

DAMAGES IN INTELLECTUAL PROPERTY DISPUTES

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ABSTRACT

Reliefs are an important ingredient in any civil or criminal action and can be in the form of injunction; imprisonment, fine and/or damages etc. With the emergence of intellectual property rights, it is imperative that the relief mechanism may also be strengthened, particularly damages, to provide adequate protection. Computing damages is still a mammoth task, particularly in a dispute involving an intellectual property due to its intangible nature. While the authorities are not completely unanimous or consistent in their stance on computation of damages, various theories have been propounded through statutes and judicial precedents. The present article discusses the various ways one may compute damages in Intellectual Property Disputes i.e., disputes involving Copyright, Trademark and Patents, through application of these theories. The article also discusses the various categories of Damages that may be awarded and the rationale regarding the same.

I. CATEGORIES OF DAMAGES

Damages may be broadly categorized into the following:

- A. **Compensatory Damages**- Compensatory damages are aimed at compensating and indemnifying the intellectual property right holder for the loss suffered by him due to the act of the wrong doer.
- B. **Punitive/ Exemplary Damages**- The purpose of punitive/exemplary damages is to punish the wrongdoer for their actions and deter any such wrong doings from taking place subsequently.¹ In order to determine the extent of such damages, an inquiry has to be made

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¹ In the case of Time s Incorporated v. Lokesh Shrivastava, (2005)30 PTC 3 (Del.), it was held that “*time has come when the Courts dealing in actions for infringement of trademarks, copyrights, patents etc., should not only grant compensatory damages but also award punitive damages with a view to discourage and dishearten law breakers who indulge in violation with impunity out of lust for money, so that they realise that in case they are caught, they would be liable not only to reimburse the aggrieved party but would be liable to pay punitive damages also, which may spell financial disaster for them.*” This judgment was later overruled in Hindustan Unilever Limited v. Reckitt Benckiser India Limited, (2014) 57 PTC 495 (Del.). The Court was of the opinion that to award punitive damages, the courts should follow the categorization in Rookes v. Barnard [1964] 1 All ER 367 (HL) and the five principles in Cassel (supra).

as to the nature of wrong done by the party as well as the intention of the party.² In the case of *Williams v. Settle*,³ it was held that: “Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reasons of the Defendant’s wrongful act, but to punish the defendant in an exemplary manner and vindicate the distinction between a wilful and an innocent wrongdoer.”

- C. **Aggravated or Enhanced Damages-** Aggravated damages may also be awarded against the Defendants on account of wilful, calculated and/or repetitive conduct on their part to infringe upon the intellectual property rights of the plaintiffs, particularly where compensatory damage is inadequate to punish the defendant for their outrageous conduct and to deter them from repeating it.⁴

In the House of Lords decision of *Rookes v. Barnard*,⁵ three categories of cases where such damages might be awarded were laid down, being:

- a. Oppressive, arbitrary or unconstitutional action by the servants of the government;
- b. Wrongful conduct by the defendant which has been calculated by him for himself which may well exceed the compensation payable to the claimant; and
- c. Any case where exemplary damages are authorised by the statute.”⁶

In *Cassell & Co. Ltd. V. Broome*,⁷ it was held that in order to calculate exemplary damages, the test is to determine the compensatory damages (referred to as the smaller figure). If this is not an adequate solatium and a larger figure is determined, the total amount should be in substitution of the small sum. These cases have been relied upon in *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*,⁸ wherein it was held that since deliberation points at an aim to denigrate the plaintiff’s goodwill and reputation, punitive/exemplary damages are warranted.

On February 24, 2022, the Delhi High Court notified the Delhi High Court Intellectual Property Rights Division Rules, 2022 (“**DHC-IPD Rules, 2022**”) for regulating the practice and procedure regarding the matters to be listed before the Intellectual Property Division of the Delhi High

² See *Microsoft Corporation v. Rajendra Pawar & Anr.*, (2008)36 PTC 697 (Del.) [The Defendant chose to evade court proceedings].

