



## Study Question

Submission date: May 9, 2017

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### Quantification of monetary relief

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#### I. Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

**1** What rules and methods are applied when quantifying actual loss?

In particular, please describe:

- a) the method used to determine the diversion of sales, i.e the part of the infringing sales that the rightholder would have made but for infringement;
- b) what level of profit margin is taken into account.

a)

There is no generally applied method for evaluating hypothetical lost turnover (potential revenues in case of lack of infringement) and corresponding lost profit. In the course of the proceedings, the right holder as the person who suffered the damage shall evidence: (i) the amount of the right holder's damages suffered as a consequence of the activity of the other party, and (ii) the causality link between the activity of the defendant and the suffered damages. Thus, the burden of proof relating to the exact amount of loss lies on the plaintiff; however he can rely on the data to be provided by the infringer on its turnover.

The judge has discretionary power to evaluate all evidence submitted by the parties. The court may order the defendant to pay general (estimated) compensation for damages if the extent of damage (usually the lost profit element of the damage) cannot be precisely, even if only in part, calculated. The court may rule only that the extent of damage cannot be precisely calculated if all available and reasonable evidence has been previously collected in order to calculate the amount of damages.

b)

The profit margin constitutes usually business secret of the right holder who is unwilling to disclose this information. Therefore, in the practice, right holders usually prefer to enforce their claim in the form of the demanding the surrender of unjust enrichment (recovery of profits) achieved by the infringer, including claims for royalty.

2

**What rules and methods are applied when quantifying a reasonable royalty?**

**In particular, please describe:**

- a) the royalty base;**
- b) how relevant comparables among licence agreements are defined;**
- c) how a reasonable royalty is quantified in the absence of relevant comparables;**
- d) the nature of the royalty, e.g. lump-sum, percentage of revenues or profit, a mix?**

a)

The base of the royalty is in general the net income of the infringer achieved through the sales of the infringing goods or services.

Case law is not consistent whether goods actually produced or actually imported into the country but not sold (withdrawn from the market) shall make part of the royalty base.

b)

In general, licence agreements concluded by the right holder concerning goods or services which are comparable to the goods or services involved in the infringement are accepted by the court.

It can be difficult to consider complex licence agreements which regulate the licencing of patents, know-how and marketing authorisation for the same goods.

c)

In the absence of relevant comparable license agreements, the court may define a royalty rate with due respect to all circumstances of the case. However, cases have been reported where the court did not define a royalty rate at all in lack of comparables and has refused the respective claim.

In copyright cases, the official price lists of the respective collecting societies have been used in quantifying damages. These price lists are subject to approval by the government.

d)

In general, the royalty is defined as a percentage of the net sales income.

The case law is not consistent as regards what percentage of the calculated royalty shall be paid by the infringer in case the infringed right covers only part of the goods or services (e.g. besides other patents, trademarks or know-how).

3

**What rules and methods are applied when quantifying the infringer's profits, as part of quantifying damages?**

**In particular, please describe:**

- a) the method to determine the profits resulting from the infringement, i.e. resulting from the use of the IP right;**
- b) what level of profit margin of the infringer should be taken into consideration.**

The scope of this Study Question does not include profits made by the infringer not classified under national law as damages (e.g. accounts of profit).

According to Article 35(2) of the Patent Act (Act XXXIII of 1995 on the Protection of Inventions by Patents) "the patentee may require surrender of the enrichment obtained by the infringer of the patent". This monetary relief is actually the enrichment or accounts of profit. Other IP legislation contains comparable rules.

At the same time, according to Article 35(3) of the Patent Act "where a patent is infringed, the patentee may also claim damages under the rules of civil liability".

Therefore, theoretically the right holder may claim that the damages partly or fully correspond to the infringer's profits. In this case the quantification of the infringer's profit could be relevant.

a)

The profit is the difference between the income from sales and the direct costs connected to the production of the infringing goods.

Case law is not consistent as regards what proportion of the profits may be taken into consideration as being directly due to the infringement and not to the usefulness of the goods or services.

b)

The profit margin is, unless the infringer is willing to disclose the actual one, the usual profit in the given industry branch. For example, in a recent lawsuit, when establishing the deposit to be paid by the plaintiff as a precondition of the institution of a preliminary injunction by the court, the plaintiff, an originating pharmaceutical manufacturer, claimed that the profit margin of the defendant, a generic pharmaceutical manufacturer, is 20% and the latter accepted this figure without any discussion.

