

Denmark: Left without a smoking design gun? There might be a way out...

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In our latest [post](#) we explored the numerous benefits of the registered design under Danish law. By contrast, this post will cover the possibilities of enforcement with regard to products not protected as neither a registered nor an unregistered community design.

Although the registered community design includes substantial advantages, the proprietor of an unprotected design is not completely without options under Danish law with regard to preventing imitations of its product. This also applies in cases where the protection as a registered design could have been sought or where the registered right has expired or the application been rejected.

This protection against infringement is offered by the central standard '**good marketing practises**' to be met by all businesses in consideration of consumers' and the general public's interest as stated in the Danish Marketing Practises Act (the "Act") - in particular Section 3 of the Act.

The '*good marketing practises*' set a positive commitment and standard for the running of businesses on the Danish market and entail an obligation to act in accordance with *bona fide* and established practises of trade. As the copying of products designed by other traders will violate the aforementioned requirements in the majority of cases, the Act does *de facto* create an effective protection against

counterfeit and imitated product. As a consequence, the Act is said to include a ban against product imitations. In general, the provision is widely used for all types of intellectual property rights, and in the majority of cases before the Danish court concerning alleged infringement of design right, a violation of the Act is claimed as a supplement to the actual design right. In fact, it is uncommon to see cases argued solely on the basis of a design right.

Noteworthy elements of the protection offered by *good marketing practises* under the Act include:

- The Act requires **bad faith**, i.e. in case a product is developed without any knowledge of the earlier product, a violation of the Act will not be possible. For well-known products such knowledge will often be presumed. Past cooperation between the parties will often satisfy the requirement of disloyal behaviour and remain a core area of the protection under the Act;
- Only products which possess a degree of **commercial distinctiveness** as a result of the efforts made by the designer are protected. Therefore, it must be possible for the consumer to tell the product apart from other similar products available in the market. This is an absolute requirement for protection under the Act but the threshold for protection is low;
- The design of the actual product is not the sole factor relevant for the comparison as the product is not the actual object of protection. Therefore it is possible for e.g. the design of packaging and **similarities across a range of products** to come into play;
- No predetermined **period of protection** is granted. Instead, protection is linked to the products in question currently being offered for sale on the Danish market and as such the protection will not expire as long as this is the case; and
- Products are only protected against products which – presently or potentially – compete with the earlier product on the Danish market and as a consequence the protection offered will often be within a more **narrow scope** than the traditional intellectual property rights.

While the abovementioned points are characteristic for the protection offered against product imitations under the Act, an exhaustive list of relevant factors cannot be made. This is a result of the very flexible nature of this protection which will be likely to include a broader range of factors than the acts governing the traditional intellectual property rights.

In conclusion: the registered community design does still offer substantial advantages and remains an attractive option in many situations. However, should you find yourself without such registered right, you will not necessarily be barred from enforcement in case a third party manufactures and markets an imitation of your product on the Danish market.