

Report Q203

in the name of the Swedish Group
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Damages for infringement, counterfeiting and piracy of Trademarks

Questions

1) The state of the substantive law in the countries

- 1) *The Groups are invited to indicate, in summary form, if their national law distinguishes between different kinds of infringement, counterfeiting and piracy of trademarks and what the conditions are for liability for those different kinds of infringement, counterfeiting and piracy.*

The Groups are also invited to indicate if these various forms of the violation of trademark rights have an impact on the monetary compensation to be provided to the trademark owner.

Swedish law does not distinguish between different kinds of infringement, counterfeiting and piracy of trademarks. Thus, the conditions for liability are the same.

The various forms of violation of trademark rights may have an impact on the monetary compensation to be provided to the trademark proprietor, if it concerns counterfeit goods and piracy.

- 2) *The Groups are asked to present in a summarised form the legal theories in their respective jurisdictions for the assessment of damages for the violation of trademark rights.*

Is this assessment based on the ground of civil liability or on the ground of violation of property ownership or some other ground(s)?

In Sweden assessment of damages for the violation of trademark rights is based on a mix between the grounds of violation of property proprietorship and civil liability. On one hand, the trademark proprietor is entitled to monetary remedy in an amount corresponding to a reasonable compensation for the use of the trademark. This rule is specifically targeted to ensure compensation to the trademark proprietor, even though he cannot prove that he has sustained damage. On the other hand, general principles of tort law apply for compensation for further damage.

- 3) *The Groups are asked to indicate what factors are taken into account in the assessment of damages and how the value of the trademark is used in this assessment.*

a) *Do the Courts take into consideration how strong the trademark is, both in terms of its inherent distinctiveness and popularity acquired through use and publicity?*

b) *Do the Courts take into consideration the investment made by the trademark owner in order to make the trade mark known?*

- c) Do the Courts consider what direct effect the infringing activity has had on the trademark proprietors profitability? If so, how?
- d) Do the Courts take into account price erosion? If so, how?
- e) Do the Courts distinguish between actual lost sales (i.e; the sales which would otherwise have been made by the trademark owner) and all sales made by the infringer? If so, which sales matter?
- f) Do the Courts treat parallel imports differently ? If so, what is the legal basis for this differentiation?

According to Section 38 in the Swedish Trademarks Act (1960:644) the infringer shall, if the infringement is considered wilful or negligent, (i) pay reasonable compensation for the use of the trademark and (ii) pay compensation for the further damage caused by the infringement. If the infringement is considered unintentional, the infringer shall pay compensation only if and to the extent as found reasonable.

Further damage includes lost sales, price erosion, internal costs and losses, goodwill damage, costs for marketing etc. The possible compensation for further damage, in addition to the compensation for use of the trademark, shall not result in an over-compensation for the trademark proprietor.

One way to calculate the reasonable compensation for the use of the trademark is to base it on the royalty that the trademark proprietor normally applies in his business or the corresponding level of royalty used in similar business, alternatively, an assumed royalty should the trademark proprietor have agreed to license his trademark to the infringer.

A claim for compensation for *further damage* is in most cases a more complicated task to complete. The trademark proprietor has the right to compensation for its full and specified damage, but a more precise calculation of the individual damage posts included in the claim must normally be presented and evidenced to the court in order to be granted compensation for *further damage*.

As regards the *strength and value of the trademark* when assessing the claimed damages, the court is in principle free to use any method it sees fit for the specific case. Even though the strength of a trademark, both in terms of its inherent distinctiveness and popularity acquired may not have any particular impact on the reasonable compensation for the use of the trademark – although it might support a claim for a higher royalty fee – such value of a trademark can indeed support a more substantive damage claim for *further damage*, but not as a general principle. Such factor as *the investments by the trademark proprietor* and the extent of it in order to make the trademark known may support that the trademark is a valuable trademark and information about the investments can be used as evidence to support the claim for further damages, especially with regards to the goodwill damages suffered.

