

CIVIL ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: PUBLIC CONSULTATION ON THE EFFICIENCY OF PROCEEDINGS AND ACCESSIBILITY OF MEASURES

1 BACKGROUND INFORMATION

1.1 What is your sector of activity (if possible with a 3 digit NACE classification)? (between 1 and 500 characters)
http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-07-015/EN/KS-RA-07-015-EN.PDF

2 EFFICIENCY AND EFFECTIVENESS OF CIVIL PROCEEDINGS IN CASES CONCERNING INFRINGEMENTS OF INTELLECTUAL PROPERTY RIGHTS

2.2 Did you pursue alternative dispute resolution mechanisms before instituting court proceedings in the cases of intellectual property rights' infringements?

Yes - No - N/A

2.3 What were the costs and the length of proceedings? (maximum 1000 characters)

2.4 Were your rights sufficiently safeguarded (including right to privacy, right to be heard, and due process)? Please explain: (maximum 1000 characters)

2.5 Do you consider that alternative dispute resolution mechanisms in cases of intellectual property rights' infringements are sufficiently accessible to parties affected by an infringement?

Yes - No - No Opinion

2.6 Did you take part in litigation of cases concerning the infringements of IPRs during the period under examination? The survey focuses on the period from May 2006 onwards.

Yes - No

2.7 In how many cases per year do you take part on average? (maximum 100 characters)

2.8 How many of these cases were subject to an appeal? (maximum 100 characters)

2.9 In which capacity? (between 1 and 4 answers)

Plaintiff - Defendant - Judge - Third Party - Other

2.10 In which countries? Please indicate relevant Member States: (between 1 and 27 answers)

- AT - Österreich
- BE - Belgique / België
- BG - България
- CZ - Česká republika
- CY - Κύπρος
- DE - Deutschland
- DK - Danmark
- EE - Eesti
- EL - Ελλάδα
- ES - España
- FI - Suom/Finland
- FR - France
- HU - Magyarország
- IE - Éire/Ireland
- IT - Italia
- LT - Lietuva
- LU - Luxembourg
- LV - Latvija
- MT - Malta
- NL - Nederland
- PL - Polska
- PT - Portugal
- RO - România
- SK - Slovensko
- SI - Slovenija
- SE - Sverige
- UK - United Kingdom

2.11 Have claims against the validity of infringed/allegedly infringed intellectual property rights been made in the context of the litigation you were a party to?

Yes - No

2.12 In approximately what percentage of cases were these intellectual property rights found to be invalid as a result of these claims? (between 0 and 100)

2.13 What was the amount of external experts' costs you had to pay in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right? (between 1 and 1000 characters)
Please indicate the costs per expert and the number of experts usually called.

2.14 What was the amount of in-house costs you had to bear in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right? (between 1 and 1000 characters)

Please indicate the number of full-time equivalent employees devoted to this activity and average salary cost as well as the Member State(s) where the proceedings took place and the intellectual property right(s) that constituted the subject of these proceedings.

2.15 What was the amount of legal representation costs you had to pay in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right? (between 1 and 1000 characters)

Please explain indicating the amount of attorney's charge (according to national rules concerning lawyer's fees) and the amount of additional attorney's fees (costs related to representation other than basic attorney's charge, e.g. legal advice proceeding the litigation, etc.) as well as the Member State(s) where the proceedings took place and the intellectual property right(s) that constituted the subject of these proceedings.

2.16 Please indicate, if appropriate, other costs that you had to bear in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right: (between 1 and 1000 characters)

e.g. security provided with regard to the request of provisional/precautionary measures, payment provided for the execution of corrective measures – if not included above as "court fees"

2.17 What was the total amount of costs you had to bear in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right? (between 1 and 1000 characters)

2.18 Please indicate which of the various costs associated with the proceedings on the merits of the case at first instance were ordered by the court to be reimbursed to the winning party by the losing party following the final decision:

Please indicate whether there was a reimbursement separately for the proceedings concerning different intellectual property rights if appropriate.

- a. Court fees for instituting proceedings
- b. Other court fees
- c. Externam expert(s) costs
- d. In-house costs
- e. Attorney's charge
- f. Additional attorney's fees.

2.18.2 How would you evaluate the significance of your intellectual property rights and related assets based on the performance and growth?

Please provide an answer for the rights that you have indicated in the previous question.

