the Member State where the goods are stored may constitute an infringement of the exclusive distribution right, when that retailer offers for sale, without the authorisation of the copyright holder, goods identical to those which he is storing, provided that the stored goods are actually intended for sale on the territory of the Member State in which that motif is protected. According to the CJEU, the distance between the place of storage and the place of sale cannot, on its own, be a decisive element in determining whether the stored goods are intended for sale on the territory of that Member State.¹⁰

The two other cases (jointly C-753/18) concern *inter alia* the question of whether there is a communication to the public when a company rents out cars equipped with radio, thereby giving their customers access to musical works and audio recordings protected by copyright law.

4.1.4 *An internet service provider has been ordered to block their customers from accessing pirate websites (PMT 11706-15).*¹¹ The Patent and Market Court of Appeal has issued an injunction under Section 53 b of the Copyright Act, ordering an internet service provider to block their customers from accessing The Pirate Bay and Swefilmer websites, which contain illegal copyright protected material. The Patent and Market Court of Appeal reached this conclusion by interpreting Section 53 b in the Copyright Act in light of Section 8(3) of the Infosoc Directive (2001/29/EC) and case law from CJEU, *inter alia* C-314/12 (UPC Telekabel). According to this interpretation, right holders may demand an injunction against an internet service provider when the service provider's services are used by a third party to commit infringement of an intellectual property right, even if the internet service provider only provides its customers with internet access. By this interpretation the Patent and Market Court of Appeal deviated from the

¹⁰ Compare B 1115-15. In this case, the Patent and Market Court of Appeal found that copyright infringement is not relevant when storing goods protected by copyright for commercial purposes.

¹¹ See also PMT 7262-18 and PMÖ 9945-18 where the Patent and Market Court's interim ruling ordering Telia to block access to The Pirate Bay and several mirror sites was revoked by the Patent and Market Court of Appeal.

preparatory works implementing the Infosoc Directive (2001/29/EC), where the legislator expressed that at least some kind of "objective aiding" is required.

*4.1.5 Making copies of protected material and submitting such copies as evidence in legal trials (PMFT 2585-17 and PMFT 4717-18).*¹² In PMFT 2585-17 a mother submitted written evidence comprising of a text authored by the father in a case concerning the custody of their child. The mother made a copy of the text and her legal counsel submitted it to the court. The father brought an action against the mother for copyright infringement.

The Patent and Market Court of Appeal held that submitting the copy to the court was neither distribution nor communication to the public. However, by making a copy of the text, the mother had infringed the father's exclusive right. Since the infringement was considered too insignificant, the father was however not entitled to any compensation.

An issue in the case was whether the limitation in Section 26 b in the Copyright Act was applicable. Under said provision, copyright does not prevent the use of a work in the interest of the administration of justice or of public security. The Patent and Market Court of Appeal came to the conclusion that the limitation was not applicable in the aforementioned case, since the Court considered it a prerequisite under said provision that it is an authority responsible for the administration of justice, e.g. the police or a prosecutor that makes use of the copyright protected material. However, in the later case PMFT 4717-18, the same Court came to the conclusion that said limitation may indeed also cover individuals' use, provided that a reasonable balance between the right owners and users is maintained.

4.1.6 No infringement of exclusive rights when a daily newspaper reproduced photographs from Facebook without the right holder's consent (PMT 722-17). A daily newspaper reproduced and published several photographs of two politicians, taken from one of the politician's private Facebook page, in an article on the newspaper's webpage and on Twitter. The politician holding the Facebook page claimed that the newspaper had infringed her rights to the photographs.

The main issue before the Patent and Market Court of Appeal was whether the exception under Section 23 item 3 of the Copyright Act was applicable. Under said provision works of fine art which have been made public may under certain circumstances be reproduced in a newspaper in connection with a report on a current affairs event, except if the work has been created for reproduction in such a publication.

The Patent and Market Court of Appeal concluded that the exception was applicable and that the newspaper had not infringed any exclusive rights to the photographs. The photographs were considered to have been made public, since they were available for anyone with a Facebook account. The newspaper's web-

¹² In this context reference may be made to a previous judgment by Göta Court of Appeal 15 October 2013 in case FT 311-13 illustrating a similar situation.

site and the newspaper via Twitter were considered as newspapers. Although the pictures were not new, they were found to have been reproduced in connection with a report on a current affairs event, *inter alia* since they pictured one of the candidates in an ongoing election of the leader of one of the political parties represented in the Swedish Parliament and showed the candidate during a journey to Israel which had not previously been reported.

