

Plant variety rights

Trade names

What is the value of your IPR portfolio?

Total royalty receipts in 2011 = 320,1M€

How do infringements of your intellectual property rights impact the total value of your IPR portfolio (eg. estimated annual loss of turnover)? How do you calculate this impact?

It is difficult to quantify the impact of IPR infringement in terms of estimated annual loss of turnover for SGAE, as the loss for the industry -estimated in 2012 by the Spanish Piracy Observatory at 15,204.7M€ for music, films, videogames and books- is not equivalent, as far as digital piracy is concerned, to a lost income for such industry. In fact, many new factors must be taken into account with respect to IPR infringement in Internet, such as the capacity of storage, the gratuity of contents, the easiness of acces, the absence of legal consequences, etc. In addition, the impact of IPR infringement is much broader than a lost income and affects society as a whole and governments, having a direct impact on: - social and welfare effects = reduction of royalty incomes for right holders, - cultural diversity = reduction of the incentives to create and decrease of the cultural offer available at national level, - economy and investments = reduction of the incomes to invest due to uncertainties of any returns on investmens, - governments = decrease in tax revenues, jobs, foreign investments and global lower incomes.

What is the substitution rate between original goods and counterfeited/pirated goods in your sector according to your estimation? How do you measure this rate?

According to the 2013 Special 301 Report on Copyright Protection and Enforcement of the International Intellectual Property Alliance (IIPA), Piracy of audiovisual products, music and sound recordings, and entertainment software in Spain has supplanted the legitimate market place, making it extremilly difficult for these industries to distribute authorized content. Comparative studies continue to show that Spain has among the most Internet piracy problems in the EU and continues to suffer considerable damage to the distribution infrastructure for legitimate content. As an example, the IIPA inform for 2013 estimates at 73,9% the rate of piracy for the film industry in Spain, 90% music downloaded by Spanish users today is unauthorized. According to a study carried out in 2012 by GFK for the Spanish Piracy Observatory, 69% of the public do not pay for a content if it can access to it without any cost.

How do infringements of your intellectual property rights impact your investment in research, development and innovation (eg. estimated loss in investments/amount of investments not undertaken)?

IPR infringement directly impacts on cultural diversity through the reduction of the incentives to create and consequently on the cultural offer available at national level. Thus, apart from its disastrous consequences on copyrighted content sales, IPR infringemente is also having a strong impact on local talent development in the Spanish music industry

What is the relevance of the quality of civil enforcement system for intellectual property rights for your research, development and innovation investments? Crucial

Please explain:

Masive piracy not only reduces the royalty incomes of rightholders, limiting their resources and incentives for bringing new creative contents to market. It also constitutes a significant barrier for investment in the cultural and entertainment national industry and a huge obstacle for the further development of new online content services, as potential new entrants in the Spanish market know that they will not be able to compete with illegal services. The quality of the civil enforcement system for IP rights is of a crucial importance for investments in the creative and cultural industries. Thus, for example, in Spain, weak IP enforcement laws and practices are having a direct effect on business initiatives for the development of legal offer at national level, which cannot compete against the "free-for-all" internet culture.

Efficiency and effectiveness of civil proceedings in cases concerning infringements of intellectual property rights

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

What kind of alternative dispute resolution mechanisms did you undertake? BILATERAL NEGOTIATIONS

What were the costs and the length of proceedings? 1 to 3 months (bilateral negotiations). Around 18 months (court proceedings). No cost (bilateral negotiations). Approximately 280€ (civil action)

Were your rights sufficiently safeguarded (including right to privacy, right to be heard, and due process)? Please explain: Yes. The percentage of rejection sentences is inferior to 7%

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

Please explain:

Alternative dispute resolution mechanisms are permitted by the Spanish IP law (arbitration, extrajudicial conflict resolution mechanisms available through codes of conduct or self regulation tools) and are accesible to the parties affected by an infringement. However, in practice, such mechanisms are not used in cases of IP infringements but only in certaing occasions in relation to the fixation of tariffs, which is a very sensitive and complex issue.

