Sweden
Suède
Schweden

Report Q186

in the name of the Swedish Group
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Punitive damages as a contentious issue of Intellectual Property Rights

General Remarks

The concept of punitive damages has traditionally been used mainly in common law systems and the courts' assessments with respect to awarding punitive damages in the common law countries are dependent on the principles of law that have been developed within the common law system. To integrate a concept of punitive damages within the IP field, in the sense that the term punitive damages is generally understood, into a civil law system, would lead to a wide range of resulting effects in other areas of the law. Moreover, such integration seems to require substantial changes with regard to e.g. the concept of wilful infringement.

Thus, the point of departure for the assessment of the questions posed in Q186 may be somewhat distorted since the concept of punitive damages, in the opinion of the Swedish Group, is difficult to assess isolated without considering the differences between the legal systems in general, and the procedural rules in particular.

Questions

1)
a) Does your country have a concept of punitive damages?

Swedish law does not include a concept of punitive damages in the sense that this term is generally understood. The starting point when awarding damages in Sweden is, generally speaking, that the sufferor shall be compensated for his loss, but not more. However, damages do also have a preventive purpose, which makes it possible for the courts to divert from the basic reparative function and give the preventive aspects more weight. But, Swedish law does not include a concept of punitive damages.

Even though the Swedish law of torts is based on the reparative function of damages, in various laws there are indeed elements of preventive considerations which may be viewed upon as equivalent to considerations taken when awarding

punitive damages. This is the concept of general damages, which mainly can be found in labour law and IPR legislation. The general damages are somewhat different in different areas of law, but they cannot be interpreted as rules for punitive damages in the Anglo-Saxon sense. In a judgment from the Supreme Court from 1994 (NJA 1994 p 637) concerning a defamation, also the Supreme Court, without direct legislative support, expressed a view that the damages should be awarded at such a level that they would also have a preventive function.

Thus, as will be elaborated upon below, although Swedish law cannot be said to embrace a system of punitive damages, both the legislator and the courts have in the last two decades also introduced punitive or preventive aspects when assessing damages. It appears, however, that such aspects are mainly considered when there has been no, or very low, economic loss for the sufferor and the compensation for such loss appears unreasonably low when compared to the culpability of the tort-feasor or the profits made by him by his culpable act.

b) If so, does it apply to patents, trade marks and other IPR?

As indicated in the response to question 1 a), Swedish IPR laws open up for awarding general damages for infringement. Similar expressions are used in the various IPR Acts, such as the Patent Act, the Trademark Act and the Trade Secrets Act. The Copyright Act is somewhat differently worded, as the general damages traditionally in this area of law have been viewed upon as a compensation for violation of personal rights. Among the other IPR Acts, the concept of general damages was first introduced in the Patent Act, Sec. 58, which in the first paragraph reads as follows:

> "He who wilfully or by negligence infringes a patent shall pay reasonable compensation for the use of the invention and compensation for any further damage incurred by the infringement. When assessing the amount of damages, also *the patentee's interest of not having its rights infringed, and other than purely economically significant circumstances, should be considered*.
>
> If someone is infringing a patent without wilfulness or negligence, he should pay compensation for the use of the invention if and to the extent it is found reasonable." (emphasis added)

In the *travaux préparatoires* to Sec 58 of the Patent Act, not only the importance of giving the patent holder full compensation for his damages, but also the interest of preventing infringement is emphasized. It is for example stated that the amount of damages should be at a level which makes it impossible to gain from calculating with patent infringement. It is suggested by the legislator that wilful or grossly negligent infringements should result in higher awards. The knowledge of the fact that an infringer may be forced to pay high amounts of damages when the infringement is wilful, is considered as a preventive factor. With respect to damages equivalent to a license fee (which is standard compensation for unlawful use of proprietor rights), it is furthermore suggested in the *travaux préparatoires* that an increase of the damages when considering the infringer's profits related to the infringement may result in that

the awarded damages in this regard should correspond to an equivalent of the double or multiple license fees. However, we are not aware of any case in which such double or multiple license fees has been awarded.

However, it is also stated that the point of departure is that the patentee shall have full compensation for his loss, but that the court, when assessing the amount of damages, should consider other than purely economic circumstances, such as the above. When the rules concerning damages for infringements of other IPRs were changed in the middle of the 1990's according to the model of the above Section in the Patent Act, it was made clear that the main purpose of introducing general damages was to facilitate the assessment of economic loss and, consequently, to emphasize the importance of fully compensating the holder of the IPR in question for infringements.

With respect to trade secrets, case law from the Supreme Court also suggests that, when determining the amount of damages, punitive aspects may be considered. A dissenting judge in a leading case in the trade secret area was of the opinion that the amount should be "rounded off upwards for preventive reasons" (NJA 1998 p 633).

Thus, it can be concluded that Swedish law does not actually embrace the concept of punitive damages, but that, at least in the IPR area, the legislation and case law concerning the assessment of damages may in some cases involve the similar type of reasoning as when assessing punitive damages. However, in practice it does appear that these considerations mainly come into the picture if or when the actual (proven) damages are very low. Thus, the interest appears to be that infringement should not pay off, but also that rights holders do not get overcompensated.

c) Would the possibility of an award of punitive damages be of benefit in infringement cases?

There is a general view among practitioners that proprietors do not get fully compensated when their rights have been infringed. A system with punitive damages may have the effect that an IPR holder would be awarded a higher amount of damages in infringement cases. Thus, a system with punitive damage may remedy this alleged problem.

