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DANISH INITIATIVES COMPLEMENTING ONGOING ENFORCEMENT MEASURES

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ABSTRACT

In order to strengthen the enforcement of industrial property rights, the establishment of an Enforcement Unit at DKPTO is planned for the end of 2015. The Enforcement Unit shall function as a focal contact point for businesses, consumers and public authorities. Here they can receive guidance in concrete cases of infringement of industrial property rights as well as general information and guidance on infringement and enforcement issues. The goal is that such guidance will result in more enforcement actions in intellectual property rights (IPR) cases concerning identical or nearly identical products, trademarks or designs.

The Danish inter-agency cooperation takes place through the Danish Ministerial Network against IPR Infringements. The Network was established in 2008 and functions very well.

In the area of copyright, the Danish Minister for Culture at the time published eight initiatives in June 2012 that had the overall aim of contributing to the growth of the creative industries and helping reduce piracy on the Internet. The eight initiatives were called “the copyright package”.

* The views expressed in this document are those of the authors and not necessarily those of the Secretariat or of the Member States of WIPO.

Two of the initiatives resulted in two written Codes of Conduct (CoCs). The first CoC is about handling decisions by the courts concerning the blocking of websites due to infringements of rights (primarily but not limited to copyright infringements) and the second CoC has as its purpose to promote lawful behavior on the internet.

I. THE FORTHCOMING ENFORCEMENT UNIT AT THE DANISH PATENT AND TRADEMARK OFFICE

A. INTRODUCTION

1. In order to strengthen the enforcement of industrial property rights, the Danish Parliament adopted a bill earlier this year¹ which determines that an Enforcement Unit shall be established at the Danish Patent and Trademark Office (DKPTO).

2. The Enforcement Unit shall function as a focal contact point for businesses, consumers and public authorities. Here, these users can receive guidance in concrete cases of infringement of industrial property rights (in cases concerning identical or nearly identical products, trademarks or designs). The Enforcement Unit will also provide general information and guidance on infringement and enforcement issues.

3. Consumers and small and medium-sized enterprises (SMEs) will sometimes refrain from even looking into whether or not they have a good case against an alleged IPR infringer and how they can pursue their rights through the civil and criminal enforcement systems. They seem to find such measures difficult and costly and to be unaware of the possible lines of action.

4. It is expected that the Enforcement Unit will bring more infringement cases to light, as it will provide an uncomplicated entrance to competent guidance on infringement and enforcement issues. The goal is that such initial guidance will result in more numerous pursuits of rights against IPR infringers, which in turn is expected to lead to more cases for both private advisers (e.g., attorneys-at-law and IPR agents) and the police.

5. The mandate of the Enforcement Unit extends to trademarks, designs, patents and utility models. It is expected that most of the inquiries will concern trademarks and design rights.

B. GUIDANCE IN CONCRETE CASES OF INFRINGEMENT AND ENFORCEMENT

6. The guidance from the Enforcement Unit in concrete cases can concern the question whether or not an infringement has been committed and possible lines of action – for example through the Consumer Complaints Board or private advisers (civil enforcement measures) or through the police (criminal enforcement measures). The Enforcement Unit will thereby provide the users with a better basis for deciding whether or not to pursue their case and how to do it.

¹ The bill (L 92) was adopted on March 24, 2015, and is available (in Danish) at http://www.ft.dk/samling/20141/lovforslag/192/html_som_vedtaget.htm.

The Enforcement Unit can also provide assistance to its users on how to report an IPR crime to the police.

7. It is emphasized that guidance in concrete infringement cases is limited to cases concerning identical or nearly identical products, trademarks or designs. In cases requiring a complicated legal assessment (in order to determine whether an infringement has been committed or not), the Enforcement Unit will refer its users to seek advice from private advisers.

8. The guidance from the Enforcement Unit will be based on the information submitted by the users and the special expertise of DKPTO in relation to the IPR legislation it administers. The Enforcement Unit will for example make use of its expertise to conduct searches for IPR in online registers. It is noted that the Enforcement Unit will be separate from the departments handling applications for IP rights.

