

Q279



National Group: Hungary

Title: **Reasonable awareness in compensation for infringement of IP rights**

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Questions

I. Current law and practice

Please answer the below questions with regard to your Group's current law and practice.

- 1) Do:
- a. the objective or subjective knowledge of the infringer,
 - b. the beliefs/opinions of the infringer, and/or
 - c. the publication of the scope of the IP right in general or at a particular time (e.g. the publication of the claims of a patent amended in the course of litigation).

play a part in relation to the assessment of damages? If YES, please explain.

The answer is yes, however the issues under a), b) and c) are absorbed by and assessed by the court in light of the culpability (fault) requirement. Under the respective infringement provisions of all IP acts such as the Copyright Act (Act 76 of 1999 as amended, hereafter CA), the Patent Act (Act 33 of 1995 as amended, hereafter PA), and the Trademark Act (Act 11 of 1997, as amended, hereafter: TA) the rightholder of the respective IP right may claim compensation of damages caused by the infringement under the provisions of tort liability as provided for in the Civil Code (Act 5 of 2013, as amended, hereafter: CC).

The CA provides as follows:

“§ 94 (2): In case of copyright infringement, the author shall also be entitled to claim damages under the rules of civil liability. In the event of infringement of the moral rights specified in this Act, the author shall be entitled to claim solatium doloris in accordance with the general rules of civil law.”

The TA provides as follows:

“§ 27 (3): (3) Where a trade mark is infringed, the trade mark holder shall also be entitled to claim damages under the rules of civil liability.”

The PA provides as follows:

“§ 34 Where the subject matter of a patent application or a patent has been taken unlawfully from the invention of another person, the injured party or his successor in title may claim a statement to the effect that he is entitled wholly or partly to the patent and may claim damages under the rules of civil liability. (infringement of invention).

§ 35 (3) Where a patent is infringed, the patentee may also claim damages under the rules of civil liability.”

The provisions of the PA apply accordingly in design, utility model and microchip infringement cases.

The references to the rules of civil liability lead to the following provisions of the CC:

“§ 1:4 [Principle of generally expected standard of conduct. Fault]

(1) Unless otherwise provided in this Act, in civil law relations, one shall proceed **with the care that is generally expected under the given circumstances.**

Section 6:519 [General rule on liability]

A person causing unlawfully damage to another shall compensate for the damage caused. The person causing damage **shall be exempted from liability if he proves that he was not at fault.**”

The assessment of all the factors/components/circumstances that are listed in 1. a), b) and c) are amalgamated in and absorbed by the legal term of fault (culpability) that means that the court has to define a virtual level of awareness (knowledge), and behaviour, that can be expected from the average reasonable person (entity) committing the IP infringement under the given circumstances. The courts enjoy full discretion to assess the said components.

The requirement of fault is expressly affected in the event of the alleged infringement of a European patent that has been validated in Hungary. In a nutshell: without the filing of the Hungarian translation of the entire patent description the alleged infringer may not be deemed to be at fault. “PA § 35 (3) (...) Where the translation of the text beyond the claims of the European patent has not been supplied by the patentee under § 84/H, and the infringer is resident, or has a seat, in the territory of Hungary, **he shall not be held liable for the infringement** [i.e., shall not be regarded as being at fault – added by the working group] until

the patentee complies with § 84/G(2) or until the Hungarian Intellectual Property Office gives information to the public under Article 84/H(10) on the filing of the translation under Article 84/H(10a), **except where the patentee proves that the infringer may have understood the text beyond the claims of the European patent without the translation thereof.**"

We have to add three additional remarks:

Where the rightholder has also moral rights (inventor, author, performer) he/she has a valid claim for solatium doloris, if the infringer who infringes upon the moral rights of the rightholder, acted at fault.

Solatium doloris shall be deemed from the aspect of adjudication as if it were a claim for compensation of damage.

"§ 2: 52 CC: Conditions of the obligation to pay solatium doloris, and in particular the identification of the person who is under the obligation to pay and the ways of exculpating him, shall be governed by the rules on liability for damages, with the proviso that, apart from the fact of the infringement, there is no need to prove further loss."

In Hungary, the IP rightholder can claim a recovery of the enrichment of the infringer, independently of the claim for damages. The claim of the IP rightholder for recovery of the enrichment of the infringer does not depend on any awareness requirement (fault). Under the judicial practice the minimum of the unjust enrichment of the infringer is the lost license fee, even if the infringement was not profitable.

Therefore the rightholder is in a convenient position. If he/she wishes to avoid the lengthy evaluation of evidence on fault/lack of fault in court and finds the recovery of the enrichment of the infringer, being practically the profit of the infringer generated by the infringement (with the lost license fee minimum) as a sufficient remedy, the enforcement of the claim for compensation of damages can be avoided.

2) Are punitive damages awarded and if YES, in what circumstances?

Yes, but only in the following specific cases: Partly punitive, partly pre-established damages can be claimed in copyright infringement cases, where the collective management organization (CMO) enforces public performance right or private copy or reprography remuneration claims. In the event of the omission of the obligation of the commercial user to report the commencement or change of the circumstances of public performance of small right literary and musical works, or of the manufacturer/importer the importation or manufacture of the device/media subject to private copy or reprography remuneration claims, the CMO may claim the double of the remuneration, which were due under the applicable CMO tariff chart. The half of this double remuneration is a lump sum compensation of costs, caused by the omission of obligation of report. It is in fact a type of preestablished damages, but has an effect of an incentive to comply with the respective report obligations.

