

Quantification of monetary relief

Infringer's profits in The Netherlands & Bird & Bird

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Basis for claiming infringer's profits

- **General civil law – article 6:104 Civil Code**
 - Way for calculation of damages as provided in 6:97 Civil Code
 - There must be damages incurred (Supreme Court *Setel v AVR*)
 - Claimant must choose, but after comparison of damages incurred to infringer's profits
- **Intellectual property laws: *sui generis* right**
 - Art 70 Patent Act; art. 2.21 BCIP (trademarks); art. 3.17 BCIP (design rights); art. 27a Copyright Act, etc
 - Alternative for claiming damages (Supreme Court *Setel v AVR*)
 - No requirement for a direct relation to incurred damages
 - Purpose to discourage infringements – relation to net calculation?
 - Cumulation of losses and profits also not allowed, other damages can be claimed next to profits (Supreme Court *HBS v Danestyle*)
- **Enforcement Directive didn't bring harmonization**

Advantage of infringer's profits

- No requirement to prove that right holder would have made the sales absent infringement
- No issues of substitution, market transparency, etc
- Right holder doesn't need to disclose business information
- Infringer needs to disclose
 - Purchase price / production costs per item
 - Sales price per item
 - Quantity of infringing items purchased/ produced and sold
 - Remaining stock
 - Calculation of profits
 - Data confirmed by a certified accountant
 - Difficult to check whether disclosure is honest and accurate
 - Seizure of evidence not intended to establish damages

Problems with infringer's profits

- Only net profits can be claimed (Benelux Court *Delhaize*)
- Profits include any financial advantage
 - Includes costs saved, limitation of losses – different from economic concept
 - However, difficult to calculate
 - Boundaries unclear: does it include royalties saved?
- Costs need to be deducted from these profits
 - Purchase or production costs
 - Taxes and other costs directly related to the sales (Benelux Court *Delhaize*)
 - Indirect costs, such as general costs, can be deducted depending on the level of bad faith of the infringer (Supreme Court *Stel v AVR*)
 - Writing off specific tools or production equipment?
- Innocent infringer
 - Patent: knew or had reason to know
 - Trademarks and designs: bad faith – intentional, if infringer was aware of the infringing character (Benelux Court *Corblok*)



Thank you **& Bird & Bird**

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