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Innovation and Advanced Manufacturing

Intellectual Property and Fight Against Counterfeiting

Public consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights

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A. Introduction

In its Digital Single Market Strategy¹ the Commission committed to undertake a set of targeted actions which aim to foster the cross-border digital economy but also aim to ensure a safe online environment for business operators and consumers.

Among the actions envisaged is the modernisation of Intellectual Property Rights (IPR) enforcement, focusing on commercial-scale infringements (the so-called 'follow the money' approach) and its cross-border applicability. The Single Market Strategy² reiterated these objectives, emphasising the Commission's horizontal approach to IPR enforcement and the need to strengthen the protection of all IPR.

Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) is a legislative instrument whose overall aim is the better functioning of the internal market. It approximates the laws of the Member States in the area of civil enforcement of IPR. It sets down minimum harmonisation rules on measures, procedures and remedies available to right holders in order to enforce their IPRs, meaning that Member States can provide for greater protection if they so choose. IPRED covers all types of rights, including copyright, trademark, patent and design rights. Specifically as regards copyright, it complements Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

In order to support an evaluation of IPRED the Commission launched on 9 December 2015 a public consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights. The consultation aimed to help assess the functioning of IPRED in the online environment, with a view to identifying the possible need for adapting its provisions and, where appropriate, to propose corrective measures, focusing on commercial-scale infringements and cross-border applicability and in full respect of fundamental rights. Previous consultations had led to the conclusion that a number of key provisions of the Directive, such as the right of information, the application of injunctions or the calculation of damages, might not function properly or deliver the expected results, in particular in the online environment and in a cross-border context. Beyond the evaluation of the current Directive the consultation addressed a number of new issues, such as the role of intermediaries in IPR enforcement or the specialisation of courts, which are currently not dealt with by the Directive but might be taken up in any future initiative in order to modernise the enforcement of IPR. Finally, the public consultation sought opinions about the use and impact of 'follow the money' initiatives in the area of IPR enforcement.

This document summarizes the contributions of the different stakeholder groups that were addressed by the consultation (right holders, the judiciary and legal profession, intermediaries, Member States and public authorities, and consumers and civil society).

¹ COM(2015)192
² COM(2015)550

B. Executive summary

The contributions to the public consultation confirmed that the infringement of IPR is a major problem. More than three quarters of the responding right holders and public authorities reported that IPR infringements have increased over the last 10 years. Right holders submitted that IPR infringements not only have a negative overall financial impact on their turnover but also cause reputational damage and generate high monitoring and enforcement costs. Public authorities consider the negative impact on tax revenues, health, safety, SMEs and competitiveness to be very significant.

While the majority of respondents felt that the existing rules have helped effectively in protecting IP and preventing IP infringements, many right holders and intermediaries in particular consider that the measures and remedies provided for by IPRED are not applied in a homogeneous manner across the Member States. This could result in different levels of protection in the Member States and suggests that IPRED did not fully eliminate disparities at national level as regards the means of enforcing IPR.

More than three quarters of citizens felt that procedural and fundamental rights are not well respected in the application of IPRED.

The main reasons for right holders not to seek civil redress in cases of IPR infringement are lawyers' fees and other costs related to litigation, length of procedure, low probability of obtaining appropriate compensation for the damages suffered and low probability of obtaining appropriate compensation of legal costs and other expenses. This seems to indicate not only that the measures provided for by IPRED do not deliver the expected results but also that national civil enforcement systems in general do not ensure sufficient access to justice.

A significant number of respondents identified a need to adjust the measures, procedures and remedies provided for by IPRED, in order to ensure legal certainty and enhance their effectiveness:

- All stakeholder groups identified a need to adjust the rules on evidence. Many respondents felt that the rules were not effective enough, in particular with regard to the preservation of evidence in the digital environment and the presentation of evidence obtained in another jurisdiction.
- All stakeholder groups apart from intermediaries saw a need to adjust the right of information. Many are concerned that the right balance is not being struck between the right to property and the right to judicial review on the one hand and the right to respect for private life and/or the right to protection of personal data on the other.
- Right holders, the judiciary and legal profession and citizens called for an adjustment of the rules for setting damages. Respondents do not only seek more legal clarity on the calculation of damages but also a fairer allocation.

- All respondents except the Member States identified a need to adjust the rules on the reimbursement of costs. Respondents called for adjustments in order to enhance the level of reimbursement and to provide for a uniform interpretation and application of the rules.
- Right holders and the judiciary and legal profession see a need to adjust the rules for provisional and precautionary measures and for injunctions, calling for a clarification of the scope of injunctions, in particular with regard to intermediaries.

The consultation also addressed a number of issues which are currently not dealt with by the Directive but might be taken up in any future initiative in order to modernise the enforcement of IPR. Looking at the role, responsibility and scope of engagement of intermediaries in IP enforcement, Member States and right holders believed that intermediaries should play an important role in enforcing IPR, whereas intermediaries and citizens did not believe so. Statutory cooperation or co-regulation is considered to be more efficient than voluntary cooperation. All stakeholder groups were of the opinion that legal action in a court specialised in IPR matters provides an added value compared to legal action in non-specialised courts. The key advantages are perceived to be the shorter length of proceedings, more fit-for-purpose proceedings and better quality judgments.

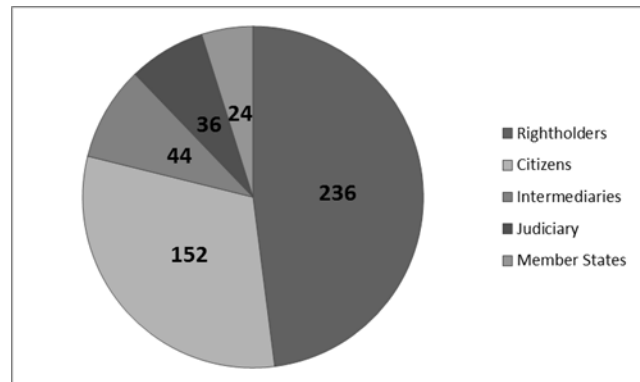
Finally, the consultation encouraged participants to raise any other issue outside the scope of the current legal framework that could be considered in view of the intention to modernise the enforcement of IPR. The responses suggest that there are a number of issues outside the scope of IPRED and its current revision that are very relevant for the efficient enforcement of IPR:

- The cumbersome procedure for obtaining provisional and precautionary measures or injunctions for the same infringements against similar addressees in more than one jurisdiction in the EU was an issue particularly raised by copyright holders.
- The lack of harmonisation of substantive IP rules is an issue adding to the challenges of cross-border enforcement. The application of the relevant rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and on the law applicable to non-contractual obligations in cross-border cases seems to result unavoidably in the competence of different national courts and the application of different national laws.
- Many right holders also highlighted the application of the e-commerce framework as an issue, on the one hand with regard to the provisions on the liability of intermediary service providers, on the other hand stressing the need for a proper enforcement of the transparency requirements foreseen in that framework.
- Technological developments were seen to create major challenges for the enforcement of IPR, for example the use of anonymisation services on the internet or the covering-up of illegal activities behind legitimate e-commerce businesses. The enforcement of IPR in the digital environment also poses particular questions for internet governance and the allocation and use of domain names.

- The development of an attractive legal offer is another issue. Users seek attractive offers and will not always, or are not able to, distinguish between legal and illegal offers, in particular if the legal offer is not available or unattractive from a consumer perspective.
- Many respondents also characterised commercial-scale IPR infringement as a global business and consider that efficient enforcement will only be possible if all relevant stakeholders across the global supply web are involved.
- Finally many respondents claimed that the disparities between the national systems of criminal sanctions make it difficult to combat counterfeiting and piracy effectively.

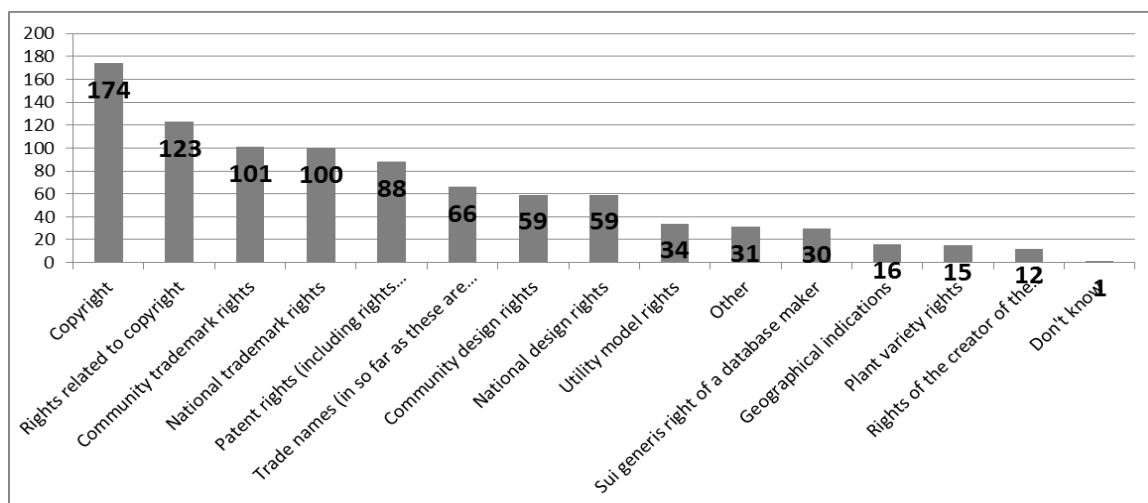
C. Responses to the consultation

The Commission received 492 responses to the public consultation, 454 responses through the dedicated online tool and 41 responses by email. Most responses came from right holders, followed by citizens, intermediaries, the judiciary and legal profession and Member States and public authorities. The geographical provenance of the responses is quite balanced for all but one targeted stakeholder group, which



should allow for a comprehensive analysis of the functioning of IPRED in the EU28. The situation is quite different for the **citizens'** responses where more than 50% of the contributions originate from Germany. Almost half of the individuals who replied to the consultation were aged under 34 years.

Looking at the **right holders** that responded to the consultation and the type of IPR they hold or represent 2/3 of these rights are industrial property rights and 1/3 copyright or rights related to copyright.



Of the respondents under the category of **judiciary and legal professions**, most responses came from the legal profession (counsellors or associations), with only a few responses from judges and academia.

The **intermediaries** that responded to the consultation are mainly internet service providers, such as internet access providers, online marketplaces, content hosting platforms or their trade associations. A number of payment service providers, transport and logistic companies and advertising service providers also responded to the consultation.

Finally, **public authorities** responsible for intellectual property policy, in particular for IPR enforcement, and other enforcement authorities from 17 Member States contributed to the public consultation.

D. Exposure to and impact of IPR infringements

Respondents were required to report their experience with IPR infringement and its overall impact. Right holders reported a significant negative impact on their business models due to IP infringements of their products and services. Most right holders were concerned with costs and reputational damages. This was felt by a wide range of business sectors such as music, e-book, films, electronic games, smart phones, software, manufacturing, luxury goods, biomedical. Despite some improvements in the enforcement of IP rights, it was felt that copyright pirates and counterfeiters were still one or two steps ahead and getting extremely sophisticated on a global scale. The picture presented by those who replied as intermediaries was rather mixed, with diverging views on the impact and trends of IPR infringements. Some noted the improved ability of internet intermediaries to deal on a voluntary basis with infringements, while others insisted on the growing risks of infringing activities by sophisticated criminal networks. The judiciary and legal profession was asked to comment on the relative importance of IP litigation, but no clear picture emerged on whether this phenomenon was considerable or not. Citizens felt mostly that it was difficult to distinguish between legal and illegal products. They insisted that it was not for individuals to find out whether those products were infringing IPR or not and that enforcement should therefore target commercial infringing activities. Member States and national authorities mostly reported an increase in IPR infringement and felt that the impact on society is significant, although difficult to quantify.

1. The occurrence of IPR infringement over the last 10 years

Overall, **right holders** indicated a trend towards more infringements, and a serious concern with piracy and counterfeits. Some respondents presented statistics from their sector, but it appeared difficult to have detailed data on past and future trends. The recent study by OECD and EUIPO was mentioned by a number of respondents to demonstrate the global impact of counterfeiting and piracy.

More than three quarters of respondents experienced an increase of IPR infringements over the last 10 years. Reasons mentioned were the development of the internet (broadband capacity, anonymity, greater ease of infringement), the development of e-commerce, the

development of new component technologies which are common to many products, the development of new business models and intermediaries and the sophistication and globalisation of piracy. One respondent also mentioned the rise of counterfeits linked to the development of 3D printing for spare parts.

A small number of respondents were of the view that infringements had decreased over the last 10 years, mainly from the musical sector. These respondents explained this trend by referring to the fundamental shift of consumption for music, with licensed streaming services becoming the dominant method for music consumption in many EU markets. However, those associations were still very much concerned by the constantly evolving piracy practices and their impact on the music business.

The increasing sophistication of pirates and counterfeiters was a clear shared concern. Many respondents noted how piracy was extremely reactive and quick to adapt its tactics to exploit loopholes in the IP protection regime. It was felt that counterfeiters and pirates were taking advantage of the internet to act globally which made enforcement even more challenging.

Intermediaries' opinions were divided as regards the interpretation of the trend of IPR infringements over the past 10 years. Almost half of the respondents did not know how IP infringements had developed over the last 10 years. The other half was divided in two groups of relatively the same size, one indicating an increase and the other reporting a decrease in IPR infringements.

Of the respondents reporting a decrease of infringements, most of them insisted on two main reasons for the decline: the improved digital distribution of legal content and the development of best practices by internet intermediaries to fight IPR infringements. These best practices included the emphasis on better informing consumers, and the improved voluntary cooperation frameworks between IPR owners and internet platforms.

The intermediaries who suggested an increase put this down to infringement opportunities with the digitalisation of content and the increase of sophisticated criminal infringing services and products.

Most **Member States and public authorities** considered there to have been an increase in IPR infringements over the last 10 years. Only one reply reported a decrease – for copyrights-over the last 5 years. This was explained by the combined impact of a more efficient national regulation and the new legal offers for accessing digital content which were made possible by new technologies. However, this respondent insisted that the situation had to be assessed separately for different products and services (it reported an increase for infringing downloads). The rest of respondents from national authorities were not in position to estimate the scale of the trend.

