

Patents in Europe 2008

Denmark

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By **Mikael Tranekær Christensen, Kim Wagner** and **Nanna Wigø**, Plougmann & Vingtoft a/s, Copenhagen

1. What options are open to a European patent holder, whose rights cover your jurisdiction, when seeking to enforce its rights in your jurisdiction?

Once a granted European patent has been translated into Danish and validated in Denmark, it will have the same effect as a national Danish patent (except that it does not cover the territories of Greenland and the Faroe Islands), and the patent holder may use several legal remedies to stop any infringing actions.

Usually, the first step will be to request a preliminary injunction against the alleged infringer. Such proceedings take place at the Bailiff's Court and the presiding judge will usually allow only limited use of experts and other witnesses.

The decision of the Bailiff's Court must be followed by a confirmatory action before the Maritime and Commercial Court. This is an in-depth trial of all issues relating to the possible infringement and the validity of the patent, if a counterclaim of invalidity has been presented to the court. Expert witnesses will always be appointed by the court.

Once the London Agreement enters into effect for Denmark as of 1st May 2008, only the patent claims need be translated into Danish, provided that the patent specification is in English. However, it is expected that the judges will usually require a full translation of the patent into Danish in connection with an infringement lawsuit.

It is possible to have the claims translated into Danish and filed with the Danish Patent and Trademark Office as soon as the European patent has been

published. Such provisional protection has the effect that the patent holder is entitled to claim damages from the date on which the translation of the claims was published in the Danish *Patents Gazette*.

2. Does your jurisdiction have specialist patent courts? If not, what level of expertise can a patent owner expect from the courts?

Denmark does not have any specialist patent courts and patent litigation is rare. In particular, in proceedings before the Bailiff's Court, it cannot be expected that the presiding judge will be experienced in patent matters. Since 1st January 2007 all patent cases must be brought before the Maritime and Commercial Court and it is expected that the judges there will eventually acquire some expertise in patent matters.

As the judges are not specialised in patent matters, expert witnesses are used in all patent cases. The parties must present their questions in writing to the expert witnesses, who will then give testimony of their findings before the court.

3. Is it possible to cross-examine witnesses at trial? How far are proceedings based on written evidence? Are there restrictions on the use of evidence from experts?

In proceedings before the Bailiff's Court, the parties may present their own witnesses. The extent of hearing of the witnesses is decided by the judge, at his own discretion. This is because a preliminary measure should not be so time-consuming as to delay the possibility for the patent holder to stop the infringement.

In proceedings before the Maritime and Commercial Court, the expert witnesses will be cross-examined based on their written opinions (ie, the answers to the questions given by the parties).

Written evidence must nearly always be read out in court. However, if a judgment of the Maritime and Commercial Court is appealed before the Supreme Court, then the proceedings will be in writing only.

4. Are infringement and invalidity dealt with simultaneously? What level of proof is necessary to demonstrate one or the other?

In most cases the alleged infringer will counterclaim that the patent is invalid. It is often most cost effective to deal with the question of invalidity in connection with the question of infringement.

It is also possible for the infringer to institute a declaratory action of non-infringement, which may then be decided before the patent holder institutes legal proceedings claiming infringement.

It is also possible to request administrative re-examination. Such a request is decided by the Danish Patent and Trademark Office. Re-examination may be requested either by the patent holder itself or by a third party. Through this procedure, it is possible to have the claims amended, for instance in view of prior art which was not previously known. If a court case for invalidity or infringement is pending, then the Danish Patent and Trademark Office will stay the re-examination proceedings pending the outcome of the court case. However, if the holder itself has requested a re-examination, then the request will be dealt with by the Danish Patent and Trademark Office so that the limited scope of the patent will form the basis for the decision on the possible infringement.

The same level of proof is required to establish infringement and invalidity of the patent, to a great extent based on expert opinions and witnesses. If the subject matter of a patent is a process for the manufacture of a new product, then there is a reversed burden of proof – that is, the alleged infringer must prove that the product has not been manufactured using the patented process. If such evidence cannot be presented to the court, the product will be deemed to have been manufactured using the patented process.

5. To what extent is pre-trial discovery permitted? If it is permitted, how is discovery conducted?

US-style pre-trial discovery does not exist under Danish law. However, a party in a lawsuit will usually request the opposing

party to produce documents. With regard to a request for disclosure by a third party, the requesting party's interest in disclosure must be balanced against the third party's and the opposing party's interests in non-disclosure. The court cannot force a party to disclose documents or other evidence, but reluctance to do so will often be interpreted in favour of the other party.

