Abstract
This paper takes as its starting point a recent dispute that attracted the attention of the Swedish media. A group of freelance journalists launched a magazine by the name of Public Service, devoted to journalism and society reportage. However, after publication of the first issue, they discovered that not everybody found the name as fitting as they did. The Swedish publicly-funded radio broadcaster, SR, argued that only the public service broadcasters had the right to call themselves ‘public service’ and threatened to take legal action against the magazine. Although the magazine journalists strongly believed that what they were doing was exactly what public service should be about – journalism in the service of the public – they felt that they lacked the financial resources needed to defend their position in a court case. Instead, they changed the magazine’s name to Re:public Service, and auctioned off the Public Service publishing licence. SR won the bidding, acquiring the licence for a reported 140 300 SEK (approx €15 000).

This chain of events raises some interesting questions for analysis and research in the context of the management and protection of brands by publicly-funded broadcasters, and is of particular importance in a Nordic context where ‘public service’ has been used as something of a brand name for the public service broadcasters’ specific services. The feud described above firstly provides a colourful case-study within which to examine the debate about the whole concept of ‘public service’: what is it, what should it be, and who has the right to define it? Secondly, it could be seen as a symptom of an increased process of commoditisation in the media industries, where the identification, valuation and legal protection of brands is spreading into previously uncharted (and ‘un-owned’) territory. In this paper we aim to examine what is encompassed by ‘public service’, both from a conceptual point of view as well as the legal issues surrounding claims of ownership, supported with interview data from the protagonists in the above case. In doing so we will seek answers to the question of whether or how ‘public service’ should form part of publicly-funded broadcasters’ branding strategies?
Introduction

During the last decades both commercial and not for profit organizations all over the world have begun to understand the increasing importance of branding and the legal protection thereof. But it is no longer ownership of just “regular” brands or trade marks that is claimed; the net has widened as far as things such as colours and sounds over which legal protection is sought, and in many cases given. This trend of commodification, the process in which intellectual property and other ownership claims are being placed on such universal things as information and concepts, can be seen also in the media industry. A recent well-known case which illustrates this was the suit filed by Fox News channel against the comedian and media critic Al Franken, accusing him and his publishers of trade mark infringement and unfair competition by using the phrase “fair and balanced” in the title of his book Lies and the lying liars who tell them: A fair and balanced look at the right. In this case the court denied Fox’s application for an injunction, shortly following which they dropped their action (Saulny 2003a and b). However, whilst they were not able successfully to invoke it here, and the trial judge cast doubt on its validity (US District Court, SDNY 2003), Fox nevertheless continues to own a registration for that phrase. So it is probably not the last legal battle we have seen where corporations claim ownership over a generic phrase or a concept; indeed a similar such dispute in Sweden forms the backdrop to this paper.

The commodification of phrases and concepts goes hand in hand with the increased interest in branding in contemporary society. Even organizations that a decade or so ago seemed to shun such practices are today engaged in all sorts of branding strategies. A case in point is Europe’s public service broadcasters (PSBs) (Wolff, 2006). Ytreberg (2002) argues that the PSBs’ increased interest in branding has to do with the technological shift into a multi-channel system and the increased presence on several platforms. This, together with a general “managerial turn” in the media sector, has put the spotlight on the importance of brands as a way to secure presence in the minds of viewers and listeners, which in the end will translate into continued legitimacy for their operations. The idea of public service being commodified has also been identified by Hoynes (2003:124) in the case of the US public broadcaster, PBS: “[P]ublic service is increasingly something to be packaged and sold to consumers who are brand loyal to PBS.” The phenomenon he discusses concerns the use of a commercial branding strategy centred on a specific brand (in this case PBS), which in turn seeks to leverage goodwill from the idea of public service. He characterises this branding strategy as “an attempt to turn the cultural value of the ‘old PBS’ into financial value for the new PBS…[by] transforming public service, and the trust that accompanies such public service, into a marketable commodity” (Hoynes, 2003:128). This commodity is still the recognised “PBS” brand, however. Something similar can be seen in the case of another public broadcaster, the BBC, whose brand manual explains that there are certain things that it considers to be its “public service brands”. These are brands that “define all the services, media platforms and content delivered by the BBC” under its remit as a public service organisation, and include BBC One, BBC News, and bbc.co.uk (BBC 2007).

The distinctive development that we identify and analyse in this paper is not merely the use by a public service organisation of its own name or titles as means of commoditisising “public service”; rather it is the apparent use by certain Swedish organisations of this concept’s actual words as a brand in itself. In particular, we will look into a dispute that played out in Sweden

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1 E.g. Löfbergs Lila, Orange and BP are all companies that have successfully been given legal protection for a particular kind of colour in relation to certain goods and services. The sound of a dog barking and the smell of bitter beer applied to dart flights have also made their way onto the UK Trade Marks Register.
concerning rights to the concept of public service. A magazine devoted to documentary journalism adopted as its name Public service, something which made the Swedish public service radio broadcaster, SR, threaten to sue them under Swedish marketing law for misleading the public. We present and examine this case, both from a conceptual point of view regarding the public service concept, as well as with regard to the legal issues surrounding any claim of right to those words. Can Public Service really be used and owned as a brand in this way?

**Research and methods**

Our approach to researching and writing this paper draws on a combination of empirical data collection and analysis, in the form of interviews; a review of the literature relating to public service as a philosophical and historical construct or concept; and legal research and analysis within the fields of trade mark law and brand protection. It is therefore to some extent cross-disciplinary, in that it seeks to analyse the strategic implications of employing and protecting Public Service as a brand, both from a legal and a wider conceptual point of view.

