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Skada och ersättning vid immaterialrättsliga intrång

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1. SUMMARY IN ENGLISH

There is no foolproof way to calculate the full value of actual damages caused by an infringement of an intellectual property right. The cases in which a pure calculation is possible, at least, appear to be few and far between. Nevertheless, courts must strive to reach a well-balanced decision and consider all relevant factors when determining damages, usually through a multifaceted process that is far more than a mathematical endeavor. But how does one determine damages in a context where the protected object in question lacks physical traits and, therefore, cannot be damaged in a tangible sense? What happens when we try to apply the general principles of causation and standards for evidence, which have evolved in a different context where the damage is often of a more traditional and physical kind?

The concept of intellectual property is based in part on the idea that intellectual creations can and should be regarded as if they were actual goods, which can be constructed, traded, and damaged like any other physical property. This, of course, does not mean that intellectual property inherently takes the form of actual property, nor that infringement causes any actual damage to the property in a physical sense. After all, the concept of intellectual property, like many other property law concepts, is a legal construct. More importantly,

it may also mean that we cannot simply take different legal principles and models used to determine traditional property damages and apply them to determine intellectual property damages. Rather, if we want to use the existing principles and models, we must first consider what they are trying to achieve and how they behave in a sphere where all physical traits are absent, but where actual economic consequences are still a reality.

In this sphere, there is an ever-present tension between the notion of actual damage and the amount of damages that must be determined. This tension is not merely the result of conflicting ideas or preconceived notions of economic damage. Rather, it is a manifestation of different goals and approaches, all of which are relevant when trying to understand what it means to decide the amount of damages in an intellectual property context. Concepts such as just compensation, deterrence, efficiency, and proportionality set goals that must be attained when determining the need for damages, even though these concepts serve different aims and cannot easily be combined or reduced to form a single, unitary entity. Indeed, the legal provisions governing assessments of intellectual property damages reflect diverse approaches that do not easily work together, hand in hand, in the sense that they can be interpreted as the outcome of a harmonious idea. Still, these approaches often may be used in conjunction with one another.

In the first chapter, I introduce these basic ideas regarding intellectual property damages. An understanding of the rudimentary difference between the notions of "damage" and "damages" guides my analysis. It also means that, instead of trying to find the one ultimate method that should be used to determine damages, my discussion focuses on all the different approaches and whether they can be combined. In other words, I am more concerned with how assessments within this context could be done rather than how they should be done. After all, the legal framework dictates that all relevant factors should be considered when the damages are determined. This gives the court and parties considerable room to maneu-

ver. Identifying the exact outer limits of what could be done within the framework is, consequently, less important for this analysis than discussing and evaluating the different possibilities that follow a more open approach to determining damages. I call this perspective de sententia ferenda, and I use this terminology to indicate that I constantly strive to identify the inherent possibilities within the current framework. Thus, the perspective can also be understood as nothing more than de lege lata with a creative touch. I deliberately base my analysis on the assumption that the current law already contains all the tools we need. The key questions are what these tools are, what they have the potential to be, and how they can be used together to determine, if not construct, the damages.

The second chapter contains a brief review of the relevant legal frameworks. In this chapter, the reader is introduced to the European Union's remedy framework for intellectual property rights, the so-called Enforcement Directive (2004/48/EC), together with Swedish laws and regulations most relevant to intellectual property damages. The main goal of this introduction is to familiarize the reader with the wordings and structure of the relevant provisions in these frameworks. In chapter two, I also briefly discuss who can be held liable for infringement.

In the third chapter, I set out to carefully investigate the Swedish laws and regulations in detail. If these provisions can be seen as a toolbox, what are the uses and limitations of each and every tool? The first part of the chapter focuses on the relevant legal provisions governing reasonable 411 compensation. This particular type of compensation stands out in the sense that it does not focus on any traditional form of actual damage suffered by the rightsholder. Instead, the aim of reasonable compensation is to grant the rightsholder such compensation for the simple fact that the infringer used the rightsholder's intellectual property rights.

Reasonable compensation has been established effectively as a means to ensure the rightsholder has received damages at the lowest threshold of compensation, and as such it has been seen as a simpli-

fied way to determine these damages. As demonstrated through a number of Swedish court cases, defining what is "reasonable" has proven to be harder than one might imagine. For instance, the concept of a "hypothetical license fee" has led to a number of different interpretations of reasonability. In some instances, it has even led the courts to abandon the concept of reasonability in the more general sense in favor of counterfactual analysis. It can also lead to a tendency by which the courts more or less, perhaps unknowingly, try to find an amount that they believe would satisfy the rightsholder. I argue that when courts do so, the whole notion of reasonability is lost, with disregard for the fact that reasonable compensation is only a simplified way to establish a minimum level of compensation. And, even more importantly, it disregards the fact that reasonable compensation is only one of the many tools that should always be used to determine the overall compensation.

