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## Damages in patent litigation: Net Profits or Gross Profits?

Miquel Montañá (Clifford Chance) · Wednesday, October 13th, 2010

EC Directive 2004/48 (known as the "Enforcement Directive") was implemented in Spain through Law 19/2006, which sought to harmonise, among other aspects, the criteria to establish damages in legal proceedings involving the infringement of intellectual property rights. In cases of patent infringement where the complainant claims profits lost or damages caused by the defendant, one of the questions discussed is whether the patentee is entitled to claim "net" profits or, on the contrary, "gross" profits. On 11 December 2009 the Court of Appeal of Madrid (Section 28) handed down a judgment where, following the same position as the Court of Appeal of Barcelona (Section 15) in its judgment of 20 July 2006, decided that the patentee is entitled to "gross" profits. This conclusion is logical, since if the goal is to try to restore the "status quo" that would have existed in the absence of the acts of infringement, it would not seem adequate to deduct the general costs that would have been incurred by the company in any event. In future cases, our Courts will be required to elaborate further on the concepts of "net" and "gross" profits, which are not self-evident, and on the type of expenses that may and may not be deducted from the income obtained through the use of the patent.

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