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## Sixteenth Session
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ADDRESSING ONLINE INTELLECTUAL PROPERTY INFRINGEMENT

*Contributions prepared by Japan, Mexico and the European Union*

1. At the fifteenth session of the Advisory Committee on Enforcement (ACE), held from August 31 to September 2, 2022, the Committee agreed to consider, at its sixteenth session, among other topics, the "exchange of information on national experiences relating to institutional arrangements concerning IP enforcement policies and regimes, including mechanisms to resolve IP disputes in a balanced, holistic and effective manner". Within this framework, this document introduces the contributions of one Member State (Japan) and one non-state Member (the European Union) on measures to address online intellectual property (IP) infringement.

2. The contribution by Japan describes the results of three surveys on trends in technologies available in the Japanese market to fight counterfeiting in e-commerce, commissioned by the Japan Patent Office (JPO) from 2014 to 2022. The findings highlight not only the benefits of these technologies but also the gaps in their adoption.

3. The contribution by Mexico explains the development of the protection of IP rights against online infringement in Mexico and analyzes the current situation, specifically with regard to obligations placed on Internet access providers and online service providers to stop online infringement.

4. The contribution by the European Union describes the three pillars of action, through which the European Union intends to fight online piracy of sports and other live events. To this end, the European Commission adopted a Recommendation in May 2023. The contribution summarizes the proposed measures and the envisaged ways of monitoring the implementation of this soft law instrument.

5. The contributions are in the following order:

Anti-Counterfeiting Technologies in Japan – State of Play and Challenges Ahead..... 3

The Role of Internet Access Providers and Online Service Providers in Addressing Intellectual Property Right Infringements and Its Evolution within the Mexican Legal System..... 8

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[Contributions follow]

# ANTI-COUNTERFEITING TECHNOLOGIES IN JAPAN – STATE OF PLAY AND CHALLENGES AHEAD

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## ABSTRACT

This document reviews three surveys[1] commissioned by the Japan Patent Office (JPO) from 2014 to 2022, focusing on trends in anti-counterfeiting technologies available in the Japanese market. The aim is to address the growing challenges from counterfeit products, particularly in the rapidly expanding e-commerce market, by providing analysis and up-to-date information on such technologies to Japanese industries affected by counterfeiting. The findings highlight not only the benefits of these technologies but also the gaps in their adoption in Japan. Given this, both public and private sectors must collaborate to advance and popularize cost-effective, reliable and hard-to-imitate technologies.

## I. INTRODUCTION

1. In 2014, 2018 and 2022, the Japan Patent Office (JPO) commissioned three surveys, focusing on trends in anti-counterfeiting technologies available in the Japanese market. The aim is to address the growing challenges from counterfeit products, particularly in the rapidly expanding e-commerce market, by providing up-to-date information on such technologies to the Japanese industries.

## II. ANTI-COUNTERFEITING TECHNOLOGIES IN JAPAN

2. A variety of technologies are available in the Japanese market to detect and prevent counterfeit products, and multiple methods are often used simultaneously. These include:

- Object image matching: uses mobile cameras to compare product images for authenticity.
- Printing technology: implements holograms, angle-dependent color-changing inks, and light-reactive images to verify authenticity.
- 1D/2D code: employs barcodes or 2D codes containing product information to ascertain authenticity.
- Integrated circuit (IC) tag: uses tags with product details read by devices to confirm product genuineness.
- Product information judgment technology: artificial intelligence (AI) learns from genuine product details and prior counterfeit data on the web to discern counterfeit items on e-commerce platforms.

[*] The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

[1] The findings in this document are based on the information available at the time the respective survey reports were prepared. They are available (in Japanese only) at https://www.jpo.go.jp/resources/report/mohohin/sonota.html.

- Blockchain technology: maintains accurate transaction histories through decentralized, cryptographic methods.
- Web crawling: monitors e-commerce content (text, images, videos) to detect counterfeit products.

3. Each technology possesses both pros and cons. Some are reliable but harder to introduce cost-wise (e.g., blockchain). Others are simple to implement but can be less dependable as they are susceptible to imitation (e.g., simple, visually detectable holograms).

## III. CHALLENGES

4. The surveys engaged both technology providers (vendors) and users (rights holders and brand owners) and revealed that few companies have put anti-counterfeiting technologies to actual use. As revealed by the responses to the surveys, both technology providers and users experience obstacles to the implementation of such technology in the Japanese industries. They are summarized in the following paragraphs.

### A. TECHNOLOGY PROVIDERS

#### a) Misalignment with Industry Needs

5. Despite some industry associations promoting anti-counterfeiting measures using such technologies, there seems to be a lack of understanding among providers on the specific technological needs of right holders. This misalignment results in scattered investments that do not necessarily lead to improved performance or cost reductions.

#### b) Stagnant Cost Reduction

6. It would be possible to reduce and distribute initial and ongoing operating costs by sharing a single system among multiple companies. However, varying technological preferences across user industries and companies hinder cost reduction. High implementation costs deter users from adopting these technologies.

#### c) Unproven Effectiveness

7. The nascent stage of some technologies means their benefits are not widely recognized or quantified, which makes it harder for providers to market them.

