

Summary Report

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2019 – Study Question – General

IP damages for acts other than sales

Introduction

The quantification of damages for infringement was addressed generally in AIPPI's Resolution on "Quantification of monetary relief" (Sydney, 2017), referred to as the Sydney Resolution.

Like the Sydney Resolution, this Study Question is aimed at assessing the loss suffered by the right holder, and not at assessing the unlawful profit made by the infringer. It is not concerned with statutory damages, or accounts of profit and other relief in which the unlawful profits of the infringer are rendered to the right holder. Specific issues in relation to FRAND (fair, reasonable and non-discriminatory) royalties in the context of standard essential patents are also outside the scope of this Study Question, other than to the extent that reasonable royalties are relevant to the quantification of damages more generally.

As noted in paragraph 8 of the Sydney Resolution, AIPPI's National and Regional Groups focused on the consequences of infringing *sales* in relation to the Sydney Resolution, and that the quantification of monetary relief in relation to infringing acts other than sales should be considered for future study by AIPPI. This Study Question is intended to address the quantification of damages for such non-sales infringements.

The Sydney Resolution provides a general framework for the quantification of damages generally, which also applies in the case of damages for non-sales acts.

However, the Sydney Resolution does not specifically address the quantification of damages where no 'simple' infringing sale was made. For example:

- where mere advertising by the infringer causes a diversion of interest to the infringers products, resulting in lost sales opportunities for the right holder; or
- where infringing products are imported, and once imported those infringing products are exported out of the jurisdiction, i.e. products shipped through the jurisdiction.

There is a distinction to be made between the event that causes the loss to the right holder (e.g. the sale of an infringing product which causes a diversion of sales away from the right holder), and infringing acts that precede or follow the loss-causing event but do not in themselves *cause* the damage. For example, warehousing infringing products would, according to the laws of many Groups, infringe, but it may be that the warehousing in itself does not cause any loss and all of the losses are caused by post-warehousing infringing sales. In such circumstances, should the damages for warehousing be assessed at zero, and how can this be reconciled with an entitlement to damages for infringing acts?

The Reporter General has received Reports from the following Groups and Independent Members in alphabetical order: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Finland, France, Canada, Czech Republic, Chile, China, Denmark, Ecuador, Hungary, Japan, Germany, Korea, Latvia, Mexico, the Netherlands, Paraguay, the Philippines, Russia, Singapore, Spain, Sweden, Switzerland, the Independent Members for Taiwan, Turkey, United Kingdom, United States of America and Vietnam.

33 Reports were received in total. The Reporter General thanks the Groups and Independent Members for their helpful and informative Reports.

The Reports provide a comprehensive overview of national and regional laws and policies relating to IP damages for non-sales infringements set out in three parts:

- Part I – Current law and practice
- Part II – Policy considerations and proposals for improvement of the current state of the law
- Part III – Proposals for harmonisation.

This Summary Report does not summarise Part I of the Reports received. Part I of any Report is the definitive source for an accurate description of the current state of the law in the jurisdiction in question. All Reports may be accessed [here](#).

This Summary Report has been prepared on the basis of a detailed review of all Reports (including Part I) but focuses on Parts II and III, given AIPPI's objective of proposing improvements to, and promoting the harmonisation of, existing laws. As it is a summary, if any question arises as to the exact position of a particular Group in relation to Parts II or III, please refer to the relevant Report directly.

In this Summary Report:

- references to Reports of or responses by one or more "Groups" may include references to Independent Members;
- where percentages of responses are given, they are to the nearest 5%; and
- in Part IV below, some conclusions have been drawn in order to provide guidance to the Study Committee for this Question.

I. Current law and practice

For the replies to Questions 1) - 3), reference is made to the full Reports. The Study Guidelines may be accessed [here](#).

II. Policy considerations and proposals for improvement of your current law

4) Are there aspects of your Group's current law or practice relating to the quantification of damages for non-sales infringements that could be improved? If YES, please explain.

