



OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET
(TRADE MARKS AND DESIGNS)

Observatory

Costs and Damages Study

Version 0.8 16 /01/2014

Project/Service	Project 4 2013		
Status	DRAFT		
Approved by owner			
Authors	VOR		
Contributors	C G	Peer review	
	J G	Peer review	
	K W	Peer review	
	PM	Editorial comment	
	AdC	Editorial comment	

Revision History

Version	Date	Author	Description
0.1	24/07/2013	VOR	Approved for peer review
0.2	30/08/2013	VOR	Incorporation of peer review comments
0.3	04/09/2013	VOR	Analysis of peer review comments
0.4	12/09/2013	VOR	Incorporation of PM and AdC comments
0.5	04/12/2013	VOR	Redraft following Working Group input
0.6	12/12/2013	VOR	Redraft on basis of AdC comments
0.7	17/12/2013	VOR	Redraft on basis of PM comments
0.8	16/01/2014	VOR	Redraft on basis of further AdC comments

Quality Criteria (to be used by reviewers)

Clear and precise language
Coherent analysis
Information up to date

TABLE OF CONTENTS

VERSION 0.8 16/01/2014	1
REVISION HISTORY	2
QUALITY CRITERIA (TO BE USED BY REVIEWERS)	2
STUDY	4-9
Annex I Updated survey of national law and practice	10-94
Annex II	95-97

Draft study of possible best practices in IPR enforcement

Costs and damages in IPR infringement cases

1.0 Introduction

1.1 Purpose

The purpose of the study is to identify possible “best practices”¹ in respect of the award of costs and damages in civil infringement proceedings undertaken to enforce intellectual property rights (IPR).

1.2 The starting point for this study is the report prepared in 2010 by the then Legal Issues Working Group (LIWG) of the Observatory entitled “Damages in Intellectual Property Rights”:

http://ec.europa.eu/internal_market/iprenforcement/docs/damages_en.pdf

The report was prepared in the context of the then relatively recent implementation of the directive on the enforcement of intellectual property rights² (the Directive).

1.3 The original report covered more than recommendations on costs and damages. It included the results of surveys of intellectual property practitioners and associations from most Member States on the legislation, practices and case law in the respective Member States. In order to have a proper base for the current study the Observatory public representatives of the 28 Member States were requested to confirm that the relevant information is still accurate and up to date or, if not accurate and up to date to supply the correct and up to date information. Member States whose responses did not feature in the previous report were given an opportunity to supply the relevant information. Amendments have been made in parts of the survey for Bulgaria, Germany, Hungary, Italy, Romania, Sweden and the United Kingdom. All the additions and substitutions, except typographical and grammar corrections, are reflected in Annex I in blue. Responses from Croatia³ have been included in that Annex.

It is clear from the comparison of the results of the original survey with that of the more recent one that there has been little substantive change in the meantime. This, in itself, indicates that national legislators have not seen the necessity to make changes in existing provisions with respect to costs and damages.

1.4 Outcome

The updating of the description of the law, practice and case law in the Member States is in itself a contribution to the understanding of the current situation.

¹ “best practice” is a term of art and does not mean that such a practice is ideal, but rather that it deserves recognition as being possibly suitable for imitation.

² Directive 2004/48/EC of 29 April 2004.

³ Croatia was not a member of the European Union at the time of the original report

2.0 Methodology

2.1 Initial approach

The LIWG initially agreed in early 2013 the following as a general methodology for the compilation of reports on best practice:

Stage I: The working group should select a limited number (say three) of “practices” that appear in the findings of the expert report already circulated or others of which the LIWG is aware.

Stage II: A minimum of three experts in the area concerned will each be commissioned to write short peer review reports on the “practice”. They will do this independently of each other. Experts may be drawn from the public or private sector.

Stage III: The experts’ reports will be circulated to each other and to the WP. An enclosed seminar involving the experts and representatives of the WG, chaired by the project manager, will discuss the written contributions. A report of the proceedings of the seminar will be prepared.

Stage IV: The WG as a whole will consider this report and recommend whether it should be adopted with or without amendments. If the subject is approved by consensus, with or without amendments, arrangements will be made for publication in the appropriate manner. Where there is no consensus in favour of a particular practice the issue will be closed.

Note

In the case of this study the seminar has not been held because, given the volume of documentation already produced, it might have hindered rather than helped the Working Group's consideration of the draft studies.

2.2 Review

Because this exercise is a pilot the working group should, in the light of the practical experience, review the methodology with a view to making changes to improve it.

One aspect that seems appropriate to be addressed is the issue of how proposals relating to national or Union legislation should be dealt with. In the course of consultations carried out to test the draft conclusions of this study (see 2.4 and 3.3) it was suggested that any proposal that would involve legislative change should first be the subject of consultation with the public sector representatives of the Member States of the Observatory. It would not be sufficient to leave the issue in the hands of the LIWG alone.

2.3 Extension

Once the 2013 programme is finished and a revised methodology is agreed the process will be repeated with newly identified “best practices”.

2.4 Consultation process

As mentioned above (1.3) public sector representatives of all the Member States were

provided with their respective country description of legislation, practice and case law⁴ and asked to confirm its accuracy, correct it where necessary and provide any relevant case law updates.

A draft study was prepared by the Observatory which repeated the recommendations contained in the 2010 report. These are set out in Annex II. The draft report was the subject to review by three independent experts⁵ acting individually. In general the comments of the peer reviewers were supportive of the proposals in the 2010 report from the LIWG, but with some reservations. Reservations were expressed in particular where the recommendations seemed to go beyond the requirements of the Directive. There was also some questioning of the accuracy of the description of some practices in some of the Member States.

The draft study and the peer review comments were circulated to all members of the LIWG for their comments. Submissions were received from the European Commission and from representatives of the Member States and of associations represented in the working group. Some of these submissions were received after the deadline but have been taken into account in the compilation of this report. The outcome of the consultation is summarised in section 3.3.

3.0 Legal issues

3.1 The earlier report led the then working group to reach conclusions and made recommendations for the adoption of certain practices as “best practices”. The areas concerned are covered by Articles 13 and 14 of the Directive:

Article 13 Damages

- 1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.*

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees

⁴ Where no description was provided for the earlier study a template of the questions was provided.

⁵ Charles Gielen, John Gormley, Knud Wallberg

which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

- 2 .Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

Article 14 Legal costs

Member States shall ensure that reasonable and proportionate legal costs and other expenses incurred by the successful party shall, as a general rule, be borne by the unsuccessful party, unless equity does not allow this.

3.2 Legal implications

The provisions of articles 13 and 14 include conditionality, options and non-exhaustive examples. A brief examination of these demonstrates the possible implication for the degree of uniformity in the implementation of these provisions at national level.

3.2.1 Article 13(1) requires that national provisions ensure that the competent judicial authorities will order the infringer to pay damages to the right holder. This is conditional on:

- the action being initiated by the injured party (usually the right holder)
- the infringer engaging in the infringing act knowingly or with reasonable grounds to know

The level of damages is to be appropriate to the actual prejudice suffered by the right holder as a result of the infringement.

In setting the damages the judicial authorities have the option of either:

- (a) taking into account all appropriate aspects, such as negative economic consequences, including but not confined to lost profits suffered by the injured party, any unfair profits made by the infringer and in appropriate cases (not defined) elements other than economic factors, such as but not confined exclusively to moral prejudice which has been caused;

or

- (b) in appropriate cases (not defined) set the damages as a lump sum on the basis of elements such as, but not confined to, the amount that would have been due if the infringer had sought authorisation for the use of the IPR in question.

3.2.2 Article 13(2) provides an option for Member States where the infringer did not knowingly or with reasonable grounds to know, engage in infringing activity, to allow judicial authorities to order the recovery of profits or the payment of damages which *may* be pre-established.

3.2.3 Article 14 requires that *reasonable*⁶ and *proportionate*⁷ legal costs and other (undefined) expenses incurred by the successful party shall, *as a general rule*, be borne by the unsuccessful party. Reasons of equity may over rule this principle.

3.2.4 This brief look at the relevant provisions of the Directive demonstrate why such diversity can be found in the national legislation, practice and case law as outlined in Annex I.

3.3 Outcome of consultation

The consultation process (see 2.4) produced some degree of support from members of the working group representing associations of enterprises for the recommendations in Annex II.

However, comments from Member States' representatives were not so supportive. The reservations expressed in the peer review comments with regard to keeping within the provisions of the Directive were echoed in the Member State comments.

Furthermore, the European Commission, in its written comments, suggests that this study should take a different approach than simply addressing proposals on legislative change to Member States. Instead the Commission proposes a screening and assessment of relevant case law. Such screening would hopefully reveal instances where a particularly sound methodology was followed in order to ensure appropriate compensation of damages and costs suffered/incurred as a result of IPR infringement, or in the consideration of some of the factors relevant for the awarding of costs and damages.

3.4 The combination of the flexibility afforded, deliberately, by the Directive and the results of the consultation suggest that it is not appropriate or productive to revisit at this time the recommendations contained in the earlier report. A different approach to making progress needs to be explored.

4.0 Next steps

4.1 This report should be published in its current form on the Observatory website as soon as it is approved. This publication will provide readers with an up to date picture of the work done to date and show the current picture in respect of the questions reproduced in Annex I.

Annex I should also be made available separately and linked, with an appropriate note, to the 2010 report⁸. In this way anyone accessing the original report will immediately be able to see that the answers to the questions have been updated and have instant access to that update. Future up dates will be provided as proposed in the following section.

4.2 Annex I should be updated by the Observatory:

⁶ Undefined

⁷ Undefined

⁸ http://ec.europa.eu/internal_market/iprenforcement/docs/damages_en.pdf

- (a) On a regular basis, initially every two years, as a result of Observatory questionnaires to the public representatives of the member States of the Observatory
- (b) When there is a significant change in the legislation, practice or case of a Member State. An imminent likely example of this is the outcome of the introduction of a new Civil Code in Hungary which will enter into force in 2014.

4.3.1 The Commission proposal (which fits with proposals from others which emerged during the consultation process) that a screening and assessment of relevant case law in the area of costs and damages should be undertaken will be followed. Such screening will hopefully reveal instances where a particularly sound methodology was followed in order to ensure appropriate compensation of damages and costs suffered/incurred as a result of IPR infringement, or in the consideration of some of the factors relevant for the awarding of costs and damages. This should build a factual and sound basis in support of any findings that the LWG would find appropriate to bring forward, including for example a set of practical (and obviously nonbinding) guidelines on practical approaches to the quantification of damages.

4.3.2 This will be undertaken by a small study group, drawn partly from the LIWG, but supplemented by outside expertise in fields such as economics and litigation.

January 2014

COUNTRY	General conditions or limitations on the availability of damages (e.g. 'good faith' infringements), intentional infringement or neglectful conduct, commercial scale only? Overall limitation on damages.	Calculation of Damages Theories	Calculation of Damages Theories
Austria	<p>No overall limitation on damages. If the infringer acted negligently or intentionally RH is entitled to twice the equitable remuneration. If the incurred damage is higher, then to that higher amount instead. In case of culpable infringement the infringer also has to surrender all profits. There is also a right to compensation for non pecuniary damages, however only very small amounts are granted under this provision.</p> <p>No requirement for commercial scale.</p>	<p>This is part of the standard calculation of damages and can be claimed for culpable infringement.</p>	<p>Reasonable royalty.</p> <p>This is the minimum compensation which applies to all kind of infringements, whether culpable or not.</p>
Belgium	<p>Mere violation of an intellectual property right is considered a tort. General principles of tort liability apply. Whoever commits a tort has to compensate any damages resulting from this tort. The entire and real prejudice must be repaired. Damages are awarded regardless of the commercial or non commercial scale of the infringing activities.</p> <p>Still, the conditions set forth by the different pieces of IP legislation have to be taken into account. If for instance the using of a work outside the course of trade does not constitute an infringement there is no damages for such behaviour.</p>	<p>A distinction is made between <i>lost profits (lucrum cessans)</i> and <i>economic loss (damnum emergens)</i>. <i>Lost profits</i> are the profits the RH would have made or the royalties the RAH would have received. RH's prejudice generally does not only include lost profits. Mostly, other economic losses also form part of the prejudice.</p> <p>Difficulty of precisely assessing the lost profits, therefore courts resort to an <i>ex aequo et bono</i> evaluation (i.e. in equity):</p> <p>(i) A first step in the evaluation of lost profits is to establish the <i>number of infringing products</i> (a rule the sold goods). The number of infringing goods is sometimes reduced to assess the lost profits. This is due to constraints faced by the RO (e.g.</p>	<p>Since the implementation of IPRED, the injured RH should at least be awarded the amount of royalties or fees which would have been due, had the infringer requested authorisation to use the IP right in question. Distinction is traditionally made between RHs who market and sell their products in person, and those who do not (e.g. when the RH grants licences or before he has started marketing and sales activity). In cases where the RH himself does not market or sell the products, the lost profits will generally be calculated based on the royalties that could have been charged under a licence agreement.</p>

		<p>manufacturing capacities, quality requirements, price difference) which don't apply for the infringer and would lead to the sale of fewer products by the RO. RH.</p> <p>(ii) An estimate has to be made of the <i>profits that could have been made by the RH</i>. It's generally accepted that the profits that have to be taken into account are not the infringer's profits but the RH's profits, although the courts may order the transfer of the infringer's profits to the RH in bad-faith infringement cases. It's generally accepted that only <i>net profits</i> can be taken into account. The general trend is for the courts to award lump-sum amounts of compensation per infringing product based on different elements provided by both parties.</p> <p>(iii) Based on the aforementioned elements, the lost profits are calculated by multiplying the number of infringing goods by the profit per product. Such calculations of damages are frequent in criminal cases, but the case law is far from certain in civil cases. Great majority of judgments handed down by the civil courts grant a single amount as compensation for the entire prejudice suffered by the RH, without specifying the different components of the damages.</p>	
Bulgaria	Damages can be claimed in cases of <i>good faith</i> infringements. The mere act of not asking an authorisation from an author constitutes an infringement.	Should be considered by the courts when assessing damages.	Not explicitly provided in the Law. Yet, recent court practice of the Bulgarian Supreme Court of

	<p>Damages may be awarded in case there is an illegal conduct, guilt (wilful, intentional or neglectful, both conscious and unconscious). No requirement for commercial scale.</p> <p>No overall limitations on damages.</p> <p>For copyright violations, general system of tort liability applies, unless there are no specific provisions in the intellectual property laws. The burden of proof for the causal nexus between the infringement and the damages caused, as well as the amount of the losses (both moral and pecuniary) lies with the RO in Copyright Law. There is also an overall limitation of lump sum damages for trade mark infringement that can be awarded by the courts – BGN 100 000.</p>		<p>Cassation has acknowledged this theory by awarding the right holder a damage recovery calculated on the base of a 6% royalty of a potential trademark license agreement.</p>
<p>Croatia</p>	<p>Right owners can demand damages for infringement of the respective intellectual property according to the general rules of liability for damage. A right owner has to prove the occurrence of an infringing act which caused the damage, the damage itself and the casual link between the two; while fault of the infringer need not be proven since it is presumed. Ordinary negligence, as the lowest degree of fault, is always presumed.</p> <p>Therefore, according to the laws currently in force in the Republic of Croatia, there is no liability for damage caused by infringement of intellectual property under the objective criterion. The owner of the infringed right has a possibility to seek from an infringer who is not at fault only what the infringer gained by unjust enrichment.</p> <p>There are no limitations only to infringements occurring on a commercial scale.</p> <p>There are no limitations on the amount of damages.</p>	<p>Lost profit is defined as a profit which the right owner would have gained under the regular circumstances, had the infringement not have occurred. If the amount of the lost profit cannot be established with precision, the court has discretion to do so. The manner in which the lost profit should be calculated is not precisely prescribed. The right owner can seek the net profits gained by the defendant as a result of the infringement of the right, or the right owner can seek his own lost profit, depending on which profit is higher.</p>	<p>The laws provide for remuneration, in addition to or notwithstanding the damages. In order for such remuneration to be awarded, it is not necessary to prove all of the elements for obtaining damages prescribed by the general rules on liability for damage. In this case, the owner whose intellectual property right is infringed has the right to seek the remuneration equal to what he would usually have gained (usual remuneration) in a specific place and at the specific time for the copyrighted work or other intellectual property rights had he, under the regular circumstances (of offer and demand), concluded a contract on the use of the copyrighted work or other intellectual property rights with</p>

			<p>someone, including the infringing party, or the remuneration to which he is entitled to according to the collecting society tariff. In the lawsuit, the plaintiff will have to state that the usual remuneration in his case is exactly the same as the one claimed and will have to offer evidence to the court to that effect. Naturally, the usual compensation could be established and calculated according to judicial practice. In this case, the court determines the amount of remuneration according to prior final decisions of that court or another court in the Republic of Croatia, rendered in a case with similar factual and legal pattern. The laws in the field of intellectual property rights protection do not exclude a possibility of cumulating claims for damages, usual remuneration or gains from unjust enrichment.</p>
Cyprus	<p>Damages are normally calculated on a common law/equity basis. Compensatory damages can be claimed as long as actual damage for lost sales or damage to goodwill is proven. Alternatively, account of profits can be claimed. However, no double recovery, as this would amount to unjust enrichment.</p> <p>If infringer at the time of the infringement did not know nor had reasonable grounds to believe that there was copyright protection, no damages awarded, but only account of profits. Court may award additional damages, if infringement is blatant and infringer clearly took the benefit of his actions.</p> <p>For non- commercial scale infringements, only nominal</p>	<p>Normal basis upon which compensatory damages are calculated for IPR; exception for copyright law.</p>	<p>Yes.</p>

	damages awarded.		
Czech Republic	<p>No general limitations on the availability of damages. However, copyright infringements must qualify at least for <i>negligence</i> in order to claim damages (this does not apply to industrial rights violations).</p> <p>Court also can make a reasonable reduction in damages compensation for reasons that merit special consideration. Courts should take into consideration in particular the circumstances under which the damage occurred, as well as the personal and material situation of the individual who caused the damage.</p> <p>The amount of damages may not be reduced if the damage was caused intentionally.</p>	<p>Yes, in some cases. Copyright owners may claim for their actual lost profit (which is, however, usually difficult to calculate and/or prove). Industrial rights owners may recover lost profits of a sort under the rules regarding lump sum damages described below, although no particular rules regarding lost profits for industrial property rights have been specified.</p> <p>The courts in practice often do not determine compensation for intellectual property rights owners on the basis of lost profits.</p>	Yes.
Denmark	<p>Damages are in general only available in case of infringements committed <i>intentionally</i> or through <i>neglectful</i> conduct.</p> <p>For unfair competition (imitations) - also for <i>good faith</i> infringements (<i>but so far not applied in case-law</i>).</p> <p>Apart from copyright (<i>where private copyright infringements are subject to damage claim</i>), IPR laws only apply to <i>commercial activities</i>. Private copyright infringements are subject to damage claims.</p> <p>Statutory limitation on the amount of damages which provides for (partial) relief in case the amount of damages awarded would be unreasonably burdensome on the infringer or in case of very exceptional circumstances. Main application of this provision in cases concerning private individuals who are being met with very substantial damages claims.</p>	<p>Yes, in case of any kind of intentional or negligent infringement of all types of IPR and require proof of economic loss. The total amount of damages awarded may not exceed:</p> <p>(i) the total damages suffered or (ii) a reasonable royalty together with such damages that exceed such royalty claim.</p>	<p>Yes. Assessment based on a reasonable royalty in case of any kind of intentional or negligent infringement of all types of IPR. The amount is based upon an assessment of what the RO could have reasonably demanded. Damages based on reasonable royalty do not require proof of an actual economic loss.</p> <p>Damages are almost always awarded as lump sum damages.</p> <p>Double, multiple or pre-determined damages are not available under Danish law.</p>