However, the positive effects must also be weighed against the negative. The current rules in the IPR laws in principle give the right holders the possibility to get reasonable compensation for their losses due to infringement, even though it may take some effort to produce the evidence to get fully compensated. Even if the problems with evidence are recognized, the Group is of the opinion that there must be a fair balance between the alleged infringers and the right holders. Introducing the concept of punitive damages could disrupt this balance and unreasonably broaden the right holders' protection and harm the competition on the market, since there may be a risk that also the serious competitors would refrain from introducing products on the market due to the risks of having to pay punitive damages, even though they consider that the IPRs most likely are invalid or that there is no infringement.

At an overall assessment, the Swedish Group does not believe that the possibility of an award of punitive damages would be a benefit to the system as a whole.

d) Is your Group in favour of courts having power to award such damages in IP cases?

The Swedish Group is not in favour of courts having power to award punitive damages in IP cases. There are no obvious examples of the system being exploited by infringers, which could constitute a need for punitive damages. The problem for the right holder to prove his loss and get fully compensated is recognized. However, this Group does not believe that punitive damages would be the right remedy to this problem.

2) If punitive damages are available:
a) In what types of situations can punitive damages be awarded?

N/A

b) How is the amount (quantum) of damages assessed?

N/A

3) Is there an obligation on a party to take legal advice to ensure there is no infringement? If so
a) what is the obligation and when does it arise?

There is no express legal obligation to take legal advice to ensure that there is no infringement. The obligation not to infringe IPRs is more general in character and whether there is an obligation on a party to take legal advice must be assessed in the light of the circumstances in each case.

b) how is that advice assessed in subsequent infringement proceedings?

A court may consider a mistake about the IPR's scope of protection to be excusable. In the legal literature, it has been suggested that such a mistake may be excusable if the person in question has reached his erroneous conclusion about non-infringement on advice from an expert (Jacobsson et al, Patentlagstiftningen (1980) p 344). Thus, it is possible that the amount of damages will be reduced if the infringer had reasonably relied on the advice. The Group is not familiar with any case where this matter has been tried in Sweden.

4)

a) Is there a pre-trial discovery system which allows an IP owner to review the defendant's behaviour?

No, there is no pre-trial discovery system allowing the rights holder to review the defendant's behaviour. However, there is a possibility under the IP laws to, when there are reasons to believe that an infringement has occurred, to request a search. This concept is, however, more similar to general search rules than to a discovery system. There is also a limited right under the Code of Judicial Procedure (called "edition") to request a court to order the other party to submit specific pieces of evidence (mostly documents) that may be relevant to the case.

b) If so, are the parties required to give discovery of documents held abroad?

N/A

5) What is the impact in court proceedings in your country of the ability of courts in other countries to award punitive damages?

No impact has been noted.

6) Proposals for harmonising the treatment of punitive damages and the processes concerning them in court proceedings?

No, the Group does not believe that there is any need for harmonisation of the sanction systems in the respective countries as long as all countries live up to the standards drawn up in the TRIPS Agreement.

Summary

Swedish law does not include a concept of punitive damages in the sense that this term is generally understood. The starting point when awarding damages in Sweden is that the sufferor shall be compensated for his loss, but not more.

Also preventive aspects are, however, given weight in the IPR laws and by the Courts. These aspects appear mainly to have been considered by the courts when the economic compensation from the infringer has been very low in comparison with the culpability or profits made by the infringer.

The Swedish Group does not believe that, in an overall assessment, the possibility of an award of punitive damages would be a benefit to the system as a whole and the Group is thus not in favour of courts having the power to award such damages in IP cases.

Résumé

Le droit suédois ne dispose pas d'un concept de dommages-intérêts punitifs comme cette terme est compris en general. Le point de départ en attribuant des dommages-intérêts en Suède est que le souffrant sera compensé pour tous ces dommages, mais pas plus.

Les aspects preventifs sont, pourtant, attribué de poids dans les lois sur les PI et par les tribunaux. Il semble que ces aspects le plus souvent ont été considérés par les tribunaux quand la compensation économique payé par le contrefacteur a été trop bas en comparaison à la culpabilité ou les
profits gagné par le contrefacteur.

Le group suédois ne pense pas que, apprécié d'ensemble, la possibilité d'un jugement attribuant des dommages-intérêts punitifs serait bénéfique pour le système pris d'ensemble et le group n'est pas en faveur du fait que les tribunaux puissent avoir la capacité d'attribuer de tels dommages-intérêts
dans des affaires de PI.

Zusammenfassung

Schwedisches Recht enthält kein Strafschadenersatzkonzept in der Meinung dieses Wort im allgemein verstanden ist. Der Ausgangspunkt für einen Schadenersatz ist in Schweden dass der Beschädigte für seinen Schaden ersetzt werden soll, aber nicht mehr.

Auch präventive Aspekte sind aber berücksichtigt in der Rechte des geistigen Eigentums und in den Gerichten. Es scheint dass diese Aspekte vor allem von den Gerichten beachtet sind wenn die ökonomische Entschädigung von dem Schädiger sehr niedrig ist im Vergleich mit dem Schuld oder Gewinne für den Schädiger.

Die schwedische Gruppe haltet dass, alles zusammen, die Möglichkeit einen Strafschadenersatz zu gewähren nicht von Nutzen für die gesamte Systeme wäre und die Gruppe ist nicht der Meinung dass die rechtliche Möglichkeit Strafschadenersatz zu erkennen von Nutzen wäre.