

# Kluwer Patent Blog

## Recent Danish case law on acquiescence/passivity in patent infringement actions

Anders Valentin (Bugge Valentin) · Monday, November 22nd, 2021

On September 30th, 2021, the Danish High Court (Eastern Division) rendered its decision in a long running patent infringement case. One important element of the case was the question of acquiescence, in particular, whether the patent proprietor is required to act on a possible patent infringement (and commence legal proceedings) when opposition proceedings are pending.

Both the Danish Administration of Justice Act (article 345) and the Danish Patent Act (article 53a) specify that the court may suspend a case, if there are other ongoing cases (such as opposition proceedings), which may impact the outcome of the case. The Danish courts have interpreted the provisions such that Danish (main) patent infringement action, as a general rule, will be suspended if opposition proceedings are pending. Thus, a patent proprietor is not able to enforce a patent by way of main proceedings in Danish courts as long as opposition proceedings are pending.

In this particular case before the Danish High Court, the patent proprietor, San-genic, a company that manufactures diaper pails with fitting diaper cassettes, was granted a European patent, which was published in Denmark in January 2009, which then became the primary point of contention in the dispute between the parties. The defendant (alleged patent infringer), Lamico, filed an opposition against the patent on the grounds of lack of novelty and inventive step. Lengthy proceedings followed first at the EPO Opposition Division and later at the Board of Appeal. The final decision in the opposition was rendered in December 2018, where the patent was upheld.

In 2015, while the opposition proceedings were ongoing, the patent proprietor decided to initiate patent infringement litigation against the infringer. The – central – question was raised whether the patent proprietor had lost its claim as a result of acquiescence, i.e., if the patent proprietor had waited too long (2015) to file the infringement case.

The Maritime and Commercial Court (the court of 1st instance) had made a non-specific assessment as the court merely pointed out that the patent proprietor had a valid patent in January 2009, which it could enforce, and that the patent proprietor by waiting 6 years before filing a lawsuit, had lost its claims on the grounds of acquiescence.

The Danish High Court (court of 2nd instance) ruled that in the assessment of acquiescence, other factors (other than just the time which has passed) must be considered, and that the patent infringer, even though 6 years had passed, had no legitimate reason to assume that the patent proprietor had forfeited its claims regarding infringement. Furthermore, the Court reasoned that if the infringement case had been brought before the courts earlier, the case would have been suspended or postponed by the Danish courts at least until the Opposition Division had made its

decision. Thus, the opposition proceedings before the EPO was a valid reason for not commencing legal proceedings. The Court then ruled that the defendant had infringed the patent. This decision is in line with Danish case law on acquiescence, whereby other factors than just time passed should be included in the assessment.

The Danish Maritime and Commercial Court has rendered several decisions this year on acquiescence and the ‘urgency’ (periculum in mora) requirement in Danish preliminary injunction proceedings.

Contrary to the Maritime and Commercial Court’s ruling in the Sangenic/Lamico decision, the Maritime and Commercial High Court ruled in another decision that eBay had not lost its claims and rights under the Danish Marketing Practices Act. The Court ruled that eBay acted passively between 2016-2019, but that the defendant (Autorola Group) had no legitimate reason to assume that eBay had forfeited its claims regarding infringement, as the defendant knew that eBay was awaiting the court’s decision in another case.

As for the urgency requirement in Danish preliminary injunction proceedings (periculum in mora), the Danish Maritime and Commercial Court rendered another decision recently. The case related to preliminary injunction based on alleged in-fringement of a patent to ceramic membranes. The patent proprietor had in-voked patent infringement in a cease & desist letter in 2015 and commenced an action for preliminary injunction in 2020. The Maritime and Commercial Court ruled that the case was not “urgent” (no periculum in mora) and consequently rejected the application for preliminary injunction.

Several actions are currently at the appeals instance and it will be interesting to see which direction the appeals court will take on acquiescence/passivity in patent actions.

Reported by Patris Hajrizaj and Frederik Buhl Brinckmann.

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