<p>Estonia</p>	<p>Reflecting the general law, most intellectual property violations require intentional or neglectful conduct in order for a right holder to be able to claim compensation of damages.</p> <p>The compensation of damages in case of <i>good faith</i> infringements is available regarding the utility models and patents. Other IP violations require for compensation of damages an intentional or neglectful conduct.</p> <p>No <i>commercial scale</i> requirement for claiming the compensation of damages in IP cases (except for layout-designs of integrated circuits).</p> <p>Limits on compensation: Limitation to foreseeable damage unless intention or gross negligence is established. Court may reduce the amount of damages if compensation in full would be grossly unfair with regard to the obligated person or not reasonably acceptable for any other reason (e.g. relationship between the persons and their economic situations, including insurance coverage etc.).</p>	<p>Available for all types of IPR rights. But approach of the courts has not been consistent: some courts consider license fees (royalties) or product prices as RH's lost profit, some as unjustified enrichment etc. No Supreme court decisions on this issue yet. Many courts seem to accept common license fee or (retail) price of the product as their lost profits.</p>	<p>Could be used basically for all IPR rights. However, problems arising from diverging jurisprudence of the courts.</p> <p>In copyright law it is provided for an author and/or the owner of neighbouring rights to receive a remuneration/royalty for the use of works or object of neighbouring rights. In case the sum of royalty (license fee) has already been fixed and used in relevant market (e.g. by collective societies), the damages are calculated based on this. In case there is no such already fixed royalty (license fee), the right holder should explain and prove the amount of any possible royalty (no information about such claims in Estonia).</p>
<p>Finland</p>	<p>Damages available regardless of intention/negligence/no negligence. Compensation in all cases (comparable to license fee) and in addition actual damages in case of negligence/intention if damages can be proved. Full compensation principle (both for intentional/negligent acts). Adjustment of compensation possible for <i>slight</i> negligence.</p>	<p>May be relevant where the courts consider that the trademark owner suffers loss of profits when consumers buy the infringing product rather than the products of the trademark owner. The <i>estimated</i> lost profits of the infringed trademark owner are referred to as the basis for the claimed caused damages. The main bases of compensation are the decrease of sales and/or the decrease of the good-will value of the trademark.</p>	<p>Royalty Rates may be used. Since difficult to determine precise rates, the court may award estimated average royalty or the RO can provide average royalty based on the specific business area</p>
<p>France</p>	<p>Distinction has to be made depending of the type of counterfeiting acts at stake. In the case of an</p>	<p>New law sets two categories of cumulative criteria of evaluation: (i)</p>	<p>Yes, lump sum shall not be less than the amount of royalties which would</p>

	<p>infringement by <i>producers, users of a process or importers</i>, damages will be available <i>without having to prove the good or bad faith</i> of the infringer. Because the state of mind of the infringer is irrelevant, it does not matter whether the infringement was intentional or due to negligence.</p> <p>However, damages will not be granted automatically in cases where a <i>third person</i> is putting the invention on the market, using it in trade or simply detaining it. In such cases, ROs will only be granted damages if only they can prove that such acts were intended in bad faith.</p> <p>Design right, TMs: explicit irrelevance of good faith for the infringement (<i>As soon as a trademark is registered, an alleged infringer cannot argue of its good faith in order to avoid damages</i>).</p>	<p><i>Negative economic consequences</i> as well as, the <i>profits realised by the infringer</i>. RO's lost profits are considered within the negative economic consequences.</p> <p>(ii) Alternatively, the RO can ask the judge to grant them <i>a lump sum</i> payment.</p> <p>Those methods are applied to all types of IPR and whether the infringement has been in good or bad faith.</p> <p>However, an exception exists in the case of patents, where an action made in good faith is not enough to constitute an infringement.</p>	<p>have been due (it is therefore easy to determine). The amount of damages can be higher than the amount required by a RH in the case of license agreement.</p> <p>As such, the legislator confirms the precedents set out by the Courts, which consisted in increasing the rate of royalties in order to assess the damages. This can be justified by the fact that <i>licence are not, in practice, freely granted</i>.</p>
<p>Germany</p>	<p>Bad faith or negligence is necessary.</p> <p>Acting on a commercial scale is not a prerequisite for the availability of damages as such (cf. section 14 (6) of the Trade Mark Act; section 139 (2) of the Patent Act; section 24 (2) of the Utility Models Act; section 42 (2) of the Designs Act; section 97 (2) of the Copyright Act which do not mention this condition).</p> <p>However, for some types of intellectual property rights only actions for commercial purposes constitute an infringement of the right. This applies e.g. to trade marks which are protected only against acts done "in the course of trade" (cf. section 14 (2) of the Trade Mark Act); likewise, patents (cf. section 11 no. 1 of the Patent Act), registered designs (cf. section 40 (1) of the Designs Act) and utility models (cf. section 12 no. 1 of the Utility</p>	<p>Yes (cf. sections 249, 252 of the German Civil Code), as one out of three possible methods for calculating damages to be used alternatively (the others being reasonable royalty and infringer's unjust enrichment). When choosing this method the rights owner has to prove what profits could have been expected in the normal course of events (i.e. without the infringement). This way of calculating is different from the calculation of damages on the basis of "reasonable royalty".</p>	<p>Yes. The rights owner can, as one out of three possible alternative methods for the calculation of damages (the others being rights owner's lost profits and infringer's unjust enrichment), demand compensation in the form of an appropriate licence fee. Note that this does not imply a double or multiple licence fee (see below at "Double/multiple/lump sum damages").</p>

	Models Act) are not protected against “acts done privately and for non-commercial purposes”. In the case of trade marks and designs, this definition of infringement of a right is predetermined by EU law (cf. Article 5 of Directive 2008/95/EC of 22 October 2008 to approximate the laws of the Member States relating to trade marks and Article 11 para. 1 a) of Directive 98/71/EC of 13 October 1998 on the legal protection of designs).		
Greece	<p>Damages only for intentional/neglectful infringements, including <i>good faith</i> infringements.</p> <p>Damages are available for commercial scale infringements if there is a causal link between the infringement and the harm caused.</p> <p>No overall limitation on damages.</p>	<p>Unless there is a quantification rule, the recovery of material damages is extremely difficult (impossible). RO lost profits is a recoverable damage. In trademark infringement and unfair competition cases, ROs lost profits are extremely difficult to substantiate.</p>	<p>In copyrights cases: double the amount of licenses.</p> <p>Patent/ utility model/ industrial design cases: amount of legitimate licenses.</p>
Hungary	<p>In case of infringement, the holder of IP rights may claim compensation for damages in accordance with the general provisions of the Hungarian Civil Code⁹. Pursuant to Article 339 of the Civil Code, whoever unlawfully causes damage to another person shall be liable for compensation. He shall be relieved of liability if he proves having acted in such way as might generally be expected in the given situation.</p> <p>There are no other conditions or limitations on damages.</p>	<p>In Hungary the general principle of awarding damages is that it should fully compensate the right holder for the damages suffered, the lost profits and the costs deriving from the infringement. Generally, the factors that can be used to assess compensation for lost profits may include the quantity of goods sold, manufactured or imported by the defendant; the quantity of goods that the plaintiff would have sold had the defendant not infringed the intellectual property right; and the net profits that the plaintiff would have made on sales. The court may appoint an expert to estimate the amount of damages.</p>	<p>It is possible to claim for lost royalties, if the right holder can prove an existing licensing practice. This requires the right holder to submit to the court license agreements that it has concluded in Hungary which concern similar or identical products.</p>

⁹ Please note that the answers are given on the basis of the Civil Code currently in force in Hungary. It has to be borne in mind, however, that the new Civil Code is entering into force in 2014 and it may contain slightly different rules on awarding damages.

		In Hungary, the calculation of the exact amount of damages cannot be deemed predictable.	
Ireland	<p>The Irish Copyright and Related Rights Act, Industrial Designs Act and Patents Act include provisions dealing with an innocent infringer.</p> <p>If it is shown that at the time of the infringement the defendant <i>did not know</i> and <i>had no reason to believe</i> that copyright subsisted in the work to which the action relates, the plaintiff is <i>not entitled to damages</i> against the defendant.</p>	<p><i>General:</i> the aggrieved person shall be put in the same position where he would be without suffering the loss. In general, damages are usually calculated by reference to the notional reasonable license fee, payable under an arm's-length license agreement. If it is not possible to calculate damages on a loss of profit basis, then it should be possible to be compensated on a "notional royalty basis", i.e. the measure of damages payable will be the amount which the defendant would have paid by way of royalty to act legally instead of acting illegally.¹⁰</p> <p><i>Copyright and Patent:</i> In case <i>Retail Systems Technology Limited v PJ McGuire et.al</i> [2007] IEHC 13 2 February 2007 the court measured <i>copyright damages</i> by applying <i>the same principles as in evaluating damages in patent infringement cases</i>. The judge took the following approach: every infringing sale by the defendant is a separate infringement of the plaintiff's rights. In respect of those sales which resulted in sales lost to the plaintiff, the measure of damages is the profit on those sales lost by the plaintiff. Furthermore, in respect of those sales which do not</p>	Payment of reasonable royalty is not a remedy as such, but reference to a licence fee or reasonable royalty is accepted as a method of calculating damages in IPR infringement cases.

¹⁰ In *Smith, Kline & French Laboratories v Doncaster Pharmaceuticals* [1989] FSB 401, damages were assessed on the basis of the difference between the price the infringer would have had to pay in order to lawfully import the products.

		<p>directly represent lost sales to the plaintiff, there is still an infringement of the plaintiff's copyright and it is necessary to determine an appropriate measure of damages in respect of those sales.</p> <p>It is accepted that the plaintiff will normally seek to obtain the amount by which the value of the copyright of the plaintiff has been diminished. This is often calculated by looking at the volume of sales made by the defendant of the pirated work by way of the unauthorized reproduction and sale. However, merely giving the plaintiff the defendant's profit may not compensate the plaintiff for lost volume of sales. This is particularly important and some cases hold that where the defendant's product undercuts the plaintiff's product, this should be reflected in the compensation award.¹¹</p>	
Italy	<p>Damages are due only for <i>wilful or negligent</i> behaviour.</p> <p>For <i>registered IP rights: presumption of infringer's (as the registration system provides for publicity of third parties' rights).</i></p> <p>The <i>scale of the counterfeiting</i> does not impact on the criteria for liquidating damages.</p> <p>No overall limitation of damages.</p>	<p>RH either gets the infringer's profits or the RH's lost profits, whichever is the greater.</p> <p>The most relevant element in assessing the damages is the loss of <i>net profit</i> suffered by the RO. Lost sales and price erosion are sometimes taken into account within the <i>lost profit</i> criterion.</p> <p>The court may order expert</p>	<p>Yes. <i>Reasonable amount of royalty is minimum amount</i> of damages when <i>no other methods</i> for liquidating damages are available.</p> <p>This method is applied irrespectively from the availability of the IP rights for licence.</p> <p>Amount of royalty: similar cases are considered, if any. Otherwise,</p>

¹¹Polygram Records Inc v Raben Footware Pty. (1996) 35 IPR 426 at 444.

	A recent highly innovative decision of the Court of Turin (June 27th, 2012), in addition to providing for the injunction and seizure of copied goods, placed a removal order that asked the infringer to buy back from the shops, possibly at market price, the copied goods and the appropriate promotional materials, in full conformity with that adopted in the rest of Europe in relation to the corresponding provision of the Directive n. 2004/48/CE.	accountancy evidence to assess the hypothetical situation of the market without the infringement. If requested by the RO the court may also grant lump-sum damages based on a rather discretionary assessment of the allegations of the case.	average royalty paid by licensors to licensees in the relevant field.
Latvia	Damages available for every infringement, irrespective from intentional conduct or acting on a commercial scale. No limits set by the law on the award of losses. Liability for acts of god excluded.	-	-
Lithuania	Damages available only with intentional or neglectful conduct. No commercial scale limitation. If infringement not committed knowingly, recovery of profits may be ordered by the court at the request of the claimant.	Yes. The amount of lost profits is set by considering the profits that would have been made when legally using the works or other objects, taking into account royalties and fees.	May be part of the lost profits calculation.
Luxembourg	General principles of tort law apply. Plaintiff must prove that there has been an infringement of IP and that this infringement caused damage. Mere violation of IRP is considered to cause damage to RO. Damages available also for <i>good faith</i> infringements. Damages available even for non-commercial scale infringements. No overall limitation of damages.	Damages are assessed according to <i>ex aequo et bono</i> principle. Not very explicit/transparent explanations how damages have been calculated. Courts take into consideration negative economic consequences of the infringement. ROs lost profits are the main negative economic consequences taken into account by the court. This is used for all IPRs and all types of infringements.	Lump sum based on royalties serves as an alternative to RO's lost profits.
Malta	General principles of tort law apply (conditions: Unlawful act, damage causal link between act and damage and intent or culpable negligence). However, it is deemed that in IPR cases the commission of an infringement suffices, no further proof of intent is	All the negative economic consequences that may have been suffered by the injured party, including lost profits..	Law allows it, but not yet a developed branch of compensable damage.

	<p>needed. Lack of case law on this issue.</p> <p>According to special IPR legislation: Damages cannot be claimed when the alleged infringer was not reasonably expected to know that he engaged in illegal activity. If infringer engaged in an illegal activity not knowingly, the court may order recovery of profits or the payment of damages. Specificity in copyright cases: no restitution of profits if the infringer was not aware and could not reasonably be expected to be aware. Still, damages can be claimed under the more general provisions of law.</p> <p>Damages are available also for non-commercial scale infringements.</p> <p>Limitations on damages: formally none. However, courts rarely award more than 500 000 EUR.</p>		
Netherlands	<p>Damages are available if the infringer knew or could reasonably have been expected to know that he was engaged in infringing activity.</p> <p>Regarding TMs and designs damages cannot be claimed for non-commercial scale infringements. Different in copyright cases; reproduction/publication without the consent of the author is already sufficient for obtaining compensation. In any case, the court will assess the commercial aspect and interests of the infringer and the owner of the copyright when awarding the damages.</p> <p>No general limit as to the compensation. Loss must be fully compensated but it must be substantiated by evidence.</p>	<p>According to general compensation rules, compensation claims for lost profits can be made for all IP rights.</p> <p>When assessing damages, the court will always weigh up the interests of the entitled party to obtain compensation for lost profits and the interests of the infringer.</p>	<p>Yes, is used. In addition, for trademark owners and design owners if the court decides on a fixed amount as compensation, the amount must be <i>at least</i> equal to the amount that was due as royalties or payments if the infringer had applied for permission to use the trademark or the design.</p>
Poland	<p>Compensation for damages according to general civil law rules (infringement, damages, causal link between the two and guilt).</p> <p>Compensation also for non-commercial scale</p>	<p>Yes, lost profits (<i>lucrum cessans</i>) together with the “actual loss incurred” (<i>damnum emergens</i>) are awarded.</p>	<p>Yes, <i>equitable</i> remuneration can be awarded alternatively to compensating RO’s damage, both under the industrial property rights and copyrights regime. For copyright</p>

	<p>infringements.</p> <p>No general limitations to award of damages. However, possible according to special provisions.</p>		<p>infringements RO may even demand double or triple such amount.</p>
Portugal	<p>Damages only awarded for intentional or neglectful conduct for IP infringements.</p> <p>No commercial scale requirement. No overall limitations on damages awarded.</p>	<p>Yes.</p>	<p>Yes. Court takes the sum of an ordinary authorization for that type of infringement as a reference size.</p>
Romania	<p>General conditions for awarding damages in civil IPR cases: Infringing act, damage, causal link between act and damage, guilt.</p> <p>Civil liability arises for the least guilt; normally the good faith of the infringer is limiting the liability only to those damages which may be foreseen on the moment of the action. However, general liability rules still apply.</p> <p>Damages are available even for non-commercial scale infringements. It must be mentioned here that the meaning of the “commercial scale” is not related to the size of the infringement, but with the commercial nature of the infringement act.</p> <p>In conclusion the large majority of the civil cases go into the direction of full liability for damages for the infringer acting in good faith.</p>	<p>Yes, such damages are granted according to the general provisions. Lost profit is not usual to estimate in many cases. In some cases it is even impossible to evaluate the damages based on the lost profit.</p>	<p>Yes, for copyright and related rights, the law clearly states that such royalties are to be considered <i>only</i> if the theory of economic consequences and moral prejudice cannot be applied.</p> <p>Also, the reasonable royalty is not considered as an alternative of the damages, but a down-limit of damages to be applied and granted when all other criteria failed.</p> <p>There are many difficulties in applying these criteria as there are not many reliable sources for establishing the value of the reasonable royalty in any specific business.</p> <p>In some cases the court granted as damages a per cent of 1-3% from the turn over as being considered down-limit royalty in any type of business.</p> <p>Actual prejudice (e.g. reputational damage, price declines), negative economic consequences, other factors (distinctiveness of TM,</p>

