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Does copyright provide sufficient protection when it rains in Denmark?

Recent case law regarding the scope of copyright protection for works of applied art after rulings in the Ilse Jacobsen rubber boot case and the Anne Black ceramics case.

Earlier this month, the Danish Supreme Court delivered a ruling in the Ilse Jacobsen rubber boot case on the scope of copyright protection for works of applied art and more specifically for fashion products. The Supreme Court dismissed any copyright protection.

Shortly after the Supreme Court's ruling, the Court of Appeal of Eastern Denmark overruled the Danish Maritime and Commercial High Court's decision in the Anne Black ceramics case, finding that two out of three of the disputed ceramic products were protected only by way of the Danish Marketing Practices Act (markedsføringsloven) and not by copyright.

Up until now, the general opinion of the Danish courts has been that fashion products and designs are not protected by copyright since such protection requires both artistic and aesthetic elements in a product's design. Instead, such types of products have been protected by marketing practices based on design related distinctiveness, commercial presence in the market and marketing investments for the product.

However, recent case law from the European Court of Justice (CJEU) shows a tendency towards a less strict threshold for obtaining copyright protection for products in the fashion industry. With the CJEU's ruling in the Cofemel case¹ in September, it is now clear that the only prerequisite for copyright protection is the requirement of originality. The Cofemel case confirmed that clothing designs must be qualified as a work of applied art which enjoys copyright protection if the designs meet the requirement of originality.

In practice, only elements of such products that are an expression of the creator's free and creative choices fulfil this requirement whereas the basic product itself, e.g. a boot, a shirt or a jacket, will often not qualify. Other elements where the design is rather based on the function or form of the product do not enjoy copyright protection, while ornamentation, unique or new shapes of a basic product with creative fastenings, etc. can be protected.

Even more recently, the CJEU added to this principle with the Brompton Bicycle ruling² stating that elements where the design is based on the product's function can also enjoy copyright protection as long as the element in question passes the test of originality. The ruling is a clear confirmation that the essential point in the assessment of a product's potential copyright protection is whether the creator has added an extra artistic element making the product unique and original and whether such factors distinguish the product from the existing product market.

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1 C-683/17 (Cofemel)

2 C-833/18 (Brompton Bicycle)



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The direction of the Danish courts

The Supreme Court’s recent ruling in the rubber boots case confirms the principle set out by the CJEU. The Supreme Court namely dismissed that the design innovation by Ilse Jacobsen in the form of combining an already known boot with common lace elements and adding to it a variant of the raw material met the originality standard necessary to obtain copyright protection.

Recently, a similar result was reached by the Maritime and Commercial High Court in the Rains case where a raincoat was found not to be protected by copyright due to a lack of originality.

Regrettably, the Eastern High Court reached a similar conclusion in the Anne Black case, finding that two out of three ceramic products only enjoyed protection according to marketing practices. The court took into consideration what was already known in the relevant product market and the fact that there were no additional elements added to the product expressing Anne Black’s own intellectual creation.

The Danish courts have thus confirmed that design features and details combined in a new way or with a new twist that only commercially separate an already known generic product from its competitors’ continue to enjoy protection subject to the Danish Marketing Practices Act or the Danish Designs Act (designloven) (but not the Danish Copyrights Act (ophavsretsloven)).

The copyright protection limitations on works of applied art and fashion products are accordingly still based on a subjective assessment, but it has now been confirmed that something more creative must be added in the product development which substantially distinguishes the design from what is already known. However, the design can still be simple and functional. It is to be expected that case law in the following years will shed further light on the subject.

To ensure the best possible position in a dispute on the protection of works of applied art, whether the argued protection is based on the Copyrights Act or the Marketing Practices Act, it is important to document the design process, sources of inspiration, the existing product market at the time of the product development as well as the continuing presence and branding of the disputed product(s). Such documentation should be dated and saved electronically for each product.

Advice on ensuring documentation

- Save all drafts, sketches and sources of inspiration during the design process – such documentation is important evidence that the design reflects the creator’s free and creative choices and that the design is distinguished from other designs at the time of creation.
- Save documentation of similar products that existed on the market at the time of the design process and at the time of launch as well as other sources of inspiration – such documentation can provide evidence of the creative process and the original features.
- Active presence on the market is of great importance – save documentation for sales promotional activities offline and online, e.g. through Social Media (SoMe), overview of marketing investments, etc. Such documentation continues to be important evidence.
- Save articles from news media, blogs, etc. mentioning the product and save the result of market surveys.

Feel free to contact Accura’s dedicated team of IP specialists if you have any questions or if you wish to know more about copyright protection of applied art and fashion products.

Increase in tax allowance for R&D

further secures Denmark's status as R&D hotspot

The Danish Government and other parties of the Parliament have reached an agreement regarding the restoration of the Danish economy after COVID-19, which includes an interim increase in tax allowance for expenses to R&D activities.

An important element of the restoration plan is the so-called stimuli initiatives aimed at stimulating innovation and growth. More specifically, one of the initiatives is aimed at incentivizing both Danish and international companies to initiate new Research and Development (R&D) projects and investments in Denmark to stimulate innovation.