### B. TECHNOLOGY USERS

8. The surveys of technology-using companies were mainly conducted in selected sectors (motorcycle and automobile parts, food and beverages, toiletry, and electrical and electronic parts), taking into account consumer safety risks and the ease with which counterfeit products could enter distribution channels.

a) Diverse Technological Needs

9. In addition to the confidential nature of anti-counterfeiting strategies, the needs for technology implementation differ by product group or by company, complicating the adoption process. In other words, an anti-counterfeiting technique itself becomes part of the brand value, making it less likely to be shared with others in the same industry.

- In the motorcycle and automotive parts sector, for example, each of the major companies has introduced diverse technologies, requiring unique problem-solving approaches different from company to company.

b) Management's Lack of Understanding and Budgetary Constraints

10. There is a lack of understanding at the management level about the risks of counterfeit products, making it challenging to allocate budgets for anti-counterfeiting measures. Also, counterfeiting data is hard to obtain, complicating the cost-benefit assessment on anti-counterfeiting measures.

- In the motorcycle and automobile parts sector, even a minor cost increase is difficult to get internal approval, due to the narrow gap between cost and product price, i.e., the profit margin.
- Most of the companies in the food, beverage and toiletry sectors are small and medium-sized, which have often not implemented anti-counterfeiting measures. Resource constraints make securing technology budgets challenging, except for high-end segment of cosmetics, for example.

c) Distribution and Technology Challenges

11. Involving distributors and wholesalers in anti-counterfeiting initiatives is problematic for the manufacturers of genuine products. Additionally, consumer awareness about counterfeit risks varies across countries and regions, further complicating the situation.

- In the food, beverage and toiletry sectors, some wholesalers mix counterfeit items with genuine products. Manufacturers struggle to prevent this due to their dependence on wholesalers.
- Consumers often purchase products based on price. They are less likely to check product authenticity post-purchase in case of low-value items or if they have limited awareness of the harms of counterfeit items.

C. OTHER ISSUES

a) Complex Distribution Channels

12. The myriad ways products reach consumers increase the risk of counterfeits infiltrating the market.

- In e-commerce marketplaces, due to the vast number of sellers, it is challenging to single out and eliminate malicious ones.

- When wholesalers intervene in the distribution channel, they have an incentive to make a profit by selling low-cost counterfeit products at the price of genuine products.

b) Antitrust Concerns

13. The collaborative introduction of certain technologies might inadvertently be regarded as barriers for third-party products, leading to potential antitrust issues.

- Third-party products exist in motorcycle and automobile parts. Antitrust issues may arise due to the establishment of a system that could effectively exclude third-party parts.

## IV. POSSIBLE WAY FORWARD

14. Based on the findings of the surveys, the following measures could possibly facilitate the adoption of anti-counterfeiting technologies in Japan (and other countries).

### A. INDUSTRY-SPECIFIC NEEDS ASSESSMENT

15. In the case of nascent technologies, a deeper understanding between providers and users is necessary for its future adoption. Collaborative pilot projects could validate the efficacy of proposed solutions.

### B. INCREASED COLLABORATION

16. Industries may be able to refer to successful collaborative efforts, such as those in semiconductor and bearing manufacturing industry.

- Semiconductor Equipment and Materials International (SEMI) is developing technical standards to ensure the traceability of semiconductor devices throughout the supply chain by unique product information recorded with blockchain.
- The World Bearing Association (WBA) launched the WBA Check App for verifying authenticity using smartphones. It reads codes from seven major companies, based on cooperation among US, European and Japanese Industrial Associations for brand protection.

### C. PUBLIC SUPPORT

17. Continue awareness-raising activities. Consider government incentives such as subsidies or tax breaks to reduce the costs associated with implementing anti-counterfeiting technologies.

18. The government should inform and update the industries on the benefits of introducing technology beyond just eliminating counterfeit products. Such benefits include boosting brand power, understanding distribution channels and improving risk management through traceability. The government should also present best practices and recommend technology groups most effective to be introduced in an industry.

## V. CONCLUSION

19. Given the increasing sophistication of counterfeits in circulation, which evade traditional anti-counterfeiting measures, and the diversification of distribution channels due to the proliferation of e-commerce sites, it is becoming difficult to reduce counterfeit products only through the efforts of individual companies. The JPO should initiate or facilitate activities such as mentioned in Section IV in order to prevent the negative impact of counterfeits on consumers and industries.

20. While the surveys identified some promising technologies, their primary focus was the domestic market, leaving international perspectives largely unexplored. As the cross-border e-commerce market continues to expand, however, they could be most powerful when incorporated into a global approach coordinated among relevant industries and authorities. In this regard, WIPO, possibly in collaboration with the International Organization for Standardization (ISO), the Organization for Economic Co-operation and Development (OECD), and others, could spearhead discussions to promote the adoption of anti-counterfeiting technologies globally.

[End of contribution]

# THE ROLE OF INTERNET ACCESS PROVIDERS AND ONLINE SERVICE PROVIDERS IN ADDRESSING INTELLECTUAL PROPERTY INFRINGEMENTS AND ITS EVOLUTION WITHIN THE MEXICAN LEGAL SYSTEM

*Contribution prepared by Mr. Aldo A. Fragoso Pastrana, Deputy Director General, Industrial Property, Mexican Industrial Property Institute (IMPI), Mexico City, Mexico*[*]

## ABSTRACT

This contribution explains the development of the protection of intellectual property rights (IPRs) against online infringement in Mexico and analyzes the current situation, specifically with regard to obligations placed on Internet access providers and online service providers to stop online IPR infringement. It describes the Mexican Industrial Property Institute's (IMPI's) practice to issue website-blocking orders against these types of intermediaries both before and after the Federal Law for the Protection of Industrial Property came into effect in 2020 and explains how the applicable provisions have been interpreted by the Mexican judiciary in the form of a judicial opinion that will serve as a precedent.