4.1.7 Some other copyright case law from the Patent and Market Court of Appeal. In *PMT 10135-15* the Patent and Market Court of Appeal held that Samsung was required to report its import of computers and electronic tables to the collecting society that collects private copying levies. Such devices are consequently suitable for private copying and fall within the definition in Section 26 k of the Copyright Act.

In *PMT 11062-16* the Patent and Market Court of Appeal held, *inter alia*, that a motorboat could be considered a work of art that enjoyed copyright protection.

The Patent and Market Court of Appeal has since June 2016 examined several applications from right holders concerning internet service providers' duty to hand over details about their customers' IP addresses due to copyright infringements committed by the internet service providers' customers.¹³

4.2 Patents. 4.2.1 Reconsideration of decisions by the Swedish Patent and Registration Office concerning supplementary patent protection – (PMÖÄ 9847-16, PMÖÄ 9828-16, PMÖÄ 9632-16, PMÖÄ 9824-16, PMÖÄ 9836-16, PMÖÄ 9838-16, PMÖÄ 9848-16, PMÖÄ 9845-16). In 2016 several pharmaceutical companies made requests to the Swedish Patent and Registration Office to reconsider previous decisions regarding the denial to grant supplementary patent protection (SPC).

The requests were made following new case law from the CJEU maintaining that patent holders are entitled to longer protection than previously recognised by the Swedish Patent and Registration Office.

In light of the new case law from the CJEU, the Patent and Market Court of Appeal has held that the extension of the SPC period was valid.

4.2.2 A claim for patent limitation in an ongoing invalidity matter may be taken into account in a matter regarding an interim injunction, provided that the claimed patent limitation is of relatively simple nature (PMÖ 3565-17). The Patent and Market Court of Appeal has held that a claim for patent limitation, made in an ongoing invalidity matter, may be taken into account in a matter regarding an interim injunction. However, in order to be taken into account, the claimed patent limitation must be of relatively simple nature since the review at the interim stage is merely preliminary and general. In the case at hand, the Court considered that the limitation

¹³ PMÖÄ 660-16 (regarding compensation for legal fees), PMÖÄ 547-17 (time period for providing the information), PMÖÄ 9695-17 and 9696-17 (evidence), PMÖÄ 2917-17 (when the internet service provider did not possess the information).

claim made by the patent holder in an ongoing case of invalidity also gave rise to questions that were not straightforward. Consequently, the Court held that the patent holder had not shown probable cause for patent infringement and rejected the interim claim.

4.2.3 Services for purchasing parking permit services not a patent infringement (PMT 744-16). The Patent and Market Court of Appeal has not considered that services for purchasing parking permits via SMS or through an application infringed a patent for a method and a device for wirelessly controlling a sales transaction from a vending machine with a mobile station. Infringement has not been considered to exist in relation to the wording of the patent nor through equivalence.

4.3 Trademarks and trade names. 4.3.1 Genuine use of a trademark, likelihood of confusion and reputation (NJA 2017 s. 905). Länsförsäkringar brought a trademark infringement claim against the Estonian construction company Matek regarding the use of a logotype with a certain design. The claim concerned Matek's use of the logotype within five years from the registration of Länsförsäkringar's EU-trademark. The Supreme Court decided to request a preliminary ruling from the CJEU and asked whether the fact that the trademark holder had not put the trademark to genuine use within the EU for goods or services included in the registration within five years from the registration affected the holder's exclusive right and, if so, in what way.

The CJEU concluded that the holder of an EU-trademark has the right to, during the five year period after registration, prevent a third party from using in the course of trade an identical or similar trademark in relation to all goods and services which are identical or similar to those for which the trademark is registered, if there is a likelihood of confusion, without having to prove genuine use of the trademark for the goods or services in question.

