Study Question - Quantification of monetary relief - Switzerland

BENHAMOU, Yaniv, et al. & AIPPI

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I. Current law and practice

Please answer all questions in Part I on the basis of your Group's current law.

1. What rules and methods are applied when quantifying actual loss?
   In particular, please describe:
   a) the method used to determine the diversion of sales, i.e. the part of the infringing sales that the rightholder would have made but for infringement;
   b) what level of profit margin is taken into account.

a) Swiss intellectual property laws explicitly refer to the Swiss Code of Obligations ("CO") with respect to monetary reliefs (art. 73 of the Swiss Patent Act, ("PA"); art. 62(2) of the Swiss Copyright Act ("CA"); art. 55(2) of the Swiss Trademark Act ("TA"); art. 35(2) of the Swiss Design Act ("DA"); art. 9(3) of the Swiss Unfair Competition Act ("UCA")). Consequently, monetary reliefs may be claimed based on damages (art. 41 CO), infringer’s profit (art. 423 CO) or unjust enrichment (art. 62 CO).

The method used to determine the diversion of sales is based on damages (art. 41 CO). Damages arising from an infringement of IP rights are identical to any damages in civil law, which are defined as the involuntary decrease in net capital (actual damage); it corresponds to the difference between the claimant’s hypothetical economic position in the absence of the wrongful conduct, and the claimant’s actual position (difference theory) (DFT 129 III 331, consid. 2.1 and references). The claimant must prove that damage occurred (art. 42(1) CO). Consequently, and based on the strict approach of the Swiss Supreme Court, the plaintiff must prove both the existence and the amount of its loss in a sufficiently determined and concrete manner (DFT 127 III 365, consid. 2b and further references by Benoit Chappuis, RSDA 4/2012, p. 269 et seq.). However, where the exact value of the damage cannot be quantified, the court estimates the value at its discretion in light of the normal course of events and the steps taken by the injured party (art. 42(2) CO). The damage is proven if the injured party provides sufficient evidence from which the court may conclude that the claimed damage has actually occurred (DFT 122 III 219, consid. 3a).

In light of the above definition of damage (actual damage and difference theory), only the loss incurred (damnum emergens) and the lost profit (lucrum cessans) are subject to damages. With regard to the loss incurred, the damage may be a result of market disturbances, because this may oblige the injured party to increase the public’s knowledge or advertisement or because the company value/goodwill diminishes (Lucas David, SIWR I/2, Der Rechtsschutz im Immaterialgüter- und Wettbewerbsrecht, 3. Ed., Basel 2011, p. 155). The damage may also be calculated on the basis of pre-trial costs (DFT 117 II 394, consid. 3a).

With regards to lost profit, there are three methods that can be used for determination. One method is to produce evidence of the actual
What rules and methods are applied when quantifying a reasonable royalty?
In particular, please describe:

a) the royalty base;
b) how relevant comparables among licence agreements are defined;
c) how a reasonable royalty is quantified in the absence of relevant comparables;
d) the nature of the royalty, e.g. lump-sum, percentage of revenues or profit, a mix?

a) As mentioned above (cf. question I.1(a)), a reasonable royalty can either be claimed under art. 41 CO as method of quantifying lost profit or, according to the main doctrine, under art. 62 CO as restitution for unjust enrichment.

According to the Swiss Supreme Court, the reasonable royalty determination seems to be based on art. 41 CO as a method for quantifying lost profits (one can speak about a lost royalty fee). In the “Milchschäumere II” decision (DFT 132 III 379), the Swiss Supreme Court examined the reasonable royalty under art. 41 CO and stated that the claimant can only ask for a reasonable royalty if he shows that he would have effectively concluded a license agreement without the infringement (DFT 132 III 379, consid. 3.3.3). For an in-depth analysis of the decision, see Benhamou, Dommages-intérêts suite à la violation de droits de propriété intellectuelle, Étude de la méthode des redevances en droit suisse et comparé, 2013, p. 198 et seqq.). The Swiss Supreme Court concluded that the claimant failed to prove that a license agreement in the claimed amount would have been concluded inter alia because he had offered the infringer a license for a fee of CHF 90’000 and the infringer refused such offer and subsequently started to infringe the patent. Furthermore, the Swiss Supreme Court indicated that the decisive criterion for determining the reasonable royalty is not an appropriate royalty but a hypothetical royalty which would have been agreed on when concluding a license agreement on the IP right in question (DFT 132 III 379).

