



Annual EU-China Forum 2023: Comparative Approach to Judiciary Procedures: damages 中欧知识产权司法论坛：损害赔偿



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Determining damages - procedural context NL /// 确定损害赔偿——程序背景（荷兰）

- In proceedings on the merits /// 在案件审理过程中
 - in provisional relief sometimes advance payment but rare, what is the urgency? /// 偶尔会出现预付临时救济的情况。为何如此急迫？
- Usually two tier: /// 通常有两层原因：
 1. Infringement/liability (with order damages likely and to be determined later) /// 侵权/责任（很可能会造成损害，将在之后确认）
 2. Assessment of damages in separate follow up proceedings /// 在后续单独诉讼程序中另行评估损害赔偿
- Vast majority of cases settled out of court /// 绝大多数案件都是庭外和解。

Determining damages - procedural context UPC /// 确定损害赔偿——程序背景（统一专利法院）

- UPC: damages may be determined in main infringement proceedings but also in separate proceedings /// 统一专利法院：损害赔偿可以在主体侵权诉讼中确定，也可以在单独诉讼程序中确定
 - Rules 118.1 and 125 RoP UPC. /// 统一专利法院程序规则第118.1条、125条
 - How to be interpreted remains to be seen but factors probably (a) if liability (i.e. infringement/validity) not really in dispute, (b) if the debate on damages is sufficiently complete and (c) if damages calculation is straightforward. /// 如何解释仍有待观察，但可能的因素包括：（a）对责任（即侵权/效力）是否没有争议；（B）关于损害赔偿的辩论是否充分完整；（c）损害赔偿的计算是否简单明了。

Determining damages - procedural context UPC cont'd /// 确定损害赔偿——程序背景（统一专利法院）（续）

- If damages in separate proceedings: interim award possible /// 如果在单独诉讼程序中作出损害赔偿：可能作出中期裁决
 - Rule 119 /// 统一专利法院程序规则第119条
 - Minimum: expected cost of the separate proceedings /// 最低为单独诉讼程序的预估诉讼费用
- Separate proceedings within one year from service final decision
/// 在送达最终判决之日起一年内，可以提出单独诉讼
 - Rule 126 /// 统一专利法院程序规则第126条

Determining damages - Legal basis /// 确定损害赔偿——法律依据

- International: /// 国际层面：
 - Art. 45 TRIPs /// 与贸易有关的知识产权协定第45条
 - Art. 13 Enforcement Directive 2004/48 /// 欧盟知识产权执法指令2004/48第13条
 - Art. 68 UPCA /// 统一专利法院协议第68条
- National: /// 国家层面：
 - Art. 6:162 Dutch Civil Code (DCC, Burgerlijk Wetboek) /// 荷兰民法典第6:162款
 - Specific IP law provisions /// 知识产权法具体规定

Determining damages – conditions NL /// 确定 损害赔偿——条件（荷兰）

- Tortuous act, i.e. infringement of valid patent /// 不当行为（如专利侵权）
 - but also e.g. enforcement of overturned judgment or /// 以及其他情形，如执行已被推翻的判决
 - sending cease and desist letters against better judgment, i.e. while serious doubts about validity/infringement /// 或在专利效力/是否侵权严重存疑的情况下，作出不合理判断，仍然发出停止函
- Liable – infringer who “knew or had reasonable grounds to know”(cf 45 TRIPs/13 ED) /// 应负责任——侵权人“知道或应当知道”（参见45 TRIPs/13 Ed）
 - Wilfulness – no more: DSC 19-12-2003, NJ 2008, 75 /// 主观故意——不再考虑：DSC 19-12-2003, NJ 2008, 75
 - Warning/cease and desist letter /// 警告/停止信
- Damage is caused by the infringement (causation) – in principle *condicio sine qua non* /// 损害是由侵权行为造成的（因果关系）——原则上的必要条件