Consequently, the Supreme Court concluded that Länsförsäkringar did not have to prove genuine use of the trademark for the relevant services. The Supreme Court also found that there was a high level of similarity between the marks as well as identity concerning certain services. Furthermore, the trademark enjoyed a reputation in Sweden and had therefore acquired a high degree of distinctiveness. However, considering the fact that the relevant public has a high level of attention due to the specific purchase situation and the type of services at hand (construction services), the Supreme Court found that there was no risk that the average consumer would confuse Länsförsäkringar's trademark and the Matek logo or be given the impression that there was an economic link between the companies. Neither was Matek considered to have taken unfair advantage of the reputation of Länsförsäkringar's trademark. Consequently, the Supreme Court found that there was no trademark infringement.¹⁴

¹⁴ The case is summarized and commented on by Arnerstål in NIR 2018 p. 137 ff.

4.3.2 Question of trademark use and trademark infringement in case of use for identical types of goods where the registered trademark consists of the English name of the type of goods written in a Swedish manner (PMT 7235-17). Pågen is the holder of a national trademark and an EU trademark for the word KRISPROLLES, registered for e.g. crisp rolls in class 30 of the Nice Classification. Pågen initiated trademark infringement proceedings against Bisca due to Bisca's use of "Crisp Rolls" and "CRISP ROLLS" for its sales of crisp rolls in Sweden.

The Patent and Market Court of Appeal concluded that both KRISPROLLES and Crisp Rolls/CRISP ROLLS are connected to the types of goods in question. With regard to the use of "Crisp Rolls" the Court found that the words had been placed on the packaging of the products with a small font, that the front of the packaging was dominated by the word "ORGANIC" and a descriptive word of the products, such as their flavour. On the top of the packaging, the trademark "Karen Volf" was indicated. Due to the way the packaging was designed, the Court found that the use of "Crisp Rolls" was meant to be considered as a description of the type of product. Consequently, the use of "Crisp Rolls" was not regarded as trademark use and could therefore not constitute trademark infringement.

With regard to the use of "CRISP ROLLS", the Patent and Market Court of Appeal found that the words were placed in a larger font and above the description of the type of crisp rolls included in the packaging. Despite its descriptive character, the use of "CRISP ROLLS" was therefore regarded to be an indication of origin and not a description of the goods. This use was therefore considered to constitute trademark use.

The Court thereafter found that the trademark KRISPROLLES, which is considered as a Swedish way of writing the English word "crisp rolls", had a low degree of inherent distinctiveness due to its descriptive meaning. According to the Court, the plaintiff had not established an enhanced distinctiveness through use, why the trademark had a limited scope of protection. In its assessment of the likelihood of confusion, the Court found that the type of goods was identical, that the marks were phonetically almost identical but that they contained visual differences that were not insignificant. Due to these visual differences and the limited scope of protection of the KRISPROLLES trademark, the Court found that there was no trademark infringement.

4.3.3 Calculation of reasonable compensation for trade name infringement (PMT 324-17). In a case regarding liability under Section 19 of the Trade Names Act (1974:156), the Patent and Market Court of Appeal found that a company negligently had committed a trade name infringement. The owner of the trade name only claimed reasonable compensation for use of the trade name, but not for other harm caused by the infringement, e.g. for goodwill damage.

Under Section 19 of the Trade Names Act, anyone who wilfully or negligently commits a trade name infringement shall pay reasonable compensation for the use of the trade name and compensation for any further damage caused by the infringement. When the amount of compensation is calculated, account

shall be taken of several factors, *inter alia* goodwill damage. According to the Court this does however not mean that goodwill damage should be a factor to take into account when calculating reasonable compensation. Due to the fact that the plaintiff had not claimed any compensation for goodwill damage, such kind of harm should not be taken into account when assessing the amount of compensation.

Further, since the plaintiff had neither presented any evidence about the level of a fictional license fee or about the strength and value of the trade name, it was not possible to apply Chapter 35, Section 5 of the Code of Judicial Procedure in order to estimate the compensation.¹⁵ Instead the Court made a conservative estimate of the compensation.

4.3.4 Imprisonment for persons involved in the sales of copies of design furniture (B 9635-16). A company marketed and sold copies of design furniture through the internet to, among others, customers in Sweden. Another Swedish company handled the transportation and storage in Sweden. Three persons involved in the furniture company selling the products were sentenced by the Patent and Market Court of Appeal to imprisonment for between 1,5 and 2 years for copyright and trademark infringement. One person involved in the transport company was sentenced to a conditional sentence (*Sw: villkorlig dom*) and fines for contributory copyright infringement.

