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NATIONAL REPORT - SWEDEN

Question B - What responsibility or obligations should online platforms have when it comes to eliminating infringements by their users, especially in the areas of IP and unfair competition?

Clara Englund
Advokatfirman MarLaw, Stockholm
Email: clara.englund@marlaw.se

1. Introduction

In Sweden, responsibilities and liabilities of online platforms, especially in the regards to copyright infringement, have been discussed since the 1990's and the technological boom. Responsibilities of online platform providers is mainly regulated in sector specific regulations such as the Swedish Copyright Act but also in the Act on Responsibility for Electronic Bulletin Boards. The later act was introduced due to dealing with the difficulties of so-called bulletin board systems, including online platforms, not taking any measures to prevent the spread of unlawful content. Platform providers that took no measures were deemed to be less liable than the platforms that in fact took more measures. So called 'Good Samaritan' clauses aim to provide platform providers legal certainty when they check their platforms for infringements or otherwise unlawful content. National laws in Sweden have recently been adjusted to Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the internal market for digital services ('The Digital Services Act' or 'DSA'), an EU initiative that together with the Digital Markets Act aims to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses.¹

Different approaches have been taken to determine the extent of online platform providers responsibilities and obligations to eliminate IP-infringements, where considerations have been taken to efficiently identify and take down unlawful content but at the same time weighing these measures against principles of fair competition and fundamental rights such as freedom of expression. Example of such newly introduced measures is so called 'Trusted Flagger' that will report unlawful content to online platforms. The historical aspects, case law and measures introduced to address the issues of defining what online platforms responsibilities should be, will be elaborated below.

2. International and National Legislation on Online Platforms

2.1 International legal provisions

As a member of the European Union (EU), Swedish national legislations, especially in the areas of digital services, are highly affected by EU-law. EU-regulations such as the Digital Services Act, has a general application and is binding in its entirety and directly applicable in all Member States², unlike directives that are binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities for implementations in consideration of own choices and methods. In the speed of technical developments, national legislation that have been introduced to tackle unlawful contents on online platforms have been criticised to be obsolete, giving rise to interpretation difficulties and non-sufficiently tackling the issue they were first created to address.

In the non-legislative resolution from the European Commission on the 'Digital Services Act and fundamental rights issues posed', the Commission highlights the need for legal clarity for platforms and users, and respect for fundamental rights given the rapid development of technology. It calls for harmonised rules for addressing illegal content online and for liability exemptions and content moderation. As a result, the Commission proposed the Digital Services Act (hereinafter referred to as 'DSA') in December 2020. As of 17 February 2024, the DSA rules apply to all platforms. The act builds on and complements the e-commerce directive. The Act keeps the core principles and responsibilities stated therein, such as liability regime and the prohibition of general monitoring.

¹The Digital Services Act package
<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>, retrieved 2025-05-15.

² Article 288, The Treaty On The Functioning Of The European Union.

To provide further legal certainty for online platforms, the EU proposed an additional article clarifying that the liability exemptions should not be disappplied when providers of intermediary services carry out voluntary own-initiative investigations or comply with the law (Article 8). Article 8 on Voluntary own-initiative investigations and legal compliance could be called a ‘Good Samaritan’ clause. Described as an innovation in the EU, but similar clauses can for example be found in U.S. law. Good Samaritan rules ensure that online intermediaries do not lose their liability privilege just because they voluntarily review user content. This clause is intended to give providers legal certainty when they check uploaded content to detect infringements proactively.

The ‘Good Samaritan’ rule is stipulated in U.S law in the Communications Decency Act from 1996 which is a part of the Telecommunications Act 1996. Section 230 c) of the Communications Decency Act reads as follows:

‘(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).’

Section 230 c) of the Communications Decency Act is under revision and reforms have been suggested to the legislation due to critique. The Department of Justice has stated, as motivation to why the ‘Good Samaritan’ clause needs to be revised, that criminals and other wrongdoers increasingly turn to online platforms to engage in a host of unlawful activities, including child sexual exploitation, selling illicit drugs, cyberstalking, human trafficking and terrorism. At the same time, courts have interpreted the scope of Section 230 immunity very broadly. This expansive statutory interpretation, combined with technological developments, has reduced the incentives of online platforms to address illicit activity on their services and, at the same time, left them free to moderate lawful content without transparency or accountability. The scope of Section 230 should therefore be realigned with the realities of the modern internet so that it continues to foster innovation and free speech but also provides stronger incentives for online platforms to address illicit material on their services.³

The reference to U.S law is only used in this report as an example of so called ‘Good Samaritan’ in other jurisdictions and that a similar mind set has been used in the creation of article 8 in the DSA.

2.2 Definition of Online Platforms

Online platforms cover a broad spectrum of businesses such as online marketplaces, social media, creative content outlets, app stores, price comparison websites, platforms for the collaborative economy as well as search engines.⁴ From a legal perspective, online platforms are defined in sector specific regulations and what is considered online platforms may differ between different sectors. The different definitions in EU Law and Swedish national law will be addressed below.

The DSA aims to regulate information society services. Article 3 of the DSA references to the definition of information services in Article 1(1), point (b), of Directive (EU) 2015/1535⁵. The terms ‘Service’ is defined as

³ Department of Justice Review of section 230 Communications Decency Act, available at <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996>, retrieved 2025-06-15.

⁴ EU Commission, Digital Strategies, Online Platforms <https://digital-strategy.ec.europa.eu/en/policies/online-platforms>

⁵ DIRECTIVE (EU) 2015/1535 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification).

‘any Information Society services, that is to say, any services normally provided for remuneration, at a distance, by electronic means and the individual request of a recipient of services.’ Further definitions within this definition are:

- ‘at a distance’ means that the service is provided without the parties being simultaneously present;
- ‘by electronic means’ means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means;
- ‘at the individual request of a recipient of services’ means that the service is provided through the transmission of data on individual request.

