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Report Q203

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

Introduction

In the past AIPPI devoted attention to the subject of damages several times, for example in resolutions Q134 (devoted to the enforcement of IP rights and the TRIPS agreement) and Q186 (which dealt with the principle of punitive damages). However AIPPI never examined in detail the special problems raised by trademark infringement, specifically it did not analyse the monetary compensation for trademark infringement.

In this contribution the Dutch Group has – as requested – specifically explored the damages for infringement, counterfeiting and piracy of trademarks. Therefore it has not paid any attention to possible damages for infringement of any other intellectual property right.

The Benelux Treaty on Intellectual Property (“BTIP”), which has direct effect in all three Benelux countries, gives the Dutch Courts a fair amount of freedom in the assessment of damages. The BTIP came into force on 1 September 2006 and replaced the Benelux Trademarks Act.

The BTIP stipulates in article 2.21 paragraph 2 that the judge that assesses the amount of damages shall take into consideration all aspects, such as negative economical consequences, including the lost profits that the trademark owner has suffered, the unlawful profits that the infringer has made and – if applicable – other elements than economical factors, inter alia moral damage suffered because of the infringement. However, these damages are not meant to be punitive.

It should be noted that there is very few case law and therefore limited guidelines regarding the factors that are taken into account in the assessment of damages. This is inter alia due to the fact that most infringement cases are handled in summary proceedings. In summary proceedings it is only possible to receive an advance payment for damages in the event that the trademark owner has an urgent interest therein, which is not often the case. The Dutch Group expects that the recent introduction of the Directive 2004/48/EC of 29 April 2004 on the Enforcement of Intellectual Property Rights (“Enforcement Directive”), which has been implemented into Dutch law on 1 May 2007, and the BTIP will produce more case law in due course.

Questions

I) 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*

In short: no.

For the needs of this study AIPPI has suggested to use the following definitions.

Infringement: a violation of the trademark right specifically by the way of imitation or non authorised parallel import of goods

Counterfeiting: copying with intent to deceive. *Counterfeit* in relation to goods means non genuine or authentic

Piracy: unauthorized appropriation, and reproduction on a massive scale of another's goods or services.

However, Dutch law does not specifically distinguish between *infringement*, *counterfeiting* and *piracy* of trademarks in the way as suggested by AIPPI, nor does the law provide specific definitions for *infringement*, *counterfeiting* or *piracy* of trademarks.

Article 2.20 BTIP provides that enforcement of a registered trademark is possible against:

- identical trademarks for identical goods or services;
- confusingly similar trademarks for identical or similar goods or services;
- identical or similar trademarks for different goods or services, if the earlier trademark is well known in Benelux and the later trademark takes unfair advantage of, or is detrimental to, the distinctive character or repute of the earlier trademark; and
- identical or similar signs that are not used as trademarks (e.g., company names), if the sign takes unfair advantage of, or is detrimental to, the distinctive character or repute of the earlier trademark and there is no valid reason for use of this particular sign. A valid reason might be an older company name, use of a sign in comparative advertising or use related to free speech (e.g., in a news item).

In the Netherlands, the term *infringement* covers all these kinds of “infringement”, including infringing parallel imports, infringement upon a well known trademark, counterfeit and piracy. In Dutch (juridical) language *counterfeit* and *piracy* are both used for copying with intent to deceive and reproduction on a massive scale of another's goods or services.

The Dutch Group further notes that the Council Regulation 2003/1383/EC of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (“Anti Piracy Regulation”) provides definitions for *counterfeit* goods and *pirated* goods that differ from this Dutch language and the definitions as provided by AIPPI.

In the Anti Piracy Regulation counterfeit goods are defined as:

- i) goods, including packaging, bearing without authorisation a trademark identical to the trademark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the trademark-owner's rights under Community law, as provided for by Council Regulation (EC) No40/94 of 20 December 1993 on the Community trademark or the law of the Member State in which the application for action by the customs authorities is made;
- ii) any trademark symbol (including a logo, label, sticker, brochure, instructions for use or guarantee document bearing such a symbol), even if presented separately, on the same conditions as the goods referred to in point (i);
- iii) packaging materials bearing the trademarks of counterfeit goods, presented separately, on the same conditions as the goods referred to in point (i).

Further, in the Anti Piracy Regulation *pirated* goods are indicated as goods which are or contain copies made without the consent of the owner of a copyright or related right or design right, regardless of whether it is registered in national law, or of a person authorised by the right-owner in the country of production in cases where the making of those copies would constitute an infringement of that right under Council Regulation (EC) No 6/2002

of 12 December 2001 on Community designs or the law of the Member State in which the application for customs action is made.