4.3.5 No likelihood of confusion and no unfair advantage taken of a trademark with reputation (PMT 9856-15). The case concerned *inter alia* the question of whether a registered trademark and trade name containing the word YOGIBOOST infringed the earlier trademark YOGGI. The Patent and Market Court of Appeal found that there was no likelihood of confusion between the marks. YOGIBOOST was used for frozen yoghurt and YOGGI was registered and known for fruit yoghurt. The Court found that albeit the similarities between the products, the way they were sold differed. The Court also concluded that despite a visual and phonetic similarity, YOGIBOOST was differentiated from YOGGI by the spelling and the suffix "BOOST". According to the Court, YOGGI had a high degree of distinctiveness with regard to fruit yoghurt, but this was to a great extent linked to the way YOGGI was spelled with double consonants. The Court made an overall assessment with regard to all relevant factors, and came to the conclusion that there was no likelihood of confusion. Neither did YOGIBOOST take unfair advantage of the reputation of YOGGI.

4.3.6 Requests for preliminary rulings from the CJEU in two trademark related cases (PMT 3491-16 and PMÖÅ 9778-16). The Patent and Market Court of Appeal has requested a preliminary ruling from the CJEU in a case regarding copyright and trademark infringement, where the defendant had brought a cross-action

¹⁵ This provision gives the courts a possibility to estimate the amount to be paid by the defendant if it is not possible or too burdensome for the plaintiff to provide evidence of the damage suffered.

to declare the registered EU trademark MANHATTAN, held by the company Svenskt Tenn, invalid. The trademark is comprised of a design, originally for fabric, created by the well-known designer Josef Frank and is considered by the Court to be a copyright protected work. The trademark is registered for various goods and can be applied to such goods in different ways.

The questions referred to the CJEU concern the interpretation of Section 7.1. e) iii) in Regulation (EU) 2017/1001, i.e. the absolute ground for refusal of a sign which consists exclusively of a shape (or another characteristic) which gives substantial value to the goods.

The Patent and Market Court of Appeal has also decided to request a preliminary ruling from the CJEU in a registration matter concerning the word mark ROSLAGSÖL for certain non-alcoholic beverages and beer. The Patent and Registration Office dismissed the trademark application on the basis that it was confusingly similar to an older figurative mark containing the words ROSLAGS PUNSCH, registered for alcoholic beverages together with a so called disclaimer that the exclusive right did not include the word Roslagspunsch. The applicant appealed the decision to the Patent and Market Court, which granted registration. The decision was appealed to the Patent and Market Court of Appeal which decided to stay the proceedings and request a preliminary ruling from the CJEU.

The questions referred to the CJEU are whether the overall assessment that shall be made when appreciating the likelihood of confusion can be affected if a certain part of the older trademark has been excluded from protection at the time of registration and, if so, in which way such disclaimer can affect the assessment.

4.4 Trade secrets. 4.4.1 No right for the claimant to access material that has been seized according to Chapter 15 Section 3 of the Swedish Code of Judicial Procedure due to a trade secret infringement (NJA 2017 s. 457). With reference to an alleged infringement of its trade secrets, a claimant requested that the trade secrets in the defendant's possession should be seized under Chapter 15, Section 3 of the Swedish Code of Judicial Procedure. The District Court (i.e. the first instance) granted the claim and also held that the claimant had a right to access the seized material. The Swedish Supreme Court upheld the decision, but revoked the claimant's right to access the material, since a measure under Chapter 15, Section 3 of the Swedish Code of Judicial Procedure may not be granted in order to clarify whether a claim could be substantiated or to clarify the amount of the damage, similar to an infringement investigation under the intellectual property legislation.

4.5 Unfair marketing practices. 4.5.1 The concepts "advertisement" and "trader" (NJA 2017 s. 217). The Supreme Court has upon a question from a district court considered the concepts of "advertisement" and "trader" under the Act on Names and Pictures in Advertising (1978:800). Under this Act, a trader may not use a representation in marketing that includes the name or image of a person without the person's consent.

A municipality used a picture of a person in its advertisement with the purpose of *inter alia* informing about the appointment of the municipality as a European