



The Economic Impact of the Unified Patent Court

Calculating Patent Infringement Damages under UPC Rules

The Unified Patent Court (“UPC”) marks a significant shift in how patent infringement damages might be claimed across Europe and worldwide, consolidating claims that previously required separate actions in multiple countries into a single, streamlined process.

As of August 2025, 18 member states covering about 80% of the EU’s GDP have agreed to having the UPC as a European Court¹, meaning that the UPC has an economic footprint of approximately €14 trillion GDP² and covers over 300 million people.³ The UPC offers patent holders the opportunity to claim damages on a pan-European scale, increasing both potential recoveries and risks for infringers. The legal framework under Article 68 of the Unified Patent Court Agreement (“UPCA”)⁴ draws from Directive 2004/48/EC⁵ but introduces important nuances, especially regarding the infringer’s knowledge and methods of damage calculation.

What are some of the practical considerations for damages claims under the UPC from an economic point of view? How can practitioners navigate the interplay of local judicial experience and new unified procedures while considering economic impacts beyond traditional loss metrics?

The Broader Scope of Patent Damages under the UPC

The UPC’s jurisdiction over currently 18 European countries transforms the landscape of patent infringement damages.⁶ Traditionally, patent owners

had to initiate separate claims in each member state, often facing divergent procedural rules and inconsistent damage awards. Since June 2023, under the UPC, a single proceeding can cover a patent portfolio spanning multiple countries, significantly broadening the scope and scale of potential damages.

This expansion affects not only plaintiffs seeking redress but also defendants, who must prepare for potentially larger and more complex damages claims. With an economic footprint of approximately €14 trillion GDP across the member states, the UPC covers around 80% of the economic performance in Europe.⁷ With potential claims covering over 300 million people, infringement cases involving industries such as pharmaceuticals or technology can result in substantial economic effects, either in case of damage awards or in cases of preliminary injunctions.

Furthermore, the UPC integrates procedural features from diverse legal frames and case law creating a hybrid model that will likely evolve as early case law develops. The judges come from several jurisdictions with both legal and technical backgrounds and expertise, including patent attorneys.

In patent litigation, economic expertise is also regularly required. Speed and high-level quality are clearly observable drivers that are in the focus of the UPC judges, which also affects the calculation of damage awards: as the UPC Rules pursue “front loaded” procedures combined with short deadlines, it is crucial to address economic effects in the beginning of a proceeding. Understanding the framework and strategies for damages claims and other economic impacts under this new patent court is essential for patent owners and defendants alike.

Legal Basis for Damages Claims at the UPC

A key advantage of the UPC framework is that claimants can avoid the cost and complexity of multi-jurisdictional litigation by consolidating damages claims for an entire patent portfolio into one proceeding.

Article 68 of the UPC Agreement sets the statutory foundation for awarding damages at the UPC. The UPC Rules of Procedure (“RoP”)⁸ complement the UPC Agreement by allowing damages claims to be addressed either within the main infringement proceedings or through a separate damages-specific phase, mirroring practices in jurisdictions such as Germany.⁹ It has to be noted that – even though Germany currently has the most cases at the UPC – many UPC judges clearly state an intention to set up a new framework for patent litigation. So, although having a deep understanding of how patent litigation in Germany works is very helpful because of the dominance of cases filed in Germany, the UPC is developing new procedural practices. A broader and international view on the UPC rules is just as important.

Interim damages awards are also possible under Rule 119 RoP, permitting courts to grant partial compensation covering expected procedural costs or anticipated damage amounts. This pragmatic approach reflects the UPC’s hybrid procedural design and its emphasis on balancing efficiency and thoroughness.

Distinguishing Between Wilful and Non-Wilful Infringement

What is new for many jurisdictions, but included in Article 68 UPC Agreement, is a notable feature of the UPC’s damage rules – the distinction between infringers who knowingly, or with reasonable grounds to know, have engaged in infringement versus those who have not.

— **Wilful infringement:** Under Article 68(2) UPC Agreement, damages aim to place the injured party in the position they would have been in if no infringement occurred, emphasising full compensation.

— **Non-wilful infringement:** Article 68(4) UPC Agreement provides for compensation that may be limited to the recovery of profits made by the infringer or a reasonable royalty, offering a distinct approach for cases where infringement was not deliberate.