Did you take part in litigation of cases concerning the infringements of IPRs during the period under examination?	YES
In how many cases per year do you take part on average?	3.000
How many of these cases were subject to an appeal?	< 10%
In which capacity?	PLAINTIFF
In which countries? Please indicate relevant Member States:	ES - España
Did you already launch proceedings concerning infringements of your IPRs that occurred in another Member State?	NO
Please explain why:	
Did you already launch proceedings concerning infringements of your IPRs that occurred in several Member States?	NO
Have claims against the validity of infringed/allegedly infringed intellectual property rights been made in the context of the litigation you were a party to?	YES
Please explain what was the impact of these claims on the procedure concerning the infringement:	For instance the validity of a tariff may be discussed in the context of a litigation, or the use of a copyleft repertoire, which could affect the result of the claim.
In approximately what percentage of cases were these intellectual property rights found to be invalid as a result of these claims?	0
For what reasons did you refrain from litigating?	PROCEDURES TOO COSTLY
Did your decision on whether or not to litigate depend on the jurisdiction?	NO
Did your decision on whether or not to litigate depend on the type of court concerned (e.g. courts specialised in intellectual property as opposed to standard commercial courts)?	NO
For you, is it more important to stop infringements that are committed for profit than infringements committed not for profit?	IT IS MORE IMPORTANT
What is your general intention in instituting civil law court proceedings concerning infringements of intellectual property rights?	TO BE COMPENSATED FOR THE INFRINGEMENT
What was the amount of a court fees that you had to pay for instituting first instance proceedings on the merits of the case concerning an infringement of your IP right?	
Did you have to pay any other court fees in relation to the first instance proceedings on the merits of the case concerning an infringement of your IP right?	NO
What was the amount of external experts' costs you had to pay in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right?	N/A

What was the amount of in-house costs you had to bear in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right?	N/A
What was the amount of legal representation costs you had to pay in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right?	N/A
Please indicate, if appropriate, other costs that you had to bear in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right:	N/A
What was the total amount of costs you had to bear in relation to the first instance proceedings on the merits of the case concerning infringement of an IP right?	N/A
Please explain how do these costs change for the preliminary proceedings:	N/A
Please explain how do these costs change for the appeal proceedings:	N/A

Please indicate which of the various costs associated with the proceedings on the merits of the case at first instance were ordered by the court to be reimbursed to the winning party by the losing party following the final decision:	
Copyright:	
Rights related to copyright:	
Sui generis right of a database maker:	
Rights of the creator of the topographies of a semiconductor product:	
Trademark rights:	
Design rights:	
Patent rights:	
Geographical indications:	
Utility model rights:	
Plant variety rights:	
Trade names:	
Do you consider that the general rule, according to which legal costs and other expenses incurred by the successful party shall be borne by the unsuccessful party, is effectively applied by the courts?	YES
Please explain:	Under Spanish law, this general rule according to which legal costs and other expenses incurred by the successful party shall be borne by the unsuccessful party exist and is effectively applied by the courts.