			<p>investment, actual lost sales vs. all infringing sales, breach of contract, parallel trade)?</p> <p>All this factors can be considered by the court for having a proper estimation of damages, but the court must pay attention not to multiply the damages by adding various amounts resulting from various ways of estimation. Damages granted shall not go further than the actual damages suffered by the right owner, using more economic criteria for the estimation of damages does not mean that this shall over-lap.</p>
Slovakia	<p>Statutory (general) conditions for claiming damages are the following: material prejudice, <i>infringing</i> activity, damage, causal link between the infringing activity and the damage. From the perspective of right to be compensated for damages it is irrelevant whether the damage was caused intentionally or negligently or without knowledge.</p> <p>In case such damage arose as a result of an act by which a lot greater damage was prevented, such act is not considered as infringing act.</p> <p>Damages can be claimed for an <i>infringement</i> of IPR but also in case there is a <i>threat of infringement</i>.</p> <p>There is no distinction between <i>commercial</i> and <i>non-commercial</i> damage, only between <i>material</i> and <i>moral</i> damage.</p> <p>No general limitation on the maximum amount of damages.</p>	<p>Yes, what is compensated is the actual prejudice and probable lost profits.</p>	<p>Yes, in case the damage cannot be calculated otherwise, since it is often extremely difficult to provide for calculations of material damage, the damage can be also calculated on the basis of fees from a licensing agreement.</p>

<p>Slovenia</p>	<p>Damages only awarded for intentional or neglectful conduct. No explicit requirement for a commercial scale, but in certain cases non-commercial use does not constitute an infringement.</p> <p>For the reward of damages in patents cases; breach on a commercial scale necessary.</p>	<p>Yes, amount is determined on the basis of estimation of the profit that could justifiably have been expected. Exact calculation procedure and criteria for assessment are not clearly specified. Usually, amount of lost profits is determined by experts appointed by the court.</p> <p>The assumption of profits the RO could have made is based on fictitious speculations. Not so for the restitution of the profits made by infringer; here the RO has to establish the mostly difficult proof that he would have achieved the same commercial results as the infringer.</p>	<p>Yes, the amount is calculated according to the <i>license analogy principle</i>: The value of the license is determined on rates, which are customary in license agreements for a similar product and similar use.</p>
<p>Spain</p>	<p>Time limit to file a proceeding is five years from the actual infringement.</p> <p>Unfair Competition Law restricts the possibility to exercise any civil action - One year from the moment the RO was aware of the unlawful action or, in any case, 3 years from the moment when the infraction took place.</p>	<p>For trademarks, RO can choose on the compensation; the first choice is RO's losses, second is royalties.</p> <p>As for patents, and designs, foresees the very same two sets of criteria.</p>	<p>Yes, RO can choose damages based on the amount of royalty.</p> <p>In TM and patents: the royalty includes what the infringer would have had to pay to the RO for using the trademark or the patent lawfully.</p> <p>In Patents Law special criteria for the assessment: the economic importance of the filed invention, the time the patent right has been exercised when the infraction occurred and the number and classes of royalties.</p> <p>The reasonable royalty can <i>never</i> be the <i>average royalty</i> in a particular sector. The reasonable royalty must include a <i>penalty</i> for the use of an</p>

			<p>exclusive right without being authorized.</p> <p>Trademarks Law and Industrial Design: RO can claim a compensation of 1% of the infringer's total business amount, with no need to bring any evidence to the court.</p> <p>The compensation can be higher if the RO can prove that the overall damage is higher.</p>
Sweden	<p>For industrial property rights damages are only available in the case of <i>intentional</i> infringement or <i>negligent</i> conduct and only for <i>commercial scale</i> activities.</p> <p>However, if <i>reasons</i> exist also granted in cases of <i>good faith</i> infringements.</p> <p>For copyrights (comprised are private and commercial use) and topographies for semiconductor products, damages are available irrespective of whether the infringer has acted in good faith.</p> <p>There is no overall limitation on the damages assessed, although damages could not exceed the actual damages suffered.</p>	<p>May be relevant where the courts consider RO suffers loss of profits when consumers buy the infringing product rather than the products of the RO. It's relevant for all IP rights.</p> <p>In order to calculate RO's lost profit, two main factors are taken into account: number of unsold units and the RO's contribution margin per unit. RO is seldom able to claim, let alone prove, that the number of unsold products is equal to the number of products sold by the infringer. Therefore, an estimate has to be made of the profits that could have been made by the RO. In one case the relationship of 1 to 3 between the original products and the infringing products was accepted by the Courts as a credible estimation of lost sales. In another case the Court accepted a number of approximately 50% of lost sales compared with the sales of infringing products as reasonable for calculating lost profit.</p> <p>Lost profit should be seen as a</p>	<p>Reasonable royalty is considered as a minimum compensation for all kinds of infringement.</p> <p>In order to calculate reasonable royalty the number of infringing products is multiplied by a price per product or similar as determined by the Court based on the parties' argumentation. The reasonable royalty is meant to correspond to the licence fee that would have been payable if the infringer had obtained an authorization (license) from the RO. If such royalty levels do not exist for the goods in question or within the RO's business, an assumed royalty should be established and must be evidenced. The Court will in most cases assess a <i>reasonable compensation</i> calculated as a royalty based on the information and argumentation provided by the parties. Many times the ROs are reluctant to reveal the actual royalty level used in their license arrangements and therefore claim a</p>

		<p><i>complement</i> to reasonable royalty. The Swedish courts tend to divide the reasonable royalty and the RO's lost profits in the calculations to make sure that the RO at least gets reasonable royalty.</p>	<p>royalty that they expect the Courts to find reasonable.</p> <p>The general trend in case law is that if the RO does not grant licenses, the royalty might be higher than if they do. The royalty levels have varied from 1% - 10%. On one particular case, the royalty was based on RO's own profit made from their products. The fact considered were that RO did not grant any licenses, that the use of the designs were meant for a product that the company had certain security standards for, and that the fee was intended to cover several exclusive rights, some of the brands being very well known. A compensation for the use of these exclusive rights based on a sum of 25% per infringed product was deemed reasonable. This is fairly high compared to other case law.</p> <p>Reasonable royalty is seen as a <i>complement</i> to lost profit. Reasonable royalty applies even if the RO has not suffered any actual loss. If the actual loss is higher, the RO is entitled to a higher compensation.</p>
<p>United Kingdom</p>	<p>Damages are based on tort remedies and are thus compensatory (restore the RO to the position it would have been in if no infringement had occurred). They should <i>not be punitive</i> and <i>multiple recoveries</i> are generally not available (i.e. award of damages <i>as well as</i> an account of profits or overlapping awards of damages to both a RO and its exclusive licensee). Except for the case of <i>additional damages</i> awards, the RO is generally</p>	<p>Yes. Courts accept lost profits as a basis for measuring a RO's damages, in particular where the RO is a manufacturer and the infringer's activities have resulted in lost sales.</p>	<p>Yes, particularly in cases where the RO exploits its IP rights through licensing. The court will assess damages based on the royalty that the infringer would have paid had it obtained such a licence. Where it is difficult to measure lost profits or there is no established royalty rate, a</p>

	<p>not put in a better position. Damages awards are not available against “innocent” infringers in the case of patent and copyright infringement (although other remedies, including injunctions, may still be granted). In copyright cases, the application of the “innocence” defence is limited and rarely succeeds. In proceedings for infringement of a <i>patent</i>, damages shall not be awarded, and no order shall be made for an account of profits, against a defendant or defender who proves that at the date of the infringement he was not aware, and had no reasonable grounds for supposing, that the patent existed</p>		<p>court may determine a <i>notional royalty</i>, which may be essentially a legal fiction.</p>
--	--	--	---

COUNTRY	Calculation of Damages: Theories Actual prejudice (e.g. reputational damage, price declines), negative economic consequences, other factors (distinctiveness of TM, investment, actual lost sales vs. all infringing sales, breach of contract, parallel trade)?	Calculation of Damages: Theories Account of infringer's (unfair) profits/unjust enrichment/conversion damages	Calculation of Damages: Theories Moral prejudice to rights owner
Austria	The actual prejudice is only assessed in pecuniary terms. If the aspects mentioned above can be expressed in pecuniary terms, e.g. by an expert's opinion, it could be granted. Difficult to proof such prejudice.	The surrender of unfair profits is applicable for many, but not all kinds of infringement.	Compensation for moral prejudice may be granted, but has been restricted by the judiciary for cases where the prejudice exceeds the inconvenience caused by every single infringement.
Belgium	<p>Infringing activities often lead to a depreciation of value of the work protected by an IPR. This depreciation is different from the strict moral prejudice and is often referred to as the <i>damnum emergens</i>.</p> <p>In TM cases, the dilution of the trademark is often taken into consideration in the evaluation of the prejudice. In copyright and design cases, the <i>damnum emergens</i> also forms part of the prejudice. Similarly, in patent cases, harm to the patentee's monopoly is often highlighted by the courts.</p> <p>In respect of all IP rights, the courts have occasionally decided that the costs aimed at the detection and the monitoring of infringing activities are part of the prejudice suffered by the</p>	The possibility for the judge to order the transfer of the profits made by the infringer exists but may only be ordered subject to evidence of the defendant's <i>bad faith</i> and <i>in appropriate cases</i> . In trademark matters, <i>net profit</i> must be calculated by deducting from the sales prices the purchase cost and the taxes and other costs directly linked to the products. General expenses cannot be deducted from the sales prices. Transfer of profits is generally awarded in those cases where the profits are higher than the allocated damages (typically for the RH's lost profits). In trademark and design matters, the transfer of profits may be ordered in addition to the grant of damages for e.g. lost profits.	Any IPR holder may potentially suffer a prejudice due to, e.g., the injury to his reputation. This prejudice should be distinguished from the prejudice strictly resulting from the infringement, even though it is linked to it. Because the damages resulting from such prejudice are difficult to assess, in most cases the courts will award lump sum damages. In copyright matters, the RH is entitled to compensation for infringement of his moral rights but, for a long time the damages awarded were limited to symbolic damages (typically €1). Tariffs set forth by the collecting societies often offer a good indication of the damages that could be granted.

	RH and must be taken in consideration when assessing the prejudice resulting from the infringement.		
Bulgaria	Although not explicitly provided for by the law, can be still attributed to certain provisions, which oblige the court to take into account any infringement-related circumstances when calculating the damages.	These are all provided for by the law.	Only if the right holder is a natural person. Bulgarian case law tradition does not allow for moral damages to be awarded to legal entities.
Croatia	Material damage is redressed primarily by restitution and subordinately by monetary compensation (Article 1085 of the Obligations Act). The court will award monetary compensation for the damage to the party sustaining damage, taking into account also the circumstances occurring after the occurrence of the damage, in the amount necessary to reverse the party's financial position to the state in which that party would have been had the damage not occurred (Article 1090 of the Obligations Act). The party sustaining damage has a right to a compensation for both pure economic loss and a loss of profit (Article 1089 of the Obligations Act). In determining the amount of damages, the court has to take into account all relevant aspects, such as negative economic consequences for the party sustaining damage, including also lost profit, all profits unfairly gained by the infringer and, in some cases also other circumstances	A right owner can ask the court to order the infringer to pay all net profits gained on the basis of infringement of an intellectual property right.	The legal basis for a just monetary compensation for immaterial damage to a legal entity is laid down by Article 1100(3) of the Obligations Act. This provision prescribes the remedy for the event of the damage to the reputation and other personality rights of a legal entity. Where finding it justified by the seriousness of the infringement and the circumstances of the case, the court will award to the legal entity a just monetary compensation, in addition to the compensation for material damage or in the absence of the latter. In determining the amount of compensation for immaterial damage, personal characteristics of the injured party are taken into account and, if they are disputed by the other party, they are to be determined by taking evidence to that effect. The just compensation is calculated based on the relevant circumstances in existence at the time the first-instance judgment is rendered.

	of non-economic nature, such as moral damage.		One form of non-monetary compensation for immaterial damage is the publication of a judgment or, as a case may be, the correction (Article 1099 of the Obligations Act). Publishing the judgments rendered in the proceedings for infringement of intellectual property rights has a double function because such publications could serve as a deterrent for potential infringers, as well for raising awareness about importance of protecting intellectual property rights.
Cyprus	Yes, other factors taken into account; however, not easy to prove.	Specific provisions in Copyright Law. For other IPRs provisions in Common Law.	Granted according to general damage section, but very difficult to quantify and prove.
Czech Republic	All relevant circumstances can be taken into consideration in evaluating the damage incurred by the rights holder. Any damage which is deemed material can in principle be compensated under the damages system.	<p>Yes, RHs can demand surrender of unjust enrichment. For copyright, the amount of unjust enrichment is a minimum of <i>double</i> the licenses.</p> <p>Similarly, for industrial rights a court can require an infringer to surrender unjust enrichment in a lump sum amount of a minimum of <i>double</i> the usual royalties.</p> <p>If the infringer at the time of the unauthorised use did not know/could not have known that he infringed such a right, the court can reduce an award for unjust enrichment to a minimum of the fees that would have had to be paid.</p>	<p>Yes. RHs may require payment of <i>appropriate satisfaction</i> for non-material damage incurred.</p> <p><i>Copyright owners</i> can claim: (a) an <i>apology</i>, and (b) <i>payment of a financial amount</i>, where a different kind of satisfaction would be inadequate. The amount of any financial satisfaction is determined by the court.</p> <p>For <i>industrial property rights</i> the same rules apply to moral prejudice as to unjust enrichment. Courts can award appropriate satisfaction in a lump sum amount of a minimum of <i>double</i> the usual fees.</p> <p>The remedy of appropriate satisfaction is available only to the</p>

			original RH (i.e. natural person).
Denmark	Damages claims may comprise claims relating to <i>disruption of the market</i> (they require proof of economic loss and can be very difficult for the RO to establish). Such damages are based on a capitalised future loss and are usually based upon an estimation of the damages caused to the image and goodwill of the RO, the damages caused to the <i>distinctiveness</i> of the RO's TMs, <i>general price declines</i> caused by the infringing product being put on the market and <i>certain losses of a more internal nature</i> .	Yes.	Yes.
Estonia	Although these factors may affect the sum of damages, they have rarely been used in practice. Mainly due to the fact that proving such damages is rather difficult and the courts usually require the plaintiff to present strong and undisputable evidence on actual damages.	This provision has been used by many courts when awarding the RH a compensation for the IP infringement. In practice, this amount is calculated based on relevant license fee or (retail) price of the product that was in unlicensed use. According to the law, the infringer shall inform the entitled person of the nature of revenue received by the violation and RH may demand that the infringer transfers all revenue made by the infringing act on the RH. However, no information that such claim was submitted to any Estonian court.	Clearly mentioned in case of copyright infringements and TM infringements. Although other IP laws don't separately mention moral damages, they may be claimed on the basis of <i>Law of Obligations Act</i> . The main question is whether the legal entity as a RH could make a claim for moral damages. According to the Law, moral damages involve primarily physical and emotional distress and suffering caused to the aggrieved person. These are common to a physical person, not to a legal entity (no information that in Estonian court practice a legal entity has made a claim for compensation of moral damages). Estonian court practice: the amounts

			of moral damage awarded by courts to private person RHs (mainly authors) have been extremely low.
Finland	<p><i>Investments</i> by TM owner not normally taken into consideration.</p> <p>Damages to <i>reputation/good-will</i> may not become evident until a later period (future losses can be compensated if substantiated by a reliable method).</p> <p>Contractual obligations have no direct effect on rulings.</p> <p>Parallel imports treated identically as TM infringements.</p>	Are taken into consideration when clear evidence that sales were made with infringing products (even in good faith infringements).	For intentional/negligent infringements
France	<p>The <i>negative economic consequences</i> should be read as being comprised of a patrimonial and moral prejudice:</p> <p><i>Material prejudice</i>: composed by the RO's lost profits and the undergone loss.</p> <p><i>Moral prejudice</i>: done in a subjective way.</p>	Negative economic consequences are not enough per se in the assessing the prejudice caused by an infringement. Indeed, the account of the infringer's profit will also be taken into consideration.	Yes.
Germany	Not as such. Depending on the case, some of these elements might be taken into account when calculating the amount of damages according to the available three methods.	Yes. Damages can be calculated based on the infringer's unjust enrichment (alternatively to rights owner's lost profits or reasonable royalty).	Authors, writers of scientific editions, photographers and performers can additionally claim monetary compensation for damage which is non-pecuniary in nature provided and to the extent that this is equitable.

<p>Greece</p>	<p>No general factors (such as reputational damage, price declines, investment, etc.) are taken into account in the assessment of actual prejudice. Damage should be substantiated on the basis of specific and objective evidence of actual prejudice.</p>	<p>Is considered when assessing the amount of moral damages to be awarded.</p>	<p>Moral prejudice is awarded in all IPR infringement cases.</p> <p>For TM/distinctive sign infringement cases, this is the only way of compensation one can hope for.</p>
<p>Hungary</p>	<p>Pursuant to Article 355(4) of the Civil Code, the loss of value in the property of the injured person and the loss of profit sustained as a consequence of the damaging act, as well as the indemnification of expenses needed for the reduction or elimination of the financial and non-financial loss shall all be elements of the full compensation that may be awarded as damages.</p>	<p>Pursuant to Article 355(4) of the Civil Code, the loss of value in the property of the injured person and the loss of profit sustained as a consequence of the damaging act, as well as the indemnification of expenses needed for the reduction or elimination of the financial and non-financial loss shall all be elements of the full compensation that may be awarded as damages. However, in the course of litigation, difficulties may arise in evidencing the damage of the plaintiff's trademark (e.g. damage of reputation, distinctiveness) arising from the infringement.</p>	<p>According to Article 355(4) of the Civil Code by way of compensation, the loss of value in the property of the injured person and the loss of profit sustained as a consequence of the damaging act, as well as the indemnification of expenses needed for the reduction or elimination of the financial and non-financial losses shall be given.</p> <p>Compensation for non-pecuniary (moral) damages may be only acknowledged and awarded if the damage caused by the infringement of the moral rights of the author or related rights holder is duly substantiated. In industrial property cases, the inventor/author of the design may request such damages under certain circumstances.</p>
<p>Ireland</p>	<p><i>General:</i> The courts are allowed to consider all aspects of the case.</p> <p>For copyright: the award made is a matter usually for the court's judgment and discretion: "The court may, in an action for infringement of copyright award such damages as, having regard to all the circumstances of the case, it</p>	<p>An account of profit is available as an alternative to actual damages.</p>	<p>-</p>

	considers just" (Section 128(1) Copyright and Related Rights Act 2000).		
Italy	<p>Compensation for any further damage, such as expenses incurred for responding to the infringement or damage to image may also be added to the amount. Legal theory and case law state that if the infringement has triggered the impairment of the reputation in the IP right (in particular: trademarks and design), additional damages should be paid to the owner. In particular in TM infringement cases both dilution and impairment of reputation are relevant forms of prejudice for this purpose.</p> <p>Damage caused to the RH's image is often calculated as a <i>fraction</i> of the advertising expenses or the cost of an advertising campaign to mitigate the negative impact of the infringement in the public.</p>	<p>RH may receive a sum which corresponds either to the infringer's profits or the RH's lost profits; whichever is greater.</p> <p>Current regime allows the RH to properly select the most favourable criterion amongst these options.</p>	Since wilful infringement also amounts to a criminal conduct, moral damages may be assessed by the Court, if requested by the RO.
Latvia	No legal provision or court decision on that issue, yet.	Yes. It is subject to the discretion of the court, limited by proportionality. No court decisions, yet.	Yes, for all IPR infringements. The amount of compensation is determined by the courts in the form of a lump sum <i>ex aequo et bono</i> .
Lithuania	IPR laws recognize the grounds of <i>actual prejudice</i> and <i>negative economic consequences</i> and the court must take into account all relevant factors including the strength of a TM, investments etc.	Only for authors and performers.	Alternative to damages, when it is difficult to establish precise amount of damages.

