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IP & Life Science News

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Final decision in the Mermaid Case:
Parody principle (re)established in Danish copyright law

The Danish Supreme Court has issued its decision in the highly debated case between the heirs of the sculptor Mr Edward Eriksen and the national newspaper Berlingske on the newspaper's use of parody and caricatures of the famous The Little Mermaid sculpture, thereby ending the heated legal debate regarding the extent of free speech and parodies as an exception to copyright protection in Denmark.

In its decision of 17 May 2023, the Supreme Court found – contrary to the Eastern High Court – that neither the drawing nor the picture of the national sculpture constituted a copyright violation, thereby establishing the existence of a parody principle in Danish copyright.

The long-standing dispute

In 2019 and 2020, Berlingske published respectively a drawing portraying The Little Mermaid as a zombie and a photograph of the sculpture wearing a face mask in connection with two articles. The question for the Supreme Court to decide on was therefore whether Berlingske had violated the copyrights to The Little Mermaid by publishing the images, or whether a non-statutory principle that copyright protected works may be subject to parodies and caricatures applies in Danish copyright law, thereby allowing Berlingske's publications.

In the previous instance, the Eastern High Court found that the publishing constituted a copyright violation which could not be justified neither as an act of free speech nor due to the images' nature as caricatures. For a more in-depth review of the Eastern High Court's decision, see our April 2022 edition.

The Supreme Court's decision

The parody principle was not just a fairytale

A parody exception has not been explicitly implemented in the Danish Copyright Act. However, it has generally been assumed in legal theory with support in the preparatory works for the Copyright Act of 1961 and Act no. 1121 of 4 June 2021, which implemented parts of the DSM Directive (the Directive on Copyright in the Digital Single Market), that such a principle applies.

The Danish Supreme Court has now expressively confirmed this assumption and stated that the parody exception rests on a firm Danish and common Nordic tradition with support in the preparatory works for the Copyright Act as well as case law, and that the principle must be interpreted in accordance with EU law.

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Balancing copyright and the right to freedom of speech

Furthermore, the Supreme Court stated that the parody principle must be interpreted in accordance with Article 10 of the European Convention on Human Rights regarding freedom of speech. In continuation thereof, the Court stated that in all cases – even when it is not a parody – a specific assessment of the interests of freedom of speech against the interests of copyright must be made if a copyright entails a restriction on the freedom of speech.

Copyright violation?

After an overall assessment, the Danish Supreme Court concluded that the *drawing* was covered by the parody principle. The Court emphasised, among other factors, that the drawing was a caricatured version of The Little Mermaid as a national symbol and that its purpose was completely alien to the original work. Regarding the *photograph*, the Court found that it was published in connection with an article covering a topic of general interest to society and that the use of the photograph did not go beyond what the purpose of the article in question could justify. Accordingly, Berlingske's actions did not constitute a copyright violation, and the heirs were ordered to pay legal costs to Berlingske before all three instances.

Accura comments

Accura welcomes this clarification by the Supreme Court explicitly stating that a parody principle applies in Danish copyright law and that copyright-protected works may therefore be subject to caricatures and parodies, as well as the more general principles of the balancing between copyright and freedom of speech. The Court's decision is of significant importance to the media's right to apply parody and use caricatures of copyright-protected works in the communication and opinions to the public and secures a high level of free speech for the media. Furthermore, the decision is interesting as the Supreme Court addresses the question of when a derivative work of an original work may be considered an independent work.

New case law on compensation for violation of name and image rights

In a recent ruling from the Danish Maritime and Commercial High Court, the betting company Bet365 was ordered to pay compensation to 23 professional athletes (including members of the Danish national men's football team and other athletes like Viktor Axelsen, Pernille Harder and Mikkel Hansen) for using the athletes' images and names in various posts on Bet 365's Twitter and Facebook pages without the athletes' consent.

Commercial or advertising use versus legitimate editorial use?

