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Is free speech just a fairy tale in Danish copyright law? — 2

New Danish Design Tribunal:

Disputes on architecture, design and handicraft can now be filed — 4

Russia to nationalise foreign intellectual property rights? — 6

Calling on Danish Small and Medium-sized Enterprises:

Partial refunds for patent application expenses available at DKPTO — 7

Is free speech just a fairy tale in Danish copyright law?

A recent ruling from the Eastern High Court of Denmark concerning copyright infringement of the sculpture *The Little Mermaid*, has stirred up a heated legal debate regarding the extent of free speech and parodies as an exception to copyright protection in Denmark.

On 9 February 2022, the Eastern High Court issued its decision stating that a photograph and a drawing portraying the Little Mermaid published in the Danish newspaper *Berlingske* violated the copyright to *The Little Mermaid* sculpture, thereby significantly limiting established media's access to use caricatures of copyright protected works in the press.

The dispute and court case

The disputed drawing illustrated *The Little Mermaid* as a zombie and was published on the front page of the paper's subsection "Opinion" under the caption "*Evilness in Denmark*" (in Danish: *Ondskaben i Danmark*), as a reference to how other Nordic countries perceived the immigration debate in Denmark ahead of the general election in 2019. The disputed photograph displayed *The Little Mermaid* wearing a face mask, and was used in an article with the caption "*Are you afraid of corona? Then you probably vote for the Danish People's Party (in Danish: Dansk Folkeparti)*" that analysed the connection between Danish voters' fear of COVID-19 and right-leaning political ideologies.

Following *Berlingske's* publications, the precedence creating case was initially filed with the District Court of Copenhagen by the heirs to the creator of the Little Mermaid statue, who are the proprietors of the copyright to the sculpture, against *Berlingske's* chief editor, claiming that the drawing and the photograph constituted an infringement of the copyrights to the sculpture.



The District Court decision

In its ruling, the District Court dismissed *Berlingske's* argumentation that the drawing and photograph were used in connection with the newspaper's treatment of subjects of obvious public interest covered by the right of free speech. Instead, the court found that the drawing and photograph violated the heirs' copyright to the Little Mermaid statue due to the similarities with the original work (the sculpture), and furthermore that the negative context, in which the work was displayed in *Berlingske*, constituted a violation of the heirs' moral (copy)rights.

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CHRISTOFFER EGE ANDERSEN
DIRECTOR, ATTORNEY-AT-LAW
IPR & LIFE SCIENCE
CEA@ACCURA.DK



AMALIE ROSENBAUM PETERSEN
ASSISTANT ATTORNEY
IPR & LIFE SCIENCE
ARP@ACCURA.DK



DANIEL MATHIAS BAGER
ASSISTANT ATTORNEY
IPR & LIFE SCIENCE
DMB@ACCURA.DK



CAROLINE DYBBRO ANDERSEN
STUDENT
IPR & LIFE SCIENCE
CDA@ACCURA.DK

The Eastern High Court's decision

The District Court's decision was appealed by Berlingske to the Eastern High Court, again arguing that the use of the work was an act of free speech. Berlingske further added to its argumentation that the drawing and photography constituted parodies of the original work of The Little Mermaid sculpture, and that such parodies are lawful under a non-statutory caricature exception in Danish copyright law. Berlingske also argued that The Little Mermaid was not used in Berlingske as a copyright protected work but as a national icon and symbol representing Danish identity.

The Eastern High Court upheld the District Court's decision by reaffirming that the drawing and photography published in the newspaper constituted a copyright violation that could not be justified neither as an act of free speech nor due to their nature as caricatures.

Accura comments: Dismissal of the non-statutory caricature exception in Danish copyright law?

The Infosoc Directive warrants an exception to copyright protection in case of third party "use for the purpose of caricature, parody or pastiche", under article 5 (3) (k). This exception has, however, not been explicitly implemented in the Danish Copyright Act, but has only been referred to in the preparatory works, most recently in 1961. In the 2021 amendment to the Copyright Act, reference to two cases mentioning the exception were added in the preparatory works. In both cases the courts did not find the exemption to apply, but both cases did, nevertheless, include references to the exception. Furthermore, the exception is widely acknowledged in legal scholarly works.

