



Damages in Intellectual Property Rights

Introduction.

In the context of the European Observatory on Counterfeiting and Piracy, the private sector members called for the establishment of a professional and technical group of legal practitioners, to horizontally assess intellectual property rights legal framework. The Commission welcomed this and on 22 October 2009 an inaugural meeting of the Observatory's sub-group on the legal framework took place. The group is mainly composed of legal practitioners from different Member States, suggested by the industries represented in the Observatory.

The task of the group is to, horizontally, examine the shortcomings, best practices and overall effectiveness of the intellectual property rights legal framework in respect of all intellectual property rights. It focuses on providing a practical view of the enforcement of intellectual property rights. The Commission (DG Internal Market and Services, Unit D3) acts as the Secretariat for the Group.

The sub-group commenced with a screening of Directive 2004/48/EC on the enforcement of intellectual property rights. Discussions have taken place on the enforcement of intellectual property rights, through criminal measures, with DG Justice, Liberty and Security. In addition, the enforcement of intellectual property rights through border measures has been discussed with DG Taxation and Customs Union.

The sub-group's methodology is as follows: members of the legal sub-group draft questionnaires which are then forwarded to legal practitioners in all Member States according to an agreed distribution of Member States. The experts' responses are included in a table and an *Executive Summary* is drafted on each topic. Members of the legal sub-group have also outlined best practices or shortcomings and have added specific *Recommendations* for each topic.

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Civil Damages in Intellectual Property Rights Cases¹

ANALYSIS, RECOMMENDATIONS AND BEST PRACTICES

Overview

Civil damages awards are one of the primary – and often most important – remedies for infringements of intellectual property rights. Damages serve both as compensation to the rightholder for the economic detriment that results from an infringement, and as a specific and general deterrent to would-be infringers.

In implementing the EU’s Directive on the Civil Enforcement of Intellectual Property Rights (“IPRED”), Member States are required to provide compensation for various types of detriment suffered by the rightholder, which include lost sales and consequential damage (such as to the value of the brand). Member States also are required to award the rightholder the reasonable costs of investigating, taking legal action against, and rectifying the infringement.

As the IPRED has been implemented in national legislation and carried out in practice, however, the rightholder often cannot recover in full the compensation appropriate to an infringement, or the full costs that the rightholder has borne to redress the infringement. Some do not award compensation for all relevant types of damage. Many limit the types and amount of costs that can be recovered. Some courts are unwilling to award damages with respect to infringements and damage that clearly have taken place but are difficult to quantify precisely.

These legal and practical drawbacks mean that some of the profit or other economic benefit of an infringement often remains with the infringer even after the rightholder has brought a “successful” civil case, or that some of the cost of litigation or other cost of redressing that infringement is borne by the rightholder rather than by the infringer. As a result, damages and costs awards can effectively leave the rightholder in a worse position, and the infringer in a better position, than either would have been in had the infringement and the civil litigation not occurred. Such a state of affairs provides not a deterrent but rather an economic *incentive* to engage in infringement and an economic *penalty* for enforcing IPR rights through civil action.

This report provides a high-level analysis of IPR damages awards in the Member States, in particular with respect to the compensation of rightholders, the recovery of costs, and the retention by infringers of various benefits of infringement. This analysis has been drawn from the Legal Sub-group’s more detailed review of Member States’ laws, and includes some rec-

¹ This document has been drafted on the basis of the responses of experts to the Questionnaire drafted by the members of the Legal Sub-group of the European Observatory on Counterfeiting and Piracy. The views expressed are those of the authors and do not represent the views of the other members of the European Observatory on Counterfeiting and Piracy or the European Commission.

ommendations and best-practice examples which could serve as the basis for improvements among all Member States.

The Purpose of Damages and Costs Awards

As a general principle, damages for IPR infringements are intended to accomplish two ends:

- **Compensation:** damage awards should put the rightholder in the position he or she would have been in had the infringement not taken place; and
- **Deterrence:** damage awards should serve to discourage both repeat and would-be infringers.

The requirement that damage awards for IPR infringements both compensate and deter is explicit in European law.

- **Compensation:** The IPRED requires that Member States “ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to *the actual prejudice suffered by him/her as a result of the infringement*” (Art. 13).

The IPRED also requires that damages must redress the full universe of harms that a rightholder may have suffered: “all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement” must be taken into account (Art. 13(1)(a)). A lump-sum award or “pre-established” damages can be used as a proxy measurement of such elements of damage in appropriate cases (Arts. 13(1)(b), 13(2)). Rightholders are also entitled to have their reasonable and proportionate legal costs and other expenses remunerated by the infringer unless equity dictates otherwise (Art. 14).

- **Deterrence:** At the same time, the IPRED also requires that damage awards – as with all civil enforcement measures – be “*effective*” and “*dissuasive*” (Art. 3(2)). The requirement that any unfair profits made by the infringer be considered in awarding damages advances this dissuasive objective: allowing the infringer to retain such benefits would provide an incentive for, rather than deter, infringements.

Shortcomings in Damages and Costs Awards

A comprehensive review of the law and practice in the EU Member States shows that although elements of the civil damages and costs awards mechanisms work well in some Member States and would be useful best practices models, national IPR damages regimes often do not effectively achieve the twin objectives of compensation and deterrence. Key findings in this regard include the following:

- **Courts face difficulty in calculating and awarding compensation comprehensively.** Consistent with IPRED Article 13, almost all countries surveyed consider the rightholder’s lost profits in awarding damages. These usually are defined as the profits that would have been made by the rightholder in the absence of the infringement.

However, it is extremely difficult to prove lost profits at all in IPR cases in at least one country (**Greece**), and courts in many other Member States find it difficult as a practical matter to assess lost profits accurately. Courts in some Member States, for example, discount the lost profits of the rightholder on the basis of net-profit measurements, i.e. costs saved (**Belgium**), or of potentially different (**Slovenia**) or non-substitutionary (**Sweden**) sales or profits made by the infringers.

Faced with these types of challenges, many national courts opt for awarding the rightholder “lump sum” damages in some cases (e.g. **Denmark, Greece, Netherlands**), as foreseen by the IPRED. Some appear to make a lump-sum calculation designed to approximate lost profits (e.g. **Luxembourg**) or “moral” damages (e.g. **Belgium**). Awards may be based on the relevant licence fee, “reasonable” royalty or “equitable remuneration” – which can be the full price of a licence or product, but may also be a lower amount, such as “estimated” or “hypothetical royalties”.

- **Outside of lost profits, rightholders may not in practical terms be compensated for other negative economic consequences resulting from an infringement.** Despite the IPRED’s instruction (Art. 13) that judicial authorities consider *all* appropriate aspects, including various “negative economic consequences” and “infringer profits”, in awarding damages for IPR infringements, in practice several such factors may never be considered. There are many types of consequential damage that can result from an infringement – reputational damage, price declines, damage to the distinctiveness or value of a trademark, and the like – which are rarely taken into account or compensated (e.g. courts in **Finland, Hungary, Poland** and **Greece** do not consider these important factors). The infringers’ profits are taken into account in many countries, but may only be allowed as an alternative to compensatory damages (e.g. **UK**).
- **Damages for non-economic harm are often unavailable.** As a general rule, moral damages are rarely awarded for IPR infringements or, when awarded, tend to be nominal (e.g. **Estonia**).
- **The costs of investigating, taking legal action against, and rectifying an infringement are often not compensated in full.** In principle, rightholders in all Member States are eligible to recover legal costs and other expenses incurred in bringing successful infringement proceedings. However, many of the actual costs involved can remain on the rightholder. For example, courts may award lawyers’ fees far below the amounts actually spent (e.g. **Denmark, Greece, Luxembourg, Spain**). Lawyers’ fees are often determined on the basis of statutory tariffs with fixed maximums; in most markets, these tariffs in practice can be far lower than the actual legal costs incurred by rightholders (e.g. **Czech, Germany, Italy, Poland, Romania**). At the same time, while fees relating to court appointed experts generally can be recovered in their entirety, costs of private experts may not be similarly compensated in full (e.g. **Romania**). The costs of storage and destruction of seized goods are sometimes placed on the rightholder. As a result, even in those instances where rightholders recover the full amount of their actual damages, incomplete costs awards nonetheless leave them worse off after infringement proceedings than before.
- **Infringers may retain some of their profits, or otherwise have an economic incentive to engage in infringement.** For example, in some Member States damages awards may be reduced or eliminated where an infringer acquires a license post-

infringement (e.g. UK). Moreover, some damages systems refuse to relieve infringers of some of their profits or other economic benefits of infringement, such as by letting the infringer in some cases keep the part of a licence fee or distribution profit that a legitimate purchaser would have had to pay to the legitimate distribution channel (UK). Far from being a deterrent to infringement, such rules encourage infringers to take the risk of infringement, with little greater “downside” than the normal licence fee even if the infringement is detected and proven.

In sum, these various challenges appear in many cases to have led to low damages and costs awards that are inconsistent with the scope of the infringements involved, the IPRED’s anticipated allocation of economic risks and benefits between rightholder and infringer, and the actual costs of redress. In a number of Member States, the current provisions and practices on damages not only fail to compensate rightholders and relieve infringers of their gains, but in fact may provide financial incentives for counterfeiting and piracy.

Recommendations and Best Practices

Notably, some Member States have taken approaches to the award of damages which do promote both accurate remuneration and deterrence. These approaches, which should serve as “best practices,” fall along the following lines:

1. Measures aimed at ensuring that rightholders are able to recover the *totality* of the losses sustained as a result of an infringement.

Although the terms used by Member States differ (e.g., “actual damages”, “compensatory damages”), there appears to be broad consensus among the Member States that damage awards in principle should result in complete indemnification of the injured rightholder, at least in cases where the infringer knew or should have known that his or her conduct was infringing. Otherwise, those who invest creative effort and resources in the production of IP-protected goods and services are left uncompensated – a fact that serves as a disincentive to creative investment.

As described above, however, calculating these losses with exactitude can prove challenging to national courts. As a direct consequence of infringements, rightholders lose the direct value of the licence itself, but also such other consequential losses as depreciation in value of the rightholder’s statutory rights, damage to reputation, lost value of sales revenue cash flow, and the like. These elements are often difficult to quantify and calculate. Courts often are convinced that infringement has been more widespread than the sample of instances actually proved, and that indirect and consequential elements of damage beyond the lost profits actually proved are reasonably likely to have occurred, but in some cases the courts have poor tools for approximating or awarding such damages.

Under the IPRED, the full universe of direct, indirect and consequential loss suffered by the rightholder by reason of an infringement, whether carried out on a “commercial scale” or not, should be included in damages awards. The tool of “lump sum” damages, however denominated, is a very useful way for courts to approximate the full extent of such damages that they reasonably believe have been incurred.

It should be noted here that defendants’ mere objection to the rights owner’s evidence of damage—which sometimes is the only defence submitted—should not be suffi-

cient, without substantiation of such objection through the presentation of evidence, to defeat the rights owner's prima facie showing of damage. Indeed, damages shown by the rights owner by prima facie evidence should be presumed to be correct absent an affirmative showing from the defendant that such damages exceed the harm suffered.

- ***Recommendation: Member States should ensure that all elements of direct, indirect and consequential economic consequences to the rightholder that result from an infringement are compensated by damages in civil cases, regardless of whether the infringement has taken place on a commercial scale.*** The UK's adoption of the exact language of IPRED Art. 13(1)(a) in its law setting forth compensable damages in IPR cases should be reviewed as a best practice.
- ***Recommendation: Member States should provide that lump-sum damages, reflecting all negative economic consequences that the rightholder has been reasonably found to have suffered, are available at the rightholder's discretion at least as an alternative to any lost profits that can be proved.*** Member States' systems providing for such lump-sum awards, including those of **France, Belgium, Luxembourg, Hungary, Estonia, Slovenia and Bulgaria**, should be reviewed as best practices.

As described above, even lump-sum damages calculations can be difficult to quantify precisely or consistently. To address this, some Member States have provided for a set amount of multiple (e.g. double) damages to be available as an alternative. These are properly seen not as a "punitive measure" or as an underserved windfall for rightholders, but rather as a proportionate and convenient way of estimating and compensating for all of the various types of economic detriment that a rightholder suffers by reason of an infringement.

- ***Recommendation: Member States should provide that a "predetermined" calculation method for determining lump-sum damages, reflecting a reasonable approximation of all negative economic consequences that the rightholder is likely to have suffered, is available as an alternative to any other means of determining damages—at a minimum in copyright and trademark cases.*** Several Member States' systems permitting such predetermined damages awards or allowing double awards of proven damages in certain cases as a measurement of the full range of damage incurred by the rightholder (including those of **Austria, Benelux, Czech, Germany, Greece and Poland**) should be reviewed as best practices. Some countries have even provided triple royalties as an option in some cases on this basis (**Belgium, Poland, Romania**).

2. Measures that enable rightholders to recover their actual costs of investigating, taking legal action against, and rectifying an IPR infringement.

Infringement proceedings are expensive. Rightholders typically must invest substantial sums to detect an infringement; identify the infringer; investigate his or her activities; gather evidence of infringement; secure seizure, storage and ultimately destruc-

tion of infringing goods; and litigate a civil infringement action. Amounts spent to pursue even the smallest infringers often run well over 10,000 euros.

Inability to recover the full range of such costs is a disincentive to pursue IP infringements for all rightholders, but is a particular concern for SMEs. Only the largest rightholders may be able to afford to bring civil litigation in the knowledge that they will recover only a percentage of their expenses.

In very few Member States are rightholders able to recover 100% of their legal costs. In other Member States, expenses related to the monitoring of infringing activities, test purchases, storage costs, costs of expert opinions, translation fees or similar costs are not recoverable.

- ***Recommendation: Member States should provide that all costs reasonably incurred by the rightholder in investigating, taking successful civil action against and rectifying an infringement should be compensated in full by the infringer.*** Although most Member States in practice do not issue costs awards of 100% of those actually incurred by a successful rightholder, the practices of **Lithuania** and the **UK** should be reviewed as best practices that have been reported as having a sufficiently deterrent effect.

3. Measures designed to ensure that infringers do not retain any economic benefit from their infringing activities.

Some Member States have taken the view that if the *profits* or other economic benefits (e.g. costs saved) are not taken from an infringer, he or she has every reason to continue to infringe the law. To that end, these Member States award a rightholder's lost profit and the infringer's profit, along with other damages incurred, to the rightholder in appropriate cases (without double counting). Others award conversion damages (i.e. treating the infringed item as being stolen, with damages reflecting the retail value of the item), or additional damages related to the infringer's turnover, egregious conduct, or other factors. Again, all of these are properly viewed not as "punitive" provisions but rather as proportionate remedies that recognise that in order to achieve the IPRED's requirement that damages awards be "dissuasive", none of the profit or other economic benefit of infringement should be left as a "reward" with the infringer.

- ***Recommendation: Member States should implement rules for awarding damages and costs in IPR cases that ensure that no economic benefit of an infringement remains with the infringer.*** Member States' systems providing for an accounting or disgorgement of infringer's profits to top up the rightholder's lost profits award without double counting (**Netherlands, Austria, Italy**); allowing for damages awards of the full retail price of the infringing goods in appropriate cases (e.g. **Estonia**); permitting disgorgement of the infringer's unjust enrichment (**Czech, Hungary, Estonia**); or requiring damages payments in the amount of a percentage of an infringer's turnover in certain cases (**Spain**); should be reviewed as best practices.

Civil Damages in Intellectual Property Rights Cases¹

EXECUTIVE SUMMARY

1. General Conditions or Limitations on the Availability of Damages (e.g. good faith infringements, intentional infringement or neglectful conduct, commercial scale, overall limitation on damages)

The general conditions for awarding damages, in principle, include: infringing act, damage and causal link between the infringing activity and the damage.

The majority of the Member States require at least negligence for awarding damages², and therefore state of mind plays a role. However, for a significant number of the Member States, the mere violation of an Intellectual Property Right will suffice for an award of damages.

There seems to be an exception for copyright cases, where in some Member States (e.g. **Sweden, Czech Republic**), even good faith infringements are eligible for damages awards. This stands in contradiction to patent cases (and utility models cases) where some countries will not grant damages for good faith infringements.

Most Member States (approximately 90%) award damages regardless whether an infringement is committed on a *commercial scale*. However, a minority (e.g. **Hungary, Sweden**) grant damages only for infringements committed on a commercial scale.

There seem to be no overall limitations on damages.

Calculation of Damages.

2. Rightsholders' lost profits.

Almost all of the Member States appear to take into account rightholders' lost profits when calculating damages awards. Lost profits are usually defined as profits that would have been earned by the rightholder in the absence of the Courts often do not provide for detailed calculations how lost profits have been infringement or profits that could have been justifiably expected (therefore not including the infringer's profits)³.

In some Member States, it seems that courts often find it difficult to assess lost profits precisely, and therefore the courts tend to resort into an *ex aequo et bono* (or similar) evaluation. If lost profits cannot be precisely determined, *probable* lost profits are estimated. Lost profits are sometimes determined by experts.

As for the factors used to undertake the calculation of lost profits, it is often the net profit that is taken into consideration. The number of infringing products (this is sometimes reduced due to the difference in quality and higher price of the original product) is multiplied by a price

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² One respondent stated that for registered IP rights, there is a presumption of negligence.

³ A minority of respondents considered licence fees or unjust enrichment as the rightholder's lost profits.

per product as determined by the court. In some countries, there seems to be a tendency to award lump sum damages per product.

As for possible defences that buyers of infringing products would not have otherwise bought a genuine one, some courts (**Sweden**) have developed innovative solutions that apply ratios, for example 1:3 - original: counterfeit.

It must be stated that many rightholders often find it very difficult to prove that they would have earned the same profits as the infringers, particularly where for example the infringers are offering their works under circumstances that differ significantly from those present in legal channels (and at the same may undermine the value of legal sales).

Courts often do not provide for detailed calculations how lost profits have been determined.

In one country (**Greece**), lost profits are extremely difficult to obtain in trademark cases and unfair competition cases. In another country (**Italy**), rightholders may opt for either infringer's profits, or their own (rightholders') lost profits, whichever is greater.

In some countries it seems uncertain whether lost profits are available as an alternative or as a complement to a reasonable royalty.

3. Reasonable royalty.

Member States generally provide for reasonable royalty damages in the amount of royalties that would have been due if the infringer sought an authorisation (licence) from the rightholder. Where a licence royalty is already fixed and used in the relevant sector, this amount will be used; if there is not an agreed royalty rate or it is difficult to determine precise rates, an estimated average royalty related to the specific type of business involved is often used.

Since rightholders should be able to claim *at least* a reasonable royalty, some respondents tended to conclude that damages should rightly be higher than the amount of royalties due.

In *copyright cases*, some countries grant damages in the form of a multiple/double of the amount of royalties otherwise due.

As to the availability of lump sum damages based on royalties, some of the respondents stated that lump sum damages are only available in their Member States when no other option for calculating damages can be used; others stated that lump sum damages are available as an alternative. Some respondents claimed that it is unclear whether lump sum damages are an alternative to other methods of calculation or whether they may be used only if actual prejudice cannot be assessed.

In some countries, lump sum damages based on a reasonable royalty seem to be part of lost profits. One respondent (**Malta**) stated that lump sum damages based on a reasonable royalty are provided for in the law but have not yet developed as a recognised type of compensation. In one Member State (**Spain**) rightholders may claim 1% of the infringer's total business turnover as damages, without providing further evidence.

In **Austria**, a reasonable royalty is the minimum compensation available for all kind of infringements, whether undertaken culpably or not.

4. Actual prejudice (e.g. reputational damage, price declines), negative economic consequences, other factors (distinctiveness of TM, investment, actual lost sales vs. all infringing sales, breach of contract, parallel trade)

It appears that there is some confusion or uncertainty as to the dividing line between *negative economic consequences* and *moral damages*. Negative economic consequences are part of material damage (unlike moral, non-material damages). However, a minority of experts consider that economic consequences also include moral or immaterial damage.

The experts consider as negative economic consequences in particular the following: market disruption, damage to image and good-will, damage to distinctiveness, general price declines, losses of an internal nature, trademark dilution, etc. There seem to be diverging opinions in particular as to whether damage to good-will and trademark dilution should be considered as *moral damages* or as *negative economic consequences*.

Despite the fact that rightholders may claim any damages as long as they can be proven, it seems that in some Member States negative economic consequences are rarely used, given that proving such damages may be very difficult in practice. Evidence also must be very specific and objective. Damage to good-will, for example, may not be quantifiable until much later.

Investments made by the rightholder in a brand or other IPR are often not taken into consideration. In some countries it seems that these types of damages, if they are awarded, represent only a fraction of real costs, such as for advertising (**Italy**). One respondent (**Finland**) stated that contractual obligations have no direct effect on damages awards⁴.

One country's respondent (**Malta**) stated that the relevant law in this area is too recent to assess. Another noted that the law does not expressly provide for these types of damages, but does not exclude them either (**Romania**).

Interestingly, one report stated that secondary losses (contributory, preparatory and consequential activities) may be claimed, but there must also be a demonstration that such loss is both caused by and a foreseeable consequence of the infringement (**UK**).

5. Account of infringer's (unfair) profits/unjust enrichment/conversion damages.

Most countries provide for a possibility for a court to order a *disgorgement* or transfer of the infringer's profits to the rightholder, but this is often possible only in cases of bad faith (e.g. in the **Netherlands, Luxembourg**). Net profit (sales price minus purchase costs and taxes (*excluding general costs*)) is often taken into account. It is often necessary to prove that profits were made with infringing products (i.e. there was a *causal link*).

In some countries (e.g. **Belgium**), a transfer of the infringer's profit is generally awarded (as an alternative) when this is higher than the damages that otherwise would be allocated. In

⁴ For example parallel imports are treated identically as trademark infringements.

some cases (in at least in four countries: **Italy, Belgium** for trademark and design infringements, **Luxembourg** and the **Netherlands**), transfer of profits may be ordered in addition to damages (e.g. in addition to the rightholder's lost profits).

In **Hungary**, an infringer's profit can only be awarded once, either as a recovery of unfair profits or as part of the damages awarded, but never cumulated.

Other countries consider an infringer's income as part of lost profits.

6. Moral prejudice to the rightholder.

Moral prejudice forms part of actual prejudice. This kind of prejudice must be distinguished from the prejudice resulting directly from the infringement even though it is linked to it. Since this type of damage is difficult to assess, in most cases the amount awarded will be at the discretion of the court, and courts tend to award a lump sum as a moral damage.

Compensation of moral damages may be done by apology, but also take the form of a monetary award. In **Poland**, however, it appears that moral damages may not attract monetary awards. Examples where moral damages have been claimed include in particular where there has been injury to the rightholder's reputation, emotional distress, suffering caused by an infringement, etc.

Damages for moral prejudice tend to be generally rather low. In some countries, it seems that damages for moral prejudice may only be granted in copyright cases (excluding owners of industrial property rights) and/or to physical persons (excluding legal entities)⁵.

Some countries do not explicitly mention the possibility of granting moral damages, although that does not automatically mean that these are not available. In other countries, even if moral damages are allowed, there have been only a few instances where moral damage has been taken into consideration (**Malta**). In some countries, moral damages are available only in cases of intentional or negligent infringements (**Finland**).