9. Guidance in concrete infringement cases can only be obtained in relation to registered rights. The Enforcement Unit will not consider the validity of the registered rights.

10. The guidance provided by the Enforcement Unit will not constitute decisions, but will only have a guiding character. The guidance will thus not be binding in any way for the police, prosecution, the courts or any other public authorities. The users will receive clear information on this.

11. The users will also be recommended to seek further assistance – in pursuing their rights against alleged infringers – e.g., from the hotline on consumer purchases (offered free of charge by the Danish Competition and Consumer Authority), the Consumer Complaints Board, private advisers and/or the police.

12. Upon request and payment of a fee (see paragraph 19 below), the Enforcement Unit can provide written opinions in concrete cases of infringement of industrial property rights. Such written opinions will contain the Enforcement Unit's assessment of whether an infringement has been committed or not. The guidance offered in written opinions is thus a subset of the guidance offered in concrete infringement cases as described in paragraphs 6 to 11 above. The terms described in paragraphs 6 to 11 thus also apply to written opinions. This means, *inter alia*, that written opinions will be non-binding. Written opinions will instead provide a first indication of whether an industrial property right has been infringed. This will be clearly stated in the written opinions. Likewise, written opinions will be based on the information provided by the users and the Enforcement Unit's searches for relevant registered rights. The Enforcement Unit will not investigate the facts of the case. Also, written opinions will only be issued in relation to registered IP rights and the Enforcement Unit will not consider the validity of registered rights. It is again emphasized that guidance in concrete infringement cases is limited to cases concerning identical or nearly identical products, trademarks or designs. Written opinions will not be provided when court proceedings have been initiated concerning the same case. The Enforcement Unit can refuse to issue a written opinion when it deems that an inquiry lies outside the purpose of the Enforcement Unit.

C. GENERAL INFORMATION AND GUIDANCE ON INFRINGEMENT AND ENFORCEMENT ISSUES

13. The Enforcement Unit will also provide general information and guidance on infringement and enforcement issues in relation to industrial property rights – for example guidance concerning the legislation and measures to prevent infringements from taking place. DKPTO already offers such general guidance today.

D. ASSISTANCE TO THE POLICE/PROSECUTORS

14. The Enforcement Unit will further assist the police and prosecutors in their efforts against IPR crimes, thereby strengthening the already close cooperation between the authorities.

E. THE ENFORCEMENT UNIT GATHERS DKPTO'S ENFORCEMENT RELATED TASKS AND COMPETENCIES

15. The Enforcement Unit will gather the tasks and competences of DKPTO in the area of IPR enforcement in one unit. The purpose is to create an optimal framework for coherent, efficient and competent work.

16. DKPTO already performs a series of tasks with the purpose of strengthening IPR enforcement. Such work includes functioning as secretariat for the Danish Ministerial Network against IPR Infringements (www.stopfakes.dk), participation in the European Observatory on Infringements of Intellectual Property Rights, national and international policy work and participation in international fora for cooperation.

F. WHO CAN USE THE ENFORCEMENT UNIT?

17. The Enforcement Unit has a broad target group and will provide guidance to consumers, businesses and public authorities. It is expected that especially consumers and SMEs will make use of the Enforcement Unit.

18. Anyone with an eligible claim/right covering Denmark can seek guidance from the Enforcement Unit. This means that parties based outside of Denmark – with a right covering Denmark – can also use the Enforcement Unit (for example a non-Danish company experiencing an infringement of its EU trademark in Denmark).

G. WHAT IS THE PRICE?

19. The adopted bill sets the fee for written opinions (described in paragraph 12 above) at DKK 1,500 (approximately EUR 200). The purpose of the fee is to prevent misuse of the system. All other guidance from the enforcement unit is free of charge.

H. WHEN WILL THE ENFORCEMENT UNIT BEGIN ITS WORK?

20. The Enforcement Unit is expected to begin its work by the end of 2015.

II. DANISH INTER-AGENCY COOPERATION ON IPR AND ENFORCEMENT

A. INTRODUCTION

21. The Danish inter-agency cooperation takes place through the Danish Ministerial Network against IPR Infringements. The network was established in 2008 and functions very well.

