

THE PROSECUTION OF INTELLECTUAL PROPERTY CRIME: REPORT ON RESULTS OF SURVEY

Document prepared by the Secretariat

ABSTRACT

This document summarizes the results of a survey administered by WIPO in 2023 to compile information on the prosecution of intellectual property (IP) crime in its Member States. The objective was to gain a better understanding of the diversity of national approaches to IP crime prosecution and the distinct needs of IP crime prosecutors so that WIPO can develop and deliver more targeted and impactful assistance to national prosecutors.

The survey sought information on fundamental elements of national IP crime prosecution systems, its role within the criminal prosecution services in general, the availability of actions such as shutting down / seizure of infringing websites, statistical information on prosecutions and recovery of illegal assets and successes and challenges of national systems for IP crime prosecution.

I. BACKGROUND AND OBJECTIVE

1. In August 2023, WIPO initiated a survey to compile information on the prosecution of intellectual property (IP) crimes in its Member States. The objective of the survey was to better understand how IP crime is prosecuted at the national level and what specific knowledge and skills IP crime prosecutors need to perform their duties effectively and efficiently. This information will help WIPO provide more targeted and impactful assistance to prosecutors.
2. In a first step, WIPO requested its Member States' Permanent Missions in Geneva to communicate the contact details of a national focal point on IP crime prosecution. Based on the information provided by the Permanent Missions, 52 national focal points were sent a link to an online survey. Twenty-seven WIPO Member States eventually submitted complete responses.
3. This contribution summarizes the results of all complete responses received through January 26, 2024.

II. ANALYSIS

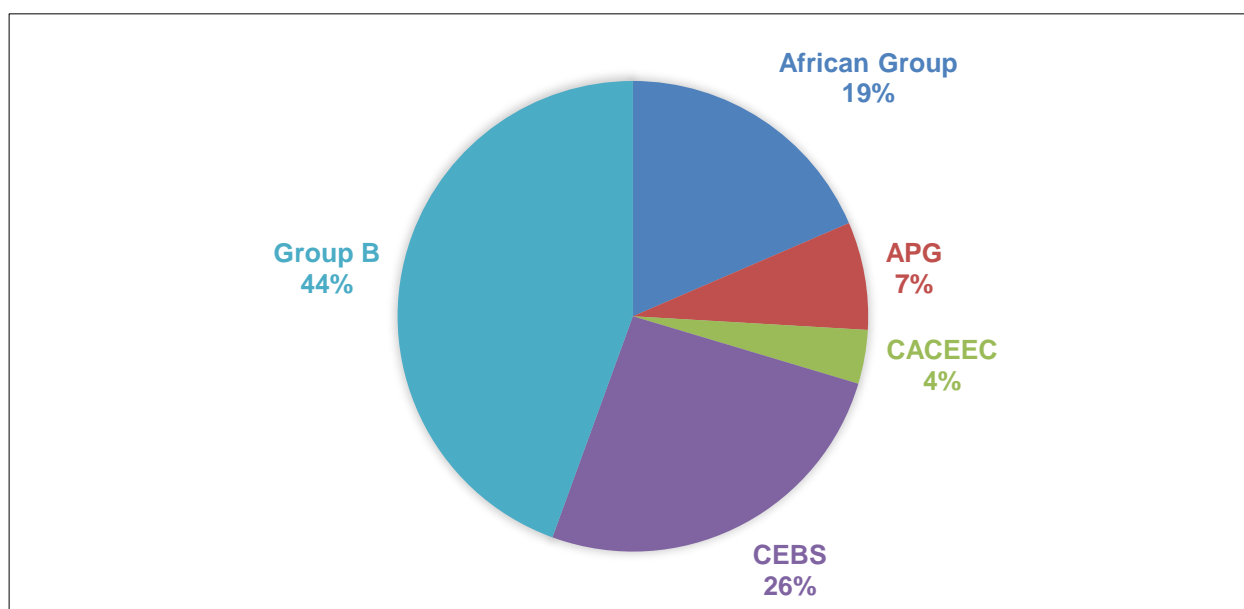
4. The survey sought information on:

- fundamental elements of national IP crime prosecution systems (e.g., types of IP infringements subject to criminal sanction, nature of the prosecution system, and how proceedings may be initiated);
- its role within the criminal prosecution services in general (e.g., whether IP crime prosecution is specialized, how it is integrated with other areas of criminal prosecution, including prosecution of digital copyright piracy; and the IP knowledge and skills of prosecutors);
- the availability of actions such as shutting down / seizure of infringing websites;
- statistical information on prosecutions and recovery of illegal assets; and
- successes and challenges of national systems for IP crime prosecution.

A. RESPONDENTS' BACKGROUND

a) WIPO Member State Group Affiliation

5. The distribution by group of the 27 WIPO Member States is as follows: five members of the African Group; two members of the Asia and Pacific Group (APG); one member of the Group of Central Asian, Caucasus and Eastern European Countries (CACEEC); seven members of the Group of Central European and Baltic States (CEBS); and 12 members of Group B. Responses to the survey were not received from any members of the Group of Latin American and Caribbean Countries (GRULAC) nor China.



Distribution of respondents by Group of WIPO Member States

b) Professional Affiliation

6. While most respondents were prosecutors (23), two judges, two representatives of Ministries of Justice, one representative of a national police service and one representative of a national IP Office also submitted responses.