As far as our empirical work is concerned, we have taken as our starting point and kernel of this paper the dispute between the magazine Public service and the radio broadcaster SR (Sveriges Radio) as it illustrates well some of the conceptual tensions that seem to be associated with the Public Service concept, at least when used as a brand or title. In order to penetrate the underlying background and chain of events in this dispute, we have gathered and assimilated Swedish press reports, conducted interviews with the editor-in-chief and co-founder of the Public service magazine, Ira Mallik, and the Head of Legal and Linguistic Services (Chef för Programsekretariatet, juridik och språkvård) at SR, Ingrid Cars Westrell, and submitted our text summary of the dispute for further comment by the aforementioned as well as the other two magazine co-founders.

In relation to the legal research, in order to establish further empirical data we have conducted searches of the Swedish, European and UK trade mark registries in respect of PUBLIC SERVICE; conducted domain name searches of the top level and country code top level domains .com, .se, .biz, .org, as well as .co.uk; and searched the publishing licence (utgivningsbevis) register at the Swedish Patent Office, PRV. We have then analysed these findings, together with the arguments of the parties in the dispute, from the point of view of trade mark and so-called ‘marketing’ law, and added further legal comment where appropriate. As will be explained more in the legal section of the paper, our aim has been to treat the legal issues at as conceptual and international a level as possible, rather than being tied only to the peculiarities of national (in this case, Swedish) law. In this way our intention is to illustrate the more general strategic legal considerations applying to Public Service as a brand, and not to provide an exhaustive account of the applicable law in the SR-Public service dispute.

**The public service concept**

“That there is no standard definition of the meaning of public service is an old truth in the field of media research” writes Norwegian media professor Syvertsen in a special issue devoted to public service broadcasting (1999:5). In the light of this it might seem paradoxical that the current debate on how public service broadcasters should be organized and funded,
how programme policy should be formulated and what kind of content or broadcaster that really is “public service” is as vibrant as ever. Syvertsen (1999) has studied the different discourses of public service, and how they have changed over time. She writes that during 60 years of broadcasting history, no single understanding of public service has crystallized. This doesn’t mean, however, that the concept has stopped being used. On the contrary, it seems like the increased competition in the Nordic television markets in the 1990s has given the concept an even more central position. Sondergaard (1999) argues that the concept always have been used as a political weapon in order to legitimate (primarily)2 public service broadcasters’ operations. In Syvertsen’s (1999:5) words: “By attaching concrete and significant privileges to the status of “public service broadcaster” without specifying what they mean by the term, authorities have elicited a battle of rhetoric, the winners of which are awarded gilt-edged concessions, a share of licence fee revenues, and politicians’ blessing.” Lindén agrees and argues that in Sweden public service is “structure politics, regional politics, industrial politics, technical politics and cultural politics” (Lidén, 2000, my translation). Depending on the context and especially who is talking about it, public service can be production culture, or a quality mark, or just television free from advertising, or a brand. Bolin (2004) argues that it is just because the concept is empty of any universally agreed upon meaning that it is so widely used (and will continue to be in the future). The emptiness allows for different actors filling it with their own understandings of what it is or should be: “…as long as it is useful as a rhetorical benchmark in a battle over what our media are and what they should be, public service as a concept will also remain.” (Bolin, 2004:285)

However, in her semantic analysis of the historical use of the concept, Syvertsen (1999) has still found that three general meanings have been attached to the public service term during the history of broadcasting. The first definition of public service that dominated in the early years of broadcasting was that it should be seen as a public utility, in the sense that it should be viewed as a service that governments provide, similar to postal services, roads, railways, health care etc. Important for such an understanding are such things as signal quality, efficient operations, and a distribution network that ensures access for all viewers. Public service in this use of the concept is thus understood in fairly technical/economic terms and is generally free of the value or content judgements that have later come to be associated with the concept.

The second meaning of the term has to do with the public sphere, in the sense that public service should be broadcasting in the service of the citizenry that make up society. Here issues such as values and content are more emphasised than in the first definition. The core understanding is thus that public service broadcasting should guarantee that all members of society should have access to such information and knowledge that enables them to be active citizens and engage in the public debate. This definition is what has been predominant in the later debate on public service and put forward by the national public broadcasters as their mission and raison d’etre. An example of a definition of the concept belonging in the “public sphere” category is Picard’s (2006:183):

“The basic mission of public service broadcasters … is to serve the cultural, social, and political needs of their audiences, to provide a common universal service that helps foster national identity, and to create the means for the aspirations and concerns of citizens to be conveyed and acted upon in society.”

2 The Swedish “hybrid” channel TV4 did however also use the public service concept in their presentation of the channel as “commercial public service”. Lately, however, they have abandoned that slogan and now call themselves “a commercial quality channel” (Bolin, 2004).
The third definition is to see public as synonymous with audience, thus seeing public service as *broadcasting in the service of the viewer*. In this understanding the aim of public service is to satisfy the interests and wishes of the individual consumer, rather than a collective citizenry. Syvertsen argues that even though this definition was not widely accepted in the late 1980s, there are today powerful forces at play (both among commercial and public broadcasters) which try to legitimize such an interpretations of the concept.

The birth of public service as we know it today took place in the UK in the 1920s as an answer to the question of how to organize the broadcasting of radio. The reasons why the UK chose to organize the new mass medium according to the public service model were several; the technological restraints (scarcity of airwaves), the characteristics of the good and the cultural and societal importance of the content carried by the new technology were some of the most important. Analogue broadcasting of both TV and radio is limited by the scarcity of spectrum, which means that only a few channels could be broadcasted. And who should then be allowed to broadcast content in these channels? With such restrictions a public service model seemed like a good solution to ensure that the radio (and later the TV) would air content directed to all parts of the public. The “market failure” and the “public good” arguments were other reasons why public service broadcasting was introduced in the first place (Ward, 2006). These arguments are based on two premises: the first is that broadcasting is a platform that is socially, culturally and politically crucial for a society, and one thus needs to ensure that this platform provides content that fulfils a range of social objectives. This is the “merit good” idea; when the market cannot provide the overall demand from society of a certain good, then the government should intervene. The second premise is that broadcasting (that is analogue broadcasting) is a public good (one cannot make sure that only the ones that have paid for the good really are the only ones consuming the good; at the same time the consumption of the good doesn’t diminish the amount available for the next consumer). Even though technology developments are increasingly making the free rider problem obsolete, the social significance of broadcasting is still used as an argument for public service, as we have seen above. In Sweden and elsewhere, there were also more pragmatic reasons why the governments settled for a public service model. The existing advertising funded media were worried that radio, and later TV, would steal their financing and fought against the idea of an advertising funded broadcast media. These lobbying forces were often quite strong, and in many countries their interests coincided with the wishes of the government to regulate the broadcast market (Findahl, 1999; Norbäck & Ots, 2005).