In all cases of negligent infringement, additional compensation should be awarded. Here, I discuss the different standards of negligence, gross negligence, and willful infringement, identifying several challenges that arise when trying to apply them to intellectual property infringements. The issues discussed in this section are basic in nature. The main focus herein is how we can differentiate between non-negligent, negligent, grossly negligent, and willful infringements, as well as the problems that arise when an infringer claims to have misjudged the scope of protection.

One of the main tools for determining additional damages has always been and will most likely continue to be estimations of the loss of profits. The concept of "loss of profits" can be interpreted in many ways, and this definition can even fully overlap with "goodwill damages." By analyzing the major Swedish court cases dealing with the loss of profits, it becomes clear that no one has ever been fully able to reveal the actual extent of all potential lost profits resulting from an infringement. There are simply too many factors to consider and, additionally, the analysis cannot be separated from the several normative questions that arise, even when assessing something as

fundamental as economic loss. The loss of profits can, of course, serve as one measure for determining damages. Swedish courts do, in fact, tend to extrapolate the available information and make rough 412 estimations concerning lost profits. This only underscores, however, that the loss of profits cannot be used as the one and only factor in assessing damages. The same applies to the loss of reputation and damaged goodwill. Calculating the economic damage to an intellectual property right itself by using a certain formula is not easily doable, especially while making rough estimations and considering other circumstances such as actual and hypothetical costs, which can and should be done when possible.

Considering the limitations of fully calculating actual damages in the normal sense of the word, it becomes clear that other factors mentioned in the Enforcement Directive and the Swedish regulatory framework cannot merely serve as auxiliary tools for determining the compensation. Consequently, the infringer's profits, deterrence, moral prejudice, and other non-economic factors must always be taken into consideration when the amount of damages is decided. The fact that certain calculations are so hard to do also means that it is nearly impossible to separate the factors and turn them into separate pieces of actual damage, which perhaps ideally could then be added on top of one another to reach a complete assessment. Instead, the determination of damages will always be based on an overall assessment. This also holds true in the sense that some of the relevant factors will overlap each other, while others, such as the infringer's profits and deterrence, must be construed in conjunction with each other to fully function as relevant factors.

Chapter three ends with a review of the general provisions of Swedish law on adjustments of final damage awards to lower sums. This is a process that can be based either on notions of reasonability in general or on the rightsholder's contributory negligence. Contributory negligence is also assessed in this chapter and set forth in contrast to the claimant's duty to mitigate losses.

The fourth chapter is solely devoted to analyzing five cases from the Court of Justice of the European Union. Through these cases, it becomes clear that the Enforcement Directive allows for a wide range of methods and approaches for determining intellectual property damages. Additionally, the cases indicate that national courts should most likely refrain from applying methods that are too narrow. A good example of this problem manifests when national procedural rules regarding evidence or general principles in tort law are construed in such a way that the methods established in Article 13 of the Enforcement Directive are effectively set aside to the detriment of the rightsholder. After all, the Enforcement Directive establishes a minimum standard of protection for all intellectual property rightsholders. The Court has also weighed in on the question of whether the Enforcement Directive establishes some form of punitive damages. The Court has clarified that punitive damages are neither required nor 413 prohibited. Instead, the Enforcement Directive establishes an upper limit for damages, but this upper limit also guards against so-called misuse. Misuse could theoretically be found when a national court knowingly goes beyond the actual damage suffered by a rightsholder. However, in most cases, the actual damage is something that remains unknown, and the Court has also made clear that rough estimations and typified lump sums are allowed, even if this means that full causation must not be demonstrated in the traditional sense. This also underscores one of the major underlying themes of intellectual property damages, namely the difference between proven damage and actual damage. The final damages award will almost inevitably differ from whatever is considered proven damage, but whether such damages exceeds actual damage is a question which remains unanswered.

In chapter five, I try to temper, or balance, the different Swedish principles used in tort law with the rules of evidence and the thresholds that they set. I argue that the non-physical form of intellectual property affects the possibility to clearly separate the application of damages principles and rules, which is something that might other-

wise be possible when it comes to more traditional damages for tangible property. Within the intellectual property context, several fundamental questions overlap where they can be construed as different perspectives on the same question. These questions include, namely, whether damage has at all been suffered, whether a certain market fluctuation constitutes damage, whether there is causation between an infringement and an alleged damage, and whether the potential damage has a certain magnitude. These overlapping considerations make it theoretically possible to approach the whole determination of damages from a single perspective or method. This is why it becomes crucial to discuss what the different perspectives and methods offer and how they can be used in a balanced way so that all relevant aspects are taken into proper consideration. Therefore, I conclude that instead of relying too much on general tort law principles or rules of evidence, the determination of damages must always be based on and adhere to the specific legal provisions governing intellectual property damages.

The dissertation concludes that intellectual property law often provides a highly varied and, perhaps, seemingly dissonant presentation of the nature of damages and intellectual property damage. This picture often does not fully coincide with the traditional image of damages or economic loss, but it does give us a better understanding of the tools necessary to determine an appropriate amount based on all relevant factors.