



Study Question

Submission date: May 8, 2017

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Quantification of monetary relief

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I. Current law and practice

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

1 **What rules and methods are applied when quantifying actual loss?**

In particular, please describe:

- a) the method used to determine the diversion of sales, i.e. the part of the infringing sales that the rightholder would have made but for infringement;**
- b) what level of profit margin is taken into account.**

As an introductory remark, it is generally noted that Danish courts often calculate the rightholder's damages based on an overall assessment of the specific facts and evidence of the case. Consequently, when awarding damages, the Danish courts rarely distinguish between what parts of the damages that are calculated based on the actual loss, a reasonable royalty, or the infringer's profits.

It is also important to note that Danish courts have a wide margin of appreciation for quantifying damages, and that there are not specific rules determining the methods for calculating the actual loss, reasonable royalty, or infringer's profits. The methods used can be extrapolated from case law, but even though it is possible to identify some general principles, it is rarely possible to identify specifically how these principles must/should apply in a specific situation.

a) the method used to determine the diversion of sales, i.e. the part of the infringing sales that the rightholder would have made but for infringement;

Generally, Danish courts will try to estimate the substitution rate, i.e. the rate at which the rightholder's and infringer's products compete with each other on the market. Danish courts will estimate the substitution rate by looking at aspects such as the similarity/overlap in design, quality, price, and venue of sale. If the similarity of these aspects is high, so is the substitution rate, and in that case it is assumed that many of the infringing products were sold to the detriment of the rightholder's sale of the genuine product.

If the infringer's product also competes with other products than the rightholder's, it is normally assumed that some of the infringing sales would have gone to the other competitors. Consequently, the rightholder cannot claim damages for these sales.

Separate from the question of substitution rate, if it is established that the rightholder has experienced a drop in sales or negative impact on projected sales after the infringement occurred, this is an indication that the rightholder has experienced a loss of sales due to the infringement.

B) what level of profit margin is taken into account.

Danish courts calculate the profit margin as the rightholder's turnover minus any costs, which are caused by an increase in turnover, i.e. variable costs. Normally, this is determined as the rightholder's contribution margin (turnover minus standard variable costs, such as cost of goods sold) on the rightholder's product. If it is determined that the rightholder would have had further costs if the infringement had not occurred, these costs will also be subtracted from the rightholder's turnover.

2

What rules and methods are applied when quantifying a reasonable royalty?

In particular, please describe:

- a) the royalty base;**
- b) how relevant comparables among licence agreements are defined;**
- c) how a reasonable royalty is quantified in the absence of relevant comparables;**
- d) the nature of the royalty, e.g. lump-sum, percentage of revenues or profit, a mix?**

a) the royalty base;

It is not clear what rules or methods Danish courts specifically apply to quantify the royalty base or rate, however, in cases without relevant comparables, the Danish Supreme Court has set the royalty base as the infringer's turnover on the entire product.

It is also worth mentioning the leading precedent on reasonable royalties, referenced as U.2007.1219 H, where the Danish Supreme Court established the general principles for calculating the reasonable royalty. The approach is as follows:

In order to calculate the reasonable royalty, a court will first try to establish (i) what the rightholder would reasonably have demanded on the market. If this cannot be established, the reasonable royalty will be based on (ii) what the infringer should have been willing to pay for the infringing use. This is based on the increase in market value that the infringer gains from the infringing use when compared to a non-infringing use. In using the approach under (ii), the Danish courts de facto apply what can be regarded as an apportionment principle, but the intricacies of this principle are unclear.

b) how relevant comparables among license agreements are defined;

Generally speaking, the Danish courts distinguish between three types of license agreements: (i) the rightholder's own license agreements, (ii) competitors' license agreements, and (iii) the general practices in the market.

As a general rule, if a license agreement/practice is well established on the market, it will be more relevant to the specific case. The relevance of a comparable license agreement/practice also appears to be affected by how similar the licensed use is to the actual infringing use. Finally, when comparing license agreements, Danish courts will often focus on the pricing provisions in the comparable license agreements, and seldomly look to other provisions in the agreement that could potentially influence the price of the license.

