

## Sweden

### Report Q185

in the name of the Swedish Group

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#### **I. Article 43 TRIPS Agreement and Article 6 of the IP Directive**

##### **2. Questions to be answered regarding content, requirements and extent**

##### **a. Does your country already provide for a mechanism in compliance with Article 43 (1) of the TRIPS Agreement and/or Article 6 (1) of the IP Directive.**

Swedish courts can order a party to legal proceedings, as well as a third party, to produce evidence in the form of written documents or physical property at the request of one of the parties. It is a condition of the availability of such an order that the documents or property in question are of probative relevance to the pending case and do not disclose a trade secret (unless special reasons can be invoked). Legal privilege also exists in respect of certain professionals, including physicians and legal professionals admitted to the bar (swe. *advokater*), but for instance not patent attorneys.

##### **b. How does your system work and what are its specific requirements in particular:**

- **Are these mechanisms arranged differently as to the different types of IP (i.e. patents, utility models, design models, trademarks and copyright).**

The rules described are set forth in the Code of Judicial Procedure and are generally applicable i.e. to disputes concerning all forms of IP.

In addition, since January 1, 1999, based on special provisions in IP legislation, holders of patents, trademarks, registered designs, copyright and integrated circuit topography rights may obtain a court order prior to or during a trial for an 'infringement investigation' at the premises of the alleged infringer. The purpose of such an 'infringement investigation' is to seek to secure evidence of the existence and extent of an alleged infringement. In urgent

cases, an ‘infringement investigation’ may be obtained *ex parte*. For further information regarding ‘infringement investigations’, see Section II. below.

- **According to Article 43 (1) of the TRIPS Agreement and Article 6 (1) of the IP Directive, the claimant must present reasonably available evidence sufficient to support the claim: Is there a comparable requirement in the laws of your national system? If yes, it will be interesting to know the extent to which the infringement must already be proven beforehand by the claimant.**

There is no clear provision in the Code of Judicial Procedure that stipulates a necessity for a claimant to present reasonably available evidence sufficient to support the claim in order to obtain such measures.

Precedents from the Supreme Court do however specify that the court has to balance the interests of the claimant with those of the defendant when ordering the production of evidence. In doing so, the court will also consider the strength of the case as presented by the party requesting the production of evidence. It is, however, possible for a court to defer a decision on the production of evidence pending an interim judgment to determine whether the conditions for the production of evidence have been satisfied. An example of this is when the production of evidence concerns documents of relevance for a potential damages award prior to a finding of infringement itself.

- **How (clearly) and to what extent must the claimant “specify” the means of evidence to be produced that is within the control of the opposing party?**

A request for production of evidence is submitted to the court handling the case. It is a requirement that the request specifies the evidence in sufficient detail to permit its ready identification (for example: “invoices concerning the sale of product y from [time] x until x”), and that it states further the relevance of the documents or property to the points at issue in the case. It is possible for a party seeking evidence to subpoena witness testimony from individuals (normally employees of the opposing party) in order to investigate the existence of relevant documents, etc and permit their specification in a subsequent request for production of evidence.

- **Are there other requirements which must be fulfilled?**

No.

c. **Regarding the extent and enforcement of the order:**

- **Is it possible to get such an order only in view of proving the infringement or can the order also be focused on evidence which may be relevant for the determination of the extent of damages?**

It can also be focused on evidence which may be relevant for the determination of the extent of damages.

However, as stated above it is possible for a court to defer making a decision on the production of evidence pending an interim judgment to determine whether the conditions for the production of evidence have been satisfied.

- **Can such order also be used to identify the possible existence of evidence, i.e. are there any means in your system that enable the claimant to search for evidence?**

It is not possible to use the order to search for evidence that is not specified in the request (see also Section II. below regarding an ‘infringement investigation’).

- **How can the order be enforced?**

A court order to produce evidence can be sanctioned with a penalty of a fine, or enforced through executive measures taken by the Enforcement Authority (*Kronofogdemyndigheten*).

