GENERAL PRINCIPLES

Before we elaborate upon the quantification of actual loss, it is appropriate to briefly explain certain basic principles and elementary concepts regarding the quantification of damages, in general, under Belgian law. The compensation of the prejudice suffered in case of IP infringement is indeed based in Belgium on the general rules of tort law, themselves derived by case law from Article 1382 of the Belgian Civil Code[2]. The main principle is that of “restitutio in integrum”, which means that the compensation should be equivalent to (no more and no less than) the actual prejudice suffered by the injured party. The purpose is to place the injured party back in the situation it had prior to the harmful event. The application of the restitution in integrum principle in cases involving IP infringements has been consistently confirmed by jurisprudence, including by the Belgian Supreme Court (Cour de Cassation).[3]

According to this principle, the compensation may not exceed a level necessary to properly compensate the injured party, as this would amount to punitive damages, which are not allowed under Belgian law (without prejudice to what is said below – at question 3 – regarding transfer of profits in case of bad faith infringement). On the other hand, all aspects of the prejudice should be taken into account.

As mentioned in the Protocol for the preparation of the questions, Directive 2004/48[4] on the enforcement of intellectual property rights serves as an important instrument of harmonisation within the EU, including for principles that need to be applied in the calculation of damages.

According to Article 13, 1(a) of the Directive, judicial authorities need to take into account all appropriate aspects when quantifying damages. This includes such aspects 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”
of these damages
Alternatively, if the claimant
not sold due to the infringement. We understand this to match with the concept of “actual loss” in the meaning of the questionnaire.

There are two ways to calculate lost profits, depending on whether or not the claimant is personally exploiting the concerned IP rights. It is sufficient to prove that IP rights have been infringed and that such infringement caused a prejudice in order to demand compensation thereof. Even if the infringer was acting in good faith, i.e. had no idea of the infringing character of his/her actions, this does not safeguard him from a claim for damages.

Second, the burden of proof lies on the claimant to demonstrate the prejudice caused by the infringement of IP rights. This means that, even if it has been determined that the IP rights in casu have been infringed, if the claimant fails to bring any evidence whatsoever that he has suffered any prejudice because of the infringement, the courts will not award any damages (or limit it to a symbolic 1 EUR).

Two further observations are required before examining more specifically the method of quantifying the actual loss suffered by the rightholders.

First, it is not required under Belgian law to demonstrate any “fault” (negligence) or “intent” by the infringer in order to be awarded damages. It is sufficient to prove that IP rights have been infringed and that such infringement caused a prejudice in order to demand compensation thereof. However, jurisprudence has developed in such a way to provide guidance. Nonetheless, courts often find great difficulties in quantifying this prejudice. Therefore, they regularly proceed to awarding a lump sum compensation ex aequo et bono for all damage caused to the rightholder, or part thereof. This means that by taking into account the facts and evidence at hand, the courts determine the amount of the damages in fairness and reasonableness. Normally, courts can only proceed to such manner of determining the damages if it cannot rely on any other method to properly calculate those damages. However, in fact it often occurs that judges rely on this method (ex aequo et bono determination), in particular when it comes to assessing a prejudice other than the pure loss of profits.

When the courts attempt and quantify more concretely the prejudice suffered by the injured party, they usually take into account two main categories of damages:

1. **Loss of profits (lucrum cessans)**: meaning the loss of (direct) profits that the rightholder would have made if the infringement had not occurred.

There are two ways to calculate lost profits, depending on whether or not the claimant is personally exploiting the concerned IP rights.

If the claimant is exploiting the IP rights, the loss of profits shall be based on “lost sales”, i.e. the diversion of sales for products (or services) not sold due to the infringement. We understand this to match with the concept of “actual loss” in the meaning of the questionnaire. This is further explained in the response to sub-question a) and b).

Alternatively, if the claimant is not himself exploiting the IP rights, the calculation shall be based on the **royalties** that the IP holder could have received, absent the infringement. This method is further described in the answer to question 2.

1. **Incurred costs & loss (damnum emergens)**: this includes the actual costs and losses incurred by the injured party. For instance: the costs for identifying and pursuing the infringement, but also moral damages or harm to reputation of the claimant or the concerned IP right.

This last element, **moral damages** or **harm to reputation**, is very often difficult to quantify and therefore, courts generally determine the amount of these damages ex aequo et bono. The following examples, found in recent case law, can be given:

- **In a judgement of 28 February 2011**, the Court of Appeal of Antwerp awarded damages in the amount of € 25,000 for counterfeited dresses violating the copyright of the claimant. The court stressed that the “exclusivity” of the product had been harmed. In a case involving the infringement of copyright in a comic book (“Jommeke”), the same court considered it inappropriate to calculate moral damages on the basis of the number of infringing copies sold. The moral damages are not necessarily linearly proportional to the number of copies sold, the court found, and therefore it decided instead to grant a sum of € 5,000 determined ex aequo et bono.

- **In a case involving the infringement of trademarks**, the Court of Appeal of Brussels awarded € 5,000 to Adidas due to the harm caused to the quality and reputation of its authentic products. The same court also awarded moral damages to the holder of the
When diversion of sales does occur, the courts generally apply the following method in quantifying the loss caused by the diversion of sales:

- The amount of moral damages or harm to reputation vary greatly depending on the circumstances of each case, such as the scope and duration of the infringement, the reputation of the injured party, etc. In a few cases, significant amounts have been awarded on that basis, such as for instance in a case involving the infringement of the “Hard Rock Café” trademark, where the Commercial Court of Antwerp[19] awarded damages to the claimant in the amount of € 620,000, for harm caused to the reputation of the brand. On the other hand, damages awarded for a reputational or moral prejudice are sometimes limited to a symbolic 1 EUR amount, when the court considers that such damage is not demonstrated by the claimant [20].

- Moral damages and harm to reputation are most often granted in copyright and trademark cases. Unsurprisingly, they also occur in cases involving the infringement of Protected Designations of Origin (PDO) or Geographical Indications, which offer a protection somewhat similar to trademarks. This was demonstrated by a case before the Commercial Court of Brussels [21] concerning the use of the PDO “Champagne” in the combination “Strawberry & Champagne”.

- In patent cases the courts often grant damages for the harm caused to the “monopoly (right)” of the patent holder. The First Instance Court of Brussels [22] so awarded a sum of 850,000 BEF (Belgian francs, approximately € 20,000) and the First Instance Court of Antwerp [23] granted 50,000 BEF (approximately € 1,250) to the claimant as compensation for “moral prejudice”. The Court of Appeal of Mons [24] decided to award € 250,000 to a patent holder for infringement of its IP rights used in laboratory equipment. It argued its decision based on the harm caused to the legal monopoly of the rightholder and the fact that it was not demonstrated that other companies offered similar solutions without infringing the patent. This greatly injured the exclusivity and “avant-garde” reputation of the patent holder. Furthermore, the concerned market was very specialised and difficult to enter. Also, the equipment was meant to be replaced only after a significant period of time given that it represented a large investment for clients. Furthermore, the infringer was already known in the market, whereas the patent holder was a relatively new and smaller player. The infringement therefore limited the possibilities to increase the patentee’s reputation, which prejudice is distinct from the pure loss of profits. This said, the argument does not always succeed; e.g., in a more recent case, the Commercial Court of Ghent [25] decided that even if such moral prejudice is possible, the claimant needed to provide at least some evidence that it had occurred.