The DSA specifically applies to intermediary services. Intermediary entails the following services:

- a ‘mere conduit’ service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
- a ‘caching’ service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
- ‘hosting’ service, consisting of the storage of information provided by, and at the request of, a recipient of the service.

In recital 13 of the DSA, online platforms are described as hosting services that not only stores information provided by the recipients of the service, but also disseminate that information to the public at the request of the recipient of the service. To avoid imposing overly broad obligations, providers of hosting services should not be considered as online platforms where the dissemination to the public is merely a minor and purely ancillary feature that is intrinsically linked to another service, or a minor functionality of the principal service, and that feature or functionality cannot, for objective technical reasons, be used without that other or principal service, and the integration of that feature or functionality is not a means to circumvent the applicability of the rules of this Regulation applicable to online platforms. For example, the comments section in an online newspaper could constitute such a feature, where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. In contrast, the storage of comments in a social network should be considered an online platform service where it is clear that it is not a minor feature of the service offered, even if it is ancillary to publishing the posts of recipients of the service. For the purposes of the DSA, cloud computing or web-hosting services should not be considered an online platform where dissemination of specific information to the public constitutes a minor and ancillary feature or a minor functionality of such services.

Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (‘DSM-directive’), targets inter alia ‘online content-sharing service provider’ which are defined as a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.

In the preparatory works to the Sweden’s implementation of the DSA, it is stated that hosting services usually includes online platforms and that online platforms are included in the definition of intermediary services. It is stated that an intermediary service can for example be an infrastructure for third party content, messages, uploaded video or blog post.⁶ According to Swedish legislators, online platforms are mainly defined as a type of *hosting* service with a commercial interest. In some cases, commercial services are provided free of charge to the user. The commercial element is then designed in a different way. For example, the service may be financed by advertising, or the provider may make money from personal or other data collected when using the service.⁷ The Swedish Post and Telecom Authority (PTS) mentions Social Media platforms such as Facebook, Instagram and

⁶ Regeringens proposition 2023/24:160 Kompletterande bestämmelser till EU:s förordning om digitala tjänster, p. 19.

⁷ Ibid, p. 104-105 and see the judgment of the Court of Justice of the European Union, Doctipharma, C-606/21, EU:C:2024:179.

TikTok, buy and sell sites, video sharing platforms such as YouTube and search engines such as Google as examples of online platforms that are covered by the DSA.⁸

2.3 National law

2.3.1 Act on Responsibility for Electronic Bulletin Board

In Sweden, legislation was introduced in the late 1990's on responsibility of bulletin board systems – the Act on Responsibility for Electronic Bulletin Board, hereinafter referred to as the 'BBS Act'. The act stipulates that the person providing an electronic bulletin board shall have reasonable supervision over such a service. A provider of an electronic bulletin board shall also be obliged to provide users of the service with certain information and to remove certain types of messages. It was proposed that anyone who fails to provide the prescribed information or fails to remove certain messages may be punished.⁹ The law applies to electronic bulletin boards, defined as a service that transmits electronic messages in text, videos, sound or other information. Therefore, the law applies to information society services in broad context – including online platforms.

The obligation to remove or otherwise prevent further dissemination of the previously specified types of messages should arise when the provider becomes aware of the existence of the message. The provider may become aware of the message by reading the message himself or by someone drawing his attention to the message. To prevent the provider from remaining unaware of which messages are on the service, criminal liability should also be able to arise for anyone who, through gross negligence, fails to remove a message or otherwise prevent further dissemination of the message.¹⁰

The act was introduced after the case NJA 1996 s.79 which regarded the question if the owner of the BBS platform had participated in committing copyright infringement by perceiving and storing copies of the copyrighted material and spreading them to the public. The Supreme Court concluded that unauthorized distribution of copyrighted material to the public in accordance with national copyright law requires an *active* measure has been taken by the infringer. The questions then regard if solely providing a BBS-platform fulfills the requirement of an active measure. When it regards criminal assessments the principal of legality must be taken into consideration, and then the provider of the platform could not be held responsible.

The judge in the applicable case lifted the discussion on platforms responsibility for illegal contents and what such responsibility should be. The judge stated that if liability requires *action* such as limiting users' possibility to make infringement this would mean that platform providers that takes measures are more likely to be held liable for a criminal action rather than a platform provider that does nothing to prevent infringement – which would not be considered reasonable or acceptable from a legality perspective.¹¹

Up until the introduction and execution of the EU's Digital Services Act, the BBS Act stipulated that an online platform had a monitoring obligation. Even intermediaries such as online platform providers had an obligation to remove illegal content such as copyright infringements. To fulfil this obligation platform providers had a monitoring responsibility, meaning that they needed to monitor its platform to detect and remove unlawful content. As article 8 DSA states that intermediary services shall not have a general monitoring obligation, Swedish legislators had to make amendments to the BBS Act and distinct intermediary services from other information society services – as intermediary services previously were included in the 'general monitoring' obligation in the BBS Act.

It is now stated in section 4 § a) the BBS Act that the obligation to monitor the service pursuant to Section 4 does not apply to the provider of an electronic bulletin board that is an *intermediation service* pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the internal market for digital services (the DSA). Second paragraph states that for the platform providing such a service, the obligation under Section 5, first paragraph, applies when the provider becomes aware that the message is on the service. In

⁸ Digital Services Act (DSA) – EU:s regler för säkrare internet, available at <https://pts.se/internet-och-telefoni/dsa-forordningen---regler-om-digitala-tjanster-for-en-saakra-onlinemiljo/>, retrieved 2025-06-02.

⁹ Regerings proposition 1997/98:15 Ansvar för elektroniska anslagstavlor, p.1.

¹⁰ Ibid, p.20.