According to the main doctrine, a reasonable royalty may be claimed under art. 62 CO as restitution for unjust enrichment (see for instance, Roberto Vito, Schadenersatz, Gewinnabschöpfung und Bereicherungsanspruch bei immaterieller Rechtsverletzungen, S. 2008, Sondernummer, 23 et seqq.; Jenny, 183 et seqq.). Unlike the method of quantifying lost profit, the action for unjust enrichment is available irrespective of the fault of the infringer (cf. question I.10)). However, this method of calculation has not really been an issue until recently and is somewhat controversial.

First, there is a controversy with respect to the conditions under which the method is available under art. 62 CO, in particular whether it is available when a license agreement could not have been concluded in the absence of the infringement or, in the alternative, whether it is available only when a license agreement could have been concluded (Benhamou, p. 200 et seqq., indicating also that the fact that the Swiss Supreme Court neglected to examine the conditions under art. 62 CO in the “Milchschäumere II” case could be seen as a rejection of the method under art. 62 CO).

Second, there is a controversy with respect to the extent of the method, in particular whether the compensation is based on the objective value of the use equivalent to the reasonable royalties (objective approach) or on the profit acquired by the infringer (subjective approach).

The doctrine and the Cantonals Court of St. Gallen follow the objective approach and consider enrichment to be equal to the license fee (Decision of the Cantonal Court of St. Gallen, sic! 1999, p. 631, consid. 2c.).

Third, the extent to which a good-faith IP infringer is allowed to deduct certain expenses (e.g. overhead- and fixed costs) under art. 64 CO remains controversial. The rationale behind this provision is that the restitution to be paid by the IP infringer shall not lead to a decrease of its own assets. On the other hand, the application of this provision creates the risk that the IP infringer is able to cut the enrichment down to a negligible residual value (see Ralph Schlosser, Commentaire romand, Propriété intellectuelle, Bâle 2013, art. 62 LDA (CA), p. 545 et seqq.).

So far, there has been no decision of the Swiss Supreme Court where the claim for a reasonable royalty under art. 62 CO has been examined and where it clearly pronounces itself for one or the other approach.

b) A royalty can be quantified based on the royalty rate customarily owed or on a hypothetical royalty.

With respect to the royalty rate customarily owed, the applicable tariffs in the respective sectors or the principles for calculating compulsory licenses or compensation for employees’ inventions may serve as indications (Jenny, p. 312). Comparables may also serve as indications by
What rules and methods are applied when quantifying the infringer’s profits, as part of quantifying damages?
In particular, please describe:

a) the method to determine the profits resulting from the infringement, i.e. resulting from the use of the IP right;
b) what level of profit margin of the infringer should be taken into consideration.

As mentioned above (cf. question I.1(a)), the infringer’s profit can also be claimed under art. 423 CO. In this case, the infringer’s profits are calculated on the basis of the infringer’s net profits, which equal the gross profit plus interests less the costs relating to the realization of the profit. According to the jurisprudence and the doctrine, only the directly attributable costs to the infringement are deductible, such as the costs of materials, salary, production, distribution and advertising costs.

Costs which would have been paid even if no infringement had occurred, such as fixed or general costs, basically cannot be deducted when quantifying the infringer’s profits. However, there is a debate over whether some of the general costs should also be deductible. Some scholars make the difference between variable costs, which shall be deductible, and non-deductible fixed or general costs (Schlosser, p. 519).

Other scholars renounce this subdivision and allow the infringed party to basically deduct any costs as long as they are causal for the infringement (Benhamou, p. 187). This approach is in line with the Swiss Supreme Court’s decision “Resonanzetikette”, in which it stated that only those costs which were exclusively incurred in relation to the production of the infringed products are deductible and that generally no costs exist that are not deductible as long as they were necessary for realization of the profit (DFT 134 III 306, consid. 4.1.4 et seqq.).

The Swiss Supreme Court has ruled that a reasonable royalty can only be requested by the right holder based on damages (art. 41 CO) if he can show that the defendant would have entered into a license agreement with the right holder. This is a major obstacle to applying reasonable royalties. The right holder usually relies on actual loss (art. 41 CO) although he has to provide evidence for the fault of the infringer. Relating to a), b) and d), the right holder is entitled to claim lost sales of ancillary products which may comprise equipment, spare parts, etc., which the right holder ordinarily sells alongside the protected article, and which are not covered by the IP right, irrespective of whether the IP right is a patent (Heinrich, PatG/EPÜ N 35 to art. 73 PA), a trademark or a design right. When a number of licensing agreements exists, concluded by the right holder with third parties according to c), it is considered permissible that the right holder requests a reasonable royalty on the basis of unjust enrichment law (art. 62 CO) (Calame/Sterpi, Patent Litigation, London 2012, p. 422).
1c. What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty where the infringing product forms part of a larger assembly.