B. FUNDAMENTAL CHARACTERISTICS OF INTELLECTUAL PROPERTY CRIME PROSECUTION

a) Intellectual Property Violations Constituting Criminal Offenses

7. Article 61 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), requires members of the World Trade Organization (WTO) to provide for “criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale”. It is important to note that WTO members may go beyond this obligation. The last sentence of TRIPS Article 61 states that WTO members remain free to “provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights”. Against this background, the survey asked which types of IP infringements are criminally sanctioned.

8. While two WIPO Member States responded that criminal sanctions are limited to counterfeiting and piracy, most jurisdictions provide for the criminal prosecution of other forms of IP infringement. Many Member States criminally sanction any infringement of copyright or industrial property rights, such as trademark, industrial designs, patents, utility models, typographies of semiconductor products, geographical indications, plant variety rights (three Member States) and animal variety rights (one Member State). Many Member States also mentioned the unauthorized disclosure of trade secrets as a criminal offense.

9. In relation to copyright, several Member States not only criminally sanction violations of the author’s economic rights, but also those related to moral rights or even plagiarism. In one Member State, it is a criminal offense to make a public statement on the contents of an unpublished work. Circumventing technological protection measures and tampering with right management information is also mentioned by many Member States as criminal offenses. Some Member States also make specific reference to infringements of related rights as criminal offenses.

10. At least three Member States have specific criminal provisions on online infringement, such as the use of an information network to commit an offense or, more specifically, the illegal receipt of online and media services, commercial dealings in devices or subscription services that give access to unauthorized streams of copyrighted content or facilitating access to copyright-infringing works on the Internet.

11. A few Member States also mentioned related offenses, such as false indications about the provenance, quality or composition of products, unfair competition and tax evasion.

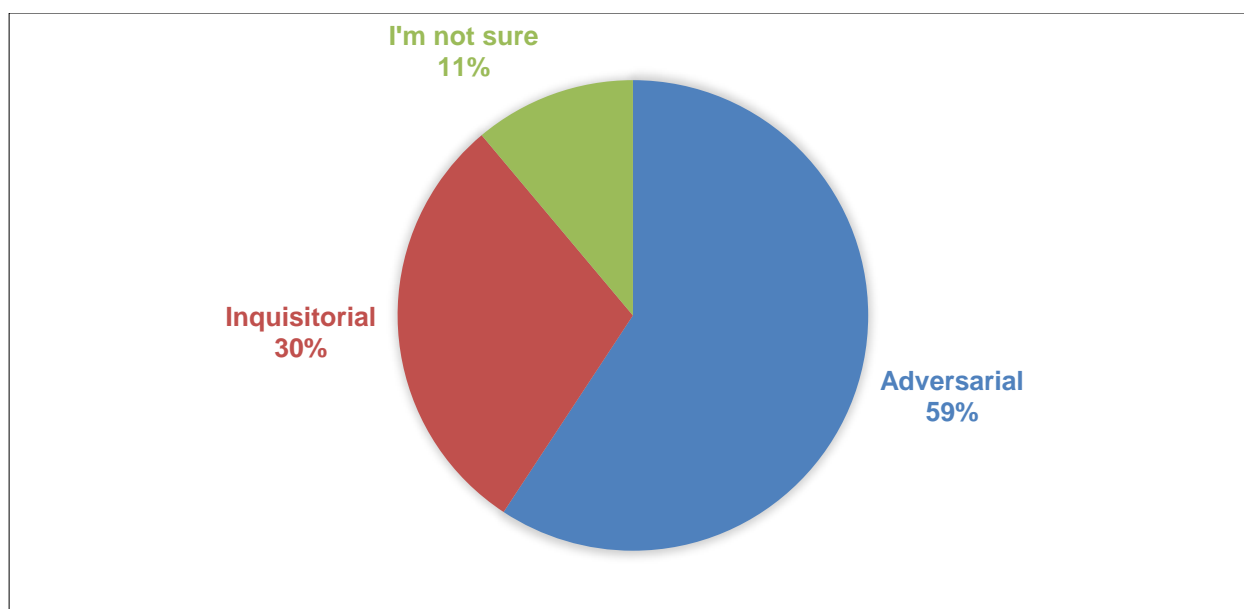
12. Some Member States specified that, to qualify as an IP crime, the infringement must be committed on a commercial scale or for commercial gain or must cause considerable harm or economic loss. Several Member States mention specific aggravating factors, such as a particularly high economic benefit, a large number of infringing products produced, a particular seriousness of the offense, considerable harm, commission as part of an organized crime group or by using minors. One Member State expressly mentioned that attempted offenses may also lead to criminal liability.

13. Several Member States indicated that criminal liability is conditioned on intent or gross negligence.

b) Adversarial vs. Inquisitorial System

14. The survey asked whether the prosecution in the Member States concerned followed the adversarial or the inquisitorial system. In the adversarial system, typically used in common law countries, a competitive process between prosecution and defense determines the facts, with the judge serving as arbitrator. Inquisitorial systems, typically found in civil law countries, use extensive pre-trial investigation and interrogations as an official inquiry to ascertain the truth, with the judge overseeing the process.

