

Bird & Bird

Sweden

Patent Litigation Q&A

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# Sweden – Patent Litigation

## Where can patent infringement actions be started? Is there a choice of venue?

The Patent and Market Court and the Patent and Market Court of Appeal are exclusively competent to hear cases concerning patent infringement. An action is initiated at the Patent and Market Court, which is located in Stockholm.

## Are the judges' specialists? Do they have technical backgrounds?

The judges at the Patent and Market Courts are specialised in intellectual property rights, including patents. In a patent case, the panel will typically comprise two legally qualified judges and two technical judges (Chapter 4, Section 1 of the Act (2016:188) on the Patent and Market Courts). The legal judges will typically not have a technical background. If needed, an additional legal judge and a technical judge may be added to the panel. If the patent case does not require technical knowledge, the panel may consist of only three legally qualified judges.

## How long does it take from starting proceedings to trial?

In most cases the oral hearing is held within 12 – 18 months from the start of the proceedings, but of course complex cases including interim measures or procedural decisions may take more time.

## Can a party be compelled to disclose documents before or during the proceedings?

It is possible to compel the opposing party to disclose information by several different measures, and these may be employed both prior to and during a patent litigation. Before proceedings have formally begun, an infringement investigation offers a unique opportunity for patentees to obtain evidence regarding a suspected infringement.

*The infringement investigation* can be requested by the patentee or its licensee and, if granted by the Patent and Market Courts, allows for the collection of evidence related to the alleged infringement (see Chapter 16, Sections 6–17 of the Patents Act, SFS 2024:945). To obtain such an order, the applicant must demonstrate reasonable grounds to believe that someone has infringed the patent or contributed to such an act. The investigation typically involves access to the alleged infringer's premises in order to locate relevant objects or documents. However, the order does not permit seizure of infringing products or the recording of infringing processes. The court will only grant the order if the benefits of the investigation outweigh any harm or inconvenience to the affected party or other competing interests. The same measure may also be used in cases of suspected attempted or preparatory infringement. While functionally similar to the French *saisie-contrefaçon*, the Swedish procedure allows only for infringing items to be photographed or copied, not seized.

*An information order* serves as another tool available before litigation and may also be sought during the proceedings (see Chapter 16, Sections 1–5 of the Patents Act, SFS 2024:945). This remedy is available where the patentee or licensee can demonstrate probable cause that an infringement has taken place. Under such an order, which is enforceable under penalty of a fine, the respondent must disclose information concerning the origin and distribution channels of the relevant goods or services. This obligation may apply not only to the alleged infringer but also to certain third parties. The court must find that the disclosure is likely to assist the investigation and that the interest in accessing the information outweighs any negative impact on the disclosing party or other legitimate interests. Notably, there is no obligation to disclose information that would reveal that the informant, or someone close to them, has committed a criminal offence.

Once proceedings have commenced, additional procedural mechanisms become available. A party may request an order for the production of specified written evidence, whether in physical or digital form, pursuant to Chapter 38, Section 2 of the Code of Judicial Procedure. Such requests may be directed at the opposing party or third parties. As a general rule, compliance is mandatory. However, exceptions exist, including protections for privileged communications—such as attorney-client confidentiality—and trade secrets. In the case of the latter, the court may nonetheless order disclosure if there are exceptional reasons. A party may also seek witness examination in support of a document production request.

## How are arguments and evidence presented at the trial?

The proceedings consist of different stages: before the oral hearing, the parties exchange writs including written arguments and evidence. At the oral hearing, the general principle is that arguments and evidence

should be presented orally. In many cases the court will however allow written evidence to be considered presented by reference to certain highlighted parts.

Witnesses and expert witnesses will be examined during the oral hearing including cross-examination.

The oral hearing is concluded by both parties providing their respective pleadings, upon which the court closes the proceedings and adjourns to determine the outcome and draft the reasons for the judgment.

**How long does the trial generally last and how long is it before a judgment is made available? Are judgments publicly available?**

The length of the oral hearing will depend on the complexity of the case, in particular the number of witness and expert witness testimonies. In a less complex patent case, the hearing may take a couple of days, but in complex cases, it is not unusual for the hearing to span several weeks.