In **Greece**, moral damages are the only compensation that can realistically be awarded in trademark cases.

It appears that in one country (**Slovenia**) moral damages may be granted even if no material damages have been suffered (e.g. for mental distress).

7. Double/multiple/pre-determined/lump sum damages.

In most countries such damages do not exist. Most countries seem to only compensate for the actual prejudice suffered.

Collecting societies in some countries have set up fees that apply to copyright infringements (e.g. in **Belgium, Greece, Poland and Czech Republic** it is double the basic royalty). In **Lithuania, Austria and Slovenia** double royalties may be awarded in cases of intentional infringement. In **Belgium** triple royalties have sometimes been awarded for specific

⁵ Estonia

infringements, again based on tariffs set by collecting societies⁶. In **Romania** triple royalties apply for copyright and related rights infringements; in **Poland** triple royalties apply in cases of intentional infringements. Such calculations are frequently used in making damages determinations in these countries.

In one country (**Denmark**) contractual penalties may be awarded on top of damages.

8. Additional/exemplary/aggravated damages.

In **Poland**, the rightholder may demand that the court order payment by the infringer of an appropriate amount, not less than double the probable benefit received by the infringer, into the *Creativity Promotion Fund*, if the infringement occurred within the scope of business activity.

In some countries *additional* or *aggravated damages* may be ordered for copyright infringements (e.g. **Cyprus, Ireland, Malta, UK**).

9. Punitive damages.

Most Member States refuse to apply damages that are explicitly *punitive*. Collecting societies sometimes provide for tariffs to offset damages that are multiple and these are sometimes seen as of a *punitive character*.

10. Other legal theories or measurements of damages.

Some countries have provisions whereby the rightholder can request the transfer of ownership of the infringing goods (or materials/implements that were used in the creation of the infringing goods), and such measures are not subject to a requirement that the infringer acted in bad faith. The value of these goods may not, however, exceed the actual prejudice suffered by the infringer.

In **Estonia**, reasonable expenses that will be incurred in the future due to the damage may be claimed as well as expenses related to the prevention or reduction of damage.

11. Lump Sum Damages Claims and Awards. (When the courts are requested to compensate the rightholder for the actual prejudice he has suffered, are they entitled to award e.g. lump sum damages if they consider this more appropriate? Are the Courts precluded from awarding lump sum damages when the rightholder has not explicitly claimed them?)

In general, more than half of the respondents stated that the courts are limited by the rightholder's claims, and therefore a lump sum must be specifically demanded by the

⁶ However, as will be seen below (see §9), the possibility for the Belgian courts to apply "*punitive*" tariffs when assessing the prejudice has been recently debated before the Belgian Supreme Court, which decided that neither the fight against counterfeiting activities nor the dissuasive effect attached to punitive damages may justify the grant of damages that exceed the real prejudice suffered by the rightholder.

rightholder. Slightly less than half stated that courts may award a lump sum on their own initiative even if the rightholder has not made a specific demand for such relief. In some Member States, the situation is not clear.

In most Member States, it seems that lump sum damages are only a *secondary* option and can only be claimed when the actual prejudice cannot be calculated. In **Belgium**, the courts are normally allowed to resort to lump sums *only* in those cases where it is not possible to evaluate the prejudice otherwise. In practice, however, lump sum damages, and the *amount* of such damages, are often awarded without further (detailed) explanation.

In some countries, (e.g. **Greece**) lump sum damages cannot be obtained for example for trademark infringements, even if they are claimed.

In the **UK**, lump sum damages as such are not specifically authorised and thus are not awarded in IP infringement cases, although an alternative damages calculations are permitted in appropriate cases based on the royalties or fees that would have been due had the defendant obtained a licence, as provided by the Directive.

12. “Innocent” Infringement. (Are damages awards lower if the infringer did not know or have reasonable grounds to know he was engaged in infringing activity?)

In most countries, the mere infringement of intellectual property right constitutes a tort and infringer's good or bad faith is irrelevant and does not affect the level of damages.

In a minority of countries, no compensation is awarded if the infringer had no knowledge of the infringement (i.e. was an *innocent infringer*). Compensation is awarded only for intentional or negligent infringements.

In some countries (e.g. **Czech Republic**), the state of mind of the infringer is irrelevant in *copyright cases*. In **Hungary**, if the infringer did not know he was engaged in infringing activity, no damages can be awarded, but reimbursement of the infringer's unfair profits is still possible.

Sometimes if the infringement was committed in good faith (or there are other special circumstances), damages may be lowered by the court.

In **Sweden**, there is a fairly heavy duty imposed on infringers to have investigated the market before putting potentially infringing products on the market.

13. Seized Goods. (Can damages be awarded when infringing goods have been seized before being placed on the market?)

In the great majority of such cases, damages may be claimed.

A minority of respondents stated that material damages are not claimed in such cases as they would be difficult to substantiate (only reasonable related costs and legal costs can be awarded). One respondent stated that damages may not be claimed for goods that are in

transit. The respondent from **Hungary** stated that only storage and destruction costs can be awarded as damages in such cases.

14. Post-Infringement Licence. (Are damages awards lower if the infringer acquires a licence from the rights owner following the infringement?)

Almost all respondents stated that damages in such a case will not be lowered and the rightholder will be entitled to obtain damages when an infringement has taken place.

Some respondents stated that the practice of the courts on this issue is unclear or that they are not aware of any judgements that would address it.

One respondent answered that if a licence is acquired by an infringer following the infringement the damages will be lower only in case the acquisition of the licence really reduces the damage (**Czech Republic**). The expert from **Luxembourg** stated that in principle damages in such cases will not be lower (under a principle of full compensation), but court practice shows that damages may, indeed, be lower.

Two respondents stated that where acquisition of a licence after an infringement is considered as a recovery of damages, no damages will be awarded. However, if the licence is for future exploitation of the IPR in question, damages can be awarded as if no licence agreement had been concluded in respect of the infringement.

The UK Ministry of Justice has stated that "it is currently possible to acquire licences for software applications after an infringement has been discovered without any penalty being imposed".

Proof of damages.

15. Evidence required. (What evidence is required to prove damages? Who bears the burden of proof?)

The burden of proof lies with the claimant (plaintiff). The rightholder must prove the scope of the damage incurred.

As to evidence, common rules of civil procedure typically apply and give wide latitude as to the types of evidence that can be offered in proving damages. The courts decide if a respective fact can be deemed proven or not. The civil procedure in IPR cases thus does not differ significantly from other civil cases. If the comprehensive evidence necessary to establish the full extent of damages cannot be produced (or only with difficulty), courts will sometimes undertake an estimate to set a reasonable amount of damages in accordance with a rule allowing diminution of the burden of evidence.

As far as moral damages and damages for other economic consequences (trademark dilution, price erosion, etc.) are concerned, it appears that these are rather difficult to prove in practice.

The trend seems to be appointment of judicial experts to assess damages in IP matters.

Some decisions have stated that due to the price differences, counterfeit goods and genuine branded goods, even where identical, are not necessarily part of the same market, so the sale of fake goods does not automatically cause any lost profits to the rightholder (**Belgium**).

16. Securing evidence. (Can the rightholder obtain needed evidence concerning damages from the infringer (e.g. on gross income)?)

Almost all experts replied that such a possibility to secure evidence is available under the right of information (Article 8 of Directive 2004/48/EC). Intermediaries are also subject to application of this provision. Apart from this type of provision, search orders and seizures of the infringer's premises are available. In some cases, bank accounts and other financial information may be the subject of pre-trial or trial discovery.

In **Greece**, the capacity for a plaintiff to obtain such evidence is rather problematic. The plaintiff must precisely identify the nature, position, reference numbers, and contents of the requested documents (even the exact page number of the defendant's commercial records) in order to be granted information. The Greek expert stated that almost 90% of all such requests are rejected as *vague*.

17. Proof of Other Factors. (If other factors are taken into account in the assessment of damages (e.g. strength of trademark, investment, price erosion, actual lost sales vs. all infringing sales, breach of contract, parallel trade), what evidence is required from the rights owner in this regard?)

There are no standardised requirements regarding the type, scope or quality of evidence necessary to prove this type of damage. It is often determined on a case-by-case basis.

The evidence that is usually required to prove damages relating to:

- the reputation of a trademark are in particular the following: market surveys or polls, documents proving the presence of the trademark within a particular sector, advertisements, copies of last Interbrand report, sales volumes, published articles, advertising campaigns;
- confusion/dilution: market searches, letters of complaints, evidence of consumer confusion, witnesses;
- price erosion and the investments made for the promotion: invoices, promotion campaigns, documents proving the price erosion (e.g. accountancy, contracts with distributors), expert's analysis; and,
- lost sales: comparison between the turnover before and after the infringement, terminated agreements as a result of better offers received from the infringing parties.

Copy of the licence agreement setting the amount of royalties may also be used.

Statements from the relevant trade associations, from economics/technical experts or accountants (auditors) are also often used.

One respondent stated that evidence of damage to goodwill is difficult to prove as there is a need to establish strength of a trademark.

In **Poland**, these factors do not seem to be taken into account in assessing the actual extent of the damages.

In the absence of any document proving damages, courts may refuse to award compensatory damages due to a lack of proof. However, the fact that damages cannot be precisely proven does not mean that no prejudice has been suffered. In such cases, courts generally are willing to consider awarding damages in a lump sum.

Recovery of costs.

18. What legal costs of the rights owner can be recovered in successful civil litigation?

In principle, all costs of proceedings *necessary* for the *effective* protection and enforcement of one's IPRs can be recovered by the successful party, although these can be reduced or eliminated in the case of partial wins. In practice, courts tend to award only those costs that are *clearly proven* and that are *clearly necessary*. If the costs are disproportionate or unnecessary, the judge may order recovery of only a part of the costs.

National courts tend to differentiate between the fees related to one's *own* counsel or experts and those *appointed by the court*. The fees of experts appointed by a court are normally recovered in full; in some countries it seems that the fees of the parties' own experts (not appointed by court) cannot be recovered (e.g. **Bulgaria**).

Lawyers' fees are often determined on the basis of statutory tariffs (maximum amounts). Experience shows that these tariffs are often much lower than the actual costs incurred by the rightholders.

Regarding court costs, for claims that cannot be assessed in monetary terms (e.g. injunctions) there is often a fixed fee; for claims that can be assessed in monetary terms the deposit will depend on the value of the claims.

The consistency of such statutory tariff regimes with Article 14 of the Directive may be doubtful⁷.

⁷ Such a regime exists, *inter alia*, in Belgium since the Law of 21 April 2007 (new Article 1022 of the Judicial Code). In a judgment of 15 June 2009 (Case No. 2008/AR/1087), the Antwerp Court of Appeal held that this Law was in breach of Article 14 of the Directive, in that in most cases the statutory thresholds do not entitle the prevailing party to claim full compensation for lawyer's fees. The Court then suggested that, due to the inconsistency of the regime laid down in Article 1022 of the Judicial Code with the Directive, this provision should be disregarded and that the general provisions of the Civil Code (Article 1382), allowing anyone having suffered a prejudice to claim full compensation, applied with respect to lawyer's. The Antwerp Court found some support in this regard in a ruling of the Belgian Supreme Court dating from before the Law of 21 April 2007 (see e.g. 16 November 2006).

19. Percentage of Costs Recovered. (What percentage of the actual legal costs expended by the rightholder is typically recovered in successful civil litigation?)

The experience of the experts varies considerably. However, most of the respondents stated that compensation is usually far below the actual legal costs incurred. The following estimates have been made of the average proportion of actual costs that are recovered in civil IPR cases: 10-50% (**Denmark**), *only a small percentage* (**Greece**), 30% (**Italy**), between 10-30% (**Luxembourg**), 50% (**Cyprus**), 66%-100% (**Romania**), *very low* (**Spain**), approx. 75% (**Sweden**), 50-70% (**Austria**), and 80% (**Ireland**).

Some practitioners stated that it was possible to obtain 100% reimbursement of the legal costs (e.g. **Lithuania, Hungary, Slovakia** or **Austria** for simple cases).

The costs incurred by the State are most in cases 100% recoverable.

Some respondents were not able to state the percentage because of inconsistent experience and disparate case-law (e.g. **Latvia**).

One respondent (**Slovakia**) stated that lawyers' fees are substantially limited when the claims cannot be assessed in monetary terms.

20. Other Recoverable Costs. (What other expenses incurred by the rightholder can be recovered in successful civil litigation?)

Laws often seem to provide only demonstrative examples of legal costs. In practice, this means that any fees (incl. *unusual* expenses) could be claimed, if they are sufficiently proven to be clearly necessary for the effective protection/enforcement of one's IPRs.

Among others, the following expenses have been mentioned as recoverable: expenses related to the monitoring of infringing activities, test purchases, storage costs, costs of expert opinions, translation fees, etc. In **Malta** and **Romania**, extra-judicial costs seem to be unrecoverable.

21. Best practices.⁸

Even though some respondents have stated that the law implementing the Directive is too recent to permit the identification of best practices (France), it is possible to provide some suggestions and trends.

Many respondents stated that damages in the form of a lump sum are the preferred option though this will likely relate to the type of IPRs concerned. This approach allows the rightholders to claim from the infringer compensation in the full amount of relevant licence fee or retail price of the infringing product.

Regrettably, national courts seem to grant damages in a single amount without differentiating between the different components of the prejudice. Judgments are often not very explicit or transparent on how the damages have been calculated. Criminal courts generally follow a similar scheme as the civil courts.

An issue that has arisen from case-law relates to which legal theory should be used when making monetary claims against the infringer: whether it is for compensation to the rightholder for the prejudice suffered or whether it represents the infringer's unjustified enrichment (**Estonia**).

One of the reports stated that regardless of damages, rightholders should not expect to collect the actual costs of litigation.

On the contrary, in **Austria**, the provisions regarding damages and costs in IP cases are reported to be working well.

In **Italy**, interlocutory measures often mean that proceedings on the merits of the case may be avoided, as extra-judicial agreements can be reached. Therefore, decisions on damages are not very frequent.

In the **Netherlands**, indicative standards have been drawn up in order to better estimate the potential cost risk at an early stage of proceedings.

The grant by **Hungarian** courts of damages for lost profits, in the amount of the infringer's unfair profits, seems to be the exception rather than the rule. In an ordinary trademark

⁸ Calculation of damages- best practices:

Lost profits: multiply the number of infringing goods by the profit per good.

Licence fees as the basis for damages calculations: courts generally have no problem in using standard licence fees (ex-VAT) as the basis for damages calculations. In Spain, on rights holder's demand, the criterion of the hypothetical royalty is increasingly being used. In these cases, sectoral market standard royalties are applied.

The infringer's profit: market price of corresponding original products minus infringer's purchase price of infringing products = profit.

Royalty when no market for licensing exists: Estimation of royalty is based on multiple infringements plus reputation plus other facts such as security standards = royalty of 25 percent of sales price.

Damages in a case of infringer's gross negligence: lost revenues for sale of genuine goods plus lost revenues for sale of services in connection to the genuine goods plus goodwill damages.

Royalty when a market for licensing exists and there exists no equivalent goods: royalty x value of goods = total royalty.

infringement case initiated after a border seizure, the court may award lawyer's fees between €1,000 and 2,000, plus storage and destruction costs as damages.

In some countries, multiple (i.e. double) or additional damages awards are available for copyright and industrial rights infringements under various provisions. As a general matter, it is often very difficult to secure meaningful damages and compensation for legal costs. This means that in certain sectors damages actions are the exception and rightholders will instead limit their activities to seeking injunctions to stop ongoing infringements. As a result, many infringers are not deterred from undertaking infringing activities and will regard any damages or legal costs as mere costs of doing business.

22. Primary Legal or Practical Problems.

There seems to be no well-established case law on the evaluation of damages under the Directive. The laws implementing the Directive are still relatively recent and therefore it is difficult to pinpoint every legal or practical problem with the damages and costs provisions (see above).

Judgements are generally not explicit or transparent as to how the damages are actually calculated. Some courts only award damages encompassing lost profits without taking into account other components of the prejudice suffered by rightholders. Moreover, the courts often award a lump sum without any underlying justification.

Some courts allow damages for the costs of detecting and monitoring the infringement, while others consider that such expenses do not constitute a part of the prejudice. Moral prejudice and injury to reputation are often underestimated.

Since there is a general prohibition on punitive damages, infringing activities often seem to be attractive – the risk of having to pay meaningful damages is limited and many infringers operate on the basis that potential damages and legal costs are a mere cost of doing business.

One respondent suggested that it would be helpful if the rightholders were always entitled to claim the infringer's profits as a minimum, because it seems that the infringer's profits are usually higher than the damages that can be easily proven, and it seems inequitable and not dissuasive if those profits are retained by the infringer.

Indeed, proving the amount of damages can be distinctly difficult. Sometimes the courts request evidence that would be difficult or even impossible to present. In Poland, for example, damages seem to be awarded only on the basis of the number of infringing items actually seized (therefore often ignoring the actual number of infringing items).

Another rather general and not necessarily IPR-specific problem is that civil proceedings can be long, costly and difficult in many Member States.

23. Economic Impact of Damages Awards. (Do civil damages and costs awards have a neutral effect on, have a deterrent effect, or serve as an economic incentive to engage in infringement?)

At least five of the respondents stated that the damages are *not deterrent*. At least two practitioners responded that the damages serve as an economic incentive for the infringers. Five respondents stated that damages have a neutral effect and one respondent stated that damages have *neutral to economic incentive* effect.

Only a minority of the respondents stated that civil damages have a *serious deterrent effect* (in **Italy**), or a *slight deterrent effect* (in **Romania**). In **Sweden**, the deterrent effect of civil IPR damages seems to be gaining ground since there have been a range of judgements where substantial amounts have been awarded. In **Austria**, civil damages generally have a deterrent effect, since the minimum damage for faulty conduct is twice the amount of the reasonable royalty.

One respondent (**Poland**) stated that criminal conviction constitutes a much greater deterrent factor than a civil conviction.

Some experts stated that the law is too recent to provide for an answer.

24. Top 3 Enforcement Problems.

The following problems with civil IPR litigation, among others, have been mentioned in the Legal Sub-group's survey of national experts:

- Absence of deterrent damages
- Difficulty to prove damages (evidence)
- Long duration of proceedings
- Complexity of legislation and procedures
- Lack of harmonised remedies
- No clear legal guidelines on how damages for moral prejudice can be awarded in IP infringement matters
- Lack of expertise
- Lack of creative approach when calculating damages
- Not a government priority
- Lack of statutory damages
- Liability of intermediaries
- Transit
- Internet anonymity
- Understaffed customs
- Lack of interest from the police, prosecutor, etc.
- Specialised courts are not really specialised
- Criminal route is used only as a last resort (mostly when there is a threat to public health, e.g. counterfeit medicines)
- Criminal sanctions exist only in theory, reluctance to apply criminal sanctions to IPR cases
- No arbitration for domain names disputes in some countries, registration of domain names is not regulated by the state
- High fluctuation of entrepreneurs
- Misuse of criminal proceedings when civil route is available

- Internet piracy (including facilitators that make revenue from advertising and inducing illegal file-sharing or copyright infringements) is the most undeveloped area
- Erroneous assumption that downloading of illegal content from illegal sources is within the scope of the private copy exception
- Reluctance of courts to grant full legal costs, where plaintiff was not awarded the full damages claimed or more generally
- No storage and destruction costs available as part of the legal costs, but only as damages
- Majority of population do not consider IPR infringements as an illegal activity.

DAMAGES

COUNTRY	General conditions or limitations on the availability of damages (e.g. 'good faith' infringements), intentional infringement or neglectful conduct, commercial scale only? Overall limitation on damages.	Calculation of Damages Theories Rights owners' lost profits.	Calculation of Damages Theories Reasonable royalty.
Austria	<p>No overall limitation on damages. If the infringer acted negligently or intentionally RH is entitled to twice the equitable remuneration. If the incurred damage is higher, then to that higher amount instead. In case of culpable infringement the infringer also has to surrender all profits. There is also a right to compensation for non pecuniary damages, however only very small amounts are granted under this provision.</p> <p>No requirement for commercial scale.</p>	This is part of the standard calculation of damages and can be claimed for culpable infringement.	This is the minimum compensation which applies to all kind of infringements, whether culpable or not.
Belgium	Mere violation of an intellectual property right is considered a tort. General principles of tort liability apply. Whoever commits a tort has to compensate any damages resulting from this tort. The entire	A distinction is made between <i>lost profits (lucrum cessans)</i> and <i>economic loss (damnum emergens)</i> . <i>Lost profits</i> are the profits the RH would have made or the royalties the RH would	Since the implementation of IPRED, the injured RH should at least be awarded the amount of royalties or fees which would have been due, had the infringer requested authorisation to use the

DAMAGES

	<p>and real prejudice must be repaired. Damages are awarded regardless of the commercial or non commercial scale of the infringing activities.</p> <p>Still, the conditions set forth by the different pieces of IP legislation have to be taken into account. If for instance the using of a work outside the course of trade does not constitute an infringement there is no damages for such behaviour.</p>	<p>have received. RH's prejudice generally does not only include lost profits. Mostly, other economic losses also form part of the prejudice.</p> <p>Difficulty of precisely assessing the lost profits, therefore courts resort to an <i>ex aequo et bono</i> evaluation (i.e. in equity):</p> <p>(i) A first step in the evaluation of lost profits is to establish the <i>number of infringing products</i> (a rule the sold goods). The number of infringing goods is sometimes reduced to assess the lost profits. This is due to constraints faced by the RO (e.g. manufacturing capacities, quality requirements, price difference) which don't apply for the infringer and would lead to the sale of fewer products by the RO. RH.</p> <p>(ii) An estimate has to be made of the <i>profits that could have been made by the RH</i>. It's generally accepted that the profits that have to be taken into account are not the infringer's profits but the RH's profits, although the courts may order the transfer of the infringer's profits to the RH in bad-faith</p>	<p>IP right in question. Distinction is traditionally made between RHs who market and sell their products in person, and those who do not (e.g. when the RH grants licences or before he has started marketing and sales activity). In cases where the RH himself does not market or sell the products, the lost profits will generally be calculated based on the royalties that could have been charged under a licence agreement.</p>
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DAMAGES

		<p>infringement cases. It's generally accepted that only <i>net profits</i> can be taken into account. The general trend is for the courts to award lump-sum amounts of compensation per infringing product based on different elements provided by both parties.</p> <p>(iii) Based on the aforementioned elements, the lost profits are calculated by multiplying the number of infringing goods by the profit per product. Such calculations of damages are frequent in criminal cases, but the case law is far from certain in civil cases. Great majority of judgments handed down by the civil courts grant a single amount as compensation for the entire prejudice suffered by the RH, without specifying the different components of the damages.</p>	
<p>Bulgaria</p>	<p>Damages can be claimed in cases of <i>good faith</i> infringements. The mere act of not asking an authorisation from an author constitutes an infringement. Damages may be awarded in case there is an illegal conduct, guilt (wilful, intentional or neglectful,</p>	<p>Should be considered by the courts when assessing damages but there is no court practice. The amount of damages will not depend of the form of guilt (whether the act is wilful or neglectful).</p>	<p>-</p>

