



European Communities Trade Mark Association

**European Observatory on Counterfeiting and Piracy
Report of the meeting of 24 November 2009 of the Sub-Group of Experts on Legal
Framework**

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The second meeting of the Sub-Group of experts on Legal Framework set up within the European Observatory on Counterfeiting and Piracy took place on 24 November 2009 in Brussels.

The meeting was attended by:

Benoît Lory (FR), EU Commission, DG MARKT (Chair)
 Zuzana Heckova (SK), EU Commission, DG MARKT
 Dominika Svozilova (CZ), EU Commission, DG TRADE
 Allen Dixon, International Intellectual Property & Technology Consulting (UK) – Delegate of BASCAP
 Emmanuelle Hoffman-Attias, lawyer, Cabinet Hoffman (FR) – Delegate of Unifab
 Ann-Charlotte Söderlund, Delphi law firm (SE) – Founder Swedish Anti-Counterfeiting Group, Co-Founder Global Anti-Counterfeiting Group and Swedish member of the Anti-Counterfeiting Committee of ECTA
 Prof. Cesare Galli, Galli law firm (IT), University of Parma – Delegate of Indicam
 Ted Shapiro, Senior Vice-President, General Counsel & Deputy Managing Director Europe, Middle East & Africa, Motion Picture Association
 Olivia Regnier, IFPI
 Lisa Peets, Covington & Burling law firm (UK) – Delegate of Business Software Alliance
 Olivier Vrins, Altius law firm (BE) – Delegate of ECTA and the Belgian Anti-Counterfeiting Association

A delegate from BEUC (The European Consumers' Organisation) is also part of the Sub-Group but was not present at the meeting.

1) Following the approval of the Minutes of the 22 November meeting and a short overview of the CIRCA system (secured Internet platform) made available to the Sub-Group's members, the 24 November meeting followed-up in the first place on the review of the implementation in the Member States of Articles 13-14 of the Enforcement Directive relating to damages (scope, calculation, burden of proof, etc.) and costs, including additional financial measures not specified in the Directive that might nonetheless exist in the Member States.

A detailed template/questionnaire on damages to be submitted to IP specialists in the 27 Member States was drafted by the end of October 2009 and was sent to the elected contributors at the beginning of November.

As of 24 November 2009, the Sub-Group had received back 16 of the 27 national reports on damages. Depending on the quality and comprehensiveness of the answers provided, the



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Sub-Group's members might decide to submit some reports to third-party experts for review and/or completion.

DG MARKT (Zuzana Heckova) will then compare the survey replies and will set up a comparative table highlighting the similarities and differences in legislation and practices in the Member States. The members of the Sub-Group will then be requested to comment on the draft table.

At a later stage, the national reports will be released to the EU Observatory on Counterfeiting and Piracy. The contributors will, of course, be credited for their work.

The members of the Sub-Group will make sure that all 27 survey replies are received before the next meeting, which will take place in Brussels on 11 December 2009.

2) The Sub-Group also started drafting a template/questionnaire on:

- Evidence, including right of information (Arts 6 to 8 of the Enforcement Directive);
- Corrective Measures (Art 10).

The template/questionnaire on evidence will be finalised by Olivia Regnier, whilst the template/questionnaire on corrective measures will be fine-tuned by Zuzana Heckova. Both templates will be circulated to the other members of the Sub-Group for approval at the 11 December meeting.

The template/questionnaire on corrective measures will deal with issues including: market recalls, donations to charities, release of goods subject to prior removal of infringing signs, recycling of counterfeit goods, costs and liability, specificities regarding the Internet, etc.

As concerns the template/questionnaire on evidence, a similar survey has already been carried out recently within the Stakeholders' Dialogue. The final report of this working group will be provided on a confidential basis to the members of the Sub-Group. The survey will touch upon the difficulties faced in conciliating the right to information with data protection laws (cf. amongst others, the issue of ISPs). This is of great interest, especially with regard to the forthcoming revision of the Data Protection Directive.

The template/questionnaire on corrective measures will deal with issues including:

- Article 7: national practices regarding bank guarantees, the interpretation of what constitutes 'reasonably available evidence' and 'appropriate cases', the measures aimed at preserving confidentiality, the balance between *ex parte* proceedings and the rights of defence, the balance of convenience, etc.;
- Article 8 and Recital 14: interpretation of the concept of 'commercial scale', the compatibility between the right to information and data protection laws, etc.