The *direct effect of the infringing activity on the trademark proprietor's profitability and the price erosion* has been considered by the Swedish Courts. In a few cases that concerned importation of counterfeits, the trademark proprietors were granted *further damages* on the ground that the mere existence of importation of counterfeit products and the market's awareness thereof affected the trademark proprietors profitability and might force the trademark proprietor to decrease its price level. The trademark proprietors were in those cases thus forwarded damages even though the counterfeit products only were in the custom's seizure and hence had never reached the market. In more recent case law concerning counterfeit products, the courts have been more reluctant to grant damages on that ground unless the trademark proprietor provides evidence, this in particular in cases where the counterfeit products have not reached the market.

According to the preparatory works of the Swedish Trademarks Act, the court may as an alternative to *the actual lost sales*, instead consider the sales made by the infringer. It does though largely depend on the circumstances in the case and in particular on the parties' argumentation in the case.

As concerns *parallel imports*, the court has in once case specifically excluded such factors as goodwill loss and dilution of the trademark when the damages were assessed. The reason for this was that the products were not manufactured without the consent of the trademark proprietor. The factors that the court did consider were such as that the trademark proprietor had not been able to sell corresponding number of products on the Swedish market, thereby causing the trademark proprietor an economic loss, and that the competition from the unlawfully imported products risked causing price erosion on the legally imported products. Thereeto, the importer was considered having made an undue profit that the importer probably wouldn't have done if he had traded in lawfully imported products.

4) *In case the compensation is evaluated on the basis of lost profits of the trademark owner or an account of the profits arising from infringement:*

a) *What are the key principles?*

The key principle of compensation for damages only up to the financial position had the infringement not taken place, applies also to trademark law. The trademark proprietor can, as said above, claim either its own lost profit or the profit of the infringer. The trademark proprietor can though never receive more than the actual and evidenced damages suffered as regards the *further damages*. The reasonable remuneration for the use of the trademark may though in certain cases exceed the actual damages suffered and can therefore be regarded as a kind of punitive damage to compensate the trademark proprietor in general for the infringement occurred.

b) *How are the profits defined and how are they calculated?*

Normally, the two main factors taken into account when assessing lost profits are the number of unsold units and the trademark proprietor's contribution margin per unit. Since the infringing product normally is sold under other conditions than the original products due to different quality, lower price, other channels, the trademark proprietor is seldom able to claim that the number of unsold products is equal to the number of products sold by the infringer. In case the infringing products are cheaper and sold through other channels than the right proprietor's products, it may be claimed that many of the buyers of the infringing products would never buy the genuine product in the first place.

In case the damage is calculated on the infringers' profit, the profit can be defined as the profit the infringer would have obtained if he had sold the products at the price corresponding to the price of the original products, at least as concerns counterfeit products. This alternative calculation can many times render a higher damage since the infringing products many times are manufactured at lower cost than the original products.

c) *What shares of the profits are attributed to the trademark owner and any licensees?*

There is no precedence in Swedish law where this has been clarified. However, each party has the right to damage for his lost profits, but this is of course more difficult to establish if the lost profit is calculated on the infringer's profit and not the actual lost sales of the trademark proprietor or the licensee.

d) *Does the strength of the trademark come into play in apportioning the profits?*

As a general principle no, but in cases where only one of the parties has made the investments to make the trademark strong and valuable such factor could perhaps be considered in the apportioning of the profits between the trademark proprietor and the licensee.

5) *In case the monetary compensation is assessed on basis of a royalty,*

a) *How is the royalty rate fixed?*

Although the licensing of trademarks is increasing in Sweden, there are no established guidelines for the calculation of a royalty rate as regards damages. The court will in most cases assess a "reasonable compensation" calculated as a royalty based on the information and argumentation provided by the parties. Many times the trademark proprietors are reluctant to reveal the actual royalty level used in their license arrangement and therefore claims a lower royalty that they expect the courts to find reasonable.

One issue that arises when establishing a reasonable compensation based on royalty is whether the royalty shall be calculated (i) on the price the right proprietor charges for its products, or (ii) on the price the infringer has charged for its products. There is no direct answer to this question but alternative (i) may be preferred by the right proprietor since this claim could be supported by the argumentation that its trademark adds value to the products sold by the infringer, and what price is charged for the infringing product is up to the infringer. In other situations, the right proprietor may prefer alternative (ii). This could be the case if the product sold by the infringer is more expensive than the genuine product, for example when a trademark is unintentionally added to a famous brand on exclusive clothing and the added trademark has not been duly cleared. The case law has not chosen any particular line in this respect so there is no specific rule but it depends on the specific circumstances in each case.

b) *Do the Courts consider whether the mark in question is one which is or was available for licence? If so, how does this affect their analysis?*

If it exists a functioning licence market for the trademark in question, the royalty will likely be based on the amount of royalty that the trademark proprietor would have received under a negotiated license.