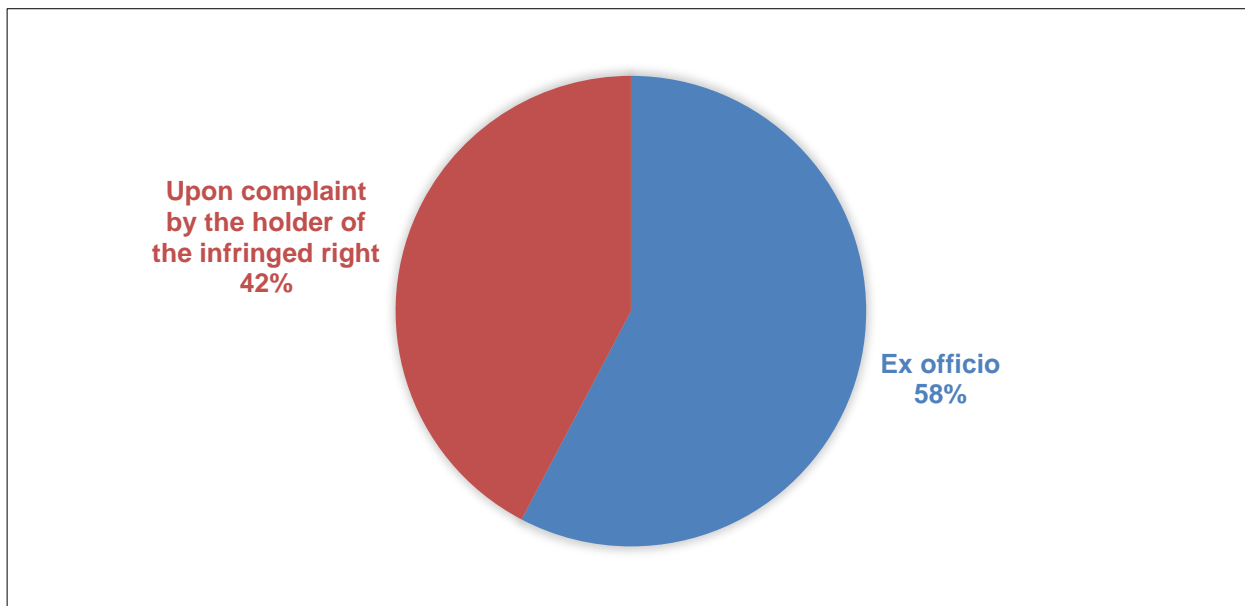
15. Sixteen Member States reported following the adversarial system (59 per cent), and eight Member States identified their prosecution system as inquisitorial (30 per cent). One of the Member States identifying with the adversarial system indicated that, while the procedure before the court is adversarial, the pre-trial process is inquisitorial with the investigator collecting evidence of an infringement.



Distribution of respondents identifying adversarial versus inquisitorial prosecution systems

c) Ex officio vs. Complaint by the Holder of the Infringed Right

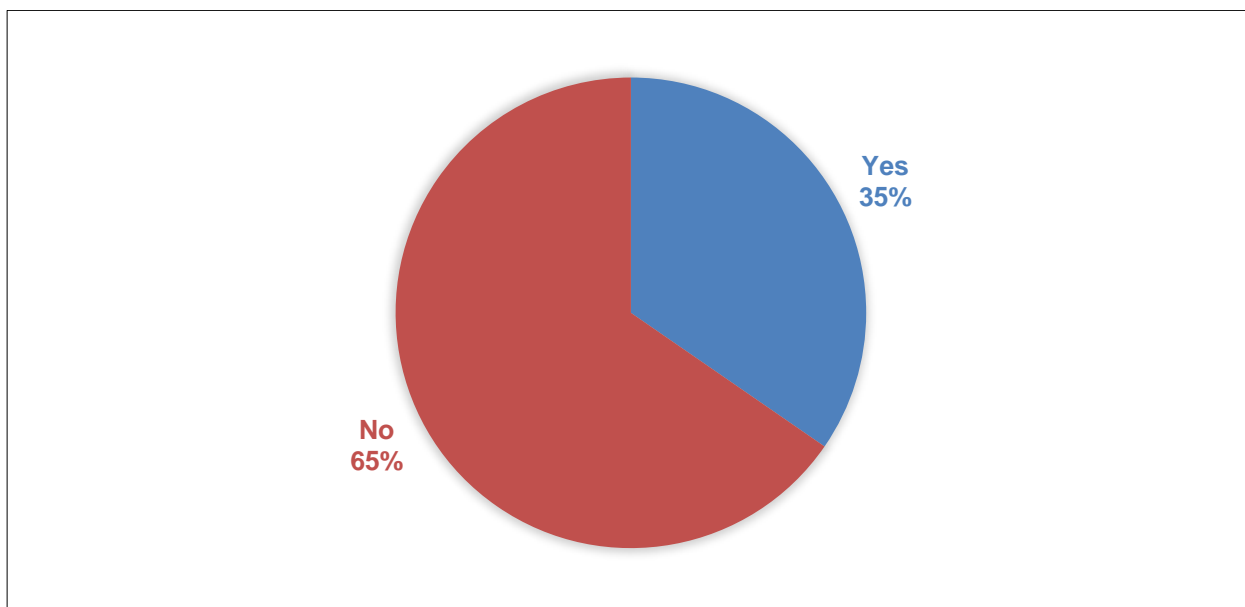
16. In 15 Member States, IP crime is prosecuted *ex officio* (58 per cent), whereas 11 Member States prosecute IP crime only upon complaint by the holder of the allegedly infringed right (42 per cent). One Member State indicated that, while IP crime is prosecuted *ex officio*, if the harm caused is not significant, the proceedings are only carried out if the right holder becomes involved. One Member State provided a contradictory reply.