- Finally, in decisions that involve the infringement of design rights likewise, the courts also frequently award damages to repair prejudice to the reputation of the rightholders. A first example is a case brought before the Court of Appeal of Liège involving the imitation of the shape of a feeding-bottle, where the court granted a sum of € 25,000, determined ex aequo et bono, to Tefal. The court reasoned that the monopoly right of the rightholder regarding the design had been harmed and that its attractiveness had been lowered due to trivialisation. This harm could clearly be distinguished from the loss of profits, according to the Court. Finally, it did mention that the quality and price of the counterfeit goods appeared very similar to those of Tefal. Therefore, there was no harm to its reputation caused by the inferior quality and low prices of the counterfeit goods. Similar reasoning was employed by the Court of Appeal of Brussels [26] in a case relating to the infringement of design rights in handbags. In two other design right infringement cases, both the Court of First Instance [27] and Court of Appeal [28] of Liège granted damages to the rightholders, based on the consideration the counterfeit products were sold at a much lower price and were furthermore of inferior quality in comparison to the original goods. This clearly harmed the reputation of the products of the rightholder.

In particular, please describe:

- 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;

As already indicated above, one of the two main categories of damages for which compensation can be obtained is the loss of profits or lucrums cessans. The calculation thereof is based on the diversion of sales if the rightholder is personally exploiting the concerned IP rights. If that is not the case, the lucrums cessans is calculated according to loss of royalties as further described in the answer to question 2.

Even if the rightholder is exploiting the IP rights in suit, there is not always a diversion of sales. For example, in a case where the comic book character ‘Lucky Luke’ had been used on posters for a political party, the copyright holder did not incur any diversion of sales, or lost royalties, but merely a moral prejudice and some costs related to the pursuit of the infringement.

When diversion of sales does occur, the courts generally apply the following method in quantifying the loss caused by the diversion of sales:
Step 1: Determining the infringing volume

Step 2: Determining the profit margin (see answer to sub-question b)

The first step consists in determining the infringing volume ("masse contrefaisante" / "inbreukmakende massa"), i.e. the volume of sales that the rightholder would have made but for the infringement.

The infringing volume is often calculated by referring to the actual sales made by the infringer.

In a case before the Court of First Instance of Ghent,[29] the Court decided that only the 112 machines manufactured and delivered to clients could be taken into account. Similarly, the Court of Appeal of Brussels[30], Liège[31] and Antwerp[32] decided that indeed only the products sold by the infringer are used when determining the infringing volume.

However, in some cases, the courts also take into account the products manufactured or ordered by the infringer but not yet sold to customers.

One example involves the infringement of Delvaux’s copyright by clothes retailer C&A which led to proceedings before the Court of Appeal of Brussels.[33] Even though the difference between the items sold (1,800) and manufactured or sold (1,850) was only 50 items in this case, the Court underlined that the counterfeiting concerned not only the sale of counterfeit products, but also their mere manufacturing and/or import. Therefore, the damages should be calculated based on all these products. Similarly, the Court of Appeal of Liège[34], the Court of First Instance of Ghent[35] and the Criminal Court of Ghent[36] decided that the infringing volume needed to be determined based on all products, whether or not they were sold by the infringer.

In some cases, the infringing volume, based on the sales of the infringer, is decreased by the courts, because it is very unlikely that the claimant would have been able to make a similar number of sales, without the infringement having taken place, due to several factors such as: limited production capacity, price elasticity, etc. [37] This could for instance be the case if the infringing product is very cheap whereas the original is a luxury product, as it can be hardly believed that all people who bought the (cheap) counterfeits would have purchased the (very expensive) authentic goods.

This was exactly the argument used by the Court of Appeal of Liège[38] and the Commercial Court of Brussels[39] when they decided to diminish the infringing volume when calculating the damages. However, both courts decided that even though the difference in price and quality between the original and the infringing product may lead to a decrease in the damages awarded for loss of profits (lucrum cessans), it should lead to an increase of the damages awarded to compensate the harm to the rightholder’s reputation (damnum emergens).

Even though the infringing volume is most often calculated by reference to the sales made, or the volume manufactured or purchased, by the infringer, other methods are sometimes used.

For example, in a case decided in 2013[40], the Court of Appeal of Brussels calculated the volume in reference to the decrease of sales made by the claimant/rightholder. As the claimant could convincingly demonstrate a loss of sales of approximately 300,000 bottles since the start of the infringement, the Court accepted that this was in fact due to the infringement and therefore set the infringing volume in casu at 300,000 pieces.

In another case, however, the Court of Appeal of Brussels[41] decided that even though the claimant could demonstrate a clear drop of its sales since the infringing products had been placed on the market, this decrease did not result only from the infringing acts, but also from other circumstances such as the economic recession and increased advertisement activity by third parties.

Furthermore, when the decrease of sales is caused by various factors among which a possible confusion with the claimant’s trademark, the infringing volume may not be appropriate to calculate the damages, or alternatively it should not be multiplied with the total profit margin of the rightholder on the concerned authentic product (cf. point b) hereunder).

Finally, when there is insufficient evidence to accurately determine the infringing mass, the courts often determine the damages purely ex aequo et bono, i.e. grant a lump sum which is proportionate to either the (unknown) infringing volume or the (rightholder/infringer) profits.

a. what level of profit margin is taken into account.

In order to determine the profit margin (that will be multiplied by the infringing volume calculated as mentioned above), the courts take into account the profit margin of the rightholder, not that of the infringer.[42] Furthermore, it is most often the net and, not the gross, profit margin that is used by the courts, i.e. the turnover minus the fixed and variable costs.[43]

This principle was for instance applied by the Court of Appeal of Brussels[44] in a recent case concerning the sale of “Longchamp” bags in violation of copyright and design rights. The infringer appealed the first instance decision only regarding the calculation of the damages. The judge had awarded damages based on a € 60 net profit margin per bag, which was the profit margin of the claimant. The infringer demonstrated that its own profit margin was between € 2 and € 4 per bag only. However, the Court of Appeal deemed this argument irrelevant, as it is the claimant’s prejudice that must be compensated; it is not simply about transferring the profit made by the infringer. The same approach had been taken by the Court of Appeal of Antwerp in an earlier case.[45] However, it is reminded that when there is a considerable gap between the prices – and profit margins – of the infringer and the rightholder respectively, the courts will sometimes calculate the loss of profits on the basis of a volume inferior to the number of counterfeits effectively sold, or award damages calculated ex
aequo et bono (cf. supra).

On another note, the Courts of Appeal of Liège [46] and Brussels [47] decided that although the net profit margin must in principle be used, and the fixed and variable costs, consequently, be deducted from the actual sale price, it is sometimes appropriate to depart from this principle. This will be the case if it can be demonstrated by the rightholder that the infringing volume is “marginal”, in comparison to its production, and would not have resulted in an increase of these costs (especially the fixed costs); in these circumstances, the gross margin may be used to determine the damages.

Footnotes

1. Except otherwise indicated, the term “IP rights” in this report is limited to the following rights: patents and supplementary protection certificates, petty patents and utility models, trademarks, copyrights, semiconductor topography rights, database rights and design rights. We observe that the questionnaire includes unfair competition in the definition of IP rights, but does not include trade secrets (see point 11, b) of the questionnaire). However, under Belgian law unfair competition cases are generally not analysed as IP infringements, except – possibly – when they concern trade secrets. Therefore, the rules and principles set out in this report may not be fully applicable to unfair competition situations.

2. This well-known provision states that “any act of man, which causes damages to another, shall oblige the person by whose fault it occurred to repair it”. For some IP rights, the right to obtain compensation of the prejudice suffered has however been confirmed by specific provisions, without many more details however: see e.g. Article 2.21 and 3.17 of the Benelux Convention on Intellectual Property (regarding Benelux trademarks Benelux designs, respectively).


6. Or at least, according to the Spanish law provision that implemented Article 13 into national law.


8. See for example: Court of Appeal Mons 7 March 2011, AM 2014, 517; Court of Appeal Antwerp, 10 January 2011, RG No 2006/AR/546, unpublished, (cited by N. Roland above).