- a: NONE
- b: LOW
- c: MEDIUM
- d: HIGH
- e: CRUCIAL

- Copyright:
(at most 6 answers)
 - Rights related to copyright:
(at most 6 answers)
 - Sui generis right of a database maker:
(at most 6 answers)
 - Rights of the creator of the topographies of
a semiconductor product:
(at most 6 answers)
 - Trademark rights:
(at most 6 answers)
 - Design rights:
(at most 6 answers)
 - Patent rights:
(at most 6 answers)
including rights derived from supplementary
protection certificates
 - Geographical indications: (at most 6 answers)
 - Utility model rights: (at most 6 answers)
 - Plant variety rights: (at most 6 answers)
 - Trade names: (at most 6 answers)
- in so far as these are protected as exclusive
property rights in the national law concerned

2.19 Please indicate the average time (months and days) between the lodging of a request before a court and the granting of a preliminary injunction (e.g. cease and desist orders against the infringer) in civil law cases concerning infringement of an IP right in your Member State/in the Member States in which you have been a party to court proceedings: (between 1 and 1000 characters)

Please explain indicating the Member State(s) where the proceedings took place and the intellectual property right(s) that constituted the subject of these proceedings

2.20 Please indicate the average length (months and days) of court proceedings on the merits of the case (from lodging the claim to obtaining the final decision of the court at first instance) in civil law cases concerning infringement(s) of an IP right(s) in your Member State/ in the Member States in which you have been a party to court proceedings: (between 1 and 1000 characters)

Please explain indicating the Member State(s) where the proceedings took place and the intellectual property right(s) that constituted the subject of these proceedings.

2.21 Please indicate the average length (months and days) of the appeal court proceedings (from lodging the appeal to obtaining the final decision of the court at appeal) in civil law cases concerning infringement(s) of an IP right(s) in your Member State/ in the Member States in which you have been a party to court proceedings: (between 1 and 1000 characters)

Please indicate the Member State(s) where the proceedings took place and the intellectual property right(s) that constituted the subject of these proceedings.

2.22 In your Member State, which courts are competent to hear civil law cases concerning infringements of IPRs in first instance and how many of these courts exist? (between 1 and 500 characters)

Other than courts designated to hear the cases concerning the Community trademarks and designs

2.23 In your Member State, which courts are competent to hear civil law cases concerning infringements of IPRs at appeal and how many of these courts exist? (between 1 and 500 characters)

Other than courts designated to hear the cases concerning the Community trademarks and designs

2.24 Are there courts specialised in litigation of intellectual property related cases in your Member State?

Other than courts designated to hear the cases concerning the Community trademarks and designs

Yes – No

2.25 In the "general" courts competent to hear civil law cases concerning infringements of IPRs, are there judges- specialised in intellectual property?

Yes – No

2.26 In your Member State, are fast track proceedings accessible in civil law cases concerning infringements of IPRs?

For the purposes of this survey, "fast track proceedings" should be understood as simplified proceedings established for certain types of cases, in order for the competent judicial authorities to rule in a timeframe that is shorter than in standard proceedings.

2.27 Are these fast track proceedings specifically established for civil law cases concerning infringements of IPRs?

Yes – No

2.28 In your Member State, are there maximum amounts for damages awarded through such fast track proceedings?

Yes – No

2.29 In your Member State, are small claims proceedings accessible in civil law cases concerning infringements of IPRs?

For the purposes of this survey, "small claims proceedings" should be understood as simplified proceedings established for cases with relatively low financial value, in order for the competent judicial authorities to rule in a timeframe that is shorter than in normal proceedings.

Yes – No

2.30 Do you think it would be useful to establish, at EU level, model rules for fast track proceedings for civil law cases concerning infringements of IPRs?

Yes – No – No opinion

2.31 Do you think it would be useful to establish, at EU level, specific (in addition to Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure) model rules for small claims proceedings for civil law cases concerning infringements of IPRs?

Yes – No – No opinion

2.32 Do you think it would be useful to establish rules for fast track proceedings for litigation of infringements of community trademarks and community designs?

Yes – No – No opinion

2.33 Do you think it would be useful to establish rules for small claims proceedings for litigation of infringements of community trademarks and community designs?