Initiation of IP crime prosecution

d) Specialized Intellectual Property Prosecution

17. Prosecutors with specialization in IP crime exist in nine responding Member States (35 per cent). Seventeen Member States do not have any such specialization (65 per cent). One Member State reported that rules to ensure the specialization of public prosecutors on IP crime have been issued but not yet implemented (not counted in the before-mentioned figures).



Existence of prosecutors with specialization in IP crime

18. Among the Member States reporting IP crime specialization, the nature of the specialization, the number of prosecutors and the structure of the specialized prosecution functions varied widely.

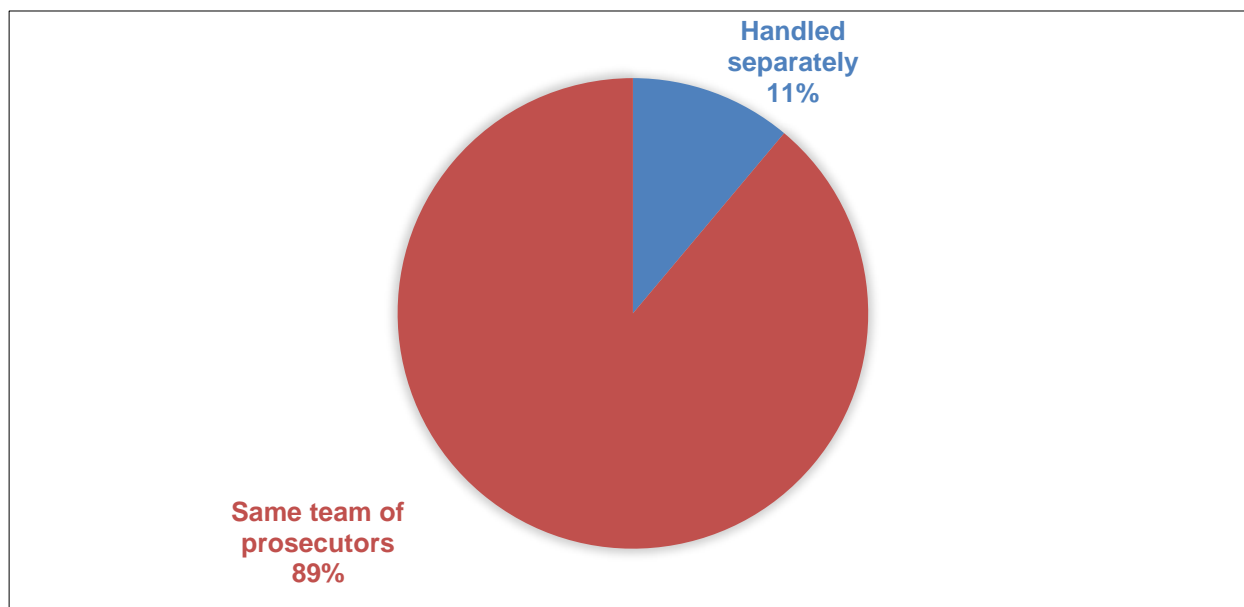
19. In two Member States, the scope of specialization in IP crime prosecution is limited: in one Member State, to IP crimes committed in the digital environment, which fall within the responsibility of prosecutors of computer crime; in the other, to organized crime. All other Member States referred to IP specialization more broadly. In at least four Member States, the prosecutors specialized in IP crime do not work exclusively in this area, but also handle the prosecution of other economic crimes.
20. In terms of numbers of specialized prosecutors, three respondents reported less than 10, with the numbers ranging from one or two prosecutors to six special IP/ cyber prosecutors working as a team in a national unit responsible for organized crime. Two respondents reported approximately 50 prosecutors with specialization in IP crime investigation.
21. The geographical distribution of specialized IP prosecution services and their integration in the national prosecution structure differed among Member States, reflecting their distinct legal and judicial frameworks. For example, in one Member State, prosecutors specialized in (but not exclusively dealing with) IP crime are located in only one district, namely the one in which the most IP crimes are committed. In two other Member States, there is at least one specialized prosecutor with experience in cyber crime, including IP-related cyber crime, in each prosecutor's office at the relevant level, in addition to a central national unit. In yet another Member State, the specialized prosecutors are housed within the entity responsible for serious and organized crime. In a further Member State, a specialized team or division for IP crimes exists in each prosecution office across the country. One respondent reported a distinct structure, in which a significant number of IP crimes are prosecuted by private counsels, who may be authorized by the Public Prosecutor to conduct prosecutions on an ad hoc basis, instructed directly by IP right holders, under the supervision of a Deputy Public Prosecutor.
22. With regard to the selection of specialized prosecutors, three of the nine respondents referred to the professional knowledge of the candidates as the relevant criterion, with one specifying that the selection of Deputy Public Prosecutors is based on expertise or experience in technology-related law. Only one Member State reported an IP-specific education requirement, namely a Master's degree in IP.
23. Four respondents confirmed that training is provided to the prosecutors specialized in IP crime. In one Member State, education and capacity building is provided by the Institute of Justice and the Supreme Prosecutors' Office, while another Member State reported training by external academics and senior prosecutors specialized in IP and technology crime. One respondent reported receiving training through the European Intellectual Property Prosecutors Network (EIPPN).
24. The duration of a prosecutor's term of service in a specialized role varies. The shortest term provided was of at least one to two years, and the longest term given was 10 years. It is important to note that these are only estimates. One respondent reported that, where specialized prosecutor's offices are established, prosecutors generally do not change their place of assignment.
25. Among Member States without specialized prosecutors, 13 reported that IP crimes fall within the purview of the general public prosecution service. Among these, in two Member States, in addition to the general prosecution services, IP crimes can be handled by specialized services such as the Public Prosecution for High-tech Crime, or the National Office for Serious Fraud, Environmental Crime and Asset Confiscation. One Member State reported that, although all prosecutors can handle IP crimes, in practice, IP prosecutions are generally allocated to slightly more experienced prosecutors. Only one Member State reported that IP crimes are prosecuted by the national copyright office.