10. See point 11, b) of the questionnaire.

11. See below Question 6 for further details.


13. Some authors consider that a “loss of chance” should also be compensated as damnum emergens (see e.g. BUYDENS, op. cit., 429; ROLAND, op. cit., 296). However, there is very little jurisprudence that actually takes this element into account. In a recent case (Court of Appeal Mons, 9 February 2015, IRDI 2015, 35, a Court refused to award damages for loss of a chance. The claimant requested compensation because, it argued, the infringer’s presence on the market hindered it from penetrating this market itself. However, the Court considered such harm too hypothetical in casu, especially given that the infringer did not actually sell any products, but only updated existing products to incorporate a patented technology therein.

14. We cite those cases here because they relate in our view to the general subject matter of this working question but are not addressed in the following, specific, questions.


22. † First Instance Brussels, 5 April 2000, unpublished (available on Darts IP).
23. † First Instance Antwerp, 1 December 2000, unpublished (available on Darts IP).
24. † Court of Appeal Mons, 9 February 2015, IRDI 2015, 35.
25. † Commercial Court Ghent 3 June 2010, unpublished (available on Darts IP).
28. † Court of Appeal Liège, 16 April 2012, IRDI 2013, 159.
29. † First Instance Ghent, 23 May 2005, unpublished (available on Darts IP).
31. † Court of Appeal Liège, 16 April 2012, IRDI 2013, 159.
32. † Court of Appeal Antwerp, 28 February 2011, IRDI 2012, 405.
35. † First Instance Ghent, 10 January 2007, IRDI 2007, 13.
37. † M. Buydens (op. cit), 457–458, N. Roland (op. cit), 294-295.
38. † Court of Appeal Liège, 16 April 2012, IRDI 2013, 159.
41. † Court of Appeal Brussels, 24 November 2015, IRDI 2016, 183.
43. † An exception to this applies in case of bad faith. This is discussed further in the answer to question 3).
44. † Court of Appeal Brussels, 20 March 2014, unpublished (available on IE-Forum).
45. † Court of Appeal Antwerp, 15 March 2010, unpublished (cited by N. Roland, see above).
46. † Court of Appeal Liège, 8 September 2008, Ing Cons. 2008, 778.
47. † Court of Appeal Brussels, 28 June 2011, IRDI 2012, 395.
Belgian legislation does not describe what methods and rules need to be followed when quantifying a reasonable royalty. Therefore, these elements have been developed through jurisprudence.

As mentioned above, loss of royalties is in principle used only to quantify the loss of profits (lucrum cessans) in circumstances where the rightholder is not exploiting itself the concerned IP rights. Otherwise the calculation should be based on the diversion of sales, according to the method explained above under question 1 a) and b). The Court of Appeal of Liège [11] decided accordingly that if a claimant is commercialising the IP right himself, he cannot rely on the loss of royalty method.

However, not all courts agree with this view. In a case involving the infringement of patent rights, the Court of Appeal of Mons considered that the loss of profits (lucrum cessans) can (at least partially) be calculated on the basis of lost royalties even if the rightholder exploits the concerned rights himself. The Court considered, in our view rightfully, that Article 13 of Directive 2004/48 does not reserve the calculation based on royalties to circumstances where the rightholder is not exploiting the IP right. In particular, if the rightholder had a limited production capacity, it could have licensed its rights in order to penetrate the market more swiftly; the prejudice would then be correctly valued by referring to a loss of royalties. However, in casu, the Court determined that this was not the case, as there was insufficient evidence to prove that the rightholder would not have been able to fulfil by its own means the entire market demand.

In particular, please describe:

a. the royalty base;

If the calculation of the loss of profits is based on royalties, the compensation should be equal to the royalty fee that the infringer would have paid if it had voluntarily entered into a license agreement with the rightholder in order to use the concerned IP rights. [2] To calculate the relevant fee, the courts shall first determine the infringing volume, similarly to the diversion of sales method as explained above [3]. Then, they shall multiply the royalty base by such infringing volume in order to determine the total lost royalty fee. The royalty base must take into account all relevant factors, including the elasticity of demand, the presence of substitute products, distribution channels, etc. [4]

The principle of restitutio in integrum still applies, even if the courts decide to award damages based on royalties. This means that in principle, the rightholder should not be awarded more (for example 200%) than the royalties which it would have received if a license had been entered voluntarily by the parties, at least as far as the compensation for loss of profits (lucrum cessans) is concerned. This was confirmed by the Supreme Court (Cour de Cassation) in a decision of 13 May 2009 [5]. The Court decided that it is not permitted to award damages above the actual royalties if these damages are intended to compensate the rightholder for the general costs made to combat counterfeits and/or to have a deterring effect on IP infringers. The judgment which had justified in such a way the application of the “200%” tariff had violated the principle of “restitutio in integrum” and was therefore quashed by the Supreme Court.

However, in some cases, the damages can still be quantified by taking into account more than, and even 200% of, the lost royalties. This was demonstrated in a later case before the Supreme Court in 2012 [6]. In fact, it depends mostly upon the justification used by the courts and the prejudice that is actually (or seemingly) compensated by these damages. If the 200% royalties are intended to compensate only the loss of profits (lucrum cessans), or other prejudice suffered by the rightholder without any link to the infringer acts, then it is not justified. However, if that sum is intended to cover not only the loss of profits, but also the moral damages and/or the harm to reputation (damnum emergens) [7] it is permitted to grant such increased damages, even if as a side effect, this would have a deterring effect on other infringers.

It was also confirmed very recently by the CJEU [8], following a Polish reference, that Article 13 of Directive 2004/48 does not preclude courts to award damages in the amount of 200% of the applicable royalty rate. [9]

Accordingly, the reference to 200% of the usual royalties have been used to calculate damages several times in Belgian case law, especially in cases involving software.

For example, Adobe and Microsoft were awarded such damages in a case before the Court of Appeal of Ghent [10] and Autodesk and Microsoft in a case before the Court of Appeal of Antwerp [11]. Several other cases [12] also applied 200% royalties to compensate the prejudice suffered by rightholders.

a. how relevant comparables among license agreements are defined;

Two methods are often used when defining relevant comparables. First, if the rightholder has already concluded license agreements in the past, or even has a standard royalty rate for all parties wishing to acquire a license [13], the courts shall normally apply this royalty rate.

For example, the Court of First Instance of Antwerp [14] decided that the standard royalty of € 5 per product sold applied by the rightholder was adequate to calculate the damages due for infringement. Similarly, the Court of Appeal of Liège [15] simply applied the royalties that would
have been included in a contract between the rightholder and the infringer for the exploitation of the concerned IP rights. Furthermore, the recommended sale price was deemed to be the correct basis to calculate a loss of royalties in cases involving the illegal copies of software owned by AutoDesk [16].

In copyright cases, reference is very often made by the courts to tariffs of collective management societies, such as SABAM, SOFAM, and others, because these tariffs are usually determined according to certain statutory principles and/or based on discussions between the parties involved [17]. However, the courts do not feel, and indeed are not, strictly bound by these tariffs. This practice has been confirmed both by the Supreme Court [18] and the lower courts.

For example, the Court of Appeal of Brussels determined on several occasions that, in absence of accurate data to calculate damages, the tariffs of the collective management societies provide useful guidance [19]. The Court of Appeals of Liège [20] took the same view. Furthermore, in one decision concerning the counterfeiting of DVD's [21], the latter Court made an interesting observation regarding the determination of the infringing volume when applying the tariffs of the collective management society (in this case SABAM). The Court indeed agreed with SABAM’s argument that, even though it was not demonstrated that the infringer had actually sold, or even manufactured, 300 copies, the infringing volume should nevertheless be considered to be 300 DVD’s, for each counterfeit movie, because this was the smallest number for which a license could be acquired. One can however wonder whether such reasoning is consistent with the basic principle of equivalence between harm and compensation.

Finally, some authors [22] suggest that reference could also be made to the royalties that generally apply in the sector, but there is little to no jurisprudence that referred to this method.

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

In the absence of relevant comparables, the courts simply determine the damages ex aequo et bono, taking into account all the evidence and elements available to them.

