

CHECKLIST OF ISSUES ON ENFORCEMENT¹

Responses from Denmark

Civil and Administrative Procedures and Remedies

(a) *Civil judicial procedures and remedies*

1. Specify the courts which have jurisdiction over IPR infringement cases.

In Denmark, there are no special courts which have exclusive jurisdiction over IPR infringement cases. As a rule, the enforcement of IPRs takes place before the ordinary courts and follows the general procedural rules set out in the Administration of Justice Act.

As for the enforcement of trademarks, proceedings are brought before the Danish Maritime and Commercial Court, cf. Section 43(4) of the Danish Trademark Act. The Danish Maritime and Commercial Court deals with civil cases where special knowledge in respect of maritime or commercial relations is of importance. Normally two, and in special situations four, lay judges participate together with a legal judge when the case is brought before the Danish Maritime and Commercial Court, whereas cases before the ordinary courts are dealt with by legal judges only.

2. Which persons have standing to assert IPRs?

All persons with a legal interest in ascertaining IPRs have standing to do so, i.e. the persons who may enforce the IPRs are the proprietors, licence holders or other rightholders deriving their rights from the proprietor of such IPRs.

Where the injured party is member of an organization administrating the IPR, the organization is often permitted to initiate a civil suit on behalf of its members. The question of the *locus standi* (legal interest) of the organization is determined based on a concrete evaluation of the relationship between the organization and its members. Where it appears that the organization normally acts on behalf of its members, the organization is deemed to have *locus standi*. An organization may never act on behalf of a rightholder, where a rightholder does not consent to such representation.

How may they be represented?

An injured party may be represented by an authorized legal counsel (in Denmark an "advokat") or he may plead the case himself.

¹Document IP/C/5

Are there requirements for mandatory personal appearances before the court by the rightholder?

There are no requirements for mandatory personal appearances before the court by the rightholder but the rightholder must then be represented by a lawyer.

Often the rightholder may be an indispensable witness, and when assessing the case the court may take into account that the rightholder has failed to appear in court. At the request of the opposing party, the court may summon the rightholder for a personal meeting in order for him to answer questions, cf. the Administration of Justice Act, Section 302. However, a party cannot be forced to give evidence in the same way as witnesses, and the court is therefore left with the option of construing such a party's silence in favour of the other party.

3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence which lies within its control?

A party can request the other party to produce specific evidence within the party's control. If the other party does not comply, the opposing party may ask the court to impose an obligation on the party to supply the required evidence, cf. the Administration of Justice Act, Section 298. As a rule, the obligation is imposed where the evidence is of relevance to the proceedings. If the party does not provide the evidence, the court may take into account - when assessing the case - that the party has failed to comply with the obligation. The imposed obligation cannot be legally enforced as such.

Attention should also be drawn to the fact that the obligation to provide evidence as a rule only applies to "documents" which however may comprise other documents than written ones. In the event that evidence needs to be brought forward for the use of experts appointed by the court any kind of evidence subject to inspection by such experts may be comprised by the obligation, cf. § 301.

In a situation where information will be disclosed which is covered by the grounds for exemption from providing evidence, cf. Section 298 cf. Sections 169-172 of the Administration of Justice Act, the obligation cannot be imposed. The provisions relating to exemption from providing evidence may be divided into two categories: (i) provisions prohibiting a witness from giving evidence (e.g. in cases where such evidence could damage the security of the realm or relations to a foreign state); and (ii) provisions allowing a witness to refuse to give evidence but not prohibiting the witness from giving evidence (e.g. in cases where the witness himself or his intimates run the risk of a penalty or other essential damage).

4. What means exist to identify and protect confidential information brought forward as evidence?

Where disclosure is deemed to cause a substantial loss to the party, the said party may be released from the duty of providing the evidence, cf. the Administration of Justice Act, Section 171. Substantial loss is a loss suffered by the party, which is not proprietary to the significance of providing the evidence. The risk of the party losing the case by providing the evidence shall not in itself be considered a substantial loss justifying exemption.