26. In two Member States, IP crimes are dealt with by prosecutors with responsibility for economic and financial crimes. In another Member State, the prosecution of IP crimes is divided between general prosecution services and sections for economic crimes, with criminal copyright offences handled by the former and all other IP crimes handled by the latter.

27. Two Member States referred to specific geographic jurisdiction for IP crimes, such as IP crimes being handled by the general prosecution services (and criminal court) of a specific city or being split between a district prosecution service (for IP crimes prosecuted alone) or a regional prosecution service (where IP crimes are prosecuted together with other serious crimes).

e) Prosecution of Digital Copyright Piracy

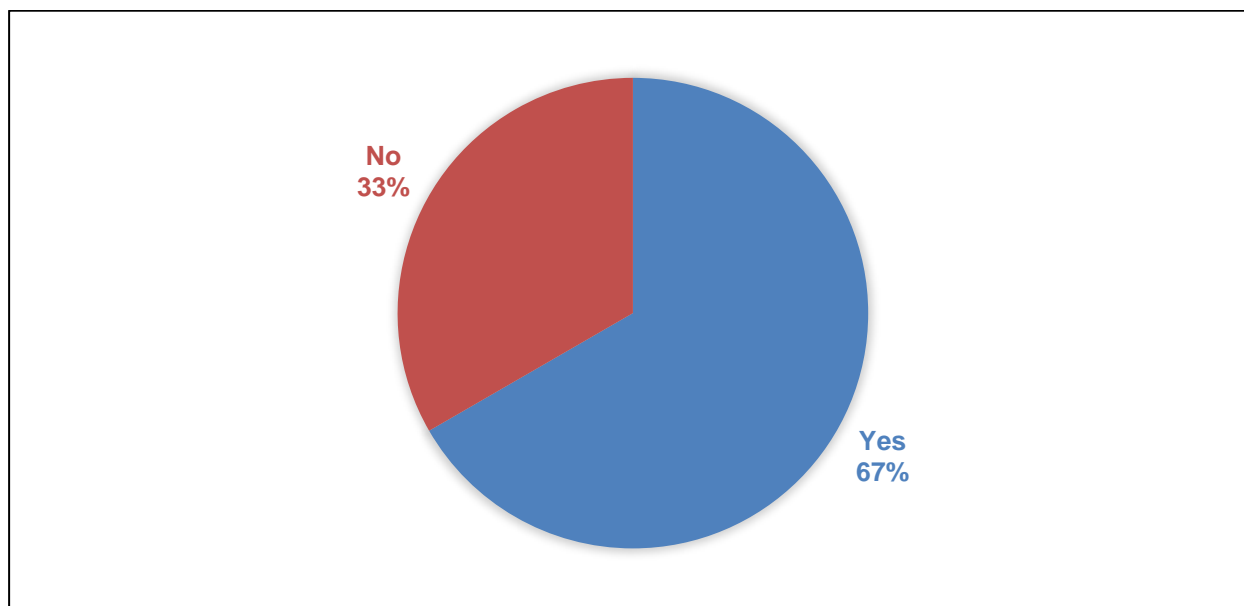
28. In 24 Member States, IP crimes involving digital copyright piracy are handled by the same team of prosecutors who handle IP crimes involving physical goods (89 per cent). Digital copyright piracy is handled by a different part of the prosecution services in only three Member States (11 per cent): by a different department of the public prosecutor's office; by the Public Prosecution for High-tech Crimes; or by specialized cybercrime teams and the National Office for Serious Fraud, Environmental Crime and Asset Confiscation. However, in at least two of the three Member States, this general separation is not absolute.



Prosecution of digital copyright piracy

f) Shutting down / Seizing Infringing Web Sites

29. Sixteen Member States have a process for shutting down or seizing websites that make available copyright-infringing digital content or engage in selling trademark counterfeit goods (67 per cent); eleven Member States do not have such a process (33 per cent).



Availability of procedures to shut down or seize infringing websites

30. In at least seven Member States, orders to shut down or seize infringing websites are made by the judiciary. In one Member State, the public prosecution can instruct the competent technical government body to seize websites that it has found to be infringing. In one Member State, an administrative entity is empowered to monitor activities in the area of copyright and related rights and to request that an Internet service provider block websites illegally retransmitting copyright-infringing broadcasts of live sport or cultural events. In two Member States, the police force has powers to shut down or seize domains, both on the basis of copyright-infringing content and the offering for sale of trademark counterfeit goods. One Member State reported the existence of an online reporting system that allows members of the public to report violations via an online platform, to trigger investigations.