**Public service in Sweden**

The British BBC model of public service has been exported to most European countries, the former British Commonwealth and Japan, however with some national differences. The Scandinavian public service broadcasters (PSBs) are the ones who are said to be most similar to the BBC role model in terms of financing (licence fee-funded) and organization. The Swedish PSBs (divided into three independent companies: SVT (television), SR (radio) and UR (educational broadcasting)) have also imported the English term ‘public service’; a term that interestingly has remained un-translated in their own communications since no satisfactory translation has been found. One reason for the difficulty of finding a usable, working translation in Swedish might be the fuzziness of the concept; if there is no consensus
on what it actually means, how can it be translated?[^3] Thus, the English term public service is used un-translated by both SVT and SR. If one visits the websites of these organizations, both make much reference to public service: they both describe themselves as public service companies, their public service mission is outlined and elaborated on and how well they live up to their mission is evaluated in the annual public service accounts.

However, the Swedish PSBs’ remit and terms of service are set and defined by the Swedish state – and the official documents which grant them permission to broadcast (sändningstillstånd) and state the licence terms on which they are to do so (anslagsvillkor) do not themselves use the English phrase public service. The first line of the respective broadcast permissions require the broadcasters to run their operations ‘i allmänhetens tjänst’ (i.e. in the service of the public). In the licence terms, the broadcasters are required to account for how they are planning to run their operations in order to ‘fullgöra sitt uppdrag i allmänhetens tjänst’ (i.e. to fulfil their mission in the service of the public), and to produce annual accounts of how this has been done. In each case, though, the words in the official documents are written in Swedish; it is the PSBs themselves who have chosen to interpret and explain this mission by use of a more catchy brand, ‘Public Service’. (This raises an interesting question, to which we will return later in the paper, as to who is ultimately in control of what the PSBs do, and what public service therefore means. Is there a difference between their basic raison d’être, which emanates exclusively from state licensing, and the public service concept, which seems to have acquired more of a life of its own?)

The ways in which the broadcasters themselves explain the meaning and aims of public service draw strongly on the wording found in the official documents. SVT on its website talks about giving “all citizens in a democratic country access to unbiased and comprehensive information in a variety of fields”; covering “the world from several different angles…so that [viewers] can form their own opinions on issues”; and aiming for “[h]umanism rather than commercialism”, “offering knowledge and insight, to stimulate people to partake in the democratic process”, “entertaining not only for entertainment’s sake, but even to further the values of a democratic society”, and “taking responsibility for particular audience categories who are not catered for by commercial channels” (Sveriges Television, 2005). SR presents itself as “Radio for everyone”, highlighting the fact that it is a “commercial-free and independent” broadcaster, whose “comprehensive range of programming should offer something indispensable for everyone”. They say that the point of public service broadcasting is that “[e]ach and every programme aims to be characterized by our belief in the equal worth of all human beings and the freedom and dignity of the individual”. As with SVT, it “aims to provide programmes which are impartial, accurate and a forum for free speech…appeal[ing] to a broad audience but also satisfy[ing] niche interests” (SR, 2007).

When it comes to their PR and promotional activities, they have used the label public service in different situations. SVT sells t-shirts with “Public Service” printed on them. SR has a jingle in and between programmes that say: “Is this what they call public service?” The jointly-owned subsidiary company responsible for collection of the Swedish licence fee, Radiotjänst, has in 2007 been sending out a promotional leaflet to accompany its bills, headed “Välkommen till public service!” (“Welcome to Public Service”), and which contains a summary of the PSBs’ offerings and market position. Finally, Sveriges Radio Förvaltnings

[^3]: However, in Sweden’s neighbouring country Norway where there has been a strong tendency to ‘Norwegenize’ foreign words, there is a translation of public service in use - “allmenkringkastning”.

AB (‘SRF’ – the common service and real-estate company for the three Swedish PSBs) has registered the domain name www.publicservice.se and uses it to provide a one page brief overview of ‘Public service in Sweden’ (in both Swedish and English), as well as links to the PSBs’ own sites, and those of Radiotjänst and SRF. It does not seem to be the case, however, that the companies have an overall branding strategy where public service is the key phrase. SVT has launched a promotional campaign that they call “Free Television” (Fri Television) where the aim is to increase the awareness of public service television and the difference between SVT and its commercial competitors. In accordance with Ytreberg (2002), this campaign could be seen in the light of PSBs’ increased self-promotion and use of managerial tools such as branding.

We will now move on to look briefly into some issues regarding the fairly recent appearance of branding in the literature on media management.

**Branding in the media sector**

Despite the heavy emphasis that the marketing community has put on the concept of branding in the past decades, it is a relatively new phenomenon for the media industry (Galbi, 2001; Ha & Chan-Olmsted, 2001). The introduction of new products could be a way to extend the brand for a media company, or at least make use of the value of their existing brand when introducing new products. In the competitive media market of today, where the consumer has hundreds of magazines, TV-channels, radio stations and other products to choose from, a strong brand can boost company products. Chan-Olmsted & Kim (2001) affirm that media companies need to establish a consistent brand image in order to succeed in today’s noisy marketplace. Ha & Chan-Olmsted (2001:202) define branding as “the marketing strategy of giving value to the name of a product to distinguish itself from competitors and achieve a competitive differential advantage”.

