



Do the Math! – Copyright Infringements and Damages¹

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Abstract. Copyright law seems to have been centred around the concept of wrongfulness in the past few decades mainly because the rapid development of technologies attached to the information society have made infringements easy and relatively cheap for the users. The study analyses theories, doctrines, and concepts formed around the question on how to award damages for copyright infringements to the copyright holder in the European Union. To conclude some recommendations and changes in the practice of awarding and calculating damages in copyright infringement cases, the article systemizes and criticizes various approaches of judicial practice in EU member states in relation to two core problems: assessing and calculating lost profits of the copyright holder and awarding moral damages for the infringement of the author's moral rights. The study is not a case analysis; instead, it confronts different ideas and theoretical bases on the preconditions of awarding damages and some common techniques on the calculation of the actual loss. While the EU is far from achieving harmonization in tort law, cases of copyright infringements are typically international in the 21st century; therefore, national laws should at least agree on similar frameworks when reinterpreting and restructuring old tort law lemmas and institutions. The article attempts to provide a starting point to support this work.

Keywords: damages, tort law, copyright law

I. Torts and Copyrights – General Remarks

Enforcing certain rights is always a challenge to the entitled person even if a given jurisdiction orders the application of diverse sanctions to choose from. Copyright law seems to be centred around the concept of wrongfulness in the past few decades. The rapid development of the information society increased the debate over the infringements of copyrights in a digital environment. This phenomenon

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resulted in neglecting another, potentially equally important question that leads us to the problem of awarding damages to the copyright holder. While proving wrongfulness in a copyright-centred lawsuit may depend on the moral attitude of the society in which the forum delivers a verdict, awarding damages for the wrongful act shows a very fragmented system worldwide. National laws are from being unified or even harmonized when it comes to the preconditions and methods on awarding damages. Tort law is rooted deep in the national culture and even in the European Union very few attempts proved to be successful covering tiny bits of approximation in tort law. Private international law generally orders the copyright holder to use the legal system in which the protection is requested; therefore, not only the substantive and somewhat harmonized rules of copyright law but the technical provisions of domestic tort law shall govern the case.

Tort law is probably one of the most diverse areas of private law that often lies in the borderline of private and criminal law. The distinction between the two otherwise remarkably different cores of the legal system may seem obvious, but a slight overlap is still often experienced when the same act may lead to criminal and tort law consequences at the same time. The two-faced nature of copyrights transform the claims of the copyright holder into moral and monetary questions at the same time. The infringement against moral rights lands us right in close proximity of the questions on moral or immaterial damages, while infringing the copyright holder's pecuniary rights results in a natural claim for monetary damages. Proving and calculating damages are rarely determined by the special rules of copyright laws. In contrary, the general umbrella of the law of damages or tort law aims to protect the copyright holder and grants him compensation or satisfaction. The study attempts to highlight some notable differences in the laws of certain EU member states in relation to awarding damages for copyright infringements to prove that the lack of approximation in this field may prove to be a real obstacle in enforcing copyright laws. Without aiming to draw a complex picture on awarding damages for copyright infringements, we took the liberty to pick a few core questions that, as we assume, can seriously block the copyright holder from getting compensation or satisfaction for the loss he has suffered as consequence of the infringement.

II. Functions of Tort Law and the Concept of Awarding Damages

Debates on the nature of tort law and the practice that private law grants damages for the loss the aggrieved or injured person suffers have been ongoing for centuries. There is no doubt that the concept of monetary compensation for civil wrongs came from the idea of providing complex protection to the