DAMAGES

	<p>both conscious and unconscious). No requirement for commercial scale.</p> <p>No overall limitations on damages.</p> <p>For copyright violations, general system of tort liability applies, unless there are no specific provisions in the intellectual property laws. The burden of proof for the causal nexus between the infringement and the damages caused, as well as the amount of the losses (both moral and pecuniary) lies with the RO in Copyright Law.</p>		
<p>Cyprus</p>	<p>Damages are normally calculated on a common law/equity basis. Compensatory damages can be claimed as long as actual damage for lost sales or damage to goodwill is proven. Alternatively, account of profits can be claimed. However, no double recovery, as this would amount to unjust enrichment.</p> <p>If infringer at the time of the infringement did not know nor</p>	<p>Normal basis upon which compensatory damages are calculated for IPR; exception for copyright law.</p>	<p>Yes.</p>

DAMAGES

	<p>had reasonable grounds to believe that there was copyright protection, no damages awarded, but only account of profits. Court may award additional damages, if infringement is blatant and infringer clearly took the benefit of his actions.</p> <p>For non commercial scale infringements, only nominal damages awarded.</p>		
<p>Czech Republic</p>	<p>No general limitations on the availability of damages. However, copyright infringements must qualify at least for <i>negligence</i> in order to claim damages (this does not apply to industrial rights violations).</p> <p>Court also can make a reasonable reduction in damages compensation for reasons that merit special consideration. Courts should take into consideration in particular the circumstances under which the damage occurred, as well as the personal and material situation of the individual who caused the damage.</p>	<p>Yes, in some cases. Copyright owners may claim for their actual lost profit (which is, however, usually difficult to calculate and/or prove). Industrial rights owners may recover lost profits of a sort under the rules regarding lump sum damages described below, although no particular rules regarding lost profits for industrial property rights have been specified.</p> <p>The courts in practice often do not determine compensation for intellectual property rights owners on the basis of lost profits.</p>	<p>Yes.</p>

DAMAGES

	<p>The amount of damages may not be reduced if the damage was caused intentionally.</p>		
<p>Denmark</p>	<p>Damages are in general only available in case of infringements committed <i>intentionally</i> or through <i>neglectful</i> conduct.</p> <p>For unfair competition (imitations) - also for <i>good faith</i> infringements (<i>but so far not applied in case-law</i>).</p> <p>Apart from copyright (<i>where private copyright infringements are subject to damage claim</i>), IPR laws only apply to <i>commercial activities</i>. Private copyright infringements are subject to damage claims.</p> <p>Statutory limitation on the amount of damages which provides for (partial) relief in case the amount of damages awarded would be unreasonably burdensome on the infringer or in case of very exceptional circumstances. Main application of this provision in cases concerning private individuals who are being met with very substantial damages</p>	<p>Yes, in case of any kind of intentional or negligent infringement of all types of IPR and require proof of economic loss. The total amount of damages awarded may not exceed:</p> <p>(i) the total damages suffered or (ii) a reasonable royalty together with such damages that exceed such royalty claim.</p>	<p>Yes. Assessment based on a reasonable royalty in case of any kind of intentional or negligent infringement of all types of IPR. The amount is based upon an assessment of what the RO could have reasonably demanded. Damages based on reasonable royalty do not require proof of an actual economic loss.</p> <p>Damages are almost always awarded as lump sum damages.</p> <p>Double, multiple or pre-determined damages are not available under Danish law.</p>

DAMAGES

	claims.		
Estonia	<p>Reflecting the general law, most intellectual property violations require intentional or neglectful conduct in order for a right holder to be able to claim compensation of damages.</p> <p>The compensation of damages in case of <i>good faith</i> infringements is available regarding the utility models and patents. Other IP violations require for compensation of damages an intentional or neglectful conduct.</p> <p>No <i>commercial scale</i> requirement for claiming the compensation of damages in IP cases (except for layout-designs of integrated circuits).</p> <p>Limits on compensation: Limitation to foreseeable damage unless intention or gross negligence is established. Court may reduce the amount of damages if compensation in full would be grossly unfair with regard to the obligated person or not reasonably acceptable for any</p>	<p>Available for all types of IPR rights. But approach of the courts has not been consistent: some courts consider license fees (royalties) or product prices as RH's lost profit, some as unjustified enrichment etc. No Supreme court decisions on this issue yet. Many courts seem to accept common license fee or (retail) price of the product as their lost profits.</p>	<p>Could be used basically for all IPR rights. However, problems arising from diverging jurisprudence of the courts.</p> <p>In copyright law it is provided for an author and/or the owner of neighbouring rights to receive a remuneration/royalty for the use of works or object of neighbouring rights. In case the sum of royalty (license fee) has already been fixed and used in relevant market (e.g. by collective societies), the damages are calculated based on this. In case there is no such already fixed royalty (license fee), the right holder should explain and prove the amount of any possible royalty (no information about such claims in Estonia).</p>

DAMAGES

	other reason (e.g. relationship between the persons and their economic situations, including insurance coverage etc.).		
Finland	Damages available regardless of intention/negligence/no negligence. Compensation in all cases (comparable to license fee) and in addition actual damages in case of negligence/intention if damages can be proved. Full compensation principle (both for intentional/negligent acts). Adjustment of compensation possible for <i>slight</i> negligence.	May be relevant where the courts consider that the trademark owner suffers loss of profits when consumers buy the infringing product rather than the products of the trademark owner. The <i>estimated</i> lost profits of the infringed trademark owner are referred to as the basis for the claimed caused damages. The main bases of compensation are the decrease of sales and/or the decrease of the good-will value of the trademark.	Royalty Rates may be used. Since difficult to determine precise rates, the court may award estimated average royalty or the RO can provide average royalty based on the specific business area
France	Distinction has to be made depending of the type of counterfeiting acts at stake. In the case of an infringement by <i>producers, users of a process or importers</i> , damages will be available <i>without having to prove the good or bad faith</i> of the infringer. Because the state of mind of the infringer is irrelevant, it does not matter whether the infringement was intentional or	New law sets two categories of cumulative criteria of evaluation: (i) <i>Negative economic consequences</i> as well as, the <i>profits realised by the infringer</i> . RO's lost profits are considered within the negative economic consequences. (ii) Alternatively, the RO can ask the judge to grant them a <i>lump sum</i> payment.	Yes, lump sum shall not be less than the amount of royalties which would have been due (it is therefore easy to determine). The amount of damages can be higher than the amount required by a RH in the case of license agreement. As such, the legislator confirms the precedents set out by the Courts, which consisted in

DAMAGES

	<p>due to negligence.</p> <p>However, damages will not be granted automatically in cases where a <i>third person</i> is putting the invention on the market, using it in trade or simply detaining it. In such cases, ROs will only be granted damages if only they can prove that such acts were intended in bad faith.</p> <p>Design right, TMs: explicit irrelevance of good faith for the infringement (<i>As soon as a trademark is registered, an alleged infringer cannot argue of its good faith in order to avoid damages</i>).</p>	<p>Those methods are applied to all types of IPR and whether the infringement has been in good or bad faith.</p> <p>However, an exception exists in the case of patents, where an action made in good faith is not enough to constitute an infringement.</p>	<p>increasing the rate of royalties in order to assess the damages. This can be justified by the fact that <i>licence are not, in practice, freely granted</i>.</p>
Germany	<p>Bad faith or negligence is necessary. However, negligence is normally assumed.</p> <p>Commercial scale is also necessary, with the exemption of copyright law.</p>	<p>Yes. Double licence fee by jurisdiction in the case of :</p> <p>(i) Collecting music societies recovering damages for infringements of immaterial reproduction rights.</p> <p>(ii) Photographers that have not been named as creators.</p>	<p>Yes.</p>
Greece	<p>Damages only for intentional/neglectful infringements, including <i>good</i></p>	<p>Unless there is a quantification rule, the recovery of material damages is extremely difficult</p>	<p>In copyrights cases: double the amount of licenses.</p>

DAMAGES

	<p><i>faith</i> infringements.</p> <p>Damages are available for commercial scale infringements if there is a causal link between the infringement and the harm caused.</p> <p>No overall limitation on damages.</p>	<p>(impossible). RO lost profits is a recoverable damage. In trademark infringement and unfair competition cases, ROs lost profits are extremely difficult to substantiate.</p>	<p>Patent/ utility model/ industrial design cases: amount of legitimate licenses.</p>
Hungary	<p>Damages only awarded for intentional infringements.</p> <p>Limitation to commercial scale infringements.</p>	<p>Yes, RH must prove decrease of sales.</p>	<p>Yes, but only if RO has granted a license for product at stake. Lost royalties are awarded only in case of intentional infringement. RO must prove granting of a license for the territory where the infringement is alleged.</p>
Ireland	<p>The Irish Copyright and Related Rights Act, Industrial Designs Act and Patents Act include provisions dealing with an innocent infringer.</p> <p>If it is shown that at the time of the infringement the defendant <i>did not know</i> and <i>had no reason to believe</i> that copyright subsisted in the work to which the action relates, the plaintiff is <i>not entitled to damages</i> against the defendant.</p>	<p><i>General:</i> the aggrieved person shall be put in the same position where he would be without suffering the loss. In general, damages are usually calculated by reference to the notional reasonable licence fee, payable under an arm's-length licence agreement. If it is not possible to calculate damages on a loss of profit basis, then it should be possible to be compensated on a "notional royalty basis", i.e. the measure of damages payable will</p>	<p>Payment of reasonable royalty is not a remedy as such, but reference to a licence fee or reasonable royalty is accepted as a method of calculating damages in IPR infringement cases.</p>

DAMAGES

		<p>be the amount which the defendant would have paid by way of royalty to act legally instead of acting illegally.¹</p> <p><i>Copyright and Patent:</i> In case <i>Retail Systems Technology Limited v PJ McGuire et.al</i> [2007] IEHC 13 2 February 2007 the court measured <i>copyright damages</i> by applying <i>the same principles as in evaluating damages in patent infringement cases</i>. The judge took the following approach: every infringing sale by the defendant is a separate infringement of the plaintiff's rights. In respect of those sales which resulted in sales lost to the plaintiff, the measure of damages is the profit on those sales lost by the plaintiff. Furthermore, in respect of those sales which do not directly represent lost sales to the plaintiff, there is still an infringement of the plaintiff's copyright and it is necessary to determine an appropriate measure of damages in respect of those sales.</p>	
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¹ In *Smith, Kline & French Laboratories v Doncaster Pharmaceuticals* [1989] FSB 401, damages were assessed on the basis of the difference between the price the infringer would have had to pay in order to lawfully import the products.

DAMAGES

		<p>It is accepted that the plaintiff will normally seek to obtain the amount by which the value of the copyright of the plaintiff has been diminished. This is often calculated by looking at the volume of sales made by the defendant of the pirated work by way of the unauthorized reproduction and sale. However, merely giving the plaintiff the defendant's profit may not compensate the plaintiff for lost volume of sales. This is particularly important and some cases hold that where the defendant's product undercuts the plaintiff's product, this should be reflected in the compensation award.²</p>	
<p>Italy</p>	<p>Damages are due only for <i>wilful or negligent</i> behaviour.</p> <p>For <i>registered IP rights: presumption of infringer's (as the registration system provides for publicity of third parties' rights).</i></p> <p>The <i>scale of the counterfeiting</i></p>	<p>RH either gets the infringer's profits or the RH's lost profits, whichever is the greater.</p> <p>The most relevant element in assessing the damages is the loss of <i>net profit</i> suffered by the RO. Lost sales and price erosion are sometimes taken into account</p>	<p>Yes. <i>Reasonable amount of royalty is minimum amount</i> of damages when <i>no other methods</i> for liquidating damages are available.</p> <p>This method is applied irrespectively from the availability of the IP rights for licence.</p>

²Polygram Records Inc v Raben Footware Pty. (1996) 35 IPR 426 at 444.

DAMAGES

	<p>does not impact on the criteria for liquidating damages.</p> <p>No overall limitation of damages.</p>	<p>within the <i>lost profit</i> criterion. The court may order expert accountancy evidence to assess the hypothetical situation of the market without the infringement.</p> <p>If requested by the RO the court may also grant lump-sum damages based on a rather discretionary assessment of the allegations of the case.</p>	<p>Amount of royalty: similar cases are considered, if any. Otherwise, average royalty paid by licensors to licensees in the relevant field.</p>
Latvia	<p>Damages available for every infringement, irrespective from intentional conduct or acting on a commercial scale. No limits set by the law on the award of losses. Liability for acts of god excluded.</p>	-	-
Lithuania	<p>Damages available only with intentional or neglectful conduct.</p> <p>No commercial scale limitation. If infringement not committed knowingly, recovery of profits may be ordered by the court at the request of the claimant.</p>	<p>Yes. The amount of lost profits is set by considering the profits that would have been made when legally using the works or other objects, taking into account royalties and fees.</p>	<p>May be part of the lost profits calculation.</p>
Luxembourg	<p>General principles of tort law apply. Plaintiff must prove that there has been an infringement of IP and that this infringement</p>	<p>Damages are assessed according to <i>ex aequo et bono</i> principle. Not very explicit/transparent explanations how damages have</p>	<p>Lump sum based on royalties serves as an alternative to RO's lost profits.</p>

DAMAGES

	<p>caused damage. Mere violation of IRP is considered to cause damage to RO.</p> <p>Damages available also for <i>good faith</i> infringements.</p> <p>Damages available even for non-commercial scale infringements. No overall limitation of damages.</p>	<p>been calculated. Courts take into consideration negative economic consequences of the infringement. ROs lost profits are the main negative economic consequences taken into account by the court. This is used for all IPRs and all types of infringements.</p>	
<p>Malta</p>	<p>General principles of tort law apply (conditions: Unlawful act, damage causal link between act and damage and intent or culpable negligence).</p> <p>However, it is deemed that in IPR cases the commission of an infringement suffices, no further proof of intent is needed. Lack of case law on this issue.</p> <p>According to special IPR legislation: Damages cannot be claimed when the alleged infringer was not reasonably expected to know that he engaged in illegal activity. If infringer engaged in an illegal activity not knowingly, the court may order recovery of profits or the payment</p>	<p>All the negative economic consequences that may have been suffered by the injured party, including lost profits..</p>	<p>Law allows it, but not yet a developed branch of compensable damage.</p>

DAMAGES

	<p>of damages. Specificity in copyright cases: no restitution of profits if the infringer was not aware and could not reasonably be expected to be aware. Still, damages can be claimed under the more general provisions of law.</p> <p>Damages are available also for non commercial scale infringements.</p> <p>Limitations on damages: formally none. However, courts rarely award more than 500 000 EUR.</p>		
<p>Netherlands</p>	<p>Damages available if the infringer knew or could reasonably have been expected to know that he was engaged in infringing activity.</p> <p>Regarding TMs and designs damages cannot be claimed for non-commercial scale infringements. Different in copyright cases; reproduction/publication without the consent of the author is already sufficient for obtaining compensation. In any case, the court will assess the commercial</p>	<p>According to general compensation rules, compensation claims for lost profits can be made for all IP rights.</p> <p>When assessing damages, the court will always weigh up the interests of the entitled party to obtain compensation for lost profits and the interests of the infringer.</p>	<p>Yes, is used. In addition, for trademark owners and design owners if the court decides on a fixed amount as compensation, the amount must be <i>at least</i> equal to the amount that was due as royalties or payments if the infringer had applied for permission to use the trademark or the design.</p>

DAMAGES

	<p>aspect and interests of the infringer and the owner of the copyright when awarding the damages.</p> <p>No general limit as to the compensation. Loss must be fully compensated but it must be substantiated by evidence.</p>		
Poland	<p>Compensation for damages according to general civil law rules (infringement, damages, causal link between the two and guilt).</p> <p>Compensation also for non-commercial scale infringements.</p> <p>No general limitations to award of damages. However, possible according to special provisions.</p>	Yes, lost profits (<i>lucrum cessans</i>) together with the “actual loss incurred” (<i>damnum emergens</i>) are awarded.	Yes, <i>equitable</i> remuneration can be awarded alternatively to compensating RO’s damage, both under the industrial property rights and copyrights regime. For copyright infringements RO may even demand double or triple such amount.
Portugal	<p>Damages only awarded for intentional or neglectful conduct for IP infringements.</p> <p>No commercial scale requirement. No overall limitations on damages awarded.</p>	Yes.	Yes. Court takes the sum of an ordinary authorization for that type of infringement as a reference size.
Romania	General conditions for awarding	Yes, such damages are granted	Yes, this is used for assessing and

DAMAGES

	<p>damages in civil IPR cases: Infringing act, damage, causal link between act and damage, guilt.</p> <p>Civil liability arises for the least guilt; if civil damages claim is added to a criminal trial (happens frequently in Romanian practice), intentional infringement necessary.</p> <p>For industrial property rights, damages awarded only for intentionally committed acts (probably due to a mistake in the transposition of IPRED by national legislator). However, general liability rules still apply.</p> <p>For <i>copyright and related rights</i>, the law does not make a difference between infringements committed intentionally and infringements committed unintentionally.</p> <p>Damages are not available in cases of <i>good faith</i> infringement, but only for infringements committed intentionally or by fault (negligence or simple fault).</p>	<p>according to the general provisions and especially for industrial property rights and copyright and related rights.</p>	<p>granting damages, as an alternative to the actual damages calculated based on criteria set forth by the law (i.e. economic consequences and moral prejudice). For copyright and related rights, the law clearly states that such royalties are to be considered <i>only</i> if i.e. economic consequences and moral prejudice cannot be applied.</p>
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DAMAGES

	<p>Damages are available even for non-commercial scale infringements.</p> <p>No overall limitation on the damages assessed.</p>		
Slovakia	<p>Statutory (general) conditions for claiming damages are the following: material prejudice, <i>infringing</i> activity, damage, causal link between the infringing activity and the damage. From the perspective of right to be compensated for damages it is irrelevant whether the damage was caused intentionally or negligently or without knowledge. In case such damage arose as a result of an act by which a lot greater damage was prevented, such act is not considered as infringing act.</p> <p>Damages can be claimed for an <i>infringement</i> of IPR but also in case there is a <i>threat of infringement</i>.</p> <p>There is no distinction between <i>commercial</i> and <i>non-commercial</i> damage, only between <i>material</i></p>	<p>Yes, what is compensated is the actual prejudice and probable lost profits.</p>	<p>Yes, in case the damage cannot be calculated otherwise, since it is often extremely difficult to provide for calculations of material damage, the damage can be also calculated on the basis of fees from a licensing agreement.</p>

DAMAGES

	<p>and <i>moral</i> damage.</p> <p>No general limitation on the maximum amount of damages.</p>		
Slovenia	<p>Damages only awarded for intentional or neglectful conduct. No explicit requirement for a commercial scale, but in certain cases non-commercial use does not constitute an infringement.</p> <p>For the reward of damages in patents cases; breach on a commercial scale necessary.</p>	<p>Yes, amount is determined on the basis of estimation of the profit that could justifiably have been expected. Exact calculation procedure and criteria for assessment are not clearly specified. Usually, amount of lost profits is determined by experts appointed by the court.</p> <p>The assumption of profits the RO could have made is based on fictitious speculations. Not so for the restitution of the profits made by infringer; here the RO has to establish the mostly difficult proof that he would have achieved the same commercial results as the infringer.</p>	<p>Yes, the amount is calculated according to the <i>license analogy principle</i>: The value of the license is determined on rates, which are customary in license agreements for a similar product and similar use.</p>
Spain	<p>Time limit to file a proceeding is five years from the actual infringement.</p> <p>Unfair Competition Law restricts the possibility to exercise any civil action - One year from the</p>	<p>For trademarks, RO can choose on the compensation; the first choice is RO's losses, second is royalties.</p> <p>As for patents, and designs, foresees the very same two sets of</p>	<p>Yes, RO can choose damages based on the amount of royalty.</p> <p>In TM and patents: the royalty includes what the infringer would have had to pay to the RO for using the trademark or the patent</p>

DAMAGES

	<p>moment the RO was aware of the unlawful action or, in any case, 3 years from the moment when the infraction took place.</p>	<p>criteria.</p>	<p>lawfully.</p> <p>In Patents Law special criteria for the assessment: the economic importance of the filed invention, the time the patent right has been exercised when the infraction occurred and the number and classes of royalties.</p> <p>The reasonable royalty can <i>never</i> be the <i>average royalty</i> in a particular sector. The reasonable royalty must include a <i>penalty</i> for the use of an exclusive right without being authorized.</p> <p>Trademarks Law and Industrial Design: RO can claim a compensation of 1% of the infringer's total business amount, with no need to bring any evidence to the court.</p> <p>The compensation can be higher if the RO can proof that the overall damage is higher.</p>
<p>Sweden</p>	<p>For industrial property rights damages are only available in the case of <i>intentional</i> infringement or <i>negligent</i> conduct and only for</p>	<p>Yes. In general, two main factors are taken into account for assessment of lost profits: number of unsold units and the RO's</p>	<p>Yes. If such royalty levels do not exist for the goods in question, an assumed royalty should be established.</p>

DAMAGES

	<p><i>commercial scale</i> activities.</p> <p>However, if <i>special reasons</i> exist also granted in cases of <i>good faith</i> infringements.</p> <p>For copyrights (comprised are private and commercial use) and topographies for semiconductor products, damages are available irrespective of whether the infringer has acted in good faith.</p> <p>There is no overall limitation on the damages assessed, although damages could not exceed the actual damages suffered.</p>	<p>contribution margin per unit.</p> <p>RO is seldom able to claim that the number of unsold products is equal to the number of products sold by the infringer, due to Examples in case law where the relationship is 1 to 3 between original products and infringing products have been accepted by the courts.</p> <p>Lost profits are available for all types of IP rights and are not limited to particular types of infringement.</p> <p>It is not clear whether lost profits should be seen as an <i>alternative</i> or as a <i>complement</i> to the reasonable royalty.</p> <p>Case law regarding patents infringements indicates that lost profits should be considered an <i>alternative</i>. However, for other IPR infringements case law indicates that lost profits should be considered a <i>complement</i>.</p>	<p>The court will in most cases assess a <i>reasonable compensation</i> calculated as a royalty based on the information and argumentation provided by the parties. Many times the ROs are reluctant to reveal the actual royalty level used in their license arrangement and therefore claim a royalty that they expect the courts to find reasonable.</p> <p>It is not clear whether the reasonable royalty should be seen as an alternative or as a complement to the lost profits.</p>
United Kingdom	Damages are based on tort remedies and are thus	Yes. Courts accept lost profits as a basis for measuring a RO's	Yes, particularly in cases where the RO exploits its IP rights

DAMAGES

	<p>compensatory (restore the RO to the position it would have been in if no infringement had occurred). They should <i>not be punitive</i> and <i>multiple recoveries</i> are generally not available (i.e. award of damages <i>besides</i> account of profits or overlapping awards of damages to both a RO and its exclusive licensee). Except for the case of <i>additional damages</i> rewards, the RO is generally not put in a better position.</p> <p><i>Innocent infringements</i> for copyright and patent cases: preclude damages awards (but not injunctions). In copyright cases, however, its application is limited and rarely succeeds. In proceedings for infringement of a <i>patent</i> damages shall not be awarded, and no order shall be made for an account of profits, against a defendant or defender who proves that at the date of the infringement he was not aware, and had no reasonable grounds for supposing, that the patent existed.</p>	<p>damages, in particular where the RO is a manufacturer and the infringer's activities have resulted in lost sales.</p>	<p>through licensing. Where it is difficult to measure lost profits or there is no established royalty rate, a court may determine a <i>notional royalty</i>, which may be essentially a legal fiction.</p>
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DAMAGES