The purpose of branding is, thus, to create a high brand familiarity and a positive brand image. The branding process consists of the development and maintenance of sets of product attributes and values which are coherent, appropriate, distinctive, protectable and appealing to consumers (Ha & Chan-Olmsted, 2001). Bellamy & Traudt (2000:128) quote a television promotion executive, who described brands as “signposts” for the viewer and that “a successful brand incorporates comfort, originality and awareness of how one fits into the overall media environment”.

For the broadcasting industry, branding is used both in on- and off-air promotion efforts. Bellamy and Traudt (2000) describe how network brand logos, in the form of ubiquitous on-air “bugs”, allow for cross-promotion within programmes. Brand names can also be used to promote products such as new channels or other spin-off products (e.g., ESPN Zone sports bars in the US). Marketing researchers argue that it will become increasingly important for companies to manage their brands like assets in order to increase their value over time. Branding should be a long range strategy that all companies must engage in (Aaker, 1996).

**The story of the magazine formerly known as Public service**

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4 The Swedish “Fri Television” doesn’t mean free of charge as it might connote when translated into the English “Free television”; neither is it a call to liberate television. The focus is rather on the independence of public service TV: free as in independent and uncontrolled.
In 2004, in Stockholm, the capital of the small kingdom of Sweden, there was a collective of freelance journalists who decided to start a magazine devoted to documentary journalism. But what should they call it? One of the journalists involved had earlier played with the idea of starting a music/night club called ‘Public Service’, and when he suggested that as a name for the magazine the others all thought it made sense. The ideal that the collective envisaged the magazine embodying was their understanding of what ‘public service’ was, or rather what they thought it should be: journalism in the service of society and its citizens. Ira Mallik, one of the founders and editor-in-chief, said that they believed that they would better deliver the public service ‘mission’ than the Swedish public service broadcasters. The name Public service was thus decided upon and the required publishing licence procured from the authorities. Little did the collective of journalists know that they would soon hear from one of the organizations that appeared to be claiming some sort of prior or superior right to the use of the phrase public service: the Swedish radio broadcaster, SR.

At SR’s headquarters, also in Stockholm, the Head of Legal and Linguistic Services, Ingrid Cars Westrell, was made aware of the magazine’s existence by one of SR’s senior managing editors, concerned at what he perceived to be misuse of the public service phrase. At the time, the usual way at SR to deal with issues of this kind (the like of which usually arose in connection with other broadcasters or magazines adopting the same name as one of SR’s programmes), was to contact the persons responsible and make SR’s position known. Cars Westrell says that back in those days there was not such an elaborate strategic vision and policy regarding trade marks and branding at SR. Responsibility in individual cases lay with legal services, whose job was to analyse possible infringements from a legal perspective; inevitably this implied that their responses would not give specific consideration to a strategic or public relations perspective.

In the case of the Public service magazine, Cars Westrell wrote them a letter, arguing that since one of SR’s radio programmes, Godmorgon Världen (‘Good Morning World’), featured a section entitled ‘public service’, use of the same title by the magazine was infringing SR’s rights. In retrospect Cars Westrell acknowledges that these initial legal grounds might not have been the strongest, but SR’s main aim at this stage was to ensure that the magazine publishers were clearly and swiftly put on notice that SR challenged the lawfulness of the magazine’s choice of name. The founders of the magazine would not yield, however, so SR’s lawyers together with the SR management took the next step and contacted a specialist intellectual property law firm. In their next letter, sent by that firm on behalf of their client, they were keen to point out that SR had no problems with the editorial content of the magazine. However, it was the title of the magazine that SR could not let pass. They claimed that under Swedish marketing law such a title would be misleading: confusing or deceiving the public into thinking that the magazine Public service was somehow connected to the public service broadcasters.

The freelance collective was quite surprised about this turn of events. In retrospect, editor-in-chief Mallik says that they might have been a bit naïve when they didn’t realize that their choice of name would get them into an animated debate about who had the right to use the public service concept. In the following years, the debate surrounding the Swedish public service broadcasters – and specifically their funding arrangements – would become very heated; in 2006 the newly appointed minister of culture would have to resign because she (rumoured to be because of ideological reasons) neglected to pay her licence fee, and the

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5 Marknadsföringslag (1995:450)
public service institutions would become scrutinized and attacked by champions of the free market for distorting the broadcasting market and providing a service that the market could just as well provide. If the journalists at Public service had anticipated just how very political the issue of public service was to become, they might have been more reluctant to get into a battle regarding the name. Mallik says that they had no intention of participating in the political discussion on the life or death of public service broadcasting. Rather their interest was to open up a debate on journalism and what journalism in the service of the public should look like. They also felt that the discussion in principle surrounding ownership of a concept such as public service was important: could SR really claim ownership over something as universal as Public Service?

One of SR’s radio programmes invited the editor in chief Mallik and the then-director general of SR, Peter Örn, to engage in an on-air discussion about the issue, an offer that Örn declined. However, when Mallik wrote an open letter about the dispute in the newspaper Aftonbladet, SR, through Ingrid Cars Westrell, responded via the same means, pointing out that rather than asserting trade mark ownership of public service, SR’s motivation was to protect the Swedish public from being misled and to counter the risk of the public service concept being undermined. SR’s contention was (and is) that since a crucial part of public service is the fact of being independent and impartial, this is not something that can be achieved by a commercial publisher. This argument was apparently not convincing enough for the journalists at Public service, however, since Mallik says that besides being frustrated, they also found SR’s actions a bit comical. In their eyes, through the director general’s refusal to engage in a discussion SR managed to live up to some of the prejudices held by its critics about the ‘ruthless monopolistic state-controlled radio’. The other side of the coin was the beneficial publicity the magazine got from their feud with SR – it was after all a fairly spectacular way to make people aware of them and their new magazine.