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

As explained above, the courts typically first calculate the infringing volume and afterwards multiply it by the applicable royalty rate. If they do not possess sufficient elements and evidence to determine the royalty base and/or the infringing volume, they shall typically grant damages based on an ex aequo et bono calculation, i.e. award a lump sum which, in their view, appears equitable in the circumstances of the case. The Supreme Court accepts such method of calculation provided that either no party has proposed a more accurate calculation, or the lower court has explained why the proposed calculation cannot be referred to.

Footnotes

3. ^ supra question 1) a).
4. ^ F. Petillion (op. cit.), 218.
7. ^ And therefore, serving as an ex aequo et bono assessment of all prejudice suffered by the rightholder.
9. ^ This was in fact included in the original Commission proposal of the Directive 2004/48, but later left out after passing through the Parliament and the Council.
13. ^ This is often the case for software licenses.
14. ^ First Instance Antwerp, 10 November 2011, unpublished (available on Darts IP).
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.

In principle, the infringer’s profits, unlike the infringing volume of counterfeit goods, do not need to be quantified in order to award damages to the victim of an IPR infringement; indeed, as mentioned above, it is the rightholder’s or licensee’s margin that should be taken into account, and multiplied by the infringing volume. However, Article XI.335 of the Code of Economic Law provides that, “in case of bad faith, the judge can, as a compensation, order the, total or partial, transfer of the profits that have resulted from the infringement”. This remedy is applicable in case of bad faith infringement of patents, supplementary protection certificates, plant variety rights, copyright, neighbouring rights, rights of producers of databases and rights of topographies; not in case of unfair competition.

The definition and conditions of bad faith will be discussed in question 10.

Belgian scholarship is divided regarding the nature of this remedy and the possibility for the awarded profits to exceed the loss of profits actually suffered by the rightholder. Some authors and case law have taken the view that, taking into account the general principle of “restitutio in integrum”, which prevents the award of punitive damages (i.e. damages exceeding the prejudice effectively suffered by the victim of a tort), the transferred profits should be “capped” at the level of profits that the rightholder would have made but for the infringement. The infringer’s profits could thus not be cumulated with the compensation awarded to repair the actual damage suffered. The latter statement is supported by the parliamentary preparatory works of the Belgian statute which generalised the mechanism of transfer of profits in case of bad faith.

According to another viewpoint, defended by one of the members of the Belgian group and other case law, the transfer of profits in case of bad faith infringement is not a mere compensation for the prejudice suffered but a specific remedy, comparable to the traditional rule under property law entitling the owner of an estate that has been dispossessed thereof to claim the restitution (“reven dicate”) not only of the estate but also of the fruits (including rents) produced by such estate, unless the unlawful possessor acquired such fruits in good faith.

Consequently, it would not be necessary to demonstrate the level of the prejudice actually suffered by the rightholder claiming transfer of the profits made by the bad faith infringer; it is only when the rightholder wants to obtain additional damages, on top of these profits, that he would have to demonstrate that his loss has not been fully compensated by the transferred profits.

It is also worth noting that, as far as Benelux trade mark and design rights are concerned, the Benelux Convention provides that, in case of bad faith, the rightholder can claim the transfer of the infringer’s profits “in addition to or instead of” his claim for compensation of his prejudice (Art. 2.21, §4 and 3.17, §4 of the Benelux Convention on Intellectual Property).

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;

The profits resulting from the infringement are calculated on the basis of the volume of infringing products. These can include counterfeited products, products on which an infringing sign has been affixed or products which were manufactured on the basis of an infringing method or by use of an infringing device. In other words, all profits which result from the intellectual property infringement are counted towards the “infringer’s profits”.
a. **what level of profit margin of the infringer should be taken into consideration.**

Article 335 of the Code of Economic Law makes it clear that “only the costs directly related to the counterfeit activities in question (e.g. resulting from the sales, or use, of the infringing products) are deducted to determine the profits to be transferred.”[^11] In accordance with established Belgian case law, it is the “semi-gross” profits of the infringer that should be taken into account. These are obtained by deducting the VAT and the “flexible” costs directly linked to the infringement from the gross profits[^12]. Only those costs or taxes that are, pursuant to the rules of normal business operations, immediately and directly linked to the production, sales and distribution of the infringing products, as well as trade discounts on the wholesale prices[^13] should be deducted. General business costs (fixed costs) should not be.

Lacking concrete evidence regarding the semi-gross profit margin, the Court of Antwerp considered in a recent case that it would be 15% of the total revenue generated by the infringement.[^14]

**Footnotes**

1. ^ “En cas de mauvaise foi, le juge peut, à titre de dommages et intérêts, ordonner la cession de tout ou partie du bénéfice réalisé à la suite de l'atteinte, ainsi qu'en rédemption de compte à cet égard.(…)”.


3. ^ Parliamentary Preparatory Works of the Chamber, 26 February 2007, Doc 51 294/001 and 2944/001, 30: “Le texte souligne que la cession du bénéfice réalisé est ordonnée à titre de réparation du préjudice subi, lequel doit être démontré conformément à l’article 1382 du Code civil. La cession du bénéfice réalisé n’est donc pas cumulée avec les dommages et intérêts visant à réparer le préjudice subi.”

4. ^ See B. Vanbrabant, La propriété intellectuelle, 2nd volume, to be published by Larcier, Brussels.

5. ^ Commercial Court Antwerp 27 April 2011, Koninklijke Philips Electronics NV v. Disco-press BVBA a.o., IR-DI, 2012, p. 173, where the Court states that “the awarded damages in case of bad faith do not have only a compensatory character but also a sanctioning character” (“De toegekende vergoeding heeft derhalve in geval van kwade trouw niet enkel een vergoedend doch tevens een sanctionerend karakter”); therefore, the court says, they may exceed the amount of the royalties that would have been due if a license had been requested.

6. ^ Before the formal inclusion of the mechanism of transfer of profits in the copyright statute, a court had decided that in case of infringement in bad faith and lacking sufficient evidence of the damage, the compensation of the prejudice suffered should be at least the amount of the infringer’s profits: cf. Court of Appeal Brussels 4 April 2007; A&M 2007/5, 470.

7. ^ See B. Vanbrabant op. cit., Part II, Title I, Chapter 2, Section 4.

8. ^ “Outre l’action en réparation ou au lieu de celle-ci, le titulaire de la marque peut intenter une action en cession du bénéfice réalisé (…)”


11. ^ “Seuls les frais directement liés aux activités de contrefaçon concernées sont portés en déduction pour déterminer le bénéfice à céder.”


We understand ‘convoyed goods’ to mean accessories or other products that are typically sold together with an infringing product, such as a charger, headphones, etc sold together with an infringing smartphone. However, in our understanding, these convoyed goods do not infringe by themselves upon any IP rights of the rightholder.

We have not found relevant case law in Belgium addressing this question, although some elements mentioned under b) below might be considered relevant in respect thereof.

When the infringing goods form a part of a larger assembly, the courts appear to start with quantifying the damages for the loss of profits (lucrum cessans) related to the entire assembly, according to the methods described above. In a second step, they determine which percentage of this loss can be awarded to the rightholder. This percentage is often decided ex aequo et bono by the courts, taking into account all relevant elements of the case.

A typical example of such a situation obviously concern patent cases, when only a part, or component, of the marketed product is patented. For instance, the Court of First Instance of Antwerp[1] considered that a cooling head that was a component of a larger physiotherapy appliance infringed the claimant’s patent. It determined that the sales of the appliances by the infringer needed to be taken into account for the calculation of loss of profits, but only 10% of this sum would be awarded to the rightholder.

In copyright, a similar reasoning is applied.

For instance, in several cases the Court of Appeal of Brussels[2] decided that it would not be justified to calculate the loss of profits (lucrum cessans) on the basis of the sales of the rightholder’s work, if only a part of such work has been used by the infringer. Instead, the rightholder should be granted damages only in proportion to the part of his work that was “borrowed” (copied). In order to calculate that proportion, the Court referred to the tariffs applied by collective management societies, which have specific tariffs for partial use of copyrighted works. It argued that these tariffs “are a trustworthy reference instrument given that they reflect the usual practices in the sector”[3].

