



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

Copyright	CRUCIAL
Rights related to copyright	CRUCIAL
Sui generis right of a database maker	CRUCIAL
Rights of the creator of the topographies of a semiconductor product	
Trademark rights	CRUCIAL
Design rights	
Patent rights	
Geographical indications	
Utility model rights	CRUCIAL
Plant variety rights	
Trade names	
What is the value of your IPR portfolio?	Our members contribute substantially to the annual market value of about 500€ billion generated by cultural industries in Europe.
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?	As a trade association, the MPA does not have a commercial role of its own and is thus not in a position to estimate the total value of any IPR portfolio. This said and in light of the above, we consider that robust enforcement of copyright throughout Europe is crucial. There is notably an urgent need to incentivise more legitimate players to enter the online distribution of audio-visual works with increased cooperation from intermediaries and by ensuring adequate remedies to address rogue sites, many of which are still located in the EU. With Europe facing difficult economic times characterized by both financial frailty and under-performing economies, the policy focus of the EU should clearly be on policies that encourages the growth of economic activity and job creation. It is worth emphasizing that the audio-visual online licensing market in Europe is dynamic, diverse and growing rapidly (see ECs Green Paper on the online distribution of audio-visual works in the European Union, COM(2011) 427). Not many economic sectors can boast such economic results today and it is therefore crucial to ensure that any new initiatives, notably in the field of enforcement of IPRs, strengthen the foundations of this spectacular success story in a manner consistent with the European Commissions own commitment to promote above all growth-enhancing measures as part of the Europe 2020 Strategy. We would like to recall that our members are active across the EU and globally. They contribute substantially to the annual market value of about 500€

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?

N/A

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)?

As a trade association, the MPA does not have a commercial role of its own and is thus not in a position to estimate the total value of any IPR portfolio. This said and in light of the above, we consider that robust enforcement of copyright throughout Europe is crucial. There is notably an urgent need to incentivise more legitimate players to enter the online distribution of audio-visual works with increased cooperation from intermediaries and by ensuring adequate remedies to address rogue sites, many of which are still located in the EU. With Europe facing difficult economic times characterized by both financial frailty and under-performing economies, the policy focus of the EU should clearly be on policies that encourage the growth of economic activity and job creation. It is worth emphasizing that the audio-visual online licensing market in Europe is dynamic, diverse and growing rapidly (see EC's Green Paper on the online distribution of audio-visual works in the European Union, COM(2011) 427). Not many economic sectors can boast such economic results today and it is therefore crucial to ensure that any new initiatives, notably in the field of enforcement of IPRs, strengthen the foundations of this spectacular success story in a manner consistent with the European Commission's own commitment to promote above all growth-enhancing measures as part of the Europe 2020 Strategy.

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:

A high quality of civil enforcement of copyright throughout Europe is crucial for our members' research, development and innovation research. A high standard of enforcement is a necessary prerequisite for the willingness of stakeholders to invest in the creation of new content. There is notably an urgent need to incentivise increased cooperation from intermediaries and by ensuring adequate remedies to address rogue sites, many of which are still located in the EU.

