



## Study Question

Submission date: May 10, 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.**

Under Chapter 9 Section 58 of the Patents Act, Chapter 7 Section 54 of the Act on Copyright in Literary and Artistic Works, Chapter 8 Section 4 of the Trademark Act, Section 36 of the Design Protection Act and Section 11 of the Act on the Protection of Topographies for Semiconductor Products, anyone who intentionally or negligently infringes the IP right shall pay compensation for the additional loss resulting from the infringement, that is actual loss in addition to the reasonable compensation described in question 2. (There is one exception in the Copyright Act where a certain type of infringement for private use demands intent, but it is largely irrelevant to this question and will not be discussed further.)

When determining the amount of compensation, particular consideration shall be taken of; lost profits; profits realized by the party committing the infringement; damage to the reputation of the IP right; non-pecuniary loss; and the interest of the rightholder in preventing infringement.

Even though the profits realized by the infringer may be taken into account, the rightholder's actual loss can never exceed the objective actual loss. The profits realized by the infringer may however serve as evidence so as to establish the objective actual loss suffered by the patent holder, especially when the rightholder's objective actual loss is hard to evidence.

1. Under applicable Swedish law, and subject to a basic requirement for proximate cause between the infringement and the alleged damage, Swedish courts freely evaluate all evidence brought by the parties so as to determine the percentage of infringing sales the rightholder would have made but for the infringement. For example, if the infringer has supported its sales of the infringing product with marketing activities the rightholder could not reasonably be considered to have undertaken but for the infringement, the diversion of sales is impacted.

2. The rightholder's net profit is commonly taken into account.

**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?**

In Sweden the term reasonable compensation is used instead of reasonable royalty. For the purposes of this discussion, the terms are interchangeable since reasonable compensation is commonly calculated based on a royalty rate.

Under Chapter 9 Section 58 of the Patents Act, Chapter 8 Section 4 of the Trademark Act and Section 36 of the Design Protection Act, anyone who intentionally or negligently infringes the IP right shall pay reasonable compensation to the rightholder. Anyone who unintentionally or without negligence commits infringement shall pay compensation if and to the extent reasonable.

Under Chapter 7 Section 54 of the Act on Copyright in Literary and Artistic Works, anyone who uses a work in violation of this Act or in violation of a regulation issued thereunder shall pay reasonable compensation to the rightholder.

Under Section 11 of the Act on the Protection of Topographies for Semiconductor Products, anyone who uses semiconductor topography in violation of this Act shall pay compensation to the rightholder, if and to the extent reasonable.

1. The royalty rate is commonly set as a percentage of the infringer's net sales of the infringing product. The common rate span in patent and trademark cases is 5-10 percent, but higher rates may be motivated by the circumstances of the case. A common rate span is harder to define for other IP rights due to a relative lack of set royalty levels.
2. Relevant comparables are commonly defined based on previous licensing rates or based on the common practices on the market, where available.
3. In the absence of relevant comparables, the royalty rate is calculated based on the value of the infringed IP right, taking all circumstances into account. The value of the IP right may be deduced based on its standing in the relevant market. Swedish courts commonly fall back on the low-end of the 5-10 percent rate discussed above in the absence of relevant comparables.
4. According to a) above, reasonable compensation is commonly set as a percentage of the infringer's turnover/revenue where available.

**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.**

According to 1) above, even though the profits realized by the infringer may be taken into account, the patent holder's actual loss is never more than the objective actual loss. The profits realized by the infringer may however serve as evidence so as to establish the objective actual loss suffered by the patent holder.

1. Under applicable Swedish law, and subject to a basic requirement for proximate cause between the infringement and the alleged damage, Swedish courts freely evaluate all evidence brought by the parties so as to determine the profits resulting from the infringement. Evidence about the infringers actual sales are commonly either supplied by the infringer willingly or through a claim from the patent holder for an order to provide information or an order to secure evidence of infringement.

The infringer's net profit is commonly taken into account.

**4.a**

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

There is limited Swedish case law on the subject of conveyed goods and related issues, but Swedish courts generally take a pragmatic view of quantifying actual loss and reasonable compensation under such circumstances and evaluate all evidence brought by the parties. Swedish courts also take a pragmatic view of quantifying and awarding claims for damages for “indirectly” conveyed goods or services. If the rightholder can show that the sale of a product protected by an IP right commonly also results in other goods or services being sold to the same customer, e.g. service on the product protected by the IP right, those other goods or services can also be used to quantify damages against the infringer.