In order to protect confidential information brought forward as evidence, the court may decide to have the evidence presented behind closed doors pursuant to Section 29(3) of the Administration of Justice Act. Pursuant to Section 31(2) of the Administration of Justice Act, any rendering or even mentioning of the hearings behind closed doors are prohibited for the persons who have been especially authorized to be present during a hearing behind closed doors.

5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use:

(a) injunctions

Unauthorized production, distribution, broadcasting and reproduction, etc. may be prevented by use of provisional injunctions obtained before the bailiff's court in accordance with the Administration of Justice Act, Chapter 57. A preliminary injunction may be issued if the claimant establishes that:

- the actions to be prohibited infringe upon the claimant's rights;
- the infringer will carry on with the actions to be prohibited; and
- the position of the rightholder is jeopardized if the claimant is referred to claim his right by means of ordinary legal proceedings.

The court will - depending on the circumstances - often require that the claimant provides security, cf. the Administration of Justice Act, Section 644. The amount of security is determined by the court and depends on the possible harm resulting from the injunction should it prove unjust. Security is most often provided in the form of a bank guarantee.

The injunction is a provisional remedy and has to be confirmed by a confirmatory action before the ordinary courts, cf. the Administration of Justice Act, Section 634, cf. Section 648. The case has to be brought before the court within 14 days from the issuing of the injunction.

If a case regarding the claim in question is already pending before the ordinary courts, the time-limit for bringing the case before the court is only eight days from the issuing of the injunction, cf. the Administration of Justice Act, Section 634(1) and (2).

(b) damages, including recovery of profits, and expenses, including attorney's fees

The rightholder may claim both remuneration for the exploitation as well as damages.

(i) Remuneration

The Danish IPR Acts contain provisions stating that the infringer is obliged to pay fair remuneration for the exploitation of the right, cf. the Copyright Act, Section 83(1), the Patent Act, Section 58(1), the Registered Designs Act, Section 36(1), the Trademark Act, Section 43(1) and the Topographies Act, Section 14. Remuneration for the exploitation of the rights infringed upon may be awarded irrespective of whether the general conditions for claiming damages are met.

The guideline for establishing the amount of the remuneration is that the infringer shall at least pay a reasonable licence fee.

(ii) Damages, etc.

Damages may be claimed in accordance with all Danish Acts on IPRs, cf. the Copyright Act, Section 83(1), the Patent Act, Section 58(1), the Registered Designs Act, Section 36(1), the Trademark Act, Section 43(1) and the Topographies Act, Section 14. The amount of damages is always estimated by the courts, the principle being that the plaintiff may claim 100 per cent indemnification for his loss.

Under Danish law, it is recognized that a plaintiff may claim damages for his loss of sale, the loss connected due to disruptions on the market as well as certain losses regarding "internal" expenses, including expenses incurred prior to initiating legal action in order to establish the existence of an infringement, e.g. investigations, acquisitions, etc.

Normally, loss of sale is the largest of the amounts mentioned. Damages may be claimed where the rightholder has a ready-made production which cannot be sold as planned and where this is due to any actions of the infringer. Loss of sale may also be covered where production has not been completed, and in this situation calculation of the loss includes recovery of profits as a starting point.

Specifically as regards copyright infringements it follows from the Copyright Act, Section 83(3), that a copyright holder may obtain compensation for non-financial damages. This right may be exercised where an infringement of *droit moral* has occurred.

The Administration of Justice Act, Section 312(1), provides that the losing party pays to the winning party the costs caused by the proceedings unless the parties have agreed otherwise or unless the court - due to special circumstances - decides otherwise. However, there is no possibility for obtaining damages for expenses held that were not necessary for the proceedings, cf. Section 312(2).

(c) destruction or other disposal of infringing goods and materials/implements for their production

As an accessory to the injunction (and in case of the infringer's violation of the injunction), the bailiff's court may seize the infringing goods and tools used for the manufacture of the infringing products, cf. the Administration of Justice Act, Section 645. In a confirmatory action, the court may, if requested by the plaintiff, require the destruction or alteration of the goods and tools, cf. the Copyright Act, Section 84, the Patent Act, Section 59, the Registered Designs Act, Section 37, the Trademark Act, Section 44 and the Topographies Act, Section 15(1). The rightholder may also acquire the infringing goods at a price laid down by the court.