Considering the above, in this study the Dutch Group will not make a distinction between infringement, counterfeit and piracy, but will discuss damages for *infringement* of trademarks, including *counterfeiting* and *piracy*.

and what the conditions are for liability for those different kinds of infringement, counterfeiting and piracy.

If the conditions in article 2.20 of the BTIP (see above) have been fulfilled, there is trademark infringement. Liability for damages resulting from the infringement necessitates attributability (in the sense of culpability) on the part of the trademark infringer. In principle, the culpability must relate to knowledge of the existence of the trademark only and not also to the infringement itself. This means that the infringer must know or must be able to know the trademark involved.

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.

As indicated, Dutch law does not make an explicit distinction between infringement, counterfeit and piracy. In case of trademark infringement the Court shall take into consideration all circumstances in the assessment of the amount of compensation. The possible intent to copy or the fact that copying took place at a large scale may influence the amount of compensation. Further, the trademark owner may only claim profits made by the infringing party in case of trademark use in bad faith.

- 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)?

The assessment of damages for the violation of trademark rights is based on grounds of civil liability. The legal ground for the assessment of damages or for a duty to compensate damages is found in article 2.20 paragraph 1 BTIP (see question 1) and article 2.21 BTIP on damages and Dutch law on tort.

The infringement itself is not sufficient for the establishment of a duty to compensate damages. As an infringement of a trademark right is generally regarded as a species of tort, it needs to meet the requirements for tort as set out in article 6:162 paragraph 3 DCC. Apart from the violation of a right and damages, the duty to compensate damages requires that the infringement can be attributed to the infringer. However, in case of infringement on trademark rights, this requirement is generally regarded to be met if the infringer knows or could have known of the *existence* of the trademark rights concerned. On the other hand, it is noted that, according to Article 45 TRIPs the duty to compensate arises if the infringer knows or could have known of the *violation* of the trademark rights concerned.

It is noted that damages can also be assessed by the amount of profits made with the infringing activity. An award to surrender profits is generally seen as a different way of assessing damages, also based on civil liability. Article 2.20 paragraph 4 BTIP allows for such a claim to surrender the profits made. The award of such claim requires the infringement to be in bad faith. See also answer to question 8.

- 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.*

See also AIPPI Report Q186.

- 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?*

Yes, whether a trademark is strong or weak is a factor that will be taken into consideration when assessing the damage suffered by the trademark owner. This will particularly be of importance in assessing damage to the reputation of the trademark.

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

Yes, the investment made by the trademark owner to make its trademark known, is a factor that may be taken into consideration.

- c) *Do the Courts consider what direct effect the infringing activity has had on the trademark proprietors profitability? If so, how?*

Yes, mainly in the framework of lost profits (see question 4).

The Courts for example estimate the amount of trademarked products that would have been purchased by the infringing party from the trademark owner if the trademark had not been infringed. The Courts may also take into account whether the trademark owner could have taken steps against the infringing party at an earlier stage.

The Courts may also assess the amount of damages suffered by the trademark owner as a lump sum, on the basis of elements such as the amount of license fees that would at least have been indebted, had the infringing party requested permission from the trademark owner to use the trademark. This method of calculation is often used when the actual amount of damages suffered is difficult to assess.

- d) *Do the Courts take into account price erosion? If so, how?*

Yes, price erosion is one of the factors that can be taken into account. However, it is often hard to assess the exact damage for the trademark owner due to price erosion. Therefore, the Courts will often make an estimation.

The Courts will for example estimate *ex aequo et bono* and/or on the basis of a percentage of the profits lost by the trademark owner, taking into account the company size of the infringing party, any arguments the trademark owner has given as to how the price erosion should be estimated, the extent to which the trade mark owner invests in advertising and publicity, the reputation of the trademark, the (geographical) extent of the infringement and the period during which the infringement has taken place, the possible change in turnover of the original trademark product since the infringement.

- 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?*

The Courts distinguish between actual lost sales by the trademark owner and sales made by the infringer. For the assessment of damages based on the profits lost by the trademark owner, the actual lost sales of the trademark owner are decisive. As it is difficult to determine which amount of sales the trademark owner would have made, the amount of damages is often estimated on the basis of the actual sales made by the infringer and the market share of the trademark owner. A one-on-one relationship, i.e. the fact that for each infringing product an original product would have been sold, is not often assumed by the Courts.