Determining damages – conditions UPC /// 确定损害赔偿——条件（统一专利法院）

- Infringement, but also other tortuous acts? /// 除侵权行为外，还有其他不当行为吗？
 - but also e.g. enforcement of overturned judgment (yes, see later) or /// 执行已被推翻的判决（见下文）
 - sending cease and desist letters against better judgment → unclear /// 作出不合理判断，发出停止函→尚不清楚
- Liable – infringer who “knew or had reasonable grounds to know”(cf 45 TRIPs/13 ED/68 UPCA) /// 应负责任——侵权人“知道或应当知道”（参见45 TRIPs/13 ED/68 UPCA）
 - Warning/cease and desist letter /// 警告/停止信
- Damage is “result of the infringement”(causation) /// 损害是“侵权的结果”（因果关系）

Determining damages – assessment NL /// 确定损害 赔偿——评估（荷兰）

- Loss of profit /// 利润损失
- Compare infringement with situation of no infringement: /// 与未侵权的情况相比较：
 - Reasonable royalty rate /// 专利许可费率是否合理
 - (Turnover of infringer) x (regular profit IP holder) /// 对比侵权人收入和权利人常规性利润
 - Price drop (especially in pharma) → expert testimony /// 价格下降（尤其在制药行业）→ 专家证词
 - Loss of monopoly/good will /// 丧失垄断地位/商誉
 - Difficult to prove in complex market situations /// 市场格局较复杂时难以证明

Determining damages – assessment NL cont'd /// 确定损害赔偿——评估（荷兰）

- Problems: /// 问题：
 - Turnover infringer \neq lost turnover IP holder (price difference) /// 侵权人收入 \neq 权利人损失（存在价差）
 - Which costs can be deducted? Indirect costs? Up to factual judge, considering all circumstances, such as “gravity of infringement”(DSC 18-6-2010, NJB 2010, 1406) /// 哪些成本可以扣除？间接成本？要依据事实判断，考虑所有情况，如“侵权严重性”（DSC 18-6-2010, NJB 2010, 1406）
- No punitive damages /// 没有惩罚性赔偿
- If unclear: ex aequo et bono /// 如果不明确：依据公平正义原则

Determining damages – assessment UPC /// 确定损害赔偿——评估（统一专利法院）

- Injured party placed in position of no infringement (68(2) UPCA) /// 对受害方：停止侵害恢复原状（68(2) UPCA)
- Court shall take into account (68(3)(a) UPCA): /// 法院应考虑（68(3)(a) UPCA）：
 - Negative economic consequences, including /// 负面经济后果，包括
 - Lost profits /// 利润损失
 - Unfair profits made by infringer /// 侵权人的不正当利益
 - Moral prejudice or /// 精神损失，或者
- Alternative (68(3)(b) UPCA): /// 亦可（68(3)(B) UPCA）：
 - lump sum, based on at least reasonable royalty rate /// 总额赔偿，至少以合理专利使用费为依据

Determining damages – assessment UPC cont'd /// 确定损害赔偿——评估（统一专利法院）

- So could boil down to three alternative ways of calculation: /// 总结而言，有三种可供选择的计算依据：
 - Lost profits patentee /// 专利权人的利润损失
 - Unfair profits made by infringer /// 侵权人的不当获利
 - Reasonable royalty rate /// 合理的专利使用费
- No punitive damages (68(2) UPCA) /// 没有惩罚性赔偿（68(2) UPCA)
- If infringer no (reasonable grounds for) knowledge: profits or compensation (68(4) UPCA) /// 如果侵权人不知情（缺乏应当知情的理由）：补偿权利人利润损失或支付赔偿金（68(4) UPCA)

Determining damages - lawyer's fees NL /// 确定损害赔偿——律师费（荷兰）

- Art. 14 ED/1019h DCCP: compensation of reasonable and proportionate costs in IP cases /// Art. 14 ED/1019h DCCP: 合理适度赔偿知识产权案件的诉讼费用
 - unless equity requires otherwise /// 除非因个案公正性原因不适用本条
 - In main decision, no separate proceedings /// 包括在主体判决内，不得另行单独诉讼