Of the respondents who reported an increase, most flagged the development of new communication technologies as a driver in facilitating infringing activities. One respondent summarised these views stating that fighting IPR infringements in the online environment was becoming a regulatory and enforcement challenge.

2. Impact of infringements

Almost all **right holders** who replied to the consultation claimed to experience IPR infringements when offering their services or trading their goods. Almost the same proportion of respondents reported a negative overall financial impact on their turnover.

The impact was not only felt as a loss of turnover, but also as putting a heavy burden on the costs of companies. Approximately two thirds of respondents mentioned monitoring costs such as technical measures for prevention and detection of infringements, litigation costs and non-legal enforcement costs (such as notice and action procedures). Reputational damage was also mentioned by a vast majority of respondents.

It appeared difficult to quantify precisely the impact in terms of costs or loss of turnover. Among those who tried to quantify this impact as a % of their turnover, figures varied from 1 to 500. Approximately one third indicated a figure under 15% of their turnover, one third between 15 and 50%, and one third above 50%.

One comment from a company in the IT sector reported that the IT industry had calculated the loss of turnover to be \$100 billion globally. Interestingly, respondents from the ICT sector were the second largest group of right holders responding to the consultation – albeit still far less than the number of right holders from the arts and entertainment sector. ICT companies expressed concerns with the infringement of technology patents, notably for those patents that are declared as essential to a standard. While there was no consensus on the reasons and impacts of these infringements, these statements seem to reflect a certain level of uncertainty by ICT industry players.

Intermediaries felt the impact on their businesses mainly in terms of higher enforcement costs and reputational damages. The more detailed comments insisted on negative reputational impacts on their company as a trusted and reliable partner.

As was the case with right holders, intermediaries were in general not in a position to precisely quantify the financial impact. One third of respondents reported a negative impact of IPR infringement overall, while two thirds had no opinion.

Intermediaries who replied to the consultation mentioned that they were made aware of infringements primarily by notifications of right holders. The ranking below shows the top 5 alert mechanisms reported by intermediaries on how they became aware of IPR infringements.

1. Notification by right holders
2. Notification by police or other enforcement authorities
3. Notification by customers
4. In-house investigation
5. Use of external service providers

Notification by customs authorities was only mentioned in 5% of the cases.

It proved even more difficult to quantify the importance of IPR infringement for the **judiciary and legal profession**. Approximately half of the respondents were of the opinion that IPR infringement cases account for a considerable part of litigation procedures overall, while the other half thought this was not that significant.

One association noted that right holders were generally using litigation as a last resort to resolve an IP dispute and therefore the number of cases would not necessarily provide a fair indicator of IP infringements. The dissuasive cost of litigation (already mentioned in the right holders' section) was mentioned as the main reason not to litigate.

Just over 50% of respondents were of the opinion that IPR holders were using litigation as a means of protecting their IPRs. However, almost half of the replies were of the opposite opinion. Reasons for not litigating were not clear with less than half of the respondents providing an answer, and no specific reason emerging.

Replies diverged on the use of litigation by SMEs to protect their IP rights. Half of the respondents from the legal profession indicated that SMEs were litigating to protect their IPR, while the other half did not think so.

The main reasons reported for SMEs not to litigate were the cost of litigation, the lack of resources, and the lack of predictability.

Member States and national authorities gave their opinion on the impact of IPR infringement on society based on 5 indicators: loss in tax revenues, health, safety, SMEs and competitiveness. The cursor on the level of the impact was almost identical for these 5 indicators, with a majority assessing the impact as very high or high. Competitiveness is the criterion where the intensity of the impact was felt as most important by all respondents. Of the impacts felt, respondents highlighted:

- decreased incentives for R&D
- negative impacts on consumers
- health and safety risks
- rise of organised crime
- anti-competitive practices
- negative social impact in terms of employment and public order

Overall, national authorities felt that the impacts of IPR infringements on society are significant and should not be underestimated.

Citizens were asked to report whether they believed that goods and services were promoted and presented in such a manner that they could easily be identified as legitimate products respecting IPR. Most of the citizens who responded to the consultation stated that they did not believe that products were presented in a manner allowing them to identify whether they were legitimate. Experience differed depending on the different sort of IPR, and overall the general feeling was that it was not easy for individuals to distinguish between legal and IPR infringing

goods or services. It was argued that for digital content the responsibility of the IPR check lied with the hosting provider.

Among the respondents who indicated that IPR infringing products were difficult to identify, it was noted that IPR compliant and infringing products looked identical. It was also felt that lists of infringing products were not helpful due to the fragmented information environment. One comment suggested the use of certification labels.

E. Overall functioning of the enforcement framework

Respondents were asked to give their feedback on the overall functioning of the legal framework for the enforcement of IPR.

1. Litigation in the Member States

Three quarters of the **right holders** who answered the question had taken legal action against infringers within the EU. According to the responses the EU jurisdictions where the majority of their litigation took place were Germany and France (36 right holders reported having litigated in each) followed by the UK, Spain, Poland and Italy. This shows indirectly how larger Member States attract more IPR litigation although since the sample is not representative the German and French scores also reflect the high number of respondents emanating from those Member States.

When asked to cite the top three EU jurisdictions in terms of cases filed for IPR infringements, the same respondents provided the same responses as above. These data again show a positive correlation between the size of a country's economy and the IPR litigation levels. Although the sample is not statistically representative, it nevertheless reflects the importance of the larger Member States in terms of both application and enforcement of IPR law. The relatively high ranking of the Netherlands reflects the fact that, as a country with a history of international trading, the Netherlands has always had a relatively high number of multinationals seated in its territory.

Right holders' answers on the litigator's experience of the relevant national civil redress systems were quite diverse, and at times contradictory. Nevertheless, in general no national system was per se criticised across the board as being ineffective. Instead, there were a number of general and specific qualifiers that were placed on all or certain jurisdictions.

The most cited complaints against most national systems were unduly long procedures (e.g. Spain, Italy, the Czech Republic, Finland and Greece) and relatively high costs of applying them. Delays in procedures often running into years were raised as a major problem for both small and large companies. Costs were cited as a main problem for SMEs in many jurisdictions. Common law systems were seen as efficient but very costly. The establishment of a specialised small claims procedure by the Intellectual Property Enterprise Court (IPEC) in the UK, although welcomed by SME right holders, was still criticised for offering capped damages that would not always cover the costs of applying the procedure.

Many copyright holders criticised a series of jurisdictions (e.g. France, Germany, Poland and Sweden) for not offering efficient access to information and injunctive relief against online intermediaries.

Germany was considered to be an efficient IPR jurisdiction offering timely civil redress procedures. Timeliness was also considered to be a positive point for both the UK and French jurisdictions. Germany was seen to be a jurisdiction of choice for defending patents (in particular due to bifurcation). A number of smaller Member States were also considered to have efficient and fast civil redress systems (e.g. Ireland, Denmark, the Netherlands and Slovenia). The recently established specialised IPR Court in Portugal was also praised in this regard.

From the **judiciary and legal profession** group, eighteen legal counsellors replied to the question regarding the Member State of litigation. A few litigated in a number of Member States but most litigated in one. Responses, when combined, covered thirteen national jurisdictions. Detailed responses explaining experience and assessment of the IPR civil enforcement litigation framework in these countries were given for eight of the jurisdictions. On the whole litigators were positive and highlighted specific relative weaknesses and strengths of the frameworks in question. Thus, in Spain, non-central jurisdictions were said to suffer from lengthy delays and it was noted that some Courts favoured very strict interpretations of the remedies offered by IPRED. The high cost of the UK system was highlighted although it was recognised that the development of the IPRED had helped to address this problem for SMEs. The French and German systems were considered to offer legal certainty and relatively fast outcomes. The presence of experienced judges in specialised chambers was noted for Germany. Likewise, the Dutch system was considered to be good, notably the specialised IP Court in the Hague. It was noted that Dutch judges encouraged arbitration but that if the merits of the case had to be ruled on by the Courts costs were high and delays long, particularly when seeking damage claims. The Estonian system was said to be good except for one requirement: it was noted that for a preliminary injunction order the claimant must also file an infringement claim, which takes a month. The practitioner who provided this information suggested that this obligation be dropped in cases where the defendant did not file an appeal against the injunction. It was noted that the legal capacity of the infringer always had to be specified and that this made it practically impossible to serve injunctions seeking to affect unknown infringers. The Belgian system was considered to be generally good but clearly suffering from limited resources. It was felt that it was not using new technology enough for filings, etc, that it had insufficient technical judges and was therefore slow and increasingly unpredictable. The Italian civil court system was considered to be effective when it came to precautionary measures and execution of access to information orders.

2. Effective protection of IP and prevention of IPR infringements

A large majority of the **right holders** felt that the implemented rules partly achieved or achieved the objective of ensuring effective civil redress against IPR infringements at national level. Those who felt this was "partly" achieved were generally positive about the rules but

many (and notably SMEs) were concerned that the speed and costs of the national systems and their remaining differences undermined the utility of those rules. They complained that IPRED's very general principles had left too much scope of manoeuvre for Member States in the national transposition process. A number felt that this had resulted in inconsistent rulings across national jurisdictions. Those who considered that the objective had not been achieved raised this problem of differing national transposition and also specific concerns regarding lack of effective injunctive relief (namely copyright and plant variety holders).

Intermediaries were also asked to deliver their opinion on whether the existing rules have helped effectively in protecting IP and preventing IP infringements. A clear majority answered in the affirmative and only very few thought the existing rules were deficient in meeting the objective. The latter were intermediaries who managed and owned copyrighted works. One felt that harmonisation of criminal sanctions for IPR was required in addition to the civil redress harmonisation and another felt that it was almost impossible in certain Member States to block online copyright infringements.

Those who felt that the rules were effective believed that the current civil redress framework in Member States was proportionate and balanced. However, they felt that the manner in which these rules were enforced by Member States varied significantly. They also felt that, too often, right holders targeted their actions through injunctions against intermediaries instead of going after the infringer. One respondent suggested that, in the online sphere, it would seem more effective to serve injunctions against domain name registrars than telecom operators. Another respondent felt that the rules were too effective in that patent asserting entities were relying disproportionately on injunctions to enforce patents (notably standard essential patents - SEPs) that were of questionable quality. Finally, a number of respondents felt that the current legal framework encouraged the development of good practice self-regulatory principles that helped reduce infringement levels whilst avoiding the costs associated with litigation.

The majority of the **judiciary** felt that the rules had partly met their objective. One third believed that they had done so and only very few felt that they had not.

Those responding "partly" suggested the following reasons why the rules had not fully met their objective:

- Over-restrictive application of the rules on preliminary injunctions preventing injunctions in the field of IPR infringements (patents and copyright).
- Significant differences in the calculation of damages as well as the evaluation of legal costs.
- Non-application of preliminary injunctions to intermediaries since national civil law remains unchanged and only applies to infringers (intermediaries are not considered as defendants).
- The costs and delays of national civil systems make the rules inapplicable.

- Excessive substantive IPR provisions, such as length of monopoly rights, and an alleged lack of proportionality as regards other fundamental rights have put the IPR legal framework in general in disrepute thus undermining effective enforcement of IPR.
- Abusive use of access to information orders has occurred in certain jurisdictions.
- In the UK, Article 11 and its application to serve injunctions on online intermediaries was not transposed and so the Courts only had national law for such measures to be awarded for copyright infringements (until later jurisprudence was developed).

Those stating that the objective was not met referred to:

- Injunctive relief to block web-sites not being available in Poland.
- Transposition had not changed anything compared to the situation before the adoption of IPRED.

Only very few of the **Member States'** authorities or intellectual property offices that responded felt that the existing rules had not helped effectively in protecting IP and preventing IP infringements. One noted that the framework needed modernisation to face the challenges posed by the internet while another suggested that the same issue would not be resolved without an adjustment of the E-Commerce Directive.

Four Member States had no opinion and the remaining 66% of the sample replied in the affirmative. Nevertheless, these respondents noted that the impact could be enhanced by the following:

- Interpretative guidance and training of judges (through, for example, workshops by the European Observatory on IPR infringements); and,
- Further precision/revision of the measures for injunctive relief against intermediaries, evidential requirements for access to information orders and evaluation of costs and damages.

Finally, one Member State felt that the rules set down by IPRED were sufficient but that the state of the general civil redress system (length and cost) meant that they were rendered ineffective.

For **civil society**, regarding the same question on the effectiveness of the provisions, out of 152 respondents, 100 responded in the affirmative (66%), and 38 (25%) disagreed, with the remaining 11 not providing an opinion. Those who said the existing rules did effectively protect IP often felt that the substantive IP laws went too far in favour of right holders and that they were not adequately balanced with fundamental rights such as privacy and the freedom of expression. They also felt the substantive rules of IPR were not fit for digital services. They were also concerned by DNS blocks being imposed without judicial orders and with the heavy reliance on the dispatch of cease and desist letters with disproportionate payment requirements.

Those who answered "no" did not consider that the rules protected IP because they felt that IPR infringements would continue irrespective of the enforcement rules. They often

considered the latter to be too harsh and suggested that better means to reduce infringement would include:

- More attractive licit offers.
- More proportionate/balanced substantive IP rules. In this respect it was suggested that the patent system simply encouraged abusive anti-innovative behaviour and that the protection of copyright was far too extensive.
- A less complex and easier to understand copyright framework.
- A "fairer" framework of substantive IP rules.

3. Homogeneous application of the measures and remedies across the Member States

A large majority of the **right holders** did not believe that the measures and remedies were applied in a homogenous manner across the internal borders of the Union. Very few felt that they were and thus on the whole harmonisation was not generally considered to have been achieved.

The lack of homogeneity included very large differences of issues not covered by the Directive such as:

- duration of litigation;
- costs of litigation;
- national resources committed to the fight against IPR infringements;
- degree of IPR specialisation of courts;
- lack of cross-border recognition of injunctions and other orders;
- differences in national patent laws leading to lack of predictability of patent litigation across Member States;
- differences in national rules pertaining to the protection of automotive spare parts resulting in right holders not being able to enforce their rights across the EU.