As a reply to SR and their lawyers, the journalists stated that they were willing to announce in their magazine that they were independent from the Swedish public service broadcasters. When this did not meet with SR’s satisfaction, however, the journalists came to the realization that they would never be able to afford going to court to fight SR, and concluded that their only option was to change name of the magazine. One idea that was mooted was to leave the cover blank and inside the magazine have a sticker with Public service written on it together with an invitation to the readers to call the magazine whatever they wanted; however with the advice to use the sticker if they couldn’t think of a better name. Ultimately, however, they decided simply to add “re:” to the old title. The new name re: public service was a hint at the dialogue they were looking for, as well as a play with words in a kingdom where some would prefer republic as the model of governance. With this SR was satisfied and decided not to pursue the case any further.

Here the story could have ended. However, there is one final twist to it. Having changed the magazine name, the publishing licence for Public service was no longer of any use to the magazine, and one of the journalists jokingly suggested selling it on the internet. No sooner said than done, the licence was put up for auction. The Swedish owned TV-channel Axess Television became interested and thought ‘public service’ would be a perfect name for their new programme magazine. Up until almost the very end of the auction process the only bid

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6 This question of ‘ownership’ is a live one; as can be seen below, SR’s position, as articulated by Ingrid Cars Westrell, is not that SR owns the phrase Public Service, but rather that a third party who is not involved in the delivery of public service broadcasting should not misleadingly use the phrase themselves. We further analyse this legal distinction below.
for the licence had been placed by Axess. But just seven minutes before the auction closed, out of the blue came SR and placed a bid of 140 300 SEK (approx €15000), thereby winning the auction and obtaining the licence for SR. Cars Westrell explains that the reason for SR getting involved in the bidding process was fairly clear. From SR’s point of view they were effectively obliged to buy it, since if anybody else had done so SR would in any case then have been forced, for consistency’s sake if nothing else, to take similar action against the new owners as well. And in any case, as Cars Westrell says, the fact of having acquired the licence means that, even if SR at present don’t have a publication on which to use the name, it is after all not a bad title for a magazine published by a public service broadcaster. Mallik and her co-workers in turn were quite satisfied with the outcome. From their point of view, the fact that SR had to buy the right to publish under the name Public service in a way indicated that these words weren’t (just) theirs to begin with.²

Legal analysis – who has the right to the Public Service brand?

What is clear from our story is the value being placed on the brand Public Service itself. We see a quest for a catchy and apposite magazine title finding its holy grail in the time-worn Swedish media phrase Public Service, only to be thwarted by a public service broadcaster, whose strongly-argued position is that this is not a phrase that is effectively ‘free-to-air’, but rather one which lies within the closely-defined remit of a particular type of organisation. It is an old maxim of intellectual property law that ‘what is worth copying is worth protecting’; here we have a magazine wanting to use (copy) a successful (at least, well-known) phrase as a brand – and being told that this brand is in fact protected against this kind of use. In this part of our paper we examine the legal issues arising out of this dispute: can Public Service be legally protected as a brand – or, at least, are there some restrictions on its widespread use?

Our analysis will focus on three strands: (i) legal rights of ownership of Public Service; (ii) rights to prevent others from using Public Service; and (iii) what might be termed ‘administrative’ rights relating to the words, but which rights do not in themselves afford any greater or wider protection in a legal sense. Although the backdrop to our analysis is a dispute in Sweden, between Swedish parties, our intention is not to restrict the discussion to Swedish law, but rather to take a wider, conceptual approach, using Swedish, English and European law provisions to inform and illustrate these concepts. When we refer to registered trade mark law, we will refer to articles and provisions of the EC Trade Marks Directive⁸, on the basis that it has in turn been implemented in all EC member states’ national trade mark legislation, including that of Sweden (Varumärkeslag 1960:644). In most cases, equivalent wording can also be found in the EC Community Trade Mark Regulation⁹, governing unitary, centrally-registered, community-wide trade marks (CTMs).

(i) Legal Rights of Ownership of Public Service

² From a legal point of view, this is not necessarily the case, as we shall discuss below. Registration of a publishing licence (or for that matter a domain name) is a ‘first-come-first-served’, administrative matter, which does not by itself imply any underlying legal right of ownership of the registered name.

⁸ Directive 89/104/EEC of 21 December 1988 (to approximate the laws of the member states relating to trade marks)

⁹ Regulation 40/94/EC of 20 December 1993 on the Community Trade Mark
Registered Trade Marks

Subject to what we say about distinctiveness below, the words Public Service could potentially come within the definition of a trade mark contained in Article 2 of the Trade Marks Directive (“any sign capable of being represented graphically”). Our searches of the UK, Swedish and EU trade mark registries in August 2007 reveal no entry for those words on their own, however. The closest are a CTM for ‘The Public Service of Tennis’, registered by an American company for various sporting goods and services; and UK device marks (logos) for ‘Unison: the Public Service Union’ and ‘West Yorkshire Police – In the Public Service’\(^\text{10}\). Neither SR nor any of the other Swedish public service organisations has therefore any registered title to Public Service (although nor, for that matter, have they claimed otherwise).

We can consider, however, what the possibilities might be to obtain such a registration for this brand. As a preliminary point, it should be noted that trade marks are registered in respect of certain goods or services on which the brand is being (or is intended to be) used; there is an internationally agreed classification system administered by the World Intellectual Property Organisation (WIPO), emanating from the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. The Public Service brand, at least as used by the Swedish public service broadcasters, would therefore as a minimum need to be registered in respect of radio and television broadcasting services, falling within Class 38 (telecommunications).

In order to be registrable as a trade mark, however, the brand must be both distinctive and non-descriptive. Specifically, Article 3.1 of the Directive sets out several ‘absolute’ grounds for refusal of registration, including that the brand is devoid of any distinctive character; that the brand consists exclusively of a sign or indication which may describe the characteristics of the goods or services (such as their kind, quality or purpose); or that the brand is a sign or indication which has become customary in the current language or in the *bona fide* and established practices of the trade. On the face of it, at least, each of these categories appear to pose a problem to a Public Service trade mark application by a Swedish broadcaster.