22. The Network consists of the following public authorities:

- State Prosecutor for Serious Economic and International Crime;
- Danish National Police;
- Danish Customs Authorities (SKAT);
- DKPTO (secretariat for the network);
- Ministry of Culture;
- Danish Health and Medicines Authority;
- Danish Safety Technology Authority;
- Danish Competition and Consumer Authority;
- Danish Veterinary and Food Administration;
- Danish Business Authority;
- Ministry of Foreign Affairs (The Trade Council).

B. HOW DOES THE NETWORK FUNCTION?

23. The establishment of the Danish Ministerial Network against IPR Infringements has greatly strengthened the information sharing, coordination and daily cooperation between the various public authorities playing a role in the fight against IPR crime.

24. The Network was established on the basis of a large intergovernmental report from 2008, which was presented by the then Minister for Economic and Business Affairs.² Until now, the Network does not have a statutory basis, but its terms of reference are available on the network's website.³

25. The Network has two annual one-day meetings on recurring dates in March and September. As all Network members participate in these plenary meetings, they have fostered – and this is their main advantage – close working relationships between the various authorities. This in turn has facilitated extensive information sharing and close cooperation and coordination between the Network members in their daily work, which includes concrete enforcement actions.

² Available (with an English summary) at: <http://www.stopfakes.dk/media/80429/rapportpiratkopiering.pdf>.

³ See <http://www.stoppiraterne.dk/media/101609/sg.pdf>.

26. DKPTO is secretariat for the Network and takes the lead in the work.

C. COOPERATION WITH PRIVATE STAKEHOLDERS

27. The network consists of public authorities only. This facilitates a very open dialogue and a high degree of information sharing. However, the Network has also established a structured dialogue with the industry and this cooperation is crucial and highly useful. The set-up for the dialogue was agreed between the Network and the industry representatives at the first meeting back in 2010.

28. In general, the Network and the industry representatives meet twice a year on pre-decided dates in May and November. The topics of the meetings are agreed beforehand between the Network and the industry. The industry representatives take turns in hosting the meetings and the invited groups of people varies according to the specific topic on the agenda.

29. Additional *ad hoc* meetings and continuous informal dialogue are also possible in this flexible set-up. The contacts and networking established through the structured dialogue facilitate a continuous and informal dialogue and cooperation between the Network and the industry in the fight against IPR crime. This is one of the main advantages of the structured dialogue.

D. EXAMPLES OF THE NETWORK'S RESULTS

30. The following results can be highlighted:

- Increasing the criminal penalties to up to 6 years of imprisonment for all types of IPR crime.
- Information websites in Danish (www.stoppiratkopiering.dk) and English (www.stopfakes.dk). The websites provide guides targeted specifically at consumers and businesses respectively and also contain legal information, a news section and links to various reports on counterfeiting and piracy.
- Cooperation on Danish participation in international enforcement actions to 1) combat falsified medicines (Operation Pangea); 2) combat fake and sub-standard food and beverages (Operation Opson); and 3) close down websites offering counterfeit or pirated products (Operation In Our Sites).
- Developing and maintaining a case law database of all Danish judgments in criminal IPR cases⁴.
- Developing a standard form for reporting IPR crimes to the police (developed together with the private industry through the structured dialogue meetings).
- Participation in the working groups of The European Observatory on Infringements of Intellectual Property Rights.
- Contributing to the IPR guidelines for police and public prosecutors.
- Organizing training seminars for public enforcement authorities.

31. The Network's activities are described in more detail in the Network's annual reports⁵.

⁴ Available at <http://www.stoppiratkopiering.dk/domssamling.aspx>.