citizens and connecting private law and criminal law to function as a gapless umbrella mechanism in cases of infringements. Private law has long admitted the greedy concept of businesses: money can restore all harms, and money can buy everything. In fact, the reason why tort law and the law of damages grant monetary compensation or satisfaction to the aggrieved party is to place the aggrieved party into the centre of the adjudication. While criminal law focuses on the perpetrator and sees the events from his perspective, private law rushes to restore the ideal pre-infringement status quo in assisting the aggrieved, injured party. No restriction on the tortfeasor's and wrongdoer's freedom should be applied in private law as consequences may not grant satisfaction or compensation to the aggrieved person. Providing monetary damages to him, however, may ease the urge for revenge and the likeliness to cure the negative consequences of the infringement. Civil law legal systems advertise that tort law, or the law of non-contractual obligations exists to provide compensation for the loss suffered in relation to the infringement. Placing the copyright holder into the position he originally was as if the infringement had not happened is the flagship purpose that verifies the existence and importance of tort law in these legal regimes. Prevention or deterrence may only come in the second place. On the other hand, we cannot deny that the discouragement of repeat and would-be infringers are also important to tort law. Torts shall not pay, says the classic beacon principle of common law legal systems.² Deterrence is a function that teaches the actual infringer and the society in avoiding infringing situations; otherwise, damages must be paid. A recent trend in the debates over tort law's regulatory functions suggests that risk allocation should serve as a primary goal in awarding damages for wrongful acts.³ The concept of risk allocation is a business-friendly interpretation of compensation as it avoids emphasizing the questions of liability; instead, it decides the problem following a simple solution: who could have prevented the risks more economically. Risk allocation theory thinks of the future and surpasses imposing liability against a party; therefore, it is most likely that business relations survive the incident.

In copyright infringement cases, the function of awarding damages for the loss suffered does not necessarily need fundamental reinterpretation. We may look at copyrights as a set of substantive statutory rights that may also be subjects to infringements; therefore, the same protective, restitutive mechanism shall apply as to the violation of other rights. National laws, on the other hand, often prove a clear pragmatism, emphasizing the importance of one function over the others. Statutory law or judicial practice may come forward with this obvious decision on whether the compensatory or the deterrence function should prevail. This decision might lead to serious consequences in relation to the success ratio of

² Van Dam 2014. 38.

³ Oliphant 2012. 152.

the copyright holder's claim for damages. Systems following the compensation theory tend to be less sensitive in awarding damages for infringements against moral rights. Legal systems touching grounds on the idea of deterrence may evaluate factors independent from the entitled party's scope and nature of loss when calculating the amount of damages as they are more concerned about the infringer than the claimant. Another obvious dividing line between the two systems is how they rank the importance of the preconditions needed to award damages. In general, loss, wrongfulness, causation between the two, and fault on the wrongdoer's side are needed to be entitled to damages. The compensation theory suggests that no profit should be earned on the tort; therefore, evidence of the suffered loss is vital to support the claim. Also, the theory of causation tends to be more restrictive in such systems ordering judges to provide damages only if the loss is a direct and close consequence of the infringement. The deterrence theory, on the other hand, makes fault a material element to award damages rather than a concept of defence available for the infringer.

III. Shortcomings of National Laws in the EU

The European Union Directive on the Civil Enforcement of Intellectual Property Rights⁴ (hereinafter: the IPRED) states an obligation that 'Member States must ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right-holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement'.⁵ This obligation does not intervene to set grounds for a harmonized tort law in the member states for copyright infringements; instead, it calls for effective solutions that may be very different from each other. The IPRED acknowledges that both moral and pecuniary rights of the copyright holder shall be respected not only in a declarative way but in providing effective remedies that may cure the loss the copyright holder suffered as a consequence of the breach. We may agree that infringing activities in the words of the IPRED are always non-contractual in nature since licensing agreements authorize the user to use the copyright-protected property accordingly. Breach of such agreements may result in overreaching that is non-contractual in nature. This argumentation leads us to the conclusion that the IPRED calls for effective remedies in tort law that manifest in the form of awarding damages to the right-holder. Still, in national laws of the member states, courts face difficulties in

4 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (IPRED), Official Journal of the European Union L 157.

5 Article 13 of the IPRED.

awarding damages in copyright tort cases. Courts, in many cases, face difficulties in calculating and awarding damages comprehensively. Infringements against the moral rights of the copyright holder often result in the application of objective and restorative sanctions (e.g. ordering the infringer to discontinue the infringing activity) rather than granting damages. As the loss arisen from the infringement of moral rights is non-calculable due to the non-monetary nature of these rights, nominal or symbolic damages are often awarded that do not serve the purposes of compensation and satisfaction or even deterrence.⁶ Even in cases when pecuniary rights of the copyright holder are in the centre of the claim, awarding compensation for negative economic consequences (excluding lost profits) proves to be a challenge. The core problem in such cases is the lack of causation or the distant connection to the actual infringement that both form obstacles in awarding damages for economic loss.⁷ Another common shortcoming in national laws is that moral or immaterial harms are not compensated properly. Either because the national tort system does not support compensation for non-visible harms,⁸ or judges do not see a compensable loss in these cases.⁹ Either way, moral and immaterial harm may often be associated with the infringement of pecuniary rights (e.g. the novel is unlawfully translated into a foreign language resulting an inconsistent text full of typos that ruin the reputation of the author in those countries). It may be a general problem in European tort law that costs of disclosing the infringement, the costs of taking legal actions, or the costs of rectifying the infringement are also not properly compensated in some member states.¹⁰ It may be because the national law, in general, imposes a cap on the reimbursement of such costs or the courts extend the obligation to mitigate over these losses as well. Copyright infringement cases are highly exposed to this shortcoming, as disclosing and rectifying such infringements may result in much higher costs than in cases of infringements of other rights. All these shortcomings support the infringer's position, who may retain some profit even if his liability for the infringement is recognized by the courts.