Please indicate the average time (months and days) between the lodging of a request before a court and the granting of a preliminary injunction (e.g. cease and desist orders against the infringer) in civil law cases concerning infringement of an IP right in your Member State/ in the Member States in which you have been a party to court proceedings:	N/A
Please indicate the average length (months and days) of court proceedings on the merits of the case (from lodging the claim to obtaining the final decision of the court at first instance) in civil law cases concerning infringement(s) of an IP right(s) in your Member State/ in the Member States in which you have been a party to court proceedings:	N/A
Please indicate the average length (months and days) of the appeal court proceedings (from lodging the appeal to obtaining the final decision of the court at appeal) in civil law cases concerning infringement(s) of an IP right(s) in your Member State/ in the Member States in which you have been a party to court proceedings:	Between 6 months and 1 year
Do you think it would be useful to establish, at EU level, model rules for fast track proceedings for civil law cases concerning infringements of IPRs?	YES
Please explain, specifying in particular what types of infringements of IPRs could be covered, and what kind of measures should be granted, in the course of such fast track proceedings:	- For instance, for IP infringement committed in the digital environment - Measures aimed at facilitating the identity of the alleged infringer
Do you think it would be useful to establish, at EU level, specific (in addition to Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European small claims procedure) model rules for small claims proceedings for civil law cases concerning infringements of IPRs?	NO
Please explain, what would be, in your opinion, the drawbacks of this system?	N/A
Do you think it would be useful to establish rules for fast track proceedings for litigation of infringements of community trademarks and community designs?	NO OPINION
Do you think it would be useful to establish rules for small claims proceedings for litigation of infringements of community trademarks and community designs?	NO OPINION
What safeguards of defendant's rights should be put in place in case of the EU-level fast track/small claims proceedings concerning infringements of IPRs?	N/A

Right of information

How do you identify infringers/alleged infringers of your IPRs?	Serious challenges remain in Spain to identify online infringers in both civil and criminal IP infringement proceedings. An effective mechanism should be created to allow right holders to obtain the information necessary to protect and enforce their rights. It is necessary to review the Spanish Data Protection Law to permit disclosure of the appropriate information so as to facilitate right holders' actions and to guarantee effectively that a "fair balance" between two fundamental rights as the "right to respect for private life" and the "rights to protection of property and an effective remedy" is guaranteed as required by the TJUE jurisprudence in the "Promusicae v. Telefonica decision". This fair balance does not currently exist in Spain.
Do you face problems identifying infringers/alleged infringers of your IPRs?	YES
Please explain what are the main difficulties:	The Spanish E-Commerce Law (the LSSI) provides on the one hand, that personal data can only be disclosed in criminal proceedings. This law combined with an Attorneys General's 2006 Circular that decriminalized infringements via P2P networks and to the inability to obtain user information in civil proceedings rendered right holders unable to enforce their copyright online, civilly or criminally.
Has it been possible for you to obtain information allowing identification of infringers/alleged infringers directly from an intermediary?	NO
What was the justification when the request was denied?	IT IS REQUIRED TO FIRST OBTAIN AN ORDER FROM A COMPETENT JUDICIAL AUTHORITY
Has it been possible for you to obtain a court order obliging an intermediary to disclose the identity of the infringer/alleged infringer?	NO
What was the court's particular justification for a denial?	LIMITS IMPOSED BY DATA PROTECTION RULES
Has it been possible for you to obtain a court order obliging an intermediary to disclose the identity of the infringer/alleged infringer of your IPRs in case where the intermediary and/or the infringer/alleged infringer of your IPRs were incorporated, or resident in a Member State other than the one in which you operate?	NO

Please explain:

In addition to the above-mentioned reasons, Spain has not properly implemented Art. 8 of the Enforcement Directive on the right of information, which suffers from a burdensome dual commercial scale requirement, applying to both the services provided by the ISP as well as to the infringements committed by the direct infringer, whereas the Directive only requires the commercial scale condition only to the services provided by the ISP. In general, it is possible to say that the IP Commission's activities have been very limited - Out of 363 requirements, only 30 were accepted and illegal websites were closed - on a voluntary basis.

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

Do you consider the possibility to use notification mechanisms to be a useful tool to inform the intermediary about the fact that his services are being (allegedly) used to infringe an intellectual property right and thus bring a stop to the infringing/allegedly infringing activity?

YES

Please explain:

The preliminary procedures available under the Spanish Civil Procedural Law (1/2000, Art. 256) are frequently used in cases of IP infringements, in particular in relation to the payment of the private copy compensation. With respect to the IP infringement committed in the online environment, a new administrative-judicial mechanism was specifically designed as a tool to inform the intermediary about the fact that his services are being allegedly used to infringe an intellectual property right and thus bring a stop to the alleged infringement activity.