Other large differences cited that fall under the provisions of the Directive were as follows:

- national conditions for granting preliminary injunctions vary greatly;
- national conditions for access to information also varying, with claims that in certain Member States it has become impossible to get such access (the evidentiary burden is too great);
- incorrect application of provisions of the E-Commerce Directive depriving rights holders from gaining injunctive relief from internet platform service providers;
- national practices in terms of civil damage calculations.

Finally, a number of respondents complained that IPRED did not have specific provisions to deal with the claims of SMEs and injunctive relief for SEP holders.

When asked if they considered that the measures and remedies provided for in IPRED were applied in a homogeneous manner across the Member States, a narrow majority of

intermediaries had no opinion. Very few felt that they had resulted in adequate harmonisation whereas half of the respondents felt that they had had no such effect.

However, all those expressing a negative opinion focused on the issue of injunctive relief and the manner in which there was a totally different implementation of such relief against internet service providers across the Member States. All these respondents suggested that too much discretion had been left to the Member States and national courts when deciding when and what kind of injunctive order could be served.

The majority of **consumers and civil society** believed that harmonisation had been achieved and did not comment on this. Those that felt that homogeneity had not been achieved felt that the question on homogeneous enforcement was not appropriate given that there remained significant national differences in substantive IP law. Thus certain actions were considered to be infringing copyright in one Member State and not another (e.g. the panorama right). This led to a totally opaque situation for citizens travelling to other Member States and a sense of unpredictability.

A number of the citizens that felt that homogeneity had not been achieved believed that this was particularly true regarding the national treatment of injunctive relief and the national right to information orders. More generally, citizens felt that Directives were applied differently across the Member States.

F. Key provisions of Directive 2004/48/EC on the enforcement of intellectual property rights

This section aimed to provide the Commission with stakeholders' views, opinions and information about the functioning of key provisions of IPRED, based on the overall experience with the measures, procedures and remedies as implemented and applied at national level.

1. Evidence

Respondents were asked to report on their experience with the application of the rules on presenting, obtaining and preserving evidence and to consider any possible need for adjustment.

a. Effective means for presenting, obtaining and preserving evidence

Half of the **right holders** responding to this question considered that the measures provided for by IPRED are not effective means to present, obtain and preserve evidence. The general arguments mostly related to the excessive costs of tackling online infringements and seizing digital evidence, in particular for SMEs, and the length of proceedings. Respondents also claimed to find it difficult to identify online infringers, to preserve evidence in the digital environment and to apply for cross-border requests to obtain, present and preserve evidence especially when it comes to online infringements.

Right holders also lamented the absence of obligations for intermediaries to produce relevant evidence and of appropriate sanctions in case of non-compliance with court orders. They also highlighted the discrepancies between Member States regarding the application of measures to obtain, present and preserve the evidence

Right holders also raised more specific issues such as:

- holders of plant variety rights have no right to obtain evidence regarding infringements by the farmer (especially relating to farm saved seed),
- the poor implementation of Article 5 of the E-Commerce Directive and the lack of a “know your customer” obligation applied to intermediaries,
- the absence of a registry of Internet Service Providers (ISPs).

Half of the respondents indicated that they faced problems using evidence when making use of their right of information/taking legal action/applying for an injunction in a cross-border situation while nearly as many respondents did not have this type of problem.

The majority of respondents from the **judiciary and legal profession** consider that the measures provided by IPRED are effective means for presenting, obtaining and preserving the evidence while a quarter of respondents do not. The main reasons given are:

- the discrepancies between the applications of these measures by national courts,
- the facility for alleged infringers to destroy incriminating evidence,
- the absence of reference to digital evidence,
- the absence of compulsory rules on presenting, obtaining and preserving evidence, which creates differences between the applications of these rules by Member States,
- the need to have ex-parte inspection orders that could be issued in favour of claimants in pre-action disclosure proceedings,
- the need to impose penalties on defendants that failed to respond to disclosure requests in time.

The majority of **Member States** had no opinion on the effectiveness of the measures to preserve evidence while one third replied that the measures were effective. Only very few considered that the measures on evidence provided by IPRED were not effective, and that the Directive should address the following issues:

- Preserving evidence on IPR infringements committed on the Internet.
- Cross-border applicability of the measures.
- Effective sanctions in case of unreasonable failure to comply with the judicial order of preservation.

b. Need for adjustment

The majority of **right holders** that responded to this question consider that the measures provided by IPRED to obtain, present and preserve evidence, in particular in the digital environment, should be adjusted. Most right holders see a need to adjust the application of the

measures to preserve evidence in the digital environment mainly because of the difficulty to obtain such evidence, especially across borders.

While most respondents from the **judiciary and legal profession** consider that the measures provided by IPRED are effective means for presenting, obtaining and preserving evidence, almost two thirds still see a need to adjust the application of the rules for having access to and preserving evidence, in particular with regard to the digital environment and in cross-border cases.

The common assessment found in responses is that the provisions of IPRED regarding access to and preservation of evidence are not adapted to the online environment because they do not define digital evidence and how it may be obtained. Furthermore, the Directive does not address cross-border requests to obtain and preserve evidence and the identification of online infringers.

A majority of respondents from **Member States** did not have an opinion on the need to adjust the measure on preserving evidence while a third of respondents indicated that this measure should be modified for the following reasons:

- It is difficult to trace and identify the evidence.
- It is difficult to identify and locate the infringer.
- Although the current rules do apply to the digital environment, it is necessary to foresee specific provisions, in particular as regards the multiplicity of online intermediaries in order to ensure their identification.

2. The right of information / identification of an alleged infringer

a. Application of the right of information

Over half of the **right holders** who responded to the consultation had made use of their right of information by applying for an order by a judicial authority, with approximately the same percentage applying for orders against infringers and intermediaries.

For orders against infringers, these related to infringements online and offline in equal proportion. Of those respondents giving indications on frequency most had applied for an order in their country of establishment frequently (over 5 times a year during the last 5 years) against alleged infringers incorporated or resident in their country of establishment, but never against alleged infringers incorporated or resident in another Member State.

For orders against intermediaries, these related mainly to infringements online. The top three intermediaries were internet access providers, content hosting platforms and social media platforms. Only a low proportion of respondents gave indications on frequency, but of those who did, most had applied for an order in their country of establishment occasionally or frequently (over 1 or 5 times a year during the last 5 years) against alleged infringers incorporated or resident in their country of establishment, but once or never against alleged infringers incorporated or resident in another Member State. Most had never applied for an order in another EU Member State.

Of the respondents with experience applying for orders cross-border, most of them claimed to have faced problems when making use of their right of information in a cross-border situation. Of the problems encountered when making use of their right of information in a cross-border situation, respondents highlighted uncertainty, length, complexity and cost of the procedure, limitations of the scope of judicial orders on the right of information obtained in a given Member State, limitation of the right to information due to protection of personal data, lack of a homogeneous system for the exercise of the right of information through the application for judicial orders due to differences in the requisites being applied, diverse legal cultures and the lack of implementation of key provisions, the procedure and the information which can be disclosed and lack of cooperation by internet intermediaries. With regard to the use of the right of information in a cross-border situation against intermediaries additional problems reported included data retention laws (information is no longer available) and use by the infringer of anonymity services.

In the orders applied for against infringers, the information requested was origin and distribution network of the infringing product, quantities and price, names and addresses, invoices and excerpts of commercial books, identity of ISP's clients, information regarding third parties with whom the infringer has a commercial relationship to monetise and distribute infringing content, turnover, contracts with retailers, names and addresses of suppliers and clients. The main information requested from intermediaries was names and addresses (physical and email), banking data, server location, turnover, distribution networks and IP addresses. With regard to names and addresses right holders pointed out that even when they obtain the information, the problem is that it is often false.

A majority of the respondents had usually obtained the information requested.

On average, most right holders found it took over 30 days to obtain an order obliging the infringer or intermediary to disclose the requested information, with more than a third claiming it took over 60 days. Information obtained was used for a request for preliminary or permanent injunction, application for damages or a cease and desist letter.

With regard to intermediaries other uses given were evidence on scope and nature of defendants' activities or additional investigations and further collecting of evidence in order to ensure that the person was a criminal (not end user).

When information was not provided by the infringer, this was mostly because of protection of confidentiality of information, unjustified/disproportionate request and right to respect for private life and/or right to protection of personal data. When information was not provided by an intermediary, this was mostly because the information was not available (anymore), because of a conflict with the right to respect for private life and/or right to protection of personal data or because of the protection of confidentiality of information. Other reasons given were restrictive national law, privacy rights, use by the infringer of anonymity services, location of the information outside the EU and practice of different national courts.

On the other hand, when use was not made of the right of information by the right holder, the main reason for not making use was given as low probability of success, length of procedure,

lawyer's fee and other costs related to the application. Some right holders claimed that in Poland the related costs would not be recovered.

Respondents from the **judiciary and legal profession** submitted that a request for information would be considered to be proportionate and justified when exercising the right of information against an infringer as follows:

- a reasonable suspicion based on the reasonable available evidence that an IPR is infringed and the requested information is specified sufficiently;
- no legitimate hindrance;
- reasons whereby the exercise of the right of information is useful in order to obtain details on the origin and distribution network of the allegedly infringing goods or services;
- information is necessary to determine the origin and distribution networks.

The request should be supported by enough evidence to confirm its merits and confidentiality and specific circumstances of infringement have to be taken into account. The Court will take into account all the circumstances of the case and in particular whether the documents sought are relevant and within the disclosing party's control. In all cases, concepts of proportionality and justice are key in deciding whether to order the disclosure of the information sought. In exercising the discretion, the Court balances all parties' interests, taking into account all the relevant factors. Questions relating to secrecy and competition between the actors can also be of importance. The criteria on requirements for a request for information to be proportionate and justified are not provided by law but they are determined and established at the judges' discretion.

When the recipient of the request was another person or an intermediary, some respondents said that in their jurisdiction it would only be justified if the infringement was evident and the information cannot be obtained from the infringer. Other respondents mentioned the fact that the court has discretion and must balance irreparable harm to claimant and third party.

According to the responses received from this sector, the main reasons for not obtaining the requested information were that the request was unjustified or disproportionate.

On the definition of commercial scale, most respondents stated that there is no definition as yet. Definitions that were mentioned by respondents included "dealings carried out for direct or indirect economic profit", "evident infringements committed wilfully and systematically", "any indirect or direct activity capable of achieving a direct or indirect commercial benefit/profit" or "direct or indirect economic or commercial advantage is being sought". The term is generally considered to exclude end consumers acting or third parties not having a commercial intention or acting in good faith. Some respondents stressed that in case of a request for information against an intermediary service provider, it is the intermediary service provider that needs to operate on a commercial scale, not the alleged infringer.

Most respondents from **Member States and public authorities** did not have information on the number of request for information filed in their jurisdiction in cases of alleged infringement of IPR and on the length of the procedure.

Respondents submitted that a request for information would be considered to be proportionate and justified when exercising the right of information against an infringer if a legitimate interest or an interest that should be protected exists, an assessment is made by the court, proportionality, absence of legitimate obstacle (professional secret, etc.) and the infringement is not carried out by end consumers or with no intent to obtain economic or commercial benefit.

The court partly or wholly refuses a request for information if it is assumed that providing the information would cause the one to whom the request relates or others, injury or disadvantage which would be disproportionate to the claimant's interest in obtaining the information.

The person required to provide the information may refuse to provide such information on the same grounds as those allowing the refusal to present evidence as a witness.

On the definition of commercial scale, most respondents stated that there is no definition as yet. However, among those respondents who provided a definition, this tended to include acts carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end consumers acting in good faith.

In those cases where information was requested but not finally obtained, the main reasons given for this were because of protection of confidentiality of information and the right to respect for private life and/or right to protection of personal data.

On the other hand, when use was not made of the right of information by the right holder, the perception of the Member States was that the reason for not making use was mainly low probability of success, court in another Member State and no judgements on the merits yet.

Most **intermediaries** who responded to the consultation had never received a request for information, of those who had, almost all referred to online infringements of IPR. Most of the requests for information received originated within the same Member State where the alleged infringer was located, and most of the respondents in this category stated that they had not faced problems when dealing with a request for information in a cross-border situation (judicial authority in their country of establishment and intermediary established in another Member State and/or judicial authority of another EU Member State).

Most of the requests for information were for names and addresses, although other information was requested, such as IP-addresses with time stamps and request information about the name and address of the end user, bank details, and the alleged infringer's past trading activity on the site. In the vast majority of the cases, the information had been submitted. Where it had not, this was mainly due to the fact that the request for information had been submitted without a judicial order, or because the information was not available anymore.

Most of the **citizens** who responded to the consultation stated that they had not been concerned with a procedure for an alleged IPR infringement. Of those who had, almost all related to alleged online infringements concerning copyright or rights relating to copyright, concerning music, film and video, and e-books.

Only a quarter of citizens who responded to the consultation had been contacted by a right holder or a third party acting on her/his behalf, with most of those having been contacted by a party from their country of residence. Most of the respondents who had been contacted thought that their contact information had been obtained through an intermediary service provider (mainly internet access platforms and social media platforms), although there were quite a few who did not know how their contact information had been obtained.

Most of the contacted respondents had received a cease and desist letter or a request for damages, with only one respondent having received a court order to stop an actual and any future infringement.

Most respondents were aware of out of court procedures for cease and desist notices for alleged IPR infringements in their country of residence, however, there was a widespread feeling that these procedures are being abused in various Member States, with individuals receiving letters containing accusations of copyright infringement, and requesting out of court payments. The practice of "speculative invoicing" by some law firms has also been raised as cause for concern in different Member States.

Although some respondents recognised that alternative mechanisms have the advantage of providing for quick and flexible resolution of disputes, it was felt that the fundamental rights to be heard and to due process are not guaranteed in the same way as in court proceedings. These out of court proceedings are not appropriate to infringements of copyright law, which are not clear cut and often involve complex legal assessment.