Eight Groups were of the view that their laws do not need to be improved. However, a majority of Groups indicated in general terms that more specific rules on quantification would be helpful.

The UK Group is of the view that the quantification of damages should in practice be more generous, so as to offset any shortfall in the recovery of legal costs when litigating the issue of damages, or because nominal damages (such as £1) when damages cannot be proven. In the view of the UK Group, statutory damages would also address the problem of only nominal damages being awarded.

The US Group highlighted two key areas of potential development:

- (a) how damages should be determined for a part of a multi-component product; and
- (b) how damages should be determined for an infringement where a part of a product is supplied within the US but combined with other parts into the final product outside the US (*WesternGeco v ION Geophysical*).

Most Groups observed that when it is not possible to estimate the loss suffered by the right holder, it may be possible instead to quantify damages using reasonable royalties/the user principle for non-sales infringements. Of course, the difficulty that arises next is with specifying what the royalty should be charged on – when there is no sales price or turnover to act as a reference point (royalty base) for the royalties.

The Chinese Group proposes a general system of quantifying damages for non-sales infringement, and in particular:

- First, the method for determining whether non-sales infringements have caused damage could be specified, for example whether the loss of a right holder's potential transaction opportunities and deterioration of market reputation caused by non-sales infringing acts shall be included in the scope of the right holder's losses.
- Second, the main factors to be considered when determining the amount of damages could be specified, for example: the scale of infringement, the infringer's estimated benefits as a result of the infringement, the right holder's estimated losses, the bad faith of the infringer. Or the lower limit of damages for non-sales activities needs to be stipulated, so as to deter non-sale infringements more effectively.

- Third, some non-sales infringements can cause more damage than others. For example, manufacturing and importing generally involve infringement acts on a large scale and in a more serious nature. Although the infringer has not gained direct profits from sales yet, the nature of the infringement is more serious than that of use and offer for sale, and higher damages should be granted.

5) What policy should be adopted generally in relation to non-sales infringements? Should:

- a) **Only damages be available for past non-sales infringements?**
- b) **Only an injunction be available to restrain future non-sales infringements?**
- c) **Both damages and an injunction should be available.**

With the exception of the Hungarian Group, all Groups supported c): both damages and an injunction should be available.

The Hungarian Group stressed that on this point, the assessment should be fact-sensitive. In cases where products are being made and stockpiled prior to expiry of the relevant patent, it may be appropriate to grant an injunction only if it is certain that the products will never be sold prior to expiry and if no damage is caused to the right holder. However, damage may be caused if the infringer gains a springboard advantage that they otherwise would not have, in which case it may also be appropriate to grant damages commensurate to the financial value of the springboard advantage.

The US Group noted that a rights owner should not be awarded both injunctive relief and forward-looking damages (i.e., reasonable royalty) for future acts of infringement.

6) What policy, in relation to franking, would best promote a uniform recovery of damages in relation to infringements in a number of jurisdictions in relation to the same goods?

In the view of about a third of the Groups, there should be a basic policy that franking should never apply. Another third of the Groups were also of the view that franking should not apply: in their view, the prevention of double recovery should be the guiding principle, and there should be no additional rule that once damages are paid the goods in question are franked. Accordingly, about two-thirds of groups in total took the view that where a right holder suffers further damage (e.g. a loss of further sales) due to the circulation of infringing products in respect of which damages have already been paid, that further damage should be recoverable.

To avoid double recovery, the German Group suggested that damages already paid should be taken into account when quantifying further lost profits of the right holder in relation to connected infringing acts (e.g. further sales of infringing products). In contrast, in the view of the German Group, reasonable royalties should be in general determined independently for each connected infringing act: the royalties may be different at each stage of a chain of distribution. The Australian Group proposed that the principle of “full satisfaction” should apply:

the right holder should be able to recover damages from all infringers, provided that its total recovery does not outweigh the total loss suffered (and thus the recovery is compliant with TRIPs). If there are co-pending actions for the recovery of damages, the action relating to the recovery of damages for sales should proceed first, and other actions should be stayed.