This dual-track system is relatively novel in damage calculation of IP infringements in most of the UPC member states and requires careful assessment of the infringer’s intentions, which in turn might shape the method of damage calculation. As there is currently no case law in place, this distinction will be interesting to observe, as a patent can be observed as soon it is published or later registered. However, this might be more difficult to track if there is a complex technology where several patents protect a product or function, as is often the case when using IoT technology or by using Standard Essential Patents in certain telecommunication technology like the 4G or 5G standard.¹⁰

Practical Methods for Calculating Damages under the UPC

In the case of the “knowing infringer”, Article 68(3) UPC Agreement emphasises a rather broad interpretation for a damages award, covering all “appropriate aspects” when calculating damages, including but not limited to lost profits and unfair profits of the infringer.¹¹ The UPC also permits lump-sum damages based on royalties or fees,¹² offering a practical alternative where precise calculation of actual losses might be difficult. In addition – and this seems also to be a new aspect – Article 68 seeks to cover all negative economic consequences that are incurred. The Article states that the infringer shall not benefit from the infringement.

This leads to a broader interpretation as to whether to adopt one of the typical three methods used for damages calculations: (1) the lost profit compensation, (2) infringers profit and (3) the relief-from-royalty method. From an economic point of view, Article 68 UPCA gives a wider consideration of economic harms. This could be a delayed market entry, loss of first-mover advantage, reputational damage and impact on future investment. This expansive view encourages a holistic economic assessment tailored to the patent’s industry and strategic importance.

In some jurisdictions like Germany, damages calculations tend to separate the patentee’s lost profits from the infringer’s unfair profits, generally not considering a combination. Whether the UPC will adopt this approach strictly or allow a hybrid calculation still remains to be seen.

The Relief-of-Royalty Method

Although not explicitly mentioned in Article 68(3a), the relief-of-royalty method is implicitly recognised under Article 68(3b) as a viable damages calculation approach. This is the methodology that is used in standard essential patent (“SEP”) disputes involving FRAND (fair, reasonable and non-discriminatory) licensing terms, where damages are usually determined by reference to a reasonable royalty rate. Besides this rather specific perspective of patent litigation, the relief-of-royalty method is also one of the most often used methods in a damages calculation in IP infringement cases in general and also for patent infringement in particular and is used in several jurisdictions.

As this method is a very well-known and accepted method for the calculation of damages awards, it is very likely that this method will also be used in UPC cases and also accepted by UPC judges.

No Punitive Damages

In some jurisdictions, like in the United States, patent litigations have the risk that damages awards are increased with a punitive element, especially when the court sees proof that the infringer has knowingly and wilfully carried out the patent infringement. This increases the threat of high damages awards in these countries significantly, besides the fact that patent disputes in the United States are usually considerably more costly than a dispute in the European continent.

The UPC rules distinguish between the knowing/wilful and non-wilful infringement of a patent. Nevertheless, a punitive element is clearly excluded from damages calculations in the case of a knowing infringement.¹³ Nevertheless, to distinguish between these two cases makes it clear that under UPC rules damages awards shall be measured more broadly when the infringer was aware of the infringement in order to deter infringement. This is an important aspect to consider, given that the purpose of patent law is to encourage inventions, R&D and economic investment. These investments are privileged in their usage for a certain period of time only, meaning that the pay-off period is limited. To undermine this encouragement of investment from an economic point of view, the threat of high damages in the event of intentional infringement must be noticeable.

Gathering and Assessing Evidence for Damage Claims

Accurate damages calculation depend heavily on evidence quality. The UPC permits damages assessments based on party submissions or on detailed financial accounts of the infringer.

The UPC proceedings have a front-loaded nature and very short deadlines. This means that parties have to be extremely well prepared for UPC proceedings, which includes the damages calculations and may therefore require the early appointment of a damages expert. If a party wishes an amount of damages to be determined, it shall make a request no later than one year from service of the final decision on the merits.¹⁴ This shall also include a request for an order to lay open books. This leaves some practical questions open, as the claim for a damages award needs to be already substantiated in the front-loaded proceedings of the UPC. Nevertheless, in this claim the request to lay open books has to be included. As an economic expert it might be necessary to work with reasonable assumptions based on the available information at an early stage and be prepared to deepen the economic assessment at a later point of time after additional information has been provided.