Profit margins may also be established on the basis of published financial reports.

**4.a** What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty in relation to conveyed goods.

Under conveyed goods we understand the situation where the infringer sells two types product: (i) infringing goods and (ii) goods which can be used as accessory or spare part to the upstream goods. Example: sale of printers and compatible ink cartridges, or sale of blood sugar measuring machine and test band.

It is the sale of the infringing goods only which can be used as a basis for quantifying actual loss and quantifying a reasonable royalty. If the conveyed goods are not infringing the IP right, the infringer's revenues arising from the sale of the conveyed goods cannot be used as basis for calculating the actual loss and/or enrichment. This applies even if in certain business models the revenues are generated from the sales of the conveyed goods (i.e., printer cartridges).

**4.b** What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty where the infringing product forms part of a larger assembly.

If the infringing product forms part of a larger assembly, it is the value of the infringing products only which can be used as a basis for quantifying actual loss and quantifying a reasonable royalty.

**4.c** What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty where the IP rights found infringed are routinely licensed together with other IP rights as a portfolio?

Even if the IP right infringed is licensed as part of the portfolio, the court shall establish the (fictitious) value of the infringed IP right separately.

**4.d** What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty when the damage suffered by the rightholder is related to competing goods which do not implement the infringed IP rights?

The court shall assess the causal link between the infringement and the actual loss of the right holder. If the right holder's sales have decreased as a consequence of the launch of a competing product, there is no causal link. In such a case, the right holder cannot claim damages from the infringer, but he can claim the infringer's enrichment due the infringement (including reasonable royalty).

**5** Are any of the rules and methods addressed in your answers to 1) to 4) above different when considering the damage suffered by the rightholder or by its licensee?

No different rules and methods apply when the damage is suffered by the right holder or by the licensee but the licensee shall prove before the court that he is entitled to file for court proceedings due to infringement in his own name, on the basis of a licence agreement or of an assignment agreement concluded with the right holder.

In case of an exclusive licence, the damage suffered by the licensee is the loss of profits resulting from the infringement on the side of the licensee, on the other hand, the damage suffered by the right holder could at least be the decrease in the amount that should have been paid by licensee as royalties (if the determination of the amount of the royalties linked to the turnover of the licensee). In case of a non-exclusive license, the appropriate proportion between the right holder and the licensee for dividing the damage suffered by the infringement can be determined only as the result of the evidentiary procedure.

The licensee listed in the respective register, moreover, the licensee of an exclusive copyright licence may take legal action in his own name against the infringement, if he has already requested that the right holder should take the necessary measures for preventing the infringement, and the right holder has not taken action within thirty days of such a request. In case the licensee is not registered in the official register, moreover, the licensee of a non-exclusive copyright licence the licensee shall prove that he is entitled to start legal action alone on the basis of the assignment agreement concluded with the right holder.

Economic rights of the author can be transferred only in limited cases and under the conditions specified in law. The person that acquires economic rights is thereafter entitled to dispose of them, unless otherwise stipulated in the contract concerning the assignment of the economic rights.

**6.a** What kinds and types of evidence are accepted for proving the quantum of actual loss.

The plaintiff is not limited in the type or kind of evidence that may be submitted. The plaintiff may prove the quantum of actual loss by an accounting expert, by a market survey filed with an explanation on a realistic trend for distribution or turnover, chart on sales volumes showing the loss of turnover, etc.

**6.b** What kinds and types of evidence are accepted for proving the quantum of reasonable royalties.

There is not a single methodology or specific factors which are always accepted for determination of the quantum of reasonable royalties by the court. The plaintiff may present his own licensing practice and may also provide evidence for royalties paid by other companies on similar markets under license agreements, assignment agreements. An expert may also be appointed to determine applicable royalty rates. In copyright cases, the official price lists of the respective collecting societies have been used in quantifying damages. These price lists are subject to approval by the government.

**6** For example, is expert accounting evidence on past licensing practices accepted?

Yes, expert accounting evidence on past licensing practices may be accepted.

**7** What mechanisms (e.g. discovery) are available to the rightholder to assist with proving the quantum of actual loss or reasonable royalties?