In cases where the trademark proprietor does not license the trademark, the court has accepted that the reasonable remuneration – which is normally calculated as a royalty – instead is calculated as the profit the infringer could have made if he had sold the infringing products at the same price as the genuine products.

6) *The Groups are asked to summarise what information in relation to the unlawful activities causing the violation of the trademark can be obtained by the trademark owner in administrative or judicial proceedings in order to assess the level of monetary compensation.*

There are three main measures available to the trademark proprietor to obtain information on trademark infringement in administrative or judicial proceedings, namely (i) by an infringement search (Sw. *intrångsundersökning*), (ii) by an order for the production of a document (Sw. *edition*) and (iii) by preservation of evidence for the future.

i) Under Section 41 of the Trademarks Act (1960:644), a trademark proprietor can, when there are reasons to believe that an infringement has occurred, submit a request to a district court for a search of the alleged infringer's premises and that even before any proceeding for infringement has been initiated in court. The search shall be carried out for the purpose of searching for objects or documentation that can be assumed to be of significance for the investigation of the infringement activities and the extent of the

infringement (infringement search). If there is a risk that evidence is destroyed, the search can be carried out without first giving the party an opportunity to respond to the petition. A requirement for ordering the search is that the reasons for the measure outweighs the inconvenience that the measure means to the subject of the search and security for damage caused by the measure must be provided by the petitioner. Virtually any kind of document that can be of importance for investigating the infringement can be searched and copied and infringing objects seized. The infringement search measure is generally regarded to be very effective for securing evidence.

In addition hereto there is a special national measure such as the preservation of evidence for the future under the Code of Judicial Procedure (Chapter 41), in the form of, amongst other things, witness examinations, view or written evidence. This measure can be used before legal proceedings have been initiated and if the petitioner can demonstrate that there is a risk that evidence concerning a circumstance of importance to a person's legal rights may be lost or difficult to obtain. This can often be difficult to demonstrate and the measure is rarely used in practice. After the implementation of the measure "infringement search" as described above, this measure is though of little interest to use.

- ii) The trademark proprietor can under the Code of Judicial Procedure (Chapter 38) in ongoing civil proceedings request that the court order a party to produce specific pieces of evidence (mostly documents). A prerequisite for such an order is that the petitioner has been able to sufficiently specify the documents or the types of documents in question, which not seldom may be difficult to do. Furthermore, the documents in question must be assumed to be of importance as evidence in the case.

Criminal cases concerning trademark infringement are not very common, but in such cases, certain measures such as seizure of goods and searches of premises are available (Code of Judicial Procedure Chapter 27 and 28, respectively).

A particular type of administrative proceedings may be regarded as useful in order to obtain information on the extent of the infringement, namely customs actions against suspected infringing goods under the so-called Counterfeit Regulation (1383/2003/EC). Under this Regulation, the customs may detain goods suspected to infringe intellectual property rights. Although the purpose of the measure is to stop infringement, as an indirect effect, the trademark proprietor also will obtain information on the extent of the infringement (at least with respect to that particular shipment).

- 7) *One of the forms of the prejudice suffered by the trademark owner through the infringement is the damage to the trademark in a reputational sense (diluting exclusivity). The Groups are invited to report if this form of prejudice is considered by the Courts and what are the factors that are used in their evaluation?*

According to Swedish law, the goodwill of a trademark may be divided into two categories; one being the distinctiveness of the trademark, the other its reputation. The detrimental actions caused by infringers to a trademark's goodwill may thus result in dilution of distinctiveness, and degeneration of the reputation of the trademark.

The Swedish courts do in their judgments generally not provide detailed reasoning on how awarded damages have been calculated. However, the following factors have been identified to be most commonly referred to by the courts when determining damages in relation to damage to the goodwill of a trademark: (i) whether the trademark is well-reputed, (ii) the time period of the infringing activity, (iii) the risk of confusion between the marks/products, (iv) the extent of marketing measures taken by the infringer and, (v) other circumstances surrounding the offering and selling of the infringing products (for example an advertisement is considered to imply greater goodwill damage than the mere selling of the infringing products directly on the streets).

