

Equivalents under Danish Law

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Legislative basis

- Danish Patents Act 1967 s 39:
- *"The extent of the protection conferred by a patent shall be determined by the claims. For the interpretation of the claims the description may serve as a guideline."*
- Denmark became a member of EPC as per 1 January 1990.
- During ratification of EPC, Danish legislator considered that s 39 corresponded to EPC article 69 and the Protocol on Interpretation.
- Hence, it was not considered necessary to make amendments to s 39 of the Patents Act 1967.
- Thus, for all practical purposes there is no difference between s 39 and EPC article 69(1).

Case law from the Danish Supreme Court (1)

Dansk Elektrolyse A/S v Guldager A/S [2009] UfR 1523

- Danish patent no DK 167.870 B2 "process for corrosion protection of a water system".
- »Claim 1:
 - 1) Process for corrosion protection of a water system by electrolysis,
 - 2) by which one applies a container which the water flows through,
 - 3) with more electrodes connected to a power source

characterised by

 - 4) that one applies at least one cathode which contains the metal aluminium,
 - 5) so that aluminium ions are formed by the cathode.«
- The defendant (Dansk Elektrolyse) claimed that it did not infringe since *inter alia* it used two containers instead of one, hence not fulfilling feature 2).

Case law from the Danish Supreme Court (2)

- Reasoning of the Supreme Court:

"It follows from s 39 of the Patents Act 1967 that the extent of the protection conferred by a patent shall be determined by the claims and that the description may serve as a guideline to the understanding of the claims. When determining the scope of the patent protection, it shall be taken into consideration what can be considered technically even – equivalent – to the features in the patent claims.

(...)

... the Supreme Court affirms that it can be established that what is essential about [the patentee's] patented process for corrosion protection of a water system is the electrolytic forming of aluminium ions by a cathode containing aluminium. The character of this process is not crucially changed by the defendant's design (...). The application of two containers (...) does either not bring the designs outside the scope of the wording of the claim or can at least be considered technically equivalent solutions which as such are obvious to a person skilled in the art."

Case law from the Danish Supreme Court (3)

- Hence, a 4 point test is applied in relation to claim equivalents:
 - 1) Divide the claim into features.
 - 2) Ask what is essential in the patented invention. In Denmark, court appointed (neutral) experts are almost always used to determine this.
 - 3) Ask whether the patented invention is crucially changed by the design in dispute. Presumably at least the essential features must have been copied.
 - 4) Ask whether the design in dispute was obvious to a person skilled in the art. But patent obtained by the defendant did not prevent infringement.
- This approach allows for going outside the wording of the claims to a certain extent.

Case law from the Danish Supreme Court (4)

- The Supreme Court explicitly rejects an approach where the patent protection is determined by what is the "core of the invention", i.e. an approach where the patent claims are mere sign poles in the determination of the patent protection.
- Moreover, the Supreme Court explicitly stated that it was of no importance that the defendant's invention had been considered new and inventive by the EPO.

Case law from the Danish Supreme Court (5)

Albert Hedegaard v Hardi International A/S [2014] UfR 488

- Danish Patent no. DK 156806 C "crop sprayer".
- The Supreme Court Confirmed that equivalent solutions could be taken into considerations when determining the scope of the patent protection.
- Moreover, the Supreme Court stated:

"If the wording of the patent claims is unclear, it can be taken into consideration if the patentee towards the PTO has alleged a limited construction of unclear expressions in the patent claims in order to fulfil the requirements of novelty and inventive step..."

A few remarks about the drospirenone case in Denmark

Ruling of the High Court of 13 February 2015, case B-435-14 (unpublished, appeal from the Bailiff's Court in preliminary injunction proceedings)

- No infringement.
- The '840 patent (dehydration of water):

"(...) [the patentee] has not shown that it is likely that the manufacturing drospirenone by dehydration of water from the intermediary product 5-β-OH-DRSP infringes [the patentee's] rights according to the ['840 patent]. The High Court considers that that Bayer's original patent application concerned adding an acid or Lewis-acid to 5-β-OH-DRSP. Under the opposition/appeal proceedings before the European Patent Office (EPO) Bayer amended the description to concern adding P-Toluenesulfonic acid to 5-β-OH-DRSP. (...) In this respect, the High Court has not considered that the conceptual difference between acids and bases to be decisive."



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