¹¹ NJA 1996 s. 79 (Swedish Supreme Court), p. 92.

the preparatory work it is stated that there is no formal requirement as to how the information must have come to the provider's attention for the obligation to arise.¹²

Section 5 paragraph two regulates the obligation for online platform providers to remove certain messages published by users (service recipients) of the platforms in regard to copy right infringements. If a user posts a message to an electronic bulletin board, the service provider must remove the message from the service or otherwise prevent further dissemination of the message, if it is obvious that the user has infringed copyright or a right protected by regulation in Chapter 5 of the Copyright Act (1960:729) on Literary and Artistic Works (hereinafter referred to as the 'Copyright Act') by submitting the message.

There is only one case with prejudicial value regarding the BBS Act, NJA 2007 s.805. The case regarded hate speech and whether the person providing the platform where the illegal content had been published should be convicted to accessorial liability to the crime or liability regarding the BBS Act. A person provided a website that made it possible for visitors of the website to publish comments and forums of discussion. Some of the messages published by visitors or users of the website was obvious hate speech which are criminally sanctioned in the Swedish Penal Code. The discussion in this case was if the provider of the website could be deemed any responsibility.

The Supreme Court stated that for someone to be convicted of hate speech, it is generally required that the person himself has spread or contributed to the spread of the statement that is the subject of the examination. As with other crimes that primarily aim at active action, it is not excluded that even a failure to prevent the spread of a message may be sufficient for criminal liability. However, this requires that the person who failed to do so has assumed what is usually called in the doctrine a 'guarantor position' or, in other words, that he has had a special obligation to prevent further spread due to his position. Because a service provider falls within the scope of the BBS Act and the responsibilities to monitor the platform, cannot be used to determine that the service provider has a position as a guarantor and thereby be deemed responsible for crime against hate speech in relation to the Penal Code. The person behind the bulletin board system was not convicted for crime against the BBS Act either, as the court assessed that it could not be deemed *obvious* for the service provider that the comments stated were in fact hate speech.

2.3.2 The Electronic Commerce Act

Before the DSA was introduced within the EU and to Swedish law, the e-commerce directive was implemented in paragraph 16-18 §§ in the Electronic Commerce Act (2002:562). Intermediaries' freedom of liability was before the DSA regulated in the e-commerce directive article 14 – 15 which is now replaced by article 4, 5, 6 and 8 of the DSA. The mentioned articles in the DSA also replaces paragraph 16-18 §§ in the Electronic Commerce Act. The main rules for online platforms freedom of liability are now regulated in the DSA. According to 19 § the Swedish Electronic Commerce Act, a service provider who transmits or stores information for another person may be held liable for a crime relating to the content of the information only if the crime was committed *intentionally*.

The freedom of liability according to the Electronic Commerce Act was discussed in 2009, in the group action case against the founders of the file sharing 'streaming' service 'The Pirate Bay' hereinafter referred to as TPB. Three individuals behind the platform, TPB were convicted for aiding and abetting to copyright infringement. The case regards the illegal sharing of copyrighted material. It was established that TPB's servers were in Sweden, therefore the crimes were considered to have been committed in Sweden and Swedish law is applicable. Freedom of liability was not applicable since TPB was not considered a caching, host or intermediary service but rather a database. The court also highlighted that the freedom of liability refers to the content of stored information, the damage claim in this case instead regarded the features provided that had promoted users' copyright practices.¹³

In the case against TPB, the Court of Appeal set up requirements for when an intermediary platform could be convicted for aiding and abetting crime. According to Swedish general legal criminal principles, liability is based on lack of culpa/negligence and so called 'social adequacy'. The general principle of social adequacy is used in Swedish criminal law and an unwritten ground for excluding criminal liability. The Court of Appeal stated that if a service is considered a generally beneficial for the public society, the legitimate use of the service is dominant and precautionary measures have been taken to limit illegitimate use – the service may be assessed as legitimate regarding the principle of social adequacy. Regarding the Pirate Bay, copyrighted material that had been uploaded

¹² Regeringens proposition 2023/24:160 Kompletterande bestämmelser till EU:s förordning om digitala tjänster, p. 135.

¹³ Svea Court of Appeal, judgement of 26 November 2010, reference RH 2013:27, F.N. et al v Sweden., p. 49.

without the right holder's consent was dominant and the Pirate Bay had not taken any measures to mitigate the risk/users' possibility to upload copyrighted material and copyrighted material was not removed when the platform providers were given notice of the infringement. Considering this, the Court of Appeal could not apply the unwritten rule of exemption for social adequacy and lack of neglect in this case.¹⁴

2.3.3 The Copyright Act

As a result of the EU Directive 2019/790 on amendments on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC ('DSM'-directive), amendments were made to the Copyright Act regarding online platforms liability for copyright infringement. Chapter 6 b) was implemented regarding certain online platforms responsibility for distribution of contents. The new rules apply to mainly online content sharing service providers. 'Online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.¹⁵

Chapter 6 b) section 52 j § states that work that is made public to society by users uploading the work to the service providers service, shall be deemed as the service provider making it available to the public in accordance with section 2 of the Copy Right Act. This means that the service provider can be directly responsible for the contents itself. It is stated in the act that the rules on freedom of liability stated in the law of e-commercs (now article 4, 5, 6 and 8 of the DSA) shall not be applicable in the mentioned situations. Instead, freedom of liability under certain circumstances is regulated in chapter 6 b § 52 l). Online content sharing providers can be exempted from liability if it, after being informed by the right holders, urgently prevents access to the content. Freedom of liability also requires that the provider has taken reasonable steps to obtain permission for the transmissions to the public that the provider makes on the service and ensure that content that infringes the copyright of works, for which the rights holders have provided the provider with relevant and necessary information, is not made available on the service.