III. THE INVOLVEMENT OF THE DANISH MINISTRY OF CULTURE IN TWO TYPES OF VOLUNTARY CODES OF CONDUCT IN THE FIELD OF COPYRIGHT WITH THE OVERALL AIM OF REDUCING PIRACY AND PROMOTING LAWFUL BEHAVIOUR ON THE INTERNET

A. INTRODUCTION

32. In June 2012 the Danish Minister for Culture of the time published 8 initiatives that had the overall aim of contributing to the growth of the creative industries and helping reduce piracy on the Internet. The eight initiatives were called “the copyright package”.

33. One of these 8 initiatives concerned drafting of written guidelines for blocking access to illegal services on the Internet. The role of the Danish Ministry of Culture with regard to this initiative was to encourage the Internet service provider (ISP) industry and the rightholders to formalise a common understanding with regard to the blocking of websites in the form of a written CoC.

34. Another initiative established a Dialogue Forum with the purpose of strengthening the development of new voluntary contract-based enforcement solutions between different players on the Internet. The role of the Danish Ministry of Culture was to act as a facilitator and whip and furthermore to host a series of meetings with participation of organisations and companies from all sectors of the internet’s value chain.

B. CODE OF CONDUCT FOR HANDLING DECISIONS BY THE COURTS CONCERNING THE BLOCKING OF WEBSITES DUE TO INFRINGEMENTS OF RIGHTS

(a) Before the Code of Conduct

35. Before the CoC as well as today, the rightholders can enforce their copyrights through courts. It is possible for the rightholders to ask the courts for an interim measure ordering an ISP to block its customers’ access to a specific illegal service. If a court decides to impose such an interim measure, it will only apply to the ISP in question and not all the others operating in Denmark.

36. Before the written CoC the ISP industry and the rightholders had a common understanding regarding the procedure in cases involving the blocking of access to illegal services on the Internet.

37. Following a request from the Danish Ministry of Culture and as part of the copyright package, the members of the Telecommunications Industry Association in Denmark (TI) in September 2014 adopted a written CoC (revised in March 2015), which aims to simplify and promote the implementation of court decisions on Domain Name System (DNS) blocking.

[Footnote continued from previous page]

⁵ Available at <http://www.stopfakes.dk/authorities/public-reports-on-counterfeiting-and-piracy/initiatives-against-counterfeiting-and-piracy.aspx>.

(b) The Code of Conduct

38. The purpose of the CoC is to ensure that decisions concerning the DNS blocking of websites directed at a single TI member (or possibly another ISP domiciled in Denmark) are implemented, via TI in a one-stop shop procedure, within 7 working days by all TI members, including their subsidiaries or other affiliated entities.

39. The first step is that a rightholder – often represented by RettighedsAlliancen, an alliance of rightholders in Denmark – seeks a court order to block a specific website, *e.g.*, due to a copyright infringement. If the court rules in favor of the rightholder and orders a specific member of TI (or another Danish ISP) to implement DNS blocking of a website, the rightholder communicates the court ruling to the TI secretariat. TI will then immediately communicate the court ruling to its members which, on this basis, voluntarily arrange for DNS blocking as soon as possible and at the latest within 7 working days of TI having communicated the court ruling.

40. Also, the CoC provides that in case of the DNS blocking of a website based on a court ruling as described above, TI members will block additional DNS addresses if the rightholders proves that illegal activities covered by the court ruling take place on other websites, *e.g.*, with a new DNS address. This is done without a court ordering them to do so. As a *quid pro quo* the rightholders in question accept financial liability *vis-à-vis* the ISP in the event that the blocking of a website based on the information provided proves to be unjustified and the owner of the website successfully lodges a claim for damages against the ISP.

41. Blocked websites display a communication referring to a website which has been developed jointly by the Danish Consumer Council, the Danish Ministry of Culture, TI and RettighedsAlliancen under a joint information campaign called “Share With Care” (SWC). The information campaign, which also is part of the copyright package, had a positive angle and focused on the availability of legal services. The website dedicated to the SWC-campaign contains a list of legal online services available in Denmark.