	In addition to direct damages and lost profits, damages shall comprise reasonable costs that the claimant has incurred to: (i) Prevent or mitigate damage; (ii) Assess civil liability and damage; and (iii) in the process of recovering damages via any extrajudicial procedure.		
Luxembourg	When assessing damages suffered by RO, jurisdictions take into account the negative economic consequences in general. The latter mainly include RO's lost profits and profits unduly made by the infringer. Courts will take into consideration also reputational damage, price declines, moral prejudice of the RO, relationship between the RO and the infringer etc. It applies for all types of IPRs and all types of infringements.	Only when the infringer acted in <i>bad faith</i> . May be used in addition to the actual prejudice or as an alternative.	Moral prejudice is one of the factors under the actual prejudice.
Malta	Yes, according to newly introduced legal provision <i>all the negative economic consequences that may have been suffered by the injured party including lost profits, as well as any unfair profits made by the infringer and (at the discretion of the Court where it deems so appropriate) other elements such as the moral prejudice caused to the RH by the infringement</i> must be considered. However, law is too recent and has	Yes. RO may request that the infringing articles still in the possession of the defendant be delivered to the plaintiff. The situation regarding unjust enrichment is uncertain.	Yes, but only <i>where the court deems appropriate</i> . Even if it's legally possible, only very few instances where moral damages have been taken into account when liquidating damages. In IPR cases it still remains to be seen whether the courts will take a conservative or liberal approach in respect of moral damages.

	not been given judicial interpretation.		
Netherlands	All losses which have sufficient causal links with the infringement will qualify for compensation. Factors that play a role include the actual loss incurred, the actual visible damage and the degree of awareness or deliberate intent of the infringement.	The demand for unfair profits may be made in addition to the claim for damages. However, it is not automatically that the court will award the claim for damages and the demand for unfair profits. Case law: Supreme court stated that it cannot grant a cumulative award of the surrender of profit and compensation for damages consisting of license fees. Lower courts have, however, taken slightly different approach.	The court may take account of the moral prejudice that the RO has suffered because of the infringement. Courts however grant this with caution: it looks at whether the infringer's behavior was intentional, and whether he wanted to cause harm to the RO.
Poland	In general, no; unless they are part of <i>lost profits</i> .	Yes, according to IP Act and Copyright Act.	No pecuniary claims. However, under Industrial Property Act and Copyright Act parts of the judgement can be published.
Portugal	These factors are taken into account in the calculation of <i>lost profits</i> .	Yes, according to Civil Code the reimbursement of all unjust economic benefits acquired at the expenses of other people's legal rights is granted, without a valid excuse.	Yes, it is assessed based on the claimant's reputation and the distinctiveness of the concerned IP right.
Romania	Apart from the profit loss incurred by the injured party and the benefits unfairly made by the infringer, the law does not expressly provide for other specific such negative economic consequences, but does not exclude them either.	Yes, both in industrial property rights and copyrights and related rights. <i>Attention shall be paid as the liability of the infringer must not exceed the limits of the actual damages.</i>	Yes, both in industrial property rights and copyrights and related rights. <i>The copyright law limits the total amount of damages to the amount of three times the value of the material damages. This provision does not exist in the field of the industrial property rights but is often used by the right owners and accepted by the court just as an indication and not as</i>

			a legal ground.
Slovakia	<p>Moral damages (e.g. damage on good-will, TM's dilution, damage on TM's good-will)- compensation will depend on the court's discretion.</p> <p>Negative economic consequences: (e.g. meaningless investments, lost profits from the sale) will be assessed as material damage.</p> <p>The court can take into consideration any proved facts which directly or indirectly influence the amount and type of damage.</p>	In case there is a causal link between the IP infringement and infringer's profit (unjust enrichment), it is not excluded that the court will decide on the damages in the amount of such unjust enrichment.	The amount of moral damage depends on the assessment of the court, since it cannot be objectively calculated or proved. It can be in the form of a written apology, publication in the press but also in monetary terms, according to court's assessment. Moral damages have compensatory function, but also a function of a civil sanction, aim of which is to punish the infringer, but not to completely destroy him. It also has a preventative character.
Slovenia	<p>Monetary compensation for defamation of reputation or good name, independent of material damage.</p> <p>No specific provision that would provide basis for awarding compensation for <i>negative economic consequences</i> in general, but they are taken into consideration when determining the amount of material damage, especially lost profit.</p>	Person who became enriched to the detriment of another shall return that which was received if possible, otherwise compensate the value of the benefit achieved.	Even if no material damages have been suffered, the court shall award author/performer equitable monetary satisfaction for mental distress suffered.
Spain	<p>TMs, patents, designs: RO can also claim a compensation for the reputational damage.</p> <p>As for assessing the reputational damage to the trademark or to the design, consideration can be given to the circumstances of the infraction – particularly, its severity- and the</p>		<p>TMs, patents, copyright: foreseen compensation of moral damages even if there is no evidence of the economic damage.</p> <p>Designs: includes a compensation</p>

	degree of spread reached by the counterfeited products in the market and for TMs the notorious or well-known or prestigious character of the TM.		for a moral prejudice to the RO.
Sweden	<p>The direct effect of the infringing activity on the RO's profitability and the price erosion has been considered by the Swedish courts.</p> <p>Examples from case law when goodwill damages were awarded:</p> <ul style="list-style-type: none"> • Infringers sent out ads that were considered detrimental to the company's reputation. • The fact that illegal copies of original products generally have a lower quality was considered. • Distinctiveness of the trademark was damaged. 	<p>It is also possible to calculate lost profits on the infringer's profit, where the infringers profit is used as a tool of evidence to ascertain the RO's lost profit. RO's damages may in such situations be considered at least not less than the infringer's profit. In a recent ruling at first instance the Court expressed that a starting point when calculating damages can be the profits of the infringer. The calculation is made by multiplying the number of infringing goods by the net profit (sale price minus purchase costs and other costs directly related to the infringing products). In that case, general Swedish civil law liability principles were applied and the court made no distinction between reasonable royalty and the infringer's profits. The infringer's profits were assumed to equal (at least) the loss of the RO. This means that the infringer's profits are used as a supplementary method when calculating the actual loss.</p> <p>In other cases, where the RO's profit is treated separately from the reasonable royalty, the compensation for lost profit must be reduced with awarded compensation defined as the reasonable royalty in order to avoid double or over compensation.</p>	<p>Under this heading there is a certain overlap with injury to distinctiveness, reputation, goodwill etc. Courts may treat such injuries under separate headings or as moral prejudices.</p>

		The infringers profit may also be seen an <i>alternative</i> to calculate lost profit. In order to calculate lost profits the RO may opt for either the infringer's profits, or their own (RO's) lost profits.	
United Kingdom	The RO may claim damages for any other prejudice actually suffered as long as the injury suffered can be proved, incl. e.g. injured reputation. The fact that a particular assessment is difficult is not a reason for refusing to attempt it. The victim may claim damages not only for <i>primary acts</i> of infringement but also for <i>secondary acts</i> , which include preparatory, contributory or consequential activities. It is necessary to establish the factual basis of such claims of secondary loss, for example, it must be demonstrated that the secondary loss is both caused by and a foreseeable consequence of the infringement.	Yes, as an alternative to damages. Account of an infringer's profits is available as an alternative, not in addition to, damages for IP infringement. <i>The account is of the net profits made by the infringer as a result of the infringing activities. An innocent infringer of copyright may be liable for an account of profits (Weinerworld Ltd v Vision Video Ltd [1998] FSR 832).</i>	Yes, current law provides specifically that any appropriate non-economic factors, including <i>moral prejudice</i> shall be taken into account in awarding damages. It was not the case before the transposition of IPRED into the national law. It is not yet clear how the courts will apply such a rule. <i>Moral rights</i> are specific rights of the author under copyright legislation and are enforceable without proof of damage. Damages for breach of moral rights can be awarded, however, subject to proof of facts common to other IP or tort damages assessments.

COUNTRY	Calculation of Damages: Theories Double/multiple/pre-determined/lump sum damages	Calculation of Damages: Theories Additional/exemplary/aggravated damages	Calculation of Damages: Theories Punitive damages
Austria	In cases of culpable infringement the RH is entitled to a lump sum damage in the amount of double the reasonable royalty even if no real damage can be proven.	Not applicable.	Not applicable.
Belgium	Royalty-collecting organisations have set fees that apply to breaches of copyright: for instance, according to the SOFAM's fees, reproduction without the RH's prior consent engenders compensation of 200% of the basic fee, unauthorised reproduction of a work with a fake signature, the indemnity amounts to 300% of the basic fee. These fees are frequently used in the difficult process of evaluating the prejudice resulting from moral right infringements in copyright matters. However, they would be considered unreasonable by the Supreme Court if they exceed the amount of the real prejudice suffered by the RO (see 'Punitive damages').		Not allowed under Belgian law. However, fees charged by the collecting societies (which are often used by the courts) could be considered as punitive as they may sometimes exceed the amount of the real prejudice suffered. The possibility for the courts to apply "punitive" tariffs when assessing the prejudice has been recently debated before the Belgian Supreme Court, which decided that neither the fight against counterfeiting activities nor the dissuasive effect attached to punitive damages may justify the grant of damages which exceed the real prejudice suffered by the right holder. The possibility of cumulating a claim for damages as a compensation for the real prejudice incurred, and a claim for the transfer of profits, is normally prohibited, except in trademark and design matters. Some authors consider this distinction as being contrary to the non-discrimination principle (Articles

			10-11 of the Constitution).
Bulgaria	Such damages are allowed by the law.	-	No
Croatia	Article 223 of the Civil Procedure Act regulates the situation in which it is established that a party has the right to damages, a sum of money or replaceable things, but the amount of money or the quantity of things cannot be determined or could be determined only with disproportionate difficulty. In such a situation the court can decide on its own discretion. Where the court relies on discretion as an instrument for determining the amount of damages, it will do so according to its professional and general life experience, but also on the basis of the partially taken evidence. In the case of copyright infringement, it is possible to seek damages in twice the amount of the agreed remuneration for the use of the work, if the infringement was intentional or a result of gross negligence.		This is the case of a statutory penalty. By its definition, a statutory penalty represents a remuneration which an author could claim from a person infringing his material right intentionally or as a result of gross negligence. The burden of proof that the defendant acted intentionally or with gross negligence lies upon the plaintiff. The lowest amount of the penalty is a remuneration which is twice the amount of the agreed remuneration for using the work and, if it is not agreed the amount of the usual remuneration for using the work.
Cyprus	No double or triple damages. Pre-determined lump sum damages not provided by law, unless they are contractually a genuine pre-estimate of the loss, they may be held to be invalid as being a penalty.	Yes; under Common law and Equity principles, as well as the Copyright Act.	No.
Czech Republic	Yes. Double licence-fee awards are available measures of unjust enrichment for copyright and industrial rights infringements. For	No.	No.

	industrial rights the same double licence-fee rules apply to damages as well as unjust enrichment awards.		
Denmark	<p>Damages almost always awarded as a <i>lump sum</i>. Double, multiple, pre-determined damages do not exist.</p> <p>In some copyright cases ROs have succeeded to get 100 % lump sum plus 100 % damages on top.</p>	No.	No.
Estonia	Not available.	Not available.	Not available.
Finland	Contractual penalties may be awarded on top of damages	-	No.
France	-	<p>Recall of counterfeit products; Destruction or seizure of the counterfeit goods;</p> <p>Publication of the sentence in its entirety or in parts in newspapers or on the internet.</p> <p>All these measures are pronounced at the cost of the infringer.</p>	-
Germany	<p>No. The law does not provide for the possibility of doubling the appropriate licence fee ("double licence fee").</p> <p>In some cases the damages awarded by courts appear to be a double licence fee from an economic point of view. The background of the calculation is different though:</p>	Market confusion damages are disputed. German Federal Court of Justice denies such damages for copyright infringements. However, as regards industrial property rights (i.e. patents, trademarks, designs), a claim for such compensation can in principle be raised, according to case law and literature.	No.

	<p>A frequent situation concerns claims by the German collecting society managing the rights of composers, lyricists, and music publishers (GEMA) for unauthorised public performance of music. Here a “lump-sum additional fee for damages” is awarded in the amount of 100% of the normal tariff (cf. Federal Court of Justice, NJW 1987, 1405, 1407 et seq. - Film music). This case law does justice to the special interests in the field of unauthorised public performance of music and cannot generally be applied to other infringements. Moreover, it does not constitute a “double licence fee” in the proper meaning of the term, but rather an “additional controlling fee” to compensate for the expenses incurred for controlling and monitoring the collective enforcement of rights.</p> <p>Sometimes the courts have granted “double” licence fees where a photographer had not been named. In most of these cases there were actually two infringements: unauthorised usage of copyrighted material and, due to the failure to name the copyright holder, an infringement of moral rights. In such cases the courts, at least in the case of photographs, have regularly awarded an appropriate (“single”) licence fee for the actual copyright infringement and a 100% additional</p>		
--	---	--	--

	fee for the infringement of moral rights. Hence, this does not constitute a “double licence fee” in the proper meaning of the term either. In fact, damages are being awarded for two separate infringements.		
Greece	<i>Copyright cases</i> : double damages. <i>Patent/utility model/industrial design cases</i> : lump sum which corresponds to the loss of profits/benefits derived from the unfair exploitation.	None.	Yes, in case infringer breaches any of the terms of the decision in the future.
Hungary	The Civil Code allows it (if other types of damages cannot be calculated), but we are not aware of any recent judgement ordering the payment of lump sum damages.	-	No.
Ireland	Not available.	An account of profit is available as an alternative to actual damages.	Generally no, but an account of profit is available as an alternative to actual damages.
Italy	<i>Account of infringer's profits</i> is considered a form of deterrence. RO may ask for net profits made by the infringer even if the amount exceeds his lost profits, and even when evidence of the amount of its lost profits has not been collected.	Infringer's profits may be transferred even if it's more than the damage.	Infringer's profits may be transferred even if it's more than the damage.
Latvia	No.	No.	No.
Lithuania	When the infringer acts intentionally or with gross negligence and when	No.	-

	<p>the claimant opts for royalty-based damages, he can get twice the amount of royalties.</p> <p>In copyright law the claimant may request a form of compensation equivalent to a pre-determined sum as an alternative to damages. This is especially the case when it is difficult to establish the precise amount of damages incurred. The compensation amount limits are stated by law.</p>		
Luxembourg	No double, multiple or pre-determined damages, only the 'actual prejudice'. However, lump sum can be granted as an estimation 'in equity' of the 'actual prejudice'.	In cases of bad faith profits following the infringements may be ordered to be transferred in addition to the actual prejudice. Such measure is available for all IPRs.	In principle punitive damages don't exist with one exception: in cases of bad faith court can order additional/aggravated damages.
Malta	Only lump sum damages.	In cases of flagrant infringements of copyright the court may award additional damages.	No.
Netherlands	<p>No more than the full amount of damages should be compensated. Therefore <i>no double damages</i>.</p> <p>For all IP rights, in appropriate cases the court may award a <i>lump sum</i> in damages..</p>	See above, 'Account of infringer's unjust enrichment'.	See above, 'Account of infringer's unjust enrichment'.
Poland	Under the Copyright act there is the possibility to claim for double, or in the event of culpable infringement even triple, equitable remuneration, as an alternative form of compensation for damages	Under the Copyright Act the RO can demand from the court to impose the payment of <i>an appropriate amount, not less than double the probable advantages received by the infringer</i> to the Creativity Promotion Fund, if the infringement occurred within the scope of business activity.	The damage claims under the Copyright Act, as described before, can be regarded as being punitive.
Portugal	Yes. Possible to set damages as a	In cases of repeated default or serious	Not applicable.

	lump sum on the basis of the amount of royalties or fees which would have been due in case of authorisation to use the concerned IP right.	offences, the court may establish the indemnity, considering some or all criteria aggravating the amount due as indemnity.	
Romania	<i>Industrial property rights:</i> the courts may set the damages as a <i>lump sum</i> , on the basis of elements such as at least the amount of royalties. <i>Copyright/related rights:</i> <i>triple damages</i> principle; damages representing three times the value of the fees which would have been legally due if <i>the theory of</i> negative consequences and moral damages cannot be applied.	No such damages in the Romanian legislation without a contract.	No
Slovakia	No.	No.	No.
Slovenia	-	-	For <i>copyright</i> infringement which was committed intentionally punitive damages up to 200% of the royalties (regardless if any monetary damages actually occurred).
Spain	-	-	-
Sweden	No. Swedish Courts have taken the position that conformity with the Enforcement Directive, it is not possible to routinely double or even multiply a (hypothetical) license fee when calculating a reasonable royalty.	No.	No.
United Kingdom	Not available.	<i>Additional</i> damages are available, but only for <i>copyright</i> and <i>designs</i> infringement. <i>Additional damages are</i>	No. Damages are compensatory rather than punitive and the aim is to return the claimant to the original