COUNTRY	Calculation of Damages: Theories Actual prejudice (e.g. reputational damage, price declines), negative economic consequences, other factors (distinctiveness of TM, investment, actual lost sales vs. all infringing sales, breach of contract, parallel trade)?	Calculation of Damages: Theories Account of infringer's (unfair) profits/unjust enrichment/conversion damages	Calculation of Damages: Theories Moral prejudice to rights owner
Austria	The actual prejudice is only assessed in pecuniary terms. If the aspects mentioned above can be expressed in pecuniary terms, e.g. by an expert's opinion, it could be granted. Difficult to proof such prejudice.	The surrender of unfair profits is applicable for many, but not all kinds of infringement.	Compensation for moral prejudice may be granted, but has been restricted by the judiciary for cases where the prejudice exceeds the inconvenience caused by every single infringement.
Belgium	<p>Infringing activities often lead to a depreciation of value of the work protected by an IPR. This depreciation is different from the strict moral prejudice and is often referred to as the <i>damnum emergens</i>.</p> <p>In TM cases, the dilution of the trademark is often taken into consideration in the evaluation of the prejudice. In copyright and</p>	The possibility for the judge to order the transfer of the profits made by the infringer exists but may only be ordered subject to evidence of the defendant's <i>bad faith</i> and <i>in appropriate cases</i> . In trademark matters, <i>net profit</i> must be calculated by deducting from the sales prices the purchase cost and the taxes and other costs directly linked to the products. General expenses cannot be	Any IPR holder may potentially suffer a prejudice due to, e.g., the injury to his reputation. This prejudice should be distinguished from the prejudice strictly resulting from the infringement, even though it is linked to it. Because the damages resulting from such prejudice are difficult to assess, in most cases the courts will award lump sum damages. In copyright matters, the RH is

DAMAGES

	<p>design cases, the <i>damnum emergens</i> also forms part of the prejudice. Similarly, in patent cases, harm to the patentee's monopoly is often highlighted by the courts.</p> <p>In respect of all IP rights, the courts have occasionally decided that the costs aimed at the detection and the monitoring of infringing activities are part of the prejudice suffered by the RH and must be taken in consideration when assessing the prejudice resulting from the infringement.</p>	<p>deducted from the sales prices. Transfer of profits is generally awarded in those cases where the profits are higher than the allocated damages (typically for the RH's lost profits). In trademark and design matters, the transfer of profits may be ordered in addition to the grant of damages for e.g. lost profits.</p>	<p>entitled to compensation for infringement of his moral rights but, for a long time the damages awarded were limited to symbolic damages (typically €1). Tariffs set forth by the collecting societies often offer a good indication of the damages that could be granted.</p>
Bulgaria	-	Lost profits should also include infringer's income from the infringement.	Yes. The court sets the amount for an equitable compensation.
Cyprus	Yes, other factors taken into account; however, not easy to prove.	Specific provisions in Copyright Law. For other IPRs provisions in Common Law.	Granted according to general damage section, but very difficult to quantify and prove.
Czech Republic	All relevant circumstances can be taken into consideration in evaluating the damage incurred by the rights holder. Any damage which is deemed material can in principle be compensated under the damages system.	<p>Yes, RHs can demand surrender of unjust enrichment. For copyright, the amount of unjust enrichment is a minimum of <i>double</i> the licenses.</p> <p>Similarly, for industrial rights a court can require an infringer to</p>	<p>Yes. RHs may require payment of <i>appropriate satisfaction</i> for non-material damage incurred.</p> <p><i>Copyright owners</i> can claim: (a) an <i>apology</i>, and (b) <i>payment of a financial amount</i>, where a different kind of satisfaction</p>

DAMAGES

		<p>surrender unjust enrichment in a lump sum amount of a minimum of <i>double</i> the usual royalties.</p> <p>If the infringer at the time of the unauthorised use did not know/could not have known that he infringed such a right, the court can reduce an award for unjust enrichment to a minimum of the fees that would have had to be paid.</p>	<p>would be inadequate. The amount of any financial satisfaction is determined by the court.</p> <p>For <i>industrial property rights</i> the same rules apply to moral prejudice as to unjust enrichment. Courts can award appropriate satisfaction in a lump sum amount of a minimum of <i>double</i> the usual fees.</p> <p>The remedy of appropriate satisfaction is available only to the original RH (i.e. natural person).</p>
<p>Denmark</p>	<p>Damages claims may comprise claims relating to <i>disruption of the market</i> (they require proof of economic loss and can be very difficult for the RO to establish). Such damages are based on a capitalised future loss and are usually based upon an estimation of the damages caused to the image and goodwill of the RO, the damages caused to the <i>distinctiveness</i> of the RO's TMs, <i>general price declines</i> caused by the infringing product being put on the market and <i>certain losses of a more internal nature</i>.</p>	<p>Yes.</p>	<p>Yes.</p>

DAMAGES

<p>Estonia</p>	<p>Although these factors may affect the sum of damages, they have rarely been used in practice. Mainly due to the fact that proving such damages is rather difficult and the courts usually require the plaintiff to present strong and undisputable evidence on actual damages.</p>	<p>This provision has been used by many courts when awarding the RH a compensation for the IP infringement. In practice, this amount is calculated based on relevant license fee or (retail) price of the product that was in unlicensed use. According to the law, the infringer shall inform the entitled person of the nature of revenue received by the violation and RH may demand that the infringer transfers all revenue made by the infringing act on the RH. However, no information that such claim was submitted to any Estonian court.</p>	<p>Clearly mentioned in case of copyright infringements and TM infringements. Although other IP laws don't separately mention moral damages, they may be claimed on the basis of <i>Law of Obligations Act</i>.</p> <p>The main question is whether the legal entity as a RH could make a claim for moral damages. According to the Law, moral damages involve primarily physical and emotional distress and suffering caused to the aggrieved person. These are common to a physical person, not to a legal entity (no information that in Estonian court practice a legal entity has made a claim for compensation of moral damages).</p> <p>Estonian court practice: the amounts of moral damage awarded by courts to private person RHs (mainly authors) have been extremely low.</p>
<p>Finland</p>	<p><i>Investments</i> by TM owner not normally taken into consideration.</p> <p>Damages to <i>reputation/good-will</i></p>	<p>Are taken into consideration when clear evidence that sales were made with infringing products (even in good faith</p>	<p>For intentional/negligent infringements</p>

DAMAGES

	<p>may not become evident until a later period (future losses can be compensated if substantiated by a reliable method).</p> <p>Contractual obligations have no direct effect on rulings.</p> <p>Parallel imports treated identically as TM infringements.</p>	infringements).	
France	<p>The <i>negative economic consequences</i> should be read as being comprised of a patrimonial and moral prejudice:</p> <p><i>Material prejudice</i>: composed by the RO's lost profits and the undergone loss.</p> <p><i>Moral prejudice</i>: done in a subjective way.</p>	Negative economic consequences are not enough per se in the assessing the prejudice caused by an infringement. Indeed, the account of the infringer's profit will also be taken into consideration.	Yes.
Germany	Yes, costs necessary to research and prosecute (outside court).	Yes.	Authors, authors of scientific editions. Photographers and performing artists can additionally claim damages that are not economic damages, if this is reasonable.
Greece	No general factors (such as reputational damage, price	Is considered when assessing the amount of moral damages to be	Moral prejudice is awarded in all IPR infringement cases.

DAMAGES

	declines, investment, etc.) are taken into account in the assessment of actual prejudice. Damage should be substantiated on the basis of specific and objective evidence of actual prejudice.	awarded.	For TM/distinctive sign infringement cases, this is the only way of compensation one can hope for.
Hungary	<p>Immaterial damages can be awarded under general civil law. However, for IP infringements they are not granted in practice.</p> <p>Commercial scale requirement of the infringement.</p> <p>No overall limitation on the damages assessed.</p>	<p>TM Act provides for reimbursement of the amount acquired by the infringing activity. Similar provisions in Patent Act, Utility Model Act, Design Act and Copyright Act.</p> <p>Objective liability of the infringer, irrespective to intentional or neglectful conduct.</p>	Under the civil code damages can theoretically be awarded. However highly difficult to prove such damage in IPR cases. Since the implementation of the EIPR no RO has succeeded with such claim.
Ireland	<p><i>General:</i> The courts are allowed to consider all aspects of the case.</p> <p>For copyright: the award made is a matter usually for the court's judgment and discretion: "The court may, in an action for infringement of copyright award such damages as, having regard to all the circumstances of the case, it considers just" (Section 128(1) Copyright and Related Rights Act</p>	An account of profit is available as an alternative to actual damages.	-

DAMAGES

	2000).		
Italy	<p>Compensation for any further damage, such as expenses incurred for responding to the infringement or damage to image may also be added to the amount. Legal theory and case law state that if the infringement has triggered the impairment of the reputation in the IP right (in particular: trademarks and design), additional damages should be paid to the owner. In particular in TM infringement cases both dilution and impairment of reputation are relevant forms of prejudice for this purpose.</p> <p>Damage caused to the RH's image is often calculated as a <i>fraction</i> of the advertising expenses or the cost of an advertising campaign to mitigate the negative impact of the infringement in the public.</p>	<p>RH may receive a sum which corresponds either to the infringer's profits or the RH's lost profits; whichever is greater.</p> <p>Current regime allows the RH to properly select the most favourable criterion amongst these options.</p>	<p>Since wilful infringement also amounts to a criminal conduct, moral damages may be assessed by the Court, if requested by the RO.</p>
Latvia	No legal provision or court decision on that issue, yet.	Yes. It is subject to the discretion of the court, limited by proportionality. No court decisions, yet.	Yes, for all IPR infringements. The amount of compensation is determined by the courts in the form of a lump sum <i>ex aequo et bono</i> .

DAMAGES

<p>Lithuania</p>	<p>IPR laws recognize the grounds of <i>actual prejudice</i> and <i>negative economic consequences</i> and the court must take into account all relevant factors including the strength of a TM, investments etc.</p> <p>In addition to direct damages and lost profits, damages shall comprise reasonable costs that the claimant has incurred to:</p> <ul style="list-style-type: none"> (i) Prevent or mitigate damage; (ii) Assess civil liability and damage; and (iii) in the process of recovering damages via any extrajudicial procedure. 	<p>Only for authors and performers.</p>	<p>Alternative to damages, when it is difficult to establish precise amount of damages.</p>
<p>Luxembourg</p>	<p>When assessing damages suffered by RO, jurisdictions take into account the negative economic consequences in general.</p> <p>The latter mainly include RO's lost profits and profits unduly made by the infringer. Courts will take into consideration also reputational damage, price declines, moral prejudice of the RO, relationship between the RO and the infringer etc.</p>	<p>Only when the infringer acted in <i>bad faith</i>. May be used in addition to the actual prejudice or as an alternative.</p>	<p>Moral prejudice is one of the factors under the actual prejudice.</p>

DAMAGES

	It applies for all types of IPRs and all types of infringements.		
Malta	<p>Yes, according to newly introduced legal provision <i>all the negative economic consequences that may have been suffered by the injured party including lost profits, as well as any unfair profits made by the infringer and (at the discretion of the Court where it deems so appropriate) other elements such as the moral prejudice caused to the RH by the infringement</i> must be considered.</p> <p>However, law is too recent and has not been given judicial interpretation.</p>	<p>Yes. RO may request that the infringing articles still in the possession of the defendant be delivered to the plaintiff. The situation regarding unjust enrichment is uncertain.</p>	<p>Yes, but only <i>where the court deems appropriate</i>.</p> <p>Even if it's legally possible, only very few instances where moral damages have been taken into account when liquidating damages.</p> <p>In IPR cases it still remains to be seen whether the courts will take a conservative or liberal approach in respect of moral damages.</p>
Netherlands	<p>All losses which have sufficient causal links with the infringement will qualify for compensation. Factors that play a role include the actual loss incurred, the actual visible damage and the degree of awareness or deliberate intent of the infringement.</p>	<p>The demand for unfair profits may be made in addition to the claim for damages. However, it is not automatically that the court will award the claim for damages and the demand for unfair profits.</p> <p>Case law: Supreme court stated that it cannot grant a cumulative award of the surrender of profit and compensation for damages consisting of license fees. Lower</p>	<p>The court may take account of the moral prejudice that the RO has suffered because of the infringement. Courts however grant this with caution: it looks at whether the infringer's behavior was intentional, and whether he wanted to cause harm to the RO.</p>

DAMAGES

		courts have, however, taken slightly different approach.	
Poland	In general, no; unless they are part of <i>lost profits</i> .	Yes, according to IP Act and Copyright Act.	No pecuniary claims. However, under Industrial Property Act and Copyright Act parts of the judgement can be published.
Portugal	These factors are taken into account in the calculation of <i>lost profits</i> .	Yes, according to Civil Code the reimbursement of all unjust economic benefits acquired at the expenses of other people's legal rights is granted, without a valid excuse.	Yes, it is assessed based on the claimant's reputation and the distinctiveness of the concerned IP right.
Romania	Apart from the profit loss incurred by the injured party and the benefits unfairly made by the infringer, the law does not expressly provide for other specific such negative economic consequences, but does not exclude them either.	Yes, both in industrial property rights and copyrights and related rights.	Yes, both in industrial property rights and copyrights and related rights.
Slovakia	Moral damages (e.g. damage on good-will, TM's dilution, damage on TM's good-will)-compensation will depend on the court's discretion.	In case there is a causal link between the IP infringement and infringer's profit (unjust enrichment), it is not excluded that the court will decide on the damages in the amount of such	The amount of moral damage depends on the assessment of the court, since it cannot be objectively calculated or proved. It can be in the form of a written apology, publication in the press

DAMAGES

	<p>Negative economic consequences: (e.g. meaningless investments, lost profits from the sale) will be assessed as material damage.</p> <p>The court can take into consideration any proved facts which directly or indirectly influence the amount and type of damage.</p>	unjust enrichment.	<p>but also in monetary terms, according to court's assessment. Moral damages have compensatory function, but also a function of a civil sanction, aim of which is to punish the infringer, but not to completely destroy him. It also has a preventative character.</p>
Slovenia	<p>Monetary compensation for defamation of reputation or good name, independent of material damage.</p> <p>No specific provision that would provide basis for awarding compensation for <i>negative economic consequences</i> in general, but they are taken into consideration when determining the amount of material damage, especially lost profit.</p>	Person who became enriched to the detriment of another shall return that which was received if possible, otherwise compensate the value of the benefit achieved.	Even if no material damages have been suffered, the court shall award author/performer equitable monetary satisfaction for mental distress suffered.
Spain	<p>TMs, patents, designs: RO can also claim a compensation for the reputational damage.</p> <p>As for assessing the reputational damage to the trademark or to the design, consideration can be given to the circumstances of the</p>		<p>TMs, patents, copyright: foreseen compensation of moral damages even if there is no evidence of the economic damage.</p> <p>Designs: includes a compensation for a moral prejudice to the RO.</p>

DAMAGES

	<p>infracation –particularly, its severity- and the degree of spread reached by the counterfeited products in the market and for TMs the notorious or well-known or prestigious character of the TM.</p>		
Sweden	<p>The direct effect of the infringing activity on the RO's profitability and the price erosion have been considered by the Swedish courts.</p>	<p>It is also possible to calculate lost profits on the infringer's profit. RO's damages may in these cases be estimated to a sum equal to the infringer's profit.</p>	<p>Yes, although so far case law is <i>limited to copyright cases</i> since this kind of damages was not acknowledged in Sweden until the implementation of IPRED on 1 April 2009.</p> <p>Swedish courts tend to admit goodwill damages, however the amount of damages <i>is very low</i> and should from a practical point of view therefore only be regarded as a recognition of the same.</p>
United Kingdom	<p>The RO may claim damages for any other prejudice actually suffered as long as the injury suffered can be proved, incl. e.g. injured reputation. The fact that a particular assessment is difficult is not a reason for refusing to attempt it. The victim may claim damages not only for <i>primary acts</i> of infringement but also for</p>	<p>Yes, as an alternative to damages. Account of an infringer's profits is available as an alternative, not in addition to, damages for IP infringement.</p>	<p>Yes, current law provides specifically that any appropriate non-economic factors, including <i>moral prejudice</i> shall be taken into account in awarding damages. It was not the case before the transposition of IPRED into the national law. It is not yet clear how the courts will apply such a rule.</p>

DAMAGES

	<p><i>secondary acts</i>, which include preparatory, contributory or consequential activities. It is necessary to establish the factual basis of such claims of secondary loss, for example, it must be demonstrated that the secondary loss is both caused by and a foreseeable consequence of the infringement.</p>		<p><i>Moral rights</i> are specific rights of the author under copyright legislation and are enforceable without proof of damage. Damages for breach of moral rights can be awarded, however, subject to proof of facts common to other IP or tort damages assessments.</p>
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DAMAGES

COUNTRY	Calculation of Damages: Theories Double/multiple/pre-determined/lump sum damages	Calculation of Damages: Theories Additional/exemplary/aggravated damages	Calculation of Damages: Theories Punitive damages
Austria	In cases of culpable infringement the RH is entitled to a lump sum damage in the amount of double the reasonable royalty even if no real damage can be proven.	Not applicable.	Not applicable.
Belgium	Royalty-collecting organisations have set fees that apply to breaches of copyright: for instance, according to the SOFAM's fees, reproduction without the RH's prior consent engenders compensation of 200% of the basic fee, unauthorised reproduction of a work with a fake signature, the indemnity amounts to 300% of the basic fee. These fees are frequently used in the difficult process of evaluating the prejudice resulting from moral right infringements in copyright matters. However, they would be considered unreasonable by the Supreme Court if they exceed the amount of the real prejudice suffered by the RO (see 'Punitive		Not allowed under Belgian law. However, fees charged by the collecting societies (which are often used by the courts) could be considered as punitive as they may sometimes exceed the amount of the real prejudice suffered. The possibility for the courts to apply "punitive" tariffs when assessing the prejudice has been recently debated before the Belgian Supreme Court, which decided that neither the fight against counterfeiting activities nor the dissuasive effect attached to punitive damages may justify the grant of damages which exceed the real prejudice suffered by the right holder. The possibility of cumulating a claim

DAMAGES

	damages).		for damages as a compensation for the real prejudice incurred, and a claim for the transfer of profits, is normally prohibited, except in trademark and design matters. Some authors consider this distinction as being contrary to the non-discrimination principle (Articles 10-11 of the Constitution).
Bulgaria	No.	No.	No punitive damages.
Cyprus	No double or triple damages. Pre determined lump sum damages not provided by law, unless they are contractually a genuine pre-estimate of the loss, they may be held to be invalid as being a penalty.	Yes; under Common law and Equity principles, as well as the Copyright Act.	No.
Czech Republic	Yes. Double licence-fee awards are available measures of unjust enrichment for copyright and industrial rights infringements. For industrial rights the same double licence-fee rules apply to damages as well as unjust enrichment awards.	No.	No.
Denmark	Damages almost always awarded as a <i>lump sum</i> . Double, multiple,	No.	No.

DAMAGES

	<p>pre-determined damages do not exist.</p> <p>In some copyright cases ROs have succeeded to get 100 % lump sum plus 100 % damages on top.</p>		
Estonia	Not available.	Not available.	Not available.
Finland	Contractual penalties may be awarded on top of damages	-	No.
France	-	<p>Recall of counterfeit products; Destruction or seizure of the counterfeit goods;</p> <p>Publication of the sentence in its entirety or in parts in newspapers or on the internet.</p> <p>All these measures are pronounced at the cost of the infringer.</p>	-
Germany	In principle: No. Exception for collecting music societies recovering damages for infringements of public performance rights. Some courts also grant double license fee in case of copyright infringement	Market confusion damages are disputed. German Federal Court of Justice denies such damages in principle. ³ .	No.

³ BGH GRUR 2000, 226, 227 – *Planungsmappe*.

DAMAGES

	plus a breach of the author's right to be named: precisely speaking this is twice a single license fee for two different infringements.		
Greece	<i>Copyright cases:</i> double damages. <i>Patent/utility model/industrial design cases:</i> lump sum which corresponds to the loss of profits/benefits derived from the unfair exploitation.	None.	Yes, in case infringer breaches any of the terms of the decision in the future.
Hungary	Yes, if other types of damages cannot be calculated.	No.	No.
Ireland	Not available.	An account of profit is available as an alternative to actual damages.	Generally no, but an account of profit is available as an alternative to actual damages.
Italy	<i>Account of infringer's profits</i> is considered a form of deterrence. RO may ask for net profits made by the infringer even if the amount exceeds his lost profits, and even when evidence of the amount of its lost profits has not been collected.	Infringer's profits may be transferred even if it's more than the damage.	Infringer's profits may be transferred even if it's more than the damage.
Latvia	No.	No.	No.

DAMAGES

<p>Lithuania</p>	<p>When the infringer acts intentionally or with gross negligence and when the claimant opts for royalty-based damages, he can get twice the amount of royalties.</p> <p>In copyright law the claimant may request a form of compensation equivalent to a pre-determined sum as an alternative to damages. This is especially the case when it is difficult to establish the precise amount of damages incurred. The compensation amount limits are stated by law.</p>	<p>No.</p>	<p>-</p>
<p>Luxembourg</p>	<p>No double, multiple or pre-determined damages, only the 'actual prejudice'. However, lump sum can be granted as an estimation 'in equity' of the 'actual prejudice'.</p>	<p>In cases of bad faith profits following the infringements may be ordered to be transferred in addition to the actual prejudice. Such measure is available for all IPRs.</p>	<p>In principle punitive damages don't exist with one exception: in cases of bad faith court can order additional/aggravated damages.</p>
<p>Malta</p>	<p>Only lump sum damages.</p>	<p>In cases of flagrant infringements of copyright the court may award additional damages.</p>	<p>No.</p>
<p>Netherlands</p>	<p>No more than the full amount of damages should be compensated. Therefore <i>no double damages</i>.</p> <p>For all IP rights, in appropriate</p>	<p>See above, 'Account of infringer's unjust enrichment'.</p>	<p>See above, 'Account of infringer's unjust enrichment'.</p>

DAMAGES

	cases the court may award a <i>lump sum</i> in damages..		
Poland	Under the Copyright act there is the possibility to claim for double, or in the event of culpable infringement even triple, equitable remuneration, as an alternative form of compensation for damages	Under the Copyright Act the RO can demand from the court to impose the payment of <i>an appropriate amount, not less than double the probable advantages received by the infringer</i> to the Creativity Promotion Fund, if the infringement occurred within the scope of business activity.	The damage claims under the Copyright Act, as described before, can be regarded as being punitive.
Portugal	Yes. Possible to set damages as a lump sum on the basis of the amount of royalties or fees which would have been due in case of authorisation to use the concerned IP right.	In cases of repeated default or serious offences, the court may establish the indemnity, considering some or all criteria aggravating the amount due as indemnity.	Not applicable.
Romania	<i>Industrial property rights:</i> the courts may set the damages as a <i>lump sum</i> , on the basis of elements such as at least the amount of royalties. When the infringer acted <i>intentionally</i> , the court may order the <i>recovery</i> of profits or the <i>payment</i> of damages, which may be pre-established. <i>Copyright/related rights: triple</i>	No.	No such damages in the Romanian legislation without a contract.