IV. Proving and Discounting Lost Profits

Lost profits should, in theory, be part of the loss to be compensated under classic tort law principals. The real question concerning lost profits, however, is how a connection can be established between the wrongful act, the infringement against copyrights, and the profit the right-holder would otherwise gain in the absence of the

6 European Observatory on Counterfeiting and Piracy 2009.

7 Van Dam 2014. 78.

8 Greece.

9 Hungary.

10 Van Dam 2014. 93.

infringement. Causation theories in tort law may seriously limit the availability of the reimbursement of lost profits. As in criminal law, private law also has ‘would-be’ causation doctrines. These doctrines usually require evidence to show that at least a probable and reasonable connection can be established between the infringement and the lost profits stated in the claim. In reality, especially in cases of file sharing in a digital environment, it is extremely difficult to convince the court that the wrongful users who could get access to the copyright-protected work for free could have paid for it if it were not available on the torrent site for free. Some courts, however, developed progressive solutions – also based on speculative rules – on how to get over with this obstacle. In Sweden, for example, courts count with a 1:3 original to counterfeit ratio to rule out the ‘if it had not been available for free, I would not have paid for it’ problem. Also, it is almost always necessary to provide a rough estimation on how much the copyright holder truly lost on the infringement, as providing evidence on the exact number of illegal users is near to impossible. Therefore, some may look at the reimbursement of lost profit in copyright infringement cases as a ground for mere speculation, and some courts certainly treat it this way. *Ex aequo et bono* evaluations still seem to be a more favourable approach to copyright holders, while in some jurisdictions in the European Union (e.g. Italy) the right-holders must choose whether they ask for a reimbursement of the infringer’s profits or their own lost profits, whichever is greater. Courts tend to take multiple factors into account when evaluating and calculating lost profits. A common approach is that the net profit is reimbursable, while in case the infringement results in physical pirated copies, damages are awarded per product. A possible solution to the problem would be to award estimated lump sums per each counterfeited product. In reality, the deterrence function of tort law may be traced in the calculation of lost profits. For example, some courts thoroughly analyse the magnitude and the nature of the infringer’s business if the reimbursement of lost profits require estimation. While the actual profit the infringer made on the infringement cannot be calculated, the profit the infringer made in general in a given period may also serve as a base to decide on the magnitude of profits the copyright holder has lost.¹¹ Also, tort law’s deterrence function is spotted when the courts move toward a punitive direction awarding double or triple awards to the right-holder. Some criticize this concept since in many cases the infringers distribute the counterfeited works under very different circumstances than the right-holder would do so through legal channels.¹² This makes it difficult to value the true damage the counterfeit products caused to the copyright holder compared to the would-be value of the legal sales. This may be the primary reason why courts rarely break the amount of damages into categories, and the reasoning of the decision does not allow a deep insight on how the judge assessed lost profits.