- **Is it possible by means of such order to effectively enter the private sphere of the opposing party (for instance premises)?**

If by “private sphere” it is meant, for example, personal notes meant only for personal use; it is not possible to order that such notes be produced as evidence unless there are special reasons for the same.

An ‘infringement investigation’ may only be performed in premises to which the investigated party has unrestricted possession, i.e. it is not possible to request the performance of an investigation on a third party’s premises. (Legislative history, Prop. 1998/99:11 p. 57 and 86 *Ny skyddsåtgärd vid immaterialrättsintrång*.)

- **What are the consequences if the order is not complied with by the opposing party. For example: Shift of burden of proof, or a solution comparable to the solution of Article 43 (1) of the TRIPS Agreement?**

As noted above, there are means for enforcing an order for production of evidence, and such orders are as a rule complied with. Should a party not do so, a judge may draw a negative inference in respect of the other evidence proffered by the relevant party.

- **Can such order be obtained in your country based on an IP right registered in another country but not registered or even applied for in your country?**

In the event that a Swedish court has taken jurisdiction over a case, it would in principle be possible to obtain evidence relating to infringement of foreign IP rights.

You are referred also to paragraph (e)(v) below applicable (in the converse) in cases where the Swedish court has not taken jurisdiction over a case.

- d. **Does your system provide for legal presumptions comparable to the stipulation of the second sentence of Article 6 of the IP Directive. This provision apparently refers to a problem arising in cases where a large amount of infringing items such as optical discs are to be seized. Requiring detailed proof of copyright for each infringing item would lead to loss of time effort and money by the right holder.**

There is no such specific legal presumption in the Code of Judicial Procedure.

**e. Questions regarding procedural aspects:**

**i) What is the competent court? Who makes the decision, an administrative or a judicial body?**

The competent court is the court where the case is pending. The decision is made by that same court. There is a possibility to secure evidence outside of a pending case. In such case the competent court is the court of convenience.

**ii) How costly and time-consuming are these proceedings?**

The expense and length of time required to obtain such an order depend on the volume and complexity of the evidence sought. The cost and time aspects are normally not deterrent factors when compared to the expense and duration of the main proceedings themselves.

**iii) Is the order subject to appeal?**

- **by whom?**
- **within what time-limit?**
- **On what grounds?** You are referred to paragraph (iv) below.
- **Before what court?**

Yes, the order is subject to appeal. The respondent is first required to make a formal notification, within a week of the decision, of its intention to appeal, and is thereafter given instructions on how to appeal. The appeal is to the Court of Appeal within a period of three weeks of the date in which those instructions are issued. The party requesting production of evidence can appeal a negative decision only when appealing the case as such.

A claim for an order to produce evidence which has been made at the start of a proceeding may on occasion be denied on the ground that the analysis is not sufficient and that the same claim may conveniently be granted at a later stage of the proceedings.

**iv) What kind of counter-arguments may successfully be asserted against such an order, or what counteractive measures can be taken by the respondent in order to lift the order?**

The party that is the subject of the request to produce evidence – normally the opposing party in the pending case – will be given an opportunity to respond to the request. The main grounds for opposing a request for production of evidence are:

- (a) that the documents or property in question are insufficiently specified;
- (b) that the documents or property in question have no probative value in the pending case; or
- (c) that the disclosure of such documents or property would disclose a trade secret, and that there are no special reasons to nevertheless order the production of evidence.

As regards counteractive measures, the respondent can appeal the order.

**v) What are the implications if either claimant or respondent or both parties are foreigners?**

If necessary, a Swedish court may request assistance from foreign authorities in order to obtain evidence from outside Sweden. It may do so under certain international conventions to which Sweden is a party, namely the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 and the Convention of 1974 between Sweden, Denmark, Finland, Iceland and Norway regarding mutual assistance with service and taking of evidence. The possibility for a Swedish court to request assistance in obtaining evidence by a court of a Member State in the EU is regulated by the Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, which applies from 1 January 2004.

**vi) Is the order enforceable even if an appeal is pending?**

Yes, although the court may order the claimant to provide security for possible damages in case the order is set aside on appeal.