DAMAGES

	<i>damages</i> principle; damages representing three times the value of the fees which would have been legally due (if i.e. negative economic consequences and moral damages cannot be applied).		
Slovakia	No.	No.	No.
Slovenia	-	-	For <i>copyright</i> infringement which was committed intentionally punitive damages up to 200% of the royalties (regardless if any monetary damages actually occurred).
Spain	-	-	-
Sweden	No.	No.	No.
United Kingdom	Not available.	<p><i>Additional</i> damages are available, but only for <i>copyright</i> and <i>designs</i> infringement.</p> <p>As a rule, exemplary, aggravated, conversion or other damages that are deemed to punish the claimant for wrongful conduct are not allowed, but the <i>additional damages</i> provisions for copyright and design rights do reflect exceptions to this rule.</p>	No. Damages are compensatory rather than punitive and that the aim is to return the claimant to the original position as if the tort had not occurred.

DAMAGES

		<p>Current legislative proposal: to change <i>additional</i> to <i>aggravated and restitutionary</i> damages. It is not clear whether and how such a change would affect damages awards.</p> <p>The IPRED Statutory Instrument: makes clear that all relevant factors should be taken into account in determining damages, but only for determining the <i>actual prejudice</i> suffered. <i>This legislation did not take up the IPRED's options for lump-sum or pre-established damages.</i></p>	
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DAMAGES

COUNTRY	Calculation of Damages: Theories Other legal theories or measurements of damages	When the Courts are requested to compensate the rights owner for the <i>actual prejudice</i> he has suffered, are they entitled to award e.g. lump sum damages if they consider this more appropriate? Are the Courts precluded from awarding lump sum damages when the rights owner has not explicitly claimed them?	Are damages awards lower if the infringer did not know or have reasonable grounds to know he was engaged in infringing activity?
Austria	No.	Courts bound to formal requests of RO. If no actual prejudice can be established, RO has to request a lump sum	The amount of damages does not depend on the knowledge of the infringement, but on faulty conduct of the infringer.
Belgium	Possibility for the RH to request the transfer of the ownership of the infringing goods (e.g. in cases of parallel imports). <i>In appropriate cases</i> , the RH may also obtain the transfer of the ownership of the materials and implements having primarily served in the creation or the manufacturing of the goods but has not been frequently applied in practice. The above measures are not subject to evidence of the	Several specific provisions expressly provide the courts with the right to award lump-sum damages. All prejudices should in principle be repaired <i>in natura</i> . The grant of damages is only permitted when such reparation <i>in natura</i> is not possible. It is only when the real prejudice suffered cannot be calculated that the courts may award lump sum damages. When any of the parties provided the court with evidence	The mere infringement of an intellectual property right constitutes a tort, infringer's good faith does not pre-empt the right to compensation. However, the bad faith of the infringer may have an impact on the awarded damages. In case of bad faith, transfer of any profits and confiscation of the infringing goods and materials/tools primarily used in the creation or

DAMAGES

	infringer's bad faith. However, the value of the goods, materials and implements transferred may not exceed the extent of real prejudice suffered by the right holder	in view of the evaluation of the real prejudice, the courts must imperatively explain the reasons why they have chosen to rule out such an evaluation and, as the case may be, to grant a lump sum. However, most of the judgments handed down award lump-sum damages without further explanation.	<p>manufacture of the infringing products may be awarded. The confiscation may not constitute a punitive damage; the value of the confiscated items must be offset against the amount of the real prejudice incurred by the RH.</p> <p>In copyright cases since the implementation of IPRED, the Copyright and Neighbouring Rights Act no longer makes it compulsory for the courts to order the confiscation in the event of bad faith and therefore the courts will expectedly be less reluctant to admit the infringer's bad faith.</p>
Bulgaria	-	When actual prejudice is impossible to establish, the plaintiff may claim a lump sum, but that has to be specifically requested by the RO.	No. The form of guilt is not taken into consideration by the court when defining the amount of damages.
Cyprus	No.	Normally, covered by general damages if claimed.	No case law, however general damage can be claimed irrespective of intent.
Czech Republic	No.	Yes. However, RO has to claim lump sum damages or unjust enrichment explicitly.	Yes, they can be. In case of <i>copyright</i> , knowledge <i>generally makes no difference</i> to the damages calculation, but <i>in</i>

DAMAGES

			<p><i>principle</i> a court may take an infringer's knowledge into consideration in determining any reasonable reduction in compensation.</p> <p>In the case of <i>industrial rights</i>, damages, unjust enrichment and <i>appropriate satisfaction</i> awards are lower if the infringer at the time of unauthorised use did not know/could not have known that he violated the relevant right.</p>
Denmark	None.	Damages based on <i>actual prejudice/disruption of the market</i> are always awarded as a lump sum, as the actual <i>disruption</i> of the market is often impossible to prove. Lump sum may be awarded even if the RO hasn't claimed it.	Generally no legal basis for damages if infringer was acting in good faith.
Estonia	The Law of Obligations Act prescribes as direct patrimonial damage the reasonable expenses which have been incurred or will be incurred in the future due to the damage, including reasonable expenses relating to prevention or reduction of damage and receipt of compensation, including expenses relating to establishment	If the damage is established but the exact extent of the damage cannot be established (including in the event of non-patrimonial damage or future damage) the amount of compensation shall be determined by the court. The court may, if this is reasonable, determine compensation for the damage as a fixed amount, taking	The compensation of damages in cases of <i>good faith</i> infringements is available only regarding utility models and patents. In these cases the award of damages shall be limited to infringements that have taken place within the last five years before filing the claim.

DAMAGES

	of the damage and submission of claims relating to compensation for the damage.	<p>account, inter alia, the amount of fee the violator should have paid if he or she had obtained authorisation for the use of the relevant right.</p> <p>The courts are not bound with the claim of RH and can establish <i>lump sum damages</i> at their own initiative. This provision is applying to all proprietary disputes, if the parties disagree over the amount of the claim and a full verification of all the facts necessary for the establishment thereof involves unreasonable difficulties.</p>	
Finland	-	If the amount of damages is difficult to prove, the court will estimate the damages. <i>Lump sum</i> can be claimed on several grounds (lost profits, loss of goodwill etc.).	RO must be compensated (reasonable compensation) even in <i>good faith</i> infringements.
France	-	Courts can pronounce a lump sum payment only if it has been required by the RH.	No.
Germany	-	No. However, according to Civil Procedural Law certain discretion of courts to freely estimate	No difference between the different types of infringement in statutory law. Though, the Federal

DAMAGES

		minimum amount awarded, in case sufficient indications	Court of Justice left the question open, if after the implementation of the Enforcement-Directive the amount of damages would also depend on the level of negligence/bad faith of the infringer. ⁴
Greece	-	Lump sum damages are awarded for patent/utility model/industrial design and copyright infringements only. For other infringements they are not awarded, even if they are claimed.	If the infringer did not know (didn't have reasonable grounds to know) no compensation at all is awarded.
Hungary	No.	Yes, if claimed by RO and he additionally proves that other types of damages cannot be calculated.	No award of damages in this case, only the reimbursement of unjust profits.
Ireland	-	The courts may award a sum to their discretion.	Yes.
Italy	Infringer's profits may be transferred even if it's more than the incurred damage.	Yes, but only if he RO asks for it.	No, as damages may be awarded only for wilful/negligent behaviour.
Latvia	In the absence of actual practice, not possible to provide any	In the absence of actual practice, not possible to provide any	No <i>statutory</i> limitations on the grant of damages in case of good

⁴ BGH GRUR 2009, 856 note 54 – *Tripp-Trapp-Stuhl*.

DAMAGES

	clarification on this.	clarification on this.	faith (non-intentional) infringements.
Lithuania	-	The court can award only what the RO requests, it cannot grant a <i>lump sum</i> in case the RO asked for actual losses.	Awards are not automatically lower in these cases. The court may order recovery of profits received by the infringer.
Luxembourg	Ownership of infringing goods, materials and implements used for the manufacture of these goods can be ordered to be transferred to the plaintiff.	<i>Lump sum</i> damages may be awarded if <i>actual prejudice</i> cannot be calculated. Lump sum may be awarded even when the RO has not claimed it.	In principle, good faith does not lower the damages. However, practice of the courts is that in this case damages may be lower in such case. In some cases, account of infringer's profit is only available in bad-faith cases.
Malta	No.	The court may award <i>lump sum</i> damages where it so considers, it's an alternative method of calculation.	In case the infringer <i>did not know/didn't have reasonable grounds to know</i> damages would be lower, as they would be claimed on the basis of general tort law provisions. Only in cases of intent/negligence, IPR damages could be claimed.
Netherlands	No.	The court has discretionary powers in this area and may award <i>lump sum</i> damages if it considers appropriate. The courts have statutory powers to estimate the damages if the amount cannot be precisely determined.	Yes. When weighing up the interests to award damages and determine their amounts, the courts may take into account the intent of the infringer. In some cases, account of infringer's profit is only available in bad-faith

DAMAGES

			cases.
Poland	Not available.	Yes, civil Procedure allows in certain cases, e.g. when proof of damage is overly difficult, that the court awards <i>an appropriate amount</i> to the plaintiff. Still, courts rarely apply this provision. Courts are also bound by the plaintiff's claim.	General rule: compensation for the damages suffered; exceptions possible according to Copyright Act.
Portugal	Not available.	Yes, subject to following conditions: If amount of actual damages cannot be determined and the injured party does not oppose, the court may, alternatively, establish a fixed fair amount due as indemnity, being the minimum amount the sum of: (i) the amount set and charged as royalties by the injured party if the infringer would have obtained the necessary licence; (ii) the expenses incurred by the injured party with the protection of the concerned IP right; and (iii) the expenses incurred in order to investigate and discontinue the infringing activity.	Yes, Civil Code establishes that amount due as indemnity shall be reduced if the infringer <i>did not know or did not have reasonable grounds to know</i> that he was engaged in an infringing activity.
Romania	No.	Courts are entitled to award lump sum damages if they consider this more appropriate (in industrial	No.

DAMAGES

		<p>property rights it amounts to one time the fees' value; in copyright/related rights it amounts to three times the fees' value). The law on copyright is more restrictive than in industrial property rights; the courts may rule a triple fees lump sum <i>only</i> if the criteria about negative economic consequences and moral prejudice could not be assessed. In industrial property rights, lump sum and actual prejudice are equal criteria.</p>	
Slovakia	-	<p>In case material damage cannot be calculated, the court may decide on the damage from the fees which would have been due if the licensing agreement was concluded.</p> <p>Courts often grant damages according the expert's assessment on the amount of damage.</p>	<p>Generally no. However, the court may decrease the amount of damage, in case there are special circumstances for it.</p>
Slovenia	Not available.	<p>Court's discretion on awarding lump sum damages in case they cannot be calculated otherwise (or</p>	<p>Compensation of damages is independent on the infringer's culpability.</p>

DAMAGES

		<p>with difficulties).</p> <p>Courts are not allowed to award the RO with something he had not requested.</p>	<p>However, when assessing punitive damages for copyright infringement and compensation for non-material damage: infringer's awareness of wrongfulness of its action might influence the amount of damages.</p>
Spain	Hypothetical royalties	<p>In Spain, evidence of damages is absolutely required, and damages must be compulsorily assessed.</p> <p>In any case, courts have the possibility to award a compensation of 1% of the infringer's total business amount, without any need of evidence, in case of a TM infringement.</p>	-
Sweden	-	<p>Yes, the courts are entitled to award damages even if the RO <i>has not explicitly claimed</i> lump sum damages.</p> <p>In fact, it is fairly common that the court awards a lump sum damage and does not go into detail on for example calculation of loss.</p>	<p>Yes, negligence or intent is a general provision for the awarding of general damages.</p> <p>Typically, it is fairly difficult for the infringer to claim that he had no reason to believe that the products infringed third party intellectual property rights.</p>
United Kingdom	-	No. Lump sum damages are not	Yes, in copyright, designs and

DAMAGES

		awarded in IP infringement cases.	patent cases.
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DAMAGES

COUNTRY	Can damages be awarded when infringing goods have been seized before being placed on the market?	Are damages awards lower if the infringer acquires a licence from the rights owner following the infringement?	Proof of damages What evidence is required to prove damages? Who bears the burden of proof?
Austria	Yes.	No.	Any evidence has to be taken into consideration. Usually financial statements, expert's opinions etc. are used to prove damages. <i>Burden of proof</i> is with the RO.
Belgium	Punitive damages are normally forbidden; most of the courts refuse to award damages (at least for lost profits) when the only evidence of the infringement concerns unsold goods. Case law is however not unanimous; thus, some decisions have stated that the mere offering for sale of infringing goods gives rise to a prejudice.	Not aware of any judgment..	<i>Burden of proof</i> lies with the claimant: he must prove that the defendant has committed a fault which has caused him a prejudice. Regarding <i>lost profits</i> , the RH usually provides the courts with evidence of the net profit/average profit he would have realised had the infringement not occurred (e.g. after deduction of the gross profit and the fixed fees).However, some decisions have stated that, due to the price differences, counterfeit goods and genuine branded goods, even where identical, are not

DAMAGES

			<p>necessarily part of the same market, so the sale of fake goods does not automatically cause any lost profits to the RH.</p> <p>Regarding the <i>other economic losses and the moral prejudice</i>, they are more difficult to establish (e.g. evidence of the efforts and investments for the promotion of the authentic goods, e.g. by providing invoices or advertising material). Courts may decide to appoint judicial experts to assess such damages in IP-related disputes.</p>
Bulgaria	Yes.	No.	<p><i>Burden of proof</i> lies with the plaintiff. Both written and oral evidence may be engaged. It is common practice to claim damages based on the retail value of lawfully reproduced copies. Experts are appointed for assessing the amount of damages.</p>
Cyprus	Difficult to prove damages, unless some damage to goodwill can be shown other than costs.	Could be considered by court as a mitigating factor, however, it would not change the amount of incurred damage.	<p>Burden of proof lies with RH. Normally, oral and documentary evidence is presented.</p>
Czech Republic	Yes.	Yes, but only if the acquisition of the respective licence really	<p>The aggrieved RO bears the <i>burden of proof</i>. There are no</p>

DAMAGES

		reduces the damage (<i>e.g. when the acquired licence legalized products made originally without a licence</i>).	standardized requirements regarding the type, scope or quality of evidence necessary to prove damages. This is determined on a case-by-case basis.
Denmark	Yes (e.g. customs seizure). Then damages will be assessed on the basis of royalty (no lost profits or market disruption).	No.	RO bears the <i>burden of proof</i> . Rather free evidence system.
Estonia	In theory yes, in practice it would probably be a reason for reducing the amount of compensation.	The defendants often use this argument, but there is no clear and common court practice on this. Usually, the courts have not awarded lower damages for the reason that the infringer has acquired the license following the infringement.	<p><i>Burden of proof</i> lies within RO, he needs to present:</p> <p>(i) evidence proving the existence of copyright infringement;(ii) evidence proving that the copyright infringement was committed by the defendant;</p> <p>(iii) evidence proving that the act of the defendant was unlawful;</p> <p>(iv) evidence proving the sum of damages (e.g. expenses, lost profit etc).</p> <p>The defendant needs to prove that he is not culpable for causing such damages.</p>
Finland	Problem arises when goods in	Special procedures in place, but	<i>Burden of proof</i> lies with the

DAMAGES

	transit are seized by customs. In <i>Montex v Diesel</i> the detained products had already been unloaded in a warehouse and could have easily been cleared from there for distribution on the Finnish market. As such, customs seizure cases are handled as normal civil trademark infringements. However, it can be difficult to prove the actual damages in the transit country, as the products have still not been placed on the market.	normally RO is entitled to compensation, as soon as infringement takes place, regardless of subsequent action of the infringer.	plaintiff. Assessing damages involves calculating an amount that is equivalent to a reasonable royalty. Compensation is calculated on the base of: sales loss (number of unsold items, RO's loss per item), market's disruption, internal losses (expenses incurred in establishing the infringement). Good-will damage is difficult to prove, since it's a long term loss.
France	Yes.	No.	<i>Burden of proof lies with RO;</i> <i>two valuation methods:</i> (i) Evidence of negative econ. consequences and profits made by infringer: material and moral damage,. (ii) Evidence of total sum received in case of licensing agreement.
Germany	Yes. At least as adequate license fee which is calculated according to a fictitious license agreement under which it would be irrelevant to what extent the rights were actually used by the infringer. In particular, it is feigned that a distribution right would have been	No such rule. However, probable that the license fee agreed later will have an impact on the calculation of damages, in case it is calculated as reasonable license fee.	RO bears the burden of proof. No special formal requirement to prove damages. Common rules of civil procedure apply. According to case law, the requirements to prove damages should not be handled too strict; in particular the calculation according to

DAMAGES

	licensed for all goods produced (and not only for those sold). Early discovery of the infringement does not help the infringer.		reasonable license fee is meant to help the right owner. Additionally, information claims help RO to obtain information from infringer.
Greece	Extremely difficult to substantiate either material or moral damages in such case.	No such rule exists in legislation or has been applied by the Greek courts. Though moral damages may be lower in Assessing the infringer's <i>good behaviour</i> .	Plaintiff bears the <i>burden of proof</i> . Damages may be established on the basis of all admissible means of evidence according to procedural law; i.e. confession of the parties, direct examination, inspection, experts' opinions, documents, witnesses etc.
Hungary	Only storage and destruction costs.	If obtaining a license is a compensation for the infringement, no damages will be awarded, but if the license is for the future, damages can be awarded.	RO bears <i>burden of proof</i> . He has to file evidence such as, <i>invoices</i> regarding the sales of the products affected by the infringement or <i>valid license agreements</i> proving his licensing practice in Hungary or the region.
Ireland	Yes, but the right holder must prove that he has suffered injury (e.g. costs for enforcement).	Copyright: Yes, they can be. "...defendant undertakes to take a licence on such terms as may be agreed (...) (c) the amount recoverable against the defendant by way of damages or on an account of profits shall not exceed three times the amount which	<i>General</i> : In civil cases the onus rests upon the plaintiff rights holder to prove its case. However, certain presumptions of ownership and the subsistence of rights in the plaintiff (until the contrary is proved) may apply in certain circumstances. Irish law does not

DAMAGES

		<p><i>would have been payable by the defendant as licensee where a licence on those terms had been granted before the earliest infringement (...)</i>" (Copyright and Related Rights Act 2000, Section 130).</p> <p>This only applies to where a licence is available as of right, e.g. licences for educational works.</p>	<p>generally envisage evidence being admitted by sworn affidavit alone, and witnesses will normally have to be available for cross-examination by the defendant. As a general rule, Irish judges tend to be skeptical of survey evidence. The introduction of the Commercial Court of the High Court includes detailed provisions with regard to the agreement of facts and expert opinions prior to trial. The requirement for a claim to be of a minimum value of One Million Euros is dispensed with for Intellectual Property matters.</p> <p><i>Patents:</i> The patentee must show that the patent is infringed. If invalidity is alleged, the burden of proof is on the party making that allegation. In both cases the court must be convinced that it is more likely that the patent is infringed or invalid than not (balance of probabilities).</p>
<p>Italy</p>	<p>Only damages/account of infringer's profit not deriving from the marketing of the seized products can be awarded.</p>	<p>Only damages/ account of infringer's profit deriving from an activity <i>not covered</i> by the licence can be awarded. In patent matters compulsory licences cannot be</p>	<p><i>Burden of proving</i> the damage is put on the RO. This is a rather heavy burden to bear as it implies to estimate the market situation if the infringement had not occurred,</p>

DAMAGES

		granted to the infringer, unless he/she proves to be in good faith.	and/or the exact size of the profit made by the infringer in connection with the use of the infringed IP right. Usually, the RO is only asked to supply circumstantial evidence of lost profits/reputation damage, and then a Court expert is appointed for exactly determining the right amount thereof.
Latvia	In the absence of actual practice, it is not possible to provide any clarification on this.	In the absence of actual practice, it is not possible to provide any clarification on this.	According to general rules of Civil Procedure, each party shall prove the facts upon which its claims or objections are based. No statutory provisions defining the required evidence.
Lithuania	Yes. If goods were sold (were supposed to be sold) without a license is sufficient to establish damage.	No.	Civil IPR process does not differ from ordinary civil process. Any material, written, oral evidence, legally made photos, third party specialists, experts' assessment etc. The claimant bears the burden of proof.
Luxembourg	In principle yes, however, in this case it will be difficult to claim material damages. An option for the RO is to claim moral damages.	In principle no (principle of full compensation). However, the court's practice shows that in such case damages may be lower.	Plaintiff bears the <i>burden of proof</i> . Damages are evaluated <i>ex aequo et bono</i> , so the level of proof is not very high. No specific rules

DAMAGES

			concerning proof of damages (need to proof consumers' confusion, loss in sales etc.).
Malta	Most likely no damages could be claimed. However, this provision has never been subject to the court's interpretation, therefore, the answer to this question remains questionable.	Nothing in law on this point.	Ordinary civil procedure rules apply. Claimant bears the <i>burden of proof</i> . Maltese courts have not yet developed any sophisticated models how to calculate damages in IPR cases.
Netherlands	In such case only the reasonable costs and lawyer's costs may be awarded.	This factor plays a role in assessing the compensation for damages.	<i>Free system of proof</i> : The party on whom the burden of proof rests (the party which claims damages) may provide proof of damages by all legal means.
Poland	The approach of civil courts varies in this respect. Criminal courts, which must often oblige the defendant to repair damage caused by criminal activity, mostly award damages relating to pirated goods seized and order their forfeiture at the same time.	If a license is granted by the RO, arguably no damages have been suffered. However, this is a purely hypothetical scenario, as RO usually do not license illegitimate goods.	The <i>burden of proof</i> as to actual amount of damages or equitable remuneration lies with plaintiff. Civil Procedure Code contains a provision that allows the court to determine the appropriate amount of compensation, should proof thereof be overly difficult for the claiming party. This provision is, however, very rarely used.
Portugal	Difficult to prove damage, if infringing products are not placed	The Court might take it into consideration as an act of good	The <i>burden of proof</i> lies with the party that alleges a fact, therefore,

DAMAGES

	on the market.	will and good faith of the infringer. Also, a reduction of the amount claimed by the RO could be previously negotiated, in case a licence is to be attributed.	with the injured party. Exception: if the infringement is reported as a contractual breach, then the burden of proof shifts to infringer.
Romania	Yes, as long as the infringing deed could be proven, along with the prejudice, the cause-effect link between them and the guilt.	Generally no. However, there have been cases in practice when courts have considered the acquisition of licenses after the finding of the infringement as a recovery of damages.	<p><i>Evidence for:</i></p> <p>(i) <i>Loss of profits:</i> current price list for licenses, fees and royalties, plus proof of unauthorized use of the IPR protected objects (use plus lack of authorizations).</p> <p>(ii) <i>Benefits unfairly made by the infringer:</i> any means (i.e. official accounting registrations, parallel/informal accounting registrations, invoices, postal receipts, test purchases for comparison of prices, offers of the infringer etc.).</p> <p>The <i>burden of proof</i> is borne by the RH. However, in cases of civil claims submitted as part of a criminal trial (which is mainly the case in Romania), the law enforcement authorities gather evidence also in this respect.</p>
Slovakia	Most likely not, since there is no material damage. In case there would be a material damage there	<p>(<i>Note: contradictory assessments of experts</i>)</p> <p>I. The court will not take into</p>	Plaintiff bears the burden of proof. The defendant, is however, obliged to supply information.