Yes – No – No opinion

2.34 What safeguards of defendant's rights should be put in place in case of the EU-level fast track/small claims proceedings concerning infringements of IPRs? (between 1 and 2000 characters)

3 ACCESSIBILITY OF MEASURES NECESSARY TO ENSURE CIVIL ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

3.1 Right of information

3.1.1 How do you identify infringers/alleged infringers of your IPRs?
(between 1 and 1000 characters)

3.1.2 Has it been possible for you to obtain information allowing identification of infringers/alleged infringers directly from an intermediary?
Yes – No – N/A

3.1.3 What was the justification when the request was denied?
It is required to first obtain an order from a competent authority – Other

3.1.4 Has it been possible for you to obtain a court order obliging an intermediary to disclose the identity of the infringer/alleged infringer?
Yes – No - N/A

3.2 Mechanisms to inform about the alleged infringement and to impede access to goods and services allegedly infringing IPRs

3.2.1 Do you consider the possibility to use notification mechanisms to be a useful tool to inform the intermediary about the fact that his services are being (allegedly) used to infringe an intellectual property right and thus bring a stop to the infringing/allegedly infringing activity?
For the purposes of this survey, a "notification mechanism" should be understood as any mechanism that enables a right holder to, at least, notify an intermediary, acting in an online and/or offline environment, that his services are being used by a third party to infringe that right holder's intellectual property right.
Yes – No – No opinion

3.2.2 Do you consider the possibility to use notification mechanisms to be a useful tool to inform the infringer/alleged infringer about the infringing/allegedly infringing character of his activity? (at most 1 answers)
Yes – No- No opinion

3.2.3 Are notification mechanisms being used by the rights holders in your Member State?
Yes – No

3.2.4 Does the infringer/alleged infringer have a possibility to contest a notification sent by the right holder?
Yes – No

3.2.5 Is it possible for a right holder to use the notification to ask an intermediary to impede access to goods or services that he considers to be infringing his IPRs and that are offered through the services of this intermediary?

Yes – No

3.2.6 Is the right holder obliged to obtain an order from the competent judicial authorities if he wants to oblige the intermediary to impede access to goods or services that he considers to be infringing his IPRs?

Yes – No

3.2.7 Is it possible to ask for such a measure already at the preliminary proceedings stage?

Yes – No

3.2.8 Is a review of the measure resulting from the use of this mechanism (e.g. when access to an offer displayed on a website was impeded) provided for?

Yes – No

3.2.9 Are judicial authorities involved in this review?

Yes – No

3.2.10 In cases of commercial scale infringements of intellectual property rights, do you consider that there should be particular consequences (i.e. including e.g. suspension of the infringer's/alleged infringer's account) resulting from a notification mechanism?

For the purposes of this survey, "commercial scale infringements" should be understood as infringements carried out for direct or indirect economic advantage on a magnitude of typical/usual commercial activity, while excluding consumers acting in good faith or for personal/non-profit purposes.

Yes – No – No opinion

3.2.11 In cases of notorious infringers of intellectual property rights, do you consider that there should be particular consequences (i.e. including e.g. suspension of the infringer's/alleged infringer's account) resulting from a notification mechanism?

For the purposes of this survey, "notorious infringers" are considered as infringers who have been the subject of a number of procedures based on the notification mechanism.

Yes – No – No opinion

3.3 Requirements for granting injunctions

3.3.1 Have preliminary injunctions been sought in the context of the litigation you were party to?

For the purposes of this survey, "preliminary injunction" should be understood as an interim injunction that can be issued by the competent judicial authorities even before the commencement of the proceedings on the merits of the case.

Yes – No

3.3.2 In approximately what percentage of cases were these injunctions granted by the competent judicial authorities? (between 0 and 100)

3.3.3 Have permanent injunctions been sought in the context of the litigation you were party to?

For the purposes of this survey, "permanent injunction" should be understood as an injunction issued by the competent judicial authorities as a part of the decision on the merits of the case.

Yes – No

3.3.4 In approximately what percentage of cases were these injunctions granted by the competent judicial authorities? (between 0 and 100)

3.3.5 Is the urgency of the case taken into account by the competent judicial authorities when granting a provisional injunction?

Yes – No – Don't know

3.3.6 Is the potential harm of the measure for either of the parties taken into account by the competent judicial authorities when granting a provisional injunction?

Yes – No – Don't know

3.3.7 Is the impact of the measure on the market, competition and consumers taken into account by the competent judicial authorities when granting a provisional injunction?

Yes – No – Don't know

3.3.8 Are claims against the validity of IPRs taken into account by the competent judicial authorities when granting a provisional injunction?

