Sweden
Suède
Schweden

Report Q 188

in the name of the Swedish Group
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Conflicts between trademark protection and free speech

Questions

1) Analysis of current legislation and case law

As an introductory note, the Swedish Group would like to point out that there are no provisions under Swedish law providing protection from "non-commercial" defamation for companies in the form of libel and slander rules. Such protection is only offered in relation to marketing practices and similar commercial contexts.

1.1) a) What instrument of your law (eg. Constitution) guarantees the right to freedom of speech?

The following constitutional instruments guarantee the right of freedom of speech:
- Instrument of Government
- Freedom of the Press Act
- Freedom of Expression Act
- The European Convention on Human Rights

b) What does the right to freedom of speech include? Is both artistic and commercial speech protected? If so, does commercial speech have a different degree of protection?

According to the constitutional instruments, both artistic and commercial speech is protected to the same degree. However, according to court practice, commercial speech may be deprived of its protection related to trademark and marketing practices legislation in case the speech has a commercial purpose and a purely commercial object; for further comments please see 1.2 a below.

c) Are also corporations or only individuals entitled to invoke freedom-of-speech arguments?

Both corporations and individuals are entitled to invoke such arguments.

d) Is free speech only protected from unwarranted governmental interference, or is it also implicated when a private party calls upon a court to enforce rules of law whose effect would be to restrict or penalise expression?

Free speech may also be called upon by a private party in court.

1.2) a) How are free speech interests invoked in trademark litigation?

The criteria applied by the Swedish Courts in trade mark litigations for determining whether a free speech argument is justified is well illustrated by the Swedish Supreme Court judgment on 29 January 2003, in case TV4 AB and TV Spartacus KB vs. Bröderna Lindströms Förlags AB (NJA 2003 p. 25), noted also in paragraph 17 of the Working Guidelines for Q 188.

Bröderna Lindströms Förlags AB, a publishing company for periodicals, publishes a magazine for youngsters “OKEJ”. One of the editions included a poster and a calendar displaying the registered trade mark TRE KRONOR – a well-known TV-series – together with photos of the TV actresses. The front page of the magazine – in English translation – presented the text “ Megaposter & Calendar with TRE KRONOR and METALLICA”. In addition the defendant presented, in a radio channel, a commercial spot for the magazine OKEJ referring to the poster and calendar presenting TRE KRONOR.

The Supreme Court stated, to begin with, that certain actions were not protected under the Constitution, namely in case the actions was of a truly commercial nature; i.e. had a commercial purpose and a purely commercial object. The Court moved on to conclude that the use of “TRE KRONOR” in the magazine was not of a truly commercial nature and therefore protected by the constitution. In contrast, the Court found that the radio spot was not protected under the constitution since it apparently was part of the marketing of the magazine and therefore had a truly commercial purpose. Thus, it was possible to try the claims for damages concerning the radio spot but not the other.

According to statutory provisions the exclusive right afforded to the trade mark holder is explicitly restricted to use of a trade mark in the course of business activities.

Thus, outside the scope of application of the trade mark law fall all kinds of non-commercial use of a trade mark. A typical case was the non-profit association, Non Smoking Generation’s, anti-tobacco campaign using MARLBORO trade marks and slogans in ads with photos of a cemetery. This issue was never brought to court, but it was widely held that it was not a case of trade mark use under the Trade Marks Act.

b) Is there a provision in your trademark law which specifically concerns the admissibility of e.g.:
- **criticism of another’s mark or derogatory reference to another’s mark;**
- **parody, satire or irony;**
- **artist’s use of another’s mark;**
- **using another’s mark as a badge of loyalty or allegiance;**

- **using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product**

to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use is understood as involving a non-trademark use in which case the question of freedom of speech does not arise).

No such explicit provisions exists. On the other hand, as stated in our response to question 1.2. a) above, trade mark law can not be invoked in a non trade mark use situation.

c) If no such provisions exist, how are free speech interests invoked in trademark litigation? Is there an "open end clause" or "fair use clause" in your trademark law which permits taking into account freedom-of-speech-arguments? If not, are there any other gateways in your trademark law to permeate free speech concerns? Or do courts apply freedom-of speech arguments directly with reference to the constitution?

The Swedish Courts apply arguments directly with reference to the constitution, cf. our answer to 1.2 a) above. The courts' discretion is fairly limited as there is a presumption that free speech arguments prevails in case of doubt.

1.3) If there are trademark infringement cases in your country where defendant primarily sought to attack a company's ecological or employment policy, commercial practices and the like, do these cases also address the application of rules prohibiting defamation such as libel and slander or do they focus on the tarnishment of plaintiff's trademarks only? (The National Groups are not expected to elaborate on their country's laws prohibiting defamation.)

Cases would presumably not address defamation rules but only focus on tarnishment of trademarks.

1.4) a) If you consider the trademark infringement cases in your country in which freedom of speech-arguments were invoked what are the criteria applied by courts for determining whether a freedom-of-speech argument is justified? How important is the reputation of the trademark in question? Does it matter whether the use of the trademark in question is non-commercial or may free speech-arguments also be invoked if the trademark use is mainly commercial in nature? Does it matter whether the use of the trademark involves an expression or social discourse of objective/ considerable value or a contribution to the public debate? Is the defendant allowed to express his views in a trenchant way? Or is the defendant required to report in a balanced way or even sparingly?
If necessary, please differentiate between:
– criticism of another's mark or derogatory reference to another's mark;
– parody, satire or irony;
– artist's use of another's mark;

– using another's mark as a badge of loyalty or allegiance;
using another's mark for the purposes of comparison, point of reference, description, identification, or to convey information about the characteristics of defendant's own product

to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech (please specify in case use is understood as involving a non-trademark use in which case the question of freedom of speech does not arise).