Even though the above factors are sometimes mentioned in the judgments, it should be noted that the courts in many cases plainly state that one can assume that the goodwill of the trademark has sustained damage, and without further reasoning, the court awards damages that the court considers reasonable. Therefore, it is not always possible to identify the factors assessed by the court.

Parenthetically it may be mentioned that one of the reasons behind the courts' taciturnity regarding the calculation of the damages may be that the trademark proprietors in many cases provide few or no arguments or evidence in support of the alleged damage to the goodwill of the mark. Partly, this may emanate from that the Swedish courts historically have awarded rather low amounts of damages, partly, the plaintiffs have been able to rely on a provision in the Swedish Code of Judicial Procedure (Chapter 35, Section 5), which provides that the court may estimate the damage to a reasonable amount if full evidence cannot be presented at all, or only with difficulty, or if the evidence can be assumed to entail costs or inconvenience not being in a reasonable proportion to the size of the damage and the claim concerns only a lesser amount. However, in a recent judgment from the Supreme Court in 2005 (NJA 2005 p 180 "Formsprutarna"), the court established that, in order to receive damages, the plaintiff is required to provide at least some evidence in support of the claim.

- 8) *The Groups are also asked to indicate if the moral/wilful element of the violation of a trademark right, and particularly the will to profit or gain from counterfeit activities (where the goods do not originate from the trademark proprietor or are not marked with his consent) is taken into consideration in the evaluation of the damages and/or the account of profits. If so, what are the consequences?*

The Groups are also asked to indicate if ignorance of the trademark and/or ignorance of the infringement is taken into consideration in the evaluation of damages or the account of the profits.

Monetary remedy for violation of trademark rights in an amount corresponding to reasonable compensation for the use of the trademark is available in circumstances where the violation was committed negligently or intentionally. In the event a violation has taken place but was committed unintentionally, monetary remedy is still available if and to the extent that this is considered reasonable. It shall be noted that if the infringement case concerns a registered trademark, the courts always considers the infringement to be at least negligent.

A monetary compensation should be provided to the trademark proprietor with a higher sum in cases of intentional violation of trademark rights than in cases of negligent violations. Thus, by defining counterfeiting and piracy of trademarks as intentional violations of the trademark rights these forms of violation should have an impact on the monetary compensation when compared to negligent infringement of trademark rights, but not when compared to intentional infringements. In the preparatory work it is also stated that the period the infringement has taken place and the degree of guilt of the infringer's side should have an impact on the amount of damages. For example intentional or gross negligent infringements – as is the case regarding counterfeiting – could result in higher damages. The aim is however that the owner of the right should have full compensation for its loss, not more. When determining the amount of damages, consideration shall be taken to the trademark proprietor's interest of that infringement is not committed as well as other circumstances of other than pure economic importance. It should be noted that according to preparatory work to the Swedish Patent Act, consideration can be taken to the relationship between the infringer and patent owner. If the infringer has taken undue advantage of its stronger position in relation to the patent owner, the damages could be set higher than if the parties were equally strong. The same reasoning could be used in counterfeit cases. In practice, however, Swedish courts do only on rare occasions find that violations of trademark rights have been committed with intention.

Finally, is the scale of the counterfeiting or piracy an additional element which influences the assessment of damages and/or account of the profits? If so, what are the consequences?

The will to profit or gain from counterfeiting activities could be taken into account by courts when determining the amount of damages. The foregoing could be a reason of other than economic importance that affects the amount of compensation for further harm to be paid by the infringer. An example of further harm is according to the preparatory work for the Section in question, loss of goodwill of the trademark. Such loss of goodwill will typically occur in connection with counterfeiting as has been explained above. This form of compensation is however usually set very low by the Swedish courts.

Compensation similar to the punitive damages applied in some jurisdictions is however not applied in Sweden.