2c. What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty where the IP rights found infringed are routinely licensed together with other IP rights as a portfolio?

3c. What rules and methods are applied, both when quantifying actual loss and quantifying a reasonable royalty when the damage suffered by the rightholder is related to competing goods which do not implement the infringed IP rights?

5. Are any of the rules and methods addressed in your answers to 1) to 4) above different when considering the damage suffered by the rightholder or by its licensee?

They are the same in principle, namely with respect to exclusive licensees. Indeed, the calculation of the damages remains the same. There is a difference with respect to the standing to sue depending on the nature of the license. In more detail:

The right holder and the licensee are in a different position when it comes to claiming damages depending on the nature and scope of the license. The various statutes (art. 75 PA; art. 34(4) DA; art. 55(4) TA; art. 62(3) CA) explicitly permit the so-called “exclusive licensee” to claim damages. The notion of exclusive licensee under these provisions covers both sole licenses as well as exclusive licenses. However, the exclusive licensee may only claim damages if the licensed rights are impacted by the infringement. If these conditions are met, the exclusive licensee is in much the same situation as the right holder as regards the rules and methods addressed in questions 1 through 4 above.

Non-exclusive licensees were not granted similar statutory rights out of fear of conflicting or overlapping claims. Nonetheless, non-exclusive licensees are entitled to intervene in proceedings to claim damages; such damages must however be particularly and directly hit by the infringement, thus justifying the non-exclusive licensee’s intervention (German text of the Federal Council Message on the PA 2005, p. 127).

In general, all kinds and types of evidence are accepted, including expert accounting evidence and past licensing practices.

In particular, article 42(2) CO allows the court to estimate the quantum when the exact value of the damage or reasonable royalties cannot be established. To trigger this provision, the plaintiff must bring forth sufficient evidence to convince the court to estimate the quantum of the actual loss. Such evidence must not only be direct, but can be an array of indirect evidence (decision of the DFT 132 III 379 “Milchschäumer II”). Consequently, the court will rely on probability and experience rules (e.g. in light of the normal course of events and the steps taken by the injured party). Such indirect evidence may namely be a decrease in the right holder’s turnover in close time proximity to the infringement, the infringer’s profits, the duration of the infringement, etc. These assessments may be provided in various forms, for instance through expert advice, accounting books, and so forth.

More precisely, the Swiss Civil Procedure Code (CPC) allows for rather wide-ranging evidence: testimony, physical records, inspection, expert opinion, written information, examination of the parties (art. 168 CPC). In that respect, expert accounting evidence on past licensing practices is permissible evidence; however, in this situation, the expert must be appointed by the court. Indeed, though the parties are free to provide their own expert report such a contribution would only amount to a private pleading without benefiting from the additional weight of evidence under the CPC (Peter Hafner, in: Spühler/Tenchio/Infanger, Basler Kommentar, Schweizerische Zivilprozessordnung, Basel 2013, N4 to art. 168, p. 901).

When the court requires the defendant to provide specific items of evidence, it is not uncommon to raise a business or trade secrets defense. The defendant thus attempts to avoid having to produce evidence by claiming it is covered by a trade secret. Such a defense is however very limited as the courts, after balancing the interests of the involved parties, may implement measures to avoid any infringement of such secrets (art. 156 CPC, also art. 68 PA), for instance by redacting the names of third parties. Thus, business or trade secrets is not a solid defense against the counterparty’s right to information.
6. What kinds and types of evidence are accepted for proving the quantum of reasonable royalties.

For example, is expert accounting evidence on past licensing practices accepted?

7. What mechanisms (e.g. discovery) are available to the rightholder to assist with proving the quantum of actual loss or reasonable royalties?

Switzerland does not have a general discovery process. But with IP infringements there is a specific two-step approach ("Stufenklage") available (art. 85 CPC), which allows the right holder to get information from the infringer on the quantum of monetary compensation before the right holder has to finally specify its claim on monetary relief later on in the litigation.

Quite often courts will decide IP cases on infringement first, before they decide on monetary relief. The parties can influence the course of the litigation with their prayers for relief.