With effect from 15th April 2006, new rules were introduced allowing the courts to require an alleged infringer or a third party to disclose information on the origin of infringing goods and the channels of distribution.

It is possible to secure evidence of infringing goods with assistance from the Bailiff's Court through a search of the defendant's premises.

6. To what extent does any doctrine of equivalents apply in an infringement action?

The relevant provision of the Patents Act states that the scope of protection shall be determined by the patent claims. The Danish courts have not referred explicitly to the doctrine of equivalents in any decision, but the principles of this doctrine are relevant in an infringement lawsuit. Danish courts often use the concept of "the core of the invention", and in several cases have awarded a scope of protection clearly beyond the literal wording of the claim. Direct equivalents will usually be found to fall within the scope of protection. Since Danish patent law is harmonised with the European Patent Convention, the judges will usually take the Protocol on the Interpretation of Article 69 of the EPC into consideration.

7. Are there certain types of patent right that may be granted by the EPO – biotech or computer software-related, for example – that are more difficult to enforce than others?

Since patent litigation is so rare in Denmark, it is difficult to tell whether there could be any special problems, but the same procedural standards will apply if a software patent or a biotech patent is challenged, and the patent holder will have the same set of remedies to protect itself against infringement.

8. To what extent are courts willing to consider, or bound by, the opinions and decisions of other courts that have dealt with similar cases?

Danish courts do not rely on precedents to the same degree as courts in the US or UK. However, often prejudicial questions are brought before the European Court of Justice and the judges will adjust their decisions accordingly.

9. To what extent are courts willing to consider the reasoning given by foreign courts that have handed down decisions in similar cases?

Given the diversity of decisions on infringement in, for instance, Germany, France and the United Kingdom, Danish judges will not be greatly influenced by such foreign decisions; they will of course take them into consideration, but their judgment will be based on the merits of the case and the testimony of the expert witnesses. If the validity of a European patent in Denmark must be decided, EPO case law will also be invoked by the parties and taken into consideration.

10. What options are open to a defendant seeking to delay a case? How can a plaintiff counter delaying tactics?

In the past, the possibility of requesting administrative re-examination of the patent was often used by defendants seeking to delay a case. However, since 2000 proceedings before the Danish Patent and Trademark Office are stayed if litigation has been instituted.

The defendant may also claim that the proceedings should be stayed pending an opposition proceeding before the EPO. However, whether to do so is entirely up to the discretion of the judge.

If the plaintiff has the impression that the defendant is using delaying tactics in an unfair manner, it can ask the court not to grant any further extensions of dates set for court meetings in the preparatory phase.

11. How available are preliminary injunctions and how do you get them?

Most infringement cases start with a request for a preliminary injunction. Requests for preliminary injunctions before the Bailiff's Court are decided by a single judge, who is usually not very experienced in patent matters. The parties are entitled to present witnesses of their choosing. However, since a preliminary injunction is an interlocutory remedy, the judge will often decide that only limited presentation of evidence and hearing of witnesses are allowed. Usually, considerable sums must

be paid or placed in security before an injunction can be granted.

The procedure before the Bailiff's Court is intended as a quick procedure to be decided on later by the higher instance court (the Maritime and Commercial Court). The patent holder must provide proof, to the satisfaction of the judge, that infringement has taken place.

It is only in very obvious cases that the alleged infringer will be able to prove the invalidity of the patent without the more extensive evidence and presentation of court-appointed expert witnesses as in procedures before the courts of higher instance.

A preliminary injunction must be followed within two weeks by a confirmatory action, which proceeds like a normal infringement case and will confirm or reject the injunction. The same level of proof is required to establish infringement, invalidity or unenforceability of the patent, to a great extent based on expert opinions and witnesses.

12. How long does it take to get a decision at first instance? Is it possible to expedite this process?

Because of its nature, it is possible to obtain a preliminary injunction rather quickly, but the subsequent case before the Maritime and Commercial Court of Copenhagen may take three to four years. This is largely due to the fact that expert witnesses must be appointed and due to the time it takes to prepare the questions to be answered by the expert witnesses.

If the defendant is delaying proceedings unfairly, the court may deny any further requests for postponement of the proceedings; but usually any delays in the proceedings are based on problems with the availability of expert witnesses and the procedures for drafting the questions and getting answers from the expert witnesses.