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

In the absence of relevant comparables, Danish courts will calculate the reasonable royalty based on a general assessment of the specific facts of the case. The reasonable royalty is frequently calculated as 5 % of the infringer's turnover from the infringement.

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

When possible, the nature of the royalty will follow what the rightholder could reasonably have demanded on the market. Thus, if the rightholder's licensing practice is e.g. a lump-sum payment, then it is likely that the nature of the reasonable royalty will be a lump-sum payment, and vice-versa. If the court cannot determine what the rightholder would reasonably have demanded, the royalty will normally be calculated as a percentage of the infringer's turnover from the infringement.

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

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

When determining the infringer's profits from the infringement, Danish Court's will take into account profits from the sale of the entire product, rather than applying an apportionment principle. When calculating damages, the courts will not award the entire profits as damages, but rather take the profits into account when determining the damages. It is not clear how the profits influence the size of the damages.

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

The rule allowing for Danish courts to take into account the infringer's profits is relatively new in Denmark, and there is not much case law in which the issue has been analysed. Therefore, it is not yet clear, what profits Danish courts take into account. It is likely, however, that Danish courts will take into account the infringer's net profits, i.e. turnover minus all costs.

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

Actual Loss

The rightholder receives damages corresponding to the number of sales of the entire good, the rightholder would have had but for the infringement.

Reasonable royalty

A court would follow the general principles put forward under question 2 a). This means that the reasonable royalty as a main rule is based on what the rightholder would reasonably have demanded on the market, i.e. based on a licensing arrangement that could work on the actual market. If the market would accept a licensing practice, where the royalty is calculated based on the value of the entire good, then so should the reasonable royalty. If what the rightholder would reasonably have demanded on the market is not established, a Danish court will look to the market value surplus gained from the infringement compared to a non-infringing use. Here, the court would likely apply an apportionment principle.

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

The Danish Working Group is not aware of any case law on this specific issue, but the following can be assumed:

Actual Loss

The rightholder receives damages corresponding to the number of sales of the entire good, the rightholder would have had but for the infringement.

Reasonable Royalty

It is assumed that a court would follow the general principles put forward under question 2 a) and elaborated on under 4 a).

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

The Danish Working Group is not aware of any case law on this specific issue, but the following can be assumed:

Actual loss

The rightholder receives damages corresponding to the number of sales of the entire good, the rightholder would have had but for the infringement.

Reasonable Royalty

This question can be interpreted as having two meanings: 1) Where the rightholder routinely licenses the IP as part of a bigger portfolio, and 2) where the IP is only used as part of a bigger portfolio.

In a situation like 1), The Eastern High Court of Denmark has in case B-367-10 of 7 November 2011 accepted that the infringer should pay a full subscription fee to the rightholder, although the infringing use was significantly less than what would normally occur if one had actually purchased a subscription. Here, the rightholder had a well-established practice of licensing its' IP on a subscription basis. The decision has been met with criticism in the legal literature.

The Danish Working Group is not aware of any case law relevant to circumstances as under 2). But according to the general principles for calculating the reasonable royalty as set forth under question 2 a) and 4 a), the reasonable royalty will as a main rule be based on what the rightholder would reasonably have demanded on the market. If this is not established, a court will look to the market value surplus gained from the infringement compared to a non-infringing use.

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?

The Danish Working Group is not aware of any case law on this specific issue, but the following can be assumed:

Actual Loss

The rightholder receives damages corresponding to the number of sales the rightholder has suffered due to the infringement. If there is established a causal link between the infringement and a loss of sales of the rightholder's other goods, this loss is in principle covered.

Reasonable Royalty

The reasonable royalty will be calculated according to the general principles set out under question 2 a) and 4 a).

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

No.

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

As a general rule, the burden of proof rests with the plaintiff (often the rightholder), while the burden of proof for any counterclaims rests with the defendant.

In principle, the parties are free to determine the type and extent of evidence they wish to adduce. The parties decide what evidence they wish to produce and it is their responsibility to ensure that relevant and necessary evidence is in fact presented to the court. The court will not on its own motion procure any information or evidence.