**3. Questions to be answered regarding limits**

**a. Whether and how and through what procedures can secret information (business information, know-how etc.) of the opposing party be protected in the laws of your system?**

According Chapter 36 Section 6 of the Code of Judicial Procedure, a witness is entitled to refuse to respond to questions on the grounds that his response would disclose a trade secret (*Swe. yrkeshemlighet*). A witness is only compelled to respond to such a line of questioning if there are special reasons to require his response. The same rule applies in respect of written evidence (Chapter 38 Section 2 of the Code of Civil Procedure read together with the said Chapter 36 Section 6). A party to the proceedings is always able to freely choose whether or not he wants to answer.

Furthermore, trade secrets are protected pursuant to the Secrecy Act. According to Chapter 8 Section 7 of the Secrecy Act, information about business or production conditions are secret in court proceedings if it may be assumed that disclosure of the same would cause the proprietor substantial damage. Nevertheless, parties to the proceedings may still as of principle have access to information relevant for the proceedings (Chapter 14 Section 5 of the Secrecy Act). The protection for business secrets given in Chapter 8 Section 17 of the Secrecy Act also extends to oral hearings in courts (which are otherwise held in public). According to Chapter 5 Section 1 of the Code of Judicial Procedure, hearings may be held *in camera* if it is expected that information that is deemed secret pursuant to said rule in the Secrecy Act will be presented.

**b. In particular, are there in your system procedural possibilities to restrict the access to the information to specific persons involved in the proceedings (attorney only, neutral expert)? If so, how is this restriction legally implemented and ensured?**

Swedish law does not provide for any such procedural measures.

**c. How can abuses be prevented?**

If a witness refuses to answer questions that the court has ordered him or her to answer in accordance with Chapter 36 Section 21 in the Code of Judicial Procedure, the court may impose fines on the witness and even place the witness in custody for up to three months. These sanctions are not available with respect to parties and representatives of parties.

As regards documents, the court may sanction a non-compliant party with a monetary fine.

The court may also order the intervention of the Swedish Enforcement Authority (Chapter 38 Section 5 of the Code of Judicial Procedure).

In certain circumstances, it may constitute a criminal offence to destroy, make unusable or withhold documents (Chapter 14 Section 4 of the Criminal Code). The maximum penalty is two years imprisonment.

The option to request a hearing *in camera* to avoid the disclosure of trade secrets restricts the possibility for the opposing party to refuse disclosure of relevant evidence. A similar option is allowed for the redaction of trade secrets from written evidence (Chapter 38 Section 1 of the Code of Judicial Procedure).

The possibility to draw negative inferences as a result of the non-compliance of the opposing party (or its representatives), such as provided by Chapter 35 Section 4 and Chapter 42 Section 8 of the Code of Judicial Procedure for example, would probably have very little, if any, application when the opposing party has successfully withheld oral or written evidence by invoking the 'trade secret' defence.

**d. Is it possible for the opposing party to rely on privileges such as attorney/client privilege?**

- **If so, are there different types of privileges?**

*Infringement investigation*

An order for an 'infringement investigation' may not include a document assumed to contain information the disclosure of which would be prohibited in witness testimony (principally pursuant to the Secrecy Act e.g. by reason of a legal privilege). The document may not be seized from the possession of that person or the person who owns the confidentiality therein.

*Obligation to produce documents*

A party may not be ordered to produce a written document if the contents of such document disclose a trade secret and no special reason exists which demands production of the document (Chapter 38 Section 2 Paragraph 2 compared to Chapter 36 Section 6).

The criteria applied by the Swedish courts for determining whether a special reason exists is illustrated by case law (Swedish Supreme Court, NJA 1986 p 398). The claimant in that case petitioned the court to order the defendant to produce documents regarding matters such as sales revenue. The Supreme Court stated that the data, especially with regard to

the competition situation in the relevant business area, constituted a trade secret of the defendant, and established that the requirements for a special reason must be relatively high. In the immediate case these requirements were not considered to be fulfilled. The Court also held that it is relevant how well supported the assertion of infringement is.