The US Group pointed out that innocent third parties who purchase an infringing article for value and without actual, constructive, or inquiry notice of the infringement might not be held liable for infringement (i.e., they are a bona fide or good faith purchaser). Bona fide purchasers may also be protected from equitable remedies such as injunctions.

7) Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

The UK Group suggests that the burden of proof should be adjusted such that the infringer must provide the information in its control relevant to damages, and if the infringer withholds information, the Court should be prepared to assess damages on the basis of assumptions and inferences based on public information.

Two Groups proposed that a database of damages awards be set up, to provide greater legal certainty on legal issues of principle that arise from prior decisions on damages.

The Swedish Group suggest that damage to goodwill should be clarified.

About half of the Groups state that no further improvements are needed.

III. Proposals for harmonisation

8) Do you believe that there should be harmonisation in relation to damages for non-sales IP infringement?

Nearly all Groups indicate that harmonisation would be desirable. The Hungarian Group believes that harmonisation is unnecessary because laws on damages are so different.

In the view of the Canadian Group, the correct approach is to determine the damage that has a sufficient causal nexus with the infringing act.

9) Manufacturing of patented products: How should damages be quantified in relation to the manufacturing of infringing products?

The principal problem with quantifying damages for mere manufacturing is that there is no easy royalty base/sale price to use as the yardstick for determining damages. This is the problem that Groups grappled with and set about solving, in a number of different ways.

In the view of three Groups, there should be an assumption that manufactured products are intended to be sold. The assumption would be rebuttable by the infringer, e.g. by showing that

the manufactured goods are intended to be exported. While this assumption would undoubtedly assist with establishing a sales price in many situations, it does not address the overall, illicit gain of the infringer. If, for example, manufacturing in a specific jurisdiction is cheaper and allows the infringer to profit more from infringement, and if the manufactured products are finally sold in a jurisdiction with no relevant IP coverage, damages based on sales would not necessarily be recovered, nor would damages based on the profitably advantage gained by the infringer.

Over half of the Groups take the view that damages for manufacturing should be assessed using a reasonable royalty, which would be less than the royalty for a licence that would permit products to be sold, because (in the view of the German Group) mere manufacturing only irregularly causes damage to the right holder. This leaves open the questions of what benefit can be gained from a licence for manufacturing but not selling, and if the benefit of a manufacturing licence is low then its value (and the damages) would also be low. It also leaves open the question of whether, in a manufacturing-only licence, sales to licensed distributors should nonetheless be allowed.

Indeed, the Austrian Group states that “[a] license fee for manufacturing only might be rather artificial in many cases. Real licenses customary in a certain branch of industry would usually allow the economic exploitation of a right either by sales or internal use and therefore cannot (fully) be used as a reference. In such cases, the court should have discretion to estimate a reduced license fee and in certain cases even reduced a license fee to zero.”

The Japanese Group proposes that the court should determine damages by multiplying the *possible* sale price of the infringing goods by the royalty rate, or multiplying the costs for manufacture, wholesale, etc. of the infringing goods by the royalty rate. The Japanese Group also points out that where limited raw materials are available, infringing manufacturing can deny the ability of the right holder to manufacture and sell, thus leading to losses of sales of the right holder. Similarly, the Philippine Group suggests that damages should be quantified based on the following: (1) the number/value of the goods manufactured; and (2) the impact of their *potential* distribution.

These approaches pose an interesting question as to what damage the right holder suffers from *potential* distribution. It is possible to imagine that if customers cancel orders placed with the right holder, in anticipation of ordering goods from the infringer instead in the future, it is possible to see some damage in the loss of trade even though it has not been fully diverted yet.