³ *Williams v. Settle* [1960] 1 W.L.R. 1072 (AC)(appeal taken from Eng.).

⁴ *Koninlijke Philips N.V. & Anr. v. Amazestore & Ors.*, (2019) 260 DLT 135 (Del.).

⁵ *Rookes v. Barnard* [1964] 1 All ER 367(HL).

⁶ See *Halo Electronics Inc. v. Pulse Electronics*, 579 US 93 (2016) [an example in this category would include 35 U.S.C. § 284 (The US Patents Act) which allows a court to increase the patentee’s damages by up to three times of the amount determined as actual damages].

⁷ *Cassel & Co. Ltd. v. Broome* [1972] AC 1027(HL) (appeal taken from Eng.).

⁸ *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*, (2014)57 PTC 495 (Del.).

Court. As per Rule 20⁹ of the DHC-IPD Rules, 2022, the Court shall consider the following factors while determining the quantum of damages, being:

- i. Lost profits suffered by the injured party;
- ii. Profits earned by the infringing party;
- iii. Quantum of income which the injured party may have earned through royalties/license fees had the use of the subject IPR been duly authorized;
- iv. The duration of the infringement;
- v. Degree of intention/neglect underlying the infringement;
- vi. Conduct of the infringing party to mitigate the damages being incurred by the injured party.

II. DAMAGES IN PATENT CASES

A. Relief in a suit for Patent Infringement in India

In India, patents are governed by the Indian Patents Act, 1970. Section 48¹⁰ of the Act provides the rights granted to the patentee by virtue of a patent. For any violation of the said rights, an action may be taken against the infringer. Further, Section 108¹¹ provides that in any suit for infringement of a patent, the court may grant:-

1. Damages or account of profits; and
2. Injunction

Thus, both monetary damages and injunctive relief are available in a patent infringement law-suit under the statute. However, the court may either award damages or account of profits. As per Section 111,¹² in a suit for infringement of patent, damages or an account of profits shall not be granted against the defendant who proves that at the date of the infringement he was not aware and had no reasonable grounds for believing that the patent existed.

⁹ Damages/Account of profits- A party seeking damages/account of profits, shall give a reasonable estimate of the amounts claimed and the foundational facts/account statements in respect thereof along with any evidence, documentary and/or oral led by the parties to support such a claim. In addition, the Court shall consider the following factors while determining the quantum of damages: i. Lost profits suffered by the injured party; ii. Profits earned by the infringing party; iii. Quantum of income which the injured party may have earned through royalties/license fees had the use of the subject IPR been duly authorized; iv. The duration of the infringement; v. Degree of intention/neglect underlying the infringement; vi. Conduct of the infringing party to mitigate the damages being incurred by the injured party; In the computation of damages, the Court may take the assistance of an expert as provided for under Rule 31 of these Rules.

¹⁰ Patents Act, 1970, §48, No.39, Acts of Parliament, 1970 (India).

¹¹ Patents Act, 1970, §108, No.39, Acts of Parliament, 1970 (India).

¹² Patents Act, 1970, §111, No.39, Acts of Parliament, 1970 (India).

B. Calculation of Actual Damages in Patent Cases

In a patent infringement law-suit, damages may be calculated in any of the following manner:

1. Loss of Patent Holder's Profits-

- a. To be awarded lost profit damages as actual damages, the patent holder would have to show that absent infringement, he would have made profits. Remote and indirect consequential damages cannot be recovered.¹³
- b. In one of the early cases, *Yale Lock Manufacturing Co. v. Sargent*,¹⁴ it was held that if one can establish the difference between the money that the patentee would have realized for sales of their patented product if the infringement had not occurred and the actual sales, it is a proper measure of actual damages. Lost profits are calculated at the selling price that the patent holder would have charged had the infringement not occurred.
- c. The *Panduit test*¹⁵ has been used for determining whether profits have been lost as a result of the infringement. The Panduit test requires the patentee to establish: -
 - Demand for the patented product;
 - Absence of acceptable non-infringing substitutes;
 - Manufacturing and marketing capability to exploit the demand;
 - The amount of profit that would have been made.
- d. However, the Panduit test is not the sine qua non for proving 'but for' causation.¹⁶ Over the years, lost profits have been established through lost sales,¹⁷ or price reductions¹⁸ etc.