In the event of an infringement in bad faith, the trademark owner may also claim profits made by the infringing party, in which case the sales made by the infringing party are decisive. An infringement is committed in bad faith, when the party whose actions are afterwards judged to be of an infringing nature, was aware of the infringing nature of said

actions at the time of the infringement. Case law up until now shows that compensation for profits lost by the trademark owner and compensation in the form of profits made by the infringing party cannot be awarded accumulated. The trademark owner may choose the highest of the two amounts. Payment of the profits made by the infringing party can accumulate with compensation for possible other damages, such as price erosion, extrajudicial costs etc.

- f) *Do the Courts treat parallel imports differently? If so, what is the legal basis for this differentiation?*

There is no indication in case law that the Courts treat parallel imports differently.

- 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?*

Evaluation of the compensation is possible on the basis of lost profits, as well as on the basis of an account of the profits arising from the infringement.

The amount of damages can be calculated taking into consideration various aspects. The BTIP specifically mentions in article 2.21 paragraph 2 that these aspects can *inter alia* be the lost profits of the trademark owner and the profits that the infringer has wrongfully earned (see also question 2 and introduction). For all types of damage the trademark owner will have to prove the damage that it has suffered.

Article 2.21 paragraph 4 of the BTIP provides for a possibility for the trademark owner to claim surrender of profits by the infringer besides or instead of the claim for payment of damages. The claim for the surrender of the profits made by the infringer can only be awarded if the infringer acts in bad faith.

The Dutch Supreme Court has held in a copyright case that accumulation of damages and surrender of profits should be limited to damages which do not consist of lost profits. This accumulation was regarded as contrary to the general principles of Dutch civil law. In practice this leads to a choice between the higher of the two, since the damage incurred will mostly, in a commercial setting consist of lost profits. This principle – that accumulation is not possible – is applied by the lower Courts in trademark cases as well.

In literature, however, it is questioned whether the Supreme Court copyright decision is applicable to trademark law and it is argued that accumulation of lost profits and recovery of profits made by the infringer is possible under trademark law, since this is a question of Benelux law, rather than of Dutch civil law. Moreover, the BTIP specifically mentions the accumulation of both in the event of an infringer which has acted in bad faith.

Certainty on this can only be given by the Benelux Court of Justice.

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

Detailed calculations of damage suffered by the trademark owner are rarely found in jurisprudence, since the amount of damages suffered is usually estimated *ex aequo et bono* by the Courts.

In case law it is generally accepted that the lost profits by the trademark owner are calculated on the basis of the sales volume of the infringer. It has to be estimated which part of the sales of the infringer could be apportioned to trademark owner if the trademark infringement would not have been committed. The lost profits can be calculated by multiplying the amount of products that the trademark owner has sold less due to the infringement multiplied by the profit per product of the trademark owner.

Profits made by the infringement are established as the net profits. In case law it has been accepted that the direct costs (i.e. taxes and other costs directly and exclusively related to the sale of the infringing products) and a part of the fixed costs may be deducted from the profits that the infringer has made.

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

The trademark owner is entitled to claim its own damages and the damages on behalf of the licensee. Furthermore the licensee is entitled to claim its own damages as a third party in legal proceedings initiated by the trademark owner. The licensee can only bring such a claim independently, if he has stipulated such right from the trademark owner.

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

There is no case law giving any such examples. It is however likely that the strength of the trademark will be relevant with regards to lost profits. See question 7.

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

a) *How is the royalty rate fixed?*

In some trademark cases, the monetary compensation is assessed on the basis of lost royalties. However there are no fixed rules for establishing the royalty rate. The Courts will look at paid royalty rates by other licensees and standard rates by umbrella organizations in the particular branches. The compensation will be based on the estimated royalty, multiplied by the amount of infringements or sales by the infringer.

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?*

The Courts may take into consideration whether the trademark would have been available for license. In one case the amount of missed out license fees was considered relevant for the assessment of damages. The Court referred to the situation that the infringing party would have been granted a license to use the trademark.

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.*

The level of monetary compensation; damages and other claims

In order to make an assessment of the financial consequences of the infringement, including lost profits and/or the profits that were realized through the infringing activities, the owner of the trade mark is entitled to certain information.

Article 1019a Dutch Code of Civil Procedure ("CCP") stipulates that any infringement of an intellectual property right entitles the owner of this right to a claim for disclosure under article 843a CCP. This article allows the owner of the intellectual property right to request copies of documents, including electronic data, relating to the infringement. These may include bank details, and all the relevant financial data relating to the infringement including prices, number of sales, profits, etc.

Article 1019f CCP implements article 8 of the Enforcement Directive. This clause deals with the rights of information, and more particular this entitles the owner of a trademark to request information on the origin of the infringements and the networks used in the distribution thereof. This includes information that can be obtained via third parties involved in the production or distribution.