It is possible to separate the proceedings into several interdependent stages. As a first step, the right holder can seek a partial ruling on the production of information and documentation from the infringer, as well as the accounting of books. In a second step, the right holder can claim monetary relief based on one of the three available methods, i.e. damages (art. 41 CO), infringer’s profit (art. 423 CO) or unjust enrichment (art. 62 CO). Hence, plaintiff will typically only quantify his monetary compensation claim after the abovementioned information is obtained through this first-step ruling providing information and accounting of books.

8. How, if at all, does the quantification of damages for indirect/contributory infringement differ from the quantification of damages for direct infringement?

Swiss Patent Law stipulates (art. 73(1) PA) that damages are to be paid if any of the circumstances giving rise to liability are met (art. 66 PA). No difference is made between direct unlawful use of a patented invention and contributory infringement (art. 66(d) PA) when a person abets inter alia direct infringement, participates in it, or aids or facilitates the performance of such an act. However, Swiss Patent Law requires that a direct patent infringement takes place (DFT 129 III 588 “Stickmaschine”; Heinrich PatG/EPÜ N 42-44 to art. 66 PA). Decisions of the Swiss Federal Patent Court do not apply different quantification methods relating to damages for direct infringement and damages for contributory infringement.

Swiss Trademark Law (art. 13 TA) mentions affixing the sign to goods (direct use) and to packaging or otherwise in the course of trade (indirect use) within the same list.

Independent from the kind of IP right it is possible as a matter of principle to claim the entire loss from the contributory infringer.

9. Are forward-looking damages (e.g. damage in relation to an irreversible loss of market share) available

a) if an injunction has also been granted

Please explain your answer

Forward-looking damages are available, regardless of whether an injunction has been granted or not.

In the event of infringement, various civil actions are available to the claimant. Injunctions may be requested, i.e. the cessation of an existing infringement or the prohibition of an imminent infringement (art. 72(1) PA; 55(1)(a) TA; 62(1)(a) and (b) CA) (David p. 282 et seqq). Monetary reliefs may also be requested (art. 55(2) TA; 62(2) CA; 73(1) PA), i.e. compensation for damages (art. 41 CO), infringer’s profits (art. 423 CO) and unjust enrichment (art. 62 CO) (David, p. 105). These actions are not per se mutually exclusive. Consequently, the request for an injunction does not preclude the action for monetary compensation.

No distinction should be made between current damage (damage that has already occurred as of the date of the judgement of the cantonal court of last resort) and future damage (damage that occurs after such a judgement is made). There is little specific IP case law relating to future damage. However, case law in tort shows that the elements (current and future damage) are identical and that the principles for
calculating the damage are the same (for these principles cf. Question I.1.a), the only difference being the moment at which the damage arose (Chappuis, p. 272 and references). Future damage must be foreseeable with the same degree of certainty as current damage (DFT 116 II 441, consid. 3aa = JdT 1991 I 166). Consequently, the action for monetary compensation may cover both the current and future damage, provided that they are foreseeable.

**Is the bad faith of the infringer taken into account in the assessment of the damage?**

Yes

If so, how is bad faith defined and is it possible to infringe a patent in good faith?

The conditions of compensation for damages (art. 41 CO) are: an infringing activity, a damage suffered by the claimant, a causal connection between the infringing activity and the damage, and fault of the infringer. The conditions of infringer’s profits (art. 423 CO) are: an infringing activity, the profits made by the infringer, a causal connection between the illegal activity and the profits and bad faith of the infringer. Finally, the action for unjustified enrichment (art. 62 CO) is available irrespective of the fault or bad faith of the infringer.

Consequently, the fault or bad faith is a condition of action for monetary reliefs (excluding the action for unjustified enrichment) and shall be evidenced by the claimant (Ralph Schlosser, Commentaire romand de propriété intellectuelle, Bâle 2013, N 33 to art. 62 LDA (CA); François Dessemontet, Le droit d'auteur, Lausanne 1999, N 802). In the event of slight negligence of the infringer, the court may decide to reduce the damages (art. 43(1) and 44(2) CO). Similarly, in the event of concurrent negligence of the infringer, the court may decide to reduce the damages (art. 44(1) CO), for instance when the plaintiff delayed action for preliminary injunctions without legitimate grounds (CJ GE, sic! 2000, p. 596 consid. 7, Crazy Horse, quoted by Schlosser, N 41 to art. 62 LDA (CA)).