2. Loss of License fees/Royalty-

- a. When actual damages, e. g., lost profits, cannot be proved, the patent owner is entitled to a reasonable royalty/license fee. For instance, where the patent owner may not operate in a particular geographical area covered by the infringer and therefore, cannot show causation.¹⁹

¹³ *Yale Lock Manufacturing Company v. Sargent*, 117 U.S. 536 (1886).

¹⁴ *Id.*

¹⁵ *Panduit Corp v. Stahlin Bros. Fibre Works Inc.*, 575 F. 2d 1152 (6th Cir. 1978).

¹⁶ *Rite Hite Corporation v. Kelley Company, Inc.*, 56 F. 3d 1538 (Fed. Cir. 1995).

¹⁷ *Id.*

¹⁸ *Yale Lock Manufacturing Company v. Sargent*, 117 U.S. 536 (1886).

¹⁹ *State Indus Inc. v. Mor-Flo Indus Inc.*, 883 F. 2d 1573 (1989).

- b. “Reasonable royalty” may be based on an established royalty if there is one and if not, upon the supposed result of hypothetical negotiation between a “willing” licensor and licensee, for a license.²⁰
- c. In the case of *Georgia-Pacific Corp. v. United States Plywood Corp.*,²¹ the district court listed fifteen factors to compute reasonable royalty damages, as below:
- i. The royalties received by the patent owner for the licensing of the patent-in-suit, proving or tending to prove an established royalty;
 - ii. The rates paid by the licensee for the use of other patents comparable to the patent-in-suit;
 - iii. The nature and scope of the license, as exclusive or non-exclusive, or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold;
 - iv. The licensor’s established policy and marketing program to maintain its patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly;
 - v. The commercial relationship between the licensor and the licensee, such as whether they are competitors in the same territory in the same line of business, or whether they are inventor and promoter;
 - vi. The effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of its non-patented items; and the extent of such derivative or convoyed sales;
 - vii. The duration of the patent and the term of the license;
 - viii. The established profitability of the product made under the patent; its commercial success; and its current popularity;
 - ix. The utility and advantages of the patent property over the old modes or devices, if any, that had been used for working out similar results;
 - x. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention;
 - xi. The extent to which the infringer has made use of the invention, and any evidence probative of the value of that use;

²⁰ Rite Hite Corporation v. Kelley Company, Inc., 56 F. 3d 1538 (Fed. Cir. 1995).

²¹ *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970).

- xii. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions;
 - xiii. The portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer;
 - xiv. The opinion testimony of qualified experts; and
 - xv. The amount that a licensor (such as the patent owner) and a licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been reasonably and voluntarily trying to reach an agreement; that is, the amount that a prudent licensee – who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention – would have been willing to pay as a royalty and yet be able to make a reasonable profit, and which amount would have been acceptable by a prudent patent owner who was willing to grant a license.
3. The Entire Market Value Rule- This rule is applied to include in the compensation calculation, the unpatented components of a device being sold along with the patented components, provided that the unpatented components function together with the patented components in some manner to produce a desired end product or result.²²
4. The 25% Rule- As per this rule, 25 percent of the operating profit from the sale of an infringing good is a reasonable royalty rate. According to its proponents, the veracity of this rule has been confirmed by a careful examination of years of licensing and profit data, across companies and industries.²³ The said rule was rejected by the Federal Circuit in *Uniloc USA, Inc. v. Microsoft Corp.*,²⁴ as fundamentally flawed as the 25% Rule fails to consider the value of the patented invention, the availability of alternatives, the importance of the patented invention to the overall product, and the relationship between the parties.
5. Infringer's (unfair) profits/unjust enrichment- Another manner in which damages may be calculated can be on the basis of the infringer's profits. To prove this amount, the

²² *Id.*

²³ John C. Jarosz, Carla S. Mulhern & Michael Wagner, *The 25% percent rule lives on*, IP Law360(Sep. 8, 2010), <https://www.law360.com/articles/187507/the-25-rule-lives-on>.