The prevailing judicial rationale for registering trade marks in the European Union is that the brand needs to function as a badge of origin (see, e.g. Arsenal case, 2001 and Adam Opel case, 2005). The reason for not permitting non-distinctive marks is therefore that they do not serve as indications of origin (Linde case, 2001). In order to make out distinctive character, one needs to consider the overall impression of the brand (e.g. DKV case, 2000) first by reference to the goods and services, and secondly with regard to the perception of the relevant consumer – considered to be reasonably well-informed, observant and circumspect (MacQueen et al, 2007, referring amongst others to the Henkel case, 2001). As far as excluding descriptive marks is concerned, the policy reason is because these are types of marks that another trader would normally want to use in the course of trade; in other words, if the mark is just a standard description of something then to permit registration of it would give an unfair advantage to one particular trader (MacQueen et al, 2007).

The above two tests (for distinctiveness and non-descriptiveness) have tended to be elided in their application, as to some extent they can be seen as two sides of the same coin: if a mark

\(^{10}\) These UK marks also provide evidence of the fact that, in English-speaking countries at least, public service has a much wider connotation than just public service broadcasting, spanning all fields of work within education, health, transport, etc where services are being provided to the public (usually state funded or organised)
is merely a common description it is hard to show that it is distinctive of origin; and if one cannot show that it is distinctive of origin it is likely to allude in some way to the characteristics of the goods and services on which the mark is used. When it comes specifically to combinations of words, the European Court of Justice (ECJ) has held that a sign should be excluded from registration if “at least one of its possible meanings designates a characteristic of the goods or services concerned” – and this would include whether the sign was capable of being used by other traders (Wrigley Doublemint case, 2001). ‘Baby Dry’ for nappies has been accepted, but ‘Doublemint’ for chewing gum not.

Applying the above to Public Service for broadcasting services raises two issues. Firstly, since in order for it to be distinctive a mark needs to act as a badge of origin, then our analysis above about how public service has been defined in Sweden and Scandinavia indicates a big legal problem. Since there is no clear definition, and since the phrase has been adopted in various contexts, by various actors (some of which are related to each other, but some of which – as in the case of TV4 for example – are not) it is hard to argue that it is sufficiently distinctive to function as an indication of origin. Perhaps the only way round this legal problem would be to define origin in terms of control, and to observe that ultimately the actor setting the terms and conditions on which public service broadcasting is to be produced would be the Swedish state. Alternatively, it could be argued that since the use of the actual English phrase public service emanates from the Swedish PSBs themselves (since, as we have explained above, the official broadcasting licence and conditions from the Swedish state do not use the words public service), and that no-one in Sweden would apparently have used this phrase without their championing of it, it is sufficiently tied to them in the eyes of the public.

But that still leaves the second issue open: that however widely or narrowly a putative definition of public service might be drawn, it is hard to escape the fact that those words refer to some particular characteristics of the type or content of broadcasting. In other words, whatever our conclusion regarding how one might define public service, it seems apparent that it is being, and will continue to need to be, used as a description of something that cannot clearly be closed off by just one source within the marketplace.

A further ‘twist’ to observe here is the fact that Public Service is a foreign word mark when used in Sweden. The ECJ has held that just because foreign words may be non-distinctive or descriptive in a Member State which speaks that language, this does not preclude registration in another Member State (Matrazen case, 2004). So in other words, if the issue at hand was that Public Service is merely an English description, and consequently might be refused by the UK Trade Marks Registry, this does not necessarily mean that it should also be refused registration as a national mark in Sweden. In our case, however, the general use and understanding of Public Service as a description or characteristic of a particular type of broadcasting service is a phenomenon that can be observed far more in Sweden than in the UK (where as noted above, the words ‘Public Service’ on their own would not imply anything to do with just broadcasting or media). So this point might potentially work in reverse: Public Service, even though it is expressed in a foreign language, is too descriptive or non-distinctive in Sweden to be registered there. In an English-speaking country, however, it might (although even here the argument is probably weak) stand a better chance of being acceptable for registration.

Each of the above absolute grounds of refusal can be overcome if it can be shown that the otherwise unregistrable sign has become distinctive through use before the date the
application is filed (Article 3.3 of the Directive). The sorts of evidence that would need to be produced in order to cross this hurdle include the market share held by the brand, the amount and extent of use and promotion, and – most significantly – whether “the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark” (Windsurfing Chiemsee case, 1997). This last emphasis, focusing once more on the function of a registered trade mark as a badge of origin, would again seem to be the Achilles heel of any positive case for Public Service trade mark registration. The principal reason why it would be hard to establish that Public Service does not fall foul of the Article 3.1 absolute grounds for refusal in the first place – that as a brand it appears to refer to a concept or even ideology, more than to a particular, defined source of production – is likely similarly to apply to any attempt to adduce evidence that a significant proportion of consumers perceive something to the contrary. There is also a further, related risk that even where a brand might be shown to have become distinctive through use, it ends up going so far that it in fact becomes customary for the target public concerned – thus cancelling out any acquired distinctiveness (Alcon case, 2003). In other words, use of the brand Public Service by the Swedish public service broadcasters could end up being seen as a victim of its own success: such is the widespread use and understanding of the phrase, that even if the relevant public had at one stage been ‘educated’ into associating it with those particular broadcasters’ products, they may now merely perceive it as the customary term for a type of media offering in general.

In summary it is very hard to conceive that Public Service would be likely to be registrable as a national or community trade mark within the EU. Without registration – and therefore a lack of a clearly-identifiable title (important from both accounting and legal perspectives) – any strategic investment in such a brand will inevitably be on a more vulnerable basis.