Furthermore, the obligation to produce written documents does not extend to rough notes or to any other personal notes prepared exclusively for a person's private use, unless a special reason exists for their production. (An 'infringement investigation' is not subject to this restriction.)

- **What are the possible consequences if a fact cannot be proven due to the invocation of a privilege?**

The rules concerning presentation and evaluation of evidence are relatively liberal in the Swedish courts (Chapter 35 Article 1 of the Code of Judicial Procedure). However, this does not imply that the court may evaluate the evidence on a purely arbitrary basis. The courts must nevertheless take into account any of the professional privileges stated in Chapter 27, Section 2 of the Code of Judicial Procedure and asserted by the opposing party.

- d. **What are the consequences if it turns out that the order was unjustified?**

The applicant has strict liability for purely financial damage in the event that the court ultimately determines that the opposing party has not infringed the applicant's intellectual property rights.

- e. **Is the order subject to a security bond?**

In order for an 'infringement investigation' to be issued the applicant must provide security for injury which may be caused to the opposing party (i.e. a pledge, a guarantee or a bank guarantee). Where the applicant is not able to post such a bond, the Court may lift this obligation. If the opposing party does not accept the adequacy and nature of the security, the Court will examine the same (Article 56 c of the Copyright Act, Article 41 c of the Trade Mark Act, Article 59 c of the Patent Act, Article 37 c of the Designs Act, Article 20 c of the Company Name Act, Article 37 c of the Integrated Circuits Act, Chapter 9 Article 7 c of the Plant Variety Act, Chapter 2, Article 25, of the Enforcement Code: also case law from the Swedish Supreme Court NJA 1989 p. 52 regarding a conditional bank guarantee).

#### **4. Questions to be answered regarding future improvements**

- a. **According to the opinion of your national group, are there ambitions or motivations to further develop or improve your system?**

The national group has no specific suggestions as to improvements, as the group believes that the Swedish legislation is in compliance with both TRIPS and the IP Directive in this respect.

- b. **Are there any governmental or public ambitions in your country to improve or to change the existing system?**

No. The Swedish Government is of the opinion that the existing system complies with the provisions referred to in this Section.

- c. **The following question is particularly addressed to the national Groups within the European Union: Do you think that the laws of your national systems are already in compliance with the said provisions of the IP Directive?**

Yes, we believe that the laws are in compliance with the relevant provisions of the IP Directive.

## **II. Article 50 TRIPS Agreement and Article 7 of the IP Directive**

### **2. Questions to be answered regarding content, requirements and extent**

- a. **Do you have in your national law measures which could be deemed analogous to or comparable with the measures described above?**

Civil measures for preserving evidence relating to alleged infringements of intellectual property rights were implemented into Swedish law on January 1, 1999 to give effect to the IP Directive. These measures have been uniformly regulated for all different kinds of intellectual property rights, including rights neighbouring to copyright. Provisions regarding ‘infringement investigations’ are found in identical terms in the Act on Copyright in Literary and Artistic Works, the Trademarks Act, the Patents Act, the Design Protection Act, the Business Names Act, the Act on the Protection of Topographies for Semiconductor Products and the Act on the Protection of Plant Breeder’s rights.

- b. **If so, what are the differences?**

Unlike Article 7 of the IP Directive, the Swedish rules on ‘infringement investigations’ are not applicable on a *quia timet* or anticipatory basis save in respect of acts preparatory to an infringement or acts which are themselves illegal.