DAMAGES

	<p>is no reason why such damage would not be compensated. However, in this case non-material (moral) damage could be considered.</p>	<p>account such agreement; however, the plaintiff will probably settle the case out of the court.</p> <p>II. Yes, the court as well as the plaintiff may take this into consideration.</p>	<p>Any legal proofs of evidence are accepted, Slovak process is relatively flexible in this respect.</p>
Slovenia	<p>In general no provision which would preclude this (<i>except for patent infringement and specific breaches of copyright.</i>), but could be difficult to prove in practical terms. Also, there is no TM infringement without the commercial use of TM.</p> <p>When there is no commercial use, difficult to establish the damage for RH.</p>	No.	<p><i>Burden of proof</i> on the RO.</p> <p>No formal requirements for proving the damages, any evidence is acceptable and it will be up to the court to decide if a respective fact can be deemed proven or not.</p>
Spain	<p>Yes, but only if there is evidence of damages and these damages have been assessed.</p>	No. It would be considered an agreement between the RO and the infringer.	<p>(i) RO must show evidence of damages occurred.</p> <p>(ii) RO must choose the assessment criterion, which from that moment cannot be changed through the judicial proceedings.</p> <p>(iii) RO must assess damages in a way that approaches the real damage.</p> <p>(iv) In the case there <i>isn't a reasonable quantification</i>,</p>

DAMAGES

			<p>Spanish jurisprudence <i>does not award any damages</i> compensation (except for the 1% of the infringer's business total amount in the case of a trademark or a design infraction).</p>
<p>Sweden</p>	<p>Yes, a reasonable royalty is applicable. In some cases the courts have also awarded compensation for damage suffered.</p> <p><i>Earlier, the ROs awarded damages even when counterfeit products were in custom's seizure and had never reached the market. In more recent case law the courts have been more reluctant to award damages on that ground unless the RO provides evidence of the damage suffered.</i></p>	<p>No. These are two separate issues that should not be mixed.</p>	<p>RO bears the <i>burden of proof</i> for the scope of damage incurred. If full evidence cannot be presented at all/only with difficulty, the court often has to estimate the damages to a reasonable amount in accordance with the <i>rule of diminution of the burden of evidence</i>.</p> <p>RO must carefully estimate the specific losses and present a reasonable and solid foundation for the calculation of the amount of damages. The lack of evidence and the faith that the court possesses the necessary market knowledge has in some cases resulted in a lower amount of damages awarded. If the ROs spend a lot of costs to provide evidence and the damage claim is not granted in full, then the RO risks not getting full compensation</p>

DAMAGES

			<p>for litigation costs.</p> <p>In cases where the RO faces such difficulties /chooses not to spend too much costs on producing the evidence, the court can estimate the damages to a reasonable amount. However, circumstances for the difficulties in presenting full evidence have to be shown.</p>
United Kingdom	Yes.	<p>In some cases yes. Moreover, the Ministry of Justice stated that <i>it is currently possible to acquire licences for software applications after an infringement has been discovered without any penalty being imposed.</i></p>	<p>In civil cases the court will admit any factual if it is logically probative and not oppressive or unfair to the other side. The defendant must be given fair notice of the evidence. The RO as a starting point bears the burden of proving at least one act of infringement and the damages caused.</p> <p><i>Copyright:</i> the burden is on the plaintiff to prove damages, but not to an exhaustive degree of certainty, given that some loss of sales is assumed.</p>

DAMAGES

COUNTRY	Proof of damages Can the rights owner obtain needed evidence concerning damages from the infringer (e.g. on gross income)?	If other factors are taken into account in the assessment of damages (e.g. strength of trademark, investment, price erosion, actual lost sales vs. all infringing sales, breach of contract, parallel trade), what evidence is required from the rights owner in this regard?	Recovery of Costs What legal costs of the rights owner can be recovered in successful civil litigation?
Austria	RO may demand the rendering of accounts from the infringer.	These factors may be taken into consideration. The usual evidence is an expert's opinion.	Legal costs for the <i>lawyers' fees and technical counsel</i> (patent attorneys) are refundable, if they accrued for appropriate legal measures. For the costs of the <i>litigation</i> itself no formal proof is necessary. Cost for <i>demonstrating the infringement and the scope of the RO's prejudice</i> have to be established reasonably, however there is no formal requirement of proof. Note: costs of lawyers and patent attorneys can only be recovered according to the Code of Lawyer's Tariff, even if the rights owner actually has to pay higher fees to his lawyer.
Belgium	When there are serious, precise	<i>Reputation of a TM</i> : market	court-appointed experts can

DAMAGES

	<p>and corroborating presumptions that a party is in possession of a document or any information containing proof of a relevant fact, the courts may order the delivery thereof. The courts may also appoint independent experts, or allow the RH to carry out a <i>saisie-contrefaçon</i> on the premises of the infringer to gather evidence of the scope of the infringing activities.</p>	<p>surveys or polls, documents proving the presence of the TM within a particular sector, advertisements.</p> <p><i>Price erosion and the investments made for the promotion:</i> invoices, promotion campaigns, documents proving the price erosion (e.g. accountancy, contracts with distributors).</p> <p><i>Lost sales:</i> comparison between the turnover before and after the infringement. In the absence of any document proving such damages, the courts may rule to not allow any damages due to the absence of proof. However when the damages cannot be precisely proved, it does not mean that no prejudice has been suffered. In such cases, the courts generally award a lump sum.</p>	<p>normally be recovered in full. A distinction has to be made between claims which can be assessed in money and those which cannot be assessed in money. For claims which cannot be assessed in money (typically, any claims for an injunction), the basic deposit payable is €1,200. For claims which can be assessed in money (typically, any damages claims), the deposit depends on the amount of the claims to the extent that they have been granted by the court. For instance, if the court awards a €25,000 damages claim, the maximum indemnity is €4,000, while the minimum indemnity is €1,000; for a damages claim amounting to €500,000, the maximum indemnity amounts to €20,000, while the minimum indemnity amounts to €1,000.</p> <p>Moreover, in general terms it is difficult for the RO to adduce evidence of the real amount he has paid as lawyer's fees, since the ethical rules of the Bar prevent the communication to the adverse parties and the courts of time</p>
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DAMAGES

			sheets, hourly rates, invoices, etc.
Bulgaria	Yes, the court may, upon the plaintiff's request, oblige the defendant to present evidence under his control.	-	Court fees and expenses of judicial experts, as well as for lawyers which have been paid by the plaintiff are recovered.
Cyprus	Possibility to apply for discovery, but the infringer does not comply normally. Also the option for the Court in certain circumstances, to order the disclosure of evidence in the possession of the infringer and in cases of infringement on a commercial scale to order, under conditions, access to bank or commercial documentation in the possession of the infringer, as well as, details of the distribution networks involved in the infringement.	The right holder would have to produce credible documentary or oral evidence to prove these facts on the balance of probabilities. The witnesses will be subject to cross examination by the infringer's advocate and the Court will decide.	<i>Advocates' fees</i> on the basis of the existing Court scales are recoverable at the discretion of the Court. <i>Costs of expert evidence and travelling costs</i> may also be recovered. The costs must be necessary for the case and are at the Court's discretion. Usually notice to admit facts is served and if they are not admitted and right holder incurs costs, the Court will take it into account when assessing.
Czech Republic	Yes.	There are no standardized requirements regarding the type, scope or quality of evidence necessary to prove damages. This is determined on a case-by-case basis. The court can take into account such factors as the value,	In principle, all of the <i>costs of proceedings necessary for the effective protection/enforcement of one's IPRs</i> can be recovered by the successful party, although these can be reduced or eliminated in the case of wins that are only partial.

DAMAGES

		significance and strength of the IP right (<i>although as a practical matter courts typically do not consider the direct effect that the infringing activity has had on the owner's profitability or price erosion</i>).	In practice, courts tend to award only those costs that are <i>clearly proved</i> (e.g. by invoice for expert opinions, calculation of travelling costs, proof of payment for the court fee), and that are <i>clearly necessary</i> for the effective protection/enforcement of the rights.
Denmark	Yes, through the civil search of infringer's premises, and right of information.	Statements or opinions from relevant trade associations, from economical or technical experts with experience within the relevant field or from accountants.	<p>If successful, RO can recover the following costs:</p> <p>Lawyer's fees: always cover only a fraction of the actual legal fees expended by the RO. No evidence is needed to prove these costs.</p> <p><i>Fees of own technical counsel:</i> (e.g. in patent cases) cover only a fraction of the actual fees expended by the RO. A copy of the invoice(s) from the technical counsel will suffice as evidence of the fees.</p> <p><i>Fees of experts appointed by the court.</i></p>
Estonia	There is an exception regarding the burden of proof related to the claim for unfair profits where the	These factors have usually not been presented when making claims for compensation of	According to Civil Procedure Provisions the costs of an action shall be borne by the party against

DAMAGES

	<p>infringer shall inform the entitled person of the nature of revenue received by the violation.</p>	<p>damages. Therefore, no relevant court practice available.</p> <p>In similar cases the courts have requested the plaintiffs to present <i>relevant written evidence, like financial reports, opinions of auditors etc.</i></p> <p>Civil Procedure the costs of an action shall be borne by the party against whom the court decides. Among other, the party against whom the court decides is required to compensate the other party for any necessary extra-judicial costs which arose as a result of the court proceeding. At the same time, the law provides that in cases where ordering payment of the opposing party's costs from the party against whom the court decides would be extremely unfair or unreasonable, the court may decide that the costs must be borne, in part or in full, by the party who incurred the costs.</p> <p>In the case an action is satisfied in part, the parties shall bear the procedural expenses in equal parts</p>	<p>whom the court decides, among others this includes the compensation of the other party for any necessary <i>extra-judicial</i> costs which arose as a result of the court proceeding. In cases where ordering payment of the opposing party's costs from the party against whom the court decides would be <i>extremely unfair or unreasonable</i>, the court may decide that the costs must be borne, in part or in full, by the party who incurred the costs.</p> <p>The procedural expenses in civil court proceedings are (i) <i>the legal costs</i> and (ii) extra-judicial costs incurred by a participant in a proceeding.</p> <p>Regarding the recovering of costs of advocates and advisers, civil procedure law prescribes that if a participant in the proceeding is required to bear the costs related to the legal representative or adviser of another participant in the proceeding and the amount of the costs in money has been determined, the court shall order payment of the costs of the legal</p>
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DAMAGES

		unless the court divides the procedural expenses in proportion to the extent to which the action was satisfied (Article 163 of Code of Civil Procedure). The procedural expenses in civil court proceedings are the legal costs	representative or adviser to a <i>reasoned and necessary</i> extent. In addition, the Government has established the maximum amounts to the extent of which payment of expenses on contractual representatives and advisers can be claimed from other participants in a proceeding.
Finland	National provision more favourable for the RO than IPRED. Customs intervention often effective. Seizure and discovery procedure.	Goodwill damage difficult to prove (need to establish the strength of a trademark). Price erosion difficult to prove and estimate.	Costs of the trial preparation, participation at proceedings, fees of the attorney and counsel. Expenses not awarded automatically, must be claimed.
France	Yes, via a right of information (can be used against the infringer, but also against third person who detains the goods, uses the goods etc.).	-	Certain costs which occurred due to the trial can be recovered during litigation. Equity limits the full recovery of costs.
Germany	Yes, the RO has rights of information against the infringer and also against third persons if the infringement is committed on a commercial scale (right of information). In cases of commercial scale infringements, the trademark-owner can also demand the	The specific form of infringement might influence the calculation of damages. However, this happens on a case to case basis without special legal provisions. All these factors fall within one of the 3 calculating methods named above. Market value and reputation of trademark, likelihood of	The losing party has to bear the costs of the case, especially the costs of the winning opponent, if they were necessary for the useful enforcement. The legal fees and expenses of the attorney of the winning party have to be covered as well. The (reimbursable) statutory fees are

DAMAGES

	<p>communication of banking, financial or commercial documents or an adequate access to such documents which are in control of the infringer and which are necessary for the enforcement of the damages claim. In case of confidentiality of the documents, the court takes the necessary measures to guarantee the required protection in the single case.</p>	<p>confusion, parallel trade, actual lost sales, infringing sales, price erosion, toleration of prior comparable infringements may be factors (sometimes indirectly) influencing the calculation of damages.</p>	<p>calculated according to the value of the case. In low value cases and if for example the own lawyer bills according to the time spent, this may result in not all costs spent being reimbursed.</p> <p>The costs of a patent attorney in trademark, design right, patent law, plant variety protection and utility model law cases have also to be covered by the losing party if they were necessary.</p>
Greece	<p>Pre-trial discovery not available in Greek law. The plaintiff must precisely identify nature, position, contents of the requested documents, even page number of the defendant's commercial records, reference numbers etc... Almost 90% of all discovery requests are rejected by the courts as vague.</p>	<p>Reputation of IPRs (copies of last <i>Interbrand report</i>, sales volumes, published articles, market searches, advertising campaigns), evidence relating to risk of confusion/dilution (market searches, letters of complaints evidencing consumer confusion, witnesses), copy of the license agreement setting the amount of royalties, defendant's intent or gross negligence (other decisions issued against the same infringer), defendant's financial status.</p>	<p>Legal costs range between EUR 500- 2500. No evidence required to prove these costs.</p>
Hungary	<p>The right owner has to request the court to order the defendant to file the relevant documentation (e.g.</p>	<p>Copies of invoices proving the advertising activity and sales of goods under the trademark in</p>	<p>Lawyer's fees, stamp duty, fees of judicial experts appointed by the court, translation fees and fees of</p>

DAMAGES

	<p>invoices) that prove the sum of the enrichment obtained due to the IPR infringement. If the defendant is not willing to cooperate, the court will appoint a judicial auditor to check the books of the defendant. The fee of the auditor shall then be advanced by the rights owner.</p>	<p>question.</p>	<p>obtaining authenticated trademark certificates, e.g., can be claimed.</p> <p><i>Evidence required to prove costs:</i></p> <ul style="list-style-type: none"> (i) invoices on all costs and fees (ii) in case of hourly rate, it is advised to submit detailed timesheets (iii) instead of invoices regarding lawyer's fees, RO may submit an agreement with its lawyer in this relation
<p>Ireland</p>	<p>The court may order <i>discovery</i> if the other party has failed, refused or neglected or ignored the right owner's request. Other procedures such as the <i>Anton Piller order</i> and <i>Norwich Pharmacal order</i> are also available.</p>	<p>See in specific IP Codes.</p>	<p>Usually the costs covering the costs of the barristers, <i>but not those of the solicitor or patent attorney</i>, will be awarded to the winning party. The award of costs may be denied if the awarding is considered unfair due to e.g. the conduct of the winning party etc. Under the Rules of the Commercial Court a judge must decide on the granting of costs at the determination of the Interlocutory Stage save where it is not justly possible.</p>
<p>Italy</p>	<p>In order to gather evidence it is common for ROs to apply for a preliminary search order <i>Descrizione</i> (can be granted also</p>	<p>Ordinary rules on evidence apply.</p>	<p>The Losing party is ordered by the court to reimburse the winning party for the expenses and legal fees of the proceedings, including:</p>

DAMAGES

	<p>during the trial).</p> <p>The purpose of this order is to allow the RO to obtain a discovery of the infringer's account books information on the sellers, buyers and manufacturers of the infringing goods.</p> <p><i>Bank accounts</i> may be the subject of trial or pre trial discoveries only in case of piracy, i.e. wilfully and systematically counterfeiting/misappropriation of IP rights.</p>		<p>(i) Lawyers' fees, (ii) Court experts' fees (iii) Fees of IP attorneys who acted during the Court expert stage, if any.</p> <p>However, all these expenses are determined by the Court according to an Official Tariff, which usually is much lower than the real costs expended by the RO.</p>
<p>Latvia</p>	<p>Civil Procedure Law provides that in matters of IPR infringements the courts, based on a reasoned request from the plaintiff and taking into account the rights of to the parties involved in the matter to protection of commercial secrets, may require information regarding the relevant manufacturer, distributor, supplier, wholesaler and retailer of the goods or the relevant service provider and distributor, information regarding the volumes of infringing items</p>	<p>No statutory provisions on these issues.</p>	<p>In principle, Civil Law grants compensation for all damage suffered as a result of an IPR infringement. This includes additional expenses. Latvian courts grant compensation for reasonable costs such as translation costs, etc.</p> <p>RO is entitled to recover litigation expenses, such as court fee, the fees paid to representatives and other expenses as prescribed by the Civil Procedure Law. However, the Civil Procedure</p>

DAMAGES

	<p>manufactured, distributed, received or ordered or the quantity of services provided or ordered, as well as the price which was paid for them.</p>		<p>Law provides recovery for legal costs of representation only of sworn advocates, not so for patent or trademark attorneys. Regarding lawyers' fees there is diverging practice. Under Civil Procedure Law least 5% of the claim's amount is granted. Courts can also compensate lawyers' fees exceeding the limits stated in the Civil Procedure Law.</p> <p>Usually, the evidence required to prove these costs is adduced by way of invoices and confirmations of payment thereof.</p>
<p>Lithuania</p>	<p>Yes, but only with a bailiff. This procedure is applied only when evidence could be destroyed.</p>	<p>Strength of a TM, investment etc.</p>	<p>RO must prove that the costs were <i>necessary</i> and <i>proportionate</i> for the purpose of demonstrating the infringement.</p> <p><i>Legal costs</i> of an attorney: maximum tariffs recommendations, where the following <i>criteria shall be considered</i>: complexity of the case, complexity of legal services, novelty of the legal issue, necessity for a counsel to move to another location etc.</p>

DAMAGES

			Court often orders a detailed certificate of costs.
Luxembourg	Yes. If infringer is in possession of needed evidence, the judge can order the infringer to provide the needed evidence. <i>Right of information</i> can also be used for such request (also against intermediaries).	No specific rules concerning the proof of damages. RO has to provide all relevant evidence.	Losing party must bear fees of experts appointed by the court, costs of the bailiff. The court can order the losing party to bear part/all of the legal costs incurred. If it's inequitable for one party to bear all expenses, judge can determine the amount to be paid by the losing party. If the costs are disproportionate or unnecessary, the judge will order recovery of a part of the costs. Expenses essentially comprise lawyers' fees and technical experts' fees. No limitations to the recovery of the costs.
Malta	Yes, by filing an application to the court in that respect.	Mentioned in the law but yet untested by the courts.	The costs which may be recovered include court registry fees, lawyer's fees and fees of court-appointed experts. Extra-judicial costs cannot be recovered. The only costs which may be recovered are judicial costs (costs associated with the proceedings and which are calculated by the

DAMAGES

			Registry of the court).
Netherlands	RO may request that an account be rendered of the profits made. Right of information including the seizure of evidence on documents may be used.	RO on whom the burden of proof rests may demonstrate the damage by all legal means. In order to demonstrate that the TM is well known or strong, a market survey, for example, may be carried out.	In principle, all costs may qualify for compensation. The court will assess the rates stated in combination with the hours according to the complexity of the case.
Poland	RO may use his right of information against the infringer under the Industrial Property Act and the Copyright Act. Under both Acts the information may be sought either during or even before legal proceedings are instituted.	These factors are not to be taken into account while assessing the actual size of the damages.	According to the general principles of Polish civil proceedings, the prevailing party is entitled to receive reasonably incurred expenses. This embraces <i>court fees, other expenses paid during the proceedings</i> (experts, translations, etc.), as well as, cost of <i>legal representation</i> . In practice, it is for the particular judge hearing the case to determine the scope of costs returned to the prevailing party, especially with respect to the counsel's fees. For this, courts use official tariffs which are set at a rather low level. Experts are appointed by the court, so determination of their fees does not pose a problem. Otherwise, the prevailing party must document all the costs

DAMAGES

			incurred and it is for the judge to evaluate whether they were reasonable.
Portugal	<p>The injured party is entitled to request the disclosure of certain information related to the infringement as listed in the specific bills.</p> <p>If the infringement is committed on a commercial scale, RO can use his right of information also against third persons being in possession of infringing goods or services/ rendering illicitly services/ having participated in the production or distribution of its products or services. Also, the information disclosure obligation is extended to banking, financial, accounting and commercial documentation.</p>	As the burden of proof lies with the party that alleges a fact, if these factors are to be included in the claim, they must be sufficiently substantiated. The Portuguese Civil Procedural Code does not establish any limitation as to the type of evidence offered by the parties.	<p>New amendments to the Judicial Fees Code, allowing the successful party to claim from the counterpart, upon a favourable ruling:</p> <p>(i) The amount paid as judicial fees in the proportion of the favourable ruling;</p> <p>(ii) All the reasonable and demonstrated expenses incurred by the successful party;</p> <p>(iii) 50% of the amount paid as judicial fee to cover the lawyer's fees.</p> <p>The judicial fee will vary according to the overall amount claimed in the proceedings.</p>
Romania	Yes, right of information is used, in case of IP rights being infringed on a commercial scale. Communication of banking, financial or commercial documents under the control of the opposing party is ordered.	Consideration of other elements is possible, the relevant evidence is determined on a case-by-case basis: e.g. terminated agreements as a result of better offers received from the infringing parties; decrease of original sales vs.	The losing party shall pay the legal costs. Usually, such <i>legal costs</i> may include: <i>lawyers' fees</i> , fees of <i>judicial experts</i> (including technical, accounting experts etc.), fees of <i>experts appointed</i> by the winning party, <i>court fees</i> ,

DAMAGES

	<p>Measures to preserve the evidence are: taking of samples, physical seizure etc.</p>	<p>increase of counterfeited/pirated sales, as resulting from accounting documents; expert analysis about the price erosion; test purchases for comparison of prices; breach of contract and existence of punitive damages clauses etc.</p>	<p><i>witnesses' expenses</i> etc.</p> <p>The judges may not decrease the court fees, procedural taxes, payment of experts, reimbursement of witnesses, as well as any other expenses proved to be undertaken by the winning party. The judges however have the right to increase or decrease the lawyers' fee, according to the amounts provided in the minimum fees chart (in case they consider them un-appropriately low or high), from the value of the case or from the lawyer's work point of view (An agreement is not enough, but the actual payment proof is required).</p>
<p>Slovakia</p>	<p>The court may request the evidence in the possession of the defendant/third party (e.g. right of information).</p>	<p>In contradictory process it will depend mainly on the plaintiff to what extent he is able to convince the court about his arguments, no prescribed process as to evidence, Slovak system is relatively open. What has to be proved is in particular the extent of the infringement, its duration and the consequences.</p>	<p>The law contains only demonstrative examples of legal costs, which means that any fees which have been <i>usefully spent</i> to defend one's rights can be claimed. No special proceedings are required to assess the evidence in relation to the legal costs. The costs which are not usual should however be justified by the applicant and it will depend on the court's assessment whether such</p>