The athletes' images and names had been used by Bet365 for social media posts in a two-year period and were typically posted in connection with the respective athletes' upcoming sports events. As an example, photos of the football players Christian Eriksen and Lasse Schöne were posted on Bet 365's Facebook page on the night of the 2019 UEFA Champions League semi-finals between Tottenham and Ajax (the athletes' respective clubs at the time).

Bet365 argued that the posts constituted editorial content posted with the purpose of generating debates between the users of the forum about athletes and sports. Further, Bet365 argued that if the content was found not to be editorial, the use of the images and names should be allowed, as they were used in a legitimate and relevant context which did not go beyond a legitimate purpose.

However, the Maritime and Commercial High Court found the posts to be part of Bet365's marketing activities.

Consequently, Bet365 was found to have violated the athletes' image and name rights which are protected by general legal principles and Section 3 of the Danish Marketing Practices Act. Bet365 was therefore ordered to pay damages and consideration under Section 24 of the Marketing Practices Act.

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The compensation claims

Except for Mikkel Hansen, the athletes were awarded full compensation corresponding to their claims of DKK 50,000 per post. Mikkel Hansen received the same amount. The compensation stands out compared to previous rulings in similar cases, as it directly determines the awarded damages and consideration with respect of the athletes' market value, i.e., what the athletes could have received per post if they were to enter into an agreement with a betting service themselves. The court also considered the extent and longevity of the violations, including the extent of the exposure.

Accura comments

The case constitutes an important decision for professional athletes as well as public personalities in general. Beyond the media exposure of the case and the interest that public personalities in general attract, the decision is interesting in terms of the scope of legitimate editorial content in relation to social media exposure as it contributes to clarifying the distinction between commercial or advertising use of celebrities' images on social media and legitimate editorial use.

The ruling acknowledges the great commercial value of professional athletes' personal brands, including their name and images, and that an unauthorised use thereof entitles the athletes to a compensation reflecting this value. Whether it was of any significance that the violating party was a betting service, which is somewhat controversial, is not explicitly stated in the judgment. Nevertheless, the ruling represents a somewhat new method of determining damages and compensation with a more direct reference to (and acknowledgement of) the market value of the athletes' brands, which could potentially be expected to set a precedent for future rulings.

The decision has been appealed to the Eastern High Court. Accura will monitor the development of the case.

A final step towards a more tech-oriented copyright regulation

On 3 May 2023 the Danish Minister of Culture presented a draft for the amendment of the Danish Copyright Act in accordance with Denmark's obligation to implement the Directive on Copyright in the Digital Single Market ("the DSM Directive").

Below, we elaborate on the most significant changes which the implementation of the remaining provisions of the DSM Directive will undoubtedly entail.

An (unplanned) two-staged implementation

The DSM Directive was adopted in 2019 with the overall aim of modernising the regulation of copyright within the EU considering the rapid technological development, and to ensure that new types of exploitation of protected works which had emerged from this development were covered by a clear legal framework.

The DSM Directive should have been implemented in full in Denmark on 1 June 2021, but due to the corona pandemic only two provisions of the DSM Directive were implemented before the implementation deadline (we covered the first stage of the implementation and the provisions involved in our February 2021 edition).

Understanding the technology

Text and data mining is an automated analysis of large amounts of text and data performed with the purpose of discovering correlations or patterns in the mined resources – a method frequently used by companies who wish to obtain valuable knowledge regarding the habits of consumers or the optimisation of internal processes. One area where the use of text and data mining has especially increased is within the field of artificial intelligence system development. Such systems are based on an algorithm with the ability to predict a given outcome in the context of the data with which it is being fed.

An example of this is the well-known AI system ChatGPT, which is based on an algorithm capable of predicting the next word in a series of words within the context of the message that the user has written. However, an ability to predict outcomes can only be achieved by training the algorithm and having it analyse large amounts of data similar to the type of data it is presented with when it is subsequently implemented in the artificial intelligence system. Such an analysis is often carried out on the basis of text and data mining.