Most of the respondents who received a judicial decision ordering information to be provided or the notice/cease and desist submitted on the basis of the information provided did not appeal it, mainly because of high cost and a perception of futility of the exercise. However, most of the respondents who appealed were successful. All of the respondents who appealed did so on the basis that there was no infringement of IPR.

b. Need for adjustment

The majority of **right holders** who voiced a view considered that there was a need to adjust the provisions for the application of the right of information. The majority also considered that the right balance is not struck between the right to property and the right to judicial review on the one hand and the right to respect for private life and/or the right to protection of personal data on the other. Suggestions for amendments included:

- Shorter judicial procedure or administrative procedure for the application of the right of information;
- Clarification that the right of information can be applied before any judgment on the merits;
- Clarification that the right applies in respect of all third parties with whom the infringer has a commercial relationship to monetise and distribute infringing content, online and offline;

- Intermediary duty to verify the contact details of their customers (effective implementation of Article 5 of the E-Commerce Directive);
- Clarification at EU level that the ISPs have the duty to keep the information at least for 3 months for civil IPR enforcement purposes and that data protection rules should not hinder IPR enforcement;
- Stronger coercive measures to be systematically applied by courts in order to enforce right of information orders;
- Obligation for farmers to declare their use of farm saved seed.

There also seems to be a general concern that the right of information is not applied consistently at national level and that it is not fit for purpose in the online environment. Many right holders finally asked for further guidance on the balance between the right to property and the right to judicial review on the one hand and the right to respect for private life and/or the right to protection of personal data on the other.

Modifications called for to improve applying for orders cross-border include:

- Provisions to require courts to enforce orders for production of documents made by courts in other Member States through a simplified, near automatic, procedure;
- Service providers should be required to seek to verify the data of any user in the contract to avoid false data being provided;
- Harmonized and simplified cross-border measures;
- Clarification that the right of information applies to third parties with whom the infringer has a commercial relationship to monetize and distribute infringing content, such as link sites, aggregators, registrars, ad networks and uploaders, as these are the equivalent of distribution networks in the physical infringement environment.

The majority of respondents from the **judiciary and legal profession** believed that the existing rules on the right of information have helped effectively in protecting IP and preventing IPR infringements. However, the majority also thought that the application of the rules on the right of information was not clear and unambiguous, in particular with regard to requests for information held by intermediaries, and saw a need to adjust the provisions for the application of that measure as well as a need to clarify the criteria used to reconcile the requirements of the right to respect for private life/right to protection of personal data on the one hand and the right to effective remedy on the other hand when assessing requests for disclosure of personal data for the purpose of initiating judicial proceedings.

The majority of respondents from **Member States and public authorities** believed that, in view of their experience with the implementation and application of the right of information, the existing rules had helped effectively in protecting IP and preventing IPR infringements. However, the majority of respondents also believed that it was necessary to adjust the provisions for the application of the right of information, as well as a need to clarify the criteria used to reconcile the requirements of the right to respect for private life/protection of personal data on the one hand and an effective remedy on the other hand when assessing requests for disclosure of personal data for the purpose of initiating judicial proceedings.

Respondents thought that, notwithstanding the CJEU's preliminary rulings on this matter, there is still a great deal of uncertainty regarding the interplay of IP enforcement and data protection/data retention rules, especially in the context of varied national provisions in the latter domain.

The majority of **intermediaries** considered the application of the rules on the right of information to be clear and unambiguous, and thought that the existing rules on the right of information have helped effectively in protecting IP and preventing IPR infringements, therefore seeing no need to adjust the provisions for the application of the right of information. Intermediaries recalled that the CJEU established the following criteria on how to disclose personal data in order to enable them to bring civil proceedings for copyright infringements and how to interpret the right of information: (1) the authorities and courts of Member States must not only interpret their national law in a manner consistent with the Directive 2004/48, but must also make sure that they do not rely on an interpretation which would conflict with fundamental rights or with the other general principles of EU law, such as the principle of proportionality and data protection, (2) they have to ensure a fair balance between the protection of IPRs enjoyed by copyright holders and the protection of personal data enjoyed by internet subscribers or users, (3) an order for disclosure of data is fair if there is clear evidence of an infringement of an intellectual property right, if the access to this information and the reasons to overtake the measure outweigh the nuisance or other harm that this measure may entail to the person affected by it or with some other conflicting interest. These principles contribute to clarify the application of the right of information, but at the same time it means that the Court has had to analyse this right several times because of the lack of clarity. Some intermediaries pointed out that the fragmentation of the European internal market causes legal uncertainties and unnecessary costs for both right holders and intermediaries.

Most of the **citizens** who responded to the consultation felt that their rights, including the right to respect for private life and protection of personal data, are not well respected in Court proceedings for the identification of alleged infringers of IPR. However, most of the reasons given for this were based on out of court practices, such as mass identification of alleged infringers based on third party information and publication of the personal information (sometimes sensitive data, such as health data or sexual orientation) of alleged copyright infringers.

Most citizens also did not believe that the proportionality test, balancing the protection of IPR and the protection of procedural and fundamental rights, was appropriately applied in their case, since they claimed that disclosure of personal information through IP addresses to third parties is incompatible with data protection rules and raises serious proportionality concerns. In addition, the failure to distinguish between commercial-scale copyright infringements by entities operating for profit and unauthorised use of copyright-protected material by individual consumers for their own private use also creates a problem as disproportionate sanctions are imposed against individual consumers without considering the lack of commercial motive or intention.

Three quarters of the citizen respondents see a need to adjust the provisions for the application of the procedure for the identification of alleged infringers of IPR, with support voiced for the limitation of disclosure of personal information. In addition, many respondents pointed out that an IP address is a public address and therefore is not proof of a specific person having infringed IPRs. In order to allow for alleged infringers' privacy rights to be taken into account when assessing the proportionality of an identification order, the inclusion of an anonymous right of defence for alleged infringers in identification procedures under article 8 IPRED was proposed by various respondents.

3. Legal proceedings for infringing IPR, damages and legal costs

a. Legal proceedings for the infringement of IPR

Two thirds of the **right holders** have filed legal action against infringers of their IPR, equally for online and offline infringements. One quarter of respondents filed IPR infringement cases on a frequent basis (5 or more annually) both in their Member State of residence and in other Member States. Almost half of the respondents however indicated that they had never sought civil redress out of their country of establishment.

One third of the respondents experienced problems when taking legal action in a cross-border situation. Right holders reported that having to take infringers to a different court for each jurisdiction, the length of procedures and the discrepancies between Member States' rules on jurisdiction and procedure made it difficult to launch legal action in cross-border situations.

For right holders damages are the main reason for seeking civil redress, followed by the need to obtain permanent and preliminary injunctions.

Very few respondents explained the reasons for not seeking civil redress. The most relevant seem to be the low probability of obtaining appropriate compensation for the damages suffered, followed by the low probability of being able to enforce the judgment, lawyers' fees and associated costs related to litigation.

Member States considered that the most relevant reasons for taking an infringer to court are obtaining a permanent injunction, followed by interlocutory injunctions and damages. Most Member States did not identify problems with regard to legal actions in a cross-border situation. A quarter of respondents however identified some issues, such as the rules on jurisdiction, in particular in cases of provisional and preliminary measures, the diversity of national rules of secondary liability for infringements committed by third parties, the scope of injunctions and the incomplete harmonisation of copyright.

The most relevant reasons given by Member States for not seeking civil redress were the length of the procedure, the low probability of obtaining appropriate compensation for the damages suffered and the low probability of enforcing the judgment.

Almost two thirds of the **intermediaries** had been involved in civil IPR infringement proceedings, most of them as defendants and concerning alleged infringements online. For intermediaries the main reasons for legal action were applying for injunctions, followed by

damages and provisional and precautionary measures. With regard to legal action in a cross-border situation negative experiences reported included disproportionate injunctions, conflict of laws, the need to prove where the damage occurred and also the fragmentation of the single market in itself.

Members of the **judiciary and legal profession** believed that the most relevant reason for pursuing action in a court of law are requests for injunctions, followed by provisional and precautionary measures and damages. While a majority did not encounter specific problems when dealing with legal actions in a cross-border situation, a significant minority identified difficulties in determining the applicable law, the challenges in instructing practitioners in other jurisdictions as well as cumbersome procedures when litigating abroad.

Very few of the **citizens** that responded to the consultation had been involved in legal proceedings for an alleged IPR infringement. These cases concerned mainly claims for damages, followed by requests for information and requests for injunctions. Proceedings concerned infringements online and offline, primarily with regard to copyright.

b. Damages

(1). Application of the rules for the calculation and allocation of damages

Two thirds of **right holders** have applied for damages as a compensation for the prejudice suffered. It appears from the responses that damages are granted at least partly for lost profit, unfair profit, lump sum compensation and moral prejudice. Granting of damages in full was reported by only a few respondents in the case of lost profits and even less for unfair profits. Most right holders responded that it is possible to claim damages from a third party that actively and knowingly facilitates infringements of IPRs. The main reasons identified for not claiming damages were the low probability of obtaining appropriate compensation for the damages suffered and for the legal costs/other expenses.

A quarter of the **intermediaries** have been subject to a claim for damages by a right holder for alleged active and knowing facilitation of IPR infringements. No information was given on the type or part of damages granted. Some respondents reported that liability claims against internet intermediaries are often dismissed due to the liability exemption of the E-Commerce Directive.

According to an overall majority of the **judiciary and legal profession** damages can be awarded in general in the form of lost profits, unfair profits, moral prejudice as well as lump sums. Some jurisdictions seem to award attorney and experts' expenses under damages rather than legal costs if the national legislation only allows for legal costs to cover strictly expenses related to litigation fees. Two thirds of the respondents stated that damages are not awarded in full. The main reasons for this in their view are unjustified requests or lack of evidence, limitations in law and, as indicated by some respondents, the substantiation requirements in certain jurisdictions for the amount of damages requested. A large majority of the judiciary and legal profession affirmed the possibility of securing damages from intermediaries that actively facilitate IPR infringement, through legal instruments such as joint tortfeasorship,

second degree liability or indirect liability, albeit applied differently in the different jurisdictions.

(2). Need for adjustment

A strong majority of **right holders** believe that there is a need to adjust the provisions regarding damages. Half of the respondents consider the award of damages to be insufficient, almost all saying that the application of the rules in court is the main obstacle to a sufficient compensation. According to right holders damages are hardly ever assessed in their entirety. Not surprisingly, right holders strongly support a clarification of the rules, in particular the rules on quantification of damages, in order to ensure reimbursement of the damage suffered as well as dissuasion of future infringements. There were also calls to consider the commercial scale of infringements as an aggravator for the amount of damages awarded, to avoid infringers being subject to the same conditions as a regular licensee. One respondent asked the Commission to provide guidance on the interpretation of the rules in order to allow courts to explore the full potential of the rules. Many respondents also reported frustration with the procedure for claiming and obtaining damages in a cross-border or multi-jurisdictional context. One respondent suggested that the rules should allow applicants to obtain damages caused in several jurisdictions through only one court decision, and not just the damages suffered in the Member State where the court is located. Others would also like to see further clarification on the liability for damages of intermediaries that actively and knowingly facilitate infringements.

Very few **intermediaries** identified a need for adjusting the rules on damages. One respondent supported an increase of the level of damages in case of commercial-scale infringements and suggested that part of the damages be used to fund the development and maintenance of technical blocking measures.

An overall majority of the **judiciary and legal profession** found that the rules for setting damages helped effectively in protecting IPR and preventing infringements while a significant minority thought the opposite. The judiciary and legal profession did however call for more legal clarity on the calculation of damages and for a reduction in the cost of producing evidence related to damages. Respondents would also welcome guidance on the interpretation and application of the rules and ask for a strengthening of the provision, allowing for higher damages.

Those **Member States** having an opinion on the issue mostly agree that the rules for setting damages have helped effectively in protecting IP and preventing IPR infringements. Very few Member States and public authorities reflected on the need for adjustment of the provision on damages. One response asked for a clarification of the calculation of damages in order to be able to reflect the true harm suffered, without constituting punitive damages.

The majority of respondents from **citizens and civil society** do not believe that the current provisions on damages have effectively helped to prevent IPR infringement and see a need for adjustment. A majority of respondents would want to limit the allocation of damages, adjusting them to general civil law damage provisions, identifying an imbalance between right

holders' litigation capabilities and individual and unintentional infringements, in particular with regard to non-commercial infringements in the digital environment. A majority worries that with regard to individuals, damage provisions have been taken to the extreme and have become disproportionate, while severe damages should only be applied in cases of large scale commercial-scale or criminal infringements. There is also a general perception that the excessive award of damages against individuals has supported the establishment of a lucrative industry for lawyers and ancillaries, rather than serving the protection of IPR.

c. Reimbursement of legal costs

(1). Application of the rules on the reimbursement of legal costs

A large majority of **right holders** have requested reimbursement of legal costs, with most of them having been granted at least partial reimbursement. Court fees for instituting proceedings and other procedural costs are often fully covered while external experts' costs, attorneys' charges and additional attorneys' fees are mostly only partly covered. One third of the respondents stated that there are caps on the recoverability of legal costs in their national legislation. Some jurisdictions have explicit caps while others limit the legal costs on grounds of fairness or proportionality to the value of the law suit. It appears that most jurisdictions take into account equity or the economic situation of the convicted party.

Member States and public authorities mostly identified attorneys' charges, court fees for instituting proceedings, external experts' costs, additional attorneys' fees and other court costs as being covered. Half of the respondents indicated that the reimbursement of legal costs is subject to limitations.

Almost two thirds of the **intermediaries** that responded to the question had claimed reimbursement of legal costs. These legal costs were usually granted, at least in part. As for the right holders procedural costs are often fully covered while other costs, also strictly necessary for the proceedings, are not fully covered or not covered at all, such as external experts' or attorneys' charges.

The **judiciary and legal profession** respondent that legal costs can generally include court fees, other court fees, external expert costs, attorneys' charges and additional attorneys' fees. One third also stated that in-house costs are recoverable. Other respondents indicated that translation fees, costs for the enforcement of injunctions or witness costs can also be recovered. Caps on the recoverability of legal costs seem to exist in many national systems, either in the form of an explicit numerical limitation or using 'proportionality and equity' as guiding principles. Respondents believe that a court will generally be bound by lawyers' statutory fees and a proportionality and reasonableness test for other costs.