DAMAGES

			costs will be taken into consideration or not. Lawyer's fees are reimbursed according to a special law (advocate tariff).
Slovenia	Yes, via a <i>submission duty</i> which is not only applied to documents, but also to any other evidence that can only be obtained from the opposite party.	No formal requirements for evidence.	Only costs which are necessary for the purposes of the procedure, as determined by the court. Acceptable costs: e.g. travel, accommodation, wage compensation, expert translators, lawyers, experts, translators' fees etc.
Spain	Trademarks Act foresees the possibility of the RO to demand the infringer's account books.	Trademark Law and the jurisprudence foresee a penalty when the damages have been done to a notorious or a well-known trademark. Parallel trade is foreseen at a criminal level.	Among others: investigation costs the RO may have incurred to obtain reasonable evidence.
Sweden	Yes.	Full evidence is needed, unless special rules apply; in this case RO must explain why the damage cannot be calculated.	All costs related to the litigation (attorney's fees, ROs own internal costs, costs for expert witnesses and travelling and lodging costs). However, these costs are limited to a <i>reasonable amount</i> awarded by the court.
United Kingdom	General rules of civil procedure	Already described in previous	General rule is that courts should

DAMAGES

	<p>apply. Search orders for inspection and other relief (<i>Anton Piller order</i>), freezing orders for the retention of assets (<i>Mareva injunctions</i>) and pre-action orders to disclose information (<i>Norwich Pharmacal orders</i>).</p>	<p>sections.</p>	<p>order the full litigation costs (fees, charges, disbursements, expenses, and other remuneration). Costs must be reasonably incurred, and reasonable and proportionate in amount. The award and amount of costs awarded are in the discretion of the court.</p> <p>In practice, however, courts award full litigation costs very rarely. Courts distinguish between <i>standard basis</i> and <i>indemnity basis</i> costs awards. <i>Standard basis</i> costs are usually ordered and amount to about 80% of the claimant's actual costs. <i>Indemnity costs</i> are ordered only where there are factors such as blatant conduct by the defendant, in which case costs can reach 90% - 100% of the claimant's actual costs.</p>
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DAMAGES

COUNTRY	What percentage of the actual legal costs expended by the rights owner is typically recovered in successful civil litigation?	What other expenses incurred by the rights owner can be recovered in successful civil litigation?	Best practices
Austria	Depending on the agreement with the lawyer: In rather simple cases, usually 100 % of the actual legal costs can be recovered. In complex cases the actual lawyer's fees would exceed the refundable costs pursuant to the lawyer's tariff. A <i>recoverable percentage of 50 to 70 %</i> is common.	If established that costs for identification and research, for experts' statement etc. were necessary for a successful litigation, these costs can be recovered.	-
Belgium	The legally fixed deposit awarded to the winning party includes all the winning party's <i>lawyers' fees</i> ; the winning party cannot ask the court to award supplementary costs against the losing party.	The costs and expenses aimed at the detection and monitoring of infringing activities are usually considered to be part of the prejudice. Thus, it is usually considered that the infringement forced RH to invest time and money to detect the infringing activities. The loss of time caused by the infringement is sometimes also taken into account.	The majority of the case law grants a <i>lump sum</i> to compensate the prejudice suffered without differentiating the different components of the prejudice. Criminal courts generally follow a similar scheme as the civil courts. To assess the <i>lost profits</i> , the court multiplied the number of infringing goods by the profit per good. For the <i>economic loss</i> , the court granted a lump sum, taking into account criteria such as the injury to the image, the distinctiveness and the notoriety

DAMAGES

			of the TM. Reference can also be made to fees imposed by collecting societies in court decisions.
Bulgaria	Actual legal costs are awarded by the court proportionately to the damages awarded by it.	No expenses for identification and research are covered?	-
Cyprus	Very difficult to say, not aware of reliable information. The higher the scale of the subject matter, the higher the award of costs and thus the less the RH has to bear in excess of the award to be made by the Court. Gussed amount 50%.	Investigator costs can be claimed as expert evidence, according to court's discretion.	-
Czech Republic	<p>Fees for trial counsel (attorney and patent agent fees) are calculated and compensated on the basis of <i>special legislation</i> that deals with the professional fees of these professions. This legislation establishes what fees can be awarded on the basis of the type of claim and the amounts at issue in the particular proceedings.</p> <p>ROs typically do not need to prove that the trial counsel fees have been really paid, or in what amount. The amount of fees awarded is predominately based on the amounts at issue in the</p>	<p>Costs would typically include fees for trial counsel (attorney fees, patent agent fees), costs of expert opinions and other evidence, court experts' fees, court fees, cost of interim measures, etc., paid by the successful party.</p> <p>Fees for attorneys are compensated according to a special legislation.</p> <p>Courts virtually automatically award attorney fees, attorney traveling costs and cash costs (calculated on the basis of the relevant legislation). All other</p>	<p><i>Licence fees as the basis for damages calculations:</i> courts generally have no problem in using standard licence fees (ex-VAT) as the basis for damages calculations.</p> <p><i>Multiple (i.e. double) damages awards</i> are available for copyright and industrial rights infringements under various provisions.</p> <p><i>Reasonable costs recoveries:</i> It is standard to require compensation of the successful party's attorney fees, attorney traveling costs and cash costs, court fees paid (fee</p>

DAMAGES

	lawsuit. The only pre-requisite is that the successful party was represented by a licensed attorney (patent agent).	costs are subject to more in-depth review.	paid by the plaintiff for initiation of the proceedings), costs of test purchases, and costs of necessary expert opinions etc.
Denmark	If successful, the RO will typically recover <i>10-50% percent</i> of the actual legal costs expended.	Test purchases, storage costs.	-
Estonia	<p><i>Legal costs</i> (e.g. state fee) are usually recovered 100% in case of successful litigation. The recovery of <i>extra-judicial costs</i> (e.g. lawyers and advisers fees) may depend on several circumstances but usually are <i>not</i> recovered 100%. The Government Regulation sets the <i>maximum amounts</i> to the extent of which payment of expenses on contractual representatives and advisers can be claimed from other participants in a proceeding. All these amounts <i>directly depend on the sum of claim</i>.</p> <p>For example, in case of claim in the amount of 10.000 EEK - the maximum sum of recovery of lawyers and advisers fees is 5.000 EEK, in case of claim in the</p>	<p>The procedural expenses which may be recovered in civil court proceedings are:</p> <p>(i) the <i>legal costs</i> (state fee, witnesses, experts, translators, costs of evidence, inspection etc.) and</p> <p>(ii) <i>extra-judicial costs</i> (lawyers' fees, technical experts, bailiff's fees, costs of possible pre-trial proceedings etc.)</p> <p>In case an expertise is made prior civil court proceedings (and not by court's order), these expenses shall <i>not</i> be claimed as a <i>recovery of procedural expenses</i> but as a <i>damage</i>.</p> <p>In case the expertise was ordered by court, relevant expenses shall be recovered as procedural</p>	<p>Best practices: claiming the fee as a fixed amount (lump sum), taking into account the amount of fee the violator should have paid if he or she had obtained authorisation for the use of the relevant right. This provision allows the RHs to claim from the infringer compensation in the full amount of relevant license fee or retail price of the infringing product. This principle has been used in several court cases.</p> <p>Only the Supreme Court practise could be considered as the case law but basically no Supreme Court decisions regarding the damages and costs awards in IP cases.</p> <p>Issues raised by case-law:</p>

DAMAGES

	<p>amount of 100.000 EEK - the maximum sum of recovery is 50.000 EEK, in case of claim in the amount of 1.000.000 EEK - the maximum sum of recovery is 270.000 EEK and in case of claim in the amount of 2.500.000 EEK - the maximum sum of recovery is 360.000 EEK.</p> <p>There is <i>no common court practice</i> which fees could be considered as reasonable and each judge shall decide this at his or her discretion. There are no relevant statistics available.</p>	<p>expenses in case of successful civil litigation.</p>	<p>e.g. which legal theory should be used when making monetary claims against the infringer (compensation of damages or unjustified enrichment).</p> <p>Compensation of damages could be claimed only regarding such infringement that has been proven. Case of a hotel which didn't pay for the music it was playing for several years: RHs were allowed to get compensation only for one song that was established by police during the inspection (<i>many years</i> evidence was missing).</p> <p>Moral damages were awarded to an architect because of changing his works without the relevant authorisation (moral damages were cca. 3000 EUR).</p>
Finland	<p>Not possible to state the exact percentage, legal costs which are proven and reasonable are usually recoverable.</p>	<p>If experts are appointed on a request by one party only, costs will be born by this party alone. However, losing party will have to pay all reasonable costs incl. experts' costs.</p>	<p>Damages are rather low.</p>
France	-	-	<p>The law is too recent to provide for any best practices.</p>

DAMAGES

Germany	<p>No certain percentage which could be stated.</p> <p>There is a law regulating the expenses of the attorneys for certain actions. If it is agreed with the right owner that payment shall be based on these rules then 100% of the costs can be recovered. If there is an individual cost agreement with the attorney beyond these rules, then the right owner would have to carry these costs exceeding the statutory fees.</p> <p>For justified <i>outside court warning letters</i>, RH may claim lawyer's cost reimbursement as damages and under other provisions. This claim is limited to necessary costs, i.e. what the lawyer was supposed to bill pursuant to the statutory fees (see above). In low value cases with an individual agreement to pay the lawyer on an hourly basis, RO</p>	<p>All costs that were necessary for the case, these can be costs of identification and research and experts' statements.</p>	<p><i>Design infringements:</i></p> <p>Court stated that general <i>costs</i> of the infringer can only be subtracted from the profits when they by exception can be attributed precisely to the infringement. In contrast, variable costs may in general be subtracted as they directly occurred due to the infringement.⁵</p> <p><i>Copyright infringements:</i></p> <p>(i) Court stated that RO can claim the profits from <i>every infringer within the chain</i>. Damages paid just by one party do not lead to exhaustion. Only if an infringer further up in the chain is claimed successfully by an infringer further down in the chain for having to pay damages to the RO such costs can be subtracted.⁶</p> <p>(ii) Court held that the reasonable license fee may be calculated</p>
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⁵ "Gemeinkostenanteil" – Federal Court of Justice, November 2nd, 2000.

⁶ "Tripp-Trapp-Stuhl"- Federal Court of Justice, May 14, 2009 on damages in the distribution chain

DAMAGES

	<p>may not be able to recover all costs spent.</p> <p>Copyright Act contains a newly introduced cap of EUR 100 to the cost reimbursement under the following conditions: first warning, easy case with no considerable infringement, no commercial activity. If applied generously to infringers, this cap could make it impossible in certain piracy cases to recover the costs, which may not be in line with the Enforcement Directive. There is no prallel provision in other German IP laws.</p>		<p>according to the own licensing practice of the RO, in case the right owner had concluded a <i>sufficient</i> number of licensing agreements in this amount. This <i>usual licensing practice</i> by the RO may be higher than the usual market licensing price.⁷</p> <p>(iii) In contrast to the previous mentioned case (<i>Reseller-Vertrag</i>), the court decided that the own licensing practice of the RO is not the relevant measuring rule for the reasonable license fee, in case this licensing practice is beyond the objective value of a license.⁸ Reading together these two decisions, one can deduce that a RO may invoke a higher licensing price of its own licensing practice, but the RO is not bound to its own licensing practice, in case it is lower than the market price.</p>
<p>Greece</p>	<p>Only a small percentage of the actual legal costs is recovered.</p>	<p>Costs of research, experts' statements are not separately recovered; only within the overall amount of legal costs. Still, there</p>	<p><i>Patent and copyright infringements</i>: quantification rule. Otherwise claim of expenses has a slight success and ROs may only</p>

⁷ „Reseller-Vertrag“ Federal Court of Justice, March 26, 2009, on the calculation of an a reasonable license fee.

⁸ “Whistling for a Train” – Federal Court of Justice, October 2, 2008, on calculation of a reasonable license fee.

DAMAGES

		the court takes into consideration if the case requires answering difficult technical and legal issues.	claim moral damages, legal fees and expectation to recover a <i>reasonable</i> amount. Regardless of damages, ROs should not expect to collect the actual costs of litigation.
Hungary	It might be 100 %, but this largely depends on the discretion of the court, which has the liberty to decide which activities and fees were <i>reasonable</i> and which were not. The court has discretion to reduce the claim for lawyer's fees.	None.	<p>There is no steady and well-established jurisprudence concerning the amended provisions yet.</p> <p>Courts only exceptionally grant damages for lost profits, the infringer's unfair profits, etc.</p> <p>In an ordinary TM infringement case initiated after a border seizure, the court may award lawyer's fees between €1,000 and 2,000, plus the storage and destruction costs as damages.</p>
Ireland	80%	Expert witnesses expenses	There is now a provision in the Rules of the Superior Courts Order 99, whereby at the end of an interlocutory hearing in the High Court e.g. for an injunction to restrain copyright infringement, the <i>trial judge must award costs to the successful party</i> , save where it is not possible to justly adjudicate

DAMAGES

			<p>on liability for costs. This is of great assistance where a strong case is made out and the defendant is a mark for costs (i.e. capable of paying). Previous practice was that normally the costs would be reserved to the full hearing or trial of the action.</p> <p>Commercial Court rules Order 63 Rule A 30 has a similar provision for matters being heard in the Commercial Court.</p>
Italy	Usually only about 30% of the actual legal costs are recovered.	Costs of identification and research and waste of time RO's employees due to the necessity of tackling the infringing activity.	Interlocutory measures often mean that proceedings on the merits of the case may be avoided, as extra-judicial agreements can be reached. Therefore, decisions on damages are not very frequent.
Latvia	Case law is very diverging in this regard.	<p>Civil Procedure Law defines the costs related to the adjudicating of matters, namely:</p> <ul style="list-style-type: none"> (i) amounts which must be paid to witnesses and experts; (ii) costs related to the examination of witnesses or conducting of inspections on-site; (iii) costs related to searching for defendants; (iv) costs related to execution of 	Practice is very diverging and not all Court decisions are publicly available.

DAMAGES

		<p>court judgments;</p> <p>(v) costs related to the service and issue of true copies of statements of claim, of court summonses and translations;</p> <p>(vi) costs related to publication of notices in newspapers;</p> <p>(vii) costs related to security for a claim; and</p> <p>(viii) costs related to the safeguarding, and the preparing of an inventory of an estate.</p>	
<p>Lithuania</p>	<p>RO can recover 100% of legal costs in successful litigation.</p>	<p>Witnesses, experts, translator services, costs of inspection, curator fees etc.</p>	<p>Statutory compensation is available if it is difficult to establish precise amount of damages. In one case, pecuniary damage was based on income received by the infringer from advertising. Non-pecuniary damages were awarded on the commercial and repetitive nature of IPR infringement and the size of the territory where the infringing material was disseminated.</p> <p>In another case, the amount of awarded non-pecuniary damages was calculated taking into account the prolonged period of the infringement (around 5 years), the</p>

DAMAGES

			significant number of infringing items produced, and the scope of the activity across the whole territory of Lithuania.
Luxembourg	<p>No clear rules concerning the recovery of the legal expenses, courts have great latitude in granting the recovery of the legal expenses.</p> <p>The percentage of legal costs typically recovered in successful litigation lies in general between 10-30%.</p>	<p>Recoverable expenses are: <i>legal costs and lawyers' fees</i>. Expenses related to research could be considered to be part of the prejudice. However, no case law on this.</p>	<p>Damages are awarded <i>ex aequo et bono</i>. Judgements are not very explicit/transparent on how the damages have been calculated.</p>
Malta	<p>Only judicial costs can be recovered.</p>	<p>Only judicial costs can be recovered. No extra-judicial costs may be recovered.</p>	<p>Not aware of any IPR cases where damages would be claimed. Most proceedings ask to declare an IP infringement without accompanying request for damages.</p>
Netherlands	<p>Not possible to state a percentage here, because of the huge differences between the various cases.</p>	<p>Costs to establish damages and liability include experts' costs such as the costs of legal advice and collecting evidence.</p> <p>Out-of-court costs include the costs of serving notice of default and out-of-court debt collection</p>	<p>Indicative standards have been drawn up in order to better estimate the potential cost risk at an early stage of proceedings. These <i>indicative rates in IP cases</i> have been applied since 1 August 2008.</p> <p><i>Indicative rates in IP cases</i></p>

DAMAGES

		costs.	<p><i>(excluding patent cases):</i></p> <p>Simple interlocutory proceedings: maximum €6,000</p> <p>Other interlocutory proceedings: maximum €15,000</p> <p>Simple proceedings on the merits, without reply and rejoinder: maximum €8,000</p> <p>Other proceedings on the merits without reply and rejoinder: maximum €20,000</p> <p>Simple proceedings on the merits, with reply, rejoinder and/or counsel's plea: maximum € 10,000</p> <p>Other proceedings on the merits with reply, rejoinder and/or counsel's plea: maximum € 25,000.</p>
Poland	Usually all costs other than the counsel's fee are awarded to the prevailing party. As regards the cost of legal representation, only a portion (sometimes relatively small) thereof is awarded to the prevailing party.	In principle, return of such expenses should be awarded to the prevailing party, provided that the court considers them as reasonable.	There is no substantial case law or established court practice.
Portugal	As a favourable ruling entitles the successful party to claim all the expenses incurred with the	All reasonable and demonstrated expenses can be claimed from the counterpart.	Following the issue of guidelines on good practice by the Portuguese Regional Public

DAMAGES

	proceedings to the unsuccessful party, the actual recovery of the costs will vary case by case, according to the solvency of the unsuccessful party.		District Attorney's Office in February 2009, awareness as to the serious damages resulting from the IP rights infringements has been raised in the judiciary.
Romania	The <i>legal costs</i> other than lawyer's fees are recovered 100%, while the lawyer's fees recovery may vary between 66% and 100%.	Only the judicial legal costs are recovered (i.e. only costs strictly related to the litigation and the official course thereof; it is <i>less likely</i> to get in court the recovery of an expert analysis conducted <i>prior to the trial</i> , but only for the expert analysis conducted <i>during the trial</i> and upon approval and appointment by the court.	Claiming of prejudice alone does not suffice. Plaintiff must substantiate the amounts by sufficient evidence, e.g. evidence for proving the price on Romanian market, price of assignment of a similar (in nature) TM etc. In another case the court generally admitted the <i>triple-license penalties</i> , but since the infringement was found lacking social harm, the infringer was not convicted.
Slovakia	In case the value of the case cannot be assessed in monetary terms (<i>e.g. prohibition to use the mark or unfair competition where there is no monetary compensation or moral damages</i>) lawyer's fees are substantially limited. This is quite discriminatory compared to cases where one asks for compensation in monetary	The law contains only demonstrative examples of legal costs, which means that any fees which have been <i>usefully spent</i> to defend one's rights can be claimed. These are for example lawyer's fees, travel expenses, expert's fees etc. The costs which are not usual should be justified by the applicant and it will depend on the	Use of mathematics.

DAMAGES

	<p>terms.</p> <p>In case the plaintiff was 100% successful in his case, the legal costs will be reimbursed by 100%, if the success was a partial one, the court will divide the legal costs between the parties.</p>	<p>court's assessment whether such costs will be taken into consideration or not.</p> <p>Lawyer's fees are reimbursed according to a special law (advocate tariff).</p>	
Slovenia	<p>Varies severely, therefore unable to assess Percentage.</p>	<p>Travel, accommodation, subsistence costs, wage compensation or lost profit for witnesses, expert translators, lawyers, experts, translators' fees etc.</p>	<p>No case law was found which would elaborate on exact calculations of costs. Not possible to generalize.</p>
Spain	<p>Very low.</p>	<p>Besides, the damage awards can eventually include investigation costs that the RH may have incurred to obtain reasonable evidence of the infraction which is the object of the judicial proceedings.</p>	<p>On RH's demand, the criterion of the <i>hypothetical royalty</i> is increasingly being used in Spain. In these cases, sectoral market standard royalties are applied.</p> <p>For a fairer approach to due royalties, more information should be provided in the research we have commanded.</p>
Sweden	<p>Approximately 75 %.</p>	<p>Attorney fees, ROs own internal costs, expert witnesses, travelling, lodging costs. However, these costs are limited to a reasonable amount awarded by the court.</p>	<p><i>The infringer's profit</i> based on: market price of corresponding original products minus infringer's purchase price of</p>

DAMAGES

			<p>infringing products equals profit.</p> <p><i>Responsibility for board members based on: infringing activity made by board member plus negligence.</i></p> <p><i>The royalty when no market for licensing exists: Estimation of royalty based on: multiple infringements plus reputation plus other facts such as security standards equals royalty of 25 percent of sales price</i></p> <p><i>Damages: lost revenues for sale of genuine goods plus lost revenues for sale of services in connection to the genuine goods plus goodwill damages; damages where infringer's gross negligence increased the damages.</i></p> <p><i>The royalty when a market for licensing exists and there exists no equivalent goods: royalty x value of goods amounts to total royalty.</i></p> <p><i>Value of goods: protected product plus product sold in connection with the same equals total value per piece.</i></p>
United Kingdom	The award and amount of costs	Lawyers' fees, fees of technical	<i>Additional damages for copyright</i>

DAMAGES

	<p>awarded are in the discretion of the court. Costs must be reasonably incurred, and reasonable and proportionate in amount. See also previous reply.</p>	<p>counsel (such as trade mark or patent attorneys, fees of judicial experts appointed by the courts, etc.</p>	<p>and <i>designs</i> infringements, although these are not routinely awarded.</p> <p>There have been some (unsuccessful) bills put forward in Parliament in the past to extend these to <i>patent</i> cases.</p> <p>Full civil costs awards against infringers: serve as a disincentive to infringement.</p>
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DAMAGES

COUNTRY	Primary legal or practical problems with the damages and costs	Do civil damages and costs awards have a <u>neutral</u> effect on, have a <u>deterrent</u> effect, or serve as an <u>economic incentive</u> to engage in infringement?	Top 3 Enforcement Problems
Austria	<p>In general, the provisions regarding damages and costs in IP cases are working well. No changes are in preparation.</p> <p>In cases, where the infringement does not resemble a standard business case (e.g. movie piracy in the internet), it is difficult to apply the reasonable royalty rule. In such cases a more punitive approach should be taken.</p>	<p>The civil damages have a deterrent effect in major cases, since the minimum damage for faulty conduct is twice the amount of the reasonable royalty. However, infringers sometimes argue that they did not and could not be aware of the infringement and therefore claim that they pay the single royalties only.</p>	<p>(i) Some defects in the system of private criminal prosecution have risen since reform of criminal procedure in 2008: Prosecution of unknown infringers has been repealed. An application for a raid has to be served to the infringer prior to the raid etc. A modification of the law is expected in Spring 2010.</p> <p>(ii) Prosecution of infringements committed via the Internet has become <i>almost impossible</i>. Since Austria did not implement Art 15 of the Directive 2002/58/EC, the obligation to delete traffic data (Art 91 Telecommunications Act) prevails the obligation to render master data of infringing users (Art 87b Copyright Act, Art 18 para 4 E-Commerce-Act).⁹</p> <p>(iii) The legal provisions for the</p>

⁹ decision of the Supreme Court of 14. 7. 2009, 4 Ob 41/09x.