### 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?	MEDIATION OTHER
What were the costs and the length of proceedings?	National legal proceedings involve substantial legal costs though the actual levels vary considerably from member state to member state. We estimate the range of 25K for preliminary proceeding up to several hundred thousand euros for proceedings involving appeals (to the ECJ). The length of proceedings also varies considerably. While preliminary or urgent matters are often heard relatively quickly (on average a decision is rendered within three months since filing, procedures on the merits can take considerable time (on average 1 to 5 years).
Were your rights sufficiently safeguarded (including right to privacy, right to be heard, and due process)? Please explain:	The recent CJEU caselaw, confirms that fundamental rights have to be weighed. Additional safeguards are not required. National courts apply the CJEU caselaw. See Justice Arnold in <i>EMI v. BT</i> (2013 EWHC 397 Ch.). there are two reasons why it is necessary to consider the proportionality of orders in this field. The first is that article 3(2) [IPRED] imposes a general obligation to consider the proportionality of remedies for the infringement of intellectual property rights (see <i>LOreal v. eBay</i> ). The second is that the CJEU has held that, when adopting measures to protect copyright owners against online infringement, national courts must strike a fair balance between the protection of intellectual property rights guaranteed by Article 17(2) of the Charter of Fundamental Rights of the European Union (the Charter) and the protection of the fundamental rights of individuals who are affected by such measures, and in particular the rights safeguarded by the articles of the Charter.
Please explain:	ADR is pursued and a viable tool if one is dealing with a defendant who is willing to engage, although it is not always appropriate for example large scale internet piracy cases where rogue and anonymously operating entities are involved. The MPA does not resort to issuing court proceedings until other options have been fully considered. Recourse to court proceedings remains a very necessary option, particularly in cases of willful wholesale copyright infringement.
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:	ADR is sufficiently accessible in our experience. There should be no requirement to use ADR as a precursor to litigation.

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?	MPA manages on average 5/15 cases per year either directly or indirectly.
How many of these cases were subject to an appeal?	A minority of cases are subject to appeal (1/3 cases on average).
In which capacity?	PLAINTIFF OTHER
Please explain:	MPA manages litigation on behalf of it's members (studios) and advises local rightholders involved in litigation.
In which countries? Please indicate relevant Member States:	AT - Österreich BE - Belgique / België CZ - Česká republika CY - Κύπρος DE - Deutschland DK - Danmark FI - Suomi/Finland FR - France IE - Éire/Ireland IT - Italia LU - Luxembourg NL - Nederland RO - România SE - Sverige UK - United Kingdom
Did you already launch proceedings concerning infringements of your IPRs that occurred in another Member State?	YES
Did you already launch proceedings concerning infringements of your IPRs that occurred in several Member States?	YES

<p>Were you able to consolidate all these claims in one jurisdiction or were you obliged to launch the proceedings in the jurisdiction of several Member States? Please explain:</p>	<p>We have not been able to consolidate claims in one jurisdiction (see C-4/-3 GAT/LUK). There are clear efficiency benefits to consolidating proceedings. Structurally-infringing websites such as The Piratebay, relocate from member state to member state in a matter of minutes simply by changing their hosting provider. They also spread their business operations out over several territories, i.e. hosting in country A, payment structure in country B, DNS registrar in country C, Ad-broker in country D, etc. Rightholders are forced to start highly similar legal proceedings in all these different member states. The lack of combined proceedings has, in the case of Piratebay, led to courts in at least 10 member states, over the past 8 years, granting similar injunctions against this website or against intermediaries that facilitate it. Yet it survives and grows in popularity. In order to avoid these inefficiencies better regulations to allow an injunction against a specific service obtained in one member state to be enforced in another member state, either directly or by way of an expedited court procedure could be considered.</p>
<p>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?</p>	<p>NO</p>
<p>In approximately what percentage of cases were these intellectual property rights found to be invalid as a result of these claims?</p>	<p>0</p>
<p>For what reasons did you refrain from litigating?</p>	<p>OTHER</p>
<p>Please explain:</p>	<p>Legal systems that are overly formalistic and that dont provide effective remedies (such as title specific injunctions) are a reason to refrain from litigating. Another reason to refrain from litigation is when negotiations (outreach) can provide similar results. The MPA undertakes litigation to establish or clarify principles of law and to secure cooperation from intermediaries to stop, prevent and deter infringements.</p>
<p>Did your decision on whether or not to litigate depend on the jurisdiction?</p>	<p>YES</p>
<p>Please explain:</p>	<p>Decisions can be impacted by the jurisdiction and its substantive and procedural laws on enforcement (for example the lack of Art.8.3 implementation in Germany) and the effectiveness of the relief provided. The decision where to litigate also depends on where the infringing operation or the intermediary is located. The issue of national procedural law and expected costs are important factors. Some member states lack expedient / cost-effective national procedure or effective relief.</p>