Economic Damages in the Context of Preliminary Injunctions

Additionally, the UPC framework presents particular challenges and opportunities concerning preliminary injunctions. The possibility to obtain preliminary injunctions covering up to 18 participating member states within a few months makes it attractive for patent owners. This is already confirmed by the many decisions rendered in cases of preliminary injunctions by the UPC to date and this number is increasing.

Nevertheless, in the case of a revocation of a preliminary injunction this raises complex damages issues: parties harmed by wrongful injunctions may pursue compensation, and these claims often interplay with final damages awards for patent infringement. An appropriate compensation can be requested and this will be based on Rule 213.2 RoP in relation to the UPC Agreement Article 62 (5) in conjunction with Article 60 (9) and Rule 354.22 RoP. To date, no UPC case law is available with regard to the damages calculation in this context, a calculation of an appropriate damages amount has to consider economic principles and analysis within the wider framework of the UPCA/ROP. This means that sound preparation, including early expert analysis, and experience in damages award calculations of patent infringements is crucial to address these nuanced claims effectively.

Given the early stage of the UPC and the anticipated development of UPC case law, the practical conduct of damages proceedings will depend substantially on the expertise of presiding judges and the strategic choices of litigants. It is imperative for parties to integrate economic considerations and local procedural nuances into their litigation and settlement strategies to navigate this evolving landscape effectively.

Expert Testimony and Court-Appointed Experts at the UPC

Damages claims generally involve expert economic opinions submitted in writing. If oral evidence is required, parties must request expert hearings under Rule 181 RoP, citing specific reasons.

The UPC currently reflects diverse national traditions regarding expert testimony. For example, oral expert examinations are routine in Germany but less common in France. Unlike English procedures, cross-examination is not standard practice in Germany or France, though experts may be questioned directly by the court.¹⁵ Cross-examination of party appointed experts is also common practice in arbitration proceedings, which often leads to very detailed and thoroughly prepared evidence from economic experts. As the current practicing judges generally do not have either UK or arbitration backgrounds, it seems rather unlikely that we will see those practices in future proceedings, even though they might arguably increase the quality of expert testimony.

Nevertheless, in line with Rule 181 RoP an economic expert has to declare in their expert report that it is their duty to assist the court impartially on matters within their expertise and that this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid. In addition, the expert shall confirm they are independent and objective and not to act as an advocate for any party to the proceedings.

The economic expert must also state that they have made clear which facts and matters referred to in the expert opinion are within their own knowledge and which are not. Finally, the expert has to confirm they are available and willing to provide oral evidence in relation to the matters discussed in the written expert report at a hearing before the UPC Court. These elements of an expert declaration are very similar to international arbitration.

In a nutshell, even though the economic expert is working as a party appointed expert, the role of the expert is – similar to international arbitration proceedings and also to UK rules – an independent role and is primarily to assist the court.

Besides party appointed experts, the UPC rules allow the court to appoint its own experts under Article 57 UPCA and Rule 185 RoP when additional evidence – either technical or economic – is necessary. Court appointed experts might prepare reports subject to party comment and may attend oral hearings to respond to questions, enhancing the robustness of damage assessments. At the time of this article, there had not yet been a case involving court-appointed economic experts and this does not currently seem likely. Nevertheless, in France and in Germany, court appointed economic experts are often involved where the judges need additional support in decisions.

Navigating the New Landscape of UPC Damages Claims

Damages claims under the Unified Patent Court represent a significant evolution in European patent litigation, combining procedural elements from continental and common law traditions. The UPC's pan-European jurisdiction over currently 18 member states greatly expands the scope and potential volume of damage awards, increasing both opportunities and risks for patentees and alleged infringers.

Practitioners must carefully consider the multifaceted approaches allowed by the UPC for calculating damages – ranging from lost profits and infringer's unfair gains to lump sum royalties – while recognising the importance of economic consequences beyond direct financial losses, such as reputational harm and strategic market setbacks.

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- ¹² Article 68(3b) UPCA
- ¹³ Article 68(2) UPCA
- ¹⁴ Rule 126 RoP
- ¹⁵ “Guide to Patent Case Management 5.6.1,” WIPO <https://www.wipo.int/patent-judicial-guide/en/full-guide/germany/5.6>