Normally, a judgment is rendered within 4 – 6 weeks from the conclusion of the oral hearing. All rendered judgments are public and you may request a copy as soon as it has been issued. All judgments from the Patent and Market Court of Appeal are made publicly available on the court's web page.

**Can a defence of patent invalidity be raised? Are infringement and validity issues heard together?**

Yes, a patent invalidity defence may be raised against an infringement action and is in most cases standard practice. Although the revocation action is a separate action it will be heard and tried together with the infringement action. The Patent and Market Court will consequently decide on validity first and if the patent is deemed invalid, the Patent and Market Court will make a hypothetical assessment on infringement based on an assumption that the patent is valid. Thereby, the Patent and Market Court of Appeal may decide on both questions even though the Patent and Market Court would disagree with the Patent and Market Court's assessment of validity.

**Are infringement proceedings stayed pending resolution of validity in the national patent office (or, if relevant, the EPO) or another court?**

No, the Patent and Market Courts will not stay an infringement action pending EPO's resolution of the validity of an European patent, unless both parties agree otherwise.

**Are preliminary injunctions available? If they are, can they be obtained *ex parte*? Is a bond necessary? Can a potential defendant file protective letters?**

In Swedish patent litigation, preliminary injunctions (PIs) are both available and frequently used. Such injunctions, which are enforceable under penalty of a fine, can be sought either before or during the main infringement proceedings. It is important to note, however, that even if a PI is requested before formal proceedings, a principal action must ultimately be initiated within a month of the PI decision. If that is not done, the PI will no longer be upheld.

The Patent and Market Courts may grant a PI that remains in effect until a final judgment is rendered, provided that certain conditions are met. First, the claimant must establish probable cause that an infringement—or complicity in an infringement—is taking place, or that preparatory acts aimed at future infringement are underway. Second, it must be reasonably assumed that the continued actions of the defendant would reduce the value of the patentee's exclusive rights. Third, the injunction must satisfy a proportionality assessment: the harm to the alleged infringer must not outweigh the patentee's interest in protecting its rights. Fourth and finally, the applicant is required to provide security to cover potential damages incurred by the defendant should it later be found that no infringement occurred—for example, if the patent is declared invalid. Although courts have discretion to waive this requirement in exceptional circumstances, such waivers are seldom granted in patent disputes.

It is also possible to apply for a PI without notifying the opposing party—so-called *ex parte* relief—if any delay would risk causing irreparable damage. However, such requests are rarely successful in the context of patents. Typically, the defendant is afforded a brief period to present a response before the court decides on the matter. Although Sweden does not acknowledge the practice of filing protective letters, such measures would in any case rarely be relevant.

When assessing a request for a PI, the Patent and Market Courts will apply a strong assumption that the patent is

valid. However, it is possible for the defendant to rebut this presumption by filing a revocation action and arguing invalidity based on new prior art not presented during prosecution or showing formal or material errors in the Patent Authorities decision.

As a side note, the Patent and Market Court of Appeal has recently confirmed that a PI request may be filed before the grant of a European patent as long as the grant is imminent and likely to be rendered before the case is decided (see PMÖD 2022:4).

The time frame for decisions on preliminary injunctions varies depending on the complexity of the case but is generally between three and six months. In situations involving clear and urgent infringements, decisions may be issued more rapidly.

### Are final injunctions available as of right? Is a bond necessary?

The Patent and Market Courts will upon request by the plaintiff grant a final injunction should infringement be proven. The injunction will be combined with a penalty fine. Except for a PI, a bond will not be necessary for the decision.

### What other remedies are usually ordered if a patentee is successful?

The patentee may claim monetary relief in the form of either actual damages or reasonable compensation, though punitive damages are not available under Swedish law (cf. Chapter 15 Section 10 of the Patents Act, SFS 2024:945). Compensation for damages may be awarded in cases where the infringement was carried out either wilfully or negligently. Even if no quantifiable harm can be demonstrated, the patentee is nonetheless entitled to reasonable compensation for the unauthorised use of the invention—typically calculated based on a hypothetical licence fee. In instances where the infringement was neither intentional nor negligent, compensation may still be granted to the extent it is considered reasonable.