## I. INTRODUCTION

1. E-commerce has been a reality for decades and, as a result, intellectual property (IP) infringements in this area have been too. In this regard, the Mexican Industrial Property Institute (IMPI) believes that the authorities responsible to enforce IP must ensure that right holders have access to the same tools and solutions that are available to them in the physical world. This is a task not only for administrative authorities but also the legislature and the judiciary.

2. This contribution aims to explain the significant progress that has been made in the online protection of IPRs in Mexico and illustrate how IP enforcement in the digital environment has developed, always in support of right holders and with the – not always voluntary – cooperation of third parties such as Internet access providers and online service providers. More specifically, it analyzes IMPI's practice to grant website-blocking orders against these Internet intermediaries.

3. While it is true that the Mexican legal framework provides for the mandatory improvement of human rights protection through the so-called principle of progressivity, it is also true that some actors have considered the orders issued by IMPI to block infringing content to be unconstitutional.

4. With regard to this resistance, IMPI's administrative decisions become relevant, as they clearly and robustly establish that: (i) IPRs are human rights; (ii) human rights must be protected progressively, taking into account new realities; (iii) IP enforcement measures are applied proportionately; (iv) on a website whose sole purpose is to reproduce infringing content, there is no exercise of human rights on the part of the alleged infringer (such as freedom of expression) and; (v) even if one assumes that there is a conflict of fundamental rights, the party requesting protection should be privileged over the alleged infringer.

[*] The views expressed in this document are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

5. To explain the development of online IPR protection in Mexico, it is necessary to provide more detailed information about existing administrative and judicial decisions on website blocking, as well as the legislative and jurisprudential adjustments that have been made in Mexico. To that end, the following section will address recent milestones in the enforcement of IPRs in the digital environment in Mexico.

## II. BACKGROUND INFORMATION ON IMPI'S AUTHORITYTO ENFORCE INTELLECTUAL PROPERTY RIGHTS IN THE DIGITAL ENVIRONMENT: 2013 - 2018

6. Since 2013, various copyright holders have asked IMPI to impose sanctions for infringements on website operators that offered illegal reproductions of copyrighted content (specifically musical and audiovisual works, such as TV series and films)[1].

7. In response to these requests, IMPI, in addition to flagging the website operators as alleged infringers, imposed provisional measures on third parties, namely ordering Internet access providers to block those websites.

8. The Internet access providers filed lawsuits against IMPI's orders, alleging that IMPI had infringed the right to information, the right to freedom of expression and the principle of network neutrality, as well as maintaining that IMPI was not empowered to impose such measures as there was no express provision for website blocking orders in the law in force at the time.

9. In addition to the legal issues raised in the previous paragraph, several Internet access providers argued that, in practice, it was impossible to remove the infringing content. Of the 10 Internet access providers that received a blocking order from IMPI, only one fully complied with it. In addition to setting an example, this showed that it was operationally possible for Internet access providers to block infringing content.

10. IMPI defended its position in all legal proceedings and, in 2017, received an important and definitive ruling from the Supreme Court of Justice of Mexico determining that: (i) IMPI is empowered to issue measures to block infringing content in the digital environment, even though this is not expressly provided for in the law; (ii) due process must be followed in all cases; and (iii) blocking measures are legal, provided that they are proportional[2].

## III. THE 2020 LEGISLATIVE REFORM

11. The above-mentioned events, together with the desire to implement obligations arising from the Agreement between Mexico, the United States of America and Canada[3], led to legislative reform in Mexico. In 2019 and 2020, legislators worked, with the support of IP stakeholders (such as authorities, businesses, lawyers' associations and civil society), on developing a legal instrument that, *inter alia*, takes due account of the emergence of IPRs in the digital environment and e-commerce. This instrument was approved, and, in December 2020, the new Federal Law for the Protection of Industrial Property came into effect[4].

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1 Since 1997, the Mexican Federal Copyright Law (Art. 231 and 232) has mandated IMPI to make available administrative procedures to resolve copyright disputes that involve use for profit. Therefore, IMPI has a specialized Sub-directorate for this purpose. By way of example, 453 new requests were received in 2023.

2 Mexican Supreme Court of Justice, Amparo en revisión 1/2017, April 19, 2017; available at: https://www.wipo.int/wipolex/es/text/663.

3 Available at: https://www.gob.mx/t-mec/acciones-y-programas/textos-finales-del-tratado-entre-mexicoestados-unidos-y-canada-t-mec-202730?state=published (in Spanish).

4 Available on WIPO Lex at: https://www.wipo.int/wipolex/en/text/577613.

12. The Law contains important changes to the enforcement of IPRs and, in view of the above-mentioned events, its Articles 344(VII) and 358 expressly empower IMPI to issue provisional measures to block IP infringing web sites and to conduct inspections of the digital environment[5]. These powers extend to infringements of all intellectual property right – industrial property right and copyright.