When assessing whether the provider has done what can reasonably be required, particular consideration shall be given to; the type of service the provider provides, the audience and scope of the service, the type of works that users of the service upload there, and what appropriate and effective means of taking measures the available on the market and the cost to the provider of them to prevent the dissemination of contents. In the preparatory works to the implementation of the DSM directive in the Copyright Act it was discussed which type of technical measures the online platforms would need to take to prevent copyright infringement. Filter systems was raised as a criticised and problematic technical tool for this purpose as it most likely will lead to over-removal¹⁶ and jeopardising freedom of expression. There is however no explicit provision stating that the online platform shall refrain from using algorithmic content monitoring and removing.

4. Criminal and Civil liability for Online Platforms

The act of copyright infringement is sanctioned with criminal liability in the Copyright Act. According to section 53 §, anyone who, in relation to a literary or artistic work, takes an action which constitutes an infringement of the copyright attached to the work pursuant to Chapters 1 and 2 of the act shall be convicted, if done intentionally or through gross negligence, of copyright infringement.

Section 5 of the BBS Act stipulates that the platform provider shall prevent further spread of messages if it is obvious that the user has infringed copyright or a right protected by regulation in Chapter 5 of the Copyright Act by submitting the message. A violation of section 5 of the BBS Act is combined with criminal liability. According to section 7, if section 5 is violated due to neglect or willful misconduct, the platform provider shall be sentenced to a fine or imprisonment for a maximum of six months or, if the crime is serious, to imprisonment for a maximum of two years. In minor cases, no liability shall be imposed.

Accessory liability is regulated in chapter 23 § 4 of the Swedish Penal Code. This section stipulates that liability prescribed in this code for a certain act shall be imposed not only on the person who committed the act but also on another person who promoted it by advice or deed. The same shall apply to an act punishable by another law or

¹⁴ Svea Court of Appeal, judgement of 26 November 2010, reference RH 2013:27, F.N. et al v Sweden., p. 24-25.

¹⁵ Article 2.6 EU Directive 2019/790 on amendments on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

¹⁶ Regeringens proposition 2021/22:278 Upphovsrätten på den digitala inre marknaden, p. 129.

statute for which imprisonment is prescribed. A person who is not to be regarded as the perpetrator shall be sentenced, if he has induced another to commit the crime, for urging of the crime and otherwise for aiding and abetting it.

Both the violation of the Copyright Act and the BBS Act prescribe imprisonment for violations of the acts. This means that not only direct liability can be granted to these service providers behind the platform, but also accessory liability according to the Penal Code.

Besides criminal law, civil liability for copyright infringement is regulated in 53 § of the Copyright Act stating that anyone who exploits a work in violation of this Act shall pay reasonable compensation for the exploitation to the author or his or her right holder – which expresses a form of strict liability. Further compensation can be payable if the violation is done intentionally or through negligence. When determining the amount of compensation, special consideration shall be given to loss of profit, profit made by the infringer or transgressor, damage to the reputation of the work, moral damage, and the interest of the author or right holder in preventing infringement.

The Court of Appeal concluded in the *Pirate Bay* -case that in the case of TPB, those who provided the service for commercial purposes have contributed to the copyright disposals of others in a way that has meant that they have not only been guilty of accessory offences but have also exploited the works economically. In such circumstances, it cannot be of any significance for liability for compensation whether they are to be regarded as perpetrators or accessories from a criminal perspective. Since their participation in the offences has involved exploitation of the works, they have incurred liability for compensation.

Besides compensation the courts may also issue prohibition from continuing the violating act. At the request of the author or his or her right holder or of the person who has the right to exploit the work due to a license, the court may, subject to a fine, prohibit a person who undertakes or participates in an action that constitutes an infringement or violation as referred to in section 53 from continuing with the action.

Prohibition was for example issued against an intermediary service *Black Internet AB*¹⁷, *Black Internet* has provided internet access to the file-sharing service *The Pirate Bay*. The Court of Appeal assessed that the plaintiff companies' interest in stopping the infringement outweighs the disadvantages that a ban on fines entails for the intermediary service, and that the fact that a ban may result in certain legal material not being able to be distributed via *The Pirate Bay* should not mean that a ban should be considered disproportionate. The Court of Appeal did not find that the bans could be considered to restrict freedom of expression or other fundamental rights in a way that would conflict with the Instrument of Government, the European Convention or other provisions.¹⁸

5. Mechanisms in cases of infringement

5.1 *Trusted flaggers*

As the DSA is directly applicable in Sweden, article 16 of the DSA applies which states that hosting services, including online platforms, shall provide mechanisms that allows individuals or entities to notify the platform providers of illegal content.

The providers of hosting services shall take the necessary measures to enable and to facilitate the submission of notices containing all of the following elements:

- a) a sufficiently substantiated explanation of the reasons why the individual or entity alleges the information in question to be illegal content;
- b) a clear indication of the exact electronic location of that information, such as the exact URL or URLs, and, where necessary, additional information enabling the identification of the illegal content adapted to the type of content and to the specific type of hosting service;

¹⁷ Svea Court of Appeal, judgement of 21st of May 2010, reference nr Ö 7131-09, *Black Internet AB vs. EMI Music Sweden Aktiebolag, Sony Music Entertainment Sweden AB, Universal Music Aktiebolag and others*.

¹⁸ *Ibid*.

- c) the name and email address of the individual or entity submitting the notice, except in the case of information considered to involve one of the offences referred to in Articles 3 to 7 of Directive 2011/93/EU;
- d) a statement confirming the bona fide belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete.

Article 22.2 of the DSA states that online platform providers shall ensure that notices submitted by so called 'trusted flaggers' shall be given priority.

'Providers of online platforms shall take the necessary technical and organisational measures to ensure that notices submitted by trusted flaggers, acting within their designated area of expertise, through the mechanisms referred to in Article 16, are given priority and are processed and decided upon without undue delay.'

