

INTELLECTUAL PROPERTY LAW

The area of intellectual property law is subject to detailed statutory regulation. The purpose of the regulation is the protection of rights to various types of intellectual property such as science, literature, art etc.

Danish law also prescribes means of enforcement of IP rights.

When is a copyright established?

Copyright is established when a literary or artistic work, which is the result of the creator's own intellectual contribution, is created. The area is regulated by the Danish Copyright Act (in Danish: "*Ophavsretsloven*"), which is based on various EU directives. It is neither necessary, nor possible, to register a copyright in Denmark.

The protected works, subject to the main rule under the Danish Act on Copyright, may for instance be literature - including maps, drawings and computer programmes - or art expressed in various forms, such as fictional or descriptive representation, graphical works, a work of fine art, applied art or architecture. The basic requirement for a work to be protected under the Copyright Act is "originality". A work possesses originality when it expresses the creator's independent and creative effort.

Neighbouring rights, such as sound and moving picture recordings, radio and TV broadcasts, catalogues, databases, photographic pictures, press releases and the performance of literary or artistic work are also protected by the act. The neighbouring rights may lack protection as copyright but are nevertheless protected under the act (special provisions).

How long does the copyright last?

The copyright belongs to the creator, and the copyright protection applies for 70 years after the creator's death. Generally, the protection period is shorter for neighbouring rights.

May a copyright be assigned?

The creator may assign the copyright to others. The assignment may be conducted in full or in part, i.e. by assigning a specific right of use of the protected work.

The transferee of the right is obligated to exploit the right. If not, the creator is entitled to cancel such agreement if the transferee has not exploited the work within reasonable time or at the latest within three years after fulfilment of the agreement by the creator,

unless the parties agree to a longer period. The creator must give the transferee notice within six months before termination of the agreement.

When is a design protected?

The Danish Designs Act (in Danish: "*Designloven*") regulates the protection of designs. Contrary to copyright protection, design protection may be registered. However, if the design meets the requirements in the Danish act on Copyrights to obtain copyright, the design may also be protected by the Danish Act on Copyright, thus making registration unnecessary.

Registration may be obtained by application for registration to the Danish Patents and Trademark Office or the European Office for Harmonization in the Internal Market (OHIM).

The appearance of a product or a part of a product, particularly concerning shape, structure, lines, colours, or materials as well as three-dimensional products may be design protected.

The design must possess novelty and have individual character. A design is considered to possess novelty if no identical design has been made publicly available. A design should be regarded as identical if the features only differ in immaterial details. A design is considered to have individual character if the overall impression of the design given to an informed user differs from the overall impression such a user gets from other designs.

How long does the protection of a design last?

Registered designs are protected for a period of five years renewable for a period of up to 25 years.

Unregistered designs – intended for short-lived products e.g. fashion clothing – are protected for a non-renewable period of three years by EU regulation when such designs have been brought into commercial circulation within the EU. The protection is only valid against copying.

May a design be transferred?

Designs may be transferred in whole or in part. On request, the transfer of a design must be entered into the design register, although this is not a requirement for the validity of the transfer.

How does one obtain a patent?

Patent protection is regulated by the Danish Patents Act (in Danish: "*Patentloven*"), the act protects patentable inventions. Patent registration results in exclusive right to commercial use of the invention. Thus, private use does not infringe a registered patent. Furthermore, a person who made commercial use of an invention before a patent application was filed may continue to use the invention, provided that the use does not constitute evident abuse in relation to the applicant.

There are certain requirements for the invention in question to be patentable and moreover one needs to apply for registration of the patent. The requirements for the invention in question are as follows:

1. it must be susceptible of industrial application;
2. it must possess novelty;
3. it must involve an inventive step and;
4. it must be possible to describe and reproduce.

Certain subject matters are excluded from protection, e.g. discoveries and scientific theories. Computer programmes as such are also excluded as these are subject to Danish copyright law and not patent law.

A patent in Denmark may be obtained by:

1. submission of a purely national application to the Danish Patent and Trademark Office (in Danish: "*Patent- og Varemærkestyrelsen*");
2. designation of Denmark in an application in accordance with the Patent Cooperation Treaty or;
3. a European application to the European Patent Office - EPO.

Since all three methods ensure protection on the Danish territory, the choice between them depends mainly on the number of countries where patent protection is necessary and the different fees and other costs associated with each method.

As a main rule, a patent may be protected for a maximum of 20 years from the date of the original application, subject to payment of annual fees.

May a patent be transferred?

Patents may be transferred in whole or in part. On request, the transfer of a patent must be entered into the patent register, although this is not a requirement for the validity of the transfer.

If the patent holder has given license to commercial use of the patent, the licensee may not transfer the license to another licensee, unless it has been agreed with the patent holder.

What constitutes a utility model compared to a patent?

The Utility Models Act (in Danish: "*Brugsmodelloven*") complements the Danish Patents Act. The Utility Models Act protects creations. A creation is similar to an invention in many ways, but as opposed to patents, the requirements of inventive steps are lower. In addition, the requirements for obtaining protection of utility models are easier met than the requirements for obtaining a patent.

An application for a utility model protection may constitute priority for an application for a patent and vice versa.

How does one obtain protection of a utility model?

A creation susceptible to industrial application or providing a solution to a technical problem may be registered as a utility model provided that it possesses novelty and differs distinctly from prior designs.