The Court of Appeal of Brussels also considered that if, as it was the case, a song borrows “only” eight notes from a previous song and repeats those notes five times during the song, the infringer has actually used “only” 10% of the rightholder’s song. Therefore, the loss of profits should be calculated accordingly.[4] Yet another case before the same Court[5] concerned a dispute between Deutsche Bank and an advertising agency. The agency had developed the title, layout and shape of a magazine used for content marketing by Deutsche Bank. The latter continued to use these elements after the cooperation with the agency had been terminated, without first obtaining permission from the agency. The (infringing) layout and shape were obviously used throughout the magazine, but the text of the magazine (articles, etc.) did not violate any copyright. The Court considered that between 50 and 90% of the magazine in question consisted of elements belonging to the advertising agency; and therefore decided to apply a percentage of 70% to calculate the lost profits.

Footnotes
AIPPI 2017 - Study Question - Quantification of monetary relief

We have not found relevant case law in Belgium addressing this question.

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?

We have not found relevant case law in Belgium addressing this question.

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?

Some statutory provisions specifically provide that a licensee is permitted to intervene in counterfeit cases launched by the rightholder, in order to obtain compensation for the prejudice it incurred. However, they do not depart from the rules and methods described above. Consequently, those rules and methods shall apply, the main principle remaining that of *restitutio in integrum* or full compensation for all actual prejudice suffered (personally) by the claimant. [1]

Footnotes

1. Art. XI.60, §2, para. 4, Code of Economic Law (patents); art XI. 156, §2, para. 4, CEL (plant variety); art. 2.32, para 4, Benelux Convention on Intellectual Property (“BCIP”) (individual trademarks); art. 3.26 BCIP (designs); art. 22, §4, EU Regulation on Trademarks (“EUTM”) (individual EU trademarks); art. 72, §1, EUTM (collective EU trademarks); art. 32, §4, Regulation on Community designs; art. 104, §2, Regulation on Plant Variety Rights.

3.a

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

As it is formulated, we assume that the question aims to identify, on the one hand, the nature of the elements which can be invoked to quantify the damage suffered (i) and, on the other hand, the modes/means of proving said elements (ii):

i. Elements taken into account: In IP rights cases, all relevant economic information can in principle be taken into account in order to quantify the suffered damage. This includes the following kinds of evidence, depending on the facts of each specific case [1]:

   - To quantify the actual loss[2]:
     - Evidence relating to the injured IP holder:
- Lost profits[3], including diverted sales[4];
- Price erosion[5];
- Loss of market share and pricing advantage[6];
- The extent of likelihood of consumer confusion or of consumer confusion that is actually occurring in the marketplace [7];
- Harm to consumer goodwill associated with the IP right, including tarnishment and other reputational harm, such as harm resulting from the inferior quality of the infringer’s products and/or services [8];
- Cost of reasonable corrective or preventive measures taken by the IP rightholder in relation to the infringement [9], and in particular costs relative to descriptive seizure proceedings [10];
- Loss of commercial opportunities caused by the infringement [11].

○ Evidence relating to the infringer:
  - The infringer’s financial gains obtained as a result of the infringement [12];
  - The extent of advertisement, marketing, distribution, and sales of infringing goods or services [13];
  - Quality of infringing goods or services (if the quality is substantially below that provided by the IP rightholder, the injury to the IP rightholder may be greater) [14];
  - Infringer’s bad faith (see question 10 below). ?

• To quantify reasonable royalties[15]:
  ○ Value of the use of the infringed right;
  ○ Licencing practice in the industry:
    - Royalties received by IP rightholder for licensing of the IP right in-suit to third-parties [16];
    - Royalties received by IP rightholder for licensing of other IP right(s) comparable to the IP right in-suit;
    - Royalties paid by licensees for use of other IP right(s) comparable to the IP right in-suit [17];
  ○ Tariffs of collective management societies [18];
  ○ Nature and scope of the “license” (exclusive or non-exclusive, restricted or non-restricted in terms of territory);
  ○ The IP rightholder’s established policy and marketing program to maintain its monopoly by not licensing others or by granting licenses under special conditions designed to preserve that monopoly;
  ○ The commercial relationship between the parties, such as whether they are competitors in the same territory in the same line of business, etc.;
  ○ The duration of the IP right and the term of the “license”;
  ○ Profitability of (the product made under) the IP right; its commercial success; and its current popularity;
  ○ Benefits realised by those who have legitimately used the IP right;
  ○ The extent to which the infringer has made use of the IP right, and any evidence probative of the value of that use [19];
  ○ The royalty fee that the IP rightholder and the infringer would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement [20];
the infringing volume[21];
the elasticity of demand;
the presence of substitutes products;
distribution channels, etc.

i. Types of evidence: The modes/means of proof accepted are the same whether the purpose is to prove the quantum of actual loss or the quantum of reasonable royalties.

Under Belgian law, the rules governing modes/means of proof are likely to differ according to the nature of the dispute in which the evidence is to be produced: civil (Art. 1315 et seq. Civil Code.) or commercial (Art. 25 Commercial Code).

However, in practice, when the element to be proved is a legal fact (as opposed to a legal act), the rule is freedom of proof: evidence can be brought by all legal means (written or not).

The different modes/means of proof that may be (freely) used for the purpose of establishing an infringement to IP rights and quantifying the corresponding damages are thus the following categories listed in the Civil Code: literal proof, testimonials, presumptions, confession/admission, oath.

Most of the above modes/means of proof can be received by way of: expertise (Art. 962-991undecies Judicial Code), affidavits (Art. 961/1, 961/2, 961/3 Judicial Code), and bailiff's statement (Art. 519-520 Judicial Code).

i. In IP rights related matters, the most commonly used means of evidence for quantifying damage include the following:

- Tariffs of collecting societies are often used in copyright disputes, notably because they are considered to adequately reflect the uses in a considered sector[22]. Such tariffs are however not applied systematically: while they may reflect the professional use, they are not always deemed relevant since they could constitute a forbidden form of civil sanction [23];
- Expert reports are often relied on[24]: The usefulness of the expertise notably lies in the fact that the expert has access to and has an understanding of the accountant and/or economic notions and rules which are necessary to quantify damages.
- Sometimes, civil courts are reluctant to order an expertise because it is likely to extend the length of the proceedings and to increase the costs. However, they will generally resort to this mechanism in the event of a significant counterfeit mass [25].
- Assessment of the loss profits or invoices showing the additional advertisement costs incurred [26];
- Sales brochures, catalogues;
- Price lists, certificates;
- Invoices[27];
- Turnover figures, annual reports, audits[28];
- Quantity of goods manufactured, exported, imported, offered for sale, sold, held in stock [29];
- Advertisements (press cuttings, billboard posters, TV adverts) and evidence of their intensity and reach (investment figures, reports, etc.);
- Customer and/or market surveys;
- Judicial precedents.

Footnotes


17. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).

18. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).

19. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).

20. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).

21. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).

22. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).

23. See M. BUYDENS, op.cit. 459. Note that there is little to no caselaw in this respect (see question n°2).
What kinds and types of evidence are accepted for proving the quantum of reasonable royalties.

See answer to Question 6.a

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

See answer to Question 6.a

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

a. General procedural devices:

- During judicial proceedings [1]:

Under civil procedure law there is a general possibility for the judge to order that a specific document containing evidence of a relevant fact be submitted by a party to the proceedings pending before the court.

In view of quantifying IP rights damage, the court may for example order the infringer to produce an accurate, complete and precise statement of the unauthorized uses in order to evaluate exactly the royalties avoided [2]. It may also order the infringer, more generally, to produce "any information which may accurately determine the damage suffered" [3] or, more simply, its accounting [4].

