Piercing the Corporate Veil in Finland and Sweden – When Could Shareholders also be Held Liable for Patent Infringements?

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This time we take a look at various decisions that share one thing in common — piercing the corporate veil doctrine. Even if these rulings are not purely patent law cases, they will definitely have influence on forthcoming litigations.
First, let us look at the recent Finnish Supreme Court case 2015:17, in which the defendant Verkkokauppa.com Oyj, a Finnish First North listed company, had sold products to Finnish customers using its own subsidiary Arctecho OÜ (Arctecho) without paying copyright levies.
Next, we turn to a Swedish decision (HD T 2133-14), in which the Swedish Supreme Court held that shareholders are liable for their company's obligation to compensate for legal expenses to the other party accrued during a dispute.

Devices and recordable media used for reproduction of works for private use were subject to a levy in Finland until 1 January 2015. This levy applied if such items were either imported to or manufactured in Finland. As the Estonian subsidiary had not paid the levies, the claimant Finnish Composers' Copyright Society Teosto sued both the subsidiary and Verkkokauppa.com. The Court of Appeals gave its decision on 2013 in which it held that there were grounds to pierce the corporate veil taking into account the ownership connections between these two companies and how control was exercised over the subsidiary. The court continued that in this situation the arrangement was artificial whereby the subsidiary was the company importing the products, and established that Verkkokauppa and Arctechon should pay damages at the amount of €3.5M to Teosto. The Supreme Court's ruling upheld the ruling of the Court of Appeals.

Similarly, in Sweden, the question of piercing the corporate veil was discussed in a ruling of the Supreme Court of Sweden. In this case, shareholders were held liable to pay damages to the other party, the decisive factor being that the company was merely a form or vessel to process the dispute and to hedge their position against liabilities. The court held that this kind of approach, which, in fact, led to the avoidance of statutory compensation which was against the principles of fair trial.

What we can make out of all this then:

The first, in light of above, if your patent licensing model is based on stick (rather than on carrot), confining commercialisation activities to a separate legal entity may not protect you as a shareholder against damages and claims based on unsuccessful litigations.

Second, the Finnish Patents Act (No. 550 of December 15, 1967) clearly defines the exclusive rights of a patent holder which, naturally, award protection against direct and indirect infringements. What our Patent Act does not provide for, however, is as far reaching doctrine of inducement to infringement like one in the US. With this, I refer to cases where a person does not commit such direct infringement himself but, say, asks or induces another to do so and, therefore, may be held liable for inducing infringement. Of course it is not only a US doctrine and to some extent this may be covered by our indirect infringement, but in addition to that it is also worth noting that in some jurisdictions there might also be additional non-statutory or other avenues for a similar recourse, such as the law of restitution, but these are not discussed in this post. In any case, under US law there must exist an act of direct infringement and, in addition, there must exist intent to actively induce infringement; however, under Finnish law, putting calculation of damages aside, this kind of inducement could become relevant mainly in indirect infringement or by virtue of participation in the actual steps leading to infringement. Yet, while this concept of "inducement" or "mala fide" remains perhaps less relevant in our domestic patent law system, it is interesting to see similarities between the the above US approach, as well as our corporate law doctrine of piercing the corporate veil and circumstances when a Finnish court may hold that not only the actual company committing the infringing act is liable but also its shareholders, and it is here where this interplay between intent and inducement definitely seem to have wider role to play.

In conclusion, the court's decisions leave many questions open, such as that there is no discussion on arguments against piercing the veil generally, or in this particular case, so it remains to be seen whether this will be a case of specific circumstances. However, we expect an increase in claims to pierce the corporate veil and to identify the obligations of a company with the obligations of its shareholders.