Do you consider the possibility to use notification mechanisms to be a useful tool also where the infringements/alleged infringements occurred in, or the intermediaries are incorporated in, a Member State other than the one in which you operate?

YES

Please explain:

Under the above-mentioned mechanism, for each complaint filed, the IP Commission is to issue notifications to both the responsible party (the infringer) and the intermediary. The responsible party is required to remove the infringing content within 48h, but the procedure also fixes the intermediary with effective knowledge of the infringement, including future links to the same file, and is required to take down the infringing link or material if the responsible party has not done so. Unfortunately the IP Commission has treated linking sites that have been subject of complains as intermediaries leading to a situation where linking sites which are the most harmful actors, are not held accountable for immediate removal as responsible parties. Under this procedure if the owner of a website subject to a complaint refuses to submit a convincing rebuttal or remove the infringing contents, the IP Commission may ask the Administrative Court for authorization to block access to the site through an ISP. The judge would only review whether the remedy is justified and the fundamental rights respected, without examining the merits of the case. He has to take this decision to authorize or reject the measure within 4 days, with a view to accelerate the procedure for the removal of infringing content hosted on websites.

Do you consider the possibility to use notification mechanisms to be a useful tool to inform the infringer/alleged infringer about the infringing/allegedly infringing character of his activity?

YES

Please explain:

As previously explained, the IP Commission mechanism has not resulted efficient. In particular, one of the limits of this mechanism is that the infringers are frequently located in foreign jurisdictions and the IP Commission has no possibility to execute its notifications.

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

YES

Please explain:

In a general way, none speedy and effective responses to complaints an responsible and it is necessary to held responsible not only locker and host sites, but also linking sites. In its one year of existence, the IP Commission has not referred any complaint to the Judge for issuance of a judicial order.

In cases of notorious infringers of intellectual property rights, do you consider that there should be particular consequences (i.e. including e.g. suspension of the infringer's/alleged infringer's account) resulting from a notification mechanism?	YES
Please explain:	However, a efficient implementation of the existing tools would be necessary as a priority measure.

Requirements for granting injunctions	
Have preliminary injunctions been sought in the context of the litigation you were party to?	NO
Have permanent injunctions been sought in the context of the litigation you were party to?	NO
Is the urgency of the case taken into account by the competent judicial authorities when granting a provisional injunction?	YES
Is the potential harm of the measure for either of the parties taken into account by the competent judicial authorities when granting a provisional injunction?	
Is the impact of the measure on the market, competition and consumers taken into account by the competent judicial authorities when granting a provisional injunction?	NO
Are claims against the validity of IPRs taken into account by the competent judicial authorities when granting a provisional injunction?	NO
What other circumstances are taken into account by the competent judicial authorities when granting a provisional injunction?	When there are rational and established motivations justifying that an infringement is imminent.

Injunctions imposed on intermediaries	
Have you obtained a preliminary injunction imposed on an intermediary who was not a party to the proceedings?	NO
Please explain on what grounds such a preliminary injunction was not granted:	Under Spanish IP Law, preliminary injunctions are possible against intermediaries whose services are being used by a third party to infringe IP rights. Such measures, are very rarely used in practice in relation to IP infringement due to the difficulty to prove the "effective knowledge" of the intermediary about the infringing activity.
Have you obtained a permanent injunction imposed on an intermediary who was not a party to the proceedings?	NO
Please explain on what grounds such a permanent injunction was not granted:	See above.
Have you obtained a permanent injunction imposed on an intermediary providing services necessary for the financing of the infringing activity (e.g. a payment service provider)?	NO
Please explain on what grounds such a permanent injunction was not granted:	See above.