Such order may even be addressed to a third party, i.e. someone who is not a party to the pending proceedings (Art. 877 Judicial Code) [5]. For such an order to be allowed, there must be "serious, precise and concordant presumptions" that the party in question has such document in his/her possession. If, without a due justification, the orderee refrains from making available the document in question (or a copy thereof), he/she may be condemned to damages (Art. 882 Judicial Code). Such production order is close to a common law “discovery”, though its scope is probably narrower.

A production order may be requested (i) as interim measures in proceedings on the merits (Article 19, 3rd indent, Judicial Code), (ii) in summary proceedings (which are in principle, but not always, subject to a condition of urgency) (Article 584, 3rd indent, Judicial Code) or even ex parte, then under stricter conditions (see below). In the latter case, the production order is close to a discovery at a pre-action stage, except for its scope.
Besides the production order, the following mechanisms may also have some utility to help the rightholder to quantify his actual loss or reasonable royalties:

- Investigation / Testimony (Art. 915-961 Judicial Code);
- Judicial statements / Affidavits (Art. 961/1, 961/2, 961/3 Judicial Code);
- Expertise (Art. 962-991undecies Judicial Code);
- Cross-examination of the parties (Art. 992-1004 Judicial Code);
- Oath (Art. 1005-1006 Judicial Code);
- Descent on the premises (Art. 1007-1016 Judicial Code);
- Bailiff’s statement (Art. 519-520 Judicial Code);
- Judicial sequestration of documents to secure evidence.

- Securing evidence at pre-action stage:

As mentioned above, the Judicial Code also includes a general provision allowing the Presiding judges of civil, commercial and labour courts to take various kinds of (provisional) orders on the basis of ex parte proceedings (Article 584, 3rd indent, of the Judicial Code). Such orders may be requested with the view to obtaining and securing evidence of facts, including, arguably, the violation of trade secrets, the unlawful divulgation (or use) of confidential information, and yet other acts of unfair competition.

The threshold to obtain such orders in ex parte proceedings is, however, rather high: in addition to the requirement for normal summary proceedings, namely urgency, the petitioner must demonstrate the existence of an “absolute necessity” not to make use of inter partes (summary) proceedings. Besides cases of “extreme urgency” (i.e. where any delay would cause irreparable harm to the rightholder), such absolute necessity exists, according to leading legal scholars, when there is a demonstrable risk of evidence being destroyed, and a surprise effect is hence necessary.

However, in an unpublished judgment of 17 December 2008 [7], the Brussels court of appeal cancelled an ex parte order (granted by the judge in first instance pursuant to Article 584, 3rd indent, Judicial Code) which had allowed the collecting of computer data (including emails), by a bailiff and an expert, from the computers of a company suspected of unfair competition and its directors. According to the court of appeal, the actual purpose of the petitioner was to search or identify undetermined elements of evidence. The judge held that such “fishing expedition” was not allowed under Belgian civil procedural law, outside the specific procedure of “descriptive seizure” (cf. below). Likewise, in a judgment of 8 March 2011 [8], the Liège court of appeal confirmed the cancellation of an ex parte judicial order which had allowed the collecting of evidence by an expert concerning the sales of biscuits the packaging whereof was allegedly in breach of fair market practices (trade dress case). The court held that there was no “absolute necessity” for such an order to be granted, within the meaning of Article 584, 3rd indent, Judicial Code The court underlined that the request for such order, on the basis of the latter provision, constituted an attempt to circumvent the requirements under Article 1369bis Judicial Code (the “descriptive seizure” procedure analysed below).

a. Specific IP devices[9]:

- During judicial proceedings:

Specific IP related provisions, the scope whereof is limited to the rights expressly listed therein, entitle the judge, when finding infringement of a right of such nature on a commercial scale, to order the infringer (or the user or holder of the infringing goods or services) to provide the claimant with all information and data in his/her possession about the origin and the distribution networks of the infringing goods or services (Article XI.334 (3) of the Code of Economic Law [10]; Articles 2.22.4 and 3.18.4 of Benelux Convention on Intellectual Property [11] and Article 103 of the Regulation 207/2009 on the European Union trademark [12]). Such measure will be granted only if it is “justified and proportionate”.

It is, as such, not available at pre-action stage. However, the specific “descriptive seizure” described below leads to a comparable result, on the basis of ex parte proceedings.

- Securing evidence at pre-action stage or during proceedings:

Article 1369bis Judicial Code provides for a specific procedure called “seizure in matter of counterfeit” or (“saisie en matière de contrefaçon”/”beslag inzake namaak”). This procedure aims in the first place at describing in detail (suspected) acts of counterfeit accomplished on the Belgian territory, and thereby providing the rightholder with a strong evidence of the infringement of his/her rights; it is then being referred to as “descriptive seizure” (“saisie-description”/”beschrijvend beslag”) [13].
The requirements for such “descriptive seizure” to be allowed by the Court are, on the one hand, the existence of a *prima facie* valid intellectual property right and, on the other hand, indications of an infringement, or an imminent infringement, of such right (Article 1369 *bis*/1, § 3 Judicial Code).

If those two requisites are complied with, the Court will grant the requested descriptive-seizure and will appoint an independent expert (e.g. a patent attorney). The expert will, together with a bailiff and if need be the police and/or a locksmith, go into premises where infringing goods are suspected to be manufactured, stocked, offered for sale, etc. and/or where any elements relating to the alleged infringement are suspected to be found.

The order authorizing such “descriptive seizure” is, as a matter of principle, taken on the basis of ex parte proceedings, i.e. without the alleged infringer being heard; only a third-party opposition is available to the latter, after the order being served on him and the seizure having taken place.

During the “seizure”, samples and pictures are generally taken by the expert, together with documents relating to the manufacture, sourcing and/or distribution of the infringing goods (e.g. invoices, accounting books...).

Following the “seizure”, the expert will draft a report describing the scope of the counterfeit (if any), as well as the origin and destination of the infringing goods. To that effect, additional questions may be put to the alleged counterfeiter.

Note that a “descriptive seizure” can be ordered before or during proceedings for IP rights infringement [14].

Footnotes


5. ^ Also see C. RONSE, X. VERMANDELE, E. CORNU, A. MOTTET and M. VERHULST, AIPPI - Q203, Damages for infringement, counterfeiting and piracy of Trademarks, Belgian report, question 6.


10. ^ This article only covers the following IP rights: Patent, supplementary protection certificate, plant variety right, copyright (and neighboring right), database right, semiconductor topography right.

11. ^ These articles respectively cover Benelux trademarks and designs.

12. ^ This article covers European Union trademarks.


We understand that this question is related only to indirect patent infringement and not to infringement of other IPR’s through intermediaries such as internet providers.

Belgian courts also apply the general principles set out above when assessing damages for indirect infringement of a patent. There is no specific legal provision dealing with this, and case law is rather scarce. In the few cases discussed below where a Belgian court ordered the payment of damages for indirect infringement of a patent, the quantification of damages, for indirect infringement as opposed to direct infringement, was not discussed extensively.

Article XI.29, §2 of the Code of Economic Law defines indirect infringement of a patent as follows: the patent confers its owner the right to prohibit any third party not authorised by the patent owner from supplying or offering to supply on the Belgian territory means to implement the invention on the Belgian territory which relate to an essential element of this invention, when this third party knows or should know that the offered or supplied means are suitable and intended to put the invention into effect in Belgium.

In light of the territoriality requirement set out in this provision, in one case where indirect infringement but no direct infringement had been found on the Belgian territory, the Liege Court of Appeal calculated the damages only in relation to the products imported into Belgium by the infringer (who was based outside of Belgium). However, in the absence of detailed and clear information provided by the parties in this regard, it was not possible to determine the actual loss suffered by the patent holder and the amount of damages was determined ex aequo et bono [1].

