

IMPACT OF NEW COURT REFORM ON ENFORCEMENT OF IPR



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On January 1, 2007, a new Court Reform entered into force in Denmark, which included a number of changes that have an impact on the enforcement of intellectual property rights (IPR) in Denmark.

The overall aim of the Court Reform was to centralise various legal procedures in more specialised and professional courts, in order to achieve uniform decision-taking and reduce the length of procedures.

The number of District Courts was substantially reduced from 82 to 24. Cases instituted after January 1, 2007 that are legally based on trademarks, designs and patent rights are now, in general, tried at The Maritime and Commercial Court as a first tier. Preliminary injunctions are still instituted at the District Courts. Appeals on cases decided by The Maritime and Commercial Court are lodged directly at the Supreme Court, which otherwise only deals with cases relating to matters of principle nature.

Cases based on copyright law and on the Marketing Practices Act as the sole issue are not tried at The Maritime and Commercial Court; however, many cases that are legally based on the trademark, design or patent laws may also involve issues that compel The Maritime and Commercial Court to consider aspects of the Marketing Practices Act.

The composition of The Maritime and Commercial Court differs from the composition of the High Courts in that expert judges are mandatory during the main proceedings.

The most common composition of The Maritime and Commercial Court in, for example, trademark matters, is one legally qualified trial judge and two expert judges from the relevant field of technology all taking part in the main proceedings from the very start.

Four expert judges can accede the proceeding depending on the nature of the case. The attorneys of the parties may take the opinion that more than two expert judges are appropriate and may inform The Maritime and Commercial Court accordingly; similarly, the relevant number of expert judges can be discussed during the legal proceedings. More than one legal judge can accede in special cases of, for example, principle nature, if the decision of the case is expected to have an essential impact on other parties, the case is very complex or a collegiate court is required. Thus The Maritime and Commercial Court can be composed of up to three legal judges and four expert judges. A review of published IPR-related decisions taken by The Maritime and Commercial Court since January 1, 2007 shows no cases where seven court members were involved.

All decisions to date relate to trademarks and design matters, and no decisions relating to patent infringement matters have been published yet.

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The infringer may defend his position in a Danish patent infringement case by questioning the validity or the working of the patent. Both cases can be pending simultaneously at the same court, putting a demand on the expertise and number of judges.

The Brussels Convention has previously made Denmark a potential venue for filing a ‘torpedo’ suit to obtain a court decision, so that a party having reason to believe that it will be shortly sued for infringement of a Danish patent does not violate this Danish patent. Once such an action to obtain the court decision of non-infringement is started before an EU court, it is made impossible for a subsequent action for infringement to be brought by the patentee at any European court. During pending of the torpedo suit, these other European courts must decline on their own motion until the torpedo case is decided. This new expedited procedure makes Denmark a less attractive state for filing the torpedo than previously.

Before the Court Reform, experience showed that resolving patent matters before a Danish court took considerable time, preventing the parties from committing themselves in order to avoid damages. Now a meeting is set up in which a tight schedule of deadlines for pretrial review, main proceedings, hearings, etc. is defined in order to keep a pace on the procedures. The aimed shorter length of legal proceedings should reduce costs, with the result that it will be more attractive to enforce IPR in Denmark today than prior to the entry into force of the Court Reform.

The combination of legal and expert judges and an expected higher number of cases should establish a uniform and consistent IPR case law as the basis for advising on whether or not to bring a case before The Maritime and Commercial Court.

Whether or not the Court Reform lives up to its aim and objectives and fulfils the intentions of the lawmakers is still to be seen.

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