## IV. ENFORCEMENT PROCEDURES INITIATED BY IMPI UNDER THE NEW FEDERAL LAW FOR THE PROTECTION OF INDUSTRIAL PROPERTY

13. IPR holders began to initiate infringement procedures as soon as the new Law entered into force, thereby requesting IMPI to order the blocking of websites or social network profiles that infringed their exclusive rights.

14. Of particular relevance are two cases in which significant and favorable rulings were obtained. In the first of these, an association of copyright representatives requested the blocking of a website used for music stream ripping. In the second case, IMPI initiated *ex officio* proceedings to block a website that illegally made literary works available to the public.

15. In these cases, IMPI ordered all Mexican Internet access providers and various online service providers, more specifically social media providers, to block access to or remove the infringing content respectively, and, unlike in the cases prior to the 2020 legal reform, most of them complied with the IMPI orders. However, two initiated judicial proceedings against the IMPI order, once again alleging that blocking or removing infringing content was a violation of the rights to expression and information.

16. Nevertheless, and in addition to imposing the corresponding fines for non-compliance with the provisional measures – the highest in its history[6] –, IMPI defended its position in all legal proceedings. In 2023, the Mexican courts ruled in favor of IMPI in these cases, establishing that Internet access providers and Internet service providers must comply with IMPI's orders to block access to or remove infringing content.

## V. JUDICIAL SUPPORT FOR IMPI'S AUTHORITY TO ENFORCE ONLINE INFRINGEMENT

17. In Mexico, the system of precedents is a formal source of law; in some cases, referring to it is mandatory and in others, it establishes guiding criteria for judges. For this reason, in the context of the cases mentioned in the previous section, the Mexican judiciary issued a position[7] in which it stated the following: "based on a preliminary weighing of the complainant's interests and public policy at the interlocutory stage, it can be seen that while freedom of expression, freedom of information and network neutrality generally prevent the blocking of websites, these valid interests are not represented on a website whose commercial reason is predominantly based around an engine for the downloading, processing and portability of protected music, which is carried out without copyright holder authorization".

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5 Whether *ex officio* or at the request of an interested party, IMPI inspectors have the power to inspect any physical establishment. Likewise, since 2020, they can carry out inspections of Internet sites and the corresponding minutes can be used as evidence in infringement, cancellation or nullity proceedings.

6 The fine amounted to 70,000 update measurement unit, which equals approximately 7.5 million Mexican pesos or USD 440,000.

7 https://sjf2.scjn.gob.mx/detalle/tesis/2027061.

18. On the basis of this position, the judiciary shares and strengthens the rules established in the Federal Law for the Protection of Industrial Property and the views issued by IMPI in its administrative decisions.

19. The preceding shows that strong actions have been taken at the administrative, legislative and judicial level to protect IPR holders in Mexico. This reflects a shared understanding of the importance of addressing online IP infringements through an adequate regulatory system and keeping the actors implementing it up to date with new developments, and of the need for IPR protection taking precedence over informality.

## VI. CONCLUSION AND FINAL THOUGHTS

20. The administrative, legislative and judicial action described in the preceding sections reflects the contribution of each entity in creating a safe legal environment that protects IPR holders.

21. The involvement and cooperation of non-infringing third parties, including Internet access providers and online service providers – who are themselves IPR holders – is critical to protecting these rights, as in other fields where the cooperation of third parties is natural, such as in tax-related, labor-related and criminal matters.

22. Awareness-raising among such third parties and social responsibility to protect IPRs will make the IP enforcement system more flexible and efficient, by focusing the efforts of businesses and authorities on innovation and protection without the need to resort to lawsuits or administrative fines.

[End of contribution]

# COMBATING ONLINE PIRACY OF SPORTS AND OTHER LIVE EVENTS IN THE EUROPEAN UNION

*Contribution prepared by Mr. Harrie Temmink, Head of Service Intellectual Property in the Digital World, European Observatory on Infringements of Intellectual Property Rights, European Union Intellectual Property Office (EUIPO), Alicante, Spain*[*]

## ABSTRACT

Sport events and other cultural events, such as concerts, opera, musicals and theatre performances, and game shows, are of most interest to their audiences, and hence of most economic value, during their live transmission. This value is at risk with the rise of live event piracy, and stopping it requires new approaches as event organizers, authorities and providers of intermediary services are challenged to take action in real-time.

On May 4, 2023, the European Commission (Commission) adopted a Recommendation on how to combat online piracy of sports and other live events. The Commission encourages national authorities, holders of rights and providers of intermediary services to take effective measures to fight unauthorized retransmissions of such events. The measures include the prompt treatment of notices, the use of dynamic injunctions, the promotion of legal offers and enhanced cooperation between national copyright administrations. A monitoring system has been set up for the Commission to decide by November 2025 if stricter measures are necessary.

## I BACKGROUND

1. Sport and culture play an important role in society, as drivers of creativity, social behavior and economic growth. They bring together individuals and communities, encourage dialogue, contribute to tolerance, to inclusiveness, to diversity and to engagement. Organizing and ensuring the retransmission of sports and cultural events for fans and audiences require significant investments. Organizers of live events need sustainable business models based on revenues coming from their intellectual property (IP) and other rights. This is particularly true for the income from live retransmission.