<p>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)?</p>	<p>YES</p>
<p>Please explain:</p>	<p>Yes, to a limited extent. Specialized IP judges (such as tend to exist in the field of patent law) would be a benefit to all stakeholders. The application of copyright law has, especially in the online era, become a highly specialized field. Specialized judges will provide more consistent outcomes. Costs would go down as well. MPA supports measures for having specialist intellectual property judges deal with IP cases.</p>
<p>For you, is it more important to stop infringements that are committed for profit than infringements committed not for profit?</p>	<p>IT IS NOT MORE IMPORTANT</p>
<p>What is your general intention in instituting civil law court proceedings concerning infringements of intellectual property rights?</p>	<p>TO STOP THE INFRINGING ACTIVITY TO TAKE MEASURES TO PREVENT FURTHER INFRINGEMENTS TO DISSUADE INFRINGING BEHAVIOUR IN THE FUTURE OTHER</p>
<p>Please explain:</p>	<p>The MPA undertakes litigation with a view to stopping the infringing act, minimising damage to the creative industries and establishing or clarifying principles of law and with a view to achieving cooperation from, in particular, intermediaries on the long term. Litigation as an enforcement tool is used against uncooperative platforms that do the most damage to the legal market, i.e. the most damaging forms of piracy.</p>
<p>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?</p>	<p>Court fees vary from country to country and in general they are not a barrier to launching proceedings. However, some member states (Finland and Germany) require payment of high guarantee sums before enforcing an injunction and this can be a barrier to starting civil litigation (especially for smaller rightsholders).</p>
<p>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?</p>	<p>YES</p>
<p>Please specify total additional costs and explain what the fee was paid for and indicate the Member State(s) where the proceedings took place and the intellectual property right(s) that constituted the subject of these proceedings.</p>	<p>Some member states (ex. Finland, Sweden and Germany) require payment of high guarantee sums before enforcing an injunction and this can be a barrier to starting civil litigation (especially for smaller rightsholders).</p>

<p>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?</p>	<p>The assistance of experts is sometimes mandated by the court and otherwise undertaken by parties to support their case. In the area of internet related litigation assistance from IT specialists, statisticians, accountants and academics is regularly acquired. The costs of these experts are set on the basis of free market principles or on the basis of court determined fee levels. The range of costs is generally in the 5/25K range but it can go as high as 100/150K. The most expensive experts tend to be in the area of academics, statisticians, accountants and technical experts.</p>
<p>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?</p>	<p>The MPA and their member studios combined allocate more than 10 FTE to the management of litigation and enforcement for the EMEA region.</p>
<p>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?</p>	<p>There are substantial differences across member states in the cost of legal representation. Some member states (eg Germany) provide for a statutory system of costs while in others the cost is generally based on an hourly rate and the time spent (for example the UK). In general the most expensive cases are test cases where the law or procedure is not clear and the defendant chooses to contest aspects of the case. In order to reduce the overall cost of civil litigation against one service within the EU, there should be fast-track procedures so that an injunction obtained in one member state can be enforced in other EU member states (summary procedure).</p>
<p>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:</p>	<p>In some countries, civil procedure requires the payment of a guarantee into court when right holders are seeking an injunction. The payment of such a guarantee can be prohibitive and means that right holders literally do not have the resources to apply to court for an effective injunction. For example in Finland, Finnish rightholders had to pay EUR 600K as a guarantee into court before preliminary injunctions were issued against three ISPs requiring them to block The Pirate Bay.</p>
<p>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?</p>	<p>The total amount of costs vary greatly between member states. It depends on legal fees, court fees, guarantees and the cost reimbursement. In some member states the legal fees are high but there is adequate cost reimbursement (UK) making the net-cost low. Other countries have low costs but cumbersome procedure and ineffective relief (UK). To improve the lack of harmonization MPA advocates that (a) full cost reimbursement (art. 14 IPRED) is better harmonized and (b) that secondary infringers/facilitators are also exposed to full cost reimbursement.</p>

Please explain how do these costs change for the preliminary proceedings:

The cost of a preliminary proceeding may be less expensive but there will often be a requirement to pay a guarantee for the enforcement of a preliminary ruling.