As a post-script to this section, it can be noted that even if the above-described objections could be overcome, and a form of registration obtained, it would in any event be questionable just how useful this would be in practice anyway, at least against would-be ‘infringers’. Although Article 5 of the Trade Marks Directive affords proprietors exclusive rights over their mark in trade – meaning in theory at least that they can stop anyone else from using the same words in respect of their own products and services – Article 6.1.b of the Directive specifically says that a registration can not be used to prevent other traders from using “indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of the service, or other characteristics of goods or services”. Without repeating the arguments in detail again here, it seems clear at least that given the level of public discourse and widely defined understanding of what public service means or entails, any allegedly infringing use (e.g. in the way that the Public service magazine used the mark) would seem to be strongly defensible under Article 6.1.b as being descriptive of a characteristic and therefore hard to prevent anyway.

‘Unregistered trade marks’ – reputation and goodwill

If registered rights are likely to prove a challenge, what then of so-called ‘unregistered’ rights: rights of action attaching to some sort of reputation or goodwill in a brand, acquired through use rather than registration? Registered intellectual property rights might offer the strongest security, but they are by no means the only available option. The 1883 Paris Convention for the Protection of Industrial Property in defining the objects of protection of industrial (intellectual) property refers in addition to specific individual rights (trade mark, patent, etc) to the repression of ‘unfair competition’. Article 10bis of the Convention explains
that this prohibits amongst other things acts which would create confusion with the goods or activities of a competitor, and indications given in trade which would mislead the public as to the nature or characteristics of goods. These general principles of unfair competition: unfairly causing confusion with another’s reputation, and unfairly misleading the public as to the inherent characteristics of the goods or services being provided, can be analysed separately; we will investigate the second head in our sub-section (ii) below.

We concentrate here on the first head, since that implies a more proprietorial right in itself, i.e. where the first party can be said to ‘own’ some sort brand reputation. Under the relevant Swedish law on unfair competition – the prohibition of unfair marketing practices under the Swedish Marketing Law, Marknadsföringslag (1995:450) – it is clear that taking advantage of another’s reputation will be regarded as unfair marketing in accordance with section 4 of that Law, regardless of whether there is anything misleading also taking place (Karnov, 2007). Under the similar UK common law action of passing off, it is unlawful to misrepresent or confuse the public in respect of another’s reputation; here, the major focus is on reputation and misrepresentation, and far less on actual confusion (MacQueen et al, 2007). In each case then, if some sort of reputation can be shown in relation to Public Service, it may be possible for a PSB to restrain the activity of someone else not already associated with that reputation.

The first difficulty that arises, though, is of having to prove that a PSB broadcaster has itself built up a reputation in Public Service as a brand. When the public hear those words, do they associate them with a particular source or sources of delivery? There seems little doubt that Public Service is a phrase that consumers recognise – but do they recognise it as some sort of sign emanating from just one part of the market? It certainly may be possible for the Swedish PSBs to show this sort of association – and indeed here, ongoing marketing efforts such as the Radiotjänst leaflet effectively ‘selling’ public service to licence-payers, may be a way of building on such a reputation and association. It is hard to form a legal conclusion without some specific market research as to what sort of brand reputation and association exists, however.

Again, though, the second difficulty is that in order effectively to enforce acquired rights in the Public Service phrase, it would have to be shown that the other use was unfairly taking advantage of this reputation, or in some other way misrepresenting to the public in relation to that reputation. Just because a PSB can show some acquired goodwill or reputation in Public Service, does not automatically mean that other use of the same words is unfairly riding on that back of just that reputation. As we discussed in relation to registered rights, the legal weaknesses of trying to enforce rights in a descriptive or commonplace phrase are at best prohibitive and at worst insurmountable. The counter-argument will always be made – as it was in the SR-magazine case, albeit not in particularly legal terms – that those common words denote something much wider than just a one-source brand, and that use of them by others may therefore be perfectly legitimate. In other words, enforcing rights in an unregistered brand is possible; but is by no means a clear-cut legal action in the way that straight infringement of a registered trade mark can be.

(ii) Rights to prevent others from using Public Service as a brand

There is another aspect of unfair competition law, however, referred to above, and provided for in the same Swedish law: misleading marketing practices. Similar actions are available under English law, although not in any unitary way; arguments might be found under the
laws on misleading trade descriptions, for example, or in general consumer protection legislation. The issue here – and indeed the one which SR in our case preferred to emphasise the most – is that regardless of whether anyone ‘owns’ or has rights in a phrase or brand, it might nevertheless be shown that use of it should not be generally open to anyone and everyone: to use it incorrectly could cause confusion and damage to consumers. In other words, to use the phrase ‘Public Service’ on one’s goods and services when one is not public service would be misleading, and should therefore be prevented.

The advantage of this legal strategy, from the point of view of the Swedish PSBs, is that it does not require the establishment of any positive rights; it is more of a negative cause of action, based on proving that someone should not do something (misleadingly use the phrase Public Service). On the face of it, at least, this would be an easier thing to prove. Nevertheless, it is still difficult to escape from the ongoing conundrum in our analysis: do you not have to know and define what public service is, in order to prove that what someone else is doing is not?

SR’s arguments in the particular case we have looked at were that, however one defines the public service concept, it carries with it certain fundamental values such as independence and freedom from commercial influences. If one accepts these values as inherent in the concept, then it would be a legally fairly straightforward matter to show that a commercial magazine publisher – whatever its journalistic ideals and achievements – could never be truly independent in the same sense as licence-funded PSBs. But this presupposes that those values are universally accepted as the essence of what public service means: something that the magazine itself challenged (focusing more on the nature of the output rather than the environment in which it is produced), and something which appears to be far from secure when having regard to the ongoing discussions and proposals regarding the future funding methods for public service broadcasting.

So of the three legal areas we have examined, this ‘negative’ cause of action appears to be the most effective; but there is no getting around the fact that even here, the lack of a defined (or even definable) concept is more conducive to legal argument than a clear branding strategy.