C. DIALOGUE FORUM AND THE CODE OF CONDUCT TO PROMOTE LAWFUL BEHAVIOUR ON THE INTERNET

42. One of the eight initiatives published in 2012 acknowledged that rightholders in some cases had contractual agreements with specific intermediaries on the Internet, *e.g.*, YouTube, to ensure that the rightholders will have the opportunity to remove illicit creative content from the Internet service in question. Furthermore, it was stated that such solutions could contribute to the development and availability of legal content services and could be a positive element in the efforts to fight piracy on the Internet.

43. With the aim of contributing to this development and accelerating the development of new contract-based enforcement solutions, it was decided that the Danish Ministry of Culture would facilitate a Dialogue Forum, where the participants among others would be rightholders and providers of Internet services containing creative content.

(a) The Establishment of the Dialogue Forum

44. As part of the Dialogue Forum, companies, trade associations and authorities discussed during autumn 2014 and spring 2015 how to limit the availability of illegal services with creative content through voluntary measures through, among other things, emphasizing the many legal services available or helping one another curb illegal services.

45. The Danish Ministry of Culture facilitated the discussions and hosted five meetings of the Dialogue Forum with the following themes:

- Introduction to the Dialogue Forum – held on October 27, 2014;
- Best practices within existing collaborations – held on November 27, 2014;
- Means of communication that contribute to the use of legal services – held on January 14, 2015;
- Work on the CoC to promote lawful behavior on the Internet – held on February 16, 2015;
- Work on the CoC to promote lawful behavior on the Internet – held on April 9, 2015.

46. The CoC, extensive work on which was undertaken during the fourth and fifth meeting, is regarded as essential in a future collaborative way of solving the challenges of digitalization as the companies and organizations behind it come from all sectors of the Internet value chain. Involved are thus, among others, ISPs, payment services, rightholders, search engines and trade associations such as Koda, RettighedensAlliancen, MTG, Google, Microsoft, MasterCard, Diners Club International and TDC.

(b) The Content of the Code of Conduct

47. The CoC is a non-binding declaration of intent. It states the involved parties' intention that their services, companies and products will not finance criminal activities by either supporting criminal services with money in the form of, e.g., exposure, ad revenue or the provision of payment services or otherwise "legitimize" criminal services.

48. The signatories agreed upon the following principles:

- to contribute to make the Internet a safe and legitimate platform for consumers and businesses;
- to emphasize that copyright is an important foundation stone for growth and innovation;
- to collaborate in reducing financial crime based on copyright infringement;
- to collaborate in promoting the distribution of legal products; and

- to contribute to efficient processes that can help limit copyright infringement and associated crime.

(c) Working Groups

49. In addition to concluding the CoC, a number of working groups have been established, which will map out existing voluntary measures and look at the possibilities of launching new initiatives in different areas of the Internet, e.g., payment providers, advertising and search engines.

50. A total of seven working groups will undertake work in relation to different areas of the internet supply chain. As an example, one working group will take action within the field of search engines, whilst another working group will be focusing on payment services.

51. The involvement of the Danish Ministry of Culture in the different working groups will be limited. The Ministry has put a lot of effort into the facilitation of the Dialogue Forum as well as the establishment of the working groups but will not be represented in the working groups.

D. EVALUATION OF THE INVOLVEMENT OF THE DANISH MINISTRY OF CULTURE

52. As a first observation, the importance of the involvement of a governmental authority must not be underrated. For the parties involved in the different initiatives it has shown to be important and sometimes a precondition that the Danish Ministry of Culture has participated actively in the work. The majority of the parties involved – be it trade associations or major private companies – need to justify their involvement towards their members or superior officers. In that regard, the involvement of the Danish Ministry of Culture has been a crucial driver.

53. A second observation, which was especially relevant with regard to the CoC on promoting lawful behavior on the internet, is that with more representatives from the Internet supply chain involved in the work, the likelihood for success increases exponentially. This particular CoC became a success because it was possible to convince representatives from all sectors of the Internet supply chain, *i.e.*, rightholders, ISPs, search engines, payment providers, collective management organizations, broadcasters, trade organizations and IT, advertising and media groups to participate actively in the work. In this regard it was important to pass on the message that internet piracy is a problem of common concern and not merely a rightholder problem.

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