



# **IP enforcement in the EU**

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# Context

- Counterfeiting and piracy are still on the rise, affect an increasing number of sectors & entail economic, health & security damage
- November 2017 “IP Enforcement Action Plan”
  - Evaluation Report on the Directive on the Enforcement of IP Rights (IPRED): **Directive is still “fit-for-purpose”** however there is a lack of uniform application in the Member States
  - “Guidance on certain aspects of Directive 2004/48/EC on the enforcement of intellectual property rights” (next slide)
- Industry-led initiative: Memorandum of Understanding Counterfeiting Online
  - Evaluation report pending (Q1 2020) including “good practices”
- New Commission “Digital Services Act” (political guidelines new Commission)
- Ongoing reflections on how to enhance cooperation and effective data-sharing between right holders, intermediaries, customs, enforcement authorities & the private sector (EC and EUIPO Observatory, IP Enforcement Portal)

# “Commission Guidance” on certain aspects of IPRED

**IPRED** is interpreted and applied differently

**Guidance** to ensure a more homogeneous, effective and balanced judicial redress

## *Which issues are covered?*

- ✓ **Scope of injunctions, injunctions against intermediaries, dynamic injunctions**
- ✓ **Rules on obtaining and preserving evidence, digital evidence**
- ✓ **Availability of certain specific measures (e.g. right of information)**
- ✓ **Focus on commercial scale infringements**
- ✓ **Calculation of damages (including moral damages)**
- ✓ **Reimbursement of legal costs**
- ✓ **Cross-border dimension**

# Implementation of the Guidance and next steps

- **Building on the Guidance, the Commission:**
  - Works closely with Member States to ensure full compliance with the Guidance
  - Works with Member States and the legal community to develop good practice and (possible) further practical guidance (*Commission Expert Group on IPR Enforcement, EUIPO Observatory; EPO study*)
  - Brings the relevant information and good practices online
  - Consider infringement cases where appropriate
- **Member States are called up on:**
  - To invest in a specialisation of judges
  - To improve publication of judgements

# Art 9, 11 in combination with Art 3 (2) IPRED “Injunctions”

- **Injunction: essential instrument to protect IPR rights**
  - Art 9: interlocutory injunction to prevent “any imminent infringement” of an IP right
  - Art 11: permanent injunction to prohibit “the continuation of the infringement”
  - (Alleged) infringer or intermediary
- **General obligations Art 3 IPRED – measures shall be...**
  - fair, equitable, not unnecessarily complicated/costly
  - effective, proportionate and dissuasive
  - provide safeguards against abuse

# Injunctions on patents

- **Raised concerns on patent injunctions in Europe:**
  - courts issuing an automatic (permanent) injunction against an entire product, allegedly without safeguard of proportionality/against abuse (case-by-case assessment required!)
  - could lead to forum shopping and making Europe attractive for patent assertion entities (PAEs)
    - pending CJEU-case on “copyright trolls”: Case C-579/19, MICM Mircom v Telenet BVBA (re IPRED proportionality and “suffered prejudice” ex Art 13 IPRED)
  - in particular where “complex” products are concerned (smart phones, cars)
  - in jurisdiction using different tribunals on infringement/validity: accused infringer may face injunction while challenging a likely invalid patent (“injunction gap”)
- **Factors:**
  - undue economic harm
  - third party and public interests (health, consumers)
  - “grace periods” (“use-by” periods)
  - securities/guarantees
  - abuse of rights (see also recent judgement CJEU Case C-688/17, Bayer Pharma, judgement of 12 September 2019)

***Thank you!***