²⁴ *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292 (Fed. Cir. 2011).

defendant has to disclose their sales, profits, expenses etc. Accounts of profits have been provided as an alternate relief as per Section 108 of the Indian Patents Act.²⁵

In the case of *F. Hoffmann La Roche & Anr. v. Cipla*,²⁶ vide an order, the Division Bench of the Delhi High Court was pleased to decree the suit and hold the patent valid and infringed. Further, the Court directed that the defendants would be liable to render accounts concerning the manufacture and sale of Erlocip, for which purpose the suit was filed and thereafter, evidence would be recorded pertaining to the profits made by Cipla concerning the offending product.

In *Vifor (International) Ltd. & Anr. v. Maxycon Health Care Private Ltd.*,²⁷ the Delhi High Court, while holding the defendant liable for patent infringement, imposed Rs. 10,00,000/- as punitive damages.

Since patent litigation has become more prominent in India only in the last decade and the fact that only few patent cases reached the final stage, patent cases where damages have been granted in India are also very few. Thus, there is a need for the development of damages jurisprudence in patent cases in India and with the rise in the number of patent cases, the same is inevitable. Having said that, recently, in a case for infringement of Patent of *Pfizer Inc & Ors. v. Triveni Interchem Private Limited & Ors.*,²⁸ vide order dated 24th January 2023, the Delhi High Court imposed a cost of Rs. 2 crores on the Defendant wherein the Defendant was found to be in contempt of the injunction order. This shows the shift in jurisprudence towards imposing high costs and damages, if the conduct of the Defendant and extent of infringement, warrants the same.

III. DAMAGES IN COPYRIGHT CASES

A. Relief in a suit for Copyright Infringement in India

Section 55(1) of the Copyright Act, 1957²⁹ provides that where copyright in any work has been infringed, the owner of the copyright shall, except as otherwise provided by this Act, be entitled to all such remedies by way of injunction, damages, accounts and otherwise as are or may be conferred by law for the infringement of a right.

²⁵ *Supra* note 11.

²⁶ *F. Hoffmann La Roche & Anr. v. Cipla*, Order dated Dec. 8, 2015 in RFA (OS) 92/2012, High Court (Del.).

²⁷ *In Vifor (International) Ltd. & Anr. v. Maxycon Health Care Private Ltd.*, (2018) 74 PTC 87 (Del.).

²⁸ CS(COMM) 442/2021, order dated 24th January 2023.

²⁹ The Copyright Act, 1957, §55, No. 14, Acts of Parliament, 1957(India).

The remedies of damages and accounts are remedies in the alternative, for it was held that the two reliefs are incompatible. That proposition is well settled.³⁰

B. Calculation of Actual Damages in Copyright Cases

Damages may be ascertained either by the profit which the plaintiff could have made (loss caused to the plaintiff) or the profit which the defendant actually made. Damages cannot be calculated by including both.³¹ Some of the ways in which damages may be calculated are as below:

1. Loss of royalty/license fees- Compensatory damages can be computed on the basis of loss of royalty/license fees. In the case of *Super Cassettes Industries Pvt. Ltd v. HRCN*,³² the Delhi High Court granted compensatory damages of INR 16,20,000/- by calculating compensatory damages on the basis of loss of license fees, using the rate card for license, as follows:

“15,000 (number of subscriptions and connections of the cable operator) × 18 (Subscription rate/License fees of the plaintiff per account, charged at INR 18 per month) × 6 (No. of months of infringing activity)
= INR 16, 20, 000/-”