(d) any other remedies

If the infringer deliberately violates an injunction, penalty in the form of fines or imprisonment may be imposed. The infringer may also be found liable to pay damages, cf. the Administration of Justice Act, Section 651.

6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?

At the request of the opposing party, the court may on a concrete basis impose an obligation on the infringer to supply information on any third parties involved, where the submission of such information does not lead to any substantial loss for the infringer, cf. the Administration of Justice Act, Sections 298 ff., cf. Section 171, and the comments provided to question 4 above. If the decision of the court is not followed, the court may give the non-compliance damaging effect against such party when deciding on the merits.

7. Describe provisions relating to the indemnification of defendants wrongfully enjoined.

If the plaintiff loses the case, he will be deemed to pay the costs of the defendant.

In cases where the bailiff's court has issued an injunction which is not upheld by the court in the confirmatory action the defendant may in addition to costs claim damages for loss inflicted by the injunction.

To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?

As a rule, a defendant on whom an order has been wrongfully enjoined owing to a wrongful or inappropriate decision cannot hold the judge liable for having reached a decision which is not upheld by the higher courts.

8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

A confirmatory action has to be brought before the court within two weeks from the issuance of the injunction (in certain cases within eight days).

There are no statistics available concerning the duration and costs in such proceedings.

(b) *Administrative procedures and remedies*

9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.

As a rule, enforcement of IPR infringement cases may only be provided by the courts. However, with regard to requirements related to border measures the Danish Customs Authorities may suspend the release for free circulation, export, re-export or placing under a suspensive procedure of pirated or counterfeit goods.

Administrative procedures are available with respect to revocation of patents and trademarks.

Provisional Measures

(a) *Judicial measures*

10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.

Please see the answers to question 5 above.

11. In what circumstances may such measures be ordered *inaudita altera parte*?

Section 646, cf. Sections 495 and 493(2), of the Administration of Justice Act provides that provisional measures may be ordered even though the infringer is not present, and even though previous notice has not been given to the infringer. Instead, the court may, however, decide to postpone the proceedings if it is likely that the defendant has a valid reason for being absent.

If a delay may jeopardize the enforcement, the court may order a provisional measure without hearing the evidence of the defendant first. This will be the case if e.g. a delay is likely to cause irreparable damage to the rightholder or if there is a demonstrable risk of evidence being destroyed.

12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.

An interim injunction is initiated on the basis of a written petition to the court, cf. Section 646 of the Administration of Justice Act. The petition shall clearly identify the acts which are to be subject to the injunction. The proceedings take place at a hearing before the bailiff's court which issues the injunction.

Previous notice is normally given to the defendant, and, accordingly, the defendant will be able to take part in the hearing and provide evidence for his defence.

When an interim injunction is granted, the claimant is under an obligation to instigate proceedings against the infringer to confirm the injunction within 8/14 days from the issuing of the injunction.

Upon request from the plaintiff, the court shall lend the rightholder assistance in order to uphold the injunction. For this purpose, the court may seize goods and tools, cf. Section 645 of the Administration of Justice Act.

13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

Please see the answer to question 8 provided above.

(b) *Administrative measures*

14. Reply to the above questions in relation to any administrative provisional measures.

Provisional remedies may only be issued by the courts.

Special Requirements Related to Border Measures

15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51).

The applicable legislation in connection with seizure and detention of pirated goods is mainly EC Regulations No. 3295/94 and No. 1367/95 as well as Danish Act No. 1091 of 20 December 1995 and the Danish Ministerial Order No. 1134 of 21 December 1995. EC Regulation No. 3295/94 is directly applicable under Danish law, and the Danish Act mentioned above mainly provides legal basis for imposing penalties on infringers of the prohibition set out in Article 2 of the Regulation. The Danish Ministerial Order also supplements EC Regulation No. 3295/94 with respect to the provisions regarding the applicant's provision of security.