**How do courts take into account the damage suffered between the date of the infringing acts and the date of the award of damages?**

The relevant moment for determining the damage is the date of the award of damages. On that date, the Court shall however take into account all damaging effects, whether or not already incurred, terminated or still in progress. Indeed, Swiss law enables courts to take into account various points of time (the date of the award of damages; the date of the infringing acts; the day on which the damage materialized) (Benoit Chappuis, Le moment du dommage, Zurich 2007, p. 146 et seqq.) and the Court shall take into account any damaging effects between the date of the infringing acts (e.g. the marketing value of the assets of the injured party) or after the award of damages and that will materialize in the future (Chappuis, p. 147).

As indicated above (cf. question I.9)), no distinction should be made between current and future damage. They are identical other than the one difference as to the moment at which the losses arise. Additionally, the harmed party must prove both the existence and the amount of its loss, but the court has discretionary power to lighten the burden of proof, provided however that the injuring effect is difficult to establish and that the plaintiff has collected all the evidence at its disposal. Consequently, future damage that does not exist at the moment of the judgement will be compensated, in addition to the current damage, provided it is foreseeable.

**Are there aspects of these laws that could be improved?**

Yes, the group is of the view that aspects could be improved. In Swiss law, monetary reliefs are often rejected for lack of evidence of injury, of enrichment or of a quantifiable gain (based on a strict approach of the difference theory), including the royalty method when the plaintiff cannot prove its intention or ability to enter into a licensing agreement with the infringer or a third party. Consequently, Swiss law does not necessarily comply with its obligations under the TRIPS Agreement.

The group is of the view that the aspects to be improved could be a slight relaxation of the difference theory (legitimated on the basis of the specific nature of IP and of the application of tort law tailored to IP matter), which would allow courts to apply the royalty method more broadly (i.e. also when the injured party has neither the intention nor the ability to enter into a licensing agreement).
III. Proposals for harmonisation

16. Is harmonisation of the quantification of damages desirable?
   If yes, please respond to the following questions without regard to your Group's current law.
   Even if no, please address the following questions to the extent your Group considers your Group's current law could be improved.

No

Please Explain

The group is of the view that there is no need for full harmonization of damages, as the concept of damages varies from one jurisdiction to another (from specific regimes of damages tailored to IP with over-compensatory functions, to the general tort law principles with a strict limitation to compensatory functions) and as such conceptions may be deeply enshrined in each jurisdiction's legal system. However, there shall be a minimum harmonization in the sense that courts shall award at least (minimum) damages based on the royalty method in case of
willful or negligent infringement, in order to take into account the specific nature of IP and to comply with the TRIPS Agreement (in particular art. 45.1 TRIPS and art. 41.1 TRIPS) (see Benhamou, N 654).

In Swiss law, monetary reliefs are often rejected for lack of evidence of an actual damage, an enrichment or infringer’s profits (based on a strict approach of the difference theory):

Regarding the compensation of actual damage (art. 41 CO), it requires a market disruption, i.e. that customers have been genuinely deceived with regard to the quality of the counterfeit product, and the lost profits require that the good was sold in sufficient commercial quantities as well as being substitutable. The royalty method applies, according to the Swiss Supreme Court and based on art. 41 CO, only if a licensing agreement would effectively have been concluded in the absence of infringement.

- Regarding the defendant’s profits (art. 423 CO), such profits require a delicate calculation of the deductibility of fees and the factors affecting causation.

- Regarding unjustified enrichment (art. 62 CO), the enrichment requires expenditures made in the ordinary course and on the basis of life experience, as well as a careful calculation of objective value.

The group is of the view that such difficulties are not desirable, in particular the fact that the regular rejection of monetary relief does not necessarily comply with the TRIPS Agreement, and that the courts shall at least award (minimum) damages based on the royalty method in case of willful or negligent infringement. Such method has a sufficient legal basis under the current law but requires a certain relaxation of tort law (in particular the difference theory):

- From the perspective of Swiss law, a possible legal basis is the unjust enrichment (art. 62 CO), as the Swiss Supreme Court maintains a strict interpretation of art. 41 CO which does enable the royalty method and as art. 62 CO only requires to redefine the notion of enrichment (something that is already recognized by some courts and the majority of legal scholars).

- From the perspective of adapting Swiss law to the neighboring countries of the European Union and to the minimum standards of the TRIPS Agreement, the legal basis to be preferred is the compensation of actual prejudice (art. 41 CO), because the Directive 2004/48/EC and its transposition link this method to the actual damage, while simultaneously expanding the concept of damage by taking into account the specific nature of IP.