Trusted flaggers are entities acting in their area of expertise for the purpose of taking down illegal content. These actors shall report illegal content to the online platform providers notice and action mechanisms. As stated above, notices from trusted flaggers shall be prioritised. The mechanism of trusted flaggers together with the online platform's notice and take down mechanisms aims to ensure quick and reliable take down.¹⁹

Not any entity or organisation can be appointed trusted flagger. In article 22.2 three criteria are listed for appointing trusted flaggers. The status of 'trusted flagger' shall be awarded, upon application by any entity, by the Digital Services Coordinator of the Member State in which the applicant is established, to an applicant that has demonstrated that it meets all of the following conditions:

- a) it has particular expertise and competence for the purposes of detecting, identifying and notifying illegal content;
- b) it is independent from any provider of online platforms;
- c) it carries out its activities for the purposes of submitting notices diligently, accurately and objectively

The Swedish Post and Telecom Authority (PTS) is appointed as the Digital Services Coordinator that shall appoint and approve trusted flaggers in accordance with article 22.2 DSA. To this day, ECPAT Sweden and the Swedish Theft Prevention Association (SSF) have been approved as trusted flaggers in accordance with the above conditions that are stated in article 22.2 DSA.

The Rights Alliance (*Swe. Rättighetsalliansen Europa AB*) filed an application in 2024 to become a trusted flagger in accordance with article 22 DSA for particular expertise within the area of copyright infringement. The Rights Alliance is a limited company that has been operating since 2011. The company consults and represents right holders in different industries, especially Swedish and American film companies. The company is experienced in take down matters and thereby has experience in visiting platforms to report copyright infringement.

The Swedish Post and Telecom Authority tried the application against the three criteria in article 22.2 DSA. The authority concluded that criteria a), particular expertise and competence, was fulfilled and criteria b), independent from any provider of online platforms with regard to that the Rights alliance have proven that they have no economic, social or other kinds of connections to the online platform providers. However, the authority concluded that the company could not prove to be objective and thereby did not fulfil criteria c).

According to criteria c), the applicant needs to prove that it carries out its activities for the purpose of submitting notices diligently, accurately and objectively. The authority means that the system with trusted flaggers that is meant to identify and report content, shall be operated in an objective manner. This means that their engagement and accuracy cannot be controlled by the right holder's interest. The authority also means that the criteria shall be interpreted with restrictiveness and refers to recital 61 of the DSA which states the following:

'To avoid diminishing the added value of such mechanism [the notice and action mechanism], the overall number of trusted flaggers awarded in accordance with this Regulation should be limited.'

Considering that the Rights Alliance had stated in its application that their business with identifying and reporting copyright material is controlled by assignments and clients which the company represents, the authority concludes

¹⁹ Recital 61, DSA.

that the company has not proven that its business is operated in an objective matter.²⁰ This means that there has not yet been appointed a trusted flagger according to the DSA within the area of copyright in Sweden, to report copyrighted content.

5.3 Appeal of content removal decisions

Any decisions made by the online platform providers in regard of taking down content belonging to a service recipient (user of the service), requires motivation from the platform provider to the affected recipient. According to article 12 of the DSA, online platform providers shall provide a point of contact to enable recipients of the service to communicate directly and rapidly with them. In addition, the online platform providers need to provide an internal complaint-handling system that enables affected recipients or entities to lodge complaints. Providers of online platforms shall handle complaints submitted through their internal complaint-handling system in a timely, non-discriminatory, diligent, and non-arbitrary manner (article 20(4)).

The platform provider is also responsible of informing about other dispute resolution alternatives, such as out-of-court dispute settlement and other available possibilities for redress such as the possibility to file complaint to the Digital Services Coordinator. Recipients of the service and any organisation, body or association mandated to exercise the rights conferred by the DSA on their behalf, shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of the DSA with the Digital Services Coordinator of the Member State where the recipient of the service is located or established. Service recipients should be able to choose between the internal complaint mechanism, out-of-court dispute resolution (applies to online platforms) and the possibility of initiating legal proceedings at any time (Recital 59 of the DSA). The Member States shall appoint/create an out-of-court dispute resolution.

In the preparatory works to the implementation of the DSA in Sweden, the Swedish government, and the investigation behind the preparatory work states that such an institute for dispute resolution demands a lot of resources. Existing bodies would require significant resources to expand their scope and build up expertise to handle the different types of cases that the DSA may raise. The legislators mean that an out-of-court dispute resolution for the purpose of the DSA cannot be achieved today by only small changes in already existing bodies – thereby requires a lot of resources. The Government also states that dispute resolutions based on the DSA also involve a lot of uncertainties such as the number of disputes that will arise, the extent, character, area of expertise and the need for procedure rules for such dispute resolution. The investigation also states the fact that the number, type and size of the providers of intermediary services established in Sweden are also unclear.²¹

Considering the above and that the service recipients that are not content with the online platform's moderation decisions can complain directly to the Digital Services Coordinator (in Sweden the Swedish Post and Telecom Authority) – the government has decided to wait to set up an out-of-court dispute resolution alternative for complaints regarding the DSA. The government believes that, with the knowledge it has today, there are lacking conditions to set up an out-of-court dispute resolution that will ensure a secure, efficient, and competent trial. Therefore, the government has stated that when the DSA has been in force for a while, they will review this again with more robust basis for setting up an out-of-courts dispute resolution.²²

6. Fundamental Rights and Case law

6.1 Freedom of expression in Swedish legal context

In Swedish law, the enforcement of intellectual property rights, particularly copyright, is carefully balanced against fundamental rights such as freedom of expression and the right to a fair trial. These fundamental rights are protected not only by domestic constitutional instruments, the Instrument of Government, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, but also by international commitments, most importantly the European Convention on Human Rights, to which Sweden has been a party since 1953 and which has had the status of ordinary law since 1995.²³

²⁰ The Swedish Post and Telecom Authority decision against Rättighetsalliansen Eurpoa AB on status of trusted flagger, nr 24-3510.