11 European Observatory on Counterfeiting and Piracy 2009.

12 Blum–Maunder 2015.

A classic problem is to identify that thin dividing line between lost profits and reasonable royalty. EU member states, in general, offer damages in the form of a reasonable royalty. This amount is calculated from the amount of legal royalties the copyright holder would earn if the infringer had obtained a licence from the right-holder. This concept simplifies the calculation of lost profit in sectors where the licence royalty is easy to determine; however, this brings us to the next core question as to whether reasonable royalty truly covers the lost profits of the copyright holder. The concept that equals reasonable royalty to lost profits does not calculate factors like the so-called ‘bestseller clause’ and certainly does not pay attention to the magnitude of the infringer’s business and the true market potential of the channels through which the infringer distributed the counterfeit products.¹³ In case the court awards lump sum damages based on royalties, there may be two options for the courts. They either award lump sum damages only when no other methods on calculating and assessing damages can be applied or they offer lump sum damages as an alternative to other forms and types of damages. In the latter case, we may state that the court grants an exoneration under the burden of proof. If the right-holder decides not to get engaged in a lengthy and probably very costly evidence procedure to prove the actual amount of the lost profit and the causal link between this loss and the infringement, he/she may favour the estimation based on reasonable royalties. Spain, on the other hand, makes it even simpler. The copyright holder may claim 1% of the infringer’s gross business turnover as damages instead of providing any evidence to the loss he/she suffered as consequence of the infringement.¹⁴ The concept of awarding reasonable royalty may also result that the court applies it even if fault on the infringer’s side cannot be proved. In such cases, the right to reasonable royalty calculated from the regular licensing fees is an objective or almost unconditional right to the right-holder independently from the existence of fault as an otherwise conclusive factor in tort law. This approach practically denies that reasonable royalty is a type of damages; instead, the royalty is a direct consequence of the infringement that is enforceable against factual infringers too.¹⁵ Walking on this path may get us to another problem on discounting lost profits. Mitigating damages is always a requirement in tort law, and it also serves as a defence to discount damages. If the right-holder fails to mitigate the loss, the infringer may ask for a deduction, a discount from the amount of damages he is liable for. While the old concept of ‘not to earn money on torts’ claims for universal application in all tort cases, measuring the actual amount arisen from neglecting this duty is often a challenge to the courts. A classic question is whether the right-holder has invested the same amount as the infringer has. It is always a speculation on some potential behaviour under like circumstances. Also, in copyright infringement

13 European Observatory on Counterfeiting and Piracy 2009.

14 Ibid.

15 Plijer 2012.

cases, the infringement may require costly investments (e.g. publishing a book and distributing it) that the copyright holder might not have taken if using the intended channels to distribute his/her work (e.g. the author wanted to share the artistic property through digital channels). Also, if the sanction to cover lost profit or to pay reasonable royalty to the copyright holder is applied independently from the infringer's fault (e.g. the court considers it a case of unjust enrichment), no damages can be awarded; therefore, mitigation duty is not even a requirement.

V. Reputational Damages and Moral Prejudice

Moral rights under copyright laws certainly mix a special character into the assessment of damages and the evaluation of the infringement. First and foremost, almost all cases of infringement involve some harm caused in the moral rights of the copyright holder. While most see the problem from an entirely monetary perspective, the infringement may easily undermine the reputation of the copyright holder in every aspect. A scandal can easily evolve once the infringement gets publicity, resulting that the copyright-protected work gets to the public in a way not intended by the copyright holder. The scandal may undermine the value of the work and can even distort the message the copyright holder wanted to share with the public. Compensation for moral rights is a difficult question anyway since an infringement against moral rights cannot fully be restored or compensated. Some legal systems provide moral satisfaction to the copyright holder, including an order against the infringer to apologize. In Poland, for example, an infringement against the author's moral rights does not result in awarding monetary damages, making apology the sole sanction of the infringement.¹⁶ The loss-centred concept of tort law in civil law legal systems usually requires evidence that the copyright holder suffered reputational damage, emotional distress, or any visible and tangible loss. This concept results that damages courts award for the infringement of moral rights are usually very low, especially when the claim is justified by both monetary and moral consequences of the infringement. Damages for moral prejudice may be almost nominal and symbolic. The human factor also makes a significant impact on the amount of damages awarded for moral prejudice. While most courts tend to hide it in the reasoning, a trend can be observed that courts are either reluctant or very reserved when awarding damages based on moral prejudice to legal entities as right-holders. In such cases, courts typically only identify monetary loss and no moral loss, while for private individual right-holders, even if nominal, moral damages may also be awarded.¹⁷

¹⁶ European Observatory on Counterfeiting and Piracy 2009.

¹⁷ Ben-Shahar 2010. 50.

To filter claims based on infringements against moral rights of the copyright holder, courts use different tactics and concepts. In Finland, for example, courts moved very close to the general concept of common law legal systems in torts. Moral damages are only awarded in cases when the infringer acted with intention or with gross negligence.¹⁸ The basic concept of torts in common law is that for non-visible harms and emotional distress damages are only available if the infringer's fault was excessive (intentional, reckless, or grossly negligent), and judges decide whether the claim is well-grounded based on the infringer's fault.¹⁹ This approach clearly shows some punitive character associated with damages, as compensation cannot be a guide if the availability of damages merely depends on the infringer's attitude.