(2). Need for adjustment

Of those **right holders** that responded to this question only very few considered the reimbursement of their legal costs to be sufficient. The main reasons given for the inadequacy of reimbursement are non-consideration of all the necessary litigation costs, such as in-house costs or attorneys' fees (despite the need for specialist knowledge in such cases), difficulty to

quantify the costs for producing evidence and statutory caps on the amount of legal costs that can be recovered. The majority of right holders thus called for an adjustment of the rules, ensuring an appropriate recoverability of the actual costs, including necessary non-judicial costs, such as expert and investigation costs, in all Member States.

Only very few **Member States and public authorities** responded to this question, and those that did generally agreed that the existing rules on legal costs have helped effectively in protecting IP and preventing IPR infringements. One respondent however stated that legal costs are not only difficult to quantify but are also hardly ever granted in full; and with great discrepancies between the Member States. Duly justified and reasonable legal costs should be granted in full to the winning party.

The majority of **intermediaries** considered the reimbursement of legal costs insufficient and very fragmented across the EU, and a majority of the intermediaries with an opinion on the question see a need for adjustment of the rules. Besides a general concern that legal costs are hardly ever granted in full, intermediaries are also concerned about the costs of complying with injunctions and requests for information which are usually solely borne by the intermediary. Respondents therefore called for additional guidance from the Commission on the compensation of these costs, suggesting that these costs should be covered by the right holder. They believe that intermediaries should not bear the costs of civil proceedings or enforcement measures in cases where the intermediary did not knowingly participate in any infringement.

A large majority of respondents from the **judiciary and legal profession** did not believe that the provisions on legal costs have helped effectively in protecting and preventing IPR infringements. Some respondents shared the opinion that courts enjoy too much discretionary power in granting legal costs, resulting very often in insufficient reimbursement of costs. Respondents called for adjustments to the provision in order to enhance the level of reimbursement of costs for the winning party and to provide for a uniform interpretation and application of the rules.

d. Procedural safeguards

The text of the Directive sets down that the measures, procedures and remedies that it provides for shall be fair and equitable and be applied in such a manner so as to provide for safeguards against their abuse. Citizens were asked if they have the feeling that procedural and fundamental rights are (usually) well respected in the application of the measures, procedures and remedies provided for by the current Directive.

A large majority of citizens has the feeling that procedural and fundamental rights, such as the right of defence, the right to respect for private life or the right to protection of personal data, are not well respected in the application of the measures, procedures and remedies provided for by the current Directive. The reasons for this are manifold. Citizens are very concerned about the protection of personal data, stating that the protection of personal data is not properly respected in national procedures and that access to personal data is granted without a proper assessment of the claim. Citizens criticise the use of ex-parte procedures in that respect

and call for appropriate review mechanisms before access to data is granted. They believe that the presumption of innocence should be reinforced and Article 8 of the Directive should include a reasonable and proportionate right for the defending party to information that bears on potential defences.

In general, citizens feel that the Directive contains few fundamental rights' safeguards which are more specific than general statements of principle, making it very difficult to stop breaches of fundamental rights. In that respect, they call for a more firm order for Member States to implement fundamental rights' safeguards.

Citizens are also concerned by the cost and complexity of legal action. An average internet user is burdened with complex legal procedures and usually cannot afford to apply them. They claim that the cost of legal defence even fuels frivolous claims and call for a more robust system of proof in that respect. They also hint at the conceived mismatch between the cost of defence against a claim of an alleged IP infringement and the cost of a desist order. In this context citizens believe that cease and desist procedures recognised in national law are not subject to appropriate judicial and regulatory oversight.

Citizens are furthermore concerned about the pitfalls of technology, either allowing others to pursue illegal activities under somebody else's identity or simply overwhelming the average internet user.

Other issues of concern are the use of criminal proceedings against individuals, the incorrect correlation of IP addresses to the user, the lack of proportionality of the financial consequences of an alleged or negligent infringement and disproportionate evidence seizures.

4. Provisional and precautionary measures and injunctions

a. Provisional and precautionary measures

The majority of **right holders** has used provisional and precautionary measures, mainly against infringers but also against intermediaries. Measures applied against the infringer are equally sought for online and offline infringements. Against intermediaries two thirds of the applications are for infringements online. Intermediaries addressed are primarily internet service providers, such as internet access providers, content hosting platforms, search engines, social media platforms, data storage provider and domain name registrars and registries.

Provisional and precautionary measures are most often requested in the jurisdiction of the right holder, against an alleged infringer or intermediary established in the same jurisdiction. Cross-border cases, i.e. a right holder applying for measures against an alleged infringer or intermediary established in another jurisdiction or directly in the jurisdiction of the infringer or intermediary, are less frequent.

Right holders do face problems when applying for provisional and precautionary measures in a cross-border situation: legal uncertainty, costs (translation), length of procedure (significant differences between Member States), different procedures, unexperienced courts, limited (geographical) scope of injunctions, declaration of non-infringement not available in all

Member States, insufficient guarantees (when applying), no recognition of judgments or evidence, no legal basis for measures.

The main reasons for applying for a provisional and precautionary measure against infringers and intermediaries are to prevent an imminent infringement, to forbid the continuation of an alleged infringement and to seize or deliver up the goods suspected of infringing an IPR.

These measures are usually obtained. If not, the main reasons are generally that the measures requested are too severe, insufficient evidence and confidentiality and protection of data. For measures against intermediaries the lack of a sufficient link between the intermediary and the infringement is the most common reason. The average number of days between the lodging of a request for provisional and precautionary measures before the court and the adoption of a decision varies significantly, with most of the decisions being taken between 14 and more than 60 days after the lodging. More than half of them were appealed.

Almost one third of right holders responded that the availability of provisional and precautionary measures against an intermediary depends on the identification of the infringer. The applicant can only apply for a measure against an intermediary if the infringer has been identified. In the majority of cases courts specify in the decision the exact measures which the intermediary should implement in order to stop the continuation of the alleged infringement.

Costs and length of procedure are the main reasons for not applying for provisional and precautionary measures.

Less than half of the **intermediaries** have been subject to an application for provisional and precautionary measures. In almost all cases these applications concerned alleged infringements online. The measures are most often requested in the jurisdiction of the intermediary, by an applicant established in the same jurisdiction. Occasionally intermediaries are subject to measures from other EU jurisdictions, the country of residence of the applicant.

Some intermediaries did face problems when being subject to an application for provisional and precautionary measures in a cross-border situation. This includes conflict of laws issues, legal uncertainties and unnecessary costs, broad scope and undefined period of an injunction.

The main reasons for being subject to an application for a provisional and precautionary measure is to forbid the continuation of an alleged infringement, followed by preventing an imminent infringement. Concerning internet access providers saving traffic data, it is common for a provisional and precautionary measure to be requested in order to secure that data before it is deleted by the service provider. According to intermediaries, provisional and precautionary measures are granted in half of the proceedings.

Very few intermediaries responded on the scope or content of provisional and precautionary measures. The few responses received suggest that provisional and precautionary measures are usually domestic in their geographical scope and do not specify the exact measures to be implemented by the intermediary in order to stop the continuation of an alleged infringement.

Intermediaries consider that the implementation of provisional and precautionary measures impacts on their operations primarily in terms of additional costs, staff and technical infrastructure but might also result in adjusting the service offer.

Only very few **Member States and public authorities** have information on the number of requests for provisional and precautionary measures filed in their jurisdiction in cases of alleged infringement of IPR and on the length of proceedings. The reasons for applying for provisional and precautionary measures are to prevent an imminent infringement and to forbid the continuation of an alleged infringement. Almost all respondents state that in their jurisdiction provisional and precautionary measures can be issued against an infringer not only to stop an actual infringement but also to prevent further infringements in the future.

Two thirds of the respondents say that in their jurisdiction an out of court procedure for cease and desist notices for alleged IP infringements exists. In some cases these procedures relate to third parties which services are used to infringe an IPR.

The reasons for not obtaining provisional and precautionary measures against an infringer are no likelihood of success on the merits of the case, insufficient evidence and measure requested disproportionate.

From those Member States and public authorities who knew, a slight majority responded that in their jurisdiction it is not possible to obtain provisional and precautionary measures against any intermediary but that an injunction is subject to an active involvement (responsibility/liability) of the intermediary in the infringement. The intermediary needs to be knowingly involved in the infringing activity or a causal link needs to be established between the service provided and the infringing activity. Active involvement, however, does not necessarily mean liability.

From those who knew a majority also respond that in their jurisdiction provisional and precautionary measures against an intermediary can be issued not only to stop an actual infringement but also to prevent further infringements in the future. However, little information was given on how "further infringements" are defined.

Reasons for not obtaining provisional and precautionary measures against an intermediary are no sufficient link between the intermediary and the infringement, measure requested disproportionate, insufficient evidence and protection of the right to respect for private life and/or right to protection of personal data.

The vast majority of Member States and public authorities is not aware of problems when applying for or executing provisional and precautionary measures in a cross-border situation. Issues identified are (domestic) scope of provisional and precautionary measures and lack of automatic execution.

Member States and public authorities stated that the main reasons for not applying for provisional and precautionary measures are the fact that the responsible court is in another Member State, the applicable law is of another Member State or the length of procedure.

b. Injunctions

The majority of **right holders** have used injunctions against infringers but also against intermediaries; against the infringer slightly more in cases of offline than online infringements, against intermediaries two times more in cases of online than offline infringements. Intermediaries addressed are primarily internet service providers, such as internet access providers, content hosting platforms, search engines, online marketplaces, data storage provider and domain name registrars and registries, but also retailer and wholesaler.

Injunctions are most often requested in the jurisdiction of the right holder, against an alleged infringer or intermediary established in the same jurisdiction. Cross-border applications, i.e. a right holder applying for an injunction against an infringer or intermediary established in another jurisdiction or directly in the jurisdiction of the infringer or intermediary, are less frequent. However, cross-border applications are more common against infringers than against intermediaries.

Injunctions are usually obtained. If not, the main reasons are generally injunctions requested are too severe, insufficient evidence and confidentiality and protection of data, for injunctions against intermediaries the main reason is the lack of a sufficient link between the intermediary and the infringement.

Right holders reported that they face problems when applying for injunctions in a cross-border situation: identification of the address for service, legal uncertainty, costs (translation), length of procedure, test purchases in all jurisdictions, notarisation of evidence, diverging substantive scope of injunctions, rules on jurisdiction and the lack of adequate legal basis.

Around one quarter of right holders responded that the availability of injunctions against an intermediary depends on the identification of the infringer. This means that in these cases the applicant can only apply for a measure against an intermediary if the infringer has been identified. The main reasons for applying for an injunction against an intermediary are related to the provision of internet services: block access to infringing content online, stay down of infringing content online, adopt technical measures such as filtering, de-indexing infringing websites, permanent termination of domain, and permanent termination of subscribers' accounts. In the majority of cases courts specify in the injunction the exact measures which the intermediary should implement in order to stop the continuation of the alleged infringement.

Costs and length of procedure are the main reasons for not applying for injunctions.

Half of the **intermediaries** have been subject to an application for an injunction. In almost all cases these applications concerned alleged infringements online. Injunctions are most often requested in the jurisdiction of the intermediary, by an applicant established in the same jurisdiction. Cross-border cases are rare.

The main reasons for applying for an injunction against a third party, according to the intermediaries, are blocking access to infringing content online and stay down of infringing content online. Injunctions are usually granted by the courts.

Few intermediaries responded on the scope or content of an injunction. Those few responses suggest that injunctions are usually domestic in their geographical scope and more often do specify the exact measures to be implemented by the intermediary in order to stop the continuation of an alleged infringement. Intermediaries consider that the implementation of injunctions impacts on their operations primarily in terms of additional costs, staff and technical infrastructure but might also result in adjusting the service offer.

Only very few **Member States and public authorities** have information on the number of requests for injunctions filed in their jurisdiction in cases of alleged infringement of IPR and on the length of proceedings. Almost all respondents state that in their jurisdiction injunctions can be issued against an infringer not only to stop an actual infringement but also to prevent further infringements in the future. The main reasons for not obtaining injunctions against an infringer are insufficient evidence and the fact that measure requested is disproportionate.

According to Member States and public authorities the measures applicants seek to implement when applying for an injunction against an intermediary with regard to third parties using their services infringing an IPR are blocking access to infringing content online, discontinuation of manufacturing of infringing products and stay down of infringing content online.

From those who knew, two thirds responded that in their jurisdiction it is not possible to obtain an injunction against any intermediary but that an injunction is subject to an active involvement (responsibility/liability) of the intermediary in the infringement. The intermediary needs to be knowingly involved in the infringing activity, for example refusal to act upon a notification, or a causal link needs to be established between the service provided and the infringing activity. Active involvement, however, does not necessarily mean liability.

From those who knew, a majority responded that in their jurisdiction injunctions against an intermediary can be issued not only to stop an actual infringement but also to prevent further infringements in the future. "Further infringements" would be infringements similar or equivalent to the infringement committed.

From those who knew, half responded that it is possible in their jurisdiction to obtain an injunction against an internet intermediary forbidding the continued access to the material that is allegedly infringing IPR when that injunction does not specify the measures which that access provider must take. The parties concerned can initiate legal proceedings to review the measures taken by the intermediary.

The reasons for not obtaining an injunction against an intermediary are no commercial scale infringement, insufficient evidence and that the measures requested are disproportionate.

The reasons for not applying for an injunction are length and cost of procedure, the fact that the court is in another Member State or the applicable law is of another Member State.

The vast majority is not aware of problems when applying for or executing an injunction in a cross-border situation. Issues identified are (domestic) scope of provisional and precautionary

measures and lack of automatic execution. Problems raised concerned the length of procedure for serving documents and for the cross-border execution of injunctions.

The vast majority of respondents from the **judiciary and legal profession** stated that an injunction against an infringer can be issued not only to stop an actual infringement but also to prevent further infringements in the future. The order to prevent future infringements can cover activities which are identical to, or substantially mirror, the initial infringing activity. The main reasons for not obtaining an injunction against an infringer are insufficient evidence, measures requested disproportionate, infringer established in another jurisdiction.