The answer to most of the questions has already been dealt with in 1.2. a) above. The Swedish Group is of the opinion that free speech arguments applies equally in Sweden irrespective of the trade mark is reputed or not.

There is no reason to believe that the contents of the use of the trademark or the defendant's way of expressing his views would matter for the courts to judge if freedom of speech arguments are justified.

b) Specifically, please describe how joke articles are assessed.

The Swedish courts have not tried any trademark cases related to joke articles where freedom of speech arguments have been invoked. The Swedish Group is of the opinion that such articles would be assessed in accordance with the free speech regulations in the Freedom of Press Act.

c) May using another's mark as a badge of loyalty or allegiance be considered as an exercise of the constitutional right of freedom of speech? Does it matter whether the scarves and other goods are sold to consumers? Does it matter whether the manufacturer indicates that the goods are not original?

The Swedish courts have not tried any trademark cases related to badges of loyalty or allegiance where freedom of speech arguments have been invoked.

Sweden is member of the EU and has implemented the trademark directive 89/104. The courts would therefore have to adhere to the ECJ ruling in C-206/01 Arsenal Football Club vs. Matthew Reed, which holds that the sale of goods with a trademark the can also be regarded as a badge of loyalty to consumers in the course of business activities may be prohibited as trademark infringement regardless of if they are sold with an indication of "original" or not.

In an old Swedish Supreme Court judgement (18 March 1937, "Chalmers-ringen", NJA 1937 p. 209) the use of a registered trademark on a ring worn by graduates from a technical college was held not to be trademark use, Based on this, the Swedish Group is of the opinion that the use of a trademark by e.g. a football fan on his or her scarf, sweater or hat as a badge of loyalty or allegiance would not be regarded as trademark use as it would not be in the course of business activities. The same would probably be true if a dedicated fan would put trademarks on scarves and give them away to other fans for free with no intention of doing business in relation thereto.

d) To the extent that such use may be considered as an exercise of the constitutional right of freedom of speech please specify the cases in which the defendant is entitled to use another's mark for the purposes of comparison, point of reference, description, identification or to convey information about the characteristics of defendant's own product to the extent that such use may be considered as an exercise of the constitutional right of freedom of speech? (Please specify in case use is understood as involving a non-trademark use in which case the question of freedom of speech does not arise).

The Swedish Group is of the opinion that the uses noted in 1.4. d) normally is not considered as an exercise of freedom of speech but is rather motivated by consumer law, competition law or allowed under marketing practices laws.

2) Proposals for adoption of uniform rules

The Grups are invited to put forward any proposals for adoption of uniform rules for balancing trademark owner's interests and defendant's freedom of expression concerns.

In most jurisdictions freedom of expression issues are governed by constitutional instruments that are superior to trademark regulations. It is the view of the Swedish Group that any proposal regarding the adoption of uniform rules would involve proposals to change constitutional instruments or principles in various jurisdictions, and that the format of the present report does not allow for such proposals. The superiority of the constitutional right of expression makes it difficult to harmonize rules among different jurisdictions also because constitutional issues are treated in different procedures. In Sweden any court may try a freedom of expression argument based on the constitution, but different jurisdictions have different procedures involving i.a. constitutional courts.

It is the opinion of the Swedish Group that the balancing of trademark owners' interests and freedom of expression concerns should be guided by a differentiation between commercial and non-commercial use of the trademark, where freedom of expression may be limited in commercial use but not in non-commercial use.

Summary

The right of freedom of speech in Sweden is guaranteed in constitutional instruments and include both artistic and commercial speech. Freedom of speech arguments may be invoked by both individuals and corporations.

The protection of commercial speech may be limited in relation to the use of trademarks. According to court practice use of a trademark is not protected by the

right to freedom of speech if it is of a truly commercial nature, i.e. has a commercial purpose and a purely commercial object.

Résumé

En Suède, ce sont des instruments de rang constitutionnel qui garantissent la liberté d'expresion. Cette liberté s'applique à l'expression artistique comme à l'expression commerciale. Elle peut être invoquée par les particuliers ou par les sociétés.

La protection de la liberté d'expression peut être limitée dans des cas d'usage d'une marque commerciale. La jurisprudence indique que la liberté d'expression ne peut être invoquée par celui qui utilise une marque, si cet usage est de nature véritablement commerciale, c'est à dire qu'elle poursuit un objectif commercial et qu'elle concerne des considerations purement commerciales.

Zusammenfassung

Das Recht auf Redefreiheit ist in Schweden verfassungsrechtlich geschützt und umfasst künstlerische sowie gewerbliche Sprache. Redefreiheitsargumente können sowohl von Individuen als auch von Unternehmen angeführt werden.

Der Schutz der gewerblichen Sprache kann jedoch in Bezug auf die Anwendung von Marken begrenzt sein. Gemäss Rechtssprechung fällt die Anwendung einer Marke nicht unter das Recht auf Redefreiheit, wenn diese Marke rein kommerzieller Art ist, d.h. einen kommerziellen Zweck hat und in einem rein kommerziellen Zusammenhang vorkommt.

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