DAMAGES

			<p>preservation of evidence pursuant to Art 87c Copyright Act (implementation of Art 7 Enforcement Directive) are far too general for proper use by the courts. Moreover, the courts do not have sufficient and well trained staff to carry out raids for the preservation of evidence. Therefore, the preservation of evidence is rarely applied for in civil IP cases.</p>
<p>Belgium</p>	<p>No established case law on the evaluation of damages. Some courts only award damages encompassing lost profits without taking into account other components of the prejudice. Moreover, the courts often award a lump sum without justifying it. Some courts allow damages for the costs of detecting and monitoring the infringement, while others consider that such expenses do not constitute a part of the prejudice. Regarding the moral prejudice or the injury to the reputation, it is often underestimated. General prohibition on punitive damages: infringing activities are often</p>	<p>Unclear case-law. Some new trends in the case law prove to have a deterrent effect. For instance, the moral prejudice is better taken into account by the case law which awards damages exceeding the mere symbolic damages that were previously awarded.</p> <p>Low amount of awarded damages and prohibition of punitive damages: the infringer tries his luck and prefers to engage in infringement than asking the authorisation of the RH. Therefore; between neutral to economic incentive.</p>	<p>(i) The absence of deterrent and proportionate damages.</p> <p>(ii) The difficulty for RH to prevent flows of counterfeit <i>goods in transit</i>.</p> <p>(iii) The duration of criminal investigations and proceedings.</p>

DAMAGES

	attractive.		
Bulgaria	-	They <i>should</i> have a deterrent and preventive effect on the infringer and the society.	<p>(i) Slow justice both criminal and civil.</p> <p>(ii) Expert reports in criminal cases. In internet piracy cases FTP servers seized can contain terabytes of illegal content. The question of how much time the working out of an identification expert time immediately arose. Each and every work has to be identified and this could take a year and a half. Slow judicial proceedings have a negative effect on public opinion and even if a positive sentence is obtained in a couple of years, its deterrent effect is doubtful. So, on legislative level, a proposal should be made that in criminal cases, expert reports in intellectual property cases should be based on a representative excerpt.</p> <p>(iii) Lack of deterrent sentencing in both civil and criminal cases.</p>
Cyprus	The usual problem is inability to prove extent of actual damage, be that in loss of sales or damage to goodwill. Not aware of any	Litigation is rather slow in awarding final damages and plaintiffs mostly concentrate on injunctive relief, usually on an <i>ex</i>	<p>(i) Proof of actual damage to sales and goodwill in civil cases.</p> <p>(ii) Non availability of sampling in presenting evidence in criminal</p>

DAMAGES

	changes planned.	<i>parte basis</i> . Thereafter, it is not uncommon in copyright civil cases for settlement on the damages amount which has been recovered. To my knowledge there have not been a lot of cases to determine the level of damages, but it is certainly a disincentive once awarded.	cases. This could be overcome by reversing the burden of proof in commercial scale infringement where the burden can be reversed if there are, say, more than 20 units of infringing items. (iii) Lack of effective enforcement of trading standards legislation by the Consumer Protection Unit of the Ministry of Commerce, Industry and Tourism.
Czech Republic	<p>(i) <i>Standard statutory schedule of attorney fees</i>: are calculated pursuant to special legislation and predominantly on the basis of the amount of a lawsuit (not on the basis of the actual fees paid to the counsel), sometimes makes it difficult for ROs to sue infringers when, for example, <i>smaller amounts are at issue in an infringement case</i>. In such cases, the fees awarded by a court would likely not compensate the RO for all of the fees actually paid to the counsel.</p> <p>(ii) <i>Challenges in proving the value of the licence fee or the quantity of infringing goods</i>. In software piracy cases, e.g. one of</p>	Neutral effect.	<p>(i) <i>Complexity of legislation and procedure</i>: it would be very helpful to have <i>unified legislation for protection of all IPR</i>. The current system can be quite complicated (For example, claims related to infringement of IP typically must be heard by the Municipal Court in Prague, although related claims for unfair competition can be heard by courts of general jurisdiction, which can result in problems resulting from varying court competences.).</p> <p>(ii) <i>Lack of unified civil and criminal remedy</i>: it would be helpful to have a unified system of calculation/adjudication of ROs</p>

DAMAGES

	<p>the issues is whether and how to deal with special versions/licences/other market offers of the software developer (sometimes to particularly qualified customers as academic institutions), and consequently whether and how to calculate the <i>usual</i> license fee which is the basis for copyright and unjust enrichment awards.</p>		<p>claims among the <i>civil</i> and <i>criminal</i> litigation systems. The claims that can be raised in criminal litigation are different to those available in the civil litigation system.</p> <p>(iii) <i>Lack of expertise</i>: lack of court experts that could help judges with various technical aspects of IP litigation. For example, it is quite difficult to do preliminary seizures of evidence in end-user software piracy cases, given that the courts seem to have no experts capable of doing on-site audits.</p>
<p>Denmark</p>	<p>Damages are low; the costs of litigation are far greater than damages. Would be helpful to reverse the burden of proof and/or if the RO could claim damages in case of good faith infringements.</p> <p>It would be helpful, if the RO was always entitled to claim the infringer's profits, as a minimum. Today the infringer's profits are usually higher than the damages.</p>	<p>More of an incentive.</p>	<p>(i) <i>Lowering the RO's burden of proof</i> regarding the size of damages, preferably by enabling the RO to be able to always claim the <i>infringer's profits as a minimum</i>.</p> <p>(ii) Enabling the RO to have his <i>actual costs reimbursed</i> by the unsuccessful infringer. This will in particular lower the infringer's incentive to fight well founded claims, e.g. by arguing that counterfeit goods are genuine.</p>

DAMAGES

			(iii) <i>Enhancing co-operation between the ROs, customs and the police.</i> In particular, the police needs further resources and IP competences.
Estonia	<p>(i) No common court practice and the situation may change rapidly in case the Supreme Court gives an opinion that does not comply with the already existing court practice in first and second instance courts;</p> <p>(ii) Proving the amount of damages. Sometimes the courts request evidence that would be difficult or even impossible to present.</p> <p>(iii) No punitive damages or statutory damages available in Estonia.</p> <p>(iv) Civil proceedings are long and difficult.</p>	Quite neutral effect. Taking into consideration the real damages and cost awards (payment of license fee after many years in court), it may even sometimes be profitable for the infringer to violate IP rights. The infringers are often ready to risk and conduct unlawful business.	<p>(i) The protection of IPR is not a government priority. Enforcement institutions (police, prosecutor's office) are not interested of investigating IP violations. The laws of Estonia make it also almost impossible to fight against internet piracy in Estonia.</p> <p>(ii) The court proceedings are not very effective – they are slow, sometimes extremely difficult, and costly to RHs and have no expected effect.</p> <p>(iii) Lack of statutory damages in IP cases,, they would make the claiming of damages more effective.</p>
Finland	No general formula for calculating damages. Uniformity in damages calculations is assured that one court is dealing with all TM infringement cases.	Since no punitive damages exist in Finland, damages are not deterrent. Publication of judgments may have a deterrent effect. Removing the infringing sign or destroying the product	<i>Transit problem</i> (goods transported from China via Finland to Russia). In these transit cases monetary compensation is not materialized as the goods are not brought onto the market. In

DAMAGES

		does not influence the evaluation of damage (deterrent effect).	such cases the aim is to prohibit the infringing goods from being released in other markets.
France	The law is too recent to pinpoint any legal or practical problems with the damages and costs provisions.	The law is too recent to pinpoint any legal or practical problems with the damages and costs provisions.	-
Germany	<p>The RO depends on reliable information of the infringer who may have an interest in not disclosing everything. The truth of such information can hardly be checked. Therefore, the communication of documents after the implementation of the enforcement directive might prove useful but it is too early to judge.</p> <p>If a prior criminal procedure has taken place the RO might use information gained out of this procedure.</p>	Civil damages usually will not have a deterrent effect. Punitive damages are not known to the German legal system and also not desired. However, it would be desirable if the calculation provided for higher damages in cases of strong and clear infringements. Cases were double licence fees are known (as in the Copyright sector) should be expanded.	<p>(i). Liability of intermediaries (scope of obligations, proactive measures)</p> <p>(ii) Goods in transit</p> <p>(iii) Anonymity of internet-commerce.</p>
Greece	IPRED only transposed in relation to copyright. Apart from copyright and patent infringements no quantification rule. Court decisions have small impact on infringers. No pre-trial discovery. No ex-parte orders.	Economic incentive to engage in infringements.	<p>(i) Understaffed customs;</p> <p>(ii) Lengthy civil and criminal proceedings;</p> <p>(iii) Police/tax authorities do not engage in investigation. Burden of illegal activity vests with the ROs.</p>

DAMAGES

	<p>Long litigation (up to 6 years), delay is an incentive for infringers. Lack of specialized IPR judges.</p>		
<p>Hungary</p>	<p>There are no clear legal guidelines regarding reasonable <i>legal fees</i>. There are no provisions stating that storage and destruction costs should be part of the legal fees and not part of damages.</p> <p>Regarding damages the Hungarian Report sent to the commission under Art. 18 IPRED states that: <i>no significant change can be observed in the level of awarded damages since the transposition of the Directive that the courts are overly cautious when determining the level of damages awarded and that the extent to which the courts require evidence before awarding damages is not rational</i>. These factors result in insufficient compensation for damages suffered by IP rights owners.</p> <p>When claims for damages are raised in criminal proceedings and that court redirects the adjudication of those claims to a civil court (happening in about 80</p>	<p>The present system has rather a neutral effect. Damages and costs awards are not deterrent at all.</p>	<p>(i) Storage and destruction costs cannot be compensated as part of the legal fees, but only as damages. If such costs were deemed to form part of the legal fees, the rights owner would not need to pay stamp duty when claiming the reimbursement thereof and would not have to prove that the infringer acted in bad faith to obtain compensation in this regard.</p> <p>(ii) There are no clear legal guidelines regarding how moral damages can be awarded in IP infringement matters.</p> <p>(iii) The court execution system through bailiffs is totally ineffective.</p>

DAMAGES

	<p>% of the cases), the judgment of the latter court is often based on the allegedly incomplete and not well-founded expert opinion delivered in the criminal case.</p> <p>In practice, the courts usually do not award the full reimbursement of the total legal fees of the successful party where they don't see a high value and difficult legal issues of a case, even though lawyers have billed the time spent on complex legal issues.</p>		
Ireland	<p>In my experience, in general, the damages and costs provisions are okay. However, a scale of damages to be awarded would be very helpful and would avoid ambiguity and uncertainty.</p>	<p>A <i>deterrent effect</i>, the scale of costs and damages are very prohibitive and therefore the infringer knows that, if caught, it will be expensive for him/her.</p>	<p>In my experience, many potential defendants in particular areas of piracy, e.g. resellers/hard disc loaders, are not a mark for damages.</p>
Italy	<p>(i) The length of the civil proceedings on the merits, since damages/account of infringer's profit may be assessed only with the final decision on the merits; (ii) the very low reimbursement of costs; (iii). the difficulty of proving the damages suffered, when a Court expert is not appointed for</p>	<p>Civil damages have a <i>serious deterrent effect</i>.</p> <p><i>Since the costs are not fully reimbursed, the infringer's lawyer may be encouraged to try to extend the length of the proceedings on the merits.</i></p>	<p>(i) The length of the civil proceedings on the merits (2-4 years in 1st instance), which is longer than the EU average; (ii) the very low reimbursement of costs; (iii) length and low reliability of the criminal proceedings.</p> <p>12 specialized IP divisions courts</p>

DAMAGES

	determining the same.		with exclusive competence in civil IP matters. Legislation has improved.
Latvia	Case law regarding damages claims in IPR-related infringements is very disparate and is not consistent.	Civil damages and costs awards have a neutral effect.	<p>(i) Court practice has not matured and has not revealed the clear forms and limits of the applied procedure, yet. Besides, the workload of the courts delays the development of this process and qualitative decision-making. As a result, the conformity of the Latvian system of protection of intellectual property rights with the European and international standards is impeded.</p> <p>(ii) The process of damage compensation in cases of IPR infringements is very complicated. Occasionally, both the lawyers and the employees of the legislative institutions and courts lack understanding about this subject. In practice, this results in incorrect interpretation of the provisions, transient and non-consequent court practice.</p> <p>(iii) Courts often only take into account the direct lost profits, ignoring the unfair profits made by the infringer and the lost profits of the RO. However, it is</p>

DAMAGES

			<p>too early stage to judge on that issue.</p> <p>(iv) Claiming compensation at the discretion of the court, as it used to be before the implementation of IPRED, was much more favourable for the RH, since there was not burden of proof for <i>unlike losses</i>.</p>
Lithuania	<p>Claimants seeking to recover damages (instead of statutory compensation) bear the burden of establishing the amount of damages incurred.</p> <p>Access of an alleged infringer's premises and reproducing equipment can only be granted by the court.</p>	It seems to make economic sense to infringe IPRs on a significant scale.	<p>(i) Slow judicial process;</p> <p>(ii) majority of population does not consider IPR infringements to be an illegal activity;</p> <p>(iii) when a RO claims damages for the infringement of IPRs, he faces the practical problem of calculating and proving the claimed amount, which can be difficult if there is no concrete market price or if it is otherwise difficult to identify the price.</p>
Luxembourg	<p>Judgements are not explicit/transparent in regard of how the damages are calculated. No clear rules on how legal expenses recovered. Legal costs are rarely recovered above 30% of the actual legal costs.</p>	Neutral effect. Not deterrent.	<p>(i) <i>Civil enforcement</i>: The main problem is clearly calculation and award of damages and legal costs.</p> <p>(ii) <i>Criminal enforcement</i>: magistrates are often not specialised in IPR.</p> <p>(iii) Customs: article 18 (<i>Penalties</i>) hasn't been implemented in Luxembourg.</p>

DAMAGES

<p>Malta</p>	<p>Not much case law yet. So far cases focused on a declaration of an existence of IP infringement, without claiming damages.</p>	<p>Civil damages and costs <i>in general</i> act as a deterrent to engage in infringement. However, since no judgements on damages so far, precise answer to these questions still remains to be seen.</p>	<p>(i) Transposition of IPRED in Malta simply copied the directive without making it specific to the needs and circumstances of national industry. (ii) Duration of IPR cases (5-6 years). (iii) No specific court to deal <i>solely</i> with IP infringements.</p>
<p>Netherlands</p>	<p>The indicative rates for legal costs in IP cases should not be regarded as fixed amounts against which no appeal may be lodged. A party which claims full payment of costs must substantiate this with time sheets with hourly rates and any invoices. If a party fails to do so, the court may make an estimate which deviates from the indicative rates.</p>	<p>Smaller and less financially strong businesses will be more inclined not to embark on court proceedings. This may concern both the infringers and ROs. Less financially strong parties will uphold their IPRs less effectively, whereas it is precisely the financially strong parties which will be able to exercise their rights to the maximum.</p>	<p>(i) <i>Civil</i>: in connection with ordering payment of the full costs is that access to the law is limited for the less financially strong ROs; (ii) <i>customs</i>: transit (as the infringement has not been committed on the Dutch territory); (iii) <i>criminal</i>: only a last resort that can only be applied if an infringement brings about a threat to public order and/or public health (e.g. counterfeit medicines).</p>
<p>Poland</p>	<p>Fact that legal costs awarded by the civil courts are determined at a relatively low level constitutes a deterring factor in pursuing civil matters. Especially, as courts apply quite a restrictive approach</p>	<p>As stated above, because of the manner of calculating the compensation of damages, as well as, the limitation of legal expenses refunded by civil courts, civil proceedings are not a primary</p>	<p>Duration, costs and lack of creative approach when calculating damages constitute the reason for ROs to rely more on criminal proceedings. Also; police and public prosecution service are</p>

DAMAGES

	<p>in awarding damages and usually damages only correspond to the number of infringing items actually seized. E.g.: if a retail outlet trades with illegal goods and it is quite obvious that such activity has been continued for at least many months prior to the seizure, the compensation of damages will nevertheless be limited and will relate only to items seized on the day of the police raid.</p>	<p>measure to combat piracy. Criminal conviction constitutes a much greater deterring factor.</p>	<p>increasingly eager to pursue IP related matters and the customs are also very active seizing illegal imports.</p> <p>Of vital importance to properly delimit genuine private use exception from downloading illegal content (even for private purposes) by internet users. Controversial issue, however strong opinion that under the present legislation in force, downloading of illegal content from illegal sources will still be within the limits of the personal private use exception. That constitutes a great deterrent for legally acting persons to launch successful on-line services, as they have to compete with activity of those offering their content for free.</p>
<p>Portugal</p>	<p>As the implementation of the provisions regarding the enforcement of intellectual property rights in Portugal is very recent, there is no relevant case law to ascertain the practical problems related to this matter.</p>	<p>In the past, the enforcement of IP rights has not allowed a full compensation for the losses and damages incurred, particularly due to the reluctance of the Portuguese judges in granting indemnities to the injured parties. Partially, their reluctance was explained, by the</p>	<p>Although IPRED was an important measure, the procedural aspects of the new provisional and precautionary measures and measures of preserving and collecting evidence and the fact that specialized IP courts have not yet been implemented, may</p>

DAMAGES

		<p>lack of statutory law governing this issue. As so, this situation almost served as an incentive to engage in infringements in Portugal, which hopefully will turn around with implementation of the provisions regarding the enforcement of the IP rights.</p>	<p>complicate the application of these provisions.</p> <p>Also, the current backlog at the Portuguese Courts and the scepticism of the Portuguese judges with regards to the application of the provisions related to compensation and damages, may compromise the overall IPR enforcement regime.</p>
<p>Romania</p>	<p>Copyright cases: <i>Incorrect transposition of IPRED</i> for non-knowingly committed infringements, where recovery of profits/damages may be pre-established: Romanian version is for <i>intentional</i> acts (instead of <i>non-knowingly</i>).</p>	<p>Indirect and slight deterrent effect.</p>	<p>(i) <i>Computer search warrants</i>: mere verification of the existence of software installed on the computers should not require a search warrant.</p> <p>(ii) Law enforcement (public prosecutors and/or courts) consider the damages covered by the mere acquisition of licenses/obtaining of authorizations after the raid.</p> <p>(iii) Incorrect transposition of IPRED for <i>non-knowingly committed infringements</i>, where recovery of profits/damages may be pre-established: Romanian version is for <i>intentional</i> acts.</p>

DAMAGES

<p>Slovakia</p>	<p>No legal problems, but the problem of people's attitude.</p>	<p>It is evident that the preventive function of legislation is not working, given the (even though decreasing but still significant) extent of the infringements in SK and the courage and creativity of the infringers.</p> <p>The courts do not seem to understand that moral damages do not only have a compensatory function but also serve as a civil sanction the aim of which is to effectively punish the infringer but not to destroy him.</p> <p>Damages do have effect, but it would be appropriate to provide for higher compensation than just the licensing fee, if the licensing agreement was concluded.</p>	<p>(i) Originally 3 courts have been appointed to specialize on IPR matters in SK, however only one of them is really a specialized one, where IPR matters are decided by 2 highly specialized judges. The specialisation of other two courts doesn't exist since the agenda is evenly distributed among the judges specialized for commercial matters.</p> <p>(ii) <i>Industrial designs</i>: problem to determine whether to grant an industrial property protection or copyright protection, attempts of ROs to demand automatic copyright protection for all designs. Consequently if copyright protection is upheld, (<i>since there is no requirement to have specialized copyright courts</i>) the responsible court is not the specialized court, but <i>any</i> first instance court.</p> <p>(iii) Slow court proceedings. Inability to use quick arbitration in domain name cases;</p> <p>(iv) high fluctuation of the entrepreneurs;</p> <p>(v) misuse of criminal law proceedings;</p> <p>(vi) in customs delicts: the</p>
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DAMAGES

			<p>problem with the assessment whether the product is original already at the border;</p> <p>(vii) registration of domain names is not regulated by the state.</p>
Slovenia	-	<p>Due to negative economic consequences that are imposed upon infringer, civil damages should have a deterring effect. However, in certain fields of IPR a threat of economic loss alone is not sufficient to generally prevent breaches, which might be due to lack of general awareness on the issue or due to ineffective surveillance and enforcement.</p>	<p>(i) Lack of judges specialised in IP matters (specialized court in Ljubljana, but no specialized judges);</p> <p>(ii) criminal sanctions exist only in theory (not a single criminal case involving counterfeit goods);</p> <p>(iii) internet piracy; internet file sharing activity are the most underdeveloped areas of enforcement.</p>
Spain	<p>The main problem in some cases is to provide evidence that the damage occurred. For instance, when there is <i>reputational damage without any actual prejudice</i>. That is what happens to luxury brands: a sale of fake products does not correspond to a lost sale of authentic product.</p>	<p>Civil damages and costs awards have a <i>compensating effect</i> for the RO, but they <i>never compensate the true damage</i>.</p> <p>The awards <i>never have a deterrent effect</i>, since the profit obtained by the infraction is always higher than the eventual compensation that can be awarded.</p>	<p>Some judges reluctant to apply the criminal legislation in case of IPR infringements.</p> <p>In Spain, there is no sense of wrongdoing concerning the violation of IPRs, therefore, tolerance to the crime is high.</p>
Sweden	For the RH to prove the damages	Appear to be changing from	(i) <i>Customs and in particular</i>

DAMAGES

	<p>he suffered.</p>	<p>neutral effect to <i>deterrent effect</i> since there have been a range of judgements where substantial amounts have been awarded.</p>	<p><i>Police and Prosecutor: lack of resources/interest in IPR enforcement.</i> In particular with regard to <i>industrial property rights</i> prosecutors may only prosecute if the infringement is committed on a <i>commercial scale</i> or poses <i>certain consumer risks</i>.</p> <p>(ii) Difficulties to prove <i>actual damages</i> suffered.</p> <p>(iii) Courts are reluctant to award full legal costs if the plaintiff is not awarded the full damages claimed_which has a deterrent effect against plaintiffs claiming more extensive damages.</p> <p>(iv) To have Swedish Courts award <i>goodwill damages in Customs detention cases</i>.</p>
<p>United Kingdom</p>	<p><i>Infringer retention of profits in certain cases:</i> Civil damages are only meant to <i>restore</i> the injured party to the position that it should have enjoyed absent the infringement, therefore, still possible in some cases for the infringer to <i>retain some of the economic benefit of wrongdoing</i>, particularly if there</p>	<p>(i) <i>Full civil costs awards against infringers:</i> This does serve as a disincentive to infringement.</p> <p>(ii) No deterrent to infringement if an infringer needs only to obtain a licence and <i>pay up</i> when caught (e.g. for software or other licensed material).</p>	<p>(i) Disparity between costs incurred and costs recovered (e.g. under <i>standard costs awards</i> and non-deterrent damages awards).</p> <p>(ii) Recoverability/enforceability of damages and costs awards against rogue traders.</p> <p>(iii) Inability to require Customs</p>

DAMAGES

	<p>are multiple injured parties and potential claims (e.g. from a manufacturer, licensees and various supply chain players).</p> <p><i>No deterrent to infringement:</i> If an infringer needs only to obtain a licence and <i>pay up</i> when caught (e.g. for software or other licensed material).</p>		<p>to seize goods in transit (following <i>Nokia v HMRC</i>).</p>
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