		<p>not available where the claimant has elected an account of profits.</p> <p>As a rule, exemplary, aggravated, conversion or other damages that are deemed to punish the claimant for wrongful conduct are not allowed, but the <i>additional damages</i> provisions for copyright and design rights do reflect exceptions to this rule.</p> <p>Current legislative proposal: to change <i>additional</i> to <i>aggravated and restitutionary</i> damages. It is not clear whether and how such a change would affect damages awards.</p> <p>The IPRED Statutory Instrument: makes clear that all relevant factors should be taken into account in determining damages, but only for determining the <i>actual prejudice</i> suffered. <i>This legislation did not take up the IPRED's options for lump-sum or pre-established damages.</i></p>	<p>position as if the tort had not occurred.</p>
--	--	--	--

COUNTRY	Calculation of Damages: Theories Other legal theories or measurements of damages	When the Courts are requested to compensate the rights owner for the <i>actual prejudice</i> he has suffered, are they entitled to award e.g. lump sum damages if they consider this more appropriate? Are the Courts precluded from awarding lump sum damages when the rights owner has not explicitly claimed them?	Are damages awards lower if the infringer did not know or have reasonable grounds to know he was engaged in infringing activity?
Austria	No.	Courts bound to formal requests of RO. If no actual prejudice can be established, RO has to request a lump sum	The amount of damages does not depend on the knowledge of the infringement, but on faulty conduct of the infringer.
Belgium	Possibility for the RH to request the transfer of the ownership of the infringing goods (e.g. in cases of parallel imports). <i>In appropriate cases</i> , the RH may also obtain the transfer of the ownership of the materials and implements having primarily served in the creation or the manufacturing of the goods but has not been frequently applied in practice. The above measures are not subject to evidence of the infringer's bad faith. However, the value of the goods, materials and implements transferred may not exceed the extent of real prejudice suffered by the right holder	Several specific provisions expressly provide the courts with the right to award lump-sum damages. All prejudices should in principle be repaired <i>in natura</i> . The grant of damages is only permitted when such reparation <i>in natura</i> is not possible. It is only when the real prejudice suffered cannot be calculated that the courts may award lump sum damages. When any of the parties provided the court with evidence in view of the evaluation of the real prejudice, the courts must imperatively explain the reasons why they have chosen to rule out such an evaluation and, as the case may be, to grant a lump sum. However, most of the judgments handed down award lump-sum damages without further explanation.	The mere infringement of an intellectual property right constitutes a tort, infringer's good faith does not pre-empt the right to compensation. However, the bad faith of the infringer may have an impact on the awarded damages. In case of bad faith, transfer of any profits and confiscation of the infringing goods and materials/tools primarily used in the creation or manufacture of the infringing products may be awarded. The confiscation may not constitute a punitive damage; the value of the confiscated items must be offset against the amount of the real prejudice incurred by the RH. In copyright cases since the implementation of IPRED, the Copyright and Neighbouring Rights

			Act no longer makes it compulsory for the courts to order the confiscation in the event of bad faith and therefore the courts will expectedly be less reluctant to admit the infringer's bad faith.
Bulgaria	-	When actual prejudice is impossible to establish, the plaintiff may claim a lump sum, but that has to be specifically requested by the RO.	No. The form of guilt is not taken into consideration by the court when defining the amount of damages.
Croatia	The right owner can demand payment of whatever was gained as a result of an infringement, based on the legal institute of unjust enrichment. This includes materials, products and moneys gained through sale of such products where the infringer acted in good faith.	Article 223 of the Civil Procedure Act regulates the situation in which it is established that a party has the right to damages, a sum of money or replaceable things, but the amount of money or the quantity of things cannot be determined or could be determined only with disproportionate difficulty. In such a situation the court can decide on its own discretion. Where the court relies on discretion as an instrument for determining the amount of damages, it will do so according to its professional and general life experience, but also on the basis of the partially taken evidence.	In cases where the defendant is not liable for the infringement of the plaintiff's intellectual property right, the plaintiff can demand restitution of the material gain the person obtained without legal basis. In such a case, the plaintiff has to demonstrate to the court that the defendant has used, without legal basis, his work or certain intellectual property right in obtaining the material gain, the restitution of which the plaintiff is demanding. It will also be necessary to determine and identify such gain, so that the court could order the defendant to make the restitution to the plaintiff
Cyprus	No.	Normally, covered by general damages if claimed.	No case law, however general damage can be claimed irrespective of intent.
Czech Republic	No.	Yes. However, RO has to claim lump sum damages or unjust enrichment explicitly.	Yes, they can be. In case of <i>copyright</i> , knowledge <i>generally makes no difference</i> to the damages calculation, but <i>in</i>

			<p><i>principle</i> a court may take an infringer's knowledge into consideration in determining any reasonable reduction in compensation.</p> <p>In the case of <i>industrial rights</i>, damages, unjust enrichment and <i>appropriate satisfaction</i> awards are <i>lower</i> if the infringer at the time of unauthorised use did not know/could not have known that he violated the relevant right.</p>
Denmark	None.	Damages based on <i>actual prejudice/disruption of the market</i> are always awarded as a lump sum, as the actual <i>disruption</i> of the market is often impossible to prove. Lump sum may be awarded even if the RO hasn't claimed it.	Generally no legal basis for damages if infringer was acting in good faith.
Estonia	The Law of Obligations Act prescribes as direct patrimonial damage the reasonable expenses which have been incurred or will be incurred in the future due to the damage, including reasonable expenses relating to prevention or reduction of damage and receipt of compensation, including expenses relating to establishment of the damage and submission of claims relating to compensation for the damage.	<p>If the damage is established but the exact extent of the damage cannot be established (including in the event of non-patrimonial damage or future damage) the amount of compensation shall be determined by the court. The court may, if this is reasonable, determine compensation for the damage as a fixed amount, taking account, inter alia, the amount of fee the violator should have paid if he or she had obtained authorisation for the use of the relevant right.</p> <p>The courts are not bound with the</p>	The compensation of damages in cases of <i>good faith</i> infringements is available only regarding utility models and patents. In these cases the award of damages shall be limited to infringements that have taken place within the last five years before filing the claim.

		claim of RH and can establish <i>lump sum damages</i> at their own initiative. This provision is applying to all proprietary disputes, if the parties disagree over the amount of the claim and a full verification of all the facts necessary for the establishment thereof involves unreasonable difficulties.	
Finland	-	If the amount of damages is difficult to prove, the court will estimate the damages. <i>Lump sum</i> can be claimed on several grounds (lost profits, loss of goodwill etc.).	RO must be compensated (reasonable compensation) even in <i>good faith</i> infringements.
France	-	Courts can pronounce a lump sum payment only if it has been required by the RH.	No.
Germany	None	Not applicable. As mentioned above, actual prejudice is not as such compensatable. In any case the courts are bound by the rights owner's petition. According to the rules of civil procedure the petition is only for a specified amount of money regardless of the legal basis invoked to justify its award. Moreover, the courts must not exceed the petition, i.e. award a greater sum of money than the rights owner has requested.	No difference between the different types of infringement in statutory law. Though, the Federal Court of Justice left the question open, if after the implementation of the Enforcement-Directive the amount of damages would also depend on the level of negligence/bad faith of the infringer.
Greece	-	Lump sum damages are awarded for patent/utility model/industrial design and copyright infringements only. For other infringements they are not awarded, even if they are claimed.	If the infringer did not know (didn't have reasonable grounds to know) no compensation at all is awarded.

Hungary	No.	The Civil Code allows it, if other types of damages cannot be calculated. We are not aware of any recent judgement ordering the payment of lump sum damages. Lump sum damages may only be awarded if the right holder explicitly claims them.	Compensation for damages is based on culpability, only recovery of unjust enrichment may be ordered by the courts as an objective sanction
Ireland	-	The courts may award a sum to their discretion.	Yes.
Italy	Infringer's profits may be transferred even if it's more than the incurred damage.	Yes, but only if he RO asks for it.	No, as damages may be awarded only for wilful/negligent behaviour.
Latvia	In the absence of actual practice, not possible to provide any clarification on this.	In the absence of actual practice, not possible to provide any clarification on this.	No <i>statutory</i> limitations on the grant of damages in case of good faith (non-intentional) infringements.
Lithuania	-	The court can award only what the RO requests, it cannot grant a <i>lump sum</i> in case the RO asked for actual losses.	Awards are not automatically lower in these cases. The court may order recovery of profits received by the infringer.
Luxembourg	Ownership of infringing goods, materials and implements used for the manufacture of these goods can be ordered to be transferred to the plaintiff.	<i>Lump sum</i> damages may be awarded if <i>actual prejudice</i> cannot be calculated. Lump sum may be awarded even when the RO has not claimed it.	In principle, good faith does not lower the damages. However, practice of the courts is that in this case damages may be lower in such case. In some cases, account of infringer's profit is only available in bad-faith cases.
Malta	No.	The court may award <i>lump sum</i> damages where it so considers, it's an alternative method of calculation.	In case the infringer <i>did not know/didn't have reasonable grounds to know</i> damages would be lower, as

			they would be claimed on the basis of general tort law provisions. Only in cases of intent/negligence, IPR damages could be claimed.
Netherlands	No.	The court has discretionary powers in this area and may award <i>lump sum</i> damages if it considers appropriate. The courts have statutory powers to estimate the damages if the amount cannot be precisely determined.	Yes. When weighing up the interests to award damages and determine their amounts, the courts may take into account the intent of the infringer. In some cases, account of infringer's profit is only available in bad-faith cases.
Poland	Not available.	Yes, civil Procedure allows in certain cases, e.g. when proof of damage is overly difficult, that the court awards <i>an appropriate amount</i> to the plaintiff. Still, courts rarely apply this provision. Courts are also bound by the plaintiff's claim.	General rule: compensation for the damages suffered; exceptions possible according to Copyright Act.
Portugal	Not available.	Yes, subject to following conditions: If amount of actual damages cannot be determined and the injured party does not oppose, the court may, alternatively, establish a fixed fair amount due as indemnity, being the minimum amount the sum of: (i) the amount set and charged as royalties by the injured party if the infringer would have obtained the necessary licence; (ii) the expenses incurred by the injured party with the protection of the concerned IP right; and (iii) the expenses incurred in order to investigate and discontinue the infringing activity.	Yes, Civil Code establishes that amount due as indemnity shall be reduced if the infringer <i>did not know or did not have reasonable grounds to know</i> that he was engaged in an infringing activity.

Romania	No.	<p>Courts are entitled to award lump sum damages if they consider this more appropriate and the other criteria failed in achieving the correct estimation.</p> <p>Normally the courts shall award the right-owner at least by applying the lump sum criteria even when the right owner did not explicitly request this. Unfortunately, there are many judges who wrongly understand this benefit of the right-owner to receive at least the lump sum as a subsidiary alternative and they reject entirely the damages claim when the right-owner failed to prove the exact amount of damages and the right owner did not indicate the lump sum alternative in his claims.</p>	<p>No, but the person acting in good faith cannot be liable for the unexpected damages. Nevertheless there are still civil solutions rejecting damage claims based on this ground.</p>
Slovakia	-	<p>In case material damage cannot be calculated, the court may decide on the damage from the fees which would have been due if the licensing agreement was concluded.</p> <p>Courts often grant damages according the expert's assessment on the amount of damage.</p>	<p>Generally no. However, the court may decrease the amount of damage, in case there are special circumstances for it.</p>
Slovenia	Not available.	<p>Court's discretion on awarding lump sum damages in case they cannot be calculated otherwise (or with difficulties).</p> <p>Courts are not allowed to award the RO with something he had not requested.</p>	<p>Compensation of damages is independent on the infringer's culpability.</p> <p>However, when assessing punitive damages for copyright infringement and compensation for non-material damage: infringer's awareness of</p>

			wrongfulness of its action might influence the amount of damages.
Spain	Hypothetical royalties	<p>In Spain, evidence of damages is absolutely required, and damages must be compulsorily assessed.</p> <p>In any case, courts have the possibility to award a compensation of 1% of the infringer's total business amount, without any need of evidence, in case of a TM infringement.</p>	-
Sweden	No	<p>There are no set tariffs that are used by the Swedish courts under general procedural or civil law. However, where appropriate (and normally only at the request of one of the parties), Courts may refer to terms and conditions from established business practice, standard contracts etc.</p> <p>For example, the photography industry has different trade organizations, and their tariffs have been considered when deciding on compensation. The court has to stay within the limits of the party's claim, and to be able to use a tariff it has to be claimed by the RO that the specific tariff should be used.</p>	<p>Yes, negligence or intent is a general provision for the awarding of general damages.</p> <p>Typically, it is fairly difficult for the infringer to claim that he had no reason to believe that the products infringed third party intellectual property rights. Manufacturers have a relatively strict obligation of due care in relation to holders of IP rights and must take measures to ascertain that there is no obstacle against putting the product on the market.</p>
United Kingdom	See Part 5 of the Proceeds of Crime Act 2002 which, where the facts proven against a defendant show that he has substantially profited from criminal conduct, enables proceedings for the civil recovery of	No. Lump sum damages are not awarded in IP infringement cases.	Yes, in copyright, designs and patent cases.

	the proceeds of those crimes to be brought.		
--	---	--	--

COUNTRY	Can damages be awarded when infringing goods have been seized before being placed on the market?	Are damages awards lower if the infringer acquires a licence from the rights owner following the infringement?	Proof of damages What evidence is required to prove damages? Who bears the burden of proof?
Austria	Yes.	No.	Any evidence has to be taken into consideration. Usually financial statements, expert's opinions etc. are used to prove damages. <i>Burden of proof</i> is with the RO.
Belgium	Punitive damages are normally forbidden; most of the courts refuse to award damages (at least for lost profits) when the only evidence of the infringement concerns unsold goods. Case law is however not unanimous; thus, some decisions have stated that the mere offering for sale of infringing goods gives rise to a prejudice.	Not aware of any judgment..	<i>Burden of proof</i> lies with the claimant: he must prove that the defendant has committed a fault which has caused him a prejudice. Regarding <i>lost profits</i> , the RH usually provides the courts with evidence of the net profit/average profit he would have realised had the infringement not occurred (e.g. after deduction of the gross profit and the fixed fees). However, some decisions have stated that, due to the price differences, counterfeit goods and genuine branded goods, even where identical, are not necessarily part of the same market, so the sale of fake goods does not automatically cause any lost profits to the RH. Regarding the <i>other economic losses and the moral prejudice</i> , they are more difficult to establish (e.g. evidence of the efforts and investments for the promotion of the

			authentic goods, e.g. by providing invoices or advertising material). Courts may decide to appoint judicial experts to assess such damages in IP-related disputes.
Bulgaria	Yes.	No.	<i>Burden of proof</i> lies with the plaintiff. Both written and oral evidence may be engaged. It is common practice to claim damages based on the retail value of lawfully reproduced copies. Experts are appointed for assessing the amount of damages. The burden of proof is borne by the state prosecution in criminal cases.
Croatia	Although the posed question implies that no damage has occurred to the right owner, there is a possibility that the court will award damages to the right owner, provided that the latter proves the occurrence of damage as well as other requirements of the infringer's liability for damage.	.No	The burden of proof is on the plaintiff. Article 219 of the Civil Procedure Act lays down a general rule that each party in the civil proceedings is obliged to state facts and present evidence on which his claim is based or to refute the statements and evidence of the opposing party. The court will decide which of the evidence proposed will be taken for the purpose of establishing the relevant facts (Article 220 of the Civil Procedure Act). Special rules are prescribed in Article 233 of the Civil Procedure Act regarding the submission of documents as evidence in the civil proceedings. Where one party refers to a document and claims that it is in the possession of the other party, the court will order that party to submit the document within a fixed period of time. The party may not fail to submit the document if that party has

			<p>referred to this document in the proceedings as proof of his statements, or if that party is obliged by law to hand over or present this document, or if, in a view of its contents, the document is considered joint for both parties. When a party who is ordered to submit a document denies that the document is in his or her possession, the court may take evidence to establish this fact. Considering all the circumstances of the case, the court will form an opinion and assess the significance of the fact that the party who is in possession of a certain document refuses to act in accordance with the court order to submit the document or, contrary to the court belief, denies that the document is in his possession.</p> <p>Article 223 of the Civil Procedure Act regulates the situation in which it is established that a party has the right to damages, a sum of money or replaceable things, but the amount of money or the quantity of things cannot be determined or could be determined only with disproportionate difficulty. In such a situation the court can decide on its own discretion.</p>
Cyprus	Difficult to prove damages, unless some damage to goodwill can be shown other than costs.	Could be considered by court as a mitigating factor, however, it would not change the amount of incurred damage.	Burden of proof lies with RH. Normally, oral and documentary evidence is presented.
Czech Republic	Yes.	Yes, but only if the acquisition of	The aggrieved RO bears the <i>burden of proof</i> . There are no standardized

		the respective licence really reduces the damage (<i>e.g. when the acquired licence legalized products made originally without a licence</i>).	requirements regarding the type, scope or quality of evidence necessary to prove damages. This is determined on a case-by-case basis.
Denmark	Yes (e.g. customs seizure). Then damages will be assessed on the basis of royalty (no lost profits or market disruption).	No.	RO bears the <i>burden of proof</i> . Rather free evidence system.
Estonia	In theory yes, in practice it would probably be a reason for reducing the amount of compensation.	The defendants often use this argument, but there is no clear and common court practice on this. Usually, the courts have not awarded lower damages for the reason that the infringer has acquired the license following the infringement.	<i>Burden of proof</i> lies within RO, he needs to present: (i) evidence proving the existence of copyright infringement;(ii) evidence proving that the copyright infringement was committed by the defendant; (iii) evidence proving that the act of the defendant was unlawful; (iv) evidence proving the sum of damages (e.g. expenses, lost profit etc). The defendant needs to prove that he is not culpable for causing such damages.
Finland	Problem arises when goods in transit are seized by customs. In <i>Montex v Diesel</i> the detained products had already been unloaded in a warehouse and could have easily	Special procedures in place, but normally RO is entitled to compensation, as soon as infringement takes place, regardless of subsequent action of the infringer.	<i>Burden of proof</i> lies with the plaintiff. Assessing damages involves calculating an amount that is equivalent to a reasonable royalty.