13. What avenues for appeal are open to the defeated in a first instance case? What criteria are there for granting an appeal? How long does the appeal process take?

As mentioned above, a preliminary injunction must be confirmed or rejected by the Maritime and Commercial Court of Copenhagen. A further appeal to the Supreme Court is possible. The appeal process before the Supreme Court usually takes some years before it is decided.

14. To take a case through to a first instance decision, what level of cost should a party to litigation expect to incur?

The costs will depend on the complexity of the case. In pharmaceutical cases it is usually at least DKK1 million.

15. Who can represent parties in court? Is specialist representation required?

Patent attorneys cannot represent a client in court. It is necessary to engage an attorney at law. However, the patent attorney and the attorney at law will cooperate closely, since the patent attorney will be familiar with the technical issues involved.

16. What remedies are available for infringement and how are these typically applied? Are punitive damages available and in what circumstances?

It is possible to have infringing goods seized and destroyed. Denmark has

implemented Directive 2004/48/EC on the Enforcement of Intellectual Property Rights and it is now also possible to obtain compensation for non-economic damage. The Patents Act allows for punitive damages, but usually the damages granted in infringement litigation are calculated as a reasonable royalty.

17. Are there any realistic alternatives to litigation in cases relating to patent disputes?

The parties to an agreement are entitled to provide for the resolution of disputes through arbitration. However, only the Danish Patent and Trademark Office and the courts are competent to invalidate or revoke a patent. There are no specific provisions in Danish law regarding alternative dispute resolution (ADR) and the authors are unaware of any infringement cases which have been settled by ADR. However, it is often in the interests of both parties to seek a voluntary settlement out of court.



Mikael Tranekær Christensen has worked with most aspects of IP rights from all angles of responsibility for the last 17 years. He is a qualified European patent attorney and has significant experience in the filing and prosecution of European patent applications, as well as post-grant actions.

Mr Christensen's previous experience includes significant IPR strategy and implementation insight gained from nine years acting as IPR Manager for Oticon A/S, one of the largest hearing-aid manufacturers worldwide, and as Vice President IPR for Vestas Wind Systems A/S, the world's largest wind turbine manufacturer.

Prior to these industry engagements, Mr Christensen worked in private practice with a Danish IPR firm and before that with the Danish Patent Authority.

Mikael Tranekær Christensen

European Patent Attorney
mtc@pv.eu
Tel: +45 33 63 93 00

Plougmann & Vingtoft a/s
Denmark
www.pv.eu



Kim Wagner has expertise in the areas of chemistry, in particular medicinal chemistry, pharmaceuticals and medicinal biotechnology. He has special knowledge of strategic patent issues, freedom to operate, oppositions and infringement actions.

Before joining Plougmann & Vingtoft, Mr Wagner worked as in-house patent counsel at Novozymes and Maxygen, and before that as a patent consultant with Plougmann & Vingtoft.

Mr Wagner has been working as a patent attorney since 1997.

Kim Wagner

European Patent Attorney
kiw@pv.eu
Tel: +45 33 63 93 00

Plougmann & Vingtoft a/s
Denmark
www.pv.eu



Nanna Wigø has expertise in the areas of patent and trademark law. She works as a legal adviser in matters relating to patent law and formalities, and the assignment of patent and trademark portfolios.

Ms Wigø has worked within the patent and IPR field since 1988.

Nanna Wigø

Senior Partner
nw@pv.eu
Tel: +45 33 63 93 00

Plougmann & Vingtoft a/s
Denmark
www.pv.eu

18. Has your jurisdiction signed up to the London Agreement on Translations? If not, how likely is it that it will do so?

Denmark has both signed and ratified the London Agreement, and it will come into effect as of 1st May 2008. This means that European patents for which publication of the decision to grant is 1st May 2008 or later need not be translated in their entirety if the specification is in English. The claims must be translated into Danish. If the specification is not in English, then it must be translated into English or Danish.

19. Are there any other features of the enforcement system in your jurisdiction**that you would like to point out?**

With the introduction of the EPC 2000 it is now possible for the patentee to make a voluntary limitation of its patent with effect for all member states. However, it has always been possible, and will still be possible, to apply for re-examination of a national Danish patent or a European patent validated in Denmark.

Further, it will often be a good idea for a patentee facing infringement to branch off a utility model from the European patent application or a national application in order to use the utility model registration (which can be issued very quickly) for the purpose of instituting a request for a preliminary injunction.