Further, a resembling exception can be found in the Danish Copyright Act section 52 (c) (10), according to which users of online content-sharing services can upload copyrighted works if used as a caricature or parody.

As the general caricature limitation from the InfoSoc Directive has not been implemented in the Danish Copyright Act, the Eastern High Court called into question, whether there even exists a (non-statutory) caricature exception in Danish copyright law. According to the Court, the references in the 2021 preparatory works to the Copyright Act have been based on a general misconception that the courts in previous case law accepted a caricature exception. The Court stated that even if such an exception exists, it must be applied with significant precaution.

Several Danish copyright experts, including law professors from Danish universities, have expressed concerns about the ruling and how it seemingly limits the acceptance of free speech, caricatures, and parodies as valid defenses and limitations to copyright. It is further argued that users of online content-sharing services, in light of the verdict, now hold a more extensive right of free speech (due to section 52 (c) (10) of the Copyright Act) than established media, such as traditional newspapers. Accordingly, several voices in the debate are speaking in favor of a retrial at the Danish Supreme Court, and Berlingske is expected to apply for a third instance permission from the Appeals Permission Board in order to appeal the case to the Supreme Court.

The outcome of such an appeal case will be of great importance and precedence to Danish copyright law going forward. Accura's team of IP specialists continue to carefully monitor the case development and whether the Appeals Permission Board approves the expected appeal to the Supreme Court.

New Danish Design Tribunal:

Disputes on architecture, design and handicraft can now be filed

The long-awaited Danish Design Tribunal has finally begun its work. In 2020, the first steps towards the creation of the Design Tribunal, a tribunal for disputes and questions regarding architecture, design, and handicraft was taken.

In November 2020, we wrote about the upcoming tribunal. You can read our article [here](#). In the following, we provide an update on everything you need to know about the newly launched Design Tribunal.

Two branches

The prospect of long-drawn-out cases in situations of potential design infringements could potentially restrain artist and designers from protecting their IP rights in regular courts. The desire to combat this risk was one of the motives behind the Design Tribunal, which has now opened its doors to its first cases. The aim is thus that the Design Tribunal will, in a simple and easy manner, handle disputes regarding infringements of architectural designs, arts and crafts, and designs in general.

Alongside the Tribunal, an Expert Opinion Committee (in Danish: *Responsumudvalg*) has been launched. The purpose of the Committee is to deliver statements on the legal protection of architecture, design, and handicrafts. The Tribunal and the Committee will collectively be named The Council for the Legal Protection of Architecture, Design, and Handicrafts (in Danish: *Nævnet for Retsbeskyttelse af arkitektur, design og kunsthåndværk*).

The Council is run by the Danish Crafts & Design Association (*DKoD*). Supporting the initiative is, among others, the Confederation of Danish Industry (*DI*) and The Danish Chamber of Commerce (*Dansk Erhverv*) as well as other non-governmental organisations.

The Design Tribunal

Which cases can be submitted to the Tribunal?

The Design Tribunal will try cases between two or more parties related to potential infringements of design, architecture, and handicrafts. Disputes regarding trademarks, patents, and utility models are outside the scope of the Tribunal. The Tribunal will also be available for assessing infringements of the Danish Marketing Practices Act.

It is worth noting that unless it is agreed between parties to a case at the Design Tribunal, the statute of limitations is not automatically suspended.

Which legal value does a ruling from the Tribunal have?

As a general rule, rulings from the Design Tribunal are not legally binding.

However, as the Tribunal consists of highly regarded experts in the field of intellectual property rights, it is expected that rulings from the Tribunal will be recognised in a matter which could lead to fewer cases at the general courts. Furthermore, it is the intention that a decision from the Tribunal can clarify whether there are grounds for filing a case at the general courts or perhaps help the parties reach a settlement.

The Tribunal can only provide statements on whether design, architecture, or handicraft is protected under intellectual property laws and, if so, whether such design, piece of architecture, or handicraft is infringed or not. The Tribunal cannot, however, assign damages to the infringed party unless the parties have agreed that the Tribunal is to function as a court of arbitration.