Our preference would be for the legal basis of art. 41 CO. It enables courts to limit the royalty method to cases of IP infringement - or possibly to cases of goods with similar characteristics (ubiquitous, intangible, non-consumable) such as image rights or business secrets - contrary to art. 62 CO which risks expanding the method to all cases of undue use of a good. It allows one to maintain a certain flexibility in one’s calculations and to take into account the concept of fault, which appears necessary in light of the increasingly controversial nature of IP and complex nature of the products it covers. Finally, it fits into the expansion of the concept of damage which is the object of several developments (exceptions to the difference theory as well as general and abstract presumptions under copyright law) (Benhamou, N 649 et seqq. and references).

Please propose the principles your Group considers should be applied when quantifying actual loss

Compensation for actual loss is very difficult to obtain under the current practice of the Swiss courts, which puts the burden of the quantification of the damage entirely on the holder of the infringed IP rights. For this reason, claiming lost profits requires that the plaintiff discloses its profit margin. Because of these hurdles, claiming lost profits is normally not the IP holder’s preferred option.

Notwithstanding of the aforementioned, the choice of the underlying basis of the claim to be applied in a concrete case heavily depends on the available means of evidence.

Please propose the principles your Group considers should be applied when quantifying reasonable royalties

The group is of the opinion that the quantification of a hypothetical royalty should always focus on what reasonable contracting parties would have agreed on with full knowledge of all circumstances, which are suitable to influence the amount of the license fee. This approach necessarily means that the quantification of reasonable royalties must be assessed on a case by case basis.

Explaining in particular the relevance, if any, of a hypothetical negotiation and whether the hypothetical negotiation should be under the assumption that the IP rights being negotiated were or were not found valid and infringed;
As already mentioned (cf. question 2a)) a hypothetical negotiation usually comes into play in the absence of relevant comparables. Based on the fact that a hypothetical licensee would not be willing to pay for the use of an invalid (or not infringed) IP right, we are of the opinion that the hypothetical negotiation should necessarily be under the assumption that the IP rights being negotiated were found valid and infringed.

The group agrees that the principle set out in the patent-related US decision Georgia-Pacific Corp. v. United States Plywood Corp., which established that the licensor’s established policy and marketing program to maintain its monopoly by not licensing others to use his invention might be relevant to determine the amount of the hypothetical license fee. In our view, an established restrictive license policy by the IP right holder shall necessarily lead to an increase of the license fee to be paid by the infringer of the IP rights in suit.

Furthermore, prior going rates for licensing the IP rights in suit are deemed to be relevant, as they provide a rough indication of what is customary in connection with the IP rights in suit. However, the existence of prior going rates shall not lead to a factual obligation to contract of the IP owner.

Prior licensing practices or prior going rates for licensing other IP rights of third parties should only be considered relevant if they are similar to the IP rights in suit.

Since compensation for actual loss requires – according to the current practice of the Swiss courts – that plaintiff discloses its profit margin, the burden becomes even more difficult in view of conveyed goods. The loss due to conveyed sales has to be taken into account, when the non-protected parts drove customer demand and the infringing and non-infringing products form a functional unit.

Competing goods of the right holder should not regularly be taken into account in relation to actual loss.

The loss due to sales of the entire assembly has to be taken into account, when the protected parts drove customer demand to acquire the assembly.

According to Swiss law, actions in Switzerland relating to indirect infringement, being considered to be contributory infringement, are not
The alternative or cumulative relation between damages and account of profits is of interest. Additional factors, such as “moral damages” should also be taken into account. Under Swiss law, moral damages pursuant to art. 49 CO may also be claimed by legal entities which benefit from personality rights. However, moral damages require a severe infringement of the personality of the right holder, which may be difficult to prove and are distinct from the actual damage incurred. Consequently, the relation between these moral damages and the actual damage incurred should be clarified.

Additional economic methods should also be considered to quantify a reasonable royalty (see for instance, Benhamou, 286 et seqq., suggesting to combine standard methods of economic evaluation with the economic royalty rate method and the Financial Indicative Running Royalty Model FIRRM).

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

Please indicate which industry sector views are included in part "III. Proposals of harmonization" on this form:

Please enter the name of your nominee for Study Committee representative for this Question (see Rule 12.8, Regulations of AIPPI). Study Committee leadership is chosen from amongst the nominated Study Committee representatives. Thus, persons not nominated as a Study Committee representative cannot be in the Study Committee leadership.
Yaniv Benhamou or Michael Liebetanz