In the view of the Chinese Group, it may be possible quantify damages from manufacturing if it causes a loss of the right holder’s potential market share or a reduction of the right holder’s market reputation.

The Korean Group states that “[i]f there cannot be found as sales activities, then the profit of the lost profit or the reasonable royalty is to be calculated in accordance with the production cost not by the profit of the product etc.”

In the view of the Swiss Group, there is no damage from mere manufacturing, unless the infringer is manufacturing for its own benefit (in which case a reasonable royalty could be used to calculate the royalty).

10) Should the subsequent export and sale of manufactured infringing goods change the quantification of damages?

In the view of the UK Group, the subsequent actual export and/or sale of infringing goods which differs from the sales assumed to take place when assessing damages for manufacturing, should be dealt with by adjusting the damages awarded to the right holder.

Similarly, eight Groups believe that subsequent sales should, in principle, increase the damages. The Chinese Group takes the view that the damages for manufacturing and exporting should be less than the damages for manufacturing and selling (within the jurisdiction). The Belgian Group believes that damages should be payable for each infringing act, provided that there is no double recovery.

The German Group suggests that the damages for manufacturing and sales be assessed together by reference to the sales price.

In the view of the six Groups, subsequent sales should not change the quantification of damages for manufacturing – separate damages could be awarded in relation to sales.

The US Group takes the view that an additional infringing act, such as an export and sale, will simply increase the amount of evidence of the loss suffered by the right holder and should be taken into account as such.

The Hungarian Group proposes that the appropriate form of claim would be damages for unjust enrichment.

11) Importing and warehousing of patented products: How should damages be quantified in relation to importing and keeping or warehousing?

Two Groups take the view that importing and warehousing as such do not cause damage.

Other groups sought to define the damage caused by importing and warehousing. The leading proposal, put forward by about half of the Groups, is that the damage for infringing importing and warehousing should be assessed in the same way as for manufacturing.

In the view of seven Groups, a rebuttable presumption should apply that products imported or warehoused are intended to be sold, subject to the prevention of double recovery. The Russian Group proposes that the presumed market price be used. The Swedish Group suggests that the court should establish the right holder's intention in respect of the goods, e.g. whether they will be sold, to determine what economic context in which damages should be assessed.

12) Series of infringements in relation to patented products: In the situation where there is a series of infringing acts, such as manufacturing, followed by warehousing, followed by a sale, should damages be quantified, for each individual infringing product:

- a) On the basis of a sale alone, if that infringing product was eventually sold?
- b) On the basis of each infringing act in the chain?
- c) If the infringing product was never sold?
- d) On some other basis?

The UK Group takes the view that damages should be quantified on the basis of both a) and b) above. In particular, the UK Group states that: “... *the patentee’s damages should likewise be limited by the principle of “no double recovery” such that the patentee is only able to recover damages once overall in respect of each product.*” This raises an issue of general principle as to whether double recovery ought to be prevented by ensuring that damages are not recovered twice or more:

- for each individual infringing product; and/or
- for each individual infringing act.

The general principle as stated in Article 45 of TRIPs is that damages should be “*adequate to compensate for the injury the right holder has suffered*” and does not appear to limit damages by act or product.

A clear majority of Groups takes the position that damages should be recoverable for each individual infringing act. If all acts are performed by the same person, usually the economic impact (i.e. damage) of previous manufacturing and warehousing is consummated by the economic impact of the sale. In the view of the Brazilian Group, each infringing act should lead to an award of damages, assessed using a reasonable royalty. The position of the German Group is that when a series of acts infringes, a reasonable royalty may be awarded in respect of each infringing act without taking into account the royalties for other acts. This view did not emerge as a majority view, but probably only because other Groups did not comment on the point.

In the view of six Groups, damages should be calculated on the basis of the sale price alone.

13) Services/operating patented processes: please explain how damages should be quantified in relation to infringements that consist of carrying out infringing processes. e.g. a patented manufacturing process?

