

Abstract

For Assessment of damages on infringement of selling rights in the products of the patent holder, both parties, the plaintiff and the defendant, assume a key role similar to that of the court in the legal process on burden of proof to the court so the court is able to pick up and apply such facts with the legal provision to determine the amount of damages that the plaintiff, patent holder, is eligible to receive and the defendant who has infringed the patent right is held responsible.

This thesis is designed to study types of compensatory damages entitled to the patent holder due to the infringement of the patent of the patent holder and an account of profit that those having infringed have earned from such infringement of the patent of the patent holder and the criteria employed to determine the amount of damages in such case. The author has made a study on the following issues.

Determination of the types of compensatory damages and an account of profits earned by the infringement against the rights to sell the patent of the patent holder.

The study found that the laws in the US, Canada and UK have classified the damages according to the business and economic damage and the objective of the damages is to compensate the damage of the plaintiff, patent holder, suffered from the infringement through sale of patented products by the defendant so the patent holder is placed in a position that such infringement has never been made before through examination on the opportunity that the patent holder could have made sales or profits if the defendant has not infringed the patent. To determine the damages in the case of infringement against the selling rights of the plaintiff, patent holder, the nature of the infringement will be examined whether such infringement has resulted in competition with sales of the patented products of the plaintiff or not. If such infringement of the defendant has competed with sale of the patented products of the plaintiff, the amount of damages will be determine with regard to the types of damage suffered by the plaintiff through such infringement. The laws of all three countries have entitled the plaintiff to claim for damages from lost of sales or profits, damages from lost of profits from sales of products employed in conjunction with the patented products and damages from the price reduction of the patented products due to the pricing competition by the defendant. The difference is the type of damages from the additional cost of production which is the academic opinion in Canada only. However, if the infringement of the defendant has not made in competition with sales of the patented products of the plaintiff, the amount of damages is determined with respect to the

ground that the rate of royalty of the patent entitled to the plaintiff, patent holder. The US patent law has provisioned that the court is required to determine the damages not less than the reasonable royalty of the patent employed. The UK and Canadian laws provide that the plaintiff is eligible to choose the method to claim for the net profit that the defendant has earned from the infringement through sales of the products. Thai patent law has not made any provision to provide the plaintiff with option to choose the method to claim an account of profits. The author viewed that the plaintiff should have rights to claim for an account of profits like that in England. The author has proposed an amendment to the Patent Act, B.E. 2522 (amended in B.E. 2542), Article 77 Tri in the following manner.

Determination of amount of damages or an account of profits made by defendant

From the study, it is found that the prosecution and the determination of the amount of damages in the US, Canada and the UK, the economic criteria have been applied to examine and determine the amount of compensatory damages, particularly, the US law which has the court ruling to determine the criteria to prove the damages amount of the plaintiff with proof based on the economic facts. That is different from Thai laws and the lawyer of both parties have lacked criteria to examine the damages amount in compliance with the business or economic criteria so the court has no facts and criteria to be determine the amount of damages for the plaintiff. The court could only decide on the damages amount which is deemed reasonable to the court. At present the Patent Act, B.E. 2522 (amended in B.E. 2542), Article 77 Tri has set the criteria for the court to determine the damages amount with consideration on the seriousness of the damage, including lost of benefits, that is, the court is required to determine the damages amount at the level or amount of actual damage incurred to the plaintiff, including the prospective benefits to be suffered by the plaintiff in the future. The author has proposed the criteria on prosecution of both parties and the criteria on determination of the damages amount to the court to comply with the business and economic criteria as previously mentioned.

Therefore, if such proposal of the author has been applied, the method on claiming the damages from infringement of the selling rights of the patent holder may be changed and the prosecution of both parties and the decision on determination of the damages amount of the court would be made in line with the academic criteria and method. That will benefit the plaintiff to receive the compensation sufficient for the damage and both parties will learn of their duties and rights on the burden of proof.

Thus the court could determine the damages amount in a systematic manner. That will help improve the prosecution system for better clarity and suitability.