- 9) *Is the evaluation of damages based on the same principles in cases where the infringement also constitutes a violation of a contractual obligation, for example, a violation of a licence?*

According to Section 34 second paragraph in the Trademarks Act (1960:644) the proprietor of a trademark is entitled to invoke the rights conferred to the trademark against a licensee who violates a provision in the license agreement. A breach of such provision is therefore also considered as trademark infringement by the licensee and the proprietor can claim damages either through the Trademark Act and/or through contract law. Thus, if the trademark proprietor invokes the violation of the licence in accordance with the regulations in the Trademark Act the evaluation of damages will most likely be based on the same principles as in trademark infringement cases regardless of the breach of contract. However, the lack of case law in this area and the fact that no guidance can be obtained from either the preparatory works or the doctrine indicates that it is uncertain how the court would consider such a situation.

The scope of protection of the trademark is the decisive element if the licensee's violation of a provision in the licence agreement should be considered as trademark infringement or breach of contract. In accordance with Section 34 second paragraph in the Trademark Act the licensee's violation of provisions in the license agreement relating to the duration of the license, the form under which the trademark may be used, the scope of goods for which the license is granted, the territory in which the trademark may be used, or the quality of the goods manufactured by the licensee are to be regarded not only as a breach of contract but also as trademark infringement. However, since the enumeration is not exhaustive other violations of the provisions in the license agreement than the above mentioned could also be regarded as trademark infringement. A typical case which should be considered as trademark infringement is overproduction by the licensee. However, if the licensee sells fewer articles than agreed in a minimum clause in an agreement it should be regarded as breach of a contractual obligation. In a judgement from the Swedish Supreme Court from 1997 (NJA 1997 p 109 "Partyman") concerning a licensee which had been continuing using the trademarks even after the revocation of the licence agreement, the Supreme Court found that such a situation should be regarded not only as violation of a contractual agreement but also as trademark infringement. Unfortunately the Supreme Court did not express its view if the trademark infringement in combination with the breach of contract would constitute a difference as to the evaluation of damages.

Thus, it can be concluded that Swedish law does not actually embrace a different evaluation in cases where the trademark infringement also constitutes a violation of a licence agreement or any other contractual obligation.

- 10) *The Groups are also invited to explain the problems and practical difficulties that the trademark owners face in the assessment of the damages and/or account of the profits for the violation of trademark rights?*

According to general rules of evidence, the trademark proprietor has to prove the scope of damages incurred. Due to difficulties in assessing the extent of the damages, if full evidence cannot be presented at all, or only with difficulty, the court often has to estimate the damages to a reasonable amount in accordance with the rule of diminution of the burden of evidence in Chapter 35 Section 5 in the Swedish Code of Judicial Procedure. There is a general view among practitioners and trademark proprietors that Swedish courts, when making such an assessment, have been too restrictive. The interest among the courts is that trademark infringement should not pay off, but also that the trademark proprietors should not get overcompensated.

The problems that the trademark proprietors face in the assessment of the damages and/or account of the profits for the violation of a trademark rights are often related to the compensation for further damage caused by the infringement. The damages for further damage caused by the infringement comprise compensation for loss of sales, loss of market damages and internal loss. The practical difficulties hereto lies within the presentation of full evidence of the compensatory parts indicated in the claim for damages. The trademark proprietor must therefore carefully estimate the specific losses and present a reasonable and solid foundation for the calculation of the amount of damages. The lack of evidence and the faith that the court possesses the necessary market knowledge has in some cases resulted in a lower amount of damages awarded. If the trademark proprietor spend a lot of costs to provide such evidence and the damage claim is not granted in full, then the trademark proprietor risks not getting the full compensation for procedural costs even though he in fact wins the case although with a lower damage compensation. In cases where the trademark proprietor face such difficulties – or chooses not to spend too much costs on producing the evidence - the court can, in accordance with the above mentioned rule in Chapter 35 Section 5 in the Swedish Code of Judicial Procedure, estimate the damages to a reasonable amount. However, because of its optional character, this regulation has to be invoked as applicable by the trademark proprietor and the circumstances for the difficulties in presenting full evidence has to be shown.

The main difficulties in the assessment of damages for the violation of trademark rights are related to market damages. The difficulty hereto lies within proving the origin of marketing damages i.e. the goodwill of the trademark. Swedish courts tends to admit goodwill damages, however the amount of damages is very low and should from a practical point of view therefore only be regarded as a recognition of the same. This could also be a reason to why the claims of damages by the trademark proprietors are conservatively estimated in Sweden.