The only limitation in the production of evidence is that superfluous evidence can be cut off by the court, cf. div 341(1) of the Danish Administration of Justice Act (*retsplejeloven*).

The principle of free assessment of evidence applies, cf. div 344(1) of the Danish Administration of Justice Act. Accordingly, it is entirely for the court to assess the relevance of the evidence presented to it.

Re. 6 a)

Evidence applicable for proving the quantum of actual loss may include:

- Annual reports and other kinds of accounting material (internal accounts, invoices, order confirmations, etc.)
- Auditor's statements and other kinds of expert reports prepared by or on behalf of a party for the purpose of the specific proceedings
- Court appointed expert reports
- Witness statements

It should be noted that unilaterally obtained expert reports are typically not allowed as evidence in court, unless they have been prepared *before* the proceedings were initiated. However, this practice is about to change due to a law reform that will allow production of a unilaterally obtained expert report prepared *after* the proceedings were initiated, but only as a response to any unilaterally obtained expert reports filed in the case that have been prepared before the proceedings were initiated.

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

Evidence applicable for proving the quantum of reasonable royalties may include:

- Licence/royalty agreements already entered into
- Industry practices
- Declarations from Industry/Trade organization
- Auditor's statements and other kinds of expert reports prepared by or on behalf of a party for the purpose of the specific proceedings
- Court appointed experts reports
- Witness statements

It should be noted that unilaterally obtained expert reports are typically not allowed as evidence in court, unless they have been prepared *before* the proceedings were initiated. However, this practice is about to change due to a law reform that will allow production of a unilaterally obtained expert report prepared *after* the proceedings were initiated, but only as a response to any unilaterally obtained expert reports filed in the case that have been prepared before the proceedings were initiated.

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

Yes, subject to the ordinary rules on the taking of evidence as described above.

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

Basically, there are three legal mechanisms available to the rightholder in this regard under Danish law.

1. Application for information according to Section 306 of the Danish Administration of Justice Act:

The rightholder may file a request for access to information under Section 306 of the Danish Administration of Justice Act.

Section 306 implements Article 8 in the Enforcement Directive (Directive 2004/48/EC).

It is a requirement for invoking Section 306 that infringement has been established.

The purpose of Section 306 is to give access to information that a party or a thirdparty possess concerning goods or services that constitutes an infringement of the rightholders rights in order to, i.a., assess liability and damages for the infringement.

The information available under a Section 306-request consists of:

1. the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;
2. information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

If a party fails to fulfil his obligation to give information or to follow the Court's request - e.g. for further and better particulars – this may be prejudicial to his case. Also, failure to fulfil the obligation may be sanctioned by fines or, in extreme cases, by taking the party in to custody.

2. Application for a disclosure order according to Section 298 of the Danish Administration of Justice Act:

A party may file an application for a disclosure order to the Court asking the Court to order the counter-party to disclose certain information that the requesting party intends to rely on during the proceedings and which information is under the counter-party's control. However, if the information concerns circumstances that the counter-party would be exempted from testifying to, the counter-party is not obliged to disclose the information.

If a party fails to fulfil his obligation to give information or to follow the Court's request - e.g. for further and better particulars – this this may be prejudicial to his case. To what extent failure to fulfil the obligation will be prejudicial to a party's case is up to the Courts. Normally, the Courts will not simply take the requesting party's arguments for basis, if the counter-party fails to comply with the request for further and better particulars, but rather the Courts will apply a wide margin of discretion when assessing this factor.

3. Application for a search and seizure order according to Section 653 of the Danish Administration of Justice Act:

The rightholder may also file a request for a search and seizure order under Section 653 of the Danish Administration of Justice Act.

Section 653 implements Article 7 in the Enforcement Directive (Directive 2004/48/EC).

According to Section 653, it is possible to request that the Enforcement Court secures evidence of an infringement, evidence as to the extent of infringement etc., at the alleged infringer's premises. This is done as an interim measure (so-called search and seizure proceedings).

