



Federation of the European
Sporting Goods Industry

FESI POSITION PAPER ON THE REVISION OF THE IPR ENFORCEMENT DIRECTIVE

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FEDERATION OF THE EUROPEAN
SPORTING GOODS INDUSTRY

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The Federation of the European Sports Goods Industry (FESI) supports the objective of the European Commission to revise the legal framework for the enforcement of intellectual property rights (IPR). Ideally, this process should start as soon as possible.

To ensure that the sporting goods industry maintains the reputation of its high-quality products and diminishes the losses incurred from the selling of counterfeited products, FESI calls the Commission to:

- Update the measures provided by IPRED for effective means of **presenting obtaining and preserving evidence**, particularly for online counterfeiting.
- **Harmonize national IP infringement procedures** linked to actions put in place by local authorities.
- Clearly **define the term intermediaries** as to include all the necessary actors.
- Reconsider the **award of damages** in cases of IPR infringement.
- Introduce a principle of **'duty of care'** for all online service providers.
- Define the **proportionality of an injunction** and establish that all types of **intermediaries can be subjected to injunctions**.

The sporting goods industry is one of the main targets for counterfeiters and requires for the legal framework to be effectively up to date with the ever-changing and increasingly online market. FESI thus urges for the **re-evaluation and modernization of the legal framework for the enforcement of intellectual property rights (IPR)**.

In order to **preserve the brands** but also the **safety and high-quality** reputation of the sporting goods industry it is essential to modernize the legal framework enforcement of IPR, focusing on **commercial-scale infringements** as well as effective **cross-border applicability**.

HARMONIZING MEASURES FOR EVIDENCE IN JUDICIAL CASES

FESI calls for an updated homogenised IPR enforcement directive (IPRED) for the **collection and use of evidence utilised for juridical review**, with particular focus to online counterfeiting cases. IPRED now holds no provisions on evidence found on computers, as well as lacking provisions on obligations for intermediaries to preserve certain information during certain period of time, in particular regarding online cases.

FESI also urges for courts to be empowered to:

- I. **Accept any proof of the infringement** (including simple witness statements and screen shot of web page with respect to infringements via online market place).
- II. Adopt the necessary measures to **protect the identity of witnesses** whose information has allowed to prove the infringement, where appropriate, e.g. in case of anonymous information received from members of the public.
- III. Allow the use of **samples as evidence**.

Moreover, FESI calls for evidence and **information to be allowed to be obtained from any person who is providing on commercial scale services used in infringing activities, including intermediaries**. Intermediaries should be in this regard obliged to inform right holders of the identity of the infringer while the overall process of exchange of information between Member States should be homogenised.

IDENTIFYING AND DEFINING MEASURES AGAINST COUNTERFEITING

FESI supports an **updated definition of the term 'intermediaries'** to be included in the directive e.g. transporters, carriers, freight forwarders and shipping agent in the supply chain for the movement of infringing goods. To this regard, **internet payment platforms should also be considered as intermediaries** in the same role as the transporters in sharing evidence and accountability. Moreover, IPRED should explicitly establish that **all types of intermediaries can be subject to injunctions**.

FESI supports the notion for an obligation to **actively monitor** in order to prevent future infringements which is not per se contrary to Article 3 of Directive 2004/48.

The Commission could also **clarify the scope of permanent injunctions** by, for example, adding an annex containing a non-exhaustive list of proactive and preventive measures to IPRED to guide courts on the scope of injunctions available to prevent repeat infringements. Such injunctions should not be title or brand-specific but refer to the right holder's portfolio/repertoire based on samples.

FESI, moreover, calls for the rights of information in Article 6.2 and similarly in Article 8 which **requires the infringement to be "committed on a commercial scale" to obtain the communication of banking, financial or commercial documents to be abandoned.**

An addition to the scope of Article 2 should also be amended to **include parasitic copies**, e.g. look-alikes or knock-offs.

AWARD OF DAMAGES

FESI urges for IPRED to give the right tools to **award damages in cases of IPR infringements that compensate for the actual prejudice suffered by the parties affected**, in particular with online counterfeiting. The Directive should thus clarify that the Right Holders loses profits for each infringing products, regardless of whether it is proven that the IP holder would have sold the same number of products as the infringer. IPRED should also clarify that the **IP holder can recover the legal fees and costs for test purchases** or other investigations.

DUTY OF CARE

FESI supports the idea of **introducing a general principle of "duty of care" for all online service providers and intermediaries** in order to enforce a responsible conduct in line with fair trading practices and norms.

In the light of the evolving technologies, it may be proportionated and reasonable, for online service providers, to carry out a due diligence with respect to the "soundness" of the provided services by **installing a monitoring system and imposing an obligation to actively seek facts or circumstances indicating illegal activities.**

PROVISIONAL AND PRECAUTIONARY MEASURES AND INJUNCTIONS

FESI encourages the Commission to **introduce a definition for the proportionality of injunctions and to establish that all types of intermediaries can be subjected to injunctions.**

Amendments to the provisions on provisional and precautionary measure and on injunctions should include:

- i. Notice and take down procedures:** online platforms and hosting providers should be obliged to organise an efficient and effective notice and 'take down system', accessible via the website or the online platform. Additionally, the notice and take down should

include all content listed on behalf of a certain person rather than only products. Penalties to this regard should be proportionate and harmonised.

- II. **Blocking:** right holders should be able to seek injunctions against ISP's in order to compel them to block infringing content.
- III. **Destruction:** destruction should be ordered as a provisional measure in order to avoid storage costs.

Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1,800 sporting goods manufacturers (85% of the European market) through its 12 National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 650,000 EU citizens and has an annual turnover of some 66 billion euro.