In another case, the renowned “Senseo” case, related to coffee pads, the Court of Appeal of Antwerp [2] ordered the payment of damages for indirect infringement. In its judgment, the court decided that the prejudice of the patent owner corresponds to the sales of the means supplied. The court designated an expert to calculate “the turnover of the infringing products in Belgium and thereby the loss of profits of the patent holder” as well as the “remaining prejudice suffered by the patent holder, including the loss of clientele caused by the patent infringement”.

As already stated in 2008 in the report of the Belgian group of the AIPPI on Question 204 on contributory infringement, this judgment has been criticized by the doctrine, amongst others regarding the issue of damages quantification [3]. E. Degryse[4] and D. Rombouts[5] argued that taking into account the loss of clientele in such circumstances amounts to protecting “captive markets”, which is contrary to the “specific subject-matter” doctrine developed by the Court of Justice of the EU [6].

In its report on question 204 in 2008, the Belgian group stated in relation to the Senseo decision: “At this point however there is no jurisprudence which would be based upon another reasoning, in particular a reasoning where the prejudice of the patent owner can only be admitted to the extent it is generated by the actual direct infringement.”

There have not been any decisions published since then that have discussed this issues.

Footnotes

3. ^ Belgian report Q 204.
6. ^ CJEU 31 October 1974, C-15/74, Centrapharm / Sterling Drug Jur. 1974, I-1147, 9: “In relation to patents, the specific subject matter of the industrial property is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licences to third parties, as well as the right to oppose infringements”.

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

The concept of “forward-looking damages” has been recognized by the Belgian Supreme Court in a decision of 17 May 1943. The Court further added that forward-looking damages are awarded only if the prejudice can likely be assessed “immediately” (meaning immediately at the trial) and the continuation of the loss after the judgment is certain. [1] Such rulings are in line with Belgian general principles requiring that the prejudice must be certain and compensated in its entirety.

Reference to the rules set out in this judgment of 17 May 1943 was made by the Court of Appeal in Antwerp in a Benelux trademark
In 2002 a commercial court refused to award forward-looking damages because the IP rightholder failed to demonstrate the loss he said he would suffer in the future. In a patent and trademark infringement case brought before the Court of appeal of Antwerp, the rightholder sought damages for not only the actual loss it suffered but also its future loss, asserting that its loss of earnings and harm to its reputation would continue in the future. The court awarded damages assessed ex aequo et bono without giving details regarding forward-looking damages. In another (criminal) case, the rightholder sought compensation for a drop in its profit margin allegedly due to the infringement on its IP rights. The court considered this loss to be potential, future, and non-assessable. No damages were therefore awarded. And more recently, the Court of Appeal in Mons considered that the loss of a chance to develop a market or to gain market shares could not be compensated because the rightholder failed to show that its prejudice was actual and not merely hypothetical.

So, it emerges from Belgian IP-related case-law that the concept of forward-looking damages is accepted but hardly applied because rightholders often fail to show the certainty of the prejudice caused to them. Furthermore, most court decisions do not elaborate in detail as regards forward-looking damages, and ex aequo et bono assessment without any further justification is common. It is also established case-law that moral prejudice is to be evaluated on an ex aequo et bono basis as it is impossible to assess such prejudice in concreto. Such approach is also commonly reverted to in determining indirect losses suffered as a consequence of the infringement, such as depreciation of a work, banalisation of a product, breach of the monopoly of a patentee, or the harm caused to the reputation of a trademark. It is plausible that the courts actually take into account in their ex aequo et bono assessment the fact that such losses will continue to be felt by the right holder in the future, and thereby implicitly award forward-looking damages. However, it remains difficult to tell, as Belgian courts do generally not give many details regarding their assessment of the damages.

Injunctions, which may be obtained in Belgium in summary cease-and-desist proceedings, aim at safeguarding the infringed right for the future. In that regard, the Court of Appeal in Brussels held that the injunction to recall the counterfeit products was necessary to limit the prejudice suffered by the rightholder, which would have otherwise increased. Forward-looking damages have their place under Belgian law if a prejudice continues to be suffered by the rightholder despite the injunction. However, as seen above, courts do not often award – at least explicitly – forward-looking damages.

As explained above, Belgian case-law does recognize the concept of forward-looking damages, at least in theory, on the basis of the principle that the entire prejudice suffered by the victim (here: rightholder) should be compensated, but there are not many applications to be found in IP-related case law.

Moreover, awarding damages may not always be the best way to compensate future damage. For instance, the Court of Appeal in Antwerp considered that having the judgment and other documents published was the appropriate way to compensate for the loss of a chance to enter into a specific sector, which had been suffered by an architect whose copyright had been infringed. No damages were awarded besides this remedy.

Footnotes

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?

Although Belgian legislation does not provide a definition of “bad faith”, case law interprets this as “knowingly and willingly” infringing the intellectual property right. The infringer should at least be aware of the existence, and scope, of the intellectual property right, and therefore have consciously infringed this right. In this regard, typical elements can be taken into account for the assessment of bad faith, e.g. the fact that other competitors are offering similar (infringing or seemingly infringing) products and services, the fact that a non-infringement defence does not appear impossible\[^1\], or the fact that a licensing agreement had expired and the infringer nevertheless continues exploiting the intellectual property\[^2\].

Footnotes


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

In Belgium, when assessing damage and the indemnity intended to compensate for it, the judge must place himself at the time of his decision [1].

On the basis of this principle, the judge should be able to ascertain objectively and precisely the damage suffered by the IP rightholder between the date of the infringement and the date of his decision and, consequently, award an amount of damages covering that very period.

In the event that a cease and desist order is pronounced prior to the decision granting damages (if the claimant first introduced an action for injunction or if, on the merits, he first applied for a cease and desist order, reserving the right to seek damages at a later stage), it will in principle be easier for the judge to assess the damages to award. The judge will indeed be aware not only of the starting date of the infringement, but also of the end thereof, which implies in principle the end of the harm (see however above regarding forward-looking damages).

If the judge is to rule over both a claim for injunction and a claim for damages, it will be for the claimant (i) to reformulate carefully his claims in his last submissions in order not to unduly limit the amount of damages to that (possibly) mentioned in the writ of summons and (ii) to provide the judge with all the evidence necessary for the quantification of the damage throughout the proceedings.

Where a party discovers a "new and relevant" fact during the period between the closing of the written procedure and the oral hearing, it may, not later than thirty days before the hearing date set for pleadings, ask the judge to be allowed to file additional submissions to comment on such new fact (Article 748, §2 Judicial Code). A new element allowing to better assess the extent of the damage suffered could possibly be considered as a "new and relevant" fact, although the mere lapse of time will not.

After the pleadings, the judge closes the proceedings and takes the case under deliberation (Article 769 Judicial Code). It is then in principle prohibited to file new submissions and/or to carry out additional investigative duties. Before the judgment is pronounced, the judge may nevertheless order the reopening of the proceedings, either ex officio (if he feels that he is not sufficiently informed about the case) or at the request of the parties or of one of them (if they discover a "new or crucial" piece or fact likely to influence the decision) (Article 772 Judicial Code).

Footnotes


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

Are there aspects of these laws that could be improved?

Yes see below

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

When assessing the amount of damages that should be granted, the Court will already have found that the IP-rights in suit were infringed.

The situation is different regarding validity. If the rights have been found not to be valid, no damages should be awarded. However, validity must not be assessed ex officio by the Court, but only when it is challenged by the defendant. Accordingly, where validity is not challenged, the Court’s reasoning should be under an assumption that the infringed rights are valid.
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

When assessing the amount of damages that should be granted, the Court will already have found that the IP-rights in suit were infringed. The situation is different regarding validity. If the rights have been found not to be valid, no damages should be awarded. However, validity must not be assessed *ex officio* by the Court, but only when it is challenged by the defendant. Accordingly, where validity is not challenged, the Court’s reasoning should be under an assumption that the infringed rights are valid.

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?