2. Profits earned by the Infringer- Compensatory damages can also be calculated on the basis of profits earned by the infringer as was in the case of *Koninlijke Philips N.V. and Anr. v. Amazestore and Ors.*³³ The Court in the said case considered the period of infringement, quantity and margin of profit to calculate the infringer’s profits.
3. Loss caused to the right holder- If the right holder can show that absent the infringement, he would have made the sales made by the infringer, then he would be entitled to the profits that he would have made on those sales.³⁴
4. Distortion/Mutilation of work- Under Section 57 of the Copyright Act, 1957,³⁵ the author has a special right to claim damages with respect to any distortion, mutilation, modification or other acts in relation to the said work. This provision gives protection to the author for his creation, even after assignment of copyright in the work.³⁶

C. Conversion Damages in Copyright Cases

In India, conversion damages have also been provided as a remedy for copyright infringement

³⁰ Pillalamarri Lakshmikantham & Ors. v. Ramakrishna Pictures & Ors., (1980) AIR 1981 (AP) 224.

³¹ Srimagal & Co. v. Books (India) Pvt. Ltd., (1971) AIR 1973 (Mad.) 49.

³² Super Cassettes Industries Pvt. Ltd v. HRCN, Order dated Oct. 9, 2017 in CS(COMM) 48/2015, High Court (Del.).

³³ *Supra* note 4.

³⁴ *Supra* note 30.

³⁵ The Copyright Act, 1957, §57, No. 14, Acts of Parliament, 1957(India).

³⁶ Sanjeev Pillai v. Venu Kunnapalli & Anr., Order dated Dec. 11, 2019 in FAO No. 191/2019, High Court (Ker.).

under Section 58 of the Copyright Act, 1957. While compensatory damages are granted for a wrong done to an incorporeal right, conversion damages are for conversion of particular chattels, the infringing copies.

The Courts must ensure that the damages under Section 55 and Section 58 do not overlap.³⁷ The remedies are cumulative and not alternative; although in some cases, where an owner of copyright obtains damages under the former section, he can recover nothing further in respect of damages under the latter.³⁸ Where compensation amount awarded overlaps with the conversion damages, conversion damages may not be granted.³⁹

Under Section 58 of the Copyright Act,⁴⁰ all infringing copies of any work in which copyright subsists, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of possession or in respect of the conversion thereof.

Conversion damages are usually referable to the amount that the infringer realized on the sale of the infringing articles. The normal measure for damages for conversion is the market value of the goods converted. It is well settled that the damages for conversion are to be calculated at the time of conversion, which takes place when a party deals with goods in a manner inconsistent with the rights of the true owner.⁴¹ For example, in a landmark case, the date of conversion was held to be the date on which the infringing material was delivered to their purchasers.⁴² When the infringing copy is part of the larger work, the assessment of conversion is that percentage of the market value of the copies, which is applicable to that part constituting the infringing matter.⁴³

In the case of *Gopal Das v Jagannath Prasad*,⁴⁴ it was held that the infringing copies which have been sold, being the property of the copyright owner, are entitled to the money for which the infringing copies were sold without any deduction of the cost of production.

³⁷ *Associated Publishers v. Bhashyam*, (1960) AIR 1961 (Mad.) 114.

³⁸ *WB Yeats v. Eric Dickinson & Ors.*, AIR 1938 (Lah.) 173.

³⁹ *Super Cassettes Industries Pvt. Ltd v. HRCN*, Order dated Oct. 9, 2017 in CS(COMM) 48/2015, High Court (Del.); *Sutherland Publishing Company v. Caxton Publishing Company Limited*, [1936] Ch. 323 (HL) (appeal taken from Eng.).

⁴⁰ The Copyright Act, 1957, §58, No. 14, Acts of Parliament, 1957(India).

⁴¹ *Dharam Dutt Dhawan v. Ram Lal Suri Etc.*, (1957) AIR 1957 (Punj.) 161.

⁴² *Caxton Publishing Company v. Sutherland Publishing Co.*, [1939] AC 178 (HL) (appeal taken from Eng.).

⁴³ *Super Cassettes Industries Pvt. Ltd v. HRCN*, Order dated Oct. 9, 2017 in CS (COMM) 48/2015, High Court (Del.); *Sutherland Publishing Company v. Caxton Publishing Company Limited*, [1936] Ch. 323 (HL) (appeal taken from Eng.).