²¹ Regeringens proposition 2023/24:160 Kompletterande bestämmelser till EU:s förordning om digitala tjänster p. 100.

²² Ibid, p. 101.

²³ U. Bernitz and A. Kjellgren, Europarättens Grunder, Norstedts Juridik 2022, p. 17.

The central tension arises from the fact that both copyright and freedom of expression serve vital societal interests. Copyright protects the creator's right to control and benefit from their intellectual output, while freedom of expression guarantees the individual's ability to communicate ideas, opinions, and information without interference. These rights occasionally intersect in ways that require prioritisation or reconciliation through legal reasoning. The prevailing legal and academic view in Sweden is that neither of these rights is absolute, and that any restriction of one in favour of the other must be subjected to a proportionality test. This test examines whether the restriction is prescribed by law, pursues a legitimate aim, and is necessary and proportionate in a democratic society.²⁴

The European Court of Human Rights has clarified that copyright enforcement can, under certain conditions, constitute a justified limitation of the right to freedom of expression under Article 10 of the European Convention on Human Rights. In the case *Neij and Sunde Kolmisoppi v. Sweden*,²⁵ the applicants, two individuals behind The Pirate Bay, argued that their convictions for contributory copyright infringement infringed their freedom of expression. The Court found that their activities, which involved facilitating access to protected content on a large scale, fell within the scope of Article 10.²⁶ Nevertheless, it concluded that the interference was proportionate and legitimate, particularly in light of the commercial nature of the platform and the Swedish authorities' margin of appreciation in protecting intellectual property rights.²⁷

The balancing exercise between copyright enforcement and fundamental rights is not limited to international jurisprudence but is deeply embedded in Swedish domestic case law. Swedish courts have, on several occasions, acknowledged that the enforcement of copyright must not be allowed to override constitutional rights such as the right to a fair trial and freedom of expression. These considerations are particularly evident in litigation involving evidentiary use of protected material, politically sensitive expression, or the procedural rights of parties.

In PMFT 4717-18, the Patent and Market Court of Appeal examined whether the use of copyrighted photographs submitted as evidence in civil proceedings constituted an infringement. Although the court found that the reproduction and use of the material did meet the formal criteria for infringement, it emphasised the procedural context in which the use occurred. Specifically, the photographs were submitted to substantiate factual claims in a legal dispute. The court held that, in light of Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, such evidentiary use could not be treated as unlawful in the conventional sense. Consequently, the court awarded only symbolic damages and denied the claimant full reimbursement for litigation costs, underscoring that procedural fairness and access to justice may, in some instances, outweigh the exclusivity inherent in copyright protection.²⁸

Similarly, in PMT 17286-19, the court dealt with the invocation of the so-called 'classics protection' under Section 51 of the Swedish Copyright Act, where the Swedish Academy sought to prohibit the use of national literary works in extremist political publications.²⁹ While the infringement claim was formally structured around moral rights and protection of cultural integrity, the court placed decisive weight on the political context and the expressive character of the use. It found that the evidentiary and expressive functions of the quotations, even if controversial or offensive, did not meet the threshold for injunctive relief under Section 51. This ruling reflected a strong undercurrent of judicial restraint in cases where copyright enforcement risks encroaching upon ideological pluralism and public debate.³⁰

Further support for this rights-aware approach can be found in PMT 17286-19's companion case PMFT 2585-17, where the court reiterated that the copyright system must be interpreted in light of overriding constitutional principles.³¹ It held that even where an infringement is technically established, the purpose and necessity of

²⁴ A. Hammarén, *Upphovsrätten ur ett yttrandefrihetsperspektiv*, (2023) Nordiskt Immateriellt Rättsskydd nr 4, p. 472.

²⁵ ECtHR (5th section) 19 February 2013, case of Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden, No. 40397/12.

²⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10.

²⁷ H. Bengtsson, *I gränslandet mellan upphovsrätt och informationsfrihet*, (2016) Liber Amicorum Jan Rosén, p. 101.

²⁸ Swedish Patent and Market Court of Appeal, judgement of 7 December 2018, case no. PMFT 4717-18, L.G. v J.J.

²⁹ Act on Copyright in Literary and Artistic Works (SFS 1960:729), Section 51.

³⁰ Swedish Patent and Market Court, judgement of 15 April 2021, case no. PMT 17286-19, Svenska Akademin v Nordfront and Nordiska motståndsrörelsen.

³¹ Swedish Patent and Market Court of Appeal, judgement of 24 January 2018, case no. PMFT 2585-17, J.I. v M.B.

enforcement must be scrutinized. The court noted that disproportionate enforcement could deter legitimate uses, and that courts must avoid granting remedies that result in a chilling effect on constitutionally protected expression.

The approach adopted in these cases aligns with the proportionality doctrine, which requires that restrictions on fundamental rights, such as freedom of expression or the right to present evidence, must be suitable, necessary, and proportionate to the legitimate aim pursued. This principle has been affirmed by the Court of Justice of the European Union in C-469/17 *Funke Medien*, where the Court emphasized that any limitation of fundamental rights, such as those protected under the Charter of Fundamental Rights of the European Union, must comply with the principle of proportionality. Swedish courts do not rely on rigid hierarchies of norms but rather conduct a case-by-case balancing based on the function and context of the expression in question. The courts often apply implicit constitutional interpretation, recognizing when copyright enforcement would unduly interfere with democratic discourse or procedural equity.³²

Academic commentary has reinforced this approach, emphasizing that copyright enforcement must be situated within the broader normative system of rights and freedoms. For instance, scholars argue that uses such as parody, quotation, or political critique must be safeguarded through flexible interpretation of statutory exceptions and a cautious application of enforcement tools like injunctions or damages.³³

