



Key Considerations in Calculating Unjust Enrichment Damages

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Lost Profits vs. Unjust Enrichment

- Lost Profits – seeks to put the ***plaintiff*** in the position he/she would have been but for the wrongful act of the defendant
- Unjust Enrichment – seeks to deprive the ***defendant*** of whatever gain or benefit was obtained from the wrongful act and give it to the plaintiff

Selection of the Appropriate Remedy

- How do you select the appropriate remedy?
 - Guidance from attorney/complaint
 - Consider who was damaged – In most jurisdictions, it is not necessary to prove the plaintiff was damaged in an unjust enrichment claim.
- Selection of the remedy may also impact the disclosure requirements of the parties
 - Lost profits – plaintiff will have to disclose a substantial amount of information
 - Unjust enrichment – plaintiff may avoid having to disclose certain information

Selection of the Appropriate Remedy (Cont'd)

- Contracts and Torts
 - Lost Profits or Decrease in Value
 - Out-of-Pocket Costs
 - Unjust Enrichment (not as common)
- Intellectual Property (Patents, Trade Secrets, Trademarks, Copyrights)
 - Lost Profits or Decrease in Value
 - Unjust Enrichment
 - Reasonable Royalty
- Disgorgement of defendant's gains may be used as a measure of damages in legal claims pertaining to unfair competition, fraud, false advertising, breach of fiduciary duty, unjust enrichment, price discrimination, securities violations, etc.

Intellectual Property

- The table below summarizes the potential damages available for infringement of different types of IP.

Damages	Utility Patent	Plant Patent	Design Patent	Trademark	Copyright	Trade Secret
Lost Profits	✓	✓	✓	✓	✓	✓
Unjust Enrichment			✓	✓	✓	✓
Reasonable Royalty	✓	✓	✓	✓	✓	✓
Decrease in Value				✓	✓	✓

Survey Question #1

- How often do you encounter unjust enrichment claims in your practice?
 - A. Frequently
 - B. Occasionally
 - C. Never

Unjust Enrichment Measurements

- **Head Start**
 - Defendant's time savings and acceleration to market
- **Increased Profits**
 - Profit generated by the defendant from the use of the plaintiff's IP
- **Cost Savings**
 - Defendant's avoided costs from not having to develop the IP
- **Reasonable Royalty Avoided**
 - Avoided royalty payments
- **Increased Value**
 - Increase in value of the defendant due to the use of the plaintiff's IP

Survey Question #2

- What is the most complex component in the calculation of defendant's profits?
 - A. Revenue
 - B. Expenses
 - C. Time Horizon
 - D. Other

Measuring the Ill-Gotten Gains

- Time Horizon
 - Historical vs. Future
- Revenues
- Expenses
 - Incremental vs. Full Absorption
- Apportionment

Measuring the Ill-Gotten Gains: Time Horizon

- The time horizon is typically based on the time it would take the defendant to develop similar IP
 - For example, if it took the defendant 2 years to develop IP with the same utility (using information available to the public), then the disgorgement period may be limited to that 2 years.
- Disgorgement claims are often paired with injunction claims so as to prohibit the use of the IP in the future.

Measuring the Ill-Gotten Gains: Revenue

- Properly apportioning the revenue is critical
 - Only those revenues directly attributable to the infringement or misappropriation should be measured
 - Needs to be addressed early in the case by the attorneys, as a survey may be required to properly apportion the revenues to the subject IP
- If you're engaged by the defense, apportionment can be a key component of the rebuttal analysis

Measuring the Ill-Gotten Gains: Expense Allocation

- Incremental vs. Full Absorption
 - Depends on the jurisdiction
 - Seek guidance from counsel
- Incremental – costs directly attributable to the production and distribution of the subject products
- Full Absorption – deduction of all expense items allocable to the production of the subject products