Determining damages - lawyer's fees NL cont'd /// 确定损害赔偿——律师费（荷兰）

- What types of cases? /// 什么类型的案件?
 - Declaration of non-infringement: YES (DSC Knooble/Staat) /// 无侵权声明：适用 (DSC Knooble诉Staat案)
 - Pure invalidity case (ECJ C-180/11 Bericap/Plastinova): NO, but YES if as defence against (future) infringement claim (Court of Appeal The Hague 26-2-2013, Danisco/Novozymes) /// 纯专利无效宣告案件 (ECJ C-180/11 Bericap诉Plastinova)：不适用，但如果无效宣告请求是对（未来）潜在侵权指控的防御，则适用（海牙上诉法院，2013年2月26日，Danisco诉Novozymes案）
 - Unlawful sending of letters of infringement: YES (Hague CoA 29-11-2011, ThuisKopie) /// 非法发送侵权函：适用（海牙上诉法庭，2011年11月29日，ThuisKopie）
 - Enforcement of infring. judgements/orders: YES (Hague CoA 29-11-2011, ThuisKopie and 29-5-2009, VDV) /// 侵权案件判决/命令的执行：适用（海牙上诉法院，2021年1月29日ThuisKopie、2009年5月29日，VDV）

Determining damages - lawyer's fees NL cont'd /// 确定损害赔偿——律师费（荷兰）

- In NL has led to setting of indicative tariffs (also for patents) to assess reasonable fees /// 荷兰已制定指示性费率标准（也适用于专利），以便评估合理费用
 - ECJ United Video/Telenet (C - 57/15): flat-rate scheme is ok if not less than “significant and appropriate part of the reasonable costs”/// 欧盟法院 United Video诉Telenet案（C-57/15）：如果不低于“合理总体成本中的重要相关成本项”，可以采用统一费率标准

Determining damages - lawyer's fees UPC ///

确定损害赔偿——律师费（统一专利法院）

- Art. 14 ED/69 UPCA: compensation of reasonable and proportionate costs in IP cases, /// Art. 14 ED/69 UPCA: 合理适度赔偿知识产权案件的诉讼费用
 - unless equity requires otherwise, /// 除非因个案公正性原因不适用本条
 - up to ceilings in scale Rule 276A RoP /// 赔偿尺度以统一专利法院程序规则第276A条为上限
 - JR may decide which scale in interim proceedings 104(j) RoP /// 汇报法官可以在中期程序中作出判断（统一专利法院程序规则第104条第j款）
 - Again, ECJ United Video/Telenet (C - 57/15): flat-rate scheme is ok if not less than “significant and appropriate part of the reasonable costs”/// 同样，依据欧盟法院 United Video诉Telenet案 (C-57/15)：如果不低于“合理总体成本中的重要相关成本项”，可以采用统一费率标准
 - May be in separate proceedings /// 可以提出单独诉讼程序

Determining damages - earlier decision overturned NL /// 确定损害赔偿——推翻原判（荷兰）

- if earlier decision overturned and enforced: liable for damages? In NL: yes /// 如果已被执行的原判被推翻，当事人是否承担损害赔偿责任？荷兰：是
- Same if earlier preliminary relief revoked in proceedings on the merits? In NL: yes /// 如果初步救济在案件审理过程中被撤销，当事人是否承担损害赔偿责任？荷兰：是
 - As for penalties already forfeited: only returned if enforced judgment was appealed and nullified retroactively /// 至于已经罚没的款项：只有在已被执行的原判被上级法院推翻并追溯无效的情况下才予以退还
 - ECJ Bayer/Richter: repeal is necessary but not decisive, abuse? /// 欧盟法院，拜耳诉瑞希特案：推翻原判是必要但非决定性条件。是否存在制度滥用？

Determining damages - earlier decision overturned UPC /// 确定损害赔偿——推翻原判（统一专利法院）

- UPC: compensation if provisional measure revoked (Rule 213 RoP) and if decision later varied or revoked (in appeal, revocation of patent by EPO etc) (Rule 354(2)) /// 统一专利法院：临时措施被撤销（统一专利法院程序规则第213条）、原判被更改或推翻的（经上诉，或经欧洲专利局撤销程序等）（第354(2)条），给予当事人赔偿

Compensation before patent grant /// 授予专利前的赔偿

- In NL: yes, 30 days after bailiff notification of application /// 在荷兰：是，法庭事务官送达专利申请通知30天后
 - 71/72 DPA, 67 EPC
- In UPC: yes, after publication of application /// 统一专利法院：是，专利申请公布后
 - Art. 32(1)(f) UPCA, 67 EPC, 125 RoP
- Only once patent is granted /// 在正式授予专利后，可以申请获得赔偿

- Thank you for your attention!
感谢聆听!