- 11) *In some cases the national law may provide, as a remedy for the violation of the trademark right, for the confiscation of the products bearing the illicit sign.*

If this applies in their national law, the Groups are asked to indicate, if this confiscation influences the evaluation of the damages.

The Swedish Trademarks Act (1960:644) provide for confiscation of products bearing an illicit sign. However, neither legislation nor case law indicates whether confiscation influences the evaluation of damages. It is though not precluded that confiscation and later destruction of the goods can be taken into account in the assessment of a compensation determined by court.

- 12) *The Groups are asked to indicate if the jurisprudence in their countries is a useful source of information and comparison on the assessment of monetary compensation for the violation of the trademark rights.*

In this context, the Groups are invited to indicate if they are satisfied with the degree of certainty in their laws on evaluation of the compensation.

National jurisprudence is a valuable source of information in this respect. However, it is often criticized that assessment of monetary compensation, and particularly the level of said compensation and its predictability does not follow from precedence. Another problem to use the precedence as a source of information is that many cases are only dealt with by first instance court which decisions are not published in the same manner as the Courts of Appeal or the Supreme Court's decisions. This also means that the courts of first instance do not share its precedence, which in its turn causes uncertainty in the evaluation of compensation.

When comparing how different factors are used in determining a reasonable compensation for the unauthorised use of a trademark, such as the price of original goods, unlawful profits of infringing party, and other circumstances, the court may determine a compensation that is lower than the demand for relief, even in cases whereby the claim for compensation is equal to the unlawful profit for sale of infringing articles at the same price of original goods, if the result is unreasonable.

The unsatisfactory degree of certainty on the level of compensation has led to propose the use of standardized sums instead.

- 13) *The Groups are finally asked to explain any other issues related to the topic which would appear useful in the examination of the question.*

It appears that the most purposeful interpretation of current legislation is that damages that are not remedied by the awarded economical compensation for unlawful use of a trademark, a so-called additional damage, such as damaging or diminishing goodwill are also worth of remedy. How the assessment is done and whether dilution of the trade mark and price erosion is taken into account when evaluating the awarded damages is difficult to decide by studying case law.

II) Proposals for the future harmonisation

- 1) *The Groups are requested to indicate if the evaluation of damages for violation of the trademark rights should be the subject of the international harmonisation and if this harmonisation should be undertaken through an international treaty.*
- 2) *The Groups are requested to indicate what should be, based on their national experience, the harmonised system for the evaluation of damages for violation of the trademark rights.*
- 3) *The Groups are invited to make any other suggestions about possible future developments of the present question.*

Considering the variation of the criteria for damages in for example the member states of the European Union, the harmonisation of damages for violation of trademark rights may prevent forum shopping and even "country shopping" for the release and marketing of counterfeits. Preferably a harmonised system would in such case also mean that the burden of proof that at present complicates – even prevents - the right holder's possibility to obtain full recovery for the damages caused is shifted so that the minimum level of damages that the right holder is entitled to is at least as a general rule calculated on the infringer's profit. That would in its turn lessen the costs and the difficulty for the trademark proprietor to obtain all necessary evidence to show the actual damage suffered and the necessary evidence would in such case be limited to show the infringer's intent. Hereby, the costs in the litigation will be limited and there would also be a bigger difference between the damages awarded in cases of negligent infringements and intentional infringements. Another proposal from the Group is that the penalty that today has to be paid by the infringer if he or she breaches an injunction shall be paid to the benefit of the right holder and not to the state, which is the case today.

Summary

Swedish law does not distinguish between different kinds of infringement, counterfeiting and piracy of trademarks. Thus, the conditions for liability are the same. The various forms of violation may have an impact on the monetary compensation if it concerns counterfeit goods and piracy. The assessment of damages is based on a mix between the grounds of violation of property proprietorship and civil liability.

According to the Swedish Trademarks Act the infringer shall, if the infringement is considered wilful or negligent, pay reasonable compensation (based e.g. on applicable market royalty rates) and compensation for the further damage (incl. *inter alia* lost sales and goodwill damages) caused by the infringement. If the infringement is considered unintentional, the infringer shall only pay compensation only if and to the extent as found reasonable.

