

XXXIII Nordiske NIR-møte, København 2016

Intellectual property law in the Supreme Court of Norway

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The Supreme Court of Norway is the highest court in the land.² The main role of the Court is to ensure clarity and development of the law within the framework of the Constitution and prevailing law, including the human rights conventions and the EEA-agreement, i.e. European Union law.

The Court hears both civil and criminal cases, and has jurisdiction in all areas of law. Thus, unlike in many other European countries, the Supreme Court is also the highest court in constitutional and administrative matters.

Probably the most significant trend in the practice of the Supreme Court during the last 25 years is the influence of international law. There are two main reasons for this: Firstly, the increased significance of the European Human Rights Convention, which culminated with the enactment of a bill of rights in the Constitution in 2014. The Supreme Court has taken a very active role in applying the case law of the European Court of Human Rights. Secondly, following the entry of the EEA-agreement in 1994, EU-legislation and case law from the European Court of Justice (ECJ) and the EFTA-court has been applied as a primary source of law in the application of Norwegian statutes that are based on EU-legislation. One notable example is the Trademark Act.

In order to fulfil its role as a court of precedence, the Appeals Selection Committee, which consist of three judges on rotation, only grants leave to appeal in cases that raise matters of principle beyond the specific subject matter of the issue in dispute. Although the Supreme Court may consider the evidence in civil cases, the Court will not hear a case which relies mainly on the facts.

In 2015, the Supreme Court received appeals against judgments in 469 civil cases, including administrative cases. The Supreme Court heard only 63 of these appeals, i.e. 12 percent.³ The corresponding number in criminal cases was 54 cases, also amounting to approximately 12 percent of the received appeals. During the last five years, the percentage of referrals in civil cases has varied between 12-16%.⁴

However, *with respect to IP-cases* the picture is quite different. As the number of cases is small, we need to look at longer periods that only one year. *For the period 2000 – 2015* the numbers are as follows:

- Received appeals in total: 59⁵
- IP cases decided by the Supreme Court: 25, i.e. 42 percent.

¹ Justice of the Supreme Court of Norway. I am grateful for valuable assistance from law clerk Knut André Aastebøl.

² Section 88 of the Constitution

³ Høyesteretts årsmelding 2105

⁴ Høyesteretts forretningsstatistikk, www.hoyesterett.no

⁵ This number includes two appeals on decisions (kjennelser)

These cases allocate as follows:

Patents:

- Received appeals: 15
- Decided by the Supreme Court: 5, i.e. 33 percent

Trademarks:

- Received appeals: 14
- Decided by the Supreme Court: 7, i.e. 50 percent

Copyright:

- Received appeals: 19
- Decided by the Supreme Court: 11, i.e. 57 percent

The number of appeals may differ from year to year, but no significant trend is noticeable during the last 15 years. However, if we look at the number of IP cases decided by the Supreme Court during the period 2005-2014 compared to the period 1985-1994, a significant development appears: During the years 1985 – 1994, the Court ruled in only 7 IP cases, whereas in the period 2005 – 2014, 15 cases were decided.⁶ In the first period, IP law ranked as 18 amongst civil cases decided by the Court, whereas in the next period IP climbed to number 13, after *inter alia* tax, contracts, compensation and civil procedure, but before administrative law, company law, environmental law and constitutional cases et.al.⁷

In summary: A high number of IP cases relative to appeals are granted leave to be heard by the Supreme Court. Further, the number of IP cases heard by the Court has doubled from the period 1985 – 1994 to the period 2005 – 2015. How could this be explained?

One reason may be that there are not many IP-cases before the courts in general. Among those that are decided by the courts, legal issues are at stake in a number of them. This is especially so in copyright and trademark cases, whereas in patent cases the facts, and especially considerations of complex technical issues, may often be decisive. Further, the impact of international law in general, and EEA/EU-law in particular, is probably one very important factor why the Court hears many appeals in IP-cases. This is especially the situation in trademark cases, as the Trademark Act implements the Trademark Directive. The landmark case is Rt. 2002 p. 891 (GOD MORGON), in which the Supreme Court for the first time decided a trademark case on the basis of case law from ECJ, and the General Court and OHIM as well. Following this ruling, EU-case law has been thoroughly considered and given decisive effect in a number of trademark cases.⁸ Case law in trademark cases even shows that the Supreme Court gives more weight to ECJ-case law than to its own practise.⁹

⁶ Wilhelm Matheson: "Høyesterett i sivile saker-noen strukturelle utviklingstrekk" in "Rettsavklaring og rettsutvikling", festskrift til Tore Schei (2016), page 612, table 10.

⁷ Op.cit. table 11

⁸ For a comprehensive account of the Supreme Court's case law in patent, - trademark and copyright cases during the last 50 years, see Arne Ringnes: "Høyesterett og immaterialretten" in "Lov Sannhet Rett – Norges Høyesterett 200 år" (2015) p. 871 ff. With respect to the impact of EU-law in trademark cases, see page 883 ff.

⁹ Hallvard Haukeland Fredriksen, «Høyesterett som EØS-domstol» in "Rettsavklaring og rettsutvikling", festskrift til Tore Schei (2016), page 448.

I believe the high percentage of leave to appeal also reflects that IP law, more than many other fields of law, is exposed to societal and technological changes, as well as developments in international law. The advent of Internet and digital technology is one primary example. This calls for legal clarification in national law as well. A few examples: In the *napster.no*-case (Rt. 2005 p. 41), the Supreme Court held that linking to illegal music files on the Internet was a contributory infringement of copyright. The Court further discussed, but did not conclude, whether such linking is a communication to the public and thus within the exclusive rights of the copyright holder. In the *Get/Norwaco*-case (HR-2016-562-A), the majority of the Court (4-1) held that cable distribution of television programs following a direct feed of signals from the broadcaster to a cable operator, is not a rebroadcasting under the Copyright Act Section 34. In its reasoning, the Supreme Court referred to the commercial development within the broadcasting field (section 54).