2. The value of live events lies in the emotion of the moment. For example, with sports, it is the unpredictable nature of the match, its highs and lows and the outcome. This value is decreasing in the course of the transmission and lost when the event ends. That is why the harm of unauthorized retransmission is the greatest during the event. Consequently, a response in real time is needed to put an end to the illegal retransmission during the football match or during the live concert.

3. Whereas the development of online live streaming technologies has made it easier for fans and audiences to access live events, it has also increased the potential for illegal retransmission. Piracy takes place with increasingly sophisticated technical means and through

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different channels such as illegal IPTV services and apps or websites[8], on mobile devices but also TV sets.

4. Live event streaming is a resource-intensive activity that requires the use of different categories of intermediary services. Technically, the mixture of legal and illegal services in the digital ecosystem contributes to the complexity of tackling live event piracy[9]. Some pirates make use of perfectly legitimate techniques to optimize content distribution such as content delivery networks or protection services, such as reverse proxies. Some operators also use obfuscation techniques to avoid identification or to make it more difficult to identify the servers they use. In the downstream chain, internet access providers (IAPs) enable connectivity to their clients and, more generally, serve as a gateway to all content available online.

5. In recent years a new type of service supporting piracy has gained importance, referred to as “piracy-as-a-service” (PaaS) which provides a suite of off-the-shelf services that make it easier to create, operate and monetize a fully functioning piracy operation. Sometimes those infringing services mirror legitimate streaming services.

6. The economic harm caused by illegal transmissions of live events include the loss of users’ subscription fees, entrance ticket sales and advertising revenues. It has been estimated that revenues deriving from online piracy of sport events alone amounted to EUR 522 million in 2019, based on user subscription fees[10]. This affects investments in programs, job creation and economic growth in the European Union (EU). It may also have an impact on funds made available for grassroot sports.

## II THE RECOMMENDATION OF THE EUROPEAN COMMISSION

7. On May 4, 2023, the European Commission (Commission) adopted a Recommendation on combating online piracy of sport events and other live events (Recommendation)[11]. The Recommendation encourages the EU member states and online intermediaries, together with right holders, to step up measures against the unauthorized retransmission of live events, while guaranteeing the necessary safeguards to protect fundamental rights.

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[8] According to a recent EUIPO study, streaming has become the most popular method to access illicit TV content. 58 per cent of piracy in the EU occurs via streaming and 32 per cent through download. The study also analyses the illegal access to live sports events. This type of piracy shows an upward trend in 2021 and 2022, with a 30 per cent increase in only one year. In some countries such as France and Spain, illegal sport event transmissions account for more than a third (34 per cent) of the total illegal accesses. See EUIPO (September 2023) *Online Copyright Infringement in the European Union (2017-2022)*, retrieved from https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/quantification-of-ipr-infringement/online-copyright-infringement-in-eu/online_copyright_infringement_in_eu_en.pdf.

[9] See for a detailed overview of the live event streaming ecosystem and trends in unauthorized live streaming, EUIPO (March 2023), *Live event piracy discussion paper – Challenges and good practices from online intermediaries to prevent the use of their services for live event piracy*, retrieved from https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2023_Live_Event_Piracy/2023_Live_Event_Piracy_Discussion_Paper_FullR_en.pdf.

[10] European Parliament Research Centre (December 2020), *Challenges facing sports event organizers in the digital environment. European added value assessment*, retrieved from https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654205.

[11] See Commission Recommendation (EU) 2023/2853 of 4 May 2023 on combating online piracy of sports and other live events (OJ L 136, 24.5.2023, p. 83–94), retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023H1018.

8. The Recommendation is a response to a resolution of the European Parliament of May 9, 2021[12]. It also complements existing EU legislation and in particular EU copyright legislation[13], the IP Enforcement Directive (IPRED)[14] and the Digital Services Act (DSA)[15].

9. In the EU legal order, a "recommendation" is a legal act without binding force. It is used in situations where EU institutions intend to achieve certain objectives without imposing a mandatory legal framework. However, they give guidance on the interpretation of EU law and, as "soft law", national courts should take it into consideration when interpreting EU law[16]. Recommendations also serve as an inspiration for national policy makers as well as businesses and have regularly been the first step towards binding EU measures[17].

10. In terms of scope, the Recommendation is limited to "unauthorized retransmissions" which are defined as "simultaneous transmission or retransmission intended for reception by the public of an initial live transmission of an event or of a live transmission of a sports event, and which has not been authorized by the holder of the rights"[18]. The Recommendation does not cover other models of live event piracy such as the illegal capture of the event by a pirate present at the venue (e.g., recording on a mobile phone) or delayed transmission of the event (e.g., highlights clips).

11. Due to the difference in legal protection at the EU level, the Recommendation distinguishes between live sport events and other (cultural) live events. *Sport events* are not, as such, protected by EU law and sport event organizers are not recognized as holders of rights able to benefit from EU IP law remedies such as IPRED[19]. For live sport events, the EU member states and stakeholders are encouraged to take targeted but balanced measures against unauthorized retransmissions. For *other live events*, member states and stakeholders are encouraged to apply the existing remedies of EU copyright law, taking into account the specificities of live transmissions.

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12 European Parliament (2019), *Resolution on the challenges of sport event organizers in the digital environment* (document P9_TA(2021)0236), retrieved from https://www.europarl.europa.eu/doceo/document/TA-9-2021-0236_EN.html#title1.

