Study Question

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Quantification of monetary relief

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I. Current law and practice

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

1 **What rules and methods are applied when quantifying actual loss?**
In particular, please describe:
a) the method used to determine the diversion of sales, i.e the part of the infringing sales that the rightholder would have made but for infringement;
b) what level of profit margin is taken into account.

At the beginning, it would be necessary to provide brief overview of regulation of damages in Latvia concerning intellectual property (IP) infringements.

Regulation of damages and their compensation for IP infringements is provided by different legal acts containing both substantive and procedural norms.

As regards substantive law, general legal norms for regulation of damages are provided in the Civil Law of the Republic of Latvia of 1937 (Civil Law) being a codification of civil law in Latvia. Specifically, general regulation of damages and their calculation (quantification) is provided in Article 1635 (1) and Articles 1779-1792 of the Civil Law. Special legal norms are contained in sui generis intellectual property (IP) legal acts such as Law on Trade Marks and Indications of Geographical Origin (Article 28.1), Law on Designs (Article 48.1), Patent Law (Article 64), Semiconductor Product Topography Protection Law (Article 19), Plant Varieties Protection Law (Article 38) and Copyright Law (Article 69).

In the result, in Latvia rules for compensation of material and non- material harm have been set in three different ways - one for patents, designs and trademarks, another for copyright and plant varieties, yet another – for semiconductors:
1) for trademarks, patents and industrial designs: by requesting compensation for suffered material harm, the right holder may apply for one of the following forms of remuneration: 1) compensation of damages or 2) license fee; or 3) return of the unfair earnings. The amount of non-material harm can be determined by the court at its discretion. (Trade Mark Law, Article 28.1; Patent Law, Article 64; Industrial Designs Law, Article 48.1)
2) for copyright and plant varieties: the amount of compensation for losses and moral injury must be calculated in accordance with the Civil Law, the unfair earnings may be taken into account. If the amount of actual losses cannot be calculated in accordance with Civil Law, it can be determined in accordance with the amount which could be received by the rightholder for the issue of a permit to use the object (Licence

fee) (Copyright Law, Article: 69.1; Plant Varieties Law, Article 38)
3) for semiconductors: an infringer has to pay a fair compensation to the owner of the topography. If compensation is paid, but the infringer wishes to continue the use of topography, the right holder shall grant him a license. In case of dispute amount of fair compensation and the license conditions are determined by the court, taking into account the economic value of use of the topography (Semiconductors Protection Law, Article 19).

Substantive rules on regulation of compensation of actual loss are included in the following legal acts.

General rules for loss compensation duty is set in the Civil Law. So, the general norm of Latvian delict (tort) law provides: Every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act. The amount of compensation for moral injury shall be determined by a court at its own discretion, taking into account the seriousness and the consequences of the moral injury. Moral injury shall be proved by the person who suffered the harm. (Civil Law, Article 1635).

Specific rules for compensation of actual loss for IP infringements are provided by sui generis IP legal acts in Latvia mentioned above.

Methods of calculation according to general regulation of the Civil Law. So, in evaluating losses one shall consider not only the value of the principal property and its appurtenances, but also the detriment indirectly caused by the loss having taken place and lost profits. (Civil Law, Article 1786). Furthermore, Article 1789 of the Civil Law provides that the court shall take into account not only normal value of the thing in question, but also its special value to the injured party, in this situation - to the rightholder. In addition, Article 1792 provides that the loss valuation shall correspond to the value of the subject-matter at the time the loss was occasioned. As it could be seen from these methods of calculation, they could be hardly applied in IP infringement cases without any modifications or reservations. Likewise, specific legal acts mentioned above provide several types of damage including actual loss in the case of IP infringements yet they do not lay down specific methods for calculation of losses in IP infringement cases. These deficiencies of regulation cause different kinds of difficulties for rightholders in practice to collect damages from infringers of IP rights.

As regards procedural norms, one may refer both to Latvian criminal and civil procedure law.

In criminal proceedings compensation is payment specified in monetary terms that a person who has caused harm with a criminal offence pays to a victim as atonement for moral injury, physical suffering, or financial loss. Compensation is an element of the regulation of criminal-legal relations that an accused pays voluntarily or on the basis of a court judgment. If a victim believes that the entire harm caused to him or her has not been compensated with a compensation, he or she has the right to request the compensation thereof in accordance with the procedures laid down in the Civil Procedure Law. In determining the amount of consideration, the compensation received in criminal proceedings shall be taken into account. In requesting monetary compensation within criminal proceeding, a victim is not obliged to pay a State fee. (Criminal Procedure Law, Article 350).

