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Denmark: Conditions for preliminary injunctions – the elements of urgency and current relevance

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In a recent ruling from 15 August 2019 (BS-6392/2019 SHR) the Danish Maritime and Commercial High Court found that the conditions for issuing a preliminary injunction against the clothing company Message A/S (Message) had not been fulfilled since the alleged infringement did not constitute a sufficient basis for issuing a preliminary injunction.

According to the Danish Administration of Justice Act, a trademark holder can obtain preliminary relief in the form of an injunction. In order to get a preliminary injunction, the matter in question needs to contain elements of urgency and current relevance. Consequently, besides showing that the trademark holder does, in fact, have a right which should be protected by way of a preliminary injunction, the trademark holder must also provide conclusive or at least presumptive evidence that:

- The actions of the alleged infringer require the issuance of a preliminary injunction
- The trademark holder's ability to enforce its right would be wasted if he/she awaits the outcome of an action on the merits

The plaintiff IJH A/S (IJH), which is owned by the Danish fashion designer Ilse Jacobsen, is the proprietor of several trademarks, which include the name ILSE, for instance the EU trademark of the name ILSE JACOBSEN which is registered for clothing in class 25. In addition, the plaintiff claimed to have a trademark right acquired through use to the term I'M ILSE in relation to clothing. In that regard, it should be noted that according to the Danish Trademark Act, a trademark can be established either by registration of the trademark or by commencement of use of the trademark provided the range of use of such trademark is beyond a mere locally delimited use. In practice, the requirements for use in this regard are not very high.

In January 2019, IJH became aware that Message was marketing sweaters with style names containing the name ILSE, for instance ILSE STRIK ("strik" means "knitwear" in Danish) and ILSE ICE. The style names were typically used together with the registered trademark MbyM, which is owned by Message. During the proceedings, it was stated that Message consistently used girl's names as style names for their products and that there were approximately 500 different active style names on the MbyM website, which all consisted of international girl's names.

Furthermore, Message informed the court that the sweater with the style name ILSE ICE, was

launched in 2016, and that it was last produced in the Summer of 2018. Message also informed the court that the style name on the website was altered (to HILSE ICE) after IJH in January 2019 contacted Message regarding the possible infringement. However, Message had not contacted their distributors in order to have them change the name of the sweater in question since this sweater was not produced anymore and because they expected that there would only be very few items left on the market with that name.

Against this background, the Court found that a preliminary injunction could not be issued, since the trademark holder's ability to enforce its rights would not be wasted if it awaited the outcome of an action on the merits, and since any potential damages or compensation in relation to a potential infringement could most likely be dealt with in such proceedings.

Thus, without the Court explicitly stating this, it must be assumed that the reasoning behind the rejection of the plaintiff's claim was that there were no significant current sales and nothing that would indicate that such sales were likely to happen given that the sweater in question was no longer being produced, and that the style name in question had already been altered on the website. Consequently, no urgency or current relevance seemed to be present in this matter. Furthermore, in this matter it seemed that any potential damages or compensation in relation to the sales, which had already happened, could most likely easily be dealt with in trademark proceedings on the merits.

The Court underlined that this ruling was merely decided on the basis of the procedural rules regarding preliminary injunctions, and that the Court did not rule on whether IJH did, in fact, hold any trademark rights to the name ILSE, including whether or not the alleged rights would have been infringed by the use of the style names by Message. The Court stated that this question would have to be dealt with under trademark infringement proceedings on the merits.

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