	been cleared from there for distribution on the Finnish market. As such, customs seizure cases are handled as normal civil trademark infringements. However, it can be difficult to prove the actual damages in the transit country, as the products have still not been placed on the market.		Compensation is calculated on the base of: sales loss (number of unsold items, RO's loss per item), market's disruption, internal losses (expenses incurred in establishing the infringement). Good-will damage is difficult to prove, since it's a long term loss.
France	Yes.	No.	<i>Burden of proof lies with RO;</i> <i>two valuation methods:</i> (i) Evidence of negative econ. consequences and profits made by infringer: material and moral damage,. (ii) Evidence of total sum received in case of licensing agreement.
Germany	Yes. At least as adequate license fee which is calculated according to a fictitious license agreement under which it would be irrelevant to what extent the rights were actually used by the infringer. In particular, it is feigned that a distribution right would have been licensed for all goods produced (and not only for those sold). Early discovery of the infringement does not help the infringer.	No such rule. However, probable that the license fee agreed later will have an impact on the calculation of damages, in case it is calculated as "reasonable license fee". Conclusion of a licence agreement can also be part of a court or out-of-court settlement. In this case court proceedings are terminated without an award of damages.	Rights owner bears the burden of proof. Specific formal requirements to prove damages in IP cases do not exist. Common rules of civil procedure apply. Accordingly the court may also estimate the amount of damage based on a reasonable set of facts. According to case law, the requirements for proving damages should not be handled too strictly; in particular the calculation according to reasonable license fee is meant to help the right owner. Additionally, claims for obtaining information help rights owners to obtain evidence from the infringer
Greece	Extremely difficult to substantiate either material or moral damages in such case.	No such rule exists in legislation or has been applied by the Greek courts. Though moral damages may be lower in Assessing the infringer's	Plaintiff bears the <i>burden of proof</i> . Damages may be established on the basis of all admissible means of evidence according to procedural

		<i>good behaviour.</i>	law; i.e. confession of the parties, direct examination, inspection, experts' opinions, documents, witnesses etc.
Hungary	No, only storage and destruction costs.	If obtaining a license is a compensation for the infringement, no damages will be awarded, but if the license is for the future, damages can be awarded.	<p>The Hungarian system on proof is a "free evidencing system", there are no limitations concerning the form of the evidence. The court may accept any evidence which is capable of revealing the facts (e. g. invoices regarding the sales of the product affected by the infringement, valid license agreements). The court is not bound by any formal rules on taking evidence and the court decides based on its own conviction.</p> <p>According to the general rule on the liability in damages, the one suffering damages (the plaintiff) bears the burden of proof (the defendant having the possibility to exculpate himself). He shall prove:</p> <ul style="list-style-type: none"> that the behaviour causing the damage infringed the law; the damage itself; causal link between the behaviour and the damage.
Ireland	Yes, but the right holder must prove that he has suffered injury (e.g. costs for enforcement).	Copyright: Yes, they can be. <i>"...defendant undertakes to take a licence on such terms as may be agreed (...) (c) the amount recoverable against the defendant by way of damages or on an account of</i>	<i>General:</i> In civil cases the onus rests upon the plaintiff rights holder to prove its case. However, certain presumptions of ownership and the subsistence of rights in the plaintiff (until the contrary is

		<p><i>profits shall not exceed three times the amount which would have been payable by the defendant as licensee where a licence on those terms had been granted before the earliest infringement (...)</i>" (Copyright and Related Rights Act 2000, Section 130).</p> <p>This only applies to where a licence is available as of right, e.g. licences for educational works.</p>	<p>proved) may apply in certain circumstances. Irish law does not generally envisage evidence being admitted by sworn affidavit alone, and witnesses will normally have to be available for cross-examination by the defendant. As a general rule, Irish judges tend to be skeptical of survey evidence. The introduction of the Commercial Court of the High Court includes detailed provisions with regard to the agreement of facts and expert opinions prior to trial. The requirement for a claim to be of a minimum value of One Million Euros is dispensed with for Intellectual Property matters.</p> <p><i>Patents:</i> The patentee must show that the patent is infringed. If invalidity is alleged, the burden of proof is on the party making that allegation. In both cases the court must be convinced that it is more likely that the patent is infringed or invalid than not (balance of probabilities).</p>
Italy	Only damages/account of infringer's profit not deriving from the marketing of the seized products can be awarded.	Only damages/ account of infringer's profit deriving from an activity <i>not covered</i> by the licence can be awarded. In patent matters compulsory licences cannot be	<i>Burden of proving</i> the damage is put on the RO. This is a rather heavy burden to bear as it implies to estimate the market situation if the infringement had not occurred, and/or

		granted to the infringer, unless he/she proves to be in good faith.	the exact size of the profit made by the infringer in connection with the use of the infringed IP right. Usually, the RO is only asked to supply circumstantial evidence of lost profits/reputation damage, and then a Court expert is appointed for exactly determining the right amount thereof.
Latvia	In the absence of actual practice, it is not possible to provide any clarification on this.	In the absence of actual practice, it is not possible to provide any clarification on this.	According to general rules of Civil Procedure, each party shall prove the facts upon which its claims or objections are based. No statutory provisions defining the required evidence.
Lithuania	Yes. If goods were sold (were supposed to be sold) without a license is sufficient to establish damage.	No.	Civil IPR process does not differ from ordinary civil process. Any material, written, oral evidence, legally made photos, third party specialists, experts' assessment etc. The claimant bears the burden of proof.
Luxembourg	In principle yes, however, in this case it will be difficult to claim material damages. An option for the RO is to claim moral damages.	In principle no (principle of full compensation). However, the court's practice shows that in such case damages may be lower.	Plaintiff bears the <i>burden of proof</i> . Damages are evaluated <i>ex aequo et bono</i> , so the level of proof is not very high. No specific rules concerning proof of damages (need to prove consumers' confusion, loss in sales etc.).
Malta	Most likely no damages could be claimed. However, this provision has never been subject to the court's interpretation, therefore, the answer to this question remains questionable.	Nothing in law on this point.	Ordinary civil procedure rules apply. Claimant bears the <i>burden of proof</i> . Maltese courts have not yet developed any sophisticated models how to calculate damages in IPR

			cases.
Netherlands	In such case only the reasonable costs and lawyer's costs may be awarded.	This factor plays a role in assessing the compensation for damages.	<i>Free system of proof:</i> The party on whom the burden of proof rests (the party which claims damages) may provide proof of damages by all legal means.
Poland	The approach of civil courts varies in this respect. Criminal courts, which must often oblige the defendant to repair damage caused by criminal activity, mostly award damages relating to pirated goods seized and order their forfeiture at the same time.	If a license is granted by the RO, arguably no damages have been suffered. However, this is a purely hypothetical scenario, as RO usually do not license illegitimate goods.	The <i>burden of proof</i> as to actual amount of damages or equitable remuneration lies with plaintiff. Civil Procedure Code contains a provision that allows the court to determine the appropriate amount of compensation, should proof thereof be overly difficult for the claiming party. This provision is, however, very rarely used.
Portugal	Difficult to prove damage, if infringing products are not placed on the market.	The Court might take it into consideration as an act of good will and good faith of the infringer. Also, a reduction of the amount claimed by the RO could be previously negotiated, in case a licence is to be attributed.	The <i>burden of proof</i> lies with the party that alleges a fact, therefore, with the injured party. Exception: if the infringement is reported as a contractual breach, then the burden of proof shifts to infringer.
Romania	Yes, as long as the infringing deed could be proven, along with the prejudice, the cause-effect link between them and the guilt. In practice, there are only a few successful cases of this type as it is almost impossible to prove any damages when the infringing products have been seized by the customs for example. Nevertheless, when the court will start to deeply understand the meaning and the sense of the lump sum as damages	Generally no, because acquisition of licence has effects in the future and not in the past, when the damages were produced. However, there have been cases in practice when courts have considered the acquisition of licenses after the finding of the infringement as a recovery of damages.	The civil and criminal proceeding accepts any relevant proof which may clarify any of the relevant economic aspect as described in the directive: documents; invoices, accounting documents, customs report, and accoutres experts opinion, all relevant information and documents for the average licensees in the field, testimonies if necessary. The <i>burden of proof</i> is borne by the RH. However, in cases of civil claims submitted as part of a criminal trial,

	than it will be easier to receive damages even in such cases.		the law enforcement authorities gather evidence also in this respect.
Slovakia	Most likely not, since there is no material damage. In case there would be a material damage there is no reason why such damage would not be compensated. However, in this case non-material (moral) damage could be considered.	<i>(Note: contradictory assessments of experts)</i> I. The court will not take into account such agreement; however, the plaintiff will probably settle the case out of the court. II. Yes, the court as well as the plaintiff may take this into consideration.	Plaintiff bears the burden of proof. The defendant, is however, obliged to supply information. Any legal proofs of evidence are accepted, Slovak process is relatively flexible in this respect.
Slovenia	In general no provision which would preclude this (<i>except for patent infringement and specific breaches of copyright.</i>), but could be difficult to prove in practical terms. Also, there is no TM infringement without the commercial use of TM. When there is no commercial use, difficult to establish the damage for RH.	No.	<i>Burden of proof</i> on the RO. No formal requirements for proving the damages, any evidence is acceptable and it will be up to the court to decide if a respective fact can be deemed proven or not.
Spain	Yes, but only if there is evidence of damages and these damages have been assessed.	No. It would be considered an agreement between the RO and the infringer.	(i) RO must show evidence of damages occurred. (ii) RO must choose the assessment criterion, which from that moment cannot be changed through the judicial proceedings. (iii) RO must assess damages in a way that approaches the real damage. (iv) In the case there <i>isn't a reasonable quantification</i> , Spanish jurisprudence <i>does not award any</i>

			damages compensation (except for the 1% of the infringer's business total amount in the case of a trademark or a design infraction).
Sweden	<p>Yes, a reasonable royalty is applicable. In recent case law another calculation model has been used. The reasonable royalty is decided using a figure based on a low estimate of the profit the infringer would have made, had he sold the products. The aim is not to compensate the RO's loss but to establish a reasonable compensation for the use of their brand. If the RO can prove further damages, additional compensation can be rewarded. Historically, the RO have also been compensated for goodwill loss since just the mere fact that counterfeits are imported, may impact negatively on the trademark's goodwill and press prices.</p>	No. These are two separate issues that should not be mixed.	<p>RO bears the <i>burden of proof</i> for the scope of damage incurred. If full evidence cannot be presented at all/only with difficulty, the court often has to estimate the damages to a reasonable amount in accordance with the <i>rule of diminution of the burden of evidence</i>.</p> <p>RO must 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 ROs spend a lot of costs to provide evidence and the damage claim is not granted in full, then the RO risks not getting full compensation for litigation costs.</p> <p>In cases where the RO faces such difficulties /chooses not to spend too much costs on producing the evidence, the court can estimate the damages to a reasonable amount. However, circumstances for the difficulties in presenting full evidence have to be shown.</p>

United Kingdom	Yes.	In some cases yes. Moreover, the Ministry of Justice stated that <i>it is currently possible to acquire licences for software applications after an infringement has been discovered without any penalty being imposed.</i>	In civil cases the court will admit any factual if it is logically probative and not oppressive or unfair to the other side. The defendant must be given fair notice of the evidence. The RO as a starting point bears the burden of proving at least one act of infringement and the damages caused. <i>Copyright:</i> the burden is on the claimant to prove damages, but not to an exhaustive degree of certainty, given that some loss of sales is assumed.

COUNTRY	Proof of damages Can the rights owner obtain needed evidence concerning damages from the infringer (e.g. on gross income)?	If other factors are taken into account in the assessment of damages (e.g. strength of trademark, investment, price erosion, actual lost sales vs. all infringing sales, breach of contract, parallel trade), what evidence is required from the rights owner in this regard?	Recovery of Costs What legal costs of the rights owner can be recovered in successful civil litigation?
Austria	RO may demand the rendering of accounts from the infringer.	These factors may be taken into consideration. The usual evidence is an expert's opinion.	<p>Legal costs for the <i>lawyers' fees and technical counsel</i> (patent attorneys) are refundable, if they accrued for appropriate legal measures. For the costs of the <i>litigation</i> itself no formal proof is necessary. Cost for <i>demonstrating the infringement and the scope of the RO's prejudice</i> have to be established reasonably, however there is no formal requirement of proof.</p> <p>Note: costs of lawyers and patent attorneys can only be recovered according to the Code of Lawyer's Tariff, even if the rights owner actually has to pay higher fees to his lawyer.</p>
Belgium	When there are serious, precise and corroborating presumptions that a party is in possession of a document or any information containing proof of a relevant fact, the courts may order the delivery thereof. The courts may also appoint independent experts, or allow the RH to carry out a <i>saisie-contrefaçon</i> on the premises of the infringer to gather evidence of the	<p><i>Reputation of a TM:</i> market surveys or polls, documents proving the presence of the TM within a particular sector, advertisements.</p> <p><i>Price erosion and the investments made for the promotion:</i> invoices, promotion campaigns, documents proving the price erosion (e.g.</p>	court-appointed experts can normally be recovered in full. A distinction has to be made between claims which can be assessed in money and those which cannot be assessed in money. For claims which cannot be assessed in money (typically, any claims for an injunction), the basic deposit payable is €1,200. For claims which can be

	scope of the infringing activities.	<p>accountancy, contracts with distributors).</p> <p><i>Lost sales:</i> comparison between the turnover before and after the infringement. In the absence of any document proving such damages, the courts may rule to not allow any damages due to the absence of proof. However when the damages cannot be precisely proved, it does not mean that no prejudice has been suffered. In such cases, the courts generally award a lump sum.</p>	<p>assessed in money (typically, any damages claims), the deposit depends on the amount of the claims to the extent that they have been granted by the court. For instance, if the court awards a €25,000 damages claim, the maximum indemnity is €4,000, while the minimum indemnity is €1,000; for a damages claim amounting to €500,000, the maximum indemnity amounts to €20,000, while the minimum indemnity amounts to €1,000.</p> <p>Moreover, in general terms it is difficult for the RO to adduce evidence of the real amount he has paid as lawyer's fees, since the ethical rules of the Bar prevent the communication to the adverse parties and the courts of time sheets, hourly rates, invoices, etc.</p>
Bulgaria	Yes, the court may, upon the plaintiff's request, oblige the defendant to present evidence under his control.	All listed factors are relevant and should be supported by expert report on the value of the trademark, invoices for advertisement and other activities in building the reputation of the brand, public and consumer polls, expert report on trademark erosion, etc.	Court fees and expenses of judicial experts, as well as for lawyers which have been paid by the plaintiff are recovered.
Croatia	Where the owner of an intellectual property right, acting as the plaintiff, claims in the lawsuit that there was an infringement of that right in connection to commercial activities directed at obtaining commercial or economic gain, and makes that	As a rule, the right owner is compensated for the total damage suffered by the unlawful act of the infringer. In determining the amount of damages, all relevant circumstances will be taken into account, provided that the plaintiff	If the plaintiff's lawsuit in the civil proceedings is successful, the court will order the defendant to reimburse the plaintiff for the costs of the proceedings (Article 154(1) of the Civil Procedure Act). The costs of the civil proceedings

	<p>plausible during the proceedings, and where the plaintiff refers to bank, financial or similar economic documents and similar evidence during the proceedings, claiming that these documents are in possession of the other party or in the other party's control, the court will order the latter party to submit that evidence within a fixed period of time.</p> <p>Confidential information has to be protected in doing so.</p> <p>Whether the request to order delivery of certain information is justified is decided based on the actual circumstances of each case. In particular, the proportionality of the request to order the delivery of information compared to the infringement or threat of infringement of an intellectual property right is taken into account.</p> <p>Direct infringers as well as other persons infringing or participating in the infringement of an intellectual property right on a commercial scale are obliged to deliver the information. This obligation covers persons who, within their commercial activities, possess the merchandise infringing an intellectual property right, persons who are, within their commercial activities, acting as users of services infringing the intellectual property right, but also persons who provide commercial services used in activities infringing an intellectual property right. Likewise, the persons who are named by any of the previously</p>	<p>relied on such facts and presented evidence to prove them.</p>	<p>include all payments made during or in connection with the proceedings (e.g. court fees, photocopying of documents, cost of document translation, postal fees, fees of expert witnesses, interpreters, witnesses, costs of securing evidence and similar). The costs of the civil proceedings also include attorney's fees and fees of other persons entitled to such a payment (e.g. the law recognizes the costs of the party represented by the state attorney's office, such costs being assessed according to the Tariff for Attorney's Fees).</p> <p>In deciding which costs are to be paid to the party, the court will take into consideration only the costs which were necessary for conducting the proceedings. Upon the request of a party, the court will decide which costs were necessary and in what amount, taking into careful consideration all the circumstances of the case. If there is a prescribed tariff for attorney's fees or for other costs, such costs will be calculated according to the applicable tariff (Article 155 of the Civil Procedure Act), which means there is a legally prescribed objective criterion, according to which the court decides on the reimbursement of costs.</p> <p>This means that, although the costs of legal representation are considered appropriate in principle, the court will not take into consideration each action undertaken</p>
--	--	---	--

	<p>mentioned persons as those involved in production or distribution of goods or provision of services infringing an intellectual property right, are obliged to deliver the information.</p>		<p>by an attorney, or each petition drafted by the attorney upon request of a party. The court will take into consideration only the action that it considers necessary for the success of the party to which costs are being reimbursed, provided that action is prescribed by the Tariff for Attorney's Fees and Cost Compensation, adopted by the Croatian Bar Association (Articles 18 and 19 of the Legal Profession Act).</p> <p>However, under the establishes case law the appropriate cost of legal representation by an attorney having its seat outside of the territorial jurisdiction of the court before which the civil proceedings were conducted, cannot generally be higher than the costs of an attorney having its seat within the territorial jurisdiction of the court.</p> <p>The decision on the necessary costs does not depend on whether the attorney already received the fee for certain services from the party or not, or whether the attorney and the party agreed on the payment of the services according to the principle <i>pactum de quota litis</i>.</p> <p>In fact, the obligation of a party to reimburse its attorney for costs and to pay the attorney's fee is not an obligation to reimburse the costs of the civil proceedings; however it can result in a dispute between the party and the attorney, which will be resolved in the separate proceedings</p>
Cyprus	Possibility to apply for discovery, but	The right holder would have to	<i>Advocates' fees</i> on the basis of the