31. There was not sufficient information to compare the processes used, or the availability of different kinds of orders, across Member States.

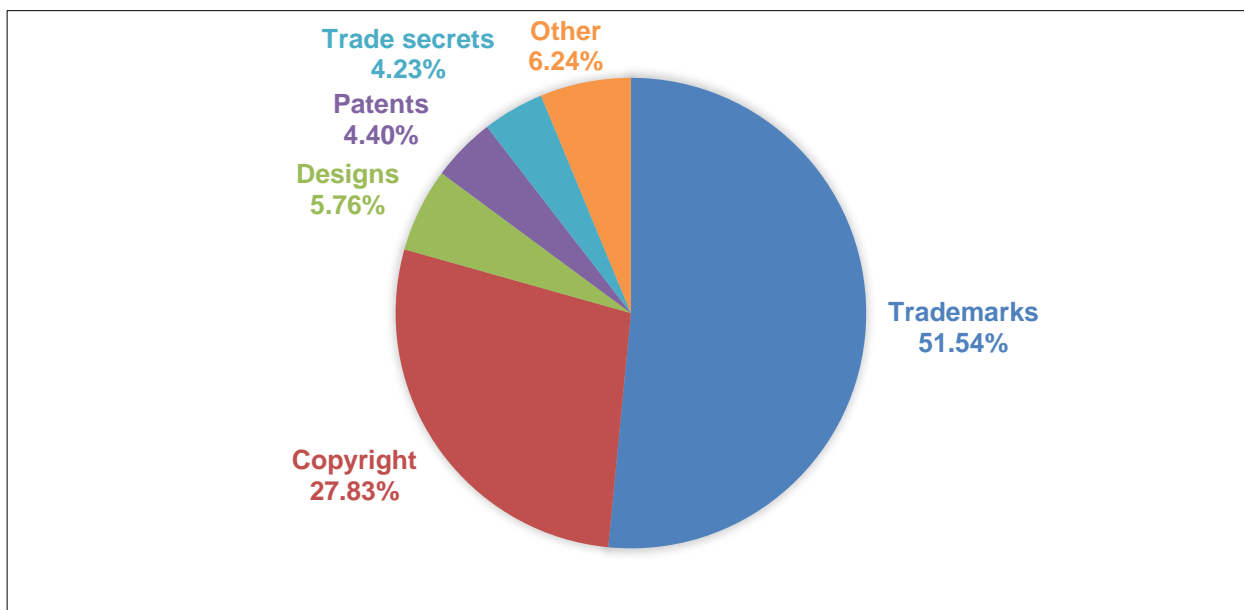
C. STATISTICS ON INTELLECTUAL PROPERTY CRIME PROSECUTION

a) Prosecutions by Infringed Intellectual Property Right

32. Less than half of respondents reported that they have recent statistics on IP crime cases. It was also noted that, where statistics do exist, they may not accurately capture all IP crime, as IP-related cases may be recorded in other areas such as tax offences or money laundering.

33. Among the respondents who shared statistics, the numbers indicate a wide gulf in the number of cases handled by authorities across jurisdictions, even considering that a defined unit of calculation was not provided. The lowest number of cases reported was two. In contrast, in one Member State, almost 4,500 cease--and--desist notices have been issued since April 2020 under an initiative to defund illegal websites involved in piracy, while over 131,000 domains that sell counterfeit goods have been shut down.

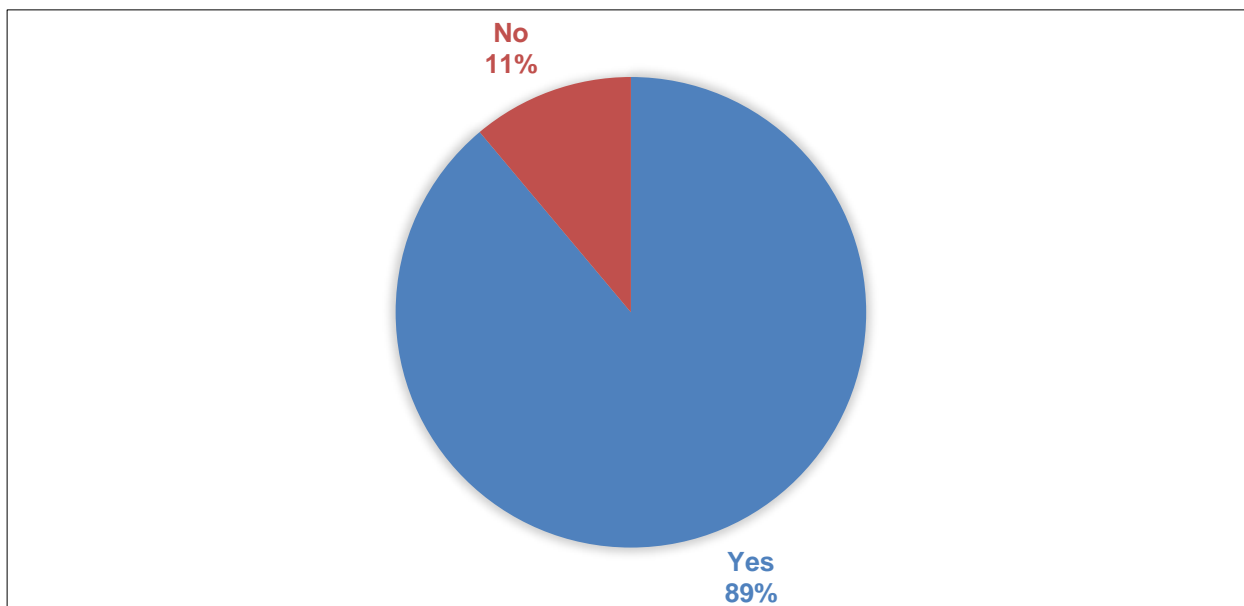
34. On average, it was estimated that a little more than half of all reported IP crimes involved trademark offences (51.54 per cent), and a little more than a quarter involved copyright offences (27.83 per cent).



