

**Question Q232**

**National Group:** Sweden

**Title:** The relevance of traditional knowledge to intellectual property law

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**Questions**

**Analysis of current law and case law**

The Groups are invited to answer the following questions under their national laws:

1) Is TK defined in your national law?

No, it is not. However, Council Regulation (EC) No. 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed (which has direct effect in Sweden) includes the definition of “traditional” as “proven usage on the Community market for a time period showing transmission between generations” (cf. article 2.1. b).

2) If yes to question 1, what is the source of the definition?

N/A

3) If yes to question 1, how is TK defined?

N/A

4) If TK is not defined in your national law, is there any 'working definition' described in any draft law or regulation, policy document or other discussion material?

No

5) Does your national law provide for any protection (whether positive or defensive) for TK?

#### Trademarks and geographical indications

Within the EU, and thereby including Sweden, there are different forms of protection for names and certain traditional specialties.

According to the Swedish Trade Mark Act (2010:1877) Section 10:7, certain provisions of the Trade mark Act relating to infringement, shall be applied to an indication based on the provisions in

Council Regulation (EC) No. 509/2006 of 20 March 2006 on the guaranteed traditional specialties of agricultural products and foodstuffs,

Council Regulation (EC) No. 510/2006 of 20 March 2006 on the protection of geo-graphical indications and designations of origin for agricultural products and foodstuffs,

Council Regulation (EEC) No. 1576/89 of 29 May 1989 on general rules on the definition, description and presentation of spirit drinks,

Parliament and Council Regulation (EC) No. 110/2008 of 15 January 2008 on the definition, description, presentation and labelling and the protection of geographical indications of, spirits and repealing Council Regulation (EEC) No. 1576/89,

#### Patents

In the Swedish Patents Act (1967:837) oral disclosure (PL sect. 2) is valid as prior art relevant for the assessment of novelty and inventive step, thus giving a sort of defensive protection also for TK made publicly available orally prior to the application of a patent.

Furthermore, Swedish Patents Act (PL section 4) has provisions regarding prior use. In the case of TK that is not publicly known, and therefore not novelty destroying, this could defend the continuation of traditional practises, which could otherwise infringe patents that are granted.

Outside the primary focus of this questionnaire as defined in p.10 and p.12, it might be worth mentioning that Section 5 a of the Swedish Patents Decree (1967:838; as amended 2004:162) provides as follows:

*"If an invention concerns biological material of plant or animal origin or if it uses such material, the patent application shall include information on the geographical origin of such material, if this is known. If the origin is not known, this shall be indicated.*

*Lack of information on the geographical origin or on the knowledge of the applicant regarding the origin is without prejudice to the processing of the patent application or the validity of the rights arising from a patent granted."*

This provision is not sanctioned. The object of this provision is mainly for providers of genetic resources to be able to track patents claimed on genetic resources for which they have approved access.

This provision, even though limited to biological material, it may facilitate also TK holders that approved access to biological material with associated TK associated, to track this material.

### Marketing law

The Marketing Act (2008:486) provides in principle protection also for marketing in connection with TK. The Act applies to unfair business-to-consumer as well as business to business commercial practices. A commercial practice may be regarded as misleading if containing false information – and thereby being untruthful - or in any way deceives the average consumer in relation to i.a. the existence or nature of the product or the main characteristics of the product, such as its geographical or commercial origin as well as its production methods and the manufacturer's qualifications.

### Trade secrets:

The Swedish Act on the protection of trade secrets (1990:409) provides protection for information concerning the business or industrial relations of a person conducting business or industrial activities which that person wants to keep secret and the divulgence of which would be likely to cause a damage to him from the point of view of competition.

### Copyright

Certain aspects of TK could also be protected by copyright for a limited period of time.

Copyright protection may be asserted for literary and artistic works, including musical works, architectural works and applied art. The copyright is however tied to the individual creator or creators and not to a collective, such as a local community.

A performing artist also has certain rights to recordings of an expression of folklore. The rights to perform an expression of folklore are however not regulated in the copyright act.

6) If yes to question 5, is the protection found in:

- a) existing IP laws or regulations;
- b) adaptation of IP laws or regulations through sui generis measures for TK protection; or
- c) wholly sui generis laws or regulations relating to TK protection?

Existing IP laws. Please refer to the answer in 5)

7) If yes, to any part of question 6, please provide details of the law(s) or regulation(s), including where such detail exists:

- a) criteria for eligibility for protection;
- b) beneficiaries of protection;
- c) scope of protection;
- d) sanctions, remedies and exercise of rights;
- e) administration of rights;
- f) exceptions to and limitations on rights;
- g) term of protection;
- h) formalities to which protection is subject;
- i) transitional measures;
- j) consistency with other laws;
- k) national treatment and foreign interests; and
- l) trans-boundary cooperation.

Varumärkeslag (2010:1877) 10 Kap. 7 § (Trade Mark Act)

Patentlag (1967:837), Kap 2, 4 (Patent Act)

Lag (1990:409) om skydd för företagshemligheter (Trade Secrets Act)

Marknadsföringslag (2008:486) (The Marketing Act)

Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Copyright Act)

8) Are the protections described in response to questions 6 and 7:

- a) referable to TK alone; or
- b) related to or linked to the concepts of protection of:
  - i) genetic resources; or
  - ii) TCEs?