	<p>the infringer does not comply normally. Also the option for the Court in certain circumstances, to order the disclosure of evidence in the possession of the infringer and in cases of infringement on a commercial scale to order, under conditions, access to bank or commercial documentation in the possession of the infringer, as well as, details of the distribution networks involved in the infringement.</p>	<p>produce credible documentary or oral evidence to prove these facts on the balance of probabilities. The witnesses will be subject to cross examination by the infringer's advocate and the Court will decide.</p>	<p>existing Court scales are recoverable at the discretion of the Court.</p> <p><i>Costs of expert evidence and travelling costs</i> may also be recovered. The costs must be necessary for the case and are at the Court's discretion.</p> <p>Usually notice to admit facts is served and if they are not admitted and right holder incurs costs, the Court will take it into account when assessing.</p>
<p>Czech Republic</p>	<p>Yes.</p>	<p>There are no standardized requirements regarding the type, scope or quality of evidence necessary to prove damages. This is determined on a case-by-case basis.</p> <p>The court can take into account such factors as the value, significance and strength of the IP right (<i>although as a practical matter courts typically do not consider the direct effect that the infringing activity has had on the owner's profitability or price erosion</i>).</p>	<p>In principle, all of the <i>costs of proceedings necessary for the effective protection/enforcement of one's IPRs</i> can be recovered by the successful party, although these can be reduced or eliminated in the case of wins that are only partial.</p> <p>In practice, courts tend to award only those costs that are <i>clearly proved</i> (e.g. by invoice for expert opinions, calculation of travelling costs, proof of payment for the court fee), and that are <i>clearly necessary</i> for the effective protection/enforcement of the</p>

			rights.
Denmark	Yes, through the civil search of infringer's premises, and right of information.	Statements or opinions from relevant trade associations, from economical or technical experts with experience within the relevant field or from accountants.	<p>If successful, RO can recover the following costs:</p> <p>Lawyer's fees: always cover only a fraction of the actual legal fees expended by the RO. No evidence is needed to prove these costs.</p> <p><i>Fees of own technical counsel:</i> (e.g. in patent cases) cover only a fraction of the actual fees expended by the RO. A copy of the invoice(s) from the technical counsel will suffice as evidence of the fees.</p> <p><i>Fees of experts appointed by the court.</i></p>
Estonia	There is an exception regarding the burden of proof related to the claim for unfair profits where the infringer shall inform the entitled person of the nature of revenue received by the violation.	<p>These factors have usually not been presented when making claims for compensation of damages. Therefore, no relevant court practice available.</p> <p>In similar cases the courts have requested the plaintiffs to present <i>relevant written evidence, like financial reports, opinions of auditors etc.</i></p>	According to Civil Procedure Provisions the costs of an action shall be borne by the party against whom the court decides, among others this includes the compensation of the other party for any necessary <i>extra-judicial</i> costs which arose as a result of the court proceeding. In cases where ordering payment of the opposing party's costs from the party against whom the court decides would be <i>extremely unfair or</i>

		<p>Civil Procedure the costs of an action shall be borne by the party against whom the court decides. Among other, the party against whom the court decides is required to compensate the other party for any necessary extra-judicial costs which arose as a result of the court proceeding. At the same time, the law provides that in cases where ordering payment of the opposing party's costs from the party against whom the court decides would be extremely unfair or unreasonable, the court may decide that the costs must be borne, in part or in full, by the party who incurred the costs.</p> <p>In the case an action is satisfied in part, the parties shall bear the procedural expenses in equal parts unless the court divides the procedural expenses in proportion to the extent to which the action was satisfied (Article 163 of Code of Civil Procedure). The procedural expenses in civil court proceedings are the legal costs</p>	<p><i>unreasonable</i>, the court may decide that the costs must be borne, in part or in full, by the party who incurred the costs.</p> <p>The procedural expenses in civil court proceedings are (i) <i>the legal costs</i> and (ii) extra-judicial costs incurred by a participant in a proceeding.</p> <p>Regarding the recovering of costs of advocates and advisers, civil procedure law prescribes that if a participant in the proceeding is required to bear the costs related to the legal representative or adviser of another participant in the proceeding and the amount of the costs in money has been determined, the court shall order payment of the costs of the legal representative or adviser to a <i>reasoned and necessary</i> extent. In addition, the Government has established the maximum amounts to the extent of which payment of expenses on contractual representatives and advisers can be claimed from other participants in a proceeding.</p>
Finland	National provision more favourable for the RO than IPRED. Customs intervention often effective. Seizure and discovery procedure.	Goodwill damage difficult to prove (need to establish the strength of a trademark). Price erosion difficult to prove and estimate.	Costs of the trial preparation, participation at proceedings, fees of the attorney and counsel. Expenses not awarded automatically, must be claimed.
France	Yes, via a right of information (can be used against the infringer, but also	-	Certain costs which occurred due

	against third person who detains the goods, uses the goods etc.).		to the trial can be recovered during litigation. Equity limits the full recovery of costs.
Germany	<p>Yes, the RO has rights of information against the infringer and also against third persons if the infringement is committed on a commercial scale (right of information).</p> <p>In cases of commercial scale infringements, the trademark owner can request the production of banking, financial or commercial documents or an adequate access to such documents which are in control of the infringer and which are necessary for the enforcement of the damages claim. In case of confidentiality of the documents, the court takes the necessary measures to guarantee the required protection in the individual case.</p>	<p>As mentioned earlier these elements might be taken into account in the calculation of damages according to the three methods available. There are no special rules concerning the proof of these factors, i.e. the general rules of civil procedure apply.</p>	<p>The losing party has to bear the costs of the case, especially the costs of the winning opponent, if they were necessary for the useful enforcement.</p> <p>The legal fees and expenses of the attorney of the winning party have to be covered as well. Recoverable fees include pre-trial activity, e.g. issuing of a warning letter.</p> <p>The costs of a patent attorney in trademark, design right, patent law, plant variety protection and utility model law cases have also to be covered by the losing party if they were necessary.</p>
Greece	<p>Pre-trial discovery not available in Greek law. The plaintiff must precisely identify nature, position, contents of the requested documents, even page number of the defendant's commercial records, reference numbers etc... Almost 90% of all discovery requests are rejected by the courts as vague.</p>	<p>Reputation of IPRs (copies of last <i>Interbrand report</i>, sales volumes, published articles, market searches, advertising campaigns), evidence relating to risk of confusion/dilution (market searches, letters of complaints evidencing consumer confusion, witnesses), copy of the license agreement setting the amount of royalties, defendant's intent or gross negligence (other decisions issued against the same infringer), defendant's financial status.</p>	<p>Legal costs range between EUR 500-2500. No evidence required to prove these costs.</p>

<p>Hungary</p>	<p>According to the relevant IP laws in Hungary the right holder may demand that the infringer give information on the identity of third persons involved in the production and distribution of the infringing goods or in the provision of infringing services and of their channels of distribution. The information to be provided include details of <i>all participants taking part in the distribution of infringing goods and services</i>, data on the persons in possession of such goods and the wholesalers and retailers involved in their distribution, as well as quantities and prices of infringing goods manufactured, distributed, used or ordered.</p> <p>Furthermore, communication of banking, financial and commercial data may be ordered by the court on request of the right holder as a <i>prerequisite of a precautionary measure</i>, i.e. when these data are needed to establish that the recovery of unfair profits or the payment of damages would probably be endangered and thus precautionary seizure of assets or blocking of bank accounts is called for.</p> <p>On the other hand, such data may be ordered to be communicated (and underlying documents presented) as a <i>measure of securing evidence</i>, i.e. if one party has already substantiated his or her claims “to the extent that can be expected”, the other party</p>	<p>The Hungarian system on proof is a “free evidencing system”, there are no limitations concerning the form of the evidence. The court may accept any evidence which is capable of revealing the facts, such as copies of invoices proving the advertising activity and sales of goods under the trademark in question</p>	<p>Pursuant to the Hungarian Civil Procedure Act legal costs include costs reasonably incurred by the parties in connection with the dispute before proceedings were commenced or out of court (e.g. translation fees, cost of correspondence, travelling costs), including costs relating to the production of evidence (e.g. experts' fees, obtaining authenticated trademark certificates) and the cost of representation (e.g. lawyers' fees).</p> <p><i>Evidence required to prove costs:</i></p> <ul style="list-style-type: none"> (i) invoices on all costs and fees; (ii) in case of hourly rate applied to services (e.g. lawyer's fees, fees of translation) it is advised to submit detailed timesheets; (iii) instead of invoices regarding lawyer's fees, right holder may submit an agreement with its lawyer in this relation.
-----------------------	---	---	---

	<p>may be ordered to provide documents or other evidence, and banking, financial or commercial data. Failure to do so entails a partial reversal of the burden of proof, i.e. the court deems the allegations of the other party undisputed.</p>		
Ireland	<p>The court may order <i>discovery</i> if the other party has failed, refused or neglected or ignored the right owner's request. Other procedures such as the <i>Anton Piller order</i> and <i>Norwich Pharmacal order</i> are also available.</p>	See in specific IP Codes.	<p>Usually the costs covering the costs of the barristers, <i>but not those of the solicitor or patent attorney</i>, will be awarded to the winning party. The award of costs may be denied if the awarding is considered unfair due to e.g. the conduct of the winning party etc. Under the Rules of the Commercial Court a judge must decide on the granting of costs at the determination of the Interlocutory Stage save where it is not justly possible.</p>
Italy	<p>In order to gather evidence it is common for ROs to apply for a preliminary search order <i>Descrizione</i> (can be granted also during the trial).</p> <p>The purpose of this order is to allow the RO to obtain a discovery of the infringer's account books information on the sellers, buyers and manufacturers of the infringing goods.</p> <p><i>Bank accounts</i> may be the subject of <i>trial or pre trial discoveries</i> only in case of <i>piracy</i>, i.e. <i>wilfully and systematically</i> counterfeiting/misappropriation of IP</p>	Ordinary rules on evidence apply.	<p>The Losing party is ordered by the court to reimburse the winning party for the expenses and legal fees of the proceedings, including: (i) Lawyers' fees, (ii) Court experts' fees (iii) Fees of IP attorneys who acted during the Court expert stage, if any.</p> <p>However, all these expenses are determined by the Court according to an Official Tariff, which usually is much lower than the real costs expended by the RO.</p>

	rights.		
Latvia	Civil Procedure Law provides that in matters of IPR infringements the courts, based on a reasoned request from the plaintiff and taking into account the rights of to the parties involved in the matter to protection of commercial secrets, may require information regarding the relevant manufacturer, distributor, supplier, wholesaler and retailer of the goods or the relevant service provider and distributor, information regarding the volumes of infringing items manufactured, distributed, received or ordered or the quantity of services provided or ordered, as well as the price which was paid for them.	No statutory provisions on these issues.	<p>In principle, Civil Law grants compensation for all damage suffered as a result of an IPR infringement. This includes additional expenses. Latvian courts grant compensation for reasonable costs such as translation costs, etc.</p> <p>RO is entitled to recover litigation expenses, such as court fee, the fees paid to representatives and other expenses as prescribed by the Civil Procedure Law. However, the Civil Procedure Law provides recovery for legal costs of representation only of sworn advocates, not so for patent or trademark attorneys. Regarding lawyers' fees there is diverging practice. Under Civil Procedure Law least 5% of the claim's amount is granted. Courts can also compensate lawyers' fees exceeding the limits stated in the Civil Procedure Law.</p> <p>Usually, the evidence required to prove these costs is adduced by way of invoices and confirmations of payment thereof.</p>
Lithuania	Yes, but only with a bailiff. This procedure is applied only when evidence could be destroyed.	Strength of a TM, investment etc.	<p>RO must prove that the costs were <i>necessary</i> and <i>proportionate</i> for the purpose of demonstrating the infringement.</p> <p><i>Legal costs</i> of an attorney: maximum tariffs recommendations, where the</p>

			<p>following <i>criteria shall be considered</i>: complexity of the case, complexity of legal services, novelty of the legal issue, necessity for a counsel to move to another location etc.</p> <p>Court often orders a detailed certificate of costs.</p>
Luxembourg	<p>Yes. If infringer is in possession of needed evidence, the judge can order the infringer to provide the needed evidence. <i>Right of information</i> can also be used for such request (also against intermediaries).</p>	<p>No specific rules concerning the proof of damages. RO has to provide all relevant evidence.</p>	<p>Losing party must bear fees of experts appointed by the court, costs of the bailiff. The court can order the losing party to bear part/all of the legal costs incurred. If it's inequitable for one party to bear all expenses, judge can determine the amount to be paid by the losing party. If the costs are disproportionate or unnecessary, the judge will order recovery of a part of the costs. Expenses essentially comprise lawyers' fees and technical experts' fees. No limitations to the recovery of the costs.</p>
Malta	<p>Yes, by filing an application to the court in that respect.</p>	<p>Mentioned in the law but yet untested by the courts.</p>	<p>The costs which may be recovered include court registry fees, lawyer's fees and fees of court-appointed experts.</p> <p>Extra-judicial costs cannot be recovered.</p> <p>The only costs which may be recovered are judicial costs (costs associated with the proceedings and which are calculated by the Registry of the court).</p>

Netherlands	RO may request that an account be rendered of the profits made. Right of information including the seizure of evidence on documents may be used.	RO on whom the burden of proof rests may demonstrate the damage by all legal means. In order to demonstrate that the TM is well known or strong, a market survey, for example, may be carried out.	In principle, all costs may qualify for compensation. The court will assess the rates stated in combination with the hours according to the complexity of the case.
Poland	RO may use his right of information against the infringer under the Industrial Property Act and the Copyright Act. Under both Acts the information may be sought either during or even before legal proceedings are instituted.	These factors are not to be taken into account while assessing the actual size of the damages.	<p>According to the general principles of Polish civil proceedings, the prevailing party is entitled to receive reasonably incurred expenses. This embraces <i>court fees, other expenses paid during the proceedings</i> (experts, translations, etc.), as well as, cost of <i>legal representation</i>. In practice, it is for the particular judge hearing the case to determine the scope of costs returned to the prevailing party, especially with respect to the counsel's fees. For this, courts use official tariffs which are set at a rather low level.</p> <p>Experts are appointed by the court, so determination of their fees does not pose a problem. Otherwise, the prevailing party must document all the costs incurred and it is for the judge to evaluate whether they were reasonable.</p>
Portugal	<p>The injured party is entitled to request the disclosure of certain information related to the infringement as listed in the specific bills.</p> <p>If the infringement is committed on a commercial scale, RO can use his right of information also against third</p>	As the burden of proof lies with the party that alleges a fact, if these factors are to be included in the claim, they must be sufficiently substantiated. The Portuguese Civil Procedural Code does not establish any limitation as to the type of evidence offered by the parties.	<p>New amendments to the Judicial Fees Code, allowing the successful party to claim from the counterpart, upon a favourable ruling:</p> <p>(i) The amount paid as judicial fees in the proportion of the favourable ruling;</p> <p>(ii) All the reasonable and demonstrated expenses incurred by</p>

	persons being in possession of infringing goods or services/ rendering illicitly services/ having participated in the production or distribution of its products or services. Also, the information disclosure obligation is extended to banking, financial, accounting and commercial documentation.		the successful party; (iii) 50% of the amount paid as judicial fee to cover the lawyer's fees. The judicial fee will vary according to the overall amount claimed in the proceedings.
Romania	Yes, right of information is used, in case of IP rights being infringed. Communication of banking, financial or commercial documents under the control of the opposing party is ordered. Measures to preserve the evidence are: taking of samples, physical seizure etc.	Consideration of other elements is possible, the relevant evidence is determined on a case-by-case basis: e.g. terminated agreements as a result of better offers received from the infringing parties; decrease of original sales vs. increase of counterfeited/pirated sales, as resulting from accounting documents; expert analysis about the price erosion; test purchases for comparison of prices; breach of contract and existence of punitive damages clauses etc.	The losing party shall pay the legal costs. Usually, such <i>legal costs</i> may include: <i>lawyers' fees</i> , fees of <i>judicial experts</i> (including technical, accounting experts etc.), fees of <i>experts appointed</i> by the winning party, <i>court fees</i> , <i>witnesses' expenses</i> etc. The judges may not decrease the court fees, procedural taxes, payment of experts, reimbursement of witnesses, as well as any other expenses proved to be undertaken by the winning party. The judges however have the right to decrease the lawyers' fee. The actual payment proof is required.
Slovakia	The court may request the evidence in the possession of the defendant/third party (e.g. right of information).	In contradictory process it will depend mainly on the plaintiff to what extent he is able to convince the court about his arguments, no prescribed process as to evidence, Slovak system is relatively open. What has to be proved is in particular the extent of the infringement, its duration and the consequences.	The law contains only demonstrative examples of legal costs, which means that any fees which have been <i>usefully spent</i> to defend one's rights can be claimed. No special proceedings are required to assess the evidence in relation to the legal costs. The costs which are not usual should however be justified by the applicant and it will depend on the

			court's assessment whether such costs will be taken into consideration or not. Lawyer's fees are reimbursed according to a special law (advocate tariff).
Slovenia	Yes, via a <i>submission duty</i> which is not only applied to documents, but also to any other evidence that can only be obtained from the opposite party.	No formal requirements for evidence.	Only costs which are necessary for the purposes of the procedure, as determined by the court. Acceptable costs: e.g. travel, accommodation, wage compensation, expert translators, lawyers, experts, translators' fees etc.
Spain	Trademarks Act foresees the possibility of the RO to demand the infringer's account books.	Trademark Law and the jurisprudence foresee a penalty when the damages have been done to a notorious or a well-known trademark. Parallel trade is foreseen at a criminal level.	Among others: investigation costs the RO may have incurred to obtain reasonable evidence.
Sweden	Yes.	Full evidence is needed, unless special rules apply. If it is too complicated or costly to present full evidence, the court can use the special procedural rules of relief of evidence. This does not mean that no evidence is required, only that the RO does not have to bring full evidence. The court will then make a discretionary estimation of the amount of damages. Some sort of reasonableness is required; at the very least it can't be more likely that the damages do not equal the	The general rule is that the losing party has to pay the legal costs of the winning party. All costs related to the litigation are recovered as long as they have been <i>reasonable for protecting the RO's interests</i> (such as attorney's fees and costs for expert witnesses). If the RO is unable to justify their expenses, the compensation for damages can be reduced by the court to a reasonable amount.

		rewarded compensation than that it does.	
United Kingdom	General rules of civil procedure apply. Search orders for inspection and other relief (<i>Anton Piller order</i>), freezing orders for the retention of assets (<i>Mareva injunctions</i>) and pre-action orders to disclose information (<i>Norwich Pharmacal orders</i>). [NOTE: A Norwich Pharmacal order would be obtained against a third party not the infringer. Information could be obtained from the infringer under the usual disclosure rules]	Already described in previous sections.	The court has a discretion as to what costs are payable by one party to another and the amount of those costs. The usual rule is that the unsuccessful party will be ordered to pay the successful party's costs. Costs claimed must be reasonably incurred and reasonable in amount. The civil courts assess costs on either the <i>standard basis</i> or the <i>indemnity basis</i> . <i>Standard basis</i> costs are usually ordered. On the standard basis, the court is required to apply an additional test of proportionality such that only costs that are proportionate to the matters in issue will be awarded. Typically, 70% to 80% of the successful party's actual costs will be awarded. <i>Indemnity costs</i> are ordered only where there are factors such as blatant conduct by the paying party. A higher proportion of actual costs incurred is likely to be awarded on the indemnity basis as compared to the standard basis. In practice, the civil courts award full litigation costs very rarely. Cost caps apply in the Patents County Court.