Protection is obtained by registration at the Danish Patent and Trademark Office or the Patent Cooperation Treaty system, which may be used if an international utility model is desired. A subject matter statement of the desired utility model must be included in the application. Against payment of a fee, the Patent and Trademark Office may ensure that the requirements of novelty and distinction are fulfilled. However, if the fee is not paid, the Patent and Trademark office does not check if the requirements are fulfilled. Thus, it is possible to have a non-valid registered utility model.

For how long is a utility model protected?

A utility model is protected for a period of three years from the date of the application. The protection may be renewed for two more periods of three and four years respectively.

What constitutes a trademark?

The Danish Trademarks Act (in Danish: "*Varemærkeloven*") protects trademarks. Trademarks are defined as distinctive signs for goods or services being used or intended for commercial use. Examples of trademark types include words, word combinations,

letters, numerals, pictures and designs, or the shape, equipment or packing of goods, and trademarks may generally consist of any sign capable of distinguishing the goods or services of one company from those of other companies, provided that the trademark in question may be represented graphically (the main function of a trademark is to provide the origin of goods marketed under the trademark).

Trademarks describing the purpose of goods and other types of trademarks which due to their nature are excluded from registration may not be registered and will not be protected through use.

The EC Trademark Directive forms the basis of the Danish Trademarks Act.

How is a trademark right established?

A national trademark right may be established either by registration or through commercial use, making it an unregistered trademark. The registered trademark right is registered at the Danish Patent and Trademark Office, OHIM (Office of Harmonization in the Internal Market) or WIPO (World Intellectual Property Organization), while an unregistered trademark right is established by use of the trademark in question in Denmark for the goods or services for which it is to be used and for which it is continuously used. However, marketing activities are required.

An unregistered trademark confers equal rights to the registered.

For all trademarks, it is a fundamental requirement that they have distinctive character. A trademark that does not have distinctive character may obtain protection by regular usage through a period of time.

Why register a trademark when it is protected without registration?

The benefits of registration of a trademark include evidence of its existence, and the extent of the right is often wider than that of the unregistered. It may also prevent future registered trademarks from coming too close to the holder's trademark.

The registration of a national trademark is published, and opposition may be filed against the validity of the registration within two months from the date of the publication.

For how long is a trademark protected?

A registered trademark is protected for a period of 10 years from the date of registration. Registration may be renewed for a new 10 year period. There is no requirement of use of a registered trademark at the time of application. Thus, it is possible to register a trademark, with the sole purpose of preventing others from registering the trademark.

However, registered trademarks may lose their protection if they have not been used for a period of five years. Trademarks established through usage remain in force as long as they are used continuously.

Is international registration possible?

It is possible to obtain trademark rights in Denmark in accordance with the Madrid Protocol by designating Denmark in an application for international registration. Through an application and registration with OHIM, protection will have effect on the Danish territory as well as in the rest of the EU. However, if the trademark cannot be registered in all countries, registration will be denied.

May a trademark be transferred?

Trademarks may be transferred in whole or in part. On request, the transfer of a registered trademark must be entered into the register of trademarks with the Danish Patent and Trademarks Office, although this is not a requirement for the validity of the transfer.

What if a right is not covered by any of the above-mentioned statutes?

The above IP rights are supplemented by the Danish Marketing Practices Act (in Danish: "*Markedsføringsloven*"), which provides a general clause prohibiting all acts which are against good marketing practices. Acts covered by the general clause might be protected against marketing of copies or close imitations of the product of another company.

In addition, the Danish Marketing Practices Act protects against unauthorised dissemination of trade secrets and technical drawings etc., and even though know-how is acknowledged under Danish law, it is not directly protected by any legislation. However, the standard of good marketing practises may generally be invoked as a protection against an unauthorised dissemination of business know-how.

What are the means of enforcement of IP rights?

Effective and relatively fast means of enforcement of IP rights – including trademarks, copyrights, and patents – appear from the Danish Administration of Justice Act (in Danish: "*Retsplejeloven*").

An interlocutory injunction against infringements of IP rights may be issued by the Enforcement Courts (in Danish: "*Fogedretten*") thereby prohibiting an infringer from further infringement under criminal liability. The holder of the right may obtain assistance from the Enforcement Court to prevent further infringements or initiate proceedings to preserve evidence – including a search of the business premises of an alleged infringer – of suspected infringement and the scope of such infringement.

What are the requirements for obtaining an injunction?

The holder of the right must establish a likelihood of infringing activity in order to obtain an injunction or an order to preserve evidence and must further establish a likelihood of infringing activity and that the evidence may be found at the requested place of search.

An injunction and motion to preserve evidence may be conducted simultaneously and may - if one satisfies the Enforcement Court that there is a risk of evidence being destroyed - be carried out without preceding notification to the alleged infringer. However, the infringer has a right to legal counsel.

The above-mentioned orders by the Enforcement Court may be appealed to the High Courts. Further, the holder of the right who has obtained these preliminary measures must file a lawsuit regarding the merits within a relatively short timeframe, unless the infringer waives the right to confirmatory action (an action to confirm the interim injunction).

The holder of the right may claim remuneration and damages, a permanent injunction and destruction of infringing material. In case of particularly serious infringements, the infringer may be held criminally liable during these proceedings.

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