**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.

When assessing infringing products that are part of larger assemblies, the total level of profit on the larger assembly can be used to quantify the actual loss, when the infringing product is the technically relevant part of the combined assembly.

**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?

**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?

**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.

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

Swedish courts freely evaluate all evidence, including expert evidence on past licensing practices, brought by the parties so as to prove the quantum of actual loss or the quantum of reasonable royalties. Swedish courts are generally skeptical to the use of written affidavits if in-person evidence can be used under the principle that the best type of evidence should always be used but there is not a blanket ban on written affidavits.

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

See 6 a.

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

Yes.

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

Order to provide information

Where an applicant shows probable cause that another party has infringed an IP right, the court may order, under penalty of a fine, that any or all of those referred to below shall provide the applicant with information regarding the origin and distribution network for the goods or services to which the infringement pertains. Such an order to provide information may be issued upon motion of the rightholder or the party who is licensed to use the IP right. It may only be issued if the information can be deemed to facilitate investigation of an infringement which pertains to the relevant goods or services.

The obligation to provide information includes those who; 1) have committed or participated in the infringement; 2) on a commercial scale, have disposition over a product to which the infringement pertains; 3) on a commercial scale, have used the service to which the infringement pertains; 4) on a commercial scale, have provided electronic communications service or another service which has been used in conjunction with the infringement; or 5) have been identified by a person referred to in subdvs 2–4 as participating in the manufacture or distribution of the product or provision of the service to which the infringement pertains.

Information regarding the origin and distribution network of goods or services may specifically pertain to; 1) names and addresses of producers, distributors, suppliers and others who have had possession of the goods or provided the services; 2) names and addresses of intended wholesalers and retailers; and 2) information regarding the quantities which have been produced, delivered, received or ordered and the price which has been determined for the goods or the services.

Order to secure evidence of infringement

Where it can reasonably be believed that a person has infringed or participated in infringement of an IP right, the court, in order to secure evidence of the infringement, may order that an investigation be carried out at such party's premises in order to search for objects or documents which may be believed to be significant to an investigation regarding the infringement. An order to secure evidence of infringement may be issued only if the reasons for the measure outweigh the inconvenience or injury which the measure would otherwise entail for the person subject to the order or for any other opposing interest.

Order to produce documents or items

Under the general procedural rules in the Code of Civil Procedure, Chapter 36, anybody holding a written document or item that can be assumed to be of importance as evidence is obliged to produce it. The claimant must in order to substantiate the claim specify the documents or items, or types of documents or items, and the way in which the documents or items are relevant as evidence in the case at hand.

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

Damages for indirect/contributory and direct infringement are quantified in the same manner.

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

a) if an injunction has also been granted

Please explain your answer

Forward-looking damages in relation to an irreversible loss of market share due to infringement of IP rights is available whether or not an injunction has been granted. This kind of damage is however generally considered exceedingly hard to prove.

**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?

As outlined above at 2), patents and other IP rights may be infringed in good faith whereby reasonable compensation shall be paid to the rightholder, either under all circumstances (copyright) or when reasonable (other IP rights).

The subjective bad faith of the infringer may according to various preparatory works and literature be taken into account when assessing damages for infringement. The subjective bad faith of the infringer may according to this argument be relevant in the sense that willful infringement shall entitle the rightholder to higher damages. The preparatory works are however somewhat ambiguous and this principle is generally not applied by Swedish courts.

**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?**

Swedish courts take the damage suffered by the rightholder in the time between the date of the infringing acts and the date of the award of damages into account in the following ways.

Claims for damages are regularly combined with a claim for interest under the Interest Act. When courts award damages, interest on the claim for damages is payable from the date the summons application is served at the latest, until damages and interest has been paid in full.

Claims for damages can also be adjusted during the litigation, in principle up until the date of the main hearing, to cover an ongoing infringement. (Claims for damages may also be structured so as to only cover a particular period, whereby continuing infringement may be subject to several separate claims for damages.)