Considering the variation of the criteria for damages in for example the member states of the European Union, the Swedish Group is positive to a future harmonisation as it may prevent forum shopping for the release and marketing of counterfeits. The Swedish Group suggests a shift in burden of proof so that the minimum level of damages that the right holder is entitled to is at least as a general rule calculated on the infringer's profit. Another proposal is that the penalty that has to be paid by the infringer if he or she breaches an injunction shall be paid to the benefit of the right holder and not to the state, which is the case today.

Résumé

La Loi suédoise ne distingue pas entre les divers types de violation de droit, tel que la contrefaçon et la piraterie des marques de commerce. C'est donc pourquoi les conditions pour engendrer la responsabilité sont les mêmes pour chaque violation de la loi. Les diverses formes de violation de droit pourraient avoir un impact sur l'indemnisation pécuniaire, s'il s'agit de contrefaçon ou piraterie. L'évaluation des dommages sera effectuée sur la base d'un mélange entre les types de violation de droit de propriété et de responsabilité civile.

Selon la Loi sur les marques de commerce en Suède, celui qui viole un droit devra, en cas de violation jugée volontaire ou négligente, payer une indemnité raisonnable (calculée, par exemple, sur la base des taux de redevances en vigueur sur le marché) ainsi qu'une indemnité pour le préjudice additionnel subi (y inclus, entre autres, la perte des ventes et la perte d'achalandage) découlant des suites de la violation. Si la violation est considérée involontaire, celui qui viole le droit ne devra payer qu'une indemnité reconnue comme étant raisonnable, selon le cas.

Étant donné la variation entre les critères applicables au calcul des dommages dans, par exemple, les états membres de la Communauté Européenne, le Groupe Suédois voit de manière positive une future harmonisation des lois en vue de supprimer la pratique de sélection du forum juridique pour la diffusion et commercialisation des contrefaçons. Le Groupe Suédois propose un déplacement du fardeau de la preuve qui permettrait au titulaire de droit d'obtenir une compensation au moins équivalente, en règle générale, aux gains réalisés par celui qui viole le droit en cause. Une deuxième proposition du Groupe Suédois est d'établir que la sanction pécuniaire en cas de bris d'injonction devrait être payée au titulaire du droit et non à l'état, comme c'est le cas aujourd'hui.

Zusammenfassung

Schwedisches Recht unterscheidet nicht zwischen verschiedenen Arten von Rechtsverletzung, Produktfälschung und Markenpiraterie. Deshalb sind die Bedingungen der Haftung die gleichen. Die verschiedenen Formen der Rechtsverletzung können eine Auswirkung auf die Kapitalabfindung haben, wenn es nachgemachte Waren und Markenpiraterie betrifft. Die Feststellung des Schadens

ist auf eine Mischung zwischen dem Grund der Verletzung des Eigentumsrechts und zivilrechtlicher Haftung basiert.

Gemäss dem schwedischen Markenschutz Gesetz soll der Rechtsverletzer, wenn die Verletzung als vorsätzlich oder fahrlässig angesehen ist, einen angemessenen Ausgleich zahlen (basiert auf z.B. anwendbare Geldmarktsätze) und Ausgleich für weitere Schaden (einschliesslich u.a. verlorene Verkäufe und Goodwill Entschädigung) verursacht durch die Verletzung. Wenn die Verletzung als unbeabsichtigt zu angesehen ist, zahlt der Rechtsverletzer nur Ausgleich wenn und im Umfang der Ausgleich ausdrücklich angemessen festgestellt werden kann.

Mit Rücksicht auf die Variationen der Kriterien für Schadenersatz in z.B. den Mitgliederstaaten der Europäischen Union, ist die schwedische Gruppe positiv dazu, eine zukünftige Harmonisierung, da es Auswahl des günstigsten Gerichtsstandes (forum shopping) für die Veröffentlichung und Marketing der Produktfälschungen verhindern könnte. Die schwedische Gruppe schlägt ein Umkehr in der Beweispflicht vor, so dass die Untergrenze der Schadenersatz, zu dem der Eigentümer des Rechts berechtigt ist, mindestens als eine generelle Richtlinie auf dem Gewinn des Rechtsverletzers berechnet worden ist. Ein anderer Vorschlag ist, dass die Entschädigung die der Rechtsverletzer zu zahlen hat, wenn er oder sie eine Verpflichtung nicht einhalten, an den richtigen Eigentümer ausbezahlt werden soll und nicht an den Staat, so wie der Fall heute ist.