In principle, the Court can take into account all factors it considers relevant to determine a reasonable royalty. In our view, the Court should look in particular at factors relevant to assess the value added by the protected feature in the infringing product. This value can be determined either based on a comparison of the infringing product with a product that is not incorporating the protected feature (and as much as possible, only that feature) or based on established royalty rates for features or characteristics similar to the protected feature.

The following elements/evidence should be taken into account to make this assessment:

- The prices of substitute products sold by the right holder that do not incorporate the protected feature and the prices of other substitutes, without features similar to the protected feature, sold by other market participants; both to be compared with the price of the infringing products;

- Other methods to manufacture the product or to match or mimic the protected feature of the product without infringing the relevant IP right, but which could be less efficient or desirable (to determine an upper bound to the value of the feature and possibly limit the amount of royalties granted);

- In copyright matters, the tariffs of the collecting societies generally offer good guidance, if other evidence is absent;

- Publicly disclosed license terms (incl. royalty rates) between unrelated parties for features that are substantially similar to the protected feature;

Beyond that, we consider that Belgian Courts should consider the following “Georgia Pacific criteria”:

- **Comparison with other royalty rates or products:**
  - Such as the royalties received by the IP holder for the licensing of the intellectual property right in suit, proving or tending to prove an established royalty, as well as the rates paid by the licensee for the use of other comparable IP rights;
  - The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.

- **Features of the license and the licensee:**
  - The nature, scope and duration of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.
  - The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter.

- **Features of the IP right in suit and the policy of the IP holder:**
  - The licensor’s established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly;
III. Proposals for harmonisation

- The typical duration of the license for comparable IP rights (for example, in comparison with the remaining duration of the monopolistic use of the protected invention);
- The established profitability of the product made under the IP right; its commercial success; and its current popularity;
- The utility and advantages of the IP property over the old (or alternative) modes or devices, if any, that had been (or are being) used for working out similar results;
- The nature of the patented invention or the product to which the IP right relates; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention or product.

**Confounding effects and characteristics:** the portion of the realizable profit that is attributable to non-protected elements, the manufacturing process, business risks, or significant features or improvements added by the infringer, rather than to the protected invention.

We consider that courts should only consider compensation for sales of convoyed or derivative goods if the diminution of sales of such goods is sufficiently certain and in causal relation to the infringement. For further details, we refer to our answer to Question 19.

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?

Yes, the quantification of damages should depend on whether injunctive relief is granted (see above Question 9). The link between forward-looking damages, and more generally the quantification of damages, and injunctive relief has not been mentioned explicitly by Belgian IP-related case-law so far (except in the “Veuve Clicquot” trademark case[^1]). It is nevertheless implicit. Moreover, under Belgian law, injunctive relief is virtually always granted. The rightholder therefore has to prove, in order to obtain damages beside the injunction, that its situation, despite the injunctive relief, will not be equivalent to its counterfactual situation (its situation absent the infringement).

Footnotes


III. Proposals for harmonisation

16 Is harmonisation of the quantification of damages desirable?

If yes, please respond to the following questions without regard to your Group’s current law.
Even if no, please address the following questions to the extent your Group considers your Group’s current law could be improved.

Yes

Please Explain

Yes, for the sake of legal certainty.

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

We agree with the criteria set forth in Article 13, § 1 of Directive 2004/48[^1] as interpreted by the CJEU in the Liffers case[^2] and in the Stowarzyszenie case[^3].

Moreover, the group considers that it is useful to adopt the following two-steps reasoning in order to quantify actual loss:

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[^1]: Article 13, § 1 of Directive 2004/48
[^2]: Liffers case
[^3]: Stowarzyszenie case
1. Establish a counterfactual situation taking into consideration substitutes, competition, price erosion, manufacturing constraints, etc, and then,

2. Compare it with the actual situation.

Footnotes

1. ^ However, the Belgian group is not convinced by the distinction made in this article between "the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity" (in others who is in bad faith) and "the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity" (who is in good faith). We are of opinion that damages must be granted in any case, whether the infringer is in good or bad faith. Furthermore, contrary to Article 13.2, recovery/transfer of infringer’s profits can be requested under Belgian law only if the infringer is in bad faith, a system which is supported by the members of the Belgian group (see above Q3 and Q10).


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

See answer to 18.a, b and c

8. 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;

From an economic perspective, it is relevant to refer to a hypothetical negotiation when lost profits/sales cannot be determined. In principle, the hypothetical negotiation should be based on the assumption that the considered IP rights are valid and infringed.

If this approach is chosen, the fact that the rightholder does usually only grant little or no licenses should be taken into account in order to increase the royalties’ amount due (see also the criteria discussed under question 14 above).

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

Such prior practices and/or going rates are perfectly relevant.

8. 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

Prior practices and/or going rates from similar players or industries and/or for similar IP rights are relevant. Prior practices and/or going rates from dissimilar players or industries and/or for dissimilar IP rights should only be used in last resort.

9. Please propose, in relation to actual loss and reasonable royalties how convoyed goods should be dealt with
The group finds that convoyed goods should be dealt with in accordance to the general principles of Belgian law, which have been set out above (Question 4), mainly the principle of *restitutio in integrum*. There is no particular reason that justifies a different treatment. This implies in particular that the loss should be *sufficiently certain*. Only if the rightholder can demonstrate that either sales of, or royalties on, convoyed goods have been lost (*i.e.* a *lucrum cessans*) and that such loss would not have taken place but for the infringement, should the rightholder be entitled to compensation.

Alternatively, the concept of *loss of a chance* (here: to sell the convoyed goods along with the infringed goods), which is recognized under Belgian law[1] may also be relevant. Indeed, due to the absence of, or drop in, sales of the counterfeited product, the rightholder has lost the chance to sell convoyed goods to potential customers (only a chance is lost, because such customers could well have purchased goods competing with convoyed goods sold by the right holder, *e.g.* goods manufactured or marketed by another manufacturer). To be subject to compensation, the lost chance should be *sufficiently certain and real*; a mere hope is not enough. If the rightholder enjoys a monopoly, or a dominant position on the market of convoyed goods, or if the counterfeited product requires convoyed goods to function (*e.g.* razor and blades, printer and cartridges), it will be easier to prove additional economic losses.

Footnotes


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.

Once again, we believe that the usual principles of Belgian law are sufficient to address this question regarding competing goods of the rightholder. The group is of the opinion that damages should not be awarded to the rightholder for the loss of sales of goods not making use of the invention protected by the infringed patent. The causal link between such loss and the infringement will generally be insufficient.

The same would apply to goods of the rightholder sold under a trademark different from the infringed trademark, works of the author/copyright holder distinct from the plagiarised work, etc.

However, the harm caused by the infringement to the reputation of the rightholder may be subject to compensation, particularly in trademark cases.

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.

As a general principle, damages should be calculated on the basis of marginal profits made by the right holder on incremental sales of the infringed product, not on a larger assembly of products.

However, in some circumstances, the existence of a larger assembly should be taken into account, for example when the infringed product is not sold separately. In such a case, the infringed product may provide specific features or characteristics to the larger assembly that other competing products lack. If these features or characteristics are significant and desirable enough to customers to drive the sales of the larger assembly, then damages should be proportionate to the added value brought by the infringing product to the larger assembly. This added value may be calculated on the basis of the royalties on the sales of the larger assembly that the infringer should have paid to the right holder to license the infringed product. The added value might reach up to 100% of the marginal profits made on incremental sales of the larger assembly if the infringed product is an essential feature or characteristic of the larger assembly.

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.

There is no reason to deviate from the general rules applicable to extra-contractual liability (see also the Belgian report on Question 204).
Please comment on any additional issues concerning any aspect of quantification of damages you consider relevant to this Study Question.

n/a

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

A large variety of industry sectors is represented through lawyers who took part in the report, including (but not limited to) chemistry, life sciences (pharma, biotech, agro,...), metallurgic, power/energy, finance, food and beverage, entertainment, fashion, art.

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.

Dominique Kaesmacher