About half of the Groups take the view that damages for infringing processes should be assessed in the same way as damages for other infringements, including using a reasonable royalty if appropriate. Any eventual sale should guide the assessment but if there is no sale then a lower royalty for carrying out infringing processes should apply.

Other Groups propose general schemes of calculation for processes:

- The Japanese Group draws a distinction between process claims that relate to manufacturing, and process claims that do not result in a manufactured product (“simple process”). The damages for manufacturing processes should be determined by reference to the price of the product made using the process.

- The Taiwanese Report suggests that the damages be calculated by the market price of the infringing articles multiplied by the “contribution rate” of the patented manufacturing process.

The French Group proposes the following rules:

- compensation through damages corresponding to the margin lost by the right holder assuming the right holder itself exploits its patent;
- compensation through damages corresponding to the lost royalty, possibly increased to take the infringement into account, assuming the latter does not itself exploit its patent; and
- in any case, compensation for the moral damage suffered by the holder of rights.

The Dutch Group proposes to distinguish between (i) methods of manufacture, (ii) methods of use and (iii) products directly obtained from a patented method of manufacture, identifying in each case what the inventive contribution is, and directing the quantification of damages to the use of that contribution. Where the inventive contribution lies in the process, it is proposed that a method of quantifying damages is a reasonable royalty levied on the turnover associated with the use of the method, based on the frequency of use.

The Philippine Group suggests that the following factors be taken into account: (1) the scale of the production (e.g., how many or how much is the value of the infringing products manufactured. The amount or value are a manifestation of the gravity of the infringer’s intent to infringe); (2) the demand for the patented product; and (3) the impact of the potential distribution on demand for the patented product of the plaintiff.

The UK Group takes the view that it would be unreasonable to recover damages for a sale as well as damages for manufacturing.

14) Please explain how damages should be quantified for subsequent post-manufacturing activities in relation to the products of a patented process, e.g. the offering for sale of a product made using a patented process?

A majority of the Groups take the view that damages for post-manufacturing activities should be recovered in the same way as for sales, manufacturing and other infringing acts. In the view of the German Group, damages should be assessed by reference to the value of the eventual sale.

In the view of the UK Group, any price depression resulting from the use of the patented process by the infringer that is suffered by the patentee should be recoverable. This might be the case where the patented process allows cheaper manufacturing, allowing the infringer to market a cheaper product than would otherwise be possible. Of course, it is possible that the infringer simply recovers higher profits instead of passing on the lower manufacturing cost to the consumer, and in such circumstances the price depression might be lower, but the right holder should recover the illicit gain made by the infringer, e.g. through an account of profits.

The Japanese Group states for manufacturing processes (but not “simple processes”) damages for post-manufacturing sales should be determined by reference to the sale price of the products.

In opinion of the Ecuadorian Group, the following should be taken into account when determining damages:

- “A. The amounts invested in designing and obtaining the process which later was patented.*
- B. The actual value of the patent in the market.*
- C. The financial losses of the patent holder.*
- D. The quantity of infringing products warehoused or imported,*
- E. The costs of the whole procedure of importing, taxes and warehousing,*
- F. The market prices of the patented product and the infringing product, of the country where it was found.”*

15) Simultaneous single infringing acts: In the situation where there is a single act, such as an offer for sale on the internet, which amounts to an infringing act simultaneously in a number of jurisdictions, how should damages be quantified in each of those jurisdictions? For example, one single offer to sell products is made on the internet and that single offer is considered to infringe by the courts of two jurisdictions A and B. If court A awards damages for that single act which compensate for the loss suffered by the right holder, should court B also award damages and how should those damages be quantified so as to eliminate or reduce double recovery?

About half of the Groups take the view that damages are due for all infringing acts in all of the relevant jurisdictions. In the view of the UK Group, the starting point should be that damages should be recoverable for each infringement, regardless of whether the same act(s) would also infringe in a different jurisdiction. Where there are multi-jurisdictional infringing acts, the right holder (who will have the requisite knowledge) should co-ordinate and inform the courts concerned so that double recovery can be avoided.