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

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

Yes. The Swedish group finds that provisions related to quantification of goodwill damage could be clarified in order to be more easily applied. Swedish scholars and practitioners have argued that advertising costs related to the restoration of the goodwill value of the infringed IP-protected product, shall be taken into account when quantifying goodwill damage. The Swedish group finds that this method is reasonable, even though it would still be problematic to quantify the exact amount needed in order to restore the goodwill value.

Further, provisions related to the quantification of damages based on the infringer's profit could be clarified as well. If the actual damages incurred are lower than the infringer's net profit for example, the court is not likely to award a higher amount than the damages incurred. Thus, an infringer with lower costs for R&D than the intellectual property owner, can keep parts of the net profit relating to an infringement. This is not desirable.

**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 former alternative is preferable, as damages normally cannot be awarded except when the IP rights in suit 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?**

No

Please Explain

**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?

The Swedish group finds that all economically relevant factors should be possible to take into consideration.

The primarily relevant factor should be royalty levels and calculation of royalty on any existing license market for the actual goods and rights in suit. Highly relevant evidence would be existing and finalized royalty agreements. Unilateral offers made by right holders or infringers, without acceptance from the other party should normally be considered irrelevant as evidence.

Lacking a license market for the actual goods and rights, license markets for the same right for other, similar or closely related, goods could be relevant. This could be evidenced with information about agreements and about the goods in question to show relevance.

An alternative basis for calculation would be the infringer's profit or, alternatively and in case infringer's profit cannot be shown, the rights holder's expected profit margin. The latter should be an exception as this information, and the evidence to prove it, is business sensitive for the rights holder.

A factor possibly relevant in some cases although difficult to apply, would be the rights holder's development costs and similar costs for obtaining and maintaining the rights in question.

**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?

The Swedish group finds that forward-looking damages for loss of market share should be available also when an injunction is granted. If there are any damages after the injunctive relief, the claimant should be able to claim such damages as well. I.e. no bar to such damages should be applied.

### 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

Yes. Harmonization of the quantification of damages is desirable in order to ensure e.g. that an infringement does not receive different treatment dependent on in which jurisdiction it occurs.

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

The Swedish group considers two over-arching principles that should guide the quantification of damages. Firstly, the rights holder should be compensated for all damages incurred by an infringement. Secondly, to calculate and prove such damages, all relevant factors should be taken into consideration, and all relevant types of evidence should be allowed.

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

The Swedish group finds that the main principle for quantification of reasonable royalties should be to weigh in all relevant economic factors, but that the question of whether the infringement is intentional or not should not play a part in the assessment.

**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;

The actual commercial situation should be the starting point for quantification of reasonable royalties, as “reasonable” is perceived to refer primarily to commercial logic. The hypothetical negotiation is of secondary relevance.

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

As is discussed in 14 above and in a), an existing license market should be the primarily relevant basis for quantification of reasonable royalties.

**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

As is discussed in 14 above, license markets for other similar or comparable products can potentially be relevant depending on the circumstances, at least as basis for supporting arguments in the hypothetical negotiation, cf a) above.

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

As a principle, conveyed goods should form part of the basis for assessing actual loss. The assessment must however be made on a case by case basis where purchasing patterns, purchasers' behaviour and the actual connection between products must be weighed in.

**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

As a principle, all damages resulting from an infringement shall be compensated. If right holder's competing goods are affected by an infringement, it should be possible to base assessment of actual loss on this as well, even though there is no relevant IP protection of the competing good.

**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

Assessment of damages caused by infringement through a part of an assembly should be based on “customer value”, i.e. how the “infringement component” contributes to the value of the assembly for the user. This in turn could be assessed e.g. by comparing assemblies sold with the infringement component and without it, but other approaches could also be useful. If the infringement component contributes marginally to customer value, actual loss is presumably low or non-existent, while increasing contribution increases actual loss.

**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.

The Swedish group finds that the same principles should be applied for quantifying damages for indirect or contributory infringement as for direct infringement. All consequences of the infringement should be covered by liability for damages.

As for contributory infringement, damages should be based on the value of the part that has been marketed and sold. Damages based on sale of the entire product should only come into question if the infringement causes sales to cease completely.

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

The Swedish group finds that an alternative way of solving the difficulties with quantification of damages would be a model compensation or other fixed minimum compensation. This would ease the evidential burden for the right holders.

Another alternative would be a model based on the infringer's profit. This would simplify for the rights holder, who don't have to account for internal economic conditions

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

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.