The proportionality approach is further developed in legal scholarship, where the prevailing view is that copyright and expression should be interpreted in a manner that recognises their mutual dependence rather than absolute opposition. The conflict between the two rights is often overstated and better understood as a form of functional tension between competing but equally legitimate aims. When copyright is enforced through ex post mechanisms such as injunctions or damage claims, the risk to freedom of expression is generally lower. However, when enforcement occurs through ex ante tools such as proactive content filtering, the risk of chilling legal speech is greater and must therefore be subjected to stricter judicial scrutiny.³⁴

Statutory limitations within the Swedish Copyright Act function as further safeguards for expressive uses. The Act includes exceptions for quotation, parody, news reporting, and critique, mechanisms that ensure copyright enforcement does not disproportionately limit protected expression. These exceptions, codified in sections 22 to 26 of the Act, have been interpreted in light of both domestic constitutional provisions and Article 10 ECHR.³⁵ For instance, the exception for parody under section 23 has been used as a shield in cases involving satirical reinterpretation of protected works, consistent with the view that humour and social commentary lie at the heart of protected expression.³⁶

At a structural level, Swedish courts do not grant copyright enforcement automatic priority over expressive rights. Rather, the courts engage in a case-by-case assessment of all relevant circumstances, including the type and severity of the infringement, the function of the expression in question, the public interest in its dissemination, and the availability of alternative channels for expression.³⁷ This nuanced approach avoids formal hierarchies between rights and instead relies on principled balancing under the auspices of proportionality.³⁸

In conclusion, Swedish law strikes the balance between IP enforcement and fundamental rights through a multi-layered framework involving constitutional guarantees, international human rights obligations, statutory exceptions, and proportional judicial interpretation. While copyright enforcement remains robust, it is not unbounded. Courts and lawmakers recognise the need to preserve a sphere of expression that is not only legally permissible but also democratically indispensable. The Swedish model thus exemplifies a rights-aware, context-sensitive, and proportionate approach to IP enforcement.

6.2 Case Law – The Balance Between Copyright Enforcement and Fundamental Rights

Swedish case law contains several notable examples where the enforcement of copyright has been legally challenged, either explicitly or implicitly, on the basis of fundamental rights such as freedom of expression and

³² CJEU, case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, EU:C:2019:623, para. 45-53.

³³ A. Hammarén, *Upphovsrätten ur ett yttrandefrihetsperspektiv*, (2023) *Nordiskt Immaterialt Rättsskydd* nr 4, p. 470.

³⁴ M. Leistner, *The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks*, (2022) *GRUR International*, Volume 71, Issue 10, p. 922.

³⁵ *Act on Copyright in Literary and Artistic Works (SFS 1960:729)*, Sections 22-26.

³⁶ A. Hammarén, *Upphovsrätten ur ett yttrandefrihetsperspektiv*, (2023) *Nordiskt Immaterialt Rättsskydd* nr 4, p. 479.

³⁷ CJEU, case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, EU:C:2019:623, para. 48 and 49.

³⁸ U. Bernitz et al, *Immaterialrätt och otillbörlig konkurrens*, Norstedts juridik 2023, p. 22 f.

the right to a fair trial. These cases demonstrate that Swedish courts are sensitive to the potential for disproportionate enforcement and often invoke principles of necessity and proportionality to reconcile competing legal interests.³⁹

One of the most prominent and legally significant cases concerning the intersection between copyright regulation and fundamental rights is RH 2013:27, involving the four founders of the digital file-sharing service The Pirate Bay.⁴⁰ The defendants were convicted by Swedish courts for aiding and abetting extensive copyright infringement by enabling and promoting the illegal dissemination of protected works via a peer-to-peer-based platform. Although the case was primarily criminal in nature, it raised fundamental legal questions regarding the boundary between copyright protection and freedom of expression, particularly in the context of a digital information society where traditional distribution channels have been replaced by decentralized mass-distribution platforms.

The defendants brought their case before the European Court of Human Rights, arguing that the Swedish state's criminal enforcement of copyright law constituted a disproportionate interference with their right to freedom of expression under Article 10 of the European Convention on Human Rights. The Court acknowledged that Article 10 was applicable and that the provision of technical infrastructure for information sharing could fall within the scope of protected expression. Nevertheless, the Court found that the restriction pursued a legitimate aim, namely, the protection of property rights under Article 1 of Protocol No. 1 to the Convention, was prescribed by law, and was necessary in a democratic society.⁴¹ In its proportionality assessment, the Court placed particular emphasis on the scale of the infringement facilitated by the platform, its commercial nature, and the defendants' failure to take any meaningful steps to prevent or limit the dissemination of protected material.

The case clarified that although freedom of expression is a cornerstone of any democratic society, it is not absolute and cannot be extended to protect conduct that is, in essence, aimed at facilitating systematic copyright infringement. The Court thus established that freedom of expression cannot be invoked as a general defence against copyright enforcement where the act of expression consists in enabling the large-scale unlawful dissemination of protected works. The judgment has since gained precedent-setting significance both in Sweden and at the European level and has been reaffirmed in later case law and extensively discussed in academic literature.

Another legally and doctrinally important case is PMT 17286-19, in which the Swedish Academy initiated proceedings against Nordfront and the Nordic Resistance Movement, invoking the so-called "classics protection" provision in Section 51 of the Swedish Copyright Act.⁴² This provision enables designated cultural institutions, including the Academy, to take legal action against uses of classic literary works that are deemed to offend cultural values or the public interest in preserving national heritage. The Academy argued that the defendants had quoted verses by canonical Swedish poets, including Viktor Rydberg, in ideological and hateful contexts, thereby damaging the integrity of the works and degrading their cultural status. However, the court dismissed the claim, citing evidentiary difficulties in proving concrete harm to cultural interests, as well as the need to respect the breadth of freedom of expression in politically controversial or ideologically sensitive contexts. Although the judgment did not explicitly reference Article 10 of the ECHR or the Swedish Constitution, it must be read as an expression of judicial restraint when it comes to applying copyright in a way that might curtail public discourse. The case therefore illustrates how courts in practice account for the value of expressive freedoms, even when these considerations are not overtly articulated in the reasoning, something particularly notable in the Swedish legal tradition, where judicial opinions tend to be relatively concise.