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CHRISTINA TYPE JARDORF
ASSOCIATE PARTNER,
ATTORNEY-AT-LAW, LL.M.
IPR & LIFE SCIENCE
CAT@ACCURA.DK



AMALIE ROSENBAUM PETERSEN
ASSISTANT ATTORNEY
IPR & LIFE SCIENCE
ARP@ACCURA.DK



DANIEL MATHIAS BAGER
ASSISTANT ATTORNEY
IPR & LIFE SCIENCE
DMB@ACCURA.DK

The Tribunal as a court of arbitration

If the parties agree thereto, the Tribunal can function as a court of arbitration. In that case, the rulings of the Tribunal will be legally enforceable under the Danish Arbitration Act. Further, the Tribunal can then give rulings on matters outside its traditional scope, i.e. non-intellectual property related issues, as well as assign damages to an infringed party.

Members of the Tribunal

The Tribunal consists of members who are all recognised as leading experts in the field of intellectual property, architecture, design, and handicrafts. The president of the Tribunal is a High Court judge, while the vice-president is a city court judge. Depending on the matter in question, the Tribunal can be supplemented with additional members.

Costs and legal counsel

The cost of filing a case with the Design Tribunal is DKK 3,750 (excl. VAT). If the Tribunal functions as an arbitration court, an additional fee decided by the president of the Tribunal must be paid.

If the case is not settled by the parties during the preparation of the case, thereby requiring a ruling from the Tribunal, the additional fee is DKK 21,250 (excl. VAT). The total fee for a ruling from the Tribunal is thus DKK 25,000 (excl. VAT), with the possibility of a higher fee due to extraordinary circumstances.

It is the intention that a party can submit a case to the Design Tribunal without any legal counsel. However, it is possible to be represented by an attorney. Cases can be filed via the Tribunal's website by using a detailed but simple form which contains the information necessary to assess the case in question.

Parties can thus expect significantly lower costs for filing a case with the Tribunal compared to those for filing a case with the ordinary Danish courts. The Tribunal expects a processing time of maximum 6 months, however, depending on the complexity of the case in question as well as the general case load of the Tribunal.

The Expert Opinion Committee

Which cases can be tried before the Expert Opinion Committee?

The purpose of the Expert Opinion Committee is to give unitary statements in cases to determine whether a specific piece of design, architecture, or handicraft is protected under the Danish Copyright and/or Design Act. Furthermore, designers, architects, and the like can ask the Committee to provide an evaluation on the range of protection before the launch of a new product.

A statement of the Expert Opinion Committee is not legally binding but as is the case with the Tribunal, it is expected that an opinion from the Committee will function as a relevant indication for parties to avoid or at least assess the need for additional legal steps.

The Expert Opinion Committee will not take on disputes concerning infringements, but may, however, deliver guidance opinions to Danish courts and courts of arbitration in ongoing disputes if such opinion is ordered by the court or agreed to by the parties. The Expert Opinion Committee can not deliver expert opinions concerning ongoing cases before the Design Tribunal.

The Expert Opinion Committee expects a processing time of maximum 6 months, which may vary depending on the complexity of the case and the general case load of the Committee.

Members of the Expert Opinion Committee

Members of the Expert Opinion Committee comprise of a range of leading Danish experts in the field of intellectual property rights, architecture, and handicrafts.

What does it cost?

A legal opinion from the Expert Opinion Committee costs DKK 12,500 (excl. VAT).

Feel free to contact Accura's dedicated team of IP experts if you have any questions regarding disputes on architecture, design and handicraft.

**CHRISTINA TYPE JARDORF**

ASSOCIATE PARTNER,
ATTORNEY-AT-LAW, LL.M.
IPR & LIFE SCIENCE

CAT@ACCURA.DK

**AMALIE ROSENBAUM PETERSEN**

ASSISTANT ATTORNEY
IPR & LIFE SCIENCE

ARP@ACCURA.DK

**DANIEL MATHIAS BAGER**

ASSISTANT ATTORNEY
IPR & LIFE SCIENCE

DMB@ACCURA.DK

Russia to nationalise foreign intellectual property rights?

In light of the ongoing conflict in Ukraine and the internationally imposed sanctions on Russia, the Russian Federal Government has recently proposed new legislation that will allow national exploitation of IP rights owned by personal or legal entities from unfriendly states.

It is our current assessment that the Russian decree will primarily affect patents. The decree opens up for Russian nationals and companies to legally manufacture and exploit patented products and technologies (and other industrial rights) without obtaining authorisation from and without paying royalties to the rightholders, if the rightholders are from so-called unfriendly countries, i.e. countries that have issued sanctions towards Russia.