A minority of Groups consider alternative arrangements:

- In the view of the Japanese Group, although the current legal framework requires all rights to be enforced in all relevant jurisdictions, a possible and more efficient way forward would be to allow more centralised litigation in a single jurisdiction. However, that would require a system of private international law that is beyond the scope of this Study Question.
- Similarly, the Singaporean, Vietnamese, and Turkish Groups suggests that the court in which the major part of the infringing acts are committed should have exclusive

jurisdiction – or duplicative litigation could be prevented with a harmonised set of rules in relation *res judicata*.

Five Groups are ambivalent in relation to the exact methods used to recover damages, as long as the right holder's recovery is not more than full satisfaction.

16) Franking: If damages have been paid in relation to goods that have been manufactured but the further circulation of those goods has not been restricted by injunction, should the infringer (or the acquirer of the goods) be liable again for damages if those same goods are subsequently sold?

a) If the answer to this question is no, does that mean that the infringer has a de facto licence to sell the manufactured infringing goods?

b) If the answer to this question is yes, does that mean that the right holder can recover twice in relation to the same goods?

A very significant majority of Groups expressed a view that franking should not occur. Double recovery should, if possible, be avoided by taking into account damages previously awarded in relation to the same goods. To borrow the words of the Canadian Group, there should be no 'franking of infringement' but there should instead be 'franking of damages', i.e. once damages have been paid in respect of specific harm suffered by the right holder, then no further damages should be paid in respect that harm.

It is clear why Groups are against franking: if there were to be franking, infringers may choose to infringe in a jurisdiction in which damages are low, allowing the infringing goods to flow onto a market which would (if the goods were not franked) result in higher levels of damages being recovered.

Some Groups dissented. The Dutch Group suggests that once a right holder has been fully compensated in damages for the manufacture and sale of the infringing product, then the manufacturer receives an implied licence to sell. Similarly, the Turkish, Vietnamese and Czech Groups suggest that once damages have been paid, the infringing products can be freely dealt with.

17) Please comment on any additional issues concerning any aspect of quantification you consider relevant to this Study Question.

Some potential future items of study were identified.

The Australian Group's view is that, in order to ensure the application of the principle of full satisfaction across multiple jurisdictions, uniform rules governing procedure need to be established. Such rules need to enable a Court to grant a stay of the proceeding it is presiding over in circumstances where:

- a. there is already a separate proceeding on foot in another jurisdiction; and

- b. the other proceeding relates to the assessment of damages arising from intellectual property infringement in relation to the same products in suit.

The Australian group considers that the proceeding in relation to the assessment of damages arising from infringing sales should take precedence over a proceeding in relation to the assessment of damages arising from non-sales infringing acts in respect of the same products. Where multiple proceedings have been filed which relate to sales in relation to the same products, the proceeding filed first should take precedence.

The French Group proposes more concrete rules concerning damages for copyright and the internet.

18) Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

The IT sector, life Sciences, medical devices, automotive, food, consumer goods, textile, confectionery.

IV. Conclusions

There was a considerable consensus amongst the Groups that the correct way to tackle the problem is to quantify damages using a reasonable royalty. The approach is crystallised in this observation of the Finnish Group:

“As the minimum, the holder of IP right should always be entitled to a reasonable royalty even in cases where there the infringing products have not been sold.”

Of course, the starting point for reasonable royalties ordinarily is the sale price. When there is no sales price available, e.g. when the products are merely manufactured but not sold, there is a substantial difficulty for the successful right holder in discharging their duty to prove the quantum of damage by proving what the relevant price/royalty base should be for the royalty. Similarly, even if the court sets a royalty by reference to a percentage value (e.g. 5% of sales price), how can that in practice be paid on goods that have no sales price?