⁴⁴ *Gopal Das v. Jagannath Prasad*, (1938) AIR 1938 (All.) 266.

As per the proviso to Section 58, no remedy would be available to the owner of the copyright regarding conversion of any infringing copies, if the defendant proves that he was not aware and had no reasonable ground to believe that copyright subsists in the work alleged to be infringed or if he had reasonable grounds for believing that such copies or plates do not involve infringement of the copyright in any work.

IV. DAMAGES IN TRADEMARK CASES

A. Relief in a suit for Trademark Infringement in India

Sub-Section (1) of Section 135 of the Trade Marks Act, 1999⁴⁵ provides that relief that may be granted in any suit for infringement or for passing off includes injunction and at the option of the plaintiff, either damages or an account of profits, together with or without an order for the delivery up of the infringing labels and marks for destruction or erasure.⁴⁶

While ‘account of profits’ requires the infringer to give up his ill-gotten gains to the party whose rights he has infringed, ‘damages’ is required to compensate the party wronged for the loss he has suffered.⁴⁷ Further, it was also held that on proof of infringement of a trademark and reasonable probability of damage to the plaintiff’s trade, court may grant injunction and nominal damages whereas substantial damages may be granted only upon proof of actual damage.⁴⁸

Section 135(3) of the Trademarks Act, 1999⁴⁹ also provides certain scenarios where nominal damages may be granted. For instance, where the defendant was unaware or had no reasonable ground to believe that the plaintiff was using or has a registered trademark.

B. Calculation of Actual Damages in Trademark Cases

Some of the factors that have been considered while computing damages in a trademark infringement law-suit, include the following:

1. Loss of trade/sales suffered by the plaintiff due to the defendant’s infringing activities as held in the case of *Sallay Mohamed Hajee Sulaiman & Anr v. SB Negi & Co.*⁵⁰ Interestingly,

⁴⁵ The Trademarks Act, 1999, §135, No. 47, Acts of Parliament, 1999 (India).

⁴⁶ *Cartier International Ag & Ors. v. Gaurav Bhatia & Ors*, (2016) 65 PTC 168 (Del.).

⁴⁷ *Araving Laboratories v. VA Samy Chemical Works*, (1994)12 PTC 223 (Mad.).

⁴⁸ *Id. See also Gujarat Ginning and Manufacturing Co. Ltd. v. Swadeshi Mills Co. Ltd.*, (1938) AIR 1939 (Bom.) 118.

⁴⁹ *Id.*

⁵⁰ *Sallay Mohamed Hajee Sulaiman & Anr v. SB Negi & Co*, (1931) AIR 1932 (Rang.) 56; *Juggilal v Swadeshi Mills*, (1928) AIR 1929 (PC) 11.

in the said case special costs of ten gold mohurs a day during the trial for the senior counsel was granted.

2. Profits earned by the defendant: Where no accounts of profits were disclosed by the defendant, a presumption may be drawn regarding the percentage of profits earned to calculate damages.⁵¹
3. Where the defendant was found to be in violation of a settlement agreement, the court granted damages taking into account the amount that was agreed upon in the settlement agreement between the parties, in case of such violation.⁵²

Unlike patent cases, high damages have been granted in trademark cases in India as evident from below. For instance, in *Whatman International Limited v. P. Mehta & Ors.*,⁵³ an award of Rupees 1 crore was granted against Defendant Nos. 1, 3 and 7; Rupees 25 Lakhs each against defendant Nos. 2, 4 and 5; Damages against Defendant No. 8 for a sum of Rupees 10 lakhs against defendant No. 8. The court held that the goods seized from the defendants' premises shows that the defendants have conducted business worth crores of rupees in Whatman filter paper and lookalike paper and earned commission of Rs. 45 lakhs. Further, the Court also granted exemplary damages in view of wilful disobedience, contempt and false statements.