In general, actual loss is usually calculated on the basis of the right holder's accounting data; therefore, no specific mechanisms are necessary for the right holder to prove the quantum of actual loss.

As regards proving the quantum of reasonable royalties, the following mechanisms are available.

Under the general procedural rules of the Hungarian Code of Civil Proceedings (Act III of 1952), the court may order the defendant to present documents which are in the defendant's possession and which the defendant is obliged to release under civil law. In general, the aforementioned rule may be used to obtain documentary evidence regarding the defendant's accounting data, business relations, market share etc.

Pursuant to IP legislation, if the right holder has already proved its statement of facts to a reasonable level of probability, the court may, upon request of the right holder, oblige the defendant to (a) file documents or items of evidence, (b) provide banking, financial and commercial information, and to file the related documents.

In practice, the use of these mechanisms is rather inconsistent. The courts do not always allow the right holder's request. In certain cases, the defendant is not obliged to provide the said evidence/information because, as the courts say, the respective provisions of law are not aimed at shifting the burden of proof to the defendant. However, we are of the view that this reasoning is clearly contrary to the wording of the relevant legislation.

**8** How, if at all, does the quantification of damages for indirect/contributory infringement differ from the quantification of damages for direct infringement?

In general, the right holder may claim damages from the infringer; simple contributors are not obliged to pay damages to the right holder.

In patent infringement cases, indirect/contributory infringers may be held liable for damages. In such cases, indirect/contributory infringer is a person who, without the patent holder's authorization, delivers an object (tool, appliance, equipment) related to an essential element of the invention, or offers it for delivery with the purpose of the implementation of the invention, provided that he knows, or it is evident on the basis of the relevant circumstances, that the object is suitable for the implementation of the invention, or serves this purpose. In such cases, the same standards apply for the quantification of damages. On the other hand, it is very hard to prove that (part) of the damages are in a causal relation with the indirect/contributory infringement and not the direct infringement. We are not aware of any similar case law.

**9** Are forward-looking damages (e.g. damage in relation to an irreversible loss of market share) available

c) or not at all?

Please explain your answer

We are not aware of respective case law. The theoretical possibility of forward-looking damages is not excluded.

**10** Is the bad faith of the infringer taken into account in the assessment of the damage?

Yes

If so, how is bad faith defined and is it possible to infringe a patent in good faith?

In case of infringement, the patent holder may claim for (a) unjust enrichment, i.e. respondent's profit (minimum: the patentee can claim a reasonable royalty); or (b) damages, i.e. patentee's lost profit (minimum: reasonable royalty).

While the claim for unjust enrichment can be based on objective basis (irrespective of the culpability of the infringer), the infringing party cannot be ordered to pay compensation for damages if the infringer can prove that his behaviour was not culpable or negligent. Thus, the claim for compensation for damages can be enforced in accordance with the general provisions of civil liability under the Civil Code.

Article 35(3) of the Patent Act defines an example relating to culpability in connection with the validation and filing the relevant translation of the European patent:

The European patent shall become effective in Hungary provided that the patentee submits to the Hungarian Intellectual Property Office (HIPO) the Hungarian translation of the claims of the European patent, and, if the language of procedure before the European Patent Office has been French or German, the English or Hungarian translation of the text beyond the claims of the European patent within three months from the date on which the mention of the grant is published in the European Patent Bulletin. Where the translation of the specification of the European patent has not been submitted by the patentee as set forth above, and the infringer is a resident or has a seat in the territory of Hungary, he shall not be held liable for the infringement until the patentee provides the translation on its own cost or until the HIPO gives information to the public on the filing of the translation, except where the patentee proves that the infringer may have understood the specification of the European patent without the translation thereof.

**11** How do courts take into account the damage suffered between the date of the infringing acts and the date of the award of damages?

Pecuniary claims shall be limited 5 years after the claims have become enforceable upon a respective defence plea submitted by the defendant. Limitation shall be suspended where the claim is enforced before court.

## II. Policy considerations and proposals for improvements of your Group's current law

### 12 Are there aspects of these laws that could be improved?

Rules on the disclosure of evidence by the defendant, as well as rules on contributory damages and damages of conveyed goods could be improved to facilitate the enforcement of IP rights for right holders.

### 3.a If the Court determines a reasonable royalty by reference to a hypothetical negotiation, should the Court's assessment of the hypothetical negotiation be under an assumption that all the IP rights in suit are valid and infringed?