Have you obtained a permanent injunction imposed on an intermediary providing services necessary to access the infringing services/goods?	NO
Please explain on what grounds such a permanent injunction was not granted:	N/A
Have you obtained a preliminary injunction imposed on an intermediary providing services necessary to access the infringing services/goods when the intermediary or the person infringing/allegedly infringing your IPRs were incorporated in a Member State other than the one in which you operate?	
Have you obtained a permanent injunction imposed on an intermediary providing services necessary to access the infringing services/goods when the intermediary or the person infringing/allegedly infringing your IPRs were incorporated in a Member State other than the one in which you operate?	NO
Please explain on what grounds such a permanent injunction was not granted:	N/A

Third party facilitation of infringements of IPRs

Corrective measures

Have corrective measures been ordered in cases in which you have been a party?	NO
Should the competent judicial authorities privilege one specific type of corrective measure?	YES
Please explain which one:	The corrective measures provided for in the Spanish IP Law (Art. 139 and following) are sufficient. The problem lays in their implementation in practice.
Should the competent judicial authorities be able to order that the goods that were found to infringe an intellectual property right should be disposed of outside the channels of commerce?	YES
Please explain under which conditions should the competent judicial authorities be able to order disposal outside the channels of commerce:	Depending on the specific conditions of the infringement, the judge may decide to privilege the disposal outside the channels of commerce or the destruction.
Should the consent of the right holder constitute a conditio sine qua non for disposing of the goods that were found to infringe an intellectual property right outside the channels of commerce?	YES
Please explain how in your opinion the infringing goods could be disposed of outside the channels of commerce:	Either through destruction or preventing access to the infringing goods.
Would you be in favour of introducing sanctions for a party who, notwithstanding that the infringing goods were subject to corrective measures ordered by the competent judicial authorities, allowed these goods to subsequently return to the channels of commerce?	YES
Please explain:	N/A

Damages	
How do you determine the amount of damages to be awarded for the purpose of filing a civil claim concerning an infringement of an IPR?	Damages are determined under Spanish IP Law based on the value of the lost suffered by the rights holder as well as on the lost invoice. Investigations costs may also be included (Art. 140 LPI).
Do you take into account the resources invested in research and development while determining the damages to be awarded for the purpose of filing a civil claim concerning an infringement of an IPR?	YES
Please explain:	See above.
On what basis do the competent judicial authorities establish the amount of damages awarded to the right holder in its final decision in a civil claim concerning an infringement of an IPR?	Based on the general tariffs of the collective management society administering the rights of the rightholder.
Is the unjust enrichment of the infringer taken into account by the competent judicial authorities in the course of establishing the amount of damages to be awarded to the right holder in its final decision in a civil claim concerning infringement of an IPR?	YES
Is due diligence of the right holder taken into account by the competent judicial authorities in the course of establishing the amount of damages to be awarded to the right holder in its final decision in a civil claim concerning infringement of an IPR?	YES
Is it possible for the competent judicial authorities in civil law cases concerning an infringement of IPRs to award damages on the joint basis of provisions on compensation for lost profits and those on unjust enrichment?	YES
Is it possible for the competent judicial authorities in civil law cases concerning an infringement of IPRs to award damages on the basis of the alleged infringement of a broader portfolio of intellectual property rights, despite the fact that normally only a very limited number of these rights are asserted during one particular court proceeding?	NO
Please explain:	It is not possible under the general principle of Justice, which conditions the resolution obtained to the request which is presented.
Would you agree that the level of damages awarded to the right holder in civil law cases concerning an infringement of IPRs should at least equal the profits made by the infringer?	YES
Please explain:	As a minimum - It is sometimes difficult to evaluate the lost profit.
Do you consider the award of damages in cases of intellectual property rights' infringements is sufficient to compensate for the actual prejudice suffered by the parties affected by an infringement?	NO
Please explain:	The law should include elements to provide for more important damages in cases of specifically grave or repeated infringements.

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

In approximately what percentage of cases would you consider that a party used IPR enforcement measures frivolously and/or for anti-competitive purposes? 0