COUNTRY	What percentage of the actual legal costs expended by the rights owner is typically recovered in successful civil litigation?	What other expenses incurred by the rights owner can be recovered in successful civil litigation?	
Austria	Depending on the agreement with the lawyer: In rather simple cases, usually 100 % of the actual legal costs can be recovered. In complex cases the actual lawyer's fees would exceed the refundable costs pursuant to the lawyer's tariff. A <i>recoverable percentage of 50 to 70 %</i> is common.	If established that costs for identification and research, for experts' statement etc. were necessary for a successful litigation, these costs can be recovered.	
Belgium	The legally fixed deposit awarded to the winning party includes all the winning party's <i>lawyers' fees</i> ; the winning party cannot ask the court to award supplementary costs against the losing party.	The costs and expenses aimed at the detection and monitoring of infringing activities are usually considered to be part of the prejudice. Thus, it is usually considered that the infringement forced RH to invest time and money to detect the infringing activities The loss of time caused by the infringement is sometimes also taken into account.	
Bulgaria	Actual legal costs are awarded by the court proportionately to the damages awarded by it.	Storage and destruction costs	
Croatia	The answer to this question is actually contained in the answer to the previous questions since the right owner is reimbursed by the court in the civil proceedings only for those costs which were necessary to conduct the proceedings, and this necessity depends on the circumstances of a particular case. If the party is represented by an attorney, the costs of legal	In addition to costs awarded to the right owner as remuneration for conducting the court proceedings, the right owner is also entitled to costs closely connected to the damage suffered due to the infringement of his rights, if he claims such costs and proves them.	

	<p>representation that are to be paid by the opposing party are determined by the court, applying the tariff in force at the time of taking each individual action. The amount of the fee for legal representation is prescribed in a range – according to the value of the dispute. Court fees are determined according to a separate act (Court Fees Act).</p> <p>The costs of the civil proceedings encompass also the amount of tax for attorney's services, while the costs considered unnecessary have to be paid by the party that caused them, and such party has no right to be reimbursed for such costs even when his lawsuit was successful.</p>		
Cyprus	<p>Very difficult to say, not aware of reliable information. The higher the scale of the subject matter, the higher the award of costs and thus the less the RH has to bear in excess of the award to be made by the Court. Gessed amount 50%.</p>	<p>Investigator costs can be claimed as expert evidence, according to court's discretion.</p>	
Czech Republic	<p>Fees for trial counsel (attorney and patent agent fees) are calculated and compensated on the basis of <i>special legislation</i> that deals with the professional fees of these professions. This legislation establishes what fees can be awarded on the basis of the type of claim and the amounts at issue in the particular proceedings.</p>	<p>Costs would typically include fees for trial counsel (attorney fees, patent agent fees), costs of expert opinions and other evidence, court experts' fees, court fees, cost of interim measures, etc., paid by the successful party.</p> <p>Fees for attorneys are compensated according to a special legislation.</p> <p>Courts virtually automatically award</p>	

	ROs typically do not need to prove that the trial counsel fees have been really paid, or in what amount. The amount of fees awarded is predominately based on the amounts at issue in the lawsuit. The only pre-requisite is that the successful party was represented by a licensed attorney (patent agent).	attorney fees, attorney traveling costs and cash costs (calculated on the basis of the relevant legislation). All other costs are subject to more in-depth review.	
Denmark	If successful, the RO will typically recover <i>10-50% percent</i> of the actual legal costs expended.	Test purchases, storage costs.	
Estonia	<p><i>Legal costs</i> (e.g. state fee) are usually recovered 100% in case of successful litigation. The recovery of <i>extra-judicial costs</i> (e.g. lawyers and advisers fees) may depend on several circumstances but usually are <i>not</i> recovered 100%. The Government Regulation sets the <i>maximum amounts</i> to the extent of which payment of expenses on contractual representatives and advisers can be claimed from other participants in a proceeding. All these amounts <i>directly depend on the sum of claim</i>.</p> <p>For example, in case of claim in the amount of 10.000 EEK - the maximum sum of recovery of lawyers and advisers fees is 5.000 EEK, in case of claim in the amount of 100.000 EEK - the maximum sum of recovery is 50.000 EEK, in case of</p>	<p>The procedural expenses which may be recovered in civil court proceedings are:</p> <p>(i) the <i>legal costs</i> (state fee, witnesses, experts, translators, costs of evidence, inspection etc.) and</p> <p>(ii) <i>extra-judicial costs</i> (lawyers' fees, technical experts, bailiff's fees, costs of possible pre-trial proceedings etc.)</p> <p>In case an expertise is made prior civil court proceedings (and not by court's order), these expenses shall <i>not</i> be claimed as a <i>recovery of procedural expenses</i> but as a <i>damage</i>.</p> <p>In case the expertise was ordered by court, relevant expenses shall be recovered as procedural expenses in case of successful civil litigation.</p>	

	<p>claim in the amount of 1.000.000 EEK - the maximum sum of recovery is 270.000 EEK and in case of claim in the amount of 2.500.000 EEK - the maximum sum of recovery is 360.000 EEK.</p> <p>There is <i>no common court practice</i> which fees could be considered as reasonable and each judge shall decide this at his or her discretion. There are no relevant statistics available.</p>		
Finland	Not possible to state the exact percentage, legal costs which are proven and reasonable are usually recoverable.	If experts are appointed on a request by one party only, costs will be born by this party alone. However, losing party will have to pay all reasonable costs incl. experts' costs.	
France	-	-	
Germany	<p>As this largely depends on the agreement between the rights owner and his lawyer no certain percentage can be stated.</p> <p>The rights owner's claim to have his legal costs reimbursed by the infringer is limited to the statutory lawyer's fees. These fees are generally calculated according to the value of the case. If the lawyer agrees with the right owner that his fees shall be based on the statutory rules then 100% of the costs can be recovered. On the other hand, if there is an individual cost agreement with the lawyer (e.g. payment based on the time spent on the case) and the</p>	All costs necessary for the case, these may include costs for identifying the infringer, and for obtaining experts' statements.	

	<p>fees exceed the statutory ones, the rights owner would have to bear these additional costs himself.</p> <p>Moreover, for copyright infringements there have been in place for some years special rules limiting the recovery of costs from private persons which are solved outside of / before court proceedings. An amendment of these rules will be adopted shortly. Once the new rules are in force, a private person will generally owe the rights owner only around €155 for the pre-trial costs of the rights owner's lawyer - provided the infringement was not for a commercial purpose and it is the first infringement which the rights owner enforces against him.</p> <p>The aim of this special provision (§ 97a para 3 of the Copyright Act) is to protect consumers from excessive claims. At the same time, the recoverable amount of approximately €155 allows rights owners to effectively pursue infringements against consumers. The provision thus creates an appropriate balance of interests and is in line with the Enforcement Directive.</p>		
<p>Greece</p>	<p>Only a small percentage of the actual legal costs is recovered.</p>	<p>Costs of research, experts' statements are not separately recovered; only within the overall amount of legal costs. Still, there the court takes into consideration if the case requires answering difficult</p>	

		technical and legal issues.	
Hungary	According to Hungarian legislation, the totality of costs may be recovered. However, the practice shows that this largely depends on the discretion of the court, which has the liberty to decide which activities and fees were <i>reasonable</i> and which were not.	None.	
Ireland	80%	Expert witnesses expenses	
Italy	Usually only about 30% of the actual legal costs are recovered.	Costs of identification and research and waste of time RO's employees due to the necessity of tackling the infringing activity.	
Latvia	Case law is very diverging in this regard.	Civil Procedure Law defines the costs related to the adjudicating of matters, namely: (i) amounts which must be paid to witnesses and experts; (ii) costs related to the examination of witnesses or conducting of inspections on-site; (iii) costs related to searching for defendants; (iv) costs related to execution of court judgments; (v) costs related to the service and issue of true copies of statements of claim, of court summonses and translations; (vi) costs related to publication of notices in newspapers; (vii) costs related to security for a claim; and (viii) costs related to the safeguarding, and the preparing of an inventory of an estate.	

Lithuania	RO can recover 100% of legal costs in successful litigation.	Witnesses, experts, translator services, costs of inspection, curator fees etc.	
Luxembourg	No clear rules concerning the recovery of the legal expenses, courts have great latitude in granting the recovery of the legal expenses. The percentage of legal costs typically recovered in successful litigation lies in general between 10-30%.	Recoverable expenses are: <i>legal costs and lawyers' fees</i> . Expenses related to research could be considered to be part of the prejudice. However, no case law on this.	
Malta	Only judicial costs can be recovered.	Only judicial costs can be recovered. No extra-judicial costs may be recovered.	
Netherlands	Not possible to state a percentage here, because of the huge differences between the various cases.	Costs to establish damages and liability include experts' costs such as the costs of legal advice and collecting evidence. Out-of-court costs include the costs of serving notice of default and out-of-court debt collection costs.	
Poland	Usually all costs other than the counsel's fee are awarded to the prevailing party. As regards the cost of legal representation, only a portion (sometimes relatively small) thereof is awarded to the prevailing party.	In principle, return of such expenses should be awarded to the prevailing party, provided that the court considers them as reasonable.	
Portugal	As a favourable ruling entitles the successful party to claim all the expenses incurred with the	All reasonable and demonstrated expenses can be claimed from the counterpart.	

	proceedings to the unsuccessful party, the actual recovery of the costs will vary case by case, according to the solvency of the unsuccessful party.		
Romania	The <i>legal costs</i> other than lawyer's fees are recovered 100%, while the lawyer's fees recovery may vary between 66% and 100%. <i>The decrease of the lawyer's fees is a very rare situation.</i>	Only the judicial legal costs are recovered (i.e. only costs strictly related to the litigation and the official course thereof; it is <i>less likely</i> to get in court the recovery of an expert analysis conducted <i>prior to the trial</i> , but only for the expert analysis conducted <i>during the trial</i> and upon approval and appointment by the court.	
Slovakia	In case the value of the case cannot be assessed in monetary terms (<i>e.g. prohibition to use the mark or unfair competition where there is no monetary compensation or moral damages</i>) lawyer's fees are substantially limited. This is quite discriminatory compared to cases where one asks for compensation in monetary terms. In case the plaintiff was 100% successful in his case, the legal costs will be reimbursed by 100%, if the success was a partial one, the court will divide the legal costs between the parties.	The law contains only demonstrative examples of legal costs, which means that any fees which have been <i>usefully spent</i> to defend one's rights can be claimed. These are for example lawyer's fees, travel expenses, expert's fees etc. The costs which are not usual should be justified by the applicant and it will depend on the court's assessment whether such costs will be taken into consideration or not. Lawyer's fees are reimbursed according to a special law (advocate tariff).	
Slovenia	Varies severely, therefore unable to assess Percentage.	Travel, accommodation, subsistence costs, wage compensation or lost profit for witnesses, expert translators, lawyers, experts,	

		translators' fees etc.	
Spain	Very low.	Besides, the damage awards can eventually include investigation costs that the RH may have incurred to obtain reasonable evidence of the infraction which is the object of the judicial proceedings.	
Sweden	100% if the RO wins 100%.	<p>ROs own internal costs, travelling and lodging costs should be covered, as long as they have been <i>justifiable for protecting the RO's interests</i>.</p> <p>The courts have historically been restrictive with rewarding compensation for investigating costs. In a recent infringement case under penal law, the Court granted the plaintiff/claimant legal costs referring to the fact that the investigation was necessary in order to have the prosecutor even initiating the criminal pre-investigation.</p> <p>It should be noted that it can be very hard and costly to take an infringement case through to the courts, and if the claimant fails he has to pay his own legal costs. In one case about file-sharing the RO was rewarded several millions in damages, but since their claim had been more than double the amount they were awarded, they were still deemed as having lost in part and thus, the claim for compensation of</p>	

		legal costs was accordingly reduced.	
United Kingdom	The award and amount of costs awarded are in the discretion of the court. Costs must be reasonably incurred, and reasonable in amount. See also previous reply.	Recoverable legal costs include solicitor and barrister fees, expert fees (such as trade mark or patent attorneys, fees of judicial experts appointed by the courts, etc.) and other disbursements such as court fees and transcription costs.	

Annex II

Measures aimed at ensuring that right holders are able to recover the *totality* of the losses sustained as a result of an infringement.

Although the terms used by Member States differ (e.g., “actual damages”, “compensatory damages”), there appears to be broad consensus among the Member States that damage awards in principle should result in complete indemnification of the injured right holder, at least in cases where the infringer knew or should have known that his or her conduct was infringing. Otherwise, those who invest creative effort and resources in the production of IP-protected goods and services are left uncompensated –a fact that serves as a disincentive to creative investment. As described above, however, calculating these losses with exactitude can prove challenging to national courts. As a direct consequence of infringements, right holders lose the direct value of the licence itself, but also such other consequential losses as depreciation in value of the right holder’s statutory rights, damage to reputation, lost value of sales revenue cash flow, and the like. These elements are often difficult to quantify and calculate. Courts often are convinced that infringement has been more widespread than the sample of instances actually proved, and that indirect and consequential elements of damage beyond the lost profits actually proved are reasonably likely to have occurred, but in some cases the courts have poor tools for approximating or awarding such damages. Under the IPRED, the full universe of direct, indirect and consequential loss suffered by the right holder by reason of an infringement, whether carried out on a “commercial scale” or not, should be included in damages awards. The tool of “lump sum” damages, however denominated, is a very useful way for courts to approximate the full extent of such damages that they reasonably believe have been incurred. It should be noted here that defendants’ mere objection to the rights owner’s evidence of damage—which sometimes is the only defence submitted—should not be sufficient, without substantiation of such objection through the presentation of evidence, to defeat the rights owner’s prima facie showing of damage. Indeed, damages shown by the rights owner by prima facie evidence should be presumed to be correct absent an affirmative showing from the defendant that such damages exceed the harm suffered.

Recommendation: Member States should ensure that all elements of direct, indirect and consequential economic consequences to the right holder that result from an infringement are compensated by damages in civil cases, regardless of whether the infringement has taken place on a commercial scale.

The **UK**’s adoption of the exact language of IPRED Art. 13(1)(a) in its law setting forth compensable damages in IPR cases should be reviewed as a best practice.

Recommendation: Member States should provide that lump-sum damages, reflecting all negative economic consequences that the right holder has been reasonably found to have suffered, are available at the right holder’s discretion at least as an

alternative to any lost profits that can be proved.

Member States' systems providing for such lump-sum awards, including those of **France, Belgium, Luxembourg, Hungary, Estonia, Slovenia** and **Bulgaria**, should be reviewed as best practices.

As described above, even lump-sum damages calculations can be difficult to quantify precisely or consistently. To address this, some Member States have provided for a set amount of multiple (e.g. double) damages to be available as an alternative. These are properly seen not as a “punitive measure” or as an undeserved windfall for right holders, but rather as a proportionate and convenient way of estimating and compensating for all of the various types of economic detriment that a right holder suffers by reason of an infringement.

Recommendation: Member States should provide that a “predetermined” calculation method for determining lump-sum damages, reflecting a reasonable approximation of all negative economic consequences that the right holder is likely to have suffered, is available as an alternative to any other means of determining damages—at a minimum in copyright and trade mark cases.

Several Member States' systems permitting such predetermined damages awards or allowing double awards of proven damages in certain cases as a measurement of the full range of damage incurred by the right holder (including those of **Austria, Benelux, Czech, Germany, Greece** and **Poland**) should be reviewed as best practices. Some countries have even provided triple royalties as an option in some cases on this basis (**Belgium, Poland, Romania**).

Measures that enable right holders to recover their actual costs of investigating, taking legal action against, and rectifying an IPR infringement.

Infringement proceedings are expensive. Right holders typically must invest substantial sums to detect an infringement; identify the infringer; investigate his or her activities; gather evidence of infringement; secure seizure, storage and ultimately destruction of infringing goods; and litigate a civil infringement action. Amounts spent to pursue even the smallest infringers often run well over 10,000 euros. Inability to recover the full range of such costs is a disincentive to pursue IP infringements for all right holders, but is a particular concern for SMEs. Only the largest right holders may be able to afford to bring civil litigation in the knowledge that they will recover only a percentage of their expenses. In very few Member States are right holders able to recover 100% of their legal costs. In other Member States, expenses related to the monitoring of infringing activities, test purchases, storage costs, costs of expert opinions, translation fees or similar costs are not recoverable.

Recommendation: Member States should provide that all costs reasonably incurred by the right holder in investigating, taking successful civil action against and rectifying an infringement should be compensated in full by the infringer.

Although most Member States in practice do not issue costs awards of 100% of those actually incurred by a successful right holder, the practices of **Lithuania** and the **UK** should be reviewed as best practices that have been reported as having a sufficiently deterrent effect.

Measures designed to ensure that infringers do not retain any economic benefit from their infringing activities.

Some Member States have taken the view that if the *profits* or other economic benefits (e.g. costs saved) are not taken from an infringer, he or she has every reason to continue to infringe the law. To that end, these Member States award a right holder's lost profit and the infringer's profit, along with other damages incurred, to the right holder in appropriate cases (without double counting). Others award conversion damages (i.e. treating the infringed item as being stolen, with damages reflecting the retail value of the item), or additional damages related to the infringer's turnover, egregious conduct, or other factors. Again, all of these are properly viewed not as "punitive" provisions but rather as proportionate remedies that recognise that in order to achieve the IPRED's requirement that damages awards be "dissuasive", none of the profit or other economic benefit of infringement should be left as a "reward" with the infringer.

Recommendation: Member States should implement rules for awarding damages and costs in IPR cases that ensure that no economic benefit of an infringement remains with the infringer.

Member States' systems providing for an accounting or disgorgement of infringer's profits to top up the right holder's lost profits award without double counting (**Netherlands, Austria, Italy**); allowing for damages awards of the full retail price of the infringing goods in appropriate cases (e.g. **Estonia**); permitting disgorgement of the infringer's unjust enrichment (**Czech, Hungary, Estonia**); or requiring damages payments in the amount of a percentage of an infringer's turnover in certain cases (**Spain**); should be reviewed as best practices.