According to the EC Regulations, pirated goods, i.e. counterfeit trademark goods and pirated copyright goods, may be subject to suspension by the customs authorities with respect to release into

free circulation, export, re-export or entry under a suspensive procedure applicable to counterfeit and pirated goods. Also the import of pirated goods which infringe a right to a specific design or pattern may be prevented, cf. EC Regulation No. 3295/94, Article 1. Apart from this addition, the provisions set out in the EC Regulation very much correspond to those of the TRIPS Agreement. Accordingly, other infringements are not covered by the EC Regulation or by supplementary Danish rules.

Suspension of the release or detention of goods may be subject to the above procedure where the goods originate from countries outside the EU and are "placed on the market", including but not limited to:

- in the customs warehouse;
- in external transit;
- for inward processing under the suspensive procedure;
- for processing in bond;
- for temporary admission;
- for export; and
- for re-export.

Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports).

Import of goods from other EU Member States cannot be subjected to the procedure. Also, pursuant to Article 10 of EC Regulation No. 3295/94, the procedure is not applicable to non-commercial goods imported by travellers in their personal luggage within the fixed limits for admittance of tax-free goods.

Cf. above under question 15 goods in external transit are also considered to be placed on the market and accordingly subjected to the procedure. No *de minimis* rules apply.

Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?

Genuine goods, i.e. goods placed on the market with the consent of the rightholder, must be released into free circulation on the market, cf. EC Regulation No. 3295/94, Article 1(4).

Pirated goods destined for export are included in the provisions of the EC Regulation, Article 2, and, accordingly, such goods may be subject to suspension by the customs authorities.

- 16. (a) Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55).**

The rightholder has to file an application for the interception of pirated material to the relevant local custom and tax office responsible for receiving and dealing with requests for actions by rightholders.

The application shall contain:

- A detailed description of the goods to enable the customs authorities to recognize the goods. This may be done by submitting photos, samples or written descriptions.

- Documentation substantiating that the applicant is the rightholder or that he holds a partial right of use etc. derived from the latter. Where the rights are registered, this may be done by submitting the registration documents from the Danish Patent Office. Please note that the right to a trademark may be obtained without registration, and that copyright is not subject to registration in Denmark. In these situations, the rightholder must submit other forms of documentation in order to substantiate his right, and, where the applicant is a representative, an authorization from the rightholder.

The rightholder shall also give other forms of relevant information enabling the customs authorities to decide on the matter. To the extent possible, such information shall include:

- the location or destination of the goods;
- identification of the shipment or the collies;
- expected arrival or date of dispatch of the goods;
- form of transportation used;
- the name of the importer, exporter or other holders of the goods; and
- the anticipated place and date of arrival of the goods.

After receiving the application, the customs authorities notify the applicant of the decision made by the customs authorities as soon as possible.

If the customs authorities decide to assist in the matter, the rightholder is notified of the period of intervention fixed by the customs authorities. This period may be extended. Normally, the period of intervention is three months and, in practice, the customs authorities extend the period upon application.

After the notification of the suspension of the release to bring the case before the court, the rightholder has ten working days. If the local customs and tax administration is not notified of any court proceedings within ten working days, the goods will be released. Under certain circumstances, this period of time may be extended by a maximum of another ten working days, cf. EC Regulation 3295/94, Article 7(1) and Danish Statutory Order 1134/1995, Section 6.

Suspension of the release or detention of goods will be upheld until a final decision is reached by the competent court.

(b) How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?

The customs authorities are entitled to require that the rightholder provides security, cf. EC Regulation No. 3295/94, Article 3(6). The amount of the security depends on the actual possible harm resulting from the suspension.

According to Article 3(6) of the EC Regulation, security provided by the rightholder will be used to cover any damages and expenses incurred by the infringer if the rightholder is held liable where no pirated material is discovered. Damages are assessed in accordance with the loss of the involved persons, including the costs incurred by the authorities as a result of the detention of the goods. Accordingly the amount varies from case to case.