The method of calculation of losses in criminal proceedings is set up in Criminal Procedure Law: court has to take into account: the amount of financial losses caused; the seriousness of a criminal offence, the caused physical suffering, the depth and publicity of a moral injury and possible mental trauma. Direct losses shall be assessed at the prices used for the determination of the amount of prosecution. (Criminal Procedure Law, Article 352). Infringer may be released from criminal liability if he settles with the victim by reaching a settlement and by complete reimbursing of caused losses. (Criminal Law, Article 58). Investigator, prosecutor or court may terminate criminal proceedings, if infringer has concluded a settlement with the victim (Criminal Procedure Law, Article 379).

2

What rules and methods are applied when quantifying a reasonable royalty?
In particular, please describe:
a) the royalty base;
b) how relevant comparables among licence agreements are defined;
c) how a reasonable royalty is quantified in the absence of relevant comparables;
d) the nature of the royalty, e.g. lump-sum, percentage of revenues or profit, a mix?

According to regulation of damages contained in sui generis IP legal acts, an IP rightholder may choose one of three different methods for calculation of damages caused one being a licence fee (for differences of regulation of licence fee for different IP rights, see the answer to Question I. above). Latvian courts have distinguished two different situations. One situation refers to a rightholder who has concluded licence contracts before. In this situation, Latvian courts would use the licence fee provided by these licence contracts for establishing a licence fee in the given case. An exception could be the situation that the court would find unreasonable to apply the license fee provided in a particular licence contract as it was established by Latvian courts in one of cases. Another situation concerns a rightholder who has not concluded any licence contracts or is unwilling to disclose licence fee contained in its concluded licence contracts to the court. In this situation, Latvian courts have difficulty to apply the licence fee method for compensation of damages. However, in one of recent cases a regional court based its judgement on established practice of the amount of royalties in a relevant industry (Judgement of Riga Regional Court of 7 November 2016 in civil case No C04292106; not appealed, entered into force).

If the economic loss is estimated using the license fee method, then it is usually in the amount by which the licensor and infringer would close a deal. There should be set an imaginary license fee, on which would have agreed to cooperate willing licensor with willing licensee. Although

such negotiations are hypothetical, the licensee and the licensor are always certain part in the relevant market, and it is assumed that they want agree on a license.

a) the royalty base;

The royalty can be determined in accordance with the amount which could be received by the rightholder for the issue of a permit to use the object (Copyright Law, Section: 69.1; Plant Varieties Law, Article 38; and other sui generis IP legal acts mentioned above)

b) how relevant comparables among license agreements are defined;

Not defined by law.

c) how a reasonable royalty is quantified in the absence of relevant comparables;

For software – actual price; for films - quantity of clicks multiplied with the sum of cinema entrance ticket; for music - quantity of clicks multiplied with sum of CD or on-line purchase;

d) the nature of the royalty, e.g. lump-sum, percentage of revenues or profit, a mix?

Potential infringer is entitled to claim compensation for losses, which he has incurred in relation to the specification of means of provisional protection if the action brought against him was refused by court (Civil Procedure Law - Article 250.15).

3 **What rules and methods are applied when quantifying the infringer's profits, as part of quantifying damages?**
In particular, please describe:
a) the method to determine the profits resulting from the infringement, i.e. resulting from the use of the IP right;
b) what level of profit margin of the infringer should be taken into consideration.

As regards quantification of the infringer's profits, Civil Law contains strict regulation in this regard.

Mere possibilities shall not be used as the basis for calculating lost profits, rather there must be no doubt, or it must at least be proven to a level that would be credible as legal evidence, that such detriment resulted, directly or indirectly (Article 1773) from the act or failure to act which caused the loss. (Article 1787).

a) the method to determine the profits resulting from the infringement, i.e. resulting from the use of the IP right;

To determine the profits resulting from the infringement, two main methods are usually used:
1) determine the difference between the profits which the infringer has gained, and the profits that would have accrued to him, without prejudice to the right;

2) determine what proportion of infringer's net profit refers to the infringement

b) what level of profit margin of the infringer should be taken into consideration.

A court in the judgment decides on reimburse the losses and moral harm caused due to unlawful utilisation of an intellectual property object (Civil Procedure Law - Article 250.^{17}). But a plaintiff has to prove existence of this loss based on general distribution of submitting evidence in civil procedure.