- 3) Are damages reduced below the level required to compensate the loss suffered by the right holder, and if YES, in what circumstances?

No. There is no such statutory reduction. The court may always evaluate, whether the amount of damage alleged by the rightholder can be regarded as evidenced, and whether such amount is or is not in causal connection with the infringing acts.

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

- 4) Could your Group's current law or practice relating to the role of knowledge in relation to damages be improved? If YES, please explain.

No. The general, abstract requirements are satisfactory. In the event of an existing registered industrial property right the infringer may reckon with the obligation to pay damages, since requirement of fault (level of knowledge) is usually met.

- 5) Should the recovery of damages depend, or not depend, on the knowledge (subjective or objective) of the infringer? Please explain.

Yes, they should as we explained under 1), on condition that the system ensures, that the rightholder may claim at least the recovery of the profit of the infringer, including the lost license fee as a minimum without any awareness requirement.

- 6) Should damages be elevated so as to discourage future infringement by:
- an infringer, when a court has established infringement and awarded an injunction against that infringer,
 - an infringer, when a court has established infringement but not awarded an injunction against that infringer,
 - third parties, when a court has not yet established infringement by such third parties or the existence of any potentially relevant third parties.

No, we are not of the view that the circumstances listed are relevant for the adjudication on the amount of damages.

- 7) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

III. Proposals for harmonisation

Please consult with relevant in-house / industry members of your Group in responding to Part III.

- 8) Do you believe that there should be harmonisation in relation to the role of knowledge in relation to damages? Please answer YES or NO.

No.

If YES, please respond to the following questions without regard to your Group's current law or practice.

Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.

- 9) a) Should the knowledge (subjective or objective) of the infringer affect the recovery of damages? Please answer YES or NO.

Yes, with regard to damage suffered as a consequence of the infringement beyond the lost license fee (enrichment of the infringer).

- b) If the answer to 9)a) is YES, should the knowledge be (you may tick one or, if you think either suffices, both boxes):

☐ subjective

☒ objective

- c) How should such knowledge (for example) be established? Please tick all that apply:

☐ by the right holder?

☐ by the infringer?

☒ by evidence of the circumstances of the infringement?

☒ by evidence of the state of mind of the infringer?

☒ referring only to facts available to any person?

☐ referring to information available only to the infringer?

- d) How should such knowledge affect the recovery of damages?

Such objective knowledge should serve as a basis of culpability (fault).

- 10) Can or should damages to compensate the right holder:

- a. only be awarded where the infringer has the level of knowledge specified in Article 45(1) TRIPs
- b. nevertheless be awarded if the infringer did not have the level of knowledge specified in Article 45(1) TRIPs.

Only in case a) is the awarding of compensation of damages just on condition that there is a claim for recovery of enrichment including a lost license fee minimum without any awareness requirement.

11) What, if any, change in the level of damages or the assessment of damages is appropriate, if the infringer:

- a. had no subjective knowledge, prior to the litigation, of the existence of the IP rights that were found infringed,
- b. had no subjective knowledge, prior to the litigation, of the scope of the IP rights that were found infringed because the IP right was not published in a language which is (or should be) understood by the infringer,
- c. had no subjective knowledge, prior to the litigation, of the scope of the IP rights that were found infringed because the IP right was amended in the course of litigation resulting in its scope changing,
- d. had a subjective belief prior to the litigation (whether gained through legal advice or otherwise) that the IP rights in question would or would not be infringed,
- e. had not undertaken searches prior to launching a new product, to determine if the new product would or might infringe,
- f. had undertaken searches prior to launching a new product, to determine if the new product would or might infringe, and those searches erroneously indicated no infringement.

In the view of the Hungarian Working Group these circumstances are irrelevant for the level of damages, and all the circumstances have to be evaluated in the course of assessment of the awareness (fault).

In case a) the infringer acts in fault,

In case b) the infringer is not at fault,

In case c) the infringer is not at fault,

In case d) the infringer may act in fault, depending on the circumstances (legal advice etc.),

In case e) the infringer acts in fault,

In case f) the infringer acts in fault.

- 12) If the grant of punitive or exemplary damages (being damages greater than those required to compensate the right holder) is permitted, please indicate whether such damages should depend on the knowledge of the infringer, and if so, what objective or subjective knowledge should be required?

If punitive damages can be awarded, a subjective willfulness should be the knowledge requirement.

- 13) Should the conduct of the infringer, e.g. setting out to make profit from infringement which exceeds the compensatory damages payable to the right holder, justify punitive/exemplary damages greater than those required to compensate the right holder:
- a. when the infringer had some intention/knowledge of the objective of making the profit?
 - b. when the infringer had no intention/knowledge of making the profit, and the profit was made "accidentally"?
 - c. regardless of the knowledge of the infringer?

(This question does not concern compensation based on the unlawful profits of the infringer)

In the view of the Hungarian working group these factors are irrelevant for the level of damages.

- 14) Please comment on any additional issues concerning any aspect of the role of knowledge in relation to damages you consider relevant to this Study Question.

No additional comments.

- 15) Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

There is no in-house counsel in the working group. It consists of attorneys and patent attorneys advising and representing clients in various fields of industry, in particular: pharmaceuticals, food, alcoholic and non-alcoholic beverages, airline industry, mechanical tools industry, consumer goods, retail and fashion, toy industry, FMCG (fast moving consumer goods tech companies), content producer and content provider companies.