- c. **Regarding content, requirements and extent: Reference is made to the catalogue of questions under B. I., which may equally apply to the measures according to the above provisions and which may be taken as a guideline for describing content, requirements and extent of the available means, in particular:**

- i) **Are there differences as to the types of IP?**
- ii) **To what extent must the infringement already be proven beforehand by the claimant?**
- iii) **How (clearly) and to what extent must the claimant “specify” the means of evidence to be produced?**
- iv) **Are there other requirements which must be fulfilled?**
- v) **Is the measure only applicable in view of proving the infringement or is it possible to apply it to evidence relevant for the extent of damages?**



- vi) Can such an order also be applied to identify the possible existence of evidence, i.e. are there any means in your system enabling the claimant to search for evidence?**
- vii) How can the order be enforced? For instance, is it possible by means of such an order to enter the private sphere of the opposing party (for instance premises) and/or to effectively seize suspected “infringing” products? Who is entitled to enter the respondent's private sphere?**
- viii) What are the consequences if the opposing parties refuse access?**

Where there is probable cause that a person has committed an infringement, the Court may order that an investigation may be undertaken in respect of that person in order to search for physical property or documents which are believed to be of importance for the inquiry into the infringement. As mentioned in paragraph 2(b) above the rules applicable to ‘infringement investigations’ are applicable to criminal attempts or preparatory acts to commit infringement in intellectual property rights. The standard of proof for the infringement (probable cause) is relatively low.

The claimant does not have to provide evidence that the infringement was committed intentionally or negligently. It is sufficient that it can be reasonably assumed on an objective basis that an infringement has occurred.

The purpose of an ‘infringement investigation’ is to preserve evidence, consisting of either physical property or documents (and including electronic documents), relating to the infringement. In order for the measure to be effective, an ‘infringement investigation’ may include the search for business documents or other documents concerning the business of the person subject to the investigation. Examples of such documents, mentioned in the *travaux préparatoires*, are business agreements, purchase orders, invoices or drawings and other descriptions. An ‘infringement investigation’ may not include the search for documents which contain information subject to professional secrecy or written communication between a suspect and his closely related. An ‘infringement investigation’ cannot also be used to search for factual circumstances, as, for example, observing a patented process.

The claimant must in the application specify the purpose of the investigation, what kind of objects and/or documents that should be searched for and which venues should be searched. It is sufficient if the documents are specified in a way that functionally describes the document(s) in order for the Court to assess if the documents can be searched for. In the *travaux préparatoires* an example was provided that illustrates this; the applicant does not need to specify the evidence to be produced as, for example, a contract of sale through which the opposing party has bought a consignment of “jeans of the brand...” from an identified person. It is sufficient that the application states “documents which show that the opposing party has purchased jeans of a certain brand ...”. It could be argued that the Swedish rules on ‘infringement investigations’ can be applied to identify the possible existence of evidence and that these rules thus enable the claimant go on a fishing exercise. However, on the other hand, a request for a search of all the opposing party’s documents regarding a certain procedure or a certain product would not normally be acceptable.

As mentioned above, the purpose of the investigation is to preserve evidence relating to the infringement, including the extent of the infringement, which evidence will be relevant for deciding the extent of damages.

The opposing party is to be given the opportunity to respond to an application before an order for an 'infringement investigation' is issued. However, where a delay would entail a risk that physical property or documents of importance for the inquiry of the infringement might be removed, destroyed or distorted, the Court may immediately issue an order to be enforceable unless and until otherwise decided.

An order for an 'infringement investigation' is immediately enforceable. The order expires if an application for its execution has not been filed within one month of its issuance.

An order for an 'infringement investigation' is executed through the local Enforcement Authority in accordance with the conditions prescribed by the Court and certain parts of the Enforcement Code. The opposing party is to be informed of the time for the execution only if the order for an 'infringement investigation' has been issued after hearing the opposing party.

It is possible by means of an order for an 'infringement investigation' to enter the private sphere of an opposing party. If the opposing party denies the Enforcement Authority access to the premises that are the subject of the order, the Enforcement Authority may force the lock or gain entry to the premises in some other way. The executive officer is authorised to use such force as he or she deems necessary in the circumstances. However, the use of force against persons is only acceptable if the executive officer meets with resistance and use of force is proportionate to the purpose at hand.