Groups proposed different solutions to address this conundrum. There might, for example, be a rebuttable assumption that goods that are manufactured will be sold, or there might be an evaluation of *potential* sales that the infringer might make having manufactured infringing goods. All of these proposals have at their heart the concept that once particular products come into existence in a particular jurisdiction in an infringing manner, for example by being made or imported, then all damage that flows from later actions in relation to those specific goods (such as assumed or potential sales) will be recoverable. Consequently, whether the actual sales are in the same jurisdiction or not, and whether the actual sales also infringe or not, should not matter, because there is at least one infringing act and the task is to determine the totality of the damage that flows from those infringing acts (and not the damage that flows

from other acts whether infringing or not). This approach is not always an extra-territorial one, because there is at least one infringing act that is within the jurisdiction of the court.

The assessment of damage caused by a simple infringing sale would be no different. For example, it is possible for an infringing disposal of a product to occur in jurisdiction A, and the product is then exported and shipped to jurisdiction B with the transfer of title occurring in jurisdiction B and the sale price being paid within jurisdiction B: it is clear that a court in jurisdiction A could be perfectly entitled to assess damages for infringement in jurisdiction A by reference to the sale price paid in jurisdiction B. The fundamental reason for doing so would be because there is a causal nexus between the damage suffered as a result of the infringement in jurisdiction A and the price paid in jurisdiction B.

A number of common principles and themes emerge from the information provided by Groups. Some of these principles and themes have been abstracted from views expressed by Groups and are identified below:

1. Establishing a causal nexus between the infringing act(s) and the damage continues to be strongly supported in the reports of all Groups. The need for such a causal nexus was explained in the Sydney Resolution, and is emphasised by the Canadian Group.
2. Damages for importing, warehousing and manufacturing should be determined using the same principles. The main task of the court is to determine what damage to the right holder has been caused by the infringement.
3. Without prejudice to the court's power to award injunctive relief, the court should award damages in respect of each infringing act. When doing so, the court should eliminate, as far as possible, double recovery such that damage caused by two or more acts of infringement is not recovered more than once. This may validly result in recovery of separate damages in respect of several infringing acts that concern a single product.
4. When assessing damages in relation to a process that is protected by a patent, the court should distinguish between (a) methods of manufacturing products, and (b) methods of use that do not result in the creation of a specific product.
5. In relation to methods of use, the court should take into account when determining what damage has been caused by the infringement:
 - a. whether the use of the process by the infringer produces an economic advantage to the infringer or a disadvantage to the right holder,
 - b. the turnover associated with the use of the process, based on the frequency of use,
 - c. any price advantage given to the infringer through the use of the process,
 - d. [possibly, other factors]
6. In relation to methods of manufacturing products, the court should take into account when determining what damage has been caused by the infringement:

- a. potential sales to be made by the infringer of any products manufactured using the process,
 - b. whether the product of the process is protected by the patent in question,
 - c. whether that product competes with products not produced using the patented process,
 - d. any price advantage given to the infringer through the use of the process,
 - e. any timing advantage given to the infringer through the use of the process (i.e. a springboard advantage),
 - f. [possibly, other factors]
7. When assessing damages for a non-sales infringement, such as manufacturing, on the basis that a potential sale might be made, potential and actual sales of those goods outside the jurisdiction should be included in the determination of damages *provided that* a sufficient causal nexus between the non-sales infringing acts within the jurisdiction and the damage from the sale is shown.
 8. The court should reduce the damages awarded by any sums shown to have been previously awarded in other proceedings, if the inclusion of those sums would otherwise lead to double recovery.
 9. There should be no policy of 'franking', such that products in respect of which damages for infringement have already been paid, may circulate freely and without further liability for infringement for any person.

It was suggested by the Hungarian Group that the court should permit recovery of damages for unjust enrichment, if there is a causal nexus between the unjust enrichment and the infringement. This aspect could perhaps be explored in a future Study Question, as other Groups did not address this area to the same extent.

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