Please explain how do these costs change for the appeal proceedings:

The costs of an appeal are usually lower than a first instance proceeding since the facts are already established at the first instance levels.

**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?

NO

Please explain:

The application of article 14 IPRED varies substantially from MS to MS. The provision on payment of full legal costs is a critical tool for providing disincentives to commercial scale copyright infringement. Those that knowingly engage in commercial scale infringement should be exposed to payment of full legal costs. Application of know your customer regulations to internet intermediaries is a necessary ingredient to be able to actually collect cost awards.

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:

The time between lodging a request and the granting of a preliminary injunction on average takes between two weeks and three months. This is too long in the internet era. Fast action is especially necessary since Movies/TVshows are at their most valuable when they are first released/broadcasted. Article 9.4 ED provides for ex-parte PI. This is an effective instrument, however it is not clear in all MS whether ex-partes can be applied against direct infringers or also against internet intermediaries that facilitate infringement. Further clarification that not only direct infringers but also internet intermediaries are in the scope of the article 9 Enforcement Directive (specifically article 9.4 re ex-parte injunctions) would speed up enforcement.

<p>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:</p>	<p>This depends on the jurisdiction and the remedy sought, and some member states are more expedient than others but on average proceedings on the merits take several years (range is between 1 to 5 years). This is clearly too long in the internet era. The gaps between ex-parte (several days), injunctive relief (several months) and full proceedings (several years) are too wide and could be addressed by proposals for fast-track procedures. Fast track procedures could bridge the gap between injunctive procedures and procedures on the merits. On the whole it could also be clarified more that ex-parte procedures and PI can be applicable to intermediaries that facilitate infringement (and not just direct infringers).</p>
<p>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:</p>	<p>Appellate proceedings take between 1 and 3 years.</p>
<p>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?</p>	<p>YES</p>
<p>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:</p>	<p>The MPA believes that it would be useful to establish rules for fast track procedures. As stated in previous answers we believe that the gap between injunctive relief procedures and procedures on the merits (months vs. years) is far too wide. Fast track procedures could fill this gap. Fast track procedures could also cover procedures against intermediaries that lead to procedures against the actual infringers (i.e. the identity disclosure and evidence preservation claims in articles 6, 7 and 8 ED) as well as procedures for the enforcement of injunctions from other member states.</p>
<p>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?</p>	<p>YES</p>

Please explain, specifying in particular what types of infringements of IPRs could be covered by such small claims proceedings:

Fast track proceedings could cover copyright and specifically focus on injunctive relief, including injunctions against intermediaries (Art.8.3-type relief). Fast track procedures could specifically cover the identity disclosure and evidence preservation claims in articles 6, 7 and 8 ED) as well as procedures for the enforcement of injunctions from other member states. The most important thing is to stop on-going copyright infringements and facilitation of copyright infringement as soon as possible. It is also vital to have right of information tools available to enable the identification of defendants so as to be able to take action against the infringer directly.

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?