13 See, in particular, Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10 (Copyright Information Society Directive). See, for a detailed overview of the EU copyright legislation, European Commission (2023), *The EU Copyright Legislation*, retrieved from https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation.

14 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.4.2004, p. 45.

15 Regulation (EU) 2022/2065 of the European Parliament and of the Council of October 19, 2022, on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277/1, 27.10.2022. See, for more information about the Digital Services Act, European Commission (2023), *The Digital Services Act Package*, retrieved from https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

16 Settled case-law, see, e.g., judgement of the Court of the Justice EU in Case C-322/88, Grimaldi, ECR, EU:C1989:646.

17 See, for instance, the Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, OJ L 63/50, 6.3.2018, which served as an inspiration for the notice-and-action mechanisms of the 2022 DSA.

18 Recommendation, point 3 (f).

19 However, they can hold rights on a contractual basis from other holders of rights. In addition, certain member states, such as France, have specific national laws in place protecting sport events, which may enable the organizers to benefit from IP remedies.

## A. THREE MAIN PILLARS OF ACTION

### a) Ensuring the Prompt Treatment of Notices Related to Unauthorized Retransmissions of Live Events

12. To avoid liability, EU law already obliges online hosting providers to act expeditiously and remove or disable illegal content, when receiving a notice of illegal content, such as an infringement of copyright. Given the immediate nature of the harm done, urgent action is required even more when processing a notice of unauthorized live event retransmissions.

13. For the treatment of notices, the Recommendation makes a distinction between different groups of online intermediaries. This is justified because of the evolving rules on so-called "notice-and-action" procedures in the EU.

14. The DSA, adopted on October 19, 2022, is the new horizontal regulatory framework for digital intermediary services. It introduces harmonized rules on "notice-and-action" mechanisms for *hosting providers* to have timely and diligent processes for notices related to illegal content. They should act upon notices in a timely manner, in particular, taking into account the type of illegal content being notified and the urgency of taking action[20]. It imposes additional obligations on *hosting providers which are online platforms* (e.g., online platforms, app stores, social networks) to take the necessary technical and organizational measure to ensure that notices submitted by trusted flaggers are given priority and are processed and decided without undue delay[21]. However, the obligation with regard to trusted flaggers do not apply to *other hosting providers*, and the obligations on notices and actions do not apply to those intermediaries used in the context of live event piracy which do not qualify as hosting providers.

15. In the context of its Recommendation, the Commission considers the DSA mechanism for trusted flaggers also useful for hosting providers other than online platforms (e.g., dedicated server providers) to ensure that the notice is processed and a decision is taken during the live transmission of sports events. Hence this group of intermediaries is also encouraged to cooperate with trusted flaggers[22] and apply technical solutions aimed at facilitating the submission and processing of notices, such as application programming interfaces (APIs)[23].

16. The "technical" intermediaries which are not hosting providers (e.g., content delivery networks, providers of reverse proxies) are often the only services that can be identified by holders of rights when they detect unauthorized retransmissions of live events. These upstream service providers in the online live streaming ecosystem are equally encouraged by the Recommendation to cooperate with the right holders to facilitate identification of the actual source of unauthorized retransmission and put in place measures against repeated misuse of their services[24].

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[20] Article 16 and recital 52 of the DSA.

[21] As of August 25, 2023, for very large online platforms and as of February 17, 2024, for other online platforms. See, as to trusted flaggers, Article 22 of the DSA.

[22] Recommendation, points 5 and 23, recitals 19-20.

[23] An API is software processing information between a website or app and a user. It makes communication easier and is widely used in the digital ecosystem.

[24] Recommendation, points 6-7 and 24-25, recital 22.

17. There are different ways to encrypt or mark the authorized signal for transmission of live event, including forensic watermarking, in order to protect it from unauthorized uses. In that respect, the Recommendation encourages right holders, from their side, to use best available technical solutions to facilitate the identification of the source[25].

b) Encouraging the Use of Injunctions Tailored to Live Events (Dynamic Nature)

18. Blocking injunctions targeting IAPs and other online intermediaries are arguably the only available way to combat unauthorized retransmissions of live events, in particular when faced with uncooperative intermediaries located outside national jurisdictions. Current EU legislation, such as in the form of the Copyright Information Society Directive and IPRED, already provides for the possibility to issue injunctions against infringers and intermediaries[26]. However, the conditions to be met and the procedure to be followed when issuing an injunction is a matter for national law within the broad limits set by the EU law principles of effectiveness, proportionality and equivalence. In addition, these directives do not provide for specific procedures against the illegal broadcasting of live events. National blocking injunctions may not necessary be fit for prompt action in real time.

19. In the absence of adequate EU harmonization, specific types of injunctions and good practices have evolved in the member states to effectively combat live event piracy.

20. *Dynamic injunctions* cover unknown Internet locations to address the reappearance of blocked live event piracy services moving to new locations without the need for a new judicial procedure. They are useful to tackle the resilience strategies developed by pirates, e.g., setting up mirror services under different domain names or switching to different IP addresses to circumvent blocking measures. A further development of dynamic injunctions, also called *live injunctions,* cover a temporary blocking of a webpage or a server only for the duration of the live event, which may also be an entire competition[27]. They enable the adaptation and update throughout the "lifetime" of the order, allowing for new pirate servers to be identified and notified to intermediaries within a short period of time and, subsequently, to be added to a blocking list.