This information, according to the Directive, includes names and addresses of the producers, sellers and distributors, including wholesalers. According to the Dutch *traveaux préparatoires*,

this may also include such information as the number of products produced, sold, delivered, received or ordered, including the relevant prices.

On basis of article 2.21 paragraph 4 BTIP the trademark owner can claim surrender of profits, including a full disclosure of the underlying financial data. However, in order to invoke this clause, bad faith is required.

- 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?*

This specific form of damage can be taken into consideration by the Dutch Courts in all types of trademark infringements. In cases that concern the enforcement of well known trademarks (Article 2.20 paragraph 1 under c BTIP and article 9 paragraph 1 under c Community Trademark Regulation EC 40/94) and – under Benelux trademark law only – in case of action by a trademark owner against identical or similar signs that are not used as trademarks, e.g. company names (article 2.20 paragraph 1 under d BTIP), the trademark owner must prove that the (younger) trademark or sign takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the older trade mark. For this purpose, the trademark owner will have to make plausible that there is at least a real threat for damage.

Taking unfair advantage of, or acting detrimental to the distinctive character or the repute of the older trade mark, includes acts such as the unjustified latching on, or profiting from, the reputation or goodwill of a (well-known) trademark.

Damage due to signs or trademarks that are detrimental to the distinctive character or the repute of the older trade mark includes *inter alia*:

- dilution/damage to the distinctive character of the trademark;
- damage to the repute of the trademark.

Dilution includes the risk that a trademark is no longer capable of inferring an immediate link with the goods or services for which it has been registered and used. Especially when it comes to famous trademarks, the Dutch Courts assume that these type of marks will easily lose distinctive character when third parties would be allowed to adopt such trademarks or similar signs. However, in each case the trademark owner will have to make plausible to the Court that there is a risk of dilution. In general, as a rule, the stronger the distinctive character of the trademark involved, the sooner dilution will be assumed by the Dutch Courts.

Damage to the repute of a trademark *inter alia* refers to cases where, due to the nature of the goods, the infringing sign has a negative effect on the trademark. This includes for example the use of a (famous) trademark for a different type of product for which it is normally used, as a result whereof the power of attraction or allurement of the trademark decreases. Furthermore, damage to the repute of the trademark may include cases where the exclusive and/or commercial value of the trademark is affected, sales value reduction, and also cases in which the trademark is made ridiculous. Also the circumstance that – besides the genuine trademark goods – there are (or have been) infringing goods on the market is considered relevant by the Dutch Courts for assessing whether the value of the trademark or its exclusivity or force of attraction is impaired. The same accounts for the comparable circumstance that consumers may wrongfully think that they own a genuine product from the trademark owner, but in reality own an (inferior) infringing product.

The damage that the owner suffered as a result of dilution or other forms of depreciation of its trademark is eligible for compensation. This loss item can be claimed in addition to the compensation for loss of profit or license fees. Even in cases were the claim for loss of profits was insufficiently substantiated, the Courts allowed damages for depreciation of the trademark. However, this type of claims is sometimes not awarded because of the limited

scope of the infringement. Also the circumstance that the infringement existed only for a short period of time may be a reason for rejection of damage claims. Furthermore, Courts have taken into consideration the fact that a trademark has a weak distinctive character when rejecting a claim for damages based on dilution/reputation damage.

In general, the estimation of damages as a result of dilution or other forms of depreciation of the trademark boils down to a comparison of the value of the trademark after the infringement with the situation wherein there would not have been an infringement. In actual practice, the Court determines the amount of the damages *ex aequo et bono*, and where applicable on the basis of damage estimations in expert reports (submitted by the trademark owner). Where the Dutch Courts used to act with caution when determining the amount of the damages in the past, nowadays there is a tendency to more often award higher amounts.

- 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?*

In practice, the circumstance whether or not the infringer acted knowingly or not, is often either directly or indirectly, taken into consideration by the Courts when estimating the amount of the damages and the (legal) costs. As a general rule, depending on the seriousness of the infringement, the more flagrant the infringement (and the more obvious the unlawful intentions of the infringer), the sooner the Dutch Courts will allow (higher) claims for compensation and costs.

As mentioned before, a claim to surrender profits is, on the basis of Article 2.21 paragraph 4 BTIP, only possible in case of trademark use in bad faith. It can be concluded from the legislative history of the former Benelux Trademark Act that use in bad faith is only assumed if the infringement was intentionally or wilfully made. In accordance with the case law of the Benelux Court of Justice, infringements are considered wilfully when the person whose acts are considered infringing (in retrospect) was at the moment of acting aware of the infringing character thereof. The Benelux Court of Justice has ruled that use in bad faith as stipulated in article 2.21 paragraph 4 BTIP does not exclusively pertain to piracy cases. Furthermore, when assessing the allowability of a claim to surrender profits, Benelux Courts may take into account all other circumstances of the case.