The MPA believes that it would be useful to establish model rules for small claims proceedings. Some member states have small claims proceedings. For instance in the UK and the Netherlands. Such procedures are designed to make the court process cheaper and easier by de-formalising the process and allowing the parties involved to participate without using lawyers. The Small Claims Track is only available for low value IP claims (range 5K/10K) and will only deal with infringement in copyright, trade marks, unregistered designs and passing off. It will not deal with cases involving patents and registered design rights. However, rightholders should not be forced to use fast track/small claims procedures if the claim is below the threshold as there may be reasons why normal procedures are appropriate. However, in particular smaller companies may be excluded from the legal system and find enforcing their rights too costly and time consuming. Small claims proceedings can address that lack of balance. Small claim proceedings should not focus on monetary claims only but include the ability to file for injunctive relief. Injunctive relief is what is missing from the existing small claims procedures. Companies of all sizes have access to justice, including the ability to stop on-going infringements. Small claim proceedings should be subject to judicial oversight as is common in national small claims procedures. This safeguards the defendants rights.

## Right of information

<p>How do you identify infringers/alleged infringers of your IPRs?</p>	<p>Commercial scale infringers operate without any regard for the law, anonymously (fake and/or anonymous WHOIS data) and funnel their revenues through empty shell companies (Seychelles, Panama, etc). It is difficult to identify this level of infringer. Identification is sought by reviewing publicly available records (WHOIS) and by filing for disclosure orders against banks and other intermediaries. The process is ineffective and the information often fake. Internet intermediaries like domain name providers, hosting providers, payment providers, online ad-brokers should be subject to know your customer obligations (see article 5 Enforcement Directive) and the money laundering Directives. Rightholders should in particular have the legal means to locate commercial scale infringers. The European Court of Justice has confirmed in the LOreal v. eBay case that infringers operating in the course of trade must be identifiable. See paragraph 142 in LOreal v. eBay.</p>
<p>Do you face problems identifying infringers/alleged infringers of your IPRs?</p>	<p>YES</p>
<p>Please explain what are the main difficulties:</p>	<p>Anonymity. Internet intermediaries (ex. hosting providers and payment providers) knowingly facilitate infringers by doing business with anonymous clients. The EU existing know your customer (KYC) legislation (see 3rd Money Laundering Directive) applies to banks, lawyers, real estate agents, casinos. It should also be made applicable to internet intermediaries. Anonymous businesses prevents the legal system from working and member states lose substantial tax revenues.</p>
<p>Has it been possible for you to obtain information allowing identification of infringers/alleged infringers directly from an intermediary?</p>	<p>YES</p>
<p>Please explain by which type of intermediary and by what means:</p>	<p>In most cases intermediaries are only willing to provide contact details following court orders. In this respect the decision in the CJEU Bonnier case (C461/10) has brought clarity that the right of information clause in Article 8 of the Enforcement Directive is consistent with EU law. Yet some intermediaries continue to oppose in order to protect their status as so called bullet proof hosters. An example is the case of BREIN v. XS Networks (412217 / HA ZA 12-153) in which the hosting provider was held liable for damages for continuing to host a structurally infringing website whilst knowing that its customer data was fake (best practise). Other national examples are the UK where rights owners can request personal information details from an ISP using so called Norwich Pharma orders. Also, in Germany right of information claims are used on a large scale by some rightholders.</p>

<p>Has it been possible for you to obtain a court order obliging an intermediary to disclose the identity of the infringer/alleged infringer?</p>	<p>YES</p>
<p>Please explain the procedure involved, the type of intermediary involved and what was the cost and duration of the proceedings:</p>	<p>We have obtained disclosure decisions against access providers, hosting providers and payment providers (access providers keep accurate records of their customers, the problems of anonymous customers occur in the areas of hosting providers, payment providers, ad-brokers and websites). It is a problem that in some states identity procedures are only possible in procedures on the merits (taking years).</p>
<p>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?</p>	<p>YES</p>
<p>Please explain:</p>	<p>MPA has been involved in litigation in member states where identity claims have been awarded by the court against hosting providers and payment providers in regard to infringing websites. These procedures are usually ineffective given some intermediaries refusal to verify the identity of their customers. On a general level, a thriving eCommerce sector requires the basic condition of knowing who one is doing business with (as is completely normal in the offline world, see obligations for business to register valid contact details at chamber of commerce). This is reflected in art. 5 eCommerce Directive but it is not enforced. This might be remedied by way of the applying the EU know your customer (KYC) regulations to internet intermediaries (currently applicable to a variety of professions such as lawyers, real estate agents, casinos, notaries). In light of the substantial revenues involved in online commerce society as a whole would benefit from increased tax collections on identifiable online businesses. The Commission has recently made proposals to update the EUs existing legal framework in this respect (see proposal COM/2013/045 final). Extension of the KYC regulations to internet intermediaries would be the single most effective measure that the EU legislature could take. We encourage the EU to do so. As a minimum the EU legislator could consider a clarification that internet intermediaries that do business anonymously or with anonymous customers, cannot avail themselves of the liability privileges in the eCommerce Directive.</p>