21. Current EU legislation as interpreted in the case-law of the Court of Justice of the EU (CJEU) allows member states to facilitate these targeted injunctions, provided that the measures are effective and proportionate, respect a fair balance between fundamental rights and interests, are not excessively costly and do not involve a general monitoring obligation for intermediaries[28].

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[25] Recommendation, recital 21. See, for an overview of automated content recognition systems, EUIPO (2020), Automated Content Recognition: Existing technologies and their impact on IP, and EUIPO (2022) Automated Content Recognition Discussion Paper – Phase 2 - IP enforcement and management use cases,etrieved from https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2022_Automated_Content_Recognition_Phase_2_Discussion_Paper/2022_Automated_Content_Recognition_Phase_2_Discussion_Paper_FullR_en.pdf.

[26] See Article 8(3) of the Copyright Information Society Directive and Article 11 of IPRED.

[27] See, e.g., Elizabeth Jones (2017), Website Blocking Injunctions: The UK Experience (pages 22-26 of document WIPO/ACE/12/10 Rev.), available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=376459, and Prathiba M. Singh (2022), Dynamic Injunctions and Other Injunctive Reliefs in India (pages 3-7 of document WIPO/ACE/15/11), available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=581919.

[28] See, for instance, the judgement of the CJEU in Case C-314/12, UPC Telekabel Wien, EU:C:2014:192. See also in generally favorite terms, European Commission Communication (2017) *Guidance on certain aspects of Directive 2004/48/EC* COM (2017) 708 final, retrieved fromeur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017DC0708. . See, in general, EUIPO (2021), *Study on Dynamic Blocking Injunctions in the EU*, retrieved from https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2021_Dynamic_Blocking_Injuctions/2021_Study_on_Dynamic_Blocking_Injuctions_in_the_European_Union_FullR_en.pdf. **Error! Hyperlink reference not valid.**

22. Dynamic and live injunctions have developed in national case-law and contributed to the fight against piracy (e.g., in Denmark, Ireland, Spain, France, Italy, The Netherlands, Austria and Sweden). However, in view of the very specific need for both prompt action and the update of injunctions, in parallel, administrative processes have been created to support the court decisions *ex ante* and *ex post*[29]. This has led to new national legislations, creating specialized administrative bodies to activate and monitor injunctions (e.g., in France, Belgium, Italy, Greece, Spain, Lithuania and Portugal). It has also stimulated the development of national voluntary collaboration schemes between IP right holders and online intermediaries, that are also, in some instances, driven by administrative bodies acting as 'trusted' entities to ensure the effectiveness of blocking orders (e.g., in Portugal and Germany)[30].

23. Whereas the recently created national rules have common features, they also show considerable differences. In addition, there is still a substantial number of EU member states where no specific measures to combat live event piracy are available.

24. In this context, the Recommendation encourages all member states to provide for a number of measures, procedures and remedies[31].

25. As to the addressees of the injunctions, member states are encouraged to ensure that:

- injunctions can be issued against operators of unauthorized retransmission of live event or providers of intermediary services whose services are misused, regardless of their lack of liability;
- injunctions may consist in blocking access to the unauthorized live event; and
- right holders of sport events are entitled to take legal action (be granted legal standing) and to apply for an injunction before the start of the sport event, including by submitting evidence that the operator concerned has already provided access to unauthorized retransmission of similar sports events.

26. As to the dynamic nature of the injunctions, member states are encouraged to:

- use a case-by-case methodology for updating the list of Internet locations covered by the dynamic injunction (identified for instance via a domain name, Internet protocol address or URL), including through the cooperation between right holders and intermediaries concerned;
- consider whether an independent national authority should certify the list of Internet locations covered by an injunction; and
- ensure measures are subject to control by judicial authorities.

27. As to the safeguards, member states are encouraged to provide that:

- measures should not be unreasonably burdensome for the addressees;
- measures should be strictly targeted to address only pirated services with adequate technical means, without unnecessarily depriving users of access to lawful information;

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[29] See for a recent exhaustive overview of the national practices the EUIPO live event piracy discussion paper (footnote 3), Annex 5, p. 95.

[30] See for a recent exhaustive overview of the national practices the EUIPO live event piracy discussion paper (footnote 3), p. 56 to 79.

[31] Recommendation, points 9-21 (as to live sports events) and points 26-32 (as to other live events).

- holders of rights, to avoid overblocking, should regularly update the information on the Internet locations no longer used for unauthorized retransmissions;
- the duration of the injunctions should not go beyond what is necessary to protect right holders and only take effect when the live transmission of events occurs.

28. Providers of intermediary services are encouraged to consider appropriate and proportionate voluntary measures to prevent their services being misused for unauthorized retransmissions of sport events. Such own initiative measures could be discussed in the context of the monitoring of the Recommendation that the Commission undertakes together with the European Observatory on Infringements of Intellectual Property Rights hosted by the European Union Intellectual Property Office (Observatory) (see section II.B.).