The amount of reputational damages is determined by various factors. The infringement may ruin the reputation of first-book authors as the public associates the author's first appearance with the infringement scandal. Famous authors may also claim that reputational damages should be high in their cases since the infringement placed them into the spotlight, where they did not want to be under normal circumstances. Usually, the circumstances of the infringement make a huge impact on the amount of reputational damages. If the infringement generated a huge scandal as the infringer was not willing to admit the infringement and defended himself publicly and vigorously, the copyright holder's reputation may also suffer serious damages. A recent trend also considers the subjective attitude of the copyright holder, who never wanted to share his/her work through certain channels. In case the copyright holder publically despised streaming services in the past and communicated this attitude loudly in the media, an infringement that used this communication channel might probably cause confusion and misunderstanding, which is a factor courts measure when calculating reputational damages.²⁰

Moral damages have always been a trivia to private law. While moral damages are categorized as damages, and therefore tort law institutions are extended to cover this area too, the lack of value of the protected rights and interests make the calculation uncertain and subjective. Since copyright law recognizes moral rights to the author, these rights should be protected under the same regime as for pecuniary rights. The law of damages, on the other hand, requires evidence from the aggrieved party to prove that he/she suffered some loss and the extent (amount) of it. Proving the infringement against the author's moral rights that constituted any loss may be a difficult process. First and foremost, the nature of moral rights makes it impossible to associate them with any material value and, therefore, material loss or harm. In such cases when only moral rights of the author were infringed, awarding damages is certainly a challenge to the court.

18 European Observatory on Counterfeiting and Piracy 2009.

19 Calame-Sterpi 2015. 85.

20 Renda-Simonelli-Mazziotti-Bolognini-Luchetta 2015. 98.

There may be two theories that make attempts to filter the claims. While the compensation theory recognizes the need for protection of such right, it only provides the availability of damages if the claimant can successfully prove some negative changes in his/her life, reputation, and circumstances. This theory filters claims based on the consequences of the infringement rather than the nature of the infringement. The competing theory aims to provide satisfaction for the copyright holder, and it also teaches a lesson to the infringer and, preferably, to the society. This latter concept makes damages available even if the claimant cannot prove an undesired change in his/her circumstances. The satisfaction theory, however, still filters claims to rule petty claims out of protection. This filter may be very subjective and highly determined by the attitude of national laws. One solution to the problem may be to thoroughly explore the conduct of the infringer, and, as it is the case in most common law legal systems, award damages in case the infringer acted intentionally, recklessly, or with gross negligence. This model clearly replaces the core emphasis in tort law, switching attention from the claimant to the tort-feasor. Some member states (e.g. Hungary) in the European Union do not grant damages at all if the infringement was titled an ‘innocent’ infringement (e.g. the infringer was not aware of the infringement such as when publishing companies contract with the wilful infringer to publish a book that is the subject of the infringement). In these cases, however, the ‘innocent’ infringer may still be obliged to reimburse the unfair profits he gained through the infringement he had not been aware of.²¹

Another potential solution to filter petty claims is to deduct to potential inner harms (moral harms) from the nature and circumstances of the infringement. If these circumstances support the claim, making it reasonable to believe that the author might have suffered negative inner consequences (not necessarily medically proved emotional distress), damages are granted. The automatic application of moral damages would probably be a mistake in any given jurisdiction as it could ruin the basic concept that supports tort law in general: restoring the balance. A selective approach to the protection of moral rights, however, lacks any unification or harmonization in Europe. The only common core in this debate might be the systematic denial of punitive damages. It is important to stress that the so-called double, multiple, lump sum, or pre-determined fees (often labelled as damages) applied by the collective rights management societies cannot be categorized as damages. These pre-determined fees that apply to certain cases of copyright infringements lack the thorough examination of the tort law preconditions. Even in cases when these collecting societies double the royalties for intentional infringements (e.g. in Austria), we cannot label this practice as if the given jurisdiction applied punitive damages. Still, even in some member states of the European Union, traces of exemplary damages can be identified. An