**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:

N&A procedures are useful in the context of incidental infringement. Notice and action procedures need to include proactive components (content recognition system, repeat infringer policy). N&A serves no purpose at all for the many piracy platforms that ignore notices. Several national verdicts note the “window dressing” character of NTD provisions when dealing with re large scale online piracy (see BPI v. BT & Ors (28 February 2013, [2013] EWHC 397, paragraphs 52-70). Under the eCommerce Directive, services that fail to follow up on notices lose the protection of the liability privileges. This should also apply in instances where services fail to implement proactive measures to prevent and deter infringements. This measure could be taken forward through non-binding guidance issued by the Commission as a result of its current review of how to improve the effective of NAPs, in addition to the other recommendations we made in the course of responding to that consultation.

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:

Notice and action procedures are useful in the international or cross-border context although their effectiveness could be substantially increased by adding repeat infringement policies. Notice and action procedures are not useful for platforms/intermediaries that encourage infringement, and obviously they serve no purpose whatsoever with the many platforms that ignore notices altogether. Where the rightholder sending the notice is located in another jurisdiction, the intermediary in question is often even more unlikely to cooperate.

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?

NO

Please explain:

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:	MPA supports strict enforcement against commercial scale infringement. This includes account suspension, but also other measures such as providing valid contact details of the infringer, discontinuation of hosting, DNS and payment services, advertising and siteblocking.
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:	MPA supports strict enforcement against notorious infringers, which would include account suspension, account deletion but also other measures such as providing valid contact details of the infringer.

### Requirements for granting injunctions

Have preliminary injunctions been sought in the context of the litigation you were party to?	YES
In approximately what percentage of cases were these injunctions granted by the competent judicial authorities?	90
Have permanent injunctions been sought in the context of the litigation you were party to?	YES
In approximately what percentage of cases were these injunctions granted by the competent judicial authorities?	90
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?	YES
Is the impact of the measure on the market, competition and consumers taken into account by the competent judicial authorities when granting a provisional injunction?	YES
Are claims against the validity of IPRs taken into account by the competent judicial authorities when granting a provisional injunction?	YES

What other circumstances are taken into account by the competent judicial authorities when granting a provisional injunction?

The European Court of Justice has clarified in several recent verdicts (L'Oreal v. eBay and Sabam/Netlog) that national courts have to apply the proportionality test, i.e. weighing all fundamental rights against each other in coming to a just outcome. In doing so the courts take into account the rights and interests of the parties and stakeholders. National courts follow these guidelines and balance the human rights of all parties involved. These sufficient safeguards prevent unjust outcomes.