Distribution of IP crime prosecution by infringed right

b) Illegal Asset Recovery

35. Twenty-four Member States reported that illegal assets can be recovered through IP crime prosecution (89 per cent).



Availability of illegal asset recovery

36. However, statistics regarding recovery of illegal assets are generally not available. Further, among Member States in which recovery is possible, only seven respondents shared examples of cases in which illegal assets had been recovered.

37. The case examples shared involved both counterfeit goods and webhosting and storage servers and other electronic devices used in online piracy, as well as sale proceeds.

38. In at least one Member State, the legislative regime also permits the confiscation of substitute assets accumulated by offenders who have benefitted from relevant IP offenses, to deal with circumstances where the offences have been taking place for a period of time and the assets that can be directly linked to the proceeds of crime are limited.

D. INTELLECTUAL PROPERTY CRIME PROSECUTION IN PRACTICE

a) Successes in Prosecuting IP Crime

39. The survey asked the respondents to describe any successes in prosecuting IP crime. In replying (which was optional), five Member States were unable to report any successes, which two Member States specifically attributed to a lack of cases. Three Member States reported that there were only a few IP crime cases, which was explained by the difficulty of obtaining evidence and the difficulty of identifying the traders and producers of IP-infringing goods.

40. Those Member States that described successes did so with reference to specific cases. Almost exclusively, these cases concerned IP-infringing physical goods (shoes, clothing and fashion, consumer electronics, electronic network equipment, e-cigarettes, printer cartridges, industrial bearings, detergents, beer, car navigation software, mobile phones) and digital piracy (illegal making available of newspapers and magazines, webhosting and storage servers, illegal Internet protocol television (IPTV), making available of blockbuster films and unreleased songs). In an apparent contrast to the multitude of IP infringements that constitute IP crime in many Member States (paragraphs 8 to 11 above), the infringement at the center of these cases concerned almost exclusively trademarks or copyright.

41. Only three Member States mentioned other types of infringement, one referring to geographical indications and the other two to the unauthorized disclosure of trade secrets - one in relation to research, identification and treatment of pediatric medical conditions and the other relating to technology involved in the core materials of semiconductors and smartphones.

42. Two Member States attributed successes in IP crime prosecution to the existence of a specialized IP unit within the police. Success with prosecuting IP crime was explained by one Member State with the existence of a special IP crime unit at the national prosecution service and by another with the cooperation between prosecution, investigation unit, national IP office and right holders.

b) Challenges in Prosecuting IP Crime

43. Respondents revealed many challenges throughout all stages of the enforcement process, such as the nature of IP crime, particularly in the digital environment, which presents difficulties for prosecution services in terms of the:

- complexity of cases;
- technological hurdles to identifying perpetrators in the digital environment;
- identification of appropriate infringers for prosecution in the context of counterfeit merchandise, which is often transmitted through a complex chain of intermediaries;

- identification and investigation of infringers in a cross-border context, including identification of bank accounts and corporate entities used for illegal funds;
 - collection of evidence, including in obtaining relevant data in the online environment;
 - determination and calculation of the harm suffered by victims;
 - recovery of illegal assets; and
 - lack of adaptation of legal provisions in some jurisdictions, including the absence of certain powers, such as for the seizure or take down of infringing websites.
44. The challenges also relate to human and institutional capacities, such as:
- lack of specialized training and experience among investigators, law enforcement, prosecutors and members of the judiciary, including as a result of insufficient practice (due to the low number of cases filed);
 - limited investigative and prosecutorial resources, particularly in dealing with financial and technological crimes; and
 - high turnover of human resources.
45. In addition, there are operational challenges for prosecutors, including:
- low priority given to IP crime in some jurisdictions, which may mean that prosecutors cannot allocate sufficient time to such cases, despite the fact that they may be complicated in nature;
 - lack of coordination with police forces and other IP enforcement entities;
 - lack of cooperation from some right holders; and
 - lack of effective international cooperation.
46. Importantly, respondents also identified broader societal factors as directly impacting their work, for example:
- lack of awareness of IP crimes among the public; and
 - hesitation on the part of IP right holders to file criminal complaints.

E. KNOWLEDGE AND SKILLS

47. Asked whether prosecutors can ensure their knowledge of developments in IP criminal law and practice remains current, almost a third of respondents reported that updated information on law and practice is not provided for prosecutors in their countries. In the remaining Member States (over 60 per cent), however, prosecutors stay current by attending training programs, professional and academic networks, and reading published materials (such as journals and compilations of national judicial decisions). In one country, the existence of at least one specialized prosecutor with expertise in cyber and IP offences in each federal prosecutor's office permits the transfer of knowledge and training to other prosecutors, ensuring that prosecutors are well-equipped to identify and pursue criminal IP cases consistently across the country.

