
Kluwer Patent Blog

should costs be awarded for patent attorney assistance in patent litigation?

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Although plans appear to be underway to establish a centralised enforcement court for patents in Denmark, the current position is that a patentee enforcing his or her rights, must turn to the local jurisdiction where the alleged infringer is domiciled. For the time being, therefore, all interlocutory injunction cases based on patents are heard by bailiff's courts with no documented experience in either the technical field of relevance, or, for that matter, patent law as such.

For that reason, Danish patent litigation will as a main rule have to draw on the expertise of experienced patent attorneys as a means of ensuring that all factual and technical issues may be communicated and put across to the court in terms that make it possible for someone lay in the technical issues to comprehend and rule on the often technically complicated issues in dispute. If a bailiff's court (first instance) decision is appealed to the High Court, the same considerations will apply.

For the above reasons, considerable costs must be expected to be incurred as a result of the necessity of retaining patent attorneys in eg. enforcement cases in Denmark. At present, however, they will not be covered in addition to legal costs awarded to the prevailing party.

In December 2008, the Danish Supreme Court for the first time ruled on the issue of whether costs should be awarded in respect of patent attorney fees related to patent enforcement cases:

The appeal board of the Danish Supreme Court granted leave for a third instance (Supreme Court) appeal of an interlocutory injunction decision rendered by the bailiff's court (first instance) and subsequently the High Court (Eastern Division). Both of these instances held that costs incurred due to the prevailing parties' need for patent attorney assistance should not be covered in addition to legal costs as only costs directly attributable to the evidence submitted should be covered in addition to legal costs.

Although, approximately half of the costs incurred by the prevailing party in that case were costs attributable to external patent attorneys assisting legal counsel, but not giving evidence, statements etc., the Supreme Court held (in concurrence with the first two instances) that neither preparations and analyses prior to the initiation of the legal proceedings nor expenses to expert assistance during the proceedings should be covered unless extraordinary circumstances were held to apply. No such circumstances were held to apply.

In a recent Supreme Court judgement (on a case on the merits), where the Supreme Court had the opportunity to reconsider its position on whether or not patent attorney costs should be covered, the Supreme Court upheld its position and it must therefore be concluded that the parties engaged in patent litigation in Denmark are highly unlikely to have costs to external patent attorneys covered in addition to legal costs.

It would be interesting to know if any other jurisdiction has a system similar to the one currently applicable in Denmark.

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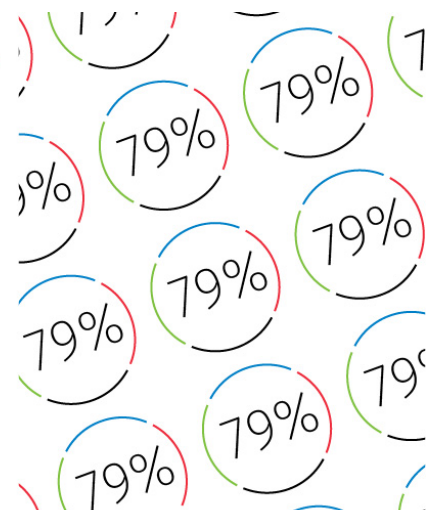
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