### Injunctions imposed on intermediaries

Have you obtained a preliminary injunction imposed on an intermediary who was not a party to the proceedings?	N/A
Have you obtained a permanent injunction imposed on an intermediary who was not a party to the proceedings?	N/A
Have you obtained a permanent injunction imposed on an intermediary providing services necessary for the financing of the infringing activity (e.g. a payment service provider)?	YES
Please specify the type of intermediary that was involved:	In the case of BREIN v. Technodesign (Netherlands) the payment provider was ordered to render account of the contact details of a customer who used their payment services for an infringing website.
Have you obtained a permanent injunction imposed on an intermediary providing services necessary to access the infringing services/goods?	YES
Please specify the type of intermediary that was involved:	MPA has been involved in litigation in several EU member states resulting in siteblocking verdicts (AT, BE, DK, IE, FI, GR, NL, UK). MPA has obtained similar injunctions against hosting providers re
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?	YES
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?	YES

### Third party facilitation of infringements of IPRs

#### Corrective measures

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

Should the competent judicial authorities privilege one specific type of corrective measure?	
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?	NO OPINION
Should the consent of the right holder constitute a <i>conditio sine qua non</i> for disposing of the goods that were found to infringe an intellectual property right outside the channels of commerce?	NO OPINION
Please explain how in your opinion the infringing goods could be disposed of outside the channels of commerce:	
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?	NO OPINION

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?	National courts can calculate damages on the basis of a variety of factors including the following elements: lost revenue, lost license fees, diminished value of IPR rights, reputational damage, legal costs, experts costs and the profits made by the infringer. In practice exact calculation of damages is difficult since most infringers try to hide the level of infringements that they are responsible for (and their assets). Rightholders focus on claims for the recovery of the infringers profits. Damage claims and recovery of profit claims are rarely effective due to the lack of an adequate disclosure obligation in most member states as well as the lack of know your customer regulations applicable to service providers. Articles 6 and 7 contain disclosure and conservation provisions applicable to infringers. These obligations could be extended to service providers that facilitate infringement on a commercial scale.
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:	Yes. The research and development costs can be a factor in the part of the claim that is based on the damage to the value of the IPR rights.

<p>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?</p>	<p>Courts take into account all the relevant factors, including the (financial)position of the infringer. The goal in most national judicial systems is to reach a "zero-sum" outcome whereby the victim's position is restored (i.e. he is in the same position as he would have been, were his rights not infringed) and the infringer is stripped off of his benefits (i.e. he is also placed back in the same position). However this is often very difficult if not impossible to assess for the reasons mentioned in question 1.</p>
<p>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?</p>	<p>YES</p>
<p>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?</p>	<p>YES</p>
<p>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?</p>	<p>NO</p>
<p>Please explain:</p>	<p>This varies per member states but our experience is that a claimant usually has to chose between lost profits or unjust enrichment.</p>
<p>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?</p>	<p>NO</p>

Please explain:

Damage claims are calculated on a per-title basis. For instance in the Swedish proceedings against The Piratebay the site operators were liable for damages. The claim was based on a limited number of titles only. The possibility to calculate damages on a broader portfolio or on the basis of sampling would lead to more just outcomes, especially in light of the very substantial damage these sites inflict. A second point is the possibility to apply for catalogue wide injunctions. In some member states such injunctions are possible (Netherlands, UK) whilst in others the injunctions are on a title specific basis only (Germany). Illegal online platforms offer their audiences download libraries covering thousands of titles. The possibility for rightholders to apply for catalogue wide injunctions against structurally infringing sites is necessary for effective civil enforcement.

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:

The infringer should be stripped of his gains and the rightholder (as the victim) should at least be placed back into the position he was before the infringement. The infringer should not be better off. However, MPA also supports regulation whereby there is a deterrent element so as to provide a disincentive to infringe; if damages just equal the license fee an infringer should have paid there is no incentive to take a licence in the first place.

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 awarded damages are not sufficient to compensate for the actual harm suffered. Online infringement involves thousands of titles, whereas the damage amounts are usually only calculated on the basis of a sample of titles. The ability for rightholders to calculate damages or claim profits could be improved by clarifying that Art 6 and 7 IPRED also apply to service providers that facilitate infringement. This will allow rightholders to more effectively calculate and claim damages.

### 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?

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