48. Over half of the respondents were not aware of any training on prosecution of IP crimes available in their countries. In Member States where such training was known to be available,

the relevant programs are offered by national legal and judicial training authorities, national IP offices, and/or regional organizations.

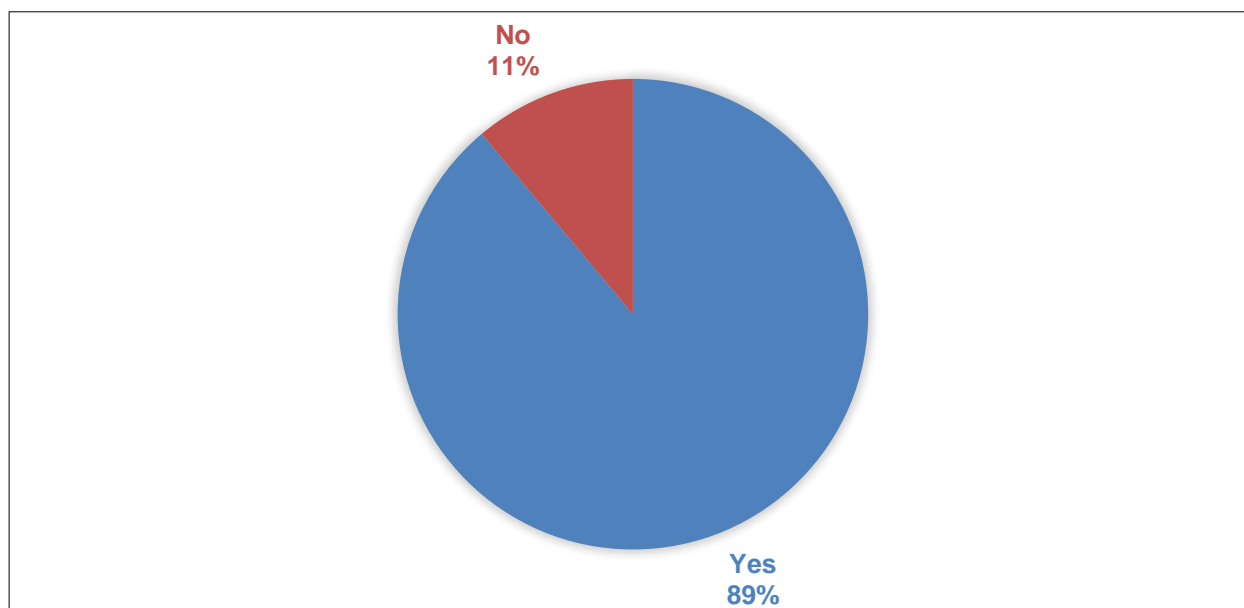
49. The survey also enquired which elements of IP criminal prosecution prosecutors would need training on as an initial step, and the results indicated a broad range of topics. In general, the training needs identified related to the following:

- foundational training on IP rights, as well as in-depth understanding of the types of IP crimes, their legal concepts and standards of proof;
- national and international good practices and modern techniques for investigation, including recognizing and distinguishing IP offenses, cooperating with right holders, and collecting and preserving evidence, with particular attention to IP crimes in the online environment;
- good practices and strategies for prosecution, such as dealing with expert witnesses and building a strong case ;
- international cooperation with foreign authorities and organizations;
- use of databases, tools and resources; and
- recovery of illegal assets.

50. One respondent reported that, despite available training for prosecutors , there is an important need that investigators be trained, as they serve the crucial role of investigating IP crime prior to prosecution. Raising awareness among the public was also cited.

F. SUPPORT FROM WIPO

51. Almost 90 per cent of respondents were interested in receiving information about WIPO's services for prosecutors dealing with IP crime. Roughly a quarter of respondents were aware, to some extent, of WIPO's existing assistance and technical support for prosecutors.



Interest in receiving information about WIPO's support for prosecutors dealing with IP crime

52. Many respondents requested capacity building support, including with raising awareness of IP matters generally, as well as specialized training on the collection of evidence and presentation of cases in Court, as well as interacting with foreign judicial and other authorities.

53. With regard to support other than capacity building, the respondents requested the following:

- facilitating information sharing at the international level, for example:
 - the latest trends, such as comparative information on recovery of illegal assets and the most effective and innovative investigative methods and tools at the national and international level;
 - cases and successful prosecutions in other jurisdictions; or
 - the establishment of an online platform or network of prosecutors, through which prosecutors can exchange their experiences and challenges in prosecuting IP cases;
- creating a list of experts to provide evidence on the calculation of damages caused to right holders in IP crime cases;
- providing technical tools and support for the digitization of prosecutorial services;
- facilitating greater international cooperation in combating IP crime; and
- fostering the development of consistent legal structures and expertise across Member States.

54. The importance of strengthening the capacity of judges who decide IP cases was also raised.

III. WAY FORWARD

With a view to achieving broader representation of WIPO Member States in the survey on prosecuting IP crime, the Secretariat will follow up with those Permanent Missions that have not yet submitted the contact details of a national focal point on prosecuting IP crime. Moreover, the Secretariat will invite national focal points who have not yet submitted complete responses to the survey, to do so.

Based on the additional information received, an updated analysis of the prosecution of IP crime in WIPO Member States will be prepared for the seventeenth session of the Advisory Committee on Enforcement (ACE).

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