R&D allowance

Currently, the tax allowance for R&D activities is 103 % in 2020, gradually increasing to 110 % in 2026. The new R&D initiative consists of an additional temporary increase in tax allowance for R&D activities from the current level of 103 % to 130 % in 2020 and 2021.

The maximum tax allowance eligible for the additional temporary increase is, however, capped at total expenses of DKK 227,272,727, representing a tax value of DKK 50 million (tax rate of 22 %) calculated on a consolidated basis within a Danish joint taxation group as a whole. Further, a specific model on the cap of DKK 50 million will be prepared to ensure that the calculation of the limit is manageable for the taxpayers and the Danish tax authorities.

R&D tax credit

As an alternative to the R&D tax allowance, loss-making companies should consider utilizing the existing Danish R&D tax credit scheme. According to the tax credit scheme, loss-making companies are entitled to a cash payment corresponding to the tax value (22 %) of their qualifying R&D costs (maximum obtainable tax credit is DKK 5.5 million in 2020, corresponding to R&D costs of DKK 25 million calculated for a joint taxation group as a whole).

The tax credit may be combined with the increased tax allowance, so that the excess amount (i.e. the additional percentage for the tax allowance for the relevant year) is included as a tax loss which may be carried forward to be set off against profit in future years.

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Qualifying R&D costs

Examples of activities qualifying for R&D tax allowance and tax credit are:

- Development work, i.e. the application of scientific or technical knowledge to develop new or significantly improved materials, products, processes, systems or services.
- Applied research, i.e. research carried out in order to acquire new knowledge for the purpose of applying it in practice.
- Work in connection with obtaining information about experiments or research.
- Fundamental research, i.e. research to acquire new knowledge which is not carried out with a view to a specific practical application of the knowledge.

R&D costs qualifying for tax allowance and tax credit are product development costs and costs incurred in connection with the creation of specific knowhow. This includes, i.a., expenditures on wages and salaries, materials and primary products (raw materials) as well as rental cost on laboratories.

Perspectives

The temporary increase in tax allowance for R&D expenses is welcomed by the Danish Life Science industry, as it will make Denmark more attractive in terms of where to invest in research and development of new products etc. within the life science industry. Stakeholders in the life science industry are, nonetheless, encouraging the Government to consider increasing the tax allowance even further and/or extending the preliminary period beyond 2021.

Feel free to contact Accura's dedicated team of Life Science specialists if you have any questions or wish to know more about R&D tax allowances.

Trademark protection in China

– in Chinese or Latin?

Chinese is the most widely used language in the world when measured in numbers of native speakers covering China, Hong Kong, Macau, Taiwan and Singapore where Chinese (Mandarin) is the official language.

This amounts to about 1.3 billion native Chinese speakers in a strongly growing consumer base.



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Despite this fact, quite a number of Western brand owners have chosen to enter Chinese-speaking markets on the premise that their trademarks are sufficiently global and that localisation into Chinese versions is not required.

Although consumers in the Chinese region recognise certain brand names in their original Latin language, most consumers nevertheless refer to products by their localised Chinese names or refer to the brands by use of local nicknames, which in some cases may have unintentionally negative or odd connotations or meanings.

As an example, LANCÔME has been registered in Hong Kong as 蘭金 (meaning “epidendrum, gold”), but is commonly referred to as 蘭蔻 (lán kòu) in China, which is phonetically almost indistinguishable from “difficult to buckle” in Mandarin and “basketball” in Cantonese.

Besides such problems of undesirable connotations or associations, and even dilution of the goodwill or reputation built up in the brand, disputes may also arise in terms of ownership to a similar Chinese name or coined version registered by local distributors or agents in their own name. Such disputes can be costly and lengthy to rectify and, unfortunately, often difficult to resolve.

We therefore strongly advise brand owners to consider registration of a Chinese version of any trademarks used in the Chinese-speaking

regions. Despite the many dialects across the region, we recommend that the Chinese version adopted is the same throughout all countries/territories, the reason being not only consistency and easy recognition, but also to avoid any confusion like the example mentioned above to an increasing consumer base, as well as in instances of parallel import.

If several Chinese versions of your trademarks already exist, perhaps filed by different regional distributors or agents, efforts should be focused on choosing one version and using that version on all marketing and packaging materials and, where possible, on the products themselves.

After ensuring that the chosen version has been properly registered in the relevant countries/territories for a relevant scope of goods and services, we recommend that such version be consistently used in the market, and all other versions allowed to lapse.

If your company has not yet decided on a Chinese version of the primary trademarks, we are able to assist you with such transliteration taking into account both local connotations, relevance to the intended goods or services, inherent registrability, potential pronunciation difficulties as well as potential enforcement difficulties.

If you are interested in learning more about registering Chinese transliterated trademarks, please contact our IP prosecution experts at trademark@accura.dk.

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”Very good legal and industry knowledge. Focuses on the relevant items”

”Great team of engaging and hard-working lawyers.”

“Always pragmatic, commercial yet diligent and fun to work with.”

“Highly recommendable.”

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