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New copyright exceptions for text and data mining

According to the proposed draft law, the Directive's exemptions for text and data mining pursuant to Articles 3 and 4 will be implemented in Sections 11 b and 11 c of the Danish Copyright Act.

Article 3 of the DSM Directive stipulates that all EU member states must introduce a copyright exception for reproductions and extractions of copyright protected works and protected databases made by research organisations and cultural heritage institutions to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access. This will, for example, entitle researchers to engage text and data mining for scientific purposes without having to obtain consent from the rightsholder as long as they have lawful access to the works.

Article 4 of the DSM Directive includes a similar mandatory exception or limitation in the copyright for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining that will apply in all cases where Article 3 does not apply. However, rightsholders can prohibit data mining under this exception by expressively reserving their rights, thereby limiting the seemingly free access to the reproduction and extraction of works in that case.

A right to remuneration and information

Another important addition to the Copyright Act is the implementation of the Directive's Article 18 and the authors' right to an appropriate and proportionate remuneration in any case of transfer of their rights to another physical person or legal entity. In addition, the author is granted the right to receive updated, relevant and sufficient information regarding the acquirers' use of the transferred rights following the implementation of Article 19 of the DSM Directive.

Accura comments

The implementation of the remaining provisions of the DSM Directive could lead to major changes in the use of copyright protected works in the digital environment. The implementation will also provide a more secure and transparent basis as regards rightsholders' access to remuneration and information. Currently, it is uncertain what impact the exception for text and data mining will have as the rightsholders' option to reserve their rights could limit the access to use protected works for the purpose of mining.

Accura's IP & Life Science team will continue to monitor the implementation of the Directive.

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Can IP rights still be protected in Russia?

The short answer is yes. In general, it is business as usual when it comes to the protection of IP in Russia.

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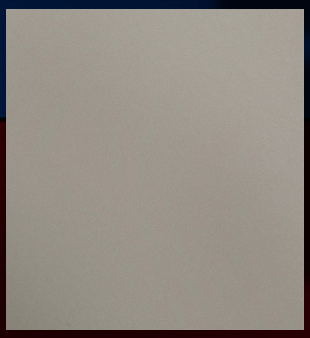

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Despite the earlier rumors of counter sanctions in the IP field being imposed by the Russian government against western countries, IP has fortunately been excluded from the sanction list.

The judicial system in Russia still appears to be working properly, and apparently there are no changes in Rospatent's past practices and decisions. The head of the national IP office recently stated that "the legal protection of trademarks of foreign companies is in the interest of Russian consumers" and "neither foreign companies in Russia nor Russian companies abroad have faced any politized decisions."