21 Johnson 2013. 304.

interesting practice in Poland dictates the court to order the infringer to pay a fee into the Fund to Promote Creativity. The amount of this fee cannot be less than double the probable profit the infringer might have gained.²² We believe that such statutory dictates erode the function of tort law, and, in fact, they fall outside the scope of tort law protection. These are exemplary ‘damages’ that stretch well beyond the relationship of the parties (in this case, the copyright holder and the infringer) and serve as punishments that provide benefit to a broader audience (e.g. urge creative people to create more artistic works). In fact, the punitive character of damages in copyright law cases was explicitly ruled out in a decision of the Belgium Supreme Court, in which the court decided that punitive damages cannot be justified by the fight against counterfeiting and the dissuasive effect as private law cannot provide and grant damages that exceed that real prejudice the copyright holder suffered.²³ As national tort laws typically refuse to award punitive damages at all, copyright law cannot be an exception under this rule just because it has a special agenda, and infringements in the digital environment started to become massive and the fight against them is often inefficient.

VI. Concluding Remarks

Copyright infringements often bear the consequence of damages. In the European Union, the regime that makes awarding damages to the copyright holder, however, does not have special rules; instead, it relies on the classic system of damages. While courts generally make attempts to apply the same principles and legal institutions in copyright infringement cases, the same way they do in other tort-related disputes, the calculation of damages often gets complicated and leads to unfair outcomes. The two most complicated questions related to damages in copyright infringement cases is the assessment and adjudication of lost profit and moral damages. Claims for lost profits often fail on the grounds that causation theories do not support would-be, or hypothetical, speculative connections between the loss and the wrongful act, while claims for moral damages should struggle with the dual nature of copyrights that seems to emphasize monetary interests more than moral ones. Various models in the European Union offer diverse approaches to these problems, either limiting or extending the options for damages to the copyright holder. In the past few decades, there seems to be a tendency that judicial practice in almost every European jurisdiction marches toward a fragmented, sector-specific approach on the law of damages. The liability of professionals (e.g. medial service providers, attorneys, accountants, etc.) already differs from the regular concept of civil liability, mostly in terms of

²² Article 79(2) of Act of 4 February 1994 on Copyright and Related Rights (Poland).

²³ European Observatory on Counterfeiting and Piracy 2009.

the interpretation of causality and fault. Copyright infringement cases may not require reinterpretation related to these lemmas; however, we urge a different approach in the calculation and assessment of the amount of damages. We suggest that the dual nature of copyright law should be respected in copyright infringement cases when the claimant requests damages for the infringement that attacked his/her moral and pecuniary rights. While total separation of the two sets of rights in awarding damages would be problematic, the assessment should cover both sets of rights and potential losses the copyright holder might have suffered as consequence of the infringement. Moral damages should be awarded merely to react to the wrongful act that targeted the moral rights of the author. We do not suggest an automatic application of damages for infringements against moral rights but a selective approach that deducts to some potential, reasonable inner harm and/or reputational harm based on the circumstances and the nature of the infringement. The amount of moral damages should not be nominal and symbolic. In fact, where the court believes there is no inner harm or reputational loss suffered by the right-holder, the claim for moral damages should be rejected. Awarding nominal damages in like situations would serve more punitive than compensatory functions, which is not supported by tort law doctrines in the continent. In cases where the copyright holder requests damages for lost profit, burden of proof should not be taken rigorously, and the courts should allow the claimants to support his/her claim with proving a high probability that he/she could also have gained profit by communicating the work through legal channels. When calculating the amount of lost profits, courts should consider various factors that are special attributes to each case. One of these factors is to determine a reasonable royalty. In case this royalty can be calculated and the infringer is obliged to pay that, excessive damages should not be awarded unless special circumstances (e.g. bestseller clause, exclusivity in the licensing agreement, etc.) certainly verify it. We believe the punitive fees applied by the collective rights management associations should be calculated accordingly in the amount of court-awarded damages and considered as deductibles only in case the fee is paid to the copyright holder. While the IPRED in the European Union calls for effective remedies to protect copyrights in all member states, the actual types of remedies may significantly differ from each other. A unification in this area is probably not realistic due to the culturally diverse tort laws in the member states. The recommendations described above could sustain the framework of tort law in each member state, only some technical rules of adjudication and the concept on evidence require a slight reinterpretation and adjustment to the special nature of copyright infringement cases.

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