Yes

Please Explain

The infringing party may request the invalidation of the allegedly infringed right. Where such request is successful, no damages shall be paid by the infringer. Where such request is unsuccessful, or where no request for invalidation is filed, the royalty shall be assessed upon the assumption that the IP rights are valid and infringed.

### 3.b If the Court determines a reasonable royalty by reference to a hypothetical negotiation, should the Court first be required to find that all the IP rights in suit are valid and infringed?

### 14 If the Court does not determine a reasonable royalty by reference to a hypothetical negotiation, what factors and what evidence should be relevant in that determination?

Marketing and/or research and development expenses of the right holders, profit margins attained by the right holders, general profit rates according to published financial reports may be considered.

### 15 Should the quantification of damages depend on whether injunctive relief is granted, e.g. should forward-looking damages for a loss of market share be available if an injunction is also being granted or only if an injunction is not granted?

Forward-looking damages shall not be dependent on whether an injunction is granted. For example, there may be cases where an injunction cannot be granted for public health, public safety or military reasons, which should not influence the availability of forward-looking damages.

## III. Proposals for harmonisation

### 16 Is harmonisation of the quantification of damages desirable? *If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's current law could be improved.*

Yes

Please Explain

We would welcome directives or principles for quantifying damages that could be used in court proceedings in different jurisdictions with a view of making international judicature more predictable.

**17 Please propose the principles your Group considers should be applied when quantifying actual loss**

Sales figures of the right holder shall be compared to national and international sales figures concerning the same goods or services over a period of at least 3 years in order to establish trends. Losses not attributable to trends or any other factors evidences by the infringer shall be considered as damages.

**18 Please propose the principles your Group considers should be applied when quantifying reasonable royalties**

It shall be taken into consideration that in most cases right holders need to enforce royalty-based claims against infringers whom they would have never given a licence to use their IP. It shall also be noted that the licensee shall bear the risks of the use of the given IP right up front, which risk does not affect the infringer.

Therefore, hypothetical royalties shall be higher than the industry standard.

**8.a Explaining in particular the relevance, if any, of a hypothetical negotiation and whether the hypothetical negotiation should be under the assumption that the IP rights being negotiated were or were not found valid and infringed;**

**8.b Explaining in particular the relevance, if any, of prior licensing practices or prior going rates for licensing the IP rights in suit**

**8.c Explaining in particular the relevance, if any, of prior licensing practices or prior going rates for licensing other IP rights of third parties that may or may not be similar to the IP rights in suit**

**9.a Please propose, in relation to actual loss and reasonable royalties how conveyed goods should be dealt with**

Depending on the facts of the case, conveyed goods, competing goods of the right holder, not making use of the patent, and infringing product forming part of a larger assembly may be taken into consideration as regards actual loss of reasonable royalties.

**9.b Please propose, in relation to actual loss and reasonable royalties how competing goods of the rightholder, not making use of the patent, should be dealt with**

Depending on the facts of the case, conveyed goods, competing goods of the right holder, not making use of the patent, and infringing product forming part of a larger assembly may be taken into consideration as regards actual loss of reasonable royalties.

**9.c** Please propose, in relation to actual loss and reasonable royalties how damages should be determined when the infringing product forms part of a larger assembly

Depending on the facts of the case, conveyed goods, competing goods of the right holder, not making use of the patent, and infringing product forming part of a larger assembly may be taken into consideration as regards actual loss of reasonable royalties.

**20** Please propose principles your Group considers should be applied when quantifying the damages for indirect/contributory infringement in circumstances where there is no direct infringement of the IP rights in suit.

**21** Please comment on any additional issues concerning any aspect of quantification of damages you consider relevant to this Study Question.

When starting any change in the wording of legislation relating to possible damages the basic principle to preserve the equilibrium between the interests of right holder and the infringing party should always be kept.

**Please indicate which industry sector views are included in part "III. Proposals of harmonization" on this form:**

The working group did not have any industry members.

Please enter the name of your nominee for Study Committee representative for this Question (see Rule 12.8, Regulations of AIPPI). Study Committee leadership is chosen from amongst the nominated Study Committee representatives. Thus, persons not nominated as a Study Committee representative cannot be in the Study Committee leadership.  
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