The infringer's profits can't automatically be recognized as a copyright holder's lost profits. In order to receive compensation for damage caused, the plaintiff must prove 1) copyright infringement; 2) the fact of loss, 3) the amount of losses and 4) the causal link between copyright infringement and fact and extent of the loss. [..] In case has not been proven the applicant's profit tear, which would have a causal connection with copyright infringement. (Supreme Court 2016, Case Nr. C30649011)

The plaintiff must prove the existence and extent of the loss. It is not justified, how the presumed unfair profits can be used for determining of the amount of loss (reduction of property or profits rapid-emergency). The plaintiff may request only compensation of losses, but not the infringer's unfair profits that are not directly related to the applicant's actual loss (Supreme Court 2015, Case Nr. C04153414).

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

A loss which has already arisen may be a diminution of the victim's present property or a decrease in his or her anticipated profits (Civil Law, Article 1772).

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

A loss which has already arisen may be a diminution of the victim's present property or a decrease in his or her anticipated profits (Civil Law, Article 1772).

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

A loss which has already arisen may be a diminution of the victim's present property or a decrease in his or her anticipated profits (Civil Law, Article 1772).

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

A loss which has already arisen may be a diminution of the victim's present property or a decrease in his or her anticipated profits (Civil Law, Article 1772).

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

No.

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

Yes, expert accounting evidence on past licensing practices accepted could be employed by court.

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

Yes, expert accounting evidence on past licensing practices accepted could be employed by court.

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

Yes, expert accounting evidence on past licensing practices accepted could be employed by court.

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

No specific mechanisms.

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

A loss shall be considered: direct where it is the natural and inevitable result of an illegal act or failure to act; indirect where it is caused by an occurrence of particular circumstances or relationships; and accidental where caused by a chance event or *force majeure*. (Civil Law, Article 1773). As all damages caused to the victim shall be compensated as provided by Article 1779 of the Latvian Civil Law, there is no difference from the point of law for calculation of damages in both cases. Yet, practical difficulties could arise for proving liability of the infringer for damages caused in the case of indirect infringement.

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

a) if an injunction has also been granted

Please explain your answer

Losses may be either such losses as have already arisen, or such losses as are anticipated; in the former case, they give rise to a right to compensation, but in the latter case, to a right to security (Civil Law, Article 1771). If forward-looking damages could be qualified as unearned profits in a particular IP infringement case, they could be claimed as damages that have already arisen, however, on the condition that an IP infringement has been established by the court.

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

Yes

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

If a claim for compensation of losses has arisen not from a breach of contractual obligations, but from acts which are of themselves illegal, then the loss valuation shall correspond to the value of the subject-matter at the time the loss was occasioned. (Civil Law, Article 1792). A victim shall take such measures for prevention of losses which are reasonable under the relevant circumstances. Infringer may request reduction in the amount of losses to be compensated in such amount in which a victim could have, through the exercise of due care, prevented the loss, except in a case of malicious infringement of rights. A victim has the right to claim compensation only for such losses from which he could not avoid by taking the measures for prevention of losses. (Civil Law, Article 1776).

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

Latvian courts take into account the time period when the infringing acts were carried out, however, they do not attribute any special meaning to certain time periods when these infringing activities took place. Yet, in some occasions Latvian courts may take into account, for the purpose of calculation of the amount of damages, the time period between the moment when the infringer was informed about the infringement and a court's ruling as well as the time period during court proceedings. In addition, in software cases is hard to convince the court that damages have to be calculated according to the full price of goods (without any discounts which are considered to the good faith acquirers) or price reductions over time.

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

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

Currently effective regulation of compensation of damages included in *sui generis* IP legal acts mutually differ as certain legal acts (in the revised wording effective since 2016) such as Trade Marks and Indications of Geographical Origin (Article 28.1), Law on Designs (Article 48.1), Patent Law (Article 64) provides that different types of damages are considered as alternatives. This regulation should be extended to other IP rights such as plant varieties rights, topographies of semiconductor products and copyright whose regulation (Plant Varieties Protection Law (Article 38), Semiconductor Product Topography Protection Law (Article 19), Copyright Law (Article 69)) currently does not provide for different types of damages being as alternatives for compensation of damage.