More general considerations on "lifting restrictions on the use of intellectual property [regarding] certain types of goods and services in Russia" have allegedly also been made by the Russian Federal Government.

It is still unclear how the new legislation will affect other intellectual property rights such as trademarks and designs. However, reports at this early stage show that the official Russian IP Administration Office, Rospatent, has received several trademark applications regarding names and logos of companies like IKEA, Starbucks, McDonald's and Chanel from applicants without any affiliation to these brands. How Rospatent will respond to such bad faith filings and trademark squatting remains uncertain at this stage.

Accura's IP team will monitor the development closely.

Calling on Danish SMEs:

Partial refunds for patent application expenses available at DKPTO

Starting this week (April 4, 2022), the Danish Patent and Trademark Office (DKPTO) are receiving applications in the first of two rounds of the 2022 Patent Voucher System. The Voucher System offers Danish small and medium-sized enterprises (SMEs) partial refunds for expenses incurred in the process of applying for a patent.

Here, we briefly highlight some of the main features of the voucher system.

What is the voucher system?

The DKPTO voucher system is a grant scheme designed to boost the protection of patent rights of SMEs established in Denmark.

SMEs are defined as companies with a maximum of 249 employees and an annual turnover of no more than EUR 50 million or an annual balance sheet total of no more than EUR 43 million.

Through the voucher system, Danish SME's can apply for financial support before engaging in patent application related processes such as patent advisement, novelty research, assistance with compiling patent applications and patent application fees for DKPTO.

The voucher system does not cover expenses for the enforcement of existing patent rights.

Note that the voucher is only valid for expenses paid after the voucher has been received. Any activities related to applying for patent protection initiated prior to receiving a voucher from DKPTO will thus not be covered.



Available funds

The voucher system is designed as a co-finance system between DKPTO and SMEs. That means that SMEs can apply for coverage of 75 pct. of the expenses to be incurred during one or more activities during application for a patent, with a maximum of DKK 75.000 per year. The remaining 25 pct. of the expenses must be covered by the SME itself.

In total, the budget of the voucher system for 2022 is set to DKK 5 million.

There are two application rounds, the second one opening for applications on October 3, 2022. An SME can only receive grants/vouchers once a year.

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CHRISTINA TYPE JARDORF

ASSOCIATE PARTNER,
ATTORNEY-AT-LAW, LL.M.
IPR & LIFE SCIENCE

CAT@ACCURA.DK



DANIEL MATHIAS BAGER

ASSISTANT ATTORNEY
IPR & LIFE SCIENCE

DMB@ACCURA.DK

How to apply

Before applying for the support scheme, the SME must complete a so called "IP check-up".

The IP check-up is free of charge and is carried out by the SME's regional Business Hub Central (in Danish: *Erhvervshus*). The IP check-up consists of a conversation between the Business Hub Central and the SME, with a focus on the SME's intellectual property rights and the underlying potential of these rights. After finalising the IP check-up, the Business Hub Centre will issue a certificate, which must be used when applying for a grant/voucher through the patent voucher system.

Read more about the IP check-up [here](#) (information only available in Danish).

Note that when the Patent Voucher System opened for applications in 2021, the funds had been emptied in less than 2 minutes. Therefore, all documentation should be at hand before this year's application process opens. We recommend postponing applications until the second round (opening October 3, 2022) if an IP check-up has not been completed by now.

Green SMEs are lacking behind in their patent protection

The patent voucher system is part of DKPTO's "Action Plan for Denmark", the purpose of which, among other things, is to encourage more companies to protect their innovations and other intellectual property.

A report from DKPTO from 2021 showed that the 10 most active companies in applying for green patents (class Y-02 patents) accounts for 72 pct. of all patent applications within the field of green technology, and that the three most active companies collectively account for 51 pct. of all applications. However, Danish SMEs are responsible for only 21 pct. of all green patent applications. The report therefore strongly indicates that there is an unfulfilled potential among the Danish SMEs in protecting their (green) innovations through patents, thereby contributing further to the development of new technologies towards a green transition.

Accura's dedicated team of IP experts are happy to assist if you have any questions regarding protection of intellectual property rights.

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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.”

Legal 500