Yes – No – Don't know

3.4 Injunctions imposed on intermediaries

3.4.1 Have you obtained a preliminary injunction imposed on an intermediary who was not a party to the proceedings?

Yes – No – N/A

3.4.2 Have you obtained a permanent injunction imposed on an intermediary who was not a party to the proceedings?

Yes – No – N/A

3.4.3 Have you obtained a permanent injunction imposed on an intermediary providing services necessary for the financing of the infringing activity (e.g. a payment service provider)?

Yes – No – N/A

3.4.4 Have you obtained a permanent injunction imposed on an intermediary providing services necessary to access the infringing services/goods?

Yes – No – N/A

3.5 Third party facilitation of infringements of IPRs

3.5.1 Is it possible in your Member State to launch legal proceedings against a third party who, even if not directly liable for an infringement of IPR under current rules, is engaged in an activity that actively and knowingly facilitates infringements of IPRs on the commercial scale by others?

Yes – No

3.5.2 Is it possible in your Member State for the right holder to claim damages from a third party who actively and knowingly facilitates infringements of IPRs?

Yes – No

3.6 Corrective measures

3.6.1 Have corrective measures been ordered in cases in which you have been a party?

For the purposes of this survey, "corrective measures" should be understood as measures ordered by a court to prevent the possibility for the goods that were found to infringe an intellectual property right to return into the channels of commerce.

Yes – No

3.6.2 Were the costs imposed on the infringer directly or did you have to pay the costs first and claim reimbursement?

Costs directly – Imposed on infringer – Reimbursement – Other

3.6.3 Should the competent judicial authorities privilege one specific type of corrective measure?

Yes – No – No opinion

3.6.4 Should the consent of the right holder constitute a conditio sine qua non for disposing of the goods that were found to infringe an intellectual property right outside the channels of commerce?

Yes – No- No opinion

3.6.5 Are there sanctions for parties who, notwithstanding that the infringing goods were subject to corrective measures, allowed these goods to subsequently return to the channels of commerce?

Yes –No

3.6.6 Would you be in favour of introducing sanctions for a party who, notwithstanding that the infringing goods were subject to corrective measures ordered by the competent judicial authorities, allowed these goods to subsequently return to the channels of commerce?

Yes – No- No opinion

3.7 Damages

3.7.1 On what basis do the competent judicial authorities establish the amount of damages awarded to the right holder in its final decision in a civil claim concerning an infringement of an IPR? (between 1 and 1000 characters)

3.7.2 Is due diligence of the right holder taken into account by the competent judicial authorities in the course of establishing the amount of damages to be awarded to the right holder in its final decision in a civil claim concerning infringement of an IPR?

E.g. right holder's diligence in contracting and applying fair contractual terms in line with the fundamental rights applied in the EU, investment in the implementation of recognised ethical auditing and track and trace procedures, and providing access to his works in the territory where the infringement took place.

Yes – No – Don't know

3.7.3 Is it possible for the competent judicial authorities in civil law cases concerning an infringement of IPRs to award damages on the joint basis of provisions on compensation for lost profits and those on unjust enrichment?

Yes – No – Don't know

3.7.4 Is it possible for the competent judicial authorities in civil law cases concerning an infringement of IPRs to award damages on the basis of the alleged infringement of a broader portfolio of intellectual property rights, despite the fact that normally only a very limited number of these rights are asserted during one particular court proceeding?

Yes – No – Don't know

3.7.5 Would you agree that the level of damages awarded to the right holder in civil law cases concerning an infringement of IPRs should at least equal the profits made by the infringer?

Yes – No – Don't opinion

3.7.6 Is it possible in your Member States to award punitive damages in a case of IPRs infringements?

Yes – No

3.7.7 Is it possible in your Member State for a relevant third party to claim compensation for damages arising out of an infringement?

Yes – No

3.7.8 Is it possible in your Member State for a relevant third party to claim compensation for damages arising out of measures taken to enforce IPRs which are subsequently held unfounded?

Yes – No

3.8 Use of IPR enforcement measures for frivolous and/or anti-competitive purposes

3.8.1 In approximately what percentage of cases would you consider that a party used IPR enforcement measures frivolously and/or for anti-competitive purposes?

3.8.2 Are there provisions on frivolous and/or anti-competitive use of the enforcement measures established in your Member State?

Yes – No

3.8.3 Are there sanctions for frivolous and/or anti-competitive use of the enforcement measures established in your Member State?

Yes – No

3.8.4 How does the legislation in your Member State safeguard your rights as a defendant, in particular in terms of (1) right to privacy, (2) due process requirements? Please explain: (maximum 2000 characters)