Likewise, the court should be entitled to double or even triple the amount of damages caused in the case of wilful infringements or infringements that were not discontinued after receiving a cease or desist letter or initiating court proceedings. This proposal is especially important in the case of licence fee as one of types of damages because if the infringer would know that he or she must just pay licence fee in the case of establishing infringement, there would be little initiative to acquire rights to use IP objects lawfully.

Regulation of compensation of damages included in *sui generis* IP legal acts could be supplemented with special rules on quantification of damages. For instance, it could be provided that if it is difficult or impossible to calculate damages, the court may quantity damages based on certain percent of turnover, for instance, till 10 per cents of the overall turnover, of the infringer. This proposal would be based on the practice of calculation of penalty for competition law infringements and the presumption of the amount of overpayment in cartel cases in the amount of 10 per cents from the fee of a thing in question. Likewise, there could be also introduced a presumption of damage if an IP infringement is established and the obligation upon the court in this situation to establish the amount of damages at its own discretion if it cannot be calculated by the right holder. This could disallow the situation which took place in some court cases in Latvia that the court refuses the claim on compensation of damages for established IP infringement just on the basis that the rightholder could not prove the amount of damages, for instance, on the basis of the licence fee criterion.

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

Yes

Please Explain

If the infringer has not challenged validity of IP rights of the rightholder, the court must be guided from the assumption that these rights are valid. Two exceptions could be mentioned here. One exception could cover situations when it is clearly seen from the circumstances of the case, that the IP rights in question refer to un-protectable objects, for instance, creations of the author that could not quality for protection in the field of copyright. Another exception refers to the situation when the alleged infringer challenges validity of the IP rights in question.

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

No

Please Explain

If the infringer has not challenged validity of IP rights of the rightholder, the court must be guided from the assumption that these rights are

valid. Two exceptions could be mentioned here. One exception could cover situations when it is clearly seen from the circumstances of the case, that the IP rights in question refer to un-protectable objects, for instance, creations of the author that could not quality for protection in the field of copyright. Another exception refers to the situation when the alleged infringer challenges validity of the IP rights in question.

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

Determination of the court of a reasonable royalty may be based on different methods such as previously concluded licence contracts by both or one of parties; the existing practice in industry for the amount of a reasonable royalty; court practice in similar cases; etc. Evidence depends on the method chosen for determination of quantification of damage such as licence contracts themselves; studies, expert testimonies and other documents testifying practices in the industry.

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

Quantification of damages shall depend on the court ruling on termination of infringement because it serves in Latvia as evidence of the very existence of the infringement considering that Latvian IP law does not admit declaratory judgements (except Latvian patent law).

III. Proposals for harmonisation

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

No

Please Explain

Harmonisation of regulation of damages in IP cases including their calculation is not desirable as each country has its own legal traditions, level of economic development and character of typical IP infringements. For possible solutions for improving Latvian IP law on compensation of damages, see the answer to question II. 1 above.

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

Quantification of actual loss in IP cases should be based on strict liability, special legal regime providing relief of quantification of damages, and assumptions of quantification of damages in situations when the amount of damages is difficult or impossible to prove.

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

See below.

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

As it was mentioned above, in the case of a hypothetical negotiation the court should assume that IP rights whose infringement is alleged is in force unless it is clearly seen the opposite or the alleged infringer challenges validity of these IP rights.

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

The prior as well as existing practice of licensing should be taken into account. Yet, this conclusion depends on evidence that is made available to the court.

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

Previous and existing licensing practice concerning one and the same IP right should be taken into account depending on evaluation whether such practice is comparable with the situation existing in a particular court case. Such practices in relation to other IP rights should be taken into account as far as these practises and IP objects may be comparable with IP right in question.

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

In these situations the court should establish the amount of damages which directly relates to the infringed goods, However, if it is not possible, the court may apply assumptions concerning the role of the infringing goods in commercial activity of the infringer by respectively reducing the amount of damages.

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

In these situations the court should establish the amount of damages which directly relates to the infringed goods, However, if it is not possible, the court may apply assumptions concerning the role of the infringing goods in commercial activity of the infringer by respectively reducing the amount of damages.

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

In these situations the court should establish the amount of damages which directly relates to the infringed goods, However, if it is not possible, the court may apply assumptions concerning the role of the infringing goods in commercial activity of the infringer by respectively reducing the amount of damages.

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

In this situation, different aspects should be taken into account such as the character of infringement, infringed IP right, the character of infringing activity, the person of the alleged infringer; and similar aspects.

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

No additional comments.

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

No specific industry sector.

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