The main reasons for applying for an injunction against an intermediary with regard to third parties using their services infringing an IPR are blocking access to infringing content online, stay down of infringing content online, adopt technical measures such as filtering, de-indexing of infringing websites, permanent termination of a domain and discontinue manufacturing of infringing products.

Half of the respondents stated that it is possible in their jurisdiction to obtain an injunction against any intermediary while the other half stated that an injunction is subject to an active involvement (responsibility/liability) of the intermediary in the infringement. The criteria for determining if an intermediary is actively involved in the infringement vary. In some jurisdictions it is sufficient that a service provider has actual knowledge of another person using their service to infringe an IPR. In other jurisdictions the intermediary must have been notified of the use of its services by another person to infringe an IPR and not have taken appropriate measures to stop the infringement. In others again it is necessary that the intermediary intentionally induces the infringement, knowingly cooperates with the infringement, has a direct economic interest in the results of the infringement, or has the ability to control the infringer's conduct. Some require that the services of an intermediary be directly used to infringe the third party rights. And in some jurisdictions the business model of the intermediary, if it entails a higher risk of IPR infringements, might result in increased due diligence requirements.

Responses suggest that in most jurisdictions an injunction against an intermediary can be issued not only to stop an actual infringement but also to prevent further infringements. Courts define "further infringements" depending on the type of intermediary. The scope of the injunction can be restricted to the exact same content and links and any repetition of the specific prohibited conduct or can also include substantially similar infringements, such as mirror sites. While general monitoring obligations cannot be imposed, in some jurisdictions specific monitoring obligations are possible, obliging the intermediary to search for infringements of specified content using technological means such as filtering. It is usually the applicant, i.e. the right holder, that is monitoring compliance of the intermediary with the injunction.

According to the responses in most jurisdictions it is not possible to obtain an injunction against an internet intermediary forbidding the continued access to the material that is allegedly infringing IPR when that injunction does not specify the exact measures which that access provider must take. In those jurisdictions where it is possible to obtain an injunction

against an internet intermediary forbidding the continued access to the material that is allegedly infringing IPR when that injunction does not specify the exact measures which that access provider must take it is for the intermediary or third parties concerned to object to unclear injunctions or specific measures taken in order to ensure compliance with the fundamental right of internet users to freedom of information.

Responses listed insufficient evidence, lack of a sufficient link between the intermediary and the infringement, measure requested disproportionate and intermediary established in another jurisdiction as the main reasons for not obtaining an injunction against an intermediary.

A quarter of the respondents are aware of problems in cases of application for an injunction in a cross-border situation (judicial authority in another jurisdiction and infringer or intermediary established in your jurisdiction) and a third of the respondents are aware of problems when executing an injunction in a cross-border situation (infringer or intermediary established in another EU Member State). The issues are similar to those concerning applications for provisional measures in cross-border situations.

c. Need for adjustment

Most **right holders** see a need to adjust the application the rules for provisional and precautionary measures and injunctions. Very clearly right holders call for the Directive to explicitly establish that all types of intermediaries can be enjoined, that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction, that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements. In that respect the Directive should establish criteria on how preventing further infringements is to be undertaken (in the online context without establishing a general monitoring obligation under the E-Commerce Directive). Two thirds of the right holders having an opinion on the issue do see a need for a definition of the term "intermediary" in the Directive. Two third of the right holders having an opinion on the issue do not see a need for criteria defining the proportionality of an injunction – and do not see a need either for a clarification on how to balance the effective implementation of a measure and the right to freedom of information of users in case of a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take.

Right holders also raised the following issues in view of the possible need for amendments to the provisions on provisional and precautionary measures and on injunctions:

- Dynamic injunctions;
- Catalogue-wide injunctions;
- Injunctions with cross-border effect;
- Expedited procedures;
- Balanced approach in granting provisional measures in cases of alleged patent infringement;

- Financial guarantees proportionate to the financial capability of the applicant;
- Lack of implementation of the provisions on injunctions in IPRED and the InfoSoc Directive;
- Cost of intermediaries for implementing injunctions (e.g. blocking injunctions);
- Ensure the implementation of provisional and permanent injunctions by the addressee.

Half of the respondents from the **judiciary and legal profession** see a need to adjust the application of these measures, also bearing in mind the cross-border application.

Half of the respondents believe that the Directive should explicitly establish that all types of intermediaries can be enjoined. They argue that this would enhance the clarity of the rules and a uniform application in the EU even if the Directive seems to already have sufficient breadth to cover all types of intermediaries. These respondents do not see a reason to differentiate between intermediaries. An injunction should not be considered a punishment and if an intermediary is able to prevent infringement without undue burden then it should be possible to obtain an injunction, in particular in cases where the infringer cannot be identified. Some however argue that there is a need to differentiate the scope of the injunctions depending on the intermediaries' liability - and also to consider differences with regard to the IPR concerned. Any listing of types of intermediaries should not be exhaustive.

Others argue that establishing the possibility of an injunction against all types of intermediaries would risk a significant interference in day-to-day business operations. To them it seems to be inappropriate to expose an intermediary who only plays a minor role regarding the infringement to an injunction. Also, in cases in which an intermediary provides a notice and takedown system and applies it correctly, it does not seem appropriate to grant an injunction against him to stop infringements. An increasing regulatory burden for intermediaries is another concern, in particular without a clear definition of the term "intermediary".

Most respondents believe that the Directive should explicitly establish that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction. However, some argue that an injunction against an intermediary without any wrongdoing of the intermediary seems inappropriate and consider the need for a violation of a duty of care to be reasonable – or even an active involvement (responsibility/liability) of the intermediary in the infringement.

A vast majority of respondents believe that the Directive should explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements. They consider this an appropriate step towards legal certainty and uniform application of the rules and a necessary means to provide effective relief. However, some consider this only appropriate in cases of exact same content and links. Others argue that the CJEU has already clarified that intermediaries can be ordered to prevent further infringements. Some respondents raised the need for proportionality, enforcement of

injunctions and the possible conflict with Articles 12 to 15 of the e-commerce Directive as an issue.

A slight majority of respondents believe in that respect the Directive should establish criteria on how preventing further infringements is to be undertaken (without establishing a general monitoring obligation under the E-Commerce Directive). In their view this would enhance legal certainty and the effectiveness of injunctions. However, criteria should be technology neutral and principles-based, in order to avoid excluding new types of infringements. Others argue that the prevention of further infringements should be determined following a case-by-case assessment by the court, taking into account the specificities of the case and not limiting the measures to be taken.

A majority of respondents does not see a need for criteria defining the proportionality of an injunction. Proportionality is already stipulated in Article 3 IPRED and courts need to have flexibility in their decision making. Others argue that criteria would enhance legal certainty and uniform application of the law and provide necessary guidance, including guidance on the costs concerning the implementation of injunctions by intermediaries. They could provide for an adequate balance between the different rights concerned and also provide clarity to questions raised by the jurisprudence of the CJEU. One respondent stated that the Directive already has a basis for a harmonised approach in Article 12, advocating the application of Article 12 as a mandatory clause.

A majority of responses identifies a need for a definition of the term "intermediary" in the Directive, to enhance legal certainty and to clarify the scope of the term "intermediary" within IPRED, in particular with regard to services provided in the digital environment. Others argue that technological developments require an open definition of the term

A slight majority believes that there is no need for a clarification on how to balance the effective implementation of an injunction and the right to freedom of information of users in case of a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take. Finding the right balance should be left to the courts on a case by case basis. Others would welcome guidance on what can be considered a reasonable and proportionate measure in this respect.

A number of responses identified a need for other amendments to the provisions on provisional and precautionary measures and on injunctions:

- Explicit extension of the reimbursement of legal costs to costs incurred in provisional/precautionary measures proceedings.
- Provisional and precautionary measures should be available without (i) the requirement to file the main infringement action; and (ii) without establishing the identity of defendant (infringer).
- Enhance the effectiveness of provisional and precautionary measures with regard to the provisional retention of traffic data, preventing the deletion of such data before the right of information can be used.

- Ensure full and uniform implementation of the provision in all Member States

From those **intermediaries** having an opinion on the question a majority does not see a need to adjust the application of the rules for provisional and permanent injunctions.

A vast majority considers that the Directive should not explicitly establish that all types of intermediaries can be enjoined. The current wording already potentially covers all types of intermediaries. Only intermediaries actively involved in an infringing activity should be subject to injunctions. Respondents also stress the need to ensure the effective application of Article 15 of the E-Commerce Directive, under which Member States shall not impose a general obligation to monitor on service providers and potential risks for technological development. Others however see certain benefit in further guidance, in particular with regard to proportionality and the right intermediary to address in a specific case.

A vast majority also considers that the Directive should not explicitly establish that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction. The current wording is seen as sufficient. In that respect respondents are aware of the interaction between IPRED and the E-commerce Directive, suggesting however that intermediaries should only be subject to an injunction if they bear responsibility for the infringing activity.

Almost unanimously intermediaries answered in the negative to the question on whether the Directive should explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements. Injunctions aimed at preventing further infringements are considered disproportionate, in particular for intermediaries not having a direct relationship with the infringer. According to the respondents such injunctions would also be in breach of Article 15 of the E-Commerce Directive and might result in a breach of telecommunications secrecy and right to information. Intermediaries should not be put in a position where they have to assess the lawfulness of an activity. Questions concerning costs and effectiveness were also raised and such injunctions were also seen as having a negative impact on the development of online services.

In that respect intermediaries stated almost unanimously that the Directive should not establish criteria on how preventing further infringements is to be undertaken. Respondents believe that such criteria would unavoidably result in establishing a general monitoring obligation, incompatible with the E-Commerce Directive.

The majority of respondents sees however a need for criteria defining the proportionality of an injunction. Such criteria should provide for a fair balance between the effectiveness, impact and costs of an injunction and also ensure respect for other fundamental rights. Others consider that Article 3 IPRED and Articles 12 to 15 of the E-Commerce Directive already provide for sufficient guidance.

Intermediaries do not see a need for a definition of the term "intermediary" in the Directive, identifying a risk of potentially not covering all possible intermediaries and not being future-proof. They also fear inconsistencies with the definitions used in the E-Commerce Directive.

Intermediaries also do not see a need for a clarification on how to balance the effective implementation of a measure and the right to freedom of information of users in case of a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take. This should be left to the courts. Some however would welcome further guidance, also in view of the jurisprudence of the CJEU.

A few respondents identified a need for other amendments to the provisions on provisional and precautionary measures and on injunctions:

- Clarification on the obligation to bear the costs for the implementation of injunctions
- Definition of "injunction", for the sake of legal certainty and uniform application
- Guidance for national courts on the application of the rules

From those **Member States and public authorities** having an opinion a majority does not see a need to adjust the application of the rules for provisional and precautionary measures and injunctions. However, a majority of respondents considers that the Directive should explicitly establish that all types of intermediaries can be enjoined. While some argue that it is already possible under the current rules to enjoin any intermediary whose services are being used by a third party to infringe an IPR others would welcome clarification.

Most respondents also consider that the Directive should explicitly establish that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction, in order to clarify the scope of the provision and enhance its uniform application throughout the Union.

A majority also believes that the Directive should explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements, to enhance legal certainty and the effectiveness of enforcement measures.

In that respect most respondents would also welcome criteria on how preventing further infringements is to be undertaken (without establishing a general monitoring obligation under the E-Commerce Directive), to ensure a balance between the different interests concerned and to rule out the imposition of a general obligation to monitor.

Half of the respondents see a need for criteria defining the proportionality of an injunction. While these respondents would welcome guidance for courts in their case by case assessment of the proportionality of an injunction others argue that national courts are already well equipped for this assessment.

A majority of respondents identified a need for a definition of the term "intermediary", considering that such a definition would clarify the scope of the provision and thus enhance legal certainty.

Half of the respondents see a need for a clarification on how to balance the effective implementation of an injunction and the right to freedom of information of users in case of a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take. They would welcome guidance on how to achieve the right balance between the effective implementation of an injunction and the right to freedom of information of users. Others argue that the current rules are sufficient and that national courts are already well equipped for this assessment.

No respondent identified a need for other amendments to the provisions on provisional and precautionary measures and on injunctions. In many responses to other questions however respondents had asked, instead of imposing new rules, for initiatives aiming at a more uniform and effective implementation of existing legislation and, where appropriate, the promotion of cooperation between the implementers, such as guidance on the application of existing rules.

5. Publication of judicial decisions

Article 15 of the Directive provides for the possibility to apply for the dissemination of information concerning the decision in legal proceedings instituted for infringement of an intellectual property right, including publication of the judicial decision in full or in part, at the expense of the infringer.

a. Application of the rules on the publication of judgments

The majority of **right holders** has not requested in legal proceedings instituted for infringement of an IPR the decision to be published in full or in part. They question the added value of such publication, do not have a need for it or state that it is just not common to do so in certain jurisdictions. Some also claim that it is not possible in their jurisdiction. Other respondents consider other channels of communication – press, blogs, etc. – more efficient than the publication of court decisions. However, right holders also report that they have applied for the publication of a judgment and courts did not grant it. Those requesting publication consider the publication of judicial decisions an additional benefit of filing legal action. They see publication as a deterrent to future infringers, as a means to reassure consumers and to raise awareness of the public at large, in particular concerning health and safety risks, and as a way to protect their reputation and the reputation of their legitimate distribution partners.

Almost all **Member States and public authorities** stated that judicial decisions related to the enforcement of IPR are publicly available in their jurisdiction. However, only few Member States have a central database containing all relevant decisions. These databases cover civil and/or criminal cases. In some Member States decisions are available only from the court that

has ruled on the case, either online or by request. In other jurisdictions it is the judge that will determine the form of publication. Very often the publication is limited to decisions of higher courts, courts of appeal or does not cover all competent courts. From those having knowledge on this issue a majority responds that parties do usually request in legal proceedings the decision to be published in full or in part.