**d. What experiences have been made in the past with such measures?**

In their application of the rules on 'infringement investigations', the Swedish courts have in generally taken into consideration the fact that the standard of proof for infringement is relatively low (probable cause). Many of the applications for 'infringement investigations' have been granted, and many of these have been granted *ex parte*. However, the courts tend to be more cautious in granting 'infringement investigations' when it comes to alleged patent infringements, since there is a greater risk that trade secrets might be disclosed than for example in the event of trademark infringements. However, from the right holder's point of view, the rules on 'infringement investigations' have generally had the effect that was intended when these measures were originally introduced. The rules have improved the possibility for right-holders to secure evidence in order to subsequently claim further interim measures such as an injunction prohibiting an act of infringement or damages (under penalty of a fine).

**3. Questions to be answered regarding limits**

**As the focus of the measures regarding the question whether and how and by means of what procedures secret information (the opposing party's business information, know-how etc. may be protected) is the same as indicated above in section B. I, reference is made to the catalogue of measures in B. I (3), Limits). This also relates to the extent and limits of the measure, including the question of how privileges such as attorney/client privileges are to be taken into consideration in your national system, i.e. the questions should be taken as a guideline for describing the limits of the means.**

An ‘infringement investigation’ may be granted only if the reasons for the measure outweigh the inconvenience or other detriment the measure involves for the affected party, as well as any other countervailing interest. According to this principle of proportionality, the courts must take into account, on the one hand, the risk that, for example, business information might be revealed and the damage this might cause *vis-à-vis* the investigative value of the ‘infringement investigation’. There have also been court decisions denying the applicant an ‘infringement investigation’ on the ground that the applicant and the opposing party are engaged in competing businesses, and that the applicant had the possibility to secure evidence through other means. A decision to grant an ‘infringement investigation’ should identify the purpose of the investigation, which physical property and documents are to be comprised within the investigation and the premises to be searched. Moreover, the court may if necessary impose additional conditions on the implementation of the ‘infringement investigation’, for example by stipulating that the applicant may not be present during the investigation.

The investigation is implemented by officials from the Enforcement Authority, who are obliged to follow the conditions set down by the court. Even if the applicant is permitted to be present during the investigation, he is not permitted to conduct the investigation himself or have a decisive bearing on it. The Enforcement Authority is to ensure that the applicant does not receive information which lies outside the purpose of the investigation.

The party that is to be investigated has the right to summon an attorney before implementation of the investigation, unless the investigation would be unduly delayed thereby, or if there is a risk that the purpose of the investigation would be forfeited by the delay.

The Enforcement Authority may take photographs and make video- and sound recordings of objects, and may take photocopies of and create extracts from documents comprised within the investigation. However, no property or documents may be removed from the premises. Information collected by the Enforcement Authority is made available to both the applicant and the opposing party.

There are no specific regulations as to the attorney/client privilege in Swedish legislation. However, an ‘infringement investigation’ may not comprise written documents which contain information which is covered by professional privilege (which include matters entrusted to, or coming into the knowledge of, advocates (members of the bar) or a party’s counsel, acting in their professional capacity).

If the applicant does not commence proceedings in the matter within a period of one month from completion of the ‘infringement investigation’, measures taken at the investigation will be reversed to the extent this is possible. This is also the case if the decision to grant an ‘infringement investigation’ has been revoked after it has been implemented. This means that the Enforcement Authority is obliged to return to the affected party all copies, photographs, etc which were made during the investigation. Also, to the extent the applicant has copies of the material, these are also be returned to the affected party – how this is to be done in practice is however not clear. Nevertheless, even if the material is returned, the applicant may still invoke matters discovered through the investigation in later proceedings. The officials of the Enforcement Authority and experts present at the investigation may be heard as witnesses in a court procedure.

A party that has been subject to an ‘infringement investigation’ is entitled to damages if infringement is not ultimately established. Consequently, an ‘infringement investigation’ may be granted only if the applicant deposits security with the court in relation to the damage which might be caused to the opposing party, unless the court releases the applicant from such an obligation. If the security proffered is not accepted by the opposing party, the court will determine whether the security is acceptable. However, failure of the applicant to commence an infringement action against the opposing party is not necessarily itself grounds for damages.

#### **4. Questions to be answered regarding future improvements**

##### **a. Does your system comply with the TRIPS Agreement?**

Yes. Even though the Swedish government was of the opinion that the Swedish system was already in compliance with the TRIPS Agreement, Sweden decided in 1999 to amend the legislation by the introduction of civil measures for preserving evidence.