(iii) ‘Administrative’ ownership of Public Service

Finally in our legal analysis, we should address the related issues of ownership of domain names and publishing licences (utgivningsbevis). In both cases, although these are things that can be ‘owned’, in the sense that they are documentary proof that the registrant in question has the right to use those outlets this does not necessarily mean that they own the legal rights in the name. In other words, just because a registrant has acquired a domain name or a publishing licence, this does not give any further proof or even indication that they are the ones with rightful ownership of any intellectual property in the same name(s). Both domain names and publishing licences are registered on a ‘first-come-first-served’ basis, meaning that so long as nothing identical has already been registered with them, the respective authorities will permit the applicant to acquire that domain name or licence. In the case of domain names, dispute resolution procedures do exist (for example via WIPO), to assist trade marks owners to ‘reclaim’ domain names that have been registered in bad faith by third parties.

11 In the case of publishing licences the Swedish registration authority PRV (the same entity responsible for patent and trade mark registration) will look at whether a highly similar publishing licence has already been issued.
parties; but these procedures have to be invoked – there is nothing to stop the bad faith registration in the first place.

As far as the licence to publish a magazine by the name of Public service is concerned, the fact that SR ultimately bought this licence from the magazine journalists does not prove that SR was not already the ‘rightful owner’ of these words; although similarly, the fact that SR is now the registered owner of that licence does not mean that it has any exclusive rights in the words public service either.12

A similar conclusion has to be drawn from the findings of our domain name searches. As mentioned earlier in this paper, Sveriges Radio Förvaltnings AB (‘SRF’ – the common service and real-estate company for the three Swedish PSBs) has registered the domain name www.publicservice.se and uses it to present an overview of ‘Public service in Sweden’. At the same time, a completely unrelated Swedish company called Public Service AB (describing itself as a commercial, not-for-profit company dealing with various forms of cultural activity) has registered and is using the highly similar Swedish domain name http://publservice.se. Internationally, other examples of identical domain name registrations include www.publicservice.co.uk (the website of a UK public sector publishing company, PSCA International Ltd); and http://publicservice.org (a general public workers site from the US, although this registration appears to have expired). The coexistence of these various sites shows that no one entity or registry has control of domain names. The fact that a company associated with the Swedish PSBs has one of these registrations does not give it (or them) any greater legal rights in Public Service; all this is really evidence of is some kind of branding or reputation-building, as discussed earlier. And as far as this latter process is concerned, the variety of types of sites choosing to present themselves under the title ‘Public Service’ provides further clues as to the difficulty of trying to isolate those words for the exclusive use of a particular type of broadcaster.

Discussion

Our legal analysis in particular points to two simultaneous weaknesses in a brand strategy based on the words ‘Public Service’, which appear to limit the effect of trying to (legally) protect the phrase. From a legal trade mark point of view, in order for a brand to be registered as a trade mark, it has to function as a badge of origin. Similarly, other rights based on the acquisition of goodwill or reputation, presuppose the association of that goodwill or reputation in one particular organisation (or possibly group of related organisations). Yet the risk with Public Service as a brand is that it falls outside the PSBs’ control for two reasons: either because it is too narrowly controlled, or because it is too wide and therefore not controlled enough.

As far as being too narrowly controlled, what we can observe is that the fundamental basis for the existence and activities of the Swedish PSBs derives from the Swedish state, who issues licences and terms which describe (albeit in Swedish) what public service needs to involve. The PSBs are therefore merely in the position of licensees, dependent on a higher ‘power’, and therefore not really positioned to build up the brand origin functions of the Public Service brand. The opposite risk that can be identified from our analysis is that in any

12 Furthermore, our searches of the PRV online databases suggests that the publishing licence sold at auction may in fact have had the full name of Samhällsmagasinet Public Service and not just Public Service, despite what the protagonists in the dispute and the press reports suggested. (See PRV utgbnr 26127.)
Public Service as a brand is just too wide to function as a badge of origin. It is a phrase in common (media) parlance, again outside of the direct control of the PSBs themselves, and can potentially be applied to any form of media production in the service of the public. And as we have described in this paper, there is not even any common consensus on how to define it, however wide the boundaries are drawn. On the face of it at least, therefore, Public Service does not seem to suggest itself as a brand to strategically or financially invest in, given the difficulties in owning or controlling it.

However, oxymoronically it seems crucial to PSBs of all nationalities to claim the concept of public service as their own, or at least to prevent other actors from using it, since being public service as Syvertsen (1999) argues, grants legitimacy, protection and a sheltered position in the media landscape. It is thus clear that there are benefits to be reaped from being public service, and the actors who have the power to define what public service is - or rather since this seems impossible - who can be said to embody this elusive concept, are powerful indeed. In the Nordic media landscape up until now the appointed PSBs have had a monopoly on being public service; if this has been perceived as a privileged position, it is nevertheless one coming under threat with the ever-increasing public debate about the organization of public service broadcasting.

So despite the legal shortcomings observed in an attempt to protect the Public Service brand as an item of property or quasi-property (commodification), the strategic importance of the phrase seems to dictate some form of alternative approach – a ‘third way’. Even if the PSBs cannot themselves establish exclusive legal title or control (and this is not something they are claiming to be able to do), it is nevertheless important that they limit the dilution risks that would come with this phrase being open to all. If everybody was public service, the privileges attached to its exclusive use would vanish or be spread thinly over a number of actors claiming ‘public serviceness’. The arguments ultimately presented by SR in their dispute with the magazine are perhaps the best legal approach to this mid-way strategy, boiled down to: “We’re not saying it’s ours, but it certainly isn’t yours!” It thus becomes a rather interesting and intriguing challenge for marketing strategists at PSBs to navigate a careful path when working to prevent other people from using a concept over which the PSBs themselves would be hard placed to claim ownership. This idea of protecting a brand that cannot be controlled, and the concomitant risks for brand dilution, are something that we would like to see investigated further, both under trade mark law and general branding strategy.
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