

XXXIII Nordic Intellectual Property Conference**Intellectual property law in the higher courts**

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Introduction

The Supreme Court of Denmark is the highest court in the Kingdom of Denmark, which apart from Denmark includes the Faroe Islands and Greenland.

The Danish judicial system is a three-tier system with 24 district courts, 2 courts of appeals and one Supreme Court at the peak. All these courts have general authority, which implies they deal with both criminal cases and civil cases, including cases raising questions of administrative law and constitutional law. We have neither specialised administrative courts nor a constitutional court.

The only exception to this system of general authority is the Maritime and Commercial Court (*Sø- og Handelsretten*) which can deal with cases where insight into trade and commerce is particularly important¹. The Maritime and Commercial Court is also a specialised court in certain IP cases². The Maritime and Commercial Court is somewhat of a hybrid between a district court and a court of appeal, trying civil cases in the first instance but under certain conditions with direct appeal to the Supreme Court.

Earlier on, the Supreme Court handled a number of more mundane cases, since civil cases in certain circumstances could be brought directly before the courts

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¹ Cf. Section 225 and 227 of the Administration of Justice Act.

² Section 225(2)(4) of the Administration of Justice Act.

of appeal as first instance, with an unrestricted right of appeal to the Supreme Court. Since a major court reform in 2007³ and a minor reform in 2014⁴ the intention has been that the Supreme Court shall not be burdened by cases where the main issues are issues of fact (evidence) or hear cases concerning issues of law, if the relevant issues have already been settled. After the court reforms of 2007 and 2014 it is the responsibility of the Supreme Court to settle issues of law, ensure the consistent, right and just application and development of the law by rendering decisions in cases which raise questions of general significance for the application and development of the law, or which otherwise have far-reaching importance for society.

Facts and figures

We do not have any official statistics on the various subject matters of the civil cases decided by the Supreme Court. I have tried to make my own unofficial statistic through a subject matter search of the Danish weekly law reports (*Ugeskrift for Retsvæsen*) for the last ten years, i.e. from 2006 to 2015. Subject to errors in such a manually compiled statistic, it appears that the numbers are fairly steady with the number of IP cases decided per year generally ranging between 5 and 13 cases (and between 3 % and 9 % of all the civil cases decided that year) with a notable peak of 18 IP cases decided in 2014 which accounts for 12 % of all the civil cases decided that year.

³ Act no. 538 of 8 June 2006. Entered into force on 1 January 2007.

⁴ Act no. 84 of 28 January 2014. Entered into force on 1 February 2014.

Year	IP cases	Civil cases (total)	%
2006	10	218	5
2007	12	216	6
2008	5	195	3
2009	11	170	6
2010	8	157	5
2011	12	169	7
2012	13	142	9
2013	7	147	5
2014	18	152	12
2015	7	117	6

In my opinion this is a fairly high share of the civil caseload of the Supreme Court compared to the many other subject matters the Court must deal with. Without having explored the issue in depths by going through all the individual cases, I believe a major factor is a high proportion of appeals of decisions in IP cases from the Maritime and Commercial Court. Until 1 February 2014 decisions from the Maritime and Commercial Court could be appealed directly to the Supreme Court without restrictions. The Maritime and Commercial Court has traditionally been a specialised trademark court and, since 2007, also a specialised patent court. In 2014 – in conjunction with new restrictions on appeals to the Supreme Court – it also became a specialised court for copyright, but only in relation to works of applied art (industrial design) and computer programmes.

Since the 2014 reform there has been three ways a civil case can reach the Supreme Court.

The main channel is with a leave to appeal to the Supreme Court as third instance after the case has been decided by a district court and a court of appeal. Unlike other countries such leave to appeal is *not* granted by the Supreme Court

itself, but by an independent Appeals Permission Board consisting of five members: a Supreme Court justice, a court of appeal judge, a district court judge, a practicing lawyer and a law professor. Permission requires that the case involves matters of legal principle⁵.

In order to avoid that cases which clearly ought to be dealt with by the Supreme Court as court of final instance would have to pass through all three instances, it is possible for the district court – with the approval of the relevant court of appeal – to refer a civil case to the court of appeal as first instance. Such a referral requires that the case involves matters of legal principle and has general significance for the application and development of the law, or otherwise is of far-reaching importance for society⁶.