29. Other market players such as the providers of advertising and payment services should take their responsibility too. They are equally encouraged to ensure that their services do not facilitate the promotion and functioning of live piracy. For payment services certain obligations exist under the EU anti-money laundering legislation[32]. The Commission already facilitates a memorandum of understanding with the participation of online operators that commit themselves to minimizing the placement of advertising on websites and apps that infringe IP rights[33]. This cooperation should be promoted further.

c) Raising Awareness and Increasing Commercial Offers

30. Evidence shows that the accessibility and availability of competitive legal offers may result in a decrease of piracy consumption. According to a recent study, for instance, 43 per cent of Europeans would stop using illegal sources if content was more affordable, and 37 per cent if there was a larger legal offer[34]. The Recommendation therefore encourages live and sport event organizers to increase the availability, affordability and attractiveness of their commercial offers across the EU[35]. Member states are encouraged to raise users' awareness on legal offers, by, e.g., informing users who try to access blocked services of the reasons for blocking and about available legal offer[36]. This can be done, e.g., by reference to the European online content portal Agorateka, developed by the Observatory, which links to existing national portals[37]. The practice exists already in a number of EU member states.

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32 See, for the general EU context of anti-money laundering and countering the financing of terrorism, https://finance.ec.europa.eu/financial-crime/eu-context-anti-money-laundering-and-countering-financing-terrorism_en.

33 See Nathalia Zebrowska (2019), *Stakeholders' Cooperation Under the European Commission's Memorandum of Understanding on Online Advertising and IP Rights – An Update from the European Commission* (pages 16 to 19 of document WIPO/ACE/13/7), retrieved fromhttps://www.wipo.int/meetings/en/doc_details.jsp?doc_id=412285. See also WIPO ALERT– an online platform where advertisers can upload details of websites or apps which have been determined to infringe copyright, retrieved from https://www.wipo.int/wipo-alert/en/.

34 See, for a recent report, EUIPO (2023), *European Citizens and Intellectual Property: Perception, Awareness, and Behaviour*, in particular p. 15, retrieved from https://euipo.europa.eu/ohimportal/en/web/observatory/ip-perception-2023.

35 Recommendation, point 33-35.

36 On the basis of Audiovisual Media Services Directive, Member States may already ensure wide access by the public to television coverage of so-called events of major importance for society such as the Olympic Games, the FIFA Football Worldcup or the UEFA European Football Championship. See Article 14 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ 2010, L 95/1 of 15.4.2010.

37 See the Agorateka website at https://euipo.europa.eu/ohimportal/en/web/observatory/agorateka.

## B. MONITORING THE IMPLEMENTATION OF THE RECOMMENDATION

31. In order to monitor and assess the implementation and the effects of the Recommendation, the Commission has set up a monitoring system with the support of the Observatory[38].

### a) Key Performance Indicators

32. To conduct an effective monitoring, on July 31, 2023, the Commission published four key performance indicators (KPIs) reflecting the different sections of the Recommendation[39]. The KPIs, with both quantitative and qualitative elements, were developed following intensive consultations of holders of rights, online intermediary services and public authorities. The addressees of the Recommendation are invited to submit the data related to the KPIs to the Observatory through pre-defined templates and within certain timelines[40]. The data collection will take place on a voluntary basis with respect for the confidentiality of the information. The Observatory intends to organize regular meetings with the addressees to take stock of the progress made.

### b) Creation of a Targeted Network of National Copyright Administrations

33. In addition, the Recommendation invites the Observatory to set up a dedicated network of national authorities to exchange information on experiences, challenges and good practices. The network should be primarily composed of representatives of administrative authorities with specific powers in the field of IP enforcement. However, member states that do not have specialized administrative authorities are also encouraged to join the network[41].

34. The information gathered in this network should contribute to the monitoring of the effects of the Recommendation. For instance, the exchange of information on services that are subject to an injunction in one member state can help inform the enforcement authorities in other member states where the same services are available. The network should also discuss good practices in building up national administrative systems to combat live event piracy. Once well-established, the network could also consider opportunities for further cross-border cooperation.

35. On October 10, 2023, the first meeting of the dedicated network of national authorities took place at the premises of the European Union Intellectual Property Office (EUIPO) in Alicante. The first experiences were positive, with participation of the vast majority of member states, detailed presentations of national experiences and animated discussions on the policy, legal and technical aspects of live event piracy. In principle, the network will meet twice per year.

36. The Observatory is further encouraged to develop and organize knowledge-building activities for national judges and authorities. The Observatory already has an intensive

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38 Recommendation, points 39-42.

39 European Commission (2023), *Recommendation on online piracy of sports and other live events: the Commission services publish Key Performance Indicators*, retrieved from https://digital-strategy.ec.europa.eu/en/news/recommendation-online-piracy-sports-and-other-live-events-commission-services-publish-key.

40 See for details the dedicated website on live event piracy of the Observatory at https://euipo.europa.eu/ohimportal/en/web/guest/european-observatory (under construction)https://euipo.europa.eu/ohimportal/en/web/observatory/agorateka.

41 Recommendation, points 36-37 and recitals 34-35.

knowledge-building program for national judges and public prosecutors on IP enforcement[42]. It will target future activities on measures and remedies promoted by the Recommendation.

## III FINAL COMMENTS

37. The Commission will assess the effects of the Recommendation on unauthorized retransmissions of live sports and other live events by November 17, 2025. It will take into account the results of the monitoring exercise. The Commission will then decide whether additional measures are needed BED at EU level. These might well be binding measures, as requested by the European Parliament.

38. More broadly, member states and other relevant parties may be inspired by the Recommendation to apply the measures in other situations where prompt action to avoid damage through IP infringement is required.

[End of document]

42 Recommendation, point 38 and recital 36.