The impact of the ECJ ruling C-367/15 (Olawska) on IP damages in Germany

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IP damages in a nutshell

The calculation of IP damages in the EU, F, UK, D, CH and USA, 2017

600 pages

‘10 Minutes

→ harmonisation of IP damages

“damages appropriate to the actual prejudice suffered”

(a) “all appropriate aspects”

(b) “lump sum”

harmonising effect so far...?
German approach

- Compensatory damages
  - Lost profits
  - Lump sum on royalty basis ("licence analogy")
  - Award of infringer’s profits
  - Moral prejudice (copyright only)
  - Other losses such as damage to reputation

UK approach

- Compensatory damages
  - Lost profits
  - Lump sum on royalty basis
  - Award of infringer’s profits
  - Account of profits
  - Other losses such as damage to reputation
French approach

- compensatory damages
  - lost profits
  - other losses such as damage to reputation (“banalisation”)
- lump sum on royalty basis
- moral prejudice

harmonising effect so far...?
quite small!
is that going to change...?

<table>
<thead>
<tr>
<th>ECJ rulings on IP damages</th>
</tr>
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<tbody>
<tr>
<td>17.3.2016, C-99/15 Liffers</td>
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<tr>
<td>22.6.2016, C-280/15 Nikolajeva</td>
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<tr>
<td>9.6.2016, C-481/14 Hansson</td>
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<tr>
<td>28.6.2016, C-57/15 United Video Properties</td>
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</table>
Whether Article 13 EnfDir precludes national legislation
  » under which the holder of an intellectual property right that has been infringed
  » may demand the payment of a sum
  » corresponding to *twice the appropriate fee* which would have been due if permission had been granted?
[28] ... the fact that Directive 2004/48 does not entail an obligation on the Member States to provide for ‘punitive’ damages cannot be interpreted as a prohibition on introducing such a measure.

[29] ... it is not evident that the provision applicable in the main proceedings entails an obligation to pay such [punitive] damages.

[30] ... mere payment of the hypothetical royalty is not capable of guaranteeing compensation in respect of all the loss actually suffered, e.g.:
   - researching and identifying possible acts of infringement
   - moral prejudice
   - interests

[31] It is admittedly possible that, in exceptional cases, payment for a loss calculated on the basis of twice the amount of the hypothetical royalty will exceed the loss actually suffered so clearly and substantially that a claim to that effect could constitute an abuse of rights, prohibited by Art. 3(2) EnfDir.

Impact on IP Damages in Germany...
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[30] ... mere payment of the hypothetical *royalty* is not capable of guaranteeing compensation in respect of *all* the *loss* actually suffered

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purely compensatory damages

- moral prejudice (all IP rights)
- lost profits
- lump sum on royalty basis ("licence analogy")
- award of infringer's profits
- other losses such as damage to reputation

harmonising effect so far...? quite small !
is that going to change...? quite likely !