The third and final avenue to the Supreme Court is an appeal from the Maritime and Commercial Court. Since 2014 the parties can choose between appealing a decision of the Maritime and Commercial Court to one of the courts of appeal or to the Supreme Court⁷. An appeal directly to the Supreme Court must either satisfy the same conditions as a referral of a district court case to the courts of appeal *or* there must be other particular grounds for permitting direct appeal, e.g. the international nature of the particular case⁸. The Supreme Court itself checks if the requirements for direct appeal are satisfied.

I believe the new conditions for direct appeal from the Maritime and Commercial Court will have some impact on the number of IP cases which will be decided by the Supreme Court in the future. It is not very likely that the Supreme Court e.g. will again consider four successive cases of possible

⁵ Section 371 of the Administration of Justice Act.

⁶ Section 226 of the Administration of Justice Act.

⁷ Section 368(4)-(6) of the Administration of Justice Act.

⁸ Report of Danish Parliamentary Proceedings 2013-14. Supplement A, Bill no. L 96, p. 13.

copyright infringement concerning the same chair for children⁹ [as was the case with the Tripp Trapp Chair in 2001, 2011, and twice in 2014] or that it will have to consider complicated issues of fact concerning possible infringement of a pharmaceutical drug patent¹⁰ [as with the drug Cipralelex in 2014]. So far it is the impression that the lawyers practice self-restraint and in most cases lodge their appeals on issues of facts directly with the courts of appeal. Since the new rules came into force on 1 February 2014, the Supreme Court has dismissed five appeals and allowed two appeals in IP cases. The five appeals¹¹ which have been dismissed concerned mainly issues of fact (evidence) or interpretation of the contractual obligations of the parties. Of the two appeals that have been allowed, one concerned parallel importing of pharmaceutical drugs and the application of an interim patent arrangement after Poland's accession to the EU¹² and the other concerned a person's forfeiture of the right to use her own name as trademark following a bankruptcy procedure¹³. Both cases thus involve important issues of law and not fact. This is not to say that a case involving issues of fact or contractual interpretation cannot involve important issues of law, e.g. the legal criteria to apply when comparing products which may or may not violate copyright or patents. But if issues of fact or contractual interpretation are substantial, the case may be better suited for a Supreme Court hearing after a decision on the fact-based issues in two instances – i.e. the Maritime and Commercial Court and a court of appeal – at which stage any important issue of law may be more clearly identified.

⁹ UfR 2001.747 H, UfR 2011.2736 H, UfR 2015.979 H and UfR 2015.992 H (Tripp Trapp Chair).

¹⁰ UfR 2014.196 H (Cipralelex)

¹¹ UfR 2014.2102 H (Tivoli), UfR 2015.3326 H (2B Scandinavia), UfR 2015.3329 H (Evonik Degussa), UfR 2016.543 H (Frese) and Supreme Court order of 7 June 2016 (case no. 80/2016) (Gramrode) (not yet in UfR).

¹² Supreme Court order of 14 November 2014 (case no. 214/2014) (Orifarm). Final judgment of 8 April 2016 (not yet in UfR).

¹³ UfR 2016.1829/1 H (Utzon).

Procedures applied

The Supreme Court is not so well suited to decide issues of fact – although it conducts a full review in civil cases. This is due to the fact that there is no direct oral evidence in form of testimony of parties, witnesses or experts at the final court hearing which usually lasts only one or maybe two days. In theory direct oral evidence can be allowed¹⁴, but in practice it only happens under rare circumstances, it has not happened for many years and to my knowledge never in an IP case¹⁵ [the latest example possibly being in 1981 in a non-IP case]. Instead any new oral evidence is heard prior to the final court hearing and entered into the court records. The reason for this practice is a wish to ensure that the factual basis for the Supreme Court's decision is settled prior to the final court hearing to allow lawyers and justices to prepare for the hearing in the final instance without surprises during the hearing. In this respect it is very helpful for the justices that the litigating parties since 1998 have been asked to submit a written summary plea (normally not exceeding 10-15 pages) no later than two weeks before the final court hearing. The procedure with no direct oral evidence at the final hearing imposes a duty on the lawyers in IP cases to be very pedagogical in introducing the justices to the factual background and context of the specific subject matter, regardless of whether the case is about a copyright infringement of designer clothes or furniture or a patent case with complex chemical or technical patent claims. One direct form of evidence which is very frequent in IP infringement cases is a presentation in the court room of the competing products, whether they are plumbing equipment, clothes, furniture, etc.

Until now, the Danish Administration of Justice Act has not allowed party appointed experts in civil cases, only “neutral” court appointed experts can be

¹⁴ Section 340(3) of Administration of Justice Act.