##### **b. Are there ambitions or motivation for further developments, improvements etc?**

You are referred to the answer under paragraph (d) below.

##### **c. Are there any governmental or public ambitions in your country to change the existing systems in the near future?**

You are referred to the answer under paragraph (d) below.

##### **d. Do you think that the laws of your national system are already in compliance with the said provision of the IP Directive or is there an immanent need for legal change?**

Swedish law does not provide a procedure for preserving evidence on a *quia timet* basis (see Art 7.1 of the IP Directive). The legislator proposed a specific provision to this effect when the civil measures for preserving evidence were implemented in 1999 (see paragraph (a) above and question 2(a)). However, the Council on Legislation was of the opinion that the proposed wording was too vague and argued that Swedish legislation was already adequate in respect of anticipatory measures by virtue of the abovementioned provisions regarding illegal acts and preparatory acts. The Swedish Department of Justice is once again discussing the matter presently but is not expected to propose any amendments to existing legislation.

Swedish legislation does not lay down any specific provisions regarding the protection of trade secrets in connection with ‘infringement investigations’, but is reliant on the Courts to provide such protection in the terms explained above when granting measures for preserving evidence. The Swedish Department of Justice is - due to the fact that this matter is often criticized - considering the need for explicit legislation. No proposal is currently before Parliament as of today.

### III. Art 47 TRIPS/ Art 8 IP Directive

#### 2. Questions to be answered regarding requirements, extent and enforcement

- a. **It would be interesting to know whether and how Article 47 of the TRIPS Agreement is implemented in the laws of your system.**

You are referred to paragraph (e) below.

- b. **Do you think that the right holder must first prove that his property right is infringed in order to be entitled to assert this right?**

This question concerns fundamental issues of legal certainty of individuals and proportionality. It seems indispensable that the system includes a safeguard against abuse and one important aspect is then that the right holder must prove to some extent that his right is infringed. The level of this burden of proof can be discussed noting that the current level for obtaining infringement investigation in Sweden is that the right holder shows probable cause for infringement.

- c. **Art. 8 of the IP Directive may also be directed against third parties if the activity is on a “commercial scale”. Consequently it would be interesting to know if any experiences have been made in your country regarding requests which are directed against third parties.**

Anyone who possesses evidence which may be of relevance to a court case may be ordered to produce evidence in accordance with the Code of Judicial Procedure. It is not a requirement that the evidence relates to activities conducted on a commercial scale, but there are some restrictions (see above paragraph I 2). An ‘infringement investigation’ itself cannot, however, be directed towards a third party (see above paragraph I 3(d)).

- d. **Do you think that this right should be enforceable in preliminary injunction proceedings?**

Please see paragraph (b) above.

- e. **Are there any ambitions in your country to change the law in view of complying with the TRIPS Agreement?**

There is perceived to be a need to change the law to comply with the TRIPS Agreement, and it is the understanding of the national group that the Swedish Department of Justice is currently considering the matter. However, no proposals have been made public as of the date of this report.

We understand that particular consideration is being given to how to implement the IP Directive. Again, no proposal has been made public. It is our understanding that the Justice Department believes that the measures proposed in TRIPS which would require only that an alleged infringer inform the right holder of the identity of third parties involved in the alleged infringing activity are proportional and adequate. On other hand, the extension of the

requirement to third parties in the IP Directive is considered possibly to be too far-reaching, since the consequences for third parties are difficult to foresee in every case.

There is a further difference between TRIPS and the IP Directive regarding the circumstances in which disclosure of information may be ordered. The IP Directive provides that these circumstances are confined to an ongoing judicial process, whereas TRIPS has no such condition. This might effect the necessary changes in the law, but it is our understanding that further analysis has not at this stage been conducted into how and to what extent.

### **3. Questions to be answered regarding limits and future improvements**

You are referred to paragraph 2(e) above and the answers on confidential information, B I 3 and B II 3.