A majority of the respondents from the **judiciary and legal profession** does have the experience that parties do request in legal proceedings instituted for infringement of an IPR the decision to be published in full or in part. Almost all respondents state that judicial decisions related to the enforcement of intellectual property rights publicly available in their jurisdiction. Some Member States have dedicated websites for such purposes. However, very often only final judgments from the appeal courts are available, not first instance or interim decisions. These are available only on commercial databases. In other jurisdictions no central database exists and judgments can only be obtained directly from the court in question. In some cases publication depends on the approval of the judge or the interest of the public in the decision in question. Personal data is removed before publication. For two Member States decisions do not seem to be publicly available.

b. A more systematic dissemination of information

A large majority of those **right holders** having an opinion on the issue see a need for, or added value in, a more systematic dissemination of the information concerning the decision in legal proceedings instituted for IPR infringement.

The reasons are very similar to those given by right holders requesting the publication of judicial decisions, in particular information of the public and deterrent to future infringers. Right holders consider that a more systematic dissemination of the information would also help the judiciary in developing a common practice in the application of the Directive, domestic and cross-border, and contribute to an increased level of legal certainty. One right holder called for a greater dissemination particularly of first instance decisions in legal proceedings regarding IPR matters. Other right holders identified the high number of out of court settlements as an issue and ask for more publicly available information also on such proceedings. Others have doubts if the national rules on publication would apply to European titles, for example European plant variety protection.

In order to facilitate access some right holders call for central platforms for the publication of judicial decisions online. Other right holders also call for better ways to disseminate the information, also by the infringer himself (e.g. on his website). They also believe the Directive should provide that the publication of judicial decisions be automatically granted upon right holders' request, as long as the defendant has been found guilty of infringement.

Others advocate caution in that respect. They note that court decisions are not always easily understood by non-experts and publication without further explanation might result in a misinterpretation of their meaning. Others also point out that the potential consequences of the publication on a defendant's business require a certain amount of discretion and

consideration to be applied by a judge on a case-by-case basis. They consider the available system sufficient, leaving it to the right holder to choose.

A slight majority of those **Member States and public authorities** having an opinion on the matter do see a need for / added value in a more systematic dissemination of the information concerning the decision in legal proceedings instituted for infringement of an IPR. On the one hand those having a centralised system at national level would wish for similar systems in other Member States but it also includes a call for a comprehensive European system.

A clear majority of the respondents from the **judiciary and legal profession** sees a need for, or added value in, a more systematic dissemination of the information concerning the decision in legal proceedings instituted for infringement of an IPR. This would increase legal certainty and the uniform application of the law, in particular if it facilitates access to decisions from courts in other jurisdictions. Some are missing comprehensive databases in certain Member States, such as France and Germany.

6. Other issues

Half of the respondents from the **judiciary and legal profession** having an opinion on this issue think that the rules foreseen by the Directive strike the right balance between the need to effectively protect IPR and preventing IPR infringements and the need to protect fundamental rights, while the other half believes they do not. Those who consider that there is not a balance between those rights argue that IPR are not sufficiently protected and invoke the following reasons:

- Uploaders and intermediaries have a feeling of full legal immunity.
- Intermediaries should have a duty of care to take effective steps to ensure that their services are not used in connection with unlawful activities.

Others consider that this last issue is not properly addressed in the Directive which leaves room for discrepancies and uncertainty as to balance such rights. More specifically:

- Case law from the EUCJ and national courts is not sufficiently clear and is often contradictory.
- The balance is not sufficiently specified and harmonised.
- There should be clarification as to the individuals affected, the impact and the length of the injunction.

Finally, a majority of these respondents consider that the Directive does not achieve this balance because the protection of IPR exceeds that of fundamental rights. They believe that the rules per se may not strike this balance but the work of the judges sometimes ensures this balance. The rules are still too much in favour of the IPR holder. National laws do not necessarily include provisions to allow courts to issue redacted judgements protecting confidential information. Aspects of EU privacy law are not addressed. Existing rules should be modified and replaced with a common right system which would be applicable to any types of rights.

Two thirds of those with an opinion did not think that other provisions of the Directive should be improved. One third however indicated that the following aspects should be considered:

- Article 12 on alternative measures should become a mandatory provision, in particular in the context of enforcement of patents by non-practicing-entities (patent trolls).
- The Directive provides measures only for civil litigation for IPRs infringement cases while IPR infringements are usually carried out by multi-jurisdictional and organised illegal businesses and civil law instruments may not fight against organised crime.
- Article 3(2) should be clarified, on the basis of existing case law, in the sense that national courts have the ability to issue catalogue-wide injunctions.
- Articles 9 and 11 should foresee better implementation within the Member States.
- The Directive should foresee further clarification as regards the order to disclose information.

Only very few **Member States** identified other aspects that needed improvement:

- Increased cooperation and disclosure.
- Clarify how much room for manoeuvre Member States have to foresee measures and procedures in implementing article 2 and article 3.

One third of **right holders** who responded to the survey identified other provisions that could be improved. The contributions mainly referred to the following:

- The specialisation of courts
- The obligation for ISPs to co-operate with right holders by implementing certain systems such as blocking infringing websites and using filtering technologies.
- The "Know your customer rule" should be imposed on intermediaries.
- The Directive should ensure that the legal costs are reasonable.
- Article 4 should be amended to require Member States to enable right holder associations, trade associations, and professional defence bodies to take civil proceedings on behalf of members.
- The calculation of legal costs should depend on the resources of the companies in order to ensure that SMEs can have access to justice.
- The ceiling for the "loser pays" principle should be adapted for SMEs.
- Damages and attorney's fees compensation should be harmonised.
- The Directive should harmonise notice and take down and stay down procedures.
- A procedure for domain name seizures should be established.

More specifically, another issue raised was that IPRED should have a specific reference to the enforcement of farm saved seed regulations.

Only a few **intermediaries** identified other provisions that should be improved. The most common issues raised are the need to refer to follow the money schemes and best practices in the Directive, avoid abusive litigation (e.g. patent trolls) and ensure that intermediaries receive compensation when they comply with injunctions.

- Domain names used by infringing sites could be seized by law enforcement agencies.
- “Follow the money” could be addressed in the Directive.
- Member States do not apply the provisions foreseen in Article 3(1) on general obligations.
- The ISPs affected by the procedure foreseen in Article 6(1) on evidence should be granted cost reimbursement when they provide the data that is requested.
- Attention should be placed on abusive litigation by Patent Assertion Entities.
- The Directive should foresee a well-balanced approach for injunctive relief in predatory patent assertion cases. This could be achieved by introducing a a four-factor test.
- The Directive should foresee a balance between the interests of right holders and third parties, including the introduction of a public interest defence.
- The Commission should provide suggested or best practices for right holders and intermediaries for addressing online infringements.

Almost two thirds of **consumers, citizens and representatives of civil society** identified other provisions that would need to be improved. Several respondents mentioned substantive law issues, such as the need to introduce exceptions for 'fair use', parody and research, or the duration of copyright protection.

Regarding enforcement per se, the majority of the respondents expressed strong concerns as regards the protection of fundamental rights such as freedom of expression. Most of the contributions requested the following:

- Better definition of intellectual property and differentiate the different types of infringements.
- "Commercial scale" should be defined as otherwise fundamental rights may be threatened.
- Non-commercial sharing and transformative use (remixes) should not be covered by the measures foreseen by the Directive.
- Review mechanisms for injunctions should be envisaged.
- Ex-parte injunctions should not be allowed.
- Consumers/citizens should not be exposed to warnings and letters.
- SMEs should benefit from legal aid.
- Articles 9 (Provisional Remedies), 11 (Injunctions) and 12 (Alternative Measures) should be amended such as to clarify the applicability of the general (Article 3) requirements of fairness, equity and proportionality to the subject matters of those articles.

G. Issues outside the scope of the current legal framework

1. Role of intermediaries in IPR enforcement and the prevention of IPR infringements

Right holders overwhelmingly believe that intermediaries should play a role in IPR enforcement and the prevention of IPR infringements. In their opinion intermediaries acting in the digital environment are best placed to prevent infringements of IPR: content hosting platforms, search engines, social media platforms, advertising service providers, payment service providers, internet access providers, online marketplaces and domain name registrars.

Two thirds of right holders that responded to the question already cooperate with intermediaries, primarily internet intermediaries such as content hosting platforms, social media platforms, advertising service providers and search engines. The majority of right holders is cooperating bilaterally but a significant number is engaged within multilateral cooperation agreements. Views are however mixed about the success of such cooperation. A slight majority considers cooperation with intermediaries successful while a significant number of right holders feels the opposite. Main challenges in establishing a successful cooperation between right holders and intermediaries are economic interests, such as costs, and regulatory requirements. Many respondents also believe that intermediaries are currently insufficiently incentivised to take steps to prevent their services being used to support or contribute to infringements of intellectual property rights. Costs were less mentioned as an issue. Those right holders that do not cooperate with intermediaries are mostly not aware of the possibility or have made already negative experience.

The vast majority of right holders does not believe that the voluntary involvement of intermediary service providers in enforcing IPR has or might have a negative impact on fundamental rights. Some respondents however believe that voluntary cooperation requires a careful approach, recalling however that intellectual property is also a fundamental right. At the same time courts have provided already guidance on this issue and technology could be used to provide the necessary safeguards for all parties concerned.

At first sight two thirds of **intermediaries** having an opinion on the issue were opposed to playing a role in IPR enforcement, considering that right holders are best placed to enforce their own IPR, supported primarily by the competent enforcement authorities. However, at the same time intermediaries do not deny a role in the protection of IPR and stress that intermediary service providers already work closely with right holders, for example by developing systems allowing right holders to notify infringements of their rights and providing procedures to take down illegal content online. More than two thirds of the intermediaries do cooperate with right holders or right holders' associations in the protection and enforcement of IPR, primarily for the protection of copyright, but also trademarks or even all IPR. Cooperation is mainly done bilaterally but a significant number of intermediaries is also engaged in multilateral cooperation agreements.

The vast majority of intermediaries consider their cooperation with right holders successful. In the intermediaries' view the main elements for a successful cooperation between right holders and intermediaries are voluntariness and mutual trust and goodwill, high level of inclusion, flexibility, common understanding of respective industries and technology and an acknowledgement of the impracticality of certain measures.

No clear picture emerges from the question which intermediaries are best placed to prevent infringements of IPR, with all types of intermediaries being mentioned several times.

Some intermediaries do not cooperate directly with right holders because they are either prohibited to do so by law or because they prefer to cooperate with the enforcement authorities in order to have legal certainty. Others feel that voluntary cooperation is used by right holders to pass on the enforcement of their rights to intermediaries.

The main challenges in establishing a successful cooperation between right holders and intermediaries were felt to be economic interests, such as costs, and specific regulatory requirements, for example data protection rules or competition law. At the same time rules seem to be missing to ensure the necessary legal certainty. In general it seems to be difficult at times to find a common understanding and common approach between intermediaries and right holders.

The majority of intermediaries is of the opinion that voluntary involvement of intermediary service providers in enforcing IPR has or might have a negative impact on fundamental rights. They see a negative impact equally on the freedom of expression, the freedom to conduct business, the right to due process and the dissemination of legal content.

The large majority of **Member States and public authorities** again believe that intermediaries should play a greater role in IPR enforcement. Others point out that intermediaries do not have a legal obligation in IP enforcement and that enforcement is not their core business. Like right holders they believe that intermediaries acting in the digital environment are best placed to prevent infringements of IPR: advertising service providers, content hosting platforms, search engines, internet access providers, payment service providers, online marketplaces and social media platforms.

Only very few Member States have a legal obligation for intermediaries to engage in the prevention of IPR infringements, relating primarily to notice and action procedures in the application of the E-Commerce Directive. The majority of Member States however facilitates voluntary cooperation between right holders and intermediaries in the protection and enforcement of IPR. While all types of intermediaries seem to be covered in at least one of these initiatives, most national initiatives concern advertising service providers, followed by payment service providers. Most of these initiatives only cover copyright and rights related to copyright. A number of initiatives deal with all IPR while few cover industrial property rights.

From the respondents having an opinion on the question a large majority considers voluntary cooperation to be successful. In the Member States' view elements of a successful cooperation are focus on the common interest, voluntariness and mutual trust, inclusion of all relevant stakeholders, flexibility, clear responsibilities, justifiable and proportionate requests and facilitation by the public authorities.

Very few Member States had an opinion on the main challenges in establishing a successful cooperation between right holders and intermediaries, with economic interests (e.g. additional costs) emerging as the only challenge given.

From those Member States and public authorities having an opinion on the question, the majority does not believe that voluntary involvement does affect fundamental rights. Others identified a risk that it could impact on the freedom of expression and the dissemination of legal content.

Member States and public authorities would consider a co-regulatory model, with basic principles laid down in a legislative act and entrusting the attainment of the objectives defined

to the partners, as the most efficient model for the involvement of intermediaries in the prevention of IPR infringements. One respondent argued that voluntary cooperation will always be limited in its impact and that the involvement of public authorities should ultimately be considered.

A majority of **citizens** has experience with the involvement of intermediaries in the prevention of IPR infringements and this experience concerned mostly the use of social media platforms, search engines, content hosting platforms and online marketplaces and covered mainly copyright and rights related to copyright but also trademarks and other industrial property rights to a lesser degree.

The overwhelming majority of citizens though do not believe that intermediary service providers should play an important role in enforcing IPR. They consider that this would result in a "privatisation" of law enforcement, undermining fundamental rights and the procedural safeguards of due process, the effectiveness of copyright provisions protecting user rights (e.g. copyright exemptions) and the safe harbour provisions of the E-commerce Directive, hampering also innovation on the internet. They do not believe that it is the role of internet service providers to filter content on the basis of right holders' requests, which would result also in a great level of legal uncertainty and inconsistency in the application of the rules. The right holders should protect their own property and enforcement should be done by public authorities.

Cooperation should only be considered if fundamental rights are complied with. Many respondents however believe that most intermediaries that cooperate with right holders are US-based companies enforcing US rules on a global scale, inevitably interfering with European fundamental rights. Intermediaries also need to be offered a "safe harbour", protecting them from responsibility for infringements by third parties. This would allow them sufficient time to fairly review notices of infringement and to refer unclear cases to appropriate courts. Moreover, cooperation between right holders and other bodies should always be subject to control by public authorities.

The majority of citizens already experienced limitations in terms of access to services or products previously provided by intermediary service providers due to their involvement in the prevention of IPR infringements. This experience concerns mainly content taken off content hosting platforms.