In order to obtain such a search and seizure by the Court, the claimant must render it probable that an infringement has occurred or will occur and there is reason to believe that evidence to this effect will be found at the premises in question. The Enforcement Court can carry out the measures without prior notice to the defendant, and the evidence secured by the Court can include all relevant material found during search of defendant's facilities, including electronic information stored in computers. If necessary, the enforcement court can seize relevant specimens as well as take copies or backups of documents, information stored in computers etc.

Within 4 weeks after the enforcement Court has ended its search and seize proceedings, main infringement proceedings against the defendant must be initiated.

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

There is no Danish case law on this point. However, the Danish Group assumes that, the quantification of damages for indirect/contributory infringement, in general, does not differ from the quantification of damages for direct infringement.

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

a) if an injunction has also been granted

Please explain your answer

Yes, in principle forward-looking damages are available under Danish law, regardless of whether an injunction has been granted or not. There are no provisions in the law saying this kind of damages is not available. However, for all practical purposes they will be very difficult to prove. In particular, they will be difficult to prove, if a preliminary injunction has been granted shortly after the infringer's market entry, as there will be little data to support a claim for forward-looking damages.

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

No

Please Explain

In general, bad faith of the infringer is not taken into account in the assessment of damages. Bad faith can be defined as ordinary negligence or greater degrees of negligence - i.e. the infringer knew or ought to have known that the act would constitute an infringement of an IP right - or if the infringer has intentionally committed the infringement,

Under Danish law, any person who intentionally or negligently commits infringement of IP rights shall pay damages, i.e. ordinary negligence is sufficient for liability for damages. For instance, mistake of the law, ignorance of the patent or incorrect assessment of the patent's scope of protection will not exempt from liability for damages.

However, according to Danish case law, it seems that the standard of proof may be lessened when the infringer has evidently acted in bad faith.

Under Danish law, it is possible to infringe a patent in good faith. However, infringers of patents in good faith cannot be held liable for damages.

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

N/A

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

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

No, generally the laws function well. However, the Danish Group believes that it would be desirable with a clearer authority in the law to, in the circumstances and according to the Court's discretion, calculate the damages as the infringer's profits. This could discourage infringement, as such damages would mean that the infringer would not profit from the infringement. Under the current rules, it can be possible for the infringer to profit from the infringement, even after paying damages.

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

No

Please Explain

No, see question 13.b, below.

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

Yes

Please Explain

Yes, however, with the qualification that the Court should only be required to find that all the IP rights that are *actually asserted as infringed* are valid and infringed.

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

N/A

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?

No, the quantification of damages should not depend on whether injunctive relief is granted.

III. Proposals for harmonisation

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

No

Please Explain

No, the Danish Working Group does not believe there is an immediate need for further harmonisation.

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

The Danish Working Group believes that the principles set out under question 1 should be applied.

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

The Danish Working Group believes that the principles described under questions 2) and 4) should be applied when quantifying reasonable royalties.

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

Courts should apply a hypothetical negotiation. As put forward in question 13), a court should first determine that the IP rights, which the rightholder assert, are valid and infringed, after which the hypothetical negotiation should be under the assumption that the IP rights were valid, and found infringed.

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

Prior licensing practices and prior going rates are very relevant and should be applied.

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

Such prior licensing practices or going rates should also be deemed relevant, however, when weighing the rates for the IP rights in suit compared to the rates of third parties, courts should put the most weight on the rates of the IP in suit.

9.a Please propose, in relation to actual loss and reasonable royalties how conveyed goods should be dealt with

The Danish working group believes that such circumstances should be dealt with according to the principles as described in question 2 a) and 4 a), where the reasonable royalty to a large extent is determined on the basis of the market value of the infringing use.

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

The Danish working group believes that such circumstances should be dealt with according to the principles as described in question 2 a) and 4 d), where the reasonable royalty to a large extent is determined on the basis of the market value of the infringing use.

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

The Danish working group believes that such circumstances should be dealt with according to the principles as described in question 2 a) and 4 b), where the reasonable royalty to a large extent is determined on the basis of the market value of the infringing use.

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

The Danish working group believes that such circumstances should be dealt with according to the principles as described in question 8), where damages for indirect/contributory infringement are calculated according to the same principles as damages for direct infringement.

21 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:

The legal sector.

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