A further key decision involving the interplay of fundamental rights is PMFT 4717-18, which concerned the use of copyright-protected photographs as evidence in civil proceedings.⁴³ The photographer brought an infringement claim, arguing that the opposing party had reproduced and disseminated the photographs without authorisation. While the court acknowledged that technical infringement had occurred, it considered the context, namely, the use of the material as part of the defendant's evidentiary submissions, and held that such use must, in certain circumstances, be accepted in order to satisfy the right to a fair trial under Article 6 of the ECHR.⁴⁴ The court therefore awarded only symbolic damages and denied the claimant full reimbursement of litigation costs. This

³⁹ U. Bernitz et al, *Immaterialrätt och otillbörlig konkurrens*, Norstedts juridik 2023, p. 109 f.

⁴⁰ Svea Court of Appeal, judgement of 26 November 2010, reference RH 2013:27, F.N. et al v Sweden.

⁴¹ Art 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

⁴² Swedish Patent and Market Court, judgement of 15 April 2021, case no. PMT 17286-19, Svenska Akademin v Nordfront and Nordiska motståndsrörelsen.

⁴³ Swedish Patent and Market Court of Appeal, judgement of 7 December 2018, case no. PMFT 4717-18, L.G. v J.J.

⁴⁴ Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

ruling is particularly significant as it indicates that procedural rights may, in some instances, outweigh the exclusivity conferred by copyright. It thus contributes to the development of Swedish law in addressing cases involving conflicting protected rights, where evidentiary interests and procedural fairness must be balanced against intellectual property claims.

Taken together, these cases demonstrate that Swedish courts apply a contextual and rights-conscious approach when copyright protection potentially conflicts with fundamental rights. Courts acknowledge, either expressly or implicitly, that both freedom of expression and the right to a fair trial enjoy constitutional and Convention-based status, and that copyright must be exercised within the boundaries set by these rights. Accordingly, there is a clear tendency in Swedish jurisprudence to avoid granting copyright claims automatic precedence. Rather, each case is assessed individually, considering the nature of the expression, the purpose of the use, its context, and the broader public interest in protecting expressive freedom.

In conclusion, Swedish case law and doctrine show that courts are increasingly attentive to the constitutional and human rights implications of copyright enforcement. While no landmark case has definitively set aside an enforcement action on fundamental rights grounds alone, the jurisprudence indicates a consistent judicial effort to avoid disproportionate outcomes. The Swedish legal system recognises that copyright must not only serve the interests of creators but also be exercised in a manner consistent with democratic values and protected freedoms.

7. Reflection and Concluding Remarks

Online platforms are required to adopt measures to remove and tackle unlawful content published on their platforms by users. To avoid being liable for content that entails infringements, they need to take effective measures to remove content. Online platforms can be held liable in the act of not removing unlawful content, but also directly liable for the content being uploaded. There is no responsibility for platforms to monitor their site or use specific measures to take down content such as algorithms or technical filters – in respect to freedom of expression and the risk of over-removal of content. Any material taken down by online platforms shall be done with proportionality in mind.

There is case law in Sweden which shows that we as many other European and non-European countries have intermediary services and face the difficulties in determining the exact responsibilities of online platforms with respect to fundamental freedoms such as freedom of expression. To tackle the spread of unlawful content through the global network, online platforms play a vital role. Online platforms are known for not only storing content, but also where the dissemination to the public is a main part of the organisation. For decades of not having enough mechanisms in place to give the platforms incentives to take measures and adopt stricter measures themselves to tackle the issue, with the introduction of the DSM and the DSA stricter measures and further mechanisms have been put into place.

As was raised in the preparatory work to the implementation of the DSA in Sweden, the number, type and size of the providers of intermediary services established in Sweden are unclear. The evaluation of the online platforms measures for take down and how they adhere to their responsibilities is still yet to be done. There have not yet been any published policies clarifying the responsibilities of how to limit uploads of content or which measures that are more appropriate than others – which could be due to the uncertainty as to how many platforms established in Sweden that are affected by this legislation.

Copyright infringements have historically been prioritized as actions that need to be prevented by online platforms, although there is no case indicating that this should be more valued than hate speech or other crimes that occur on these platforms. Approved trusted flaggers, which purpose is to notify platforms of illegal contents, in Sweden are as today ECPAT Sweden and the Swedish Theft Preventions Association (SSF). From an IP-perspective and the interest of right holders, there is a need for an organisation within the expertise of IP to be appointed as trusted flagger as well. Naming a trusted flagger within this area of expertise would be the next step in strengthening the protection of IP-material on online platforms. Considering the interest in maintaining fair competition, it is necessary that the trusted flagger can be deemed to be objective.

To conclude, the legal landscape for online platforms have evolved during the past 20 years since the first attempt to regulate these platforms. As they play a vital role in preventing the spread of unlawful content, legislators and right holder's need there to be responsibilities for these platforms. As monitoring could be considered an overly-

far responsibility, lead to risk of over-removal and provides legal uncertainty for intermediary services– this responsibility has been removed from Swedish law and a so called ‘Good Samaritan’ clause has been introduced as a result of the DSA. To determine if this is the right approach to tackle unlawful content online, and especially copyright infringement, will need close examination of online platforms actions moving forward when the DSA starts being tested by courts against online platforms in Sweden and within the EU.