In addition to monetary relief, several corrective measures may be imposed. These include the recall or seizure of infringing goods held by the defendant. The Patent and Market Courts may also order the infringer to bear the costs for publishing information about the judgment, typically as a means to inform the market of the outcome. See Chapter 15 section 13 – 15 of the Patents Act, SFS 2024:945.

If an injunction has been granted and the defendant fails to comply, it is the responsibility of the patentee to initiate enforcement proceedings. Any penalty for non-compliance is determined in a separate process and is payable to the Swedish state rather than to the patentee.

### Would the tribunal consider granting cross-border relief?

Historically the Patent and Market Courts have been hesitant to grant cross-border reliefs in patent cases due to the understanding that the Patent and market Courts only have jurisdiction in Sweden and for Swedish rights. However, based on the CJEU's judgment in Case C-339/22, BSH Hausgeräte GmbH v Electrolux AB, it is likely that the Patent and Market Courts will be more willing to grant cross-border relief if the defendant is domiciled in Sweden.

### Is there a right of appeal from a first instance judgment? How long between judgment at first instance and hearing the appeal?

Interim decisions and final judgments by the Patent and Market Court may be appealed to the Patent and Market Court of Appeal. A decision or judgment of the Patent and Market Court of Appeal will not be possible to appeal to the Supreme Court unless the Patent and Market Court of Appeal has allowed it. Leave to appeal is required for the Patent and Market Court of Appeal to hear the case, and leave is in patent cases normally granted.

A decision becomes final and binding if not appealed within the applicable time frame of three weeks from the issuance of the judgment.

From the judgment until the appeal hearing before the Patent and Market Court of Appeal, it typically takes 10 – 17 months.

### Is an appeal by way of a review or a rehearing? Can new evidence be adduced on appeal?

The Patent and Market Court of Appeal will re-assess the judgment and all arguments and evidence presented by

the parties, including conducting an oral hearing where recorded witness examinations from the first instance hearing are displayed before the court.

It is possible, but not the main rule, to include new evidence on appeal. To be allowed to introduce new evidence not presented before the first instance, the party must show that it was likely that they could not invoke the evidence before or that they had a valid excuse for not doing so previously, see Chapter 50 section 25 of the Code of Judicial Procedure.

**What is the cost of a typical infringement action to first instance judgment? If the issues of invalidity and infringement are bifurcated, what is the cost of the invalidity action? Can the winner's costs be recovered from the losing party? How much is the cost of an appeal?**

Patent litigation in Sweden is expensive and, through the front-loaded nature of the proceedings, litigation costs, which mostly consist of counsel fees and expert evidence, will accrue early on in the proceedings. It is also possible to recover costs for technical attorneys assisting the counsel and the party's own work. The costs for an infringement action will vary depending on the complexity of the case and we have seen very high litigation costs in patent disputes relating to pharmaceuticals. Normally, a straightforward simple patent infringement case will cost around EUR 200,000 but could easily increase to double that amount if preliminary requests or oral evidence are required. The revocation action will incur similar costs if the patent is simple. Consequently, to argue infringement and defend the patent against a revocation action will cost around EUR 400,000 for a simple patent.

The court fees for bringing proceedings in Sweden are currently only around EUR 250.

The litigation cost in appeal will in most cases amount to two-thirds of the costs in first instance.

As a general principle, the losing party in Swedish patent litigation is required to fully reimburse the prevailing party for its reasonable legal costs. In theory, this means that a successful party should be able to recover all litigation-related expenses. In practice, however, the Patent and Market Courts frequently exercise discretion in evaluating cost claims and have, on several occasions, reduced the amounts sought.

Exceptions to the cost-recovery rule may arise in certain situations. If both parties are partially successful, the court may allocate litigation costs proportionally, based on the relative degree of success. Additionally, if the winning party has acted negligently or initiated proceedings that were unnecessary, the court may, in rare cases, require that party to cover some or all of the opposing party's costs. Such outcomes are highly unusual in the context of patent litigation but remain legally possible.

*Note: The information in this document relates to litigation through the national jurisdiction and not the UPC.*

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