¹⁵ The latest example possibly being in UfR 1981.101 H in a non-IP case, cf. *Torben Jensen: Højesteret og retsplejen* (1999), p. 106-107.

appointed. As an expert usually already has been appointed in the first (or second) instance, it is rarely relevant to appoint a (new) expert at the Supreme Court level, but on occasion the parties are allowed to ask supplementary questions to the previously appointed expert. In a very recent report from the Danish Standing Committee on Procedural Law¹⁶, published in May 2016, the committee has, however, recommended changes to the rules on expert evidence in the Danish Administration of Justice Act, including a limited possibility for introducing party appointed experts based on a joint request from the parties. The report is now in a consultation process and the political decision on whether to follow up on the report with new legislation will likely be taken in the autumn.

Generally, a case in the Supreme Court is heard by five justices which is the minimum number of justices necessary to decide a case¹⁷. In more important cases seven justices participate and more rarely nine justices. The previous backlog of cases in the Supreme Court has been greatly reduced and at the moment a final decision is handed down within one year after the appeal is lodged with the Supreme Court.

Of course, processing the case will last longer if the Court decides to refer a preliminary question to the European Court of Justice¹⁸. This happens occasionally. Recent examples in 2014 include one case involving application of various EU regulations and directives to a private individual's import of goods violating intellectual property rights¹⁹ and another case involved the concept of bad faith in the Trademark Directive in relation to prior use²⁰. In 2013 there was

¹⁶ Report no. 1558/2016 on Reform of the Civil Procedure IX, Expert Evidence.

¹⁷ Section 3(1) of the Administration of Justice Act.

¹⁸ Article 267 of the Treaty on the Functioning of the European Union.

¹⁹ UfR 2014.2412 H (Rolex).

²⁰ UfR 2014.1998 H (Malaysia Dairy Industries).

a case involving the application of the INFOSOC Directive's provisions on "fair use" to short extracts of newspaper articles²¹.

Other topics

Apart from the case law of the ECJ, litigating parties sometimes, but not very often, refer to foreign case law. This is especially common when similar infringement law suits have been decided in other European jurisdictions. It has also happened in a situation where the decision in the Danish case was dependent on whether there existed a prior trademark right in a foreign jurisdiction, in which case it was necessary to make a preliminary finding on this issue²². In the case in question one of the issues presented was whether the use by a Danish company of a trademark violated a prior foreign trademark established in the US or elsewhere²³. In this respect the Danish Supreme Court had to make a preliminary finding on the significance of a registration in the US Supplemental and Principal Trademark Register, respectively, and whether the US company had established distinctiveness by regular usage in the US or elsewhere. Thirdly, foreign case law can also be presented and be relevant when the case before the Supreme Court requires the Court to enter into more unsettled areas of Danish IP law, especially if the relevant Danish legislation is based on EU law or on international treaties.

Conclusion

It is the intention of the Supreme Court to give a satisfactory and pedagogical reasoning, which contains the quintessence of the grounds that lead to the result to make the decision comprehensible and well suited for use as precedent for future cases²⁴. And it is also the intention that the reasons given by the Supreme

²¹ UfR 2013.1782 H (Infopaq).

²² UfR 2014.3346 H (Sox Institute).

²³ Section 15(3)(iii) of the Danish Trademark Act.

²⁴ Cf. *Lene Pagter Kristensen* in *Per Magid et al.: Højesteret – 350 år* (2011), p. 171-176, and *Børge Dahl* in *Thomas Riis & Jan Trzaskowski (Ed.): Skriftlig jura – den juridiske fremstilling* (2013), p. 309-327.

Court are self-sustaining in the sense that they generally can be understood without reading the previous decisions of the lower courts or the descriptive part of the Supreme Court's decision.

As mentioned earlier, because of the latest 2014 reform the Danish Supreme Court will most likely decide fewer civil cases, including IP cases, compared to previous years. This should enable the Court to give more careful consideration to and clearer reasoning in the precedent setting cases it does decide rather than decide a higher number of cases involving mainly fact finding and comparing products which may or may not violate copyright or patents. Again, such cases can involve important issues of law, and comparing the first Tripp Trapp case from 2001²⁵ to one of the most recent decisions from 2014²⁶, you will find in the latter a much more detailed description of the nature of the overall assessment and the elements relevant in comparing the copyright protected Tripp Trapp chair and the alleged infringing chair.

²⁵ UfR 2001.747 H (Tripp Trapp I).

²⁶ UfR 2015.979 H (Tripp Trapp III).