The overwhelming majority of citizens finally believes that voluntary involvement of intermediary service providers in enforcing IPR has or might have a negative impact on fundamental rights. They see a negative impact equally on the freedom of expression, the freedom to conduct business, the right to due process and the dissemination of legal content.

2. Specialised courts (Specialised courts / Alternative procedures)

More than two thirds of the **right holders** were of the opinion that legal action in a court specialised in IPR matters provides an added value compared to legal actions in other courts, stating that specialised courts have more expertise, court proceedings are more fit-for-purpose

and the court decisions are of better quality. Some also argued that they would result in lower costs. The consistency of decisions and necessary technical competence, in particular with regard to the internet, was raised by many respondents.

Some respondents however argue that although the specialised courts have more expertise, the negative side is that the costs of proceedings are higher than in ordinary courts and proceedings tend to be lengthy. Appeals might also only be possible in exceptional cases. Others believe that the benefit of specialised chambers or courts does very much depend on the experience and knowledge of the particular judges assigned to them, which are not necessarily uniform. The need for continuous education and training was mentioned by a number of respondents. In terms of procedures, respondents promote the idea of fast track and small claims track procedures, to ensure short proceedings and to ensure access to justice also for SMEs and individuals. Others suggested that the specialisation of courts needs to go hand in hand with the specialisation of law enforcement authorities.

The large majority of the **judiciary and legal profession** stated that they have in their jurisdiction dedicated courts, court chambers or judges specialised in IP matters. Almost all of the respondents were of the opinion that legal action in a court specialised in IPR matters provides an added value compared to legal actions in other courts, arguing that the court specialisation helps to build expertise, provides more fit-for-purpose court proceedings and results in shorter proceedings. A number of respondents, though not all, also said that it would result in lower costs. One response however suggested that specialisation will only have a positive impact if the number of courts is truly restricted in a jurisdiction.

The judiciary and legal profession was also asked - with regard to civil litigation in the area of IPR enforcement – if there are any procedures worth considering that would provide an added value or alternative to court proceedings. Most respondents believed that fast track procedures were worth considering, followed by cease and desist procedures and mediation, online dispute resolution, arbitration and fact-finding procedures. Some respondents mentioned that alternatives to court proceedings could be particularly valuable in cross-border cases.

Two thirds of the **Member States** claimed that they have in their jurisdiction dedicated courts, court chambers or judges specialised in IP matters. Three quarters of the respondents believe that legal action at a court specialised in IPR matters provides an added value compared to legal actions at other courts. Reasons given are shorter lengths of proceedings, more fit-for-purpose court proceedings and better quality of the court decision. Some responses also raised unification of case law in the field of IPR and consistent treatment of litigation and use of criminal law in IP infringement cases as supporting arguments.

Most **citizens** stated that they do not have experience with courts, court chambers or judges specialised in IP matters in their country of residence. From those who have, one respondent stated that IP expertise in the court is extremely valuable but not a complete substitute for allowing public interest participation from groups like itself and in many cases IP is still seen as a purely economic matter among private parties without wider societal impacts on freedom of expression and access to knowledge. Other respondents claimed that specialised IP courts tend to develop an extremely right holder friendly jurisprudence.

One quarter of the citizens who responded to the consultation are of the opinion that legal action at a court specialised in IPR matters provides an added value compared to legal actions at other courts, considering that court proceedings are more fit-for-purpose, court decisions are of better quality and proceedings are shorter.

On the other hand, another quarter of the respondents considered that no added value is provided by specialised IPR courts. They believe that specialised courts tend to rule in favour of certain stakeholder groups and that the judiciary system is sufficiently professional to handle issues related to IP. Creating a separate body dealing only with IP is not economically sound and may contribute to bias handling of cases, for the benefit of right holders. Respondents also believe that specialised courts have a tendency to detach themselves from the general development of law which is considered particularly disadvantageous in terms of assessing fundamental rights.

3. Other issues outside the scope of the current legal framework

Issues outside the scope of the current legal framework raised by **right holders** primarily concern the enforcement of IPR on the internet. Many respondents called upon the Commission to clarify that intermediaries have a duty of care to take effective steps to ensure that their services are not used in connection with unlawful activities and to introduce notice and action requirement for intermediaries in the Directive. Another issue is the identification of the infringer on the internet. Some respondents recalled that Article 5 of the E-Commerce Directive requires Member States to ensure that information service providers based in the EU render easily, directly and permanently accessible certain information such as the geographic address and the email. They claimed however that this provision is not well implemented at national level and is generally not complied with by infringing sites. Respondents called on the Commission to take steps to ensure that the operators of websites making content available to EU consumers disclose their true identity on the website, including meaningful consequences where operators do not do this.

Many right holders called for a proper implementation of the Directive in all Member States, in particular with regard to injunctions. They claimed that key provisions of the Directive are not implemented or misapplied by Member States, resulting in a still fragmented enforcement landscape across the EU.

Another issue is the accessibility of measures, procedures and remedies provided for by the Directive to SMEs. Many respondents claimed that legal action is often too expensive for small right holders with limited financial capacities. Rules specifically designed to facilitate the enforcement of rights of SMEs should be adopted, such as capping the amount of financial guarantees when applying for injunctions.

A number of respondents from the **judiciary and legal profession** consider it appropriate to expressly extend the scope of protection of IPRED to trade secrets and rights against unfair competition. Similarly to many right holders, some respondents called for notice and takedown / stay down as well as monitoring measures for internet service providers, respecting however the ban on general monitoring as defined in the E-Commerce Directive.

Other respondents stressed the importance of the Directive being technologically neutral, ensuring that all kinds of activity that are infringing IPR are covered by the Directive, that it would be useful to harmonise rules on the liability for unjustified threats and notice letters and that any possible review of the Directive should not impair the possibility of Member States to prosecute IPR infringements by final users.

Finally, respondents are also concerned about the perceived lack of proper and uniform implementation of the Directive in all Member States.

Member States and public authorities called for assistance in a more consistent delivery of IP enforcement across the EU. In that respect they advocate closer cooperation between enforcement authorities in the area of IPR protection, for example through setting up a network of regulatory authorities of all Member States, for the mutual exchange of information and to facilitate IPR enforcement. One respondent called for explicit alternative dispute resolution mechanisms for IPR cases.

Intermediaries stresses that IPR enforcement is primarily a matter between right holder and infringer. Some respondents therefore called for a simpler and cheaper enforcement system ensuring the right holders can effectively enforce their rights against an infringer. Others called on the Commission to promote arbitration and mediation system, also in cases where intermediaries are involved. Intermediaries are also concerned about the costs incurred by them in response to court orders granting access to information or imposing injunctions. These costs should be covered by the right holder.

In general intermediaries advocated caution in the possible review of the Directive, arguing that any regime imposing more liability on intermediaries could have a negative impact on the European digital economy and its position in the global market.

Citizens mostly expressed concerns with copyright enforcement. Enforcement should focus on commercial-scale and should not criminalise individuals who do not infringe IPR deliberately or commercially or subject them to disproportionate fines. Many respondents called for appropriate consideration of the freedom of expression and other fundamental rights and the avoidance of so-called privatisation of enforcement. Some citizens have the feeling that while the Directive was first introduced as a set of rules that would stop the distribution and the source of the infringing materials it is now those consuming that content that are prosecuted.

Other respondents also call for a differentiation between infringements of different IPR. Counterfeiting of medicines and illegal downloads have a different impact and should be treated differently.

One response reported that the costs of court proceedings relating to patent infringement are prohibitively high in practically all EU Member States and therefore requested the introduction of legal aid for creators and inventors.

H. Other comments

Respondents had an opportunity to provide additional comments not directly linked to the legal framework for the enforcement of IPR.

Right holders commented that pro-active cooperation is needed from online intermediaries to combat commercial-scale IPR infringement. Often the only way to combat pirates is to pressure third party services they need to operate (e.g. ISPs, search engines, hosting service providers, payment intermediaries and advertising services). "Follow the money" initiatives which aim to deprive commercial scale infringers of their revenue flows are a critical component of any effective IPR enforcement strategy in the digital age. These should look at all categories of intermediaries in the digital value chain.

A "duty of care" for intermediaries at EU level would be a step in the right direction and should extend to all intermediaries.

Depriving the revenue of IP infringers ("follow the money") would be an effective way to hinder, if not stop, commercial scale infringement activities. This can be effectively achieved by way of agreements between right holders and the associated businesses on whom infringing businesses and persons rely to source, promote, sell and have sold their products. However, in order for such collaborative practices to be effective they have to cover all relevant stakeholders in each country and the support of the Member States is needed to bring the relevant stakeholders together. The Commission should focus efforts on endorsing and initiating these collaborative practices. Many companies, including intermediaries, have already selected to put in place their own voluntary monitoring systems. With the advanced opportunities for online IPR infringement, there are also advanced technical solutions in place to counteract new infringing activities. For example, commercial web crawler applications, RFID authentication, and the prevalence of connected technology in everyday items all work to make IPR infringement more difficult.

Some respondents agreed with the principle of prioritising enforcement against those infringers that do most harm to the EU economy, and targeting infringers' sources of income. However, they would be wary of the "follow the money" approach being allowed to dominate the proposed reforms too extensively. If "follow the money" was followed too restrictively, it might mean that rights holders would have less effective rights in relation to the initial infringer. Other respondents said that while they support this approach, voluntary measures or self-regulatory initiatives need to be supported by a clear legal framework in order to be effective, otherwise there is a lack of incentive.

Many right holders also raised the provisions on intermediary liability in the E-Commerce Directive as an issue. They called for a review of the Directive, in particular with regard to the safe harbour provisions, requesting a clarification of the liability regime.

Another issue raised was substantive copyright law. Right holders claim that the current legal framework is inefficient in ensuring adequate compensation.

Other right holders called on Member States to ensure a smooth implementation of the unitary patent, expecting a positive impact on the enforcement of their rights.

Finally, a number of right holders addressed the question of criminal enforcement of IPR, suggesting that in many instances criminal enforcement is more efficient than civil enforcement.

However, while many right holders see a need to revise the Directive, a number of right holders, in particular of industrial property rights, claimed that the current EU legal framework strikes the right balance amongst the interests of the different stakeholders, advocating that this should not be undermined by a review of the Directive. They called on the Commission to respect better regulation standards and to limit any possible review to what is objectively necessary and proportionate to the objective, based on reliable data. Right holders also asked for a holistic approach, taking into account IPRED, the E-commerce Directive and substantive copyright rules, in particular with regard to intermediary liability. These provisions need to be considered as a whole and should remain well-balanced for all players in order to avoid any inconsistencies and overlapping.

While respondents from the **judiciary and legal profession** see a certain need for further strengthening and harmonisation of IP enforcement at an EU level they are also concerned that a review of the Directive may not be the most appropriate way of achieving that, in particular due to the possible unintended impact on different IPR. They would instead prefer further guidance from national and European courts. Respondents also highlighted the need for coherence between a possible review of the Directive, the E-commerce Directive and the data privacy rules. One respondent also identified a need to improve the image of IPR: some see them as an obstacle to free competition, others consider open innovation a better model, but in any case public authorities should promote IPR better.

Member States and public authorities commented on IPR protection on the internet. Some called for a reform of the system of exemption from liability provided for in the E-Commerce Directive and promoted voluntary agreements between right holders and internet intermediaries, including internet access providers, domain name registrars, search engines, payment services and mobile app stores. Other respondents supported an analysis of the need for new proposals to enhance the intermediaries' use of effective notice and action mechanisms for removing illegal online content and invited the European Commission to provide (1) guidance to intermediaries on how best to implement efficient and cost-effective procedures and (2) guidance to notifying parties on how to present notifications in order for them to be dealt with in a simple way.

Intermediaries did not identify a need to review the E-Commerce Directive. They considered that the liability limitation for third party content provided by the E-Commerce Directive has been essential for the development of online services in Europe. It also ensures, in their view, a balanced approach that both protects online intermediaries from liability for the misuse of their services by users and third parties and allows the intermediary to act expeditiously to remove or disable access to illegal information upon receiving actual knowledge of it. Respondents also believe that unlimited liability for monitoring illegal content and goods

online is not a practical or realistic approach in the online world and recall that the measures, procedures and remedies provided for by the Directive must respect Article 15 of the E-Commerce Directive, which prohibits national authorities from adopting measures which would require an internet service provider to carry out general monitoring of the information that it transmits or to actively monitor all the data of each of its customers in order to prevent any future infringement of IPR.

At the same time, intermediaries are already monitoring the use of their services in order to prevent IPR infringements. In that context, intermediaries asked how they could put in place additional, voluntary measures aimed at stopping IP infringing use of their services while preserving the liability protection of the E-Commerce Directive. They also raised the question of how injunctions aimed at preventing future infringements can be compatible with the general prohibition to monitor.

Most respondents support voluntary initiatives involving intermediaries in the protection of IPR. In their view, an approach aimed at removing the revenue sources of online infringement and bringing together right holders, intermediaries and all other relevant stakeholders would be more effective and proportionate. Such mechanisms could more effectively address new or rapidly evolving subject matters. At the same time respondents also stress that it is essential that these voluntary agreements are proportionate and necessary to achieve the objectives pursued and maintain a balance between all the fundamental rights involved.

The enforcement of IPR on the internet is also the main topic of the comments by **citizens**. Citizens are of the opinion that the measures provided under IPRED do not strike a fair balance between the aims of copyright enforcement and the protection of fundamental rights such as privacy, protection of personal data and freedom of speech; and any change in the enforcement of IPR should enhance the protection of fundamental rights and the freedom of the internet.

Respondents are also concerned about the increasing involvement of intermediaries in IPR protection. IPR enforcement needs to avoid the situation where internet service providers are forced to filter content based on the orders imposed by the civil courts enforcing IPR, contrary to the provisions of the E-Commerce Directive. It should also be considered how mechanisms for notice-and-action could be made more consistent, transparent and efficient across Member States.

Many citizens finally believe that the debate should not focus on enforcement but on the substantive law, in particular with regard to copyright. They call for a review and harmonisation of user exceptions and limitations, shorter term for copyright protection, and fair use.