The trademark owner has the possibility to, by way of compensation of damages, claim all costs made while investigating and establishing the infringement, such as costs of detectives, investigation agencies, market research etc. Based on the Enforcement Directive – unless equity does not allow this – the owner has the possibility to claim all reasonable and proportionate legal costs and other expenses made. In the legislative history of the Dutch law which implements the Enforcement Directive, it is stated that the Courts – when assessing the amount of the legal costs – should take into account whether or not the infringer acted in good faith or not and that full cost recovery is more obvious in large-scaled counterfeit or piracy cases. In all other cases (which lie between good faith and bad faith infringements) it is to the discretion of the Court how to assess the amount of the legal costs. Article 14 of the Enforcement Directive, however, does not require the moral/wilful element of the infringement to estimate the amount of the reasonable and proportionate legal costs, which has also been observed in various recent judgments of the Dutch Courts.

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.

Ignorance of the trademark can be taken into consideration in the evaluation of damages. With respect to account of the profits, on the basis of Article 2.21 paragraph 4 BTIP, use in bad faith is required.

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?

This is an element which may be taken into account when assessing damages or the account of profits. As indicated before, in case of trademark infringement the Court shall take into consideration all circumstances in the assessment of the amount of compensation. The possible intent to copy or the fact that copying took place at a large scale may influence the amount of compensation. Further, the trademark owner may only claim profits made by the infringing party in case of trademark use in bad faith.

- 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?*

Under article 6:74 DCC, a violation of a contractual obligation constitutes an obligation to compensate damages if the violation can be attributed to the party that is in default. The assessment of damages is based on articles 6:95 and 6:96 DCC and can exist of losses suffered, lost profits and various costs incurred, as well as non-material damages. Although the principles for the evaluation of the damages are more or less the same, the factors that are taken into account in the assessment of damages may differ. In case the violation of the contractual obligation also constitutes trademark infringement, the relevant principles and factors for the evaluation of damages for trademark infringement will be taken into account.

In case a license is violated, article 2.32 paragraph 2 BTIP explicitly allows the trademark owner to invoke his right to a trademark against the licensee next to invoking breach of contract.

- 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?*

See also AIPPI Report Q186.

The assessment of the amount of damages as a consequence of trademark infringement is very difficult. The trademark owner has the burden of proof to illustrate the amount of actual damage that is incurred by the trademark infringement. In practice this is often difficult to establish, but the BTIP gives the Courts a fair amount of freedom in the assessment of the amount of damages (see question 3).

- 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.

Confiscation or seizure of goods is provided in article 2.22 paragraph 2 BTIP. This measure aims to ensure that no infringing products are brought on the market (the general provisions for seizures apply; article 730 and further CCP).

Article 2.21 paragraph 3 BTIP stipulates that as a form of damages, a surrender of infringing products can be requested, including the production facilities or materials used. It is believed that this will have an effect on the amount of damages that may be rewarded. Article 2.22 BTIP allows a recall and/or destruction of infringing goods. This may include the production facilities or materials used.

Seizure is a means to prevent (further) damages. Through the seizure, goods will be blocked from entering the market, and thus the damages suffered by the owner of the trademark may be reduced. This may therefore lead to a reduced claim for damages, and in this respect it will have an effect on the amounts that can be recovered. The seizure does not negatively affect the calculation of damages, but still it will have an effect on the amount of damages that can be claimed.

- 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.

Jurisprudence can be a useful source of information. However, at this moment mainly lower Courts decisions are available, which do not provide uniform guidelines for the assessment of damages.

The degree of certainty with regards to the account of profits or lost royalties is relatively positive. Unfortunately this cannot be said of the assessment of damages, including damage to the reputation, lost profits and dilution.

- 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.*

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.*

The Dutch Group is of the opinion that in general, it would seem advantageous for trademark owners to enjoy a uniform protection in all jurisdictions. In this respect, it would be seen as beneficial for the legal certainty of trademark owners to ensure a certain harmonisation.

- 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.*

The Dutch Group is of the opinion that infringement of trademarks should be discouraged, and therefore it is important to ensure that a claim for damages provides both an adequate compensation for the trademark owner, as well as a deterrent for any potential infringers.

- 3) *The Groups are invited to make any other suggestions about possible future developments of the present question.*