Another factor may be that IP-advocates are skilled in tailoring the appeal so that it is suited for a decision by the Supreme Court. The Supreme Court may review even rather complicated patent cases if only the legal issues are at stake. One notable example is the *Donepezil*-case (Rt. 2009 p. 1055). In this case, the Supreme Court established the conditions for patent protection under the doctrine of equivalents. However, this being said, nearly all of the appeals in pharmaceutical and chemistry cases are denied leave to appeal, probably because the outcome depends on expert evaluation of technical issues.

As I have already mentioned, foreign and international law takes a central part in the Supreme Court's decisions in general, and so in IP-cases. With respect to the European Patent Convention (EPC) and case law from the European Patent Office (EPO), the Supreme Court has held that the Patent Act is to be applied in accordance with EPC (*Donepezil*, section 27). In the *Biomar*-judgment (Rt. 2008 p. 1555), the Supreme Court emphasised the need for harmonised patent rules on a European level. The Supreme Court has not yet explicitly stated the significance of EPO case law in the interpretation of the Norwegian Patent Act. However, most probably, a clear and consistent practise by the highest appeal bodies of EPO would be given decisive importance.

In copyright cases the situation is somewhat unsettled. In the *Tripp Trapp*-case (Rt. 2012 p. 1062), the Supreme Court held that case law from the European Court of Justice regarding originality as a condition for copyright protection was not decisive in respect of works of applied art (sections 68 and 69). This statement has been criticised in legal literature. There is no other decision in which the Supreme Court relies on case law from the ECJ regarding the copyright directives. This should in my view however not be taken as an indication that the Supreme Court would be hesitant to use ECJ-case law, to the extent that is relevant to the case at hand.

In copyright cases however, the Supreme Court draws on decisions from supreme courts of other European countries concerning similar matters, such as decisions from the Danish Supreme Court regarding the copyright protection of the *Tripp Trapp*-chair, a decision from the German Supreme Court (*Paperboy*) in the *napster.no*-case and a decision by the Netherlands Supreme Court in the *Norwaco/Get*-case. The influence of such case law is not

as a legal source *per se*, but rather as instructive examples based on persuasive and well-founded reasoning.¹⁰

The Supreme Court may submit questions to the EFTA – court.¹¹ This is however more the exception than the rule, and has been done only once in an IP-case (Paranova, Rt. 2004 p. 904)

There are no special procedural rules for IP-cases. The judges are selected at random; *i.e.* the cases are not allocated to justices that have a special expertise in IP-law. Five justices hear the case.¹²

The proceedings of the Supreme Court are almost always oral, and may last from one to three days. The advocates plead. No witnesses appear, with the rare exception that the Supreme Court may appoint experts to give oral testimony.¹³ Recent examples are child protection cases and cases concerning complicated medical and financial issues. To my knowledge, experts have not been appointed in IP-cases. However, the parties' can submit expert opinions on facts. In a number of copyright cases in recent years, such factual expert opinions have been submitted.¹⁴ On the other hand, unless all parties agree, legal opinions are not permitted, even if the opinion concerns the application of facts to the legal rules (subsumsjonen).¹⁵

As I mentioned, the Supreme Court is the highest court also in administrative cases. This implies that the Court may rule in cases concerning an appeal against a refusal by the Board of Appeal for Industrial Property Rights to grant patent, trademark or design protection.¹⁶ The jurisprudence of the Supreme Court in these matters is, in short, that the courts should be reluctant to set aside the considerations by the Norwegian Patent Office and the Board of Appeal in patent cases, due to the expertise and experience held by these authorities.¹⁷ On the other hand, in trademark cases, the courts may conduct a full review, as these cases are not considered particularly complicated.¹⁸

Probably as a reflection of the fact that Norway does not have separate administrative courts, the review by the courts in refusal cases is limited to consider the legality of the administrative decision and to revoke the decision. The courts cannot grant a patent, design or trademark. Further, the courts' review is limited to the facts and grounds for refusal considered by the Board of Appeal.¹⁹ If, for example, the basis for refusal is lack of inventive step, the Board cannot as a defence invoke insufficiency as a new argument for refusal.

¹⁰ Rt. 1994 page 1584 (LEGO)

¹¹ The Administration of the Court's Act Section 51a.

¹² Particular cases concerning e.g. constitutional issues or whether to deviate from a former precedent, may be heard in Grand Chamber by eleven justices or by all of the justices sitting in plenary session. IP-cases have never been heard by extended court.

¹³ Civil Procedure Act Section 30-11

¹⁴ Rt. 2013 side 822 (Ambassadør), Rt. 2012 side 1062 (Tripp Trapp), Rt. 2007 side 1329 (Huldra) og Rt. 2005 side 41 (Napster).

¹⁵ The Civil Procedure Act Section 11-3 and Rt. 2011 p. 430 (Tripp Trapp)

¹⁶ Klagenemnda for industrielle rettigheter

¹⁷ Rt. 1975 p. 603 (Swingball) and Rt 2008 p. 1555 (Biomar)

¹⁸ Rt. 1995 p. 1908 (MOZELL)

¹⁹ Rt. 2012 p. 1985 P

Finally; the Supreme Court does not have any backlog. In general, it takes six months from the appeal is received by the Supreme Court until the decision is handed down. There is no specific statistics relating to IP-cases, but it is fair to assume that this handling time also generally applies to IP-cases. The typical time schedule from the lodging of the appeal to the decision by the Supreme Court may be approximately seven to eight months.