The rightholder is given the opportunity to inspect the shipments of suspected pirated material or counterfeit goods, cf. EC Regulation No. 3295/94, Article 6(1). The rightholder may also be provided

with information of the name and address of the infringer to enable the rightholder to pursue his rights before the ordinary courts.

17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?

Pursuant to Section 2 of the Danish Act No. 1091 of 20 December, the applicant is to pay a fee of DKK 500 for filing the application. Hereafter, the competent customs officials will examine the application and provide the applicant with a written answer as soon as possible. Normally, the decision to grant a request for action made by the rightholder is valid for a period of three months and renewable upon request from the rightholder.

Following the notification from the customs authorities the rightholder has ten working days to bring the case before the court which makes the final decision on the merits, cf. above under question 16(a).

18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to *ex officio* action?

According to EC Regulation No. 3295/94, Article 4, the customs officials may initiate proceedings regarding suspected pirated imports on their own initiative if it appears evident to the customs officials that the goods are counterfeit or pirated.

Where the name of the rightholder is known to the customs authorities, the rightholder will be notified within a couple of days. Within three working days, the rightholder shall apply for suspension of release and is then given a time-limit of ten working days from the date of the application to file a complaint with the court. Where such complaint is not filed within ten days, the goods will be released. After this point, the time line is as described above.

19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.

According to Article 8 of EC Regulation No. 3295/94, the customs authorities may, when infringement has been established by the courts, order that the goods be altered, destroyed or handed over to the state, typically for destruction. It is insufficient: (i) to re-export the counterfeit or pirated goods in an unaltered state; (ii) to simply remove the trademarks affixed to the counterfeit goods; or (iii) to apply under a different customs procedure.

Criminal Procedures

20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.

As stated above under question 1, infringement proceedings regarding IPRs are brought before the ordinary courts. This applies to both civil and criminal aspects of an infringement case.

21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?

Danish acts on IPRs all lay down provisions regarding penalties where IPRs are infringed.

With respect to the infringement of patent rights, design rights and trademarks, only deliberate infringements are penalized, cf. the Patent Act, Section 57, the Registered Designs Act, Section 35, the Trademark Act, Section 42 and Topographies Act, Section 16. However, as for infringement of copyright, both deliberate and grossly negligent acts are criminalized, cf. the Copyright Act, Sections 76-80.

22. Which public authorities are responsible for initiating criminal proceedings?

As a rule, instigation of criminal proceedings in IPR infringement cases are subject to private prosecution. Where proceedings are exceptionally initiated by the public authorities, such proceedings will be initiated by the public prosecutor.

Are they required to do this on their own initiative and/or in response to complaints?

Only in situations of gross infringements of IPRs - when professional crimes take place - the public prosecutor initiates proceedings.

23. Do private persons have standing to initiate criminal proceedings and, if so, who?

Criminal enforcement of infringement of intellectual property is subject to the principle of private prosecution. A case has to be brought before the court by the injured party himself at his own financial risk. Proceedings are subject to the civil procedural rules set out in the Administration of Justice Act.

24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:

- **imprisonment**

Where infringement is wilful and the production is commercial, a punishment of up to one year of imprisonment may be imposed, the Copyright Act, Section 76(2), the Patent Act, Section 57, the Trademark Act, Section 42, and the Registered Designs Act, Section 35.

- **monetary fines**

The courts consider civil remedies to be the proper way in which infringement may be stopped, and fines are rarely imposed on the infringer. However, practice shows an increasing tendency for imposing fines, and in this respect practice also shows a tendency for an increase in the size of the fines.

- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production**

Since the civil procedural rules are applicable under private prosecution, the court may accordingly seize the goods and require the destruction or alteration of the goods and tools if this is claimed by the rightholder, cf. the answer provided above to question 5.

The Administration of Justice Act contains provisions regarding search that also may be applied.

- 25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.**

In practice, cases of infringement are seldom conducted solely as criminal cases. Accordingly, a typical case covers an application for an injunction, and the following confirmatory action is often combined with a plea for punishment. As for duration and costs of proceedings, please see the answer provided above under question 8.

There are no statistics available concerning duration and costs in such proceedings.