Similarly, in *Hero Electric Vehicles Private Limited and Ors. v. Guddu Ansari and Ors.*,⁵⁴ the Delhi High Court awarded 50 Lakhs in favour of the plaintiff while applying the rationale of *Koninlijke Philips N.V. and Anr. v. Amazestore and Ors.*⁵⁵ and held that the matter fell in the category of grant of aggravated (compensatory + additional damages).

In *Cartier International Ag & Others vs Gaurav Bhatia & Ors.*,⁵⁶ the Delhi High Court had awarded punitive damages amounting to one crore rupees. The damages were computed by the plaintiff in the following manner:

1. Illegal profits made by the Defendant- As per the traffic evaluation of defendant's website, it was estimated that there were 100,000 visitors or hits per day amounting to about 36

⁵¹ Bhagwan Das Ramji Lal v. Ms. Watkins Mayor and Co., (1955) AIR 1956 (Pun) 17.

⁵² Hell Energy Magyarorszag KFT v. Shri Brahm Shakti Prince Beverages Pvt. Ltd. &Ors., Order dated July 21, 2022 in CS(COMM) 403/2022, High Court (Del.).

⁵³ Whatman International Limited v. P. Mehta & Ors, (2019) 78 PTC 51 (Del.).

⁵⁴ Hero Electric Vehicles Private Limited &Ors. v. Guddu Ansari & Ors., (2016) 65 PTC 168 (Del.).

⁵⁵ *Supra* note 4.

⁵⁶ Cartier International Ag & Ors. v. Gaurav Bhatia & Ors, (2016) 65 PTC 168 (Del.).

lakh hits in 3 years and if each hit was worth Rs. 10,000, the same would be Rs. 36 crores and even if 10% was attributed to counterfeit products, the same would be Rs. 3.6 crores.

2. Number of counterfeit products likely to have been sold- Since defendants had sold more than 1000 Montblanc pens, the total estimate of counterfeit products regarding four brands was estimated to be 4000 and if cost of each product was taken as Rs. 63,000/-, the total turnover would be Rs. 25 crores.
3. Number of counterfeit products found- Over 730 watches were recovered from the defendants' premises and around one third of these depicted the suit trademarks. The average price quoted for counterfeit watches being Rs. 75,000, the defendant was found in possession of Rs.1.82 crore worth of counterfeit watches on a single day.

Further, the plaintiff also claimed damages on account of damage to their reputation and goodwill due to the availability of spurious products of the defendants.

V. CONCLUSION

The jurisprudence regarding damages is constantly evolving. India has also witnessed a major shift in the last decade regarding damages jurisprudence in intellectual property cases. However, there is not only a need for higher quantum of damages, but also an increase in the number of intellectual property cases where damages are granted in India.

Further, currently, the calculation of damages in India is not consistent and at this time may not be proportionate to the value of the intellectual property involved or the extent of infringement. Thus, it is important that the quality of decisions pertaining to damages in India is outstanding for the development of the law of damages. This may be facilitated, in multiple ways, including the following:

- A. Using accountancy firm/valuation experts for valuation of the intellectual property to ensure that the intellectual property right being enforced is optimally valued and compensated, where infringed. Valuation experts may even be called to testify regarding damages being sought in a law-suit.
- B. Discovery/Interrogatories- There are multiple tools available under Indian laws which can be used to obtain information that may aid in computation of damages i.e., seeking disclosure of sales of infringing goods, profits made, duration of infringement etc.

- C. Search of premises/Seizure of goods- Through search and seizure, the quantity of infringing goods being sold and manufactured may be ascertained, which may then be used to calculate damages.
- D. Detailed investigation/Market surveys may be carried out regarding the extent of infringement by the infringer.

While various theories and mechanisms have been laid down to compute damages in cases involving intellectual property rights, as detailed above, the applicability of the same will be dependent on the bundle of facts in each case. However, it must be borne in mind that the protection and enforcement of intellectual property rights is paramount and extremely crucial to incentivize innovation and creativity. Moreover, the infringers, if liable, should not get away with it scot-free. Thus, damages should be awarded with an objective to not only compensate the one wronged but also to penalize and deter any such wrongdoing.