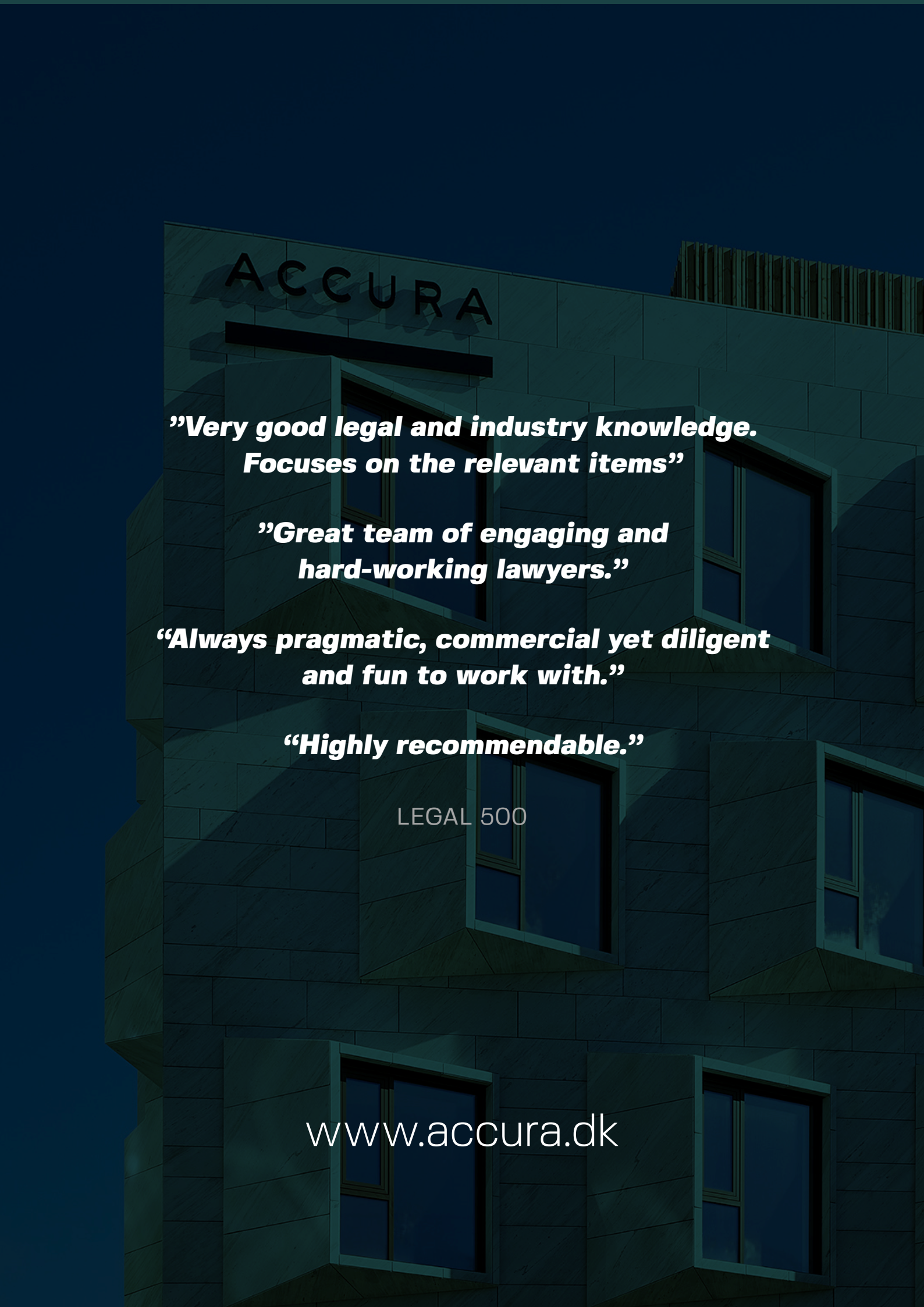
However, as a countermeasure against sanctions imposed on Russia, there are provisions enabling the state, under specific circumstances, to restrict exclusive IP rights. These restrictions include the possibility to grant a compulsory license to a Russian company without any compensation to a rights holder from a country that is considered unfriendly to Russia. Such restrictions should, however, be well justified and could for instance relate to IP rights, typically patents, for medicines, food and other vital commodities.

At the end of March 2022, a law was implemented in Russia to allow parallel imports of specific goods. This measure is temporary and will be valid until the end of 2024 for pharmaceuticals.

Previously, parallel imports without the rights holder's consent were prohibited under Russian law, and the goods were considered counterfeit. Thus, parallel imports currently ensure the shipment of specific goods into Russia.

So, what will happen in the future? As many foreign companies are currently not using their trademarks properly in Russia, and as voluntary withdrawal from the market is not a sufficient reason for non-use, how will the Russian IP court respond to non-use arguments filed by third parties? What will form a valid defense argument for the rights holder? Only time and the outcome of the current conflict will tell.

A short-term defense measure and likely possibility for a right holder to safeguard important trademark rights is possibly to re-file a slightly modified version of the trademark, i.e., a difference in logo or graphics.



”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.”

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