As the protection is solely defensive and not specifically adapted to TK, this question is not applicable to the Swedish situation.

9) If yes to question 8(b), please provide details of any linkages.

The Patent Decree §5b relates to the unsanctioned requirement of disclosing the origin of genetic resources.

10) Please identify any shortcomings in any protection of TK in your country by reference to the matters in questions 6 to 9 above.

As far as the Swedish Group is aware, there are no unmet obligations under any international IP treaties or conventions.

11) Please identify any significant case law in connection with protection of TK in your country.

As far as the Swedish Group has ascertained, there is no Swedish case law in connection with TK.

## II. Proposals for harmonisation

The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the role of TK in relation to IP law.

12) Is a harmonised definition of TK desirable?

An internationally harmonised approach of both definition of, and legal protection for, TK is desirable in order to facilitate research and trade.

13) If yes to question 12, please propose a definition of TK, or the concepts that should be included in any proposed harmonised definition of TK.

N/A

14) Is it desirable to have only one form of protection for TK, either positive or defensive, or both forms? Please state reasons.

See the comments on question 15

15) Should TK be protected by:

- a) existing IP laws or regulations;
- b) adaptation of IP laws or regulations through sui generis measures for TK protection; or
- c) wholly sui generis laws or regulations relating to TK protection? In your answer, please identify which and state reasons.

Any form of protection of TK should be aligned with, and not run counter to, the principles of the existing IP system. Whether this is done through adaptation of existing laws or introduction of sui generis systems is of lesser importance.

16) If yes to any part of question 15, is a harmonised approach to protection desirable? In your answer, please state reasons.

As stated above, an internationally harmonised approach of both definition of, and legal protection for, TK is desirable in order to facilitate research and trade. In the opinion of the Swedish Group, the most important aspect is to provide a legal framework that creates legal certainty for holders of TK/TCE and parties wishing to use or commercially exploit TK/TCE. Such legal framework should define concrete rights and responsibilities for both holders and users.

17) If yes to question 16, how should that approach be implemented

- a) at an international level; and
- b) at a national or regional level?

Please see question 16.

18) Having regard to WIPO/GRTKF/IC/19/5, please provide any proposals you have as to a harmonised approach concerning:

- a) criteria for eligibility for protection;
- b) beneficiaries of protection;
- c) scope of protection;
- d) sanctions, remedies and exercise of rights;
- e) administration of rights;
- f) exceptions to and limitations on rights;
- g) term of protection;
- h) formalities to which protection is subject;
- i) transitional measures;
- j) consistency with other laws;
- k) national treatment and foreign interests; and
- l) trans-boundary cooperation.
- m) any specific measures for facilitating protection of TK, eg, systems for recording TK, specific mechanisms for benefit-sharing, or collective or reciprocal systems of administration on behalf of indigenous people or local communities.

The Swedish group recognizes the rights of indigenous people and the value of traditional knowledge. Moreover, as the Swedish Group sees it, it is important to ensure that an adequate balance is achieved between the interests of providers and the legal certainty of users. For example, it is important that traditional knowledge that is known or used outside the community of the beneficiaries, traditional knowledge being in the public domain and is not protected by an IPR, as well as traditional knowledge representing generally well-known applications of principles, rules, skills, know-how, practices and learning all remain available for use in science and trade.

National Groups are invited to comment on any additional issue concerning the relevance of TK to IP law.

### **Summary**

Swedish national law does not provide any specific protection for TK, although conventional IP law provides some defensive protection for TK. There is no case law in connection with TK.

An internationally harmonised approach to the protection of TK is desirable in order to facilitate research and trade. Such an approach must give legal certainty to all stakeholders and be generally aligned with existing IP regulations.

### **Zusammenfassung**

Die Schwedische nationale Gesetzgebung bietet dem traditionellen Wissen keinen ausdrücklichen Schutz. Nichtdestoweniger ist Schweden durch internationale Rechtsbeziehungen in verschiedenen immaterialgüterrechtlichen Hinsichten zum Schutz von traditionellem Wissen verbunden. An Rechtssprechung fehlt es aber.

Zur Förderung des traditionellen Wissens wäre für Forschung und Handel eine internationale Annäherung durch Harmonisierung wünschenswert. Eine solche Annäherung muss eine rechtliche Garantie schaffen für alle Beteiligten und muss völlig mit vorhandenen Rechtsbedingungen des internationalen industriellen Rechtsschutzes übereinstimmen.

### **Résumé**

Le droit suédois n'offre pas de protection spécifique pour le savoir traditionnel. Le droit à la propriété intellectuelle offre une certaine protection défensive concernant le savoir traditionnel. Il n'existe pas de jurisprudence pour ce qui est du savoir traditionnel.

Une approche harmonisée internationale pour la protection du savoir traditionnel serait désirable pour faciliter la recherche et les échanges commerciaux.. Une telle approche devra offrir une garantie légale pour tous les actionnaires et être conforme d'une manière générale à la réglementation existante sur le droit à la propriété intellectuelle.