

**QUESTIONNAIRE – ALAI CONGRESS 2018 – MONTREAL**

Since the congress theme should attract many copyright practitioners, the Canadian group has chosen to develop a questionnaire which you are asked to complete with succinct answers, in either **French, English or Spanish**. The answers will be compiled in an analytical table that will be given to congress participants so that they can leave with a document allowing them to quickly compare the situation prevailing in several countries.

It is therefore essential to complete the table below by briefly answering each question. We invite you to refer to the legal provisions that apply in your country, if any.

For national groups who would also like to provide additional information related to certain questions, we ask you:

1) to indicate "\* see also answer No. X below" after the short answer that you have provided in the table.

2) to put your more detailed answer after the table.

Please note, however, that only the answers to the table will be compiled in the practical tool that will be given to the participants.

PORTUGAL											
Name of the person(s) answering the questionnaire Victor Castro Rosa António Paulo Santos											
QUESTIONS FOR THE SUMMARY TABLE	1) Are statutory damages available? If so, please indicate the criteria for awarding them and the amount of such damages.	2) If punitive damages are available, indicate the criteria for awarding them.	3) Are class actions or class remedies available in copyright matters? If so, indicate in what circumstances they are used.	4) If seizures before judgment are available, indicate what gives rise to such procedures and the criteria for granting them.	5) Are there in your country 1) criminal remedies; 2) customs measures, in connection with copyright? If so, which ones?	6) Describe how circumvention of technological protection measures is dealt with, if such is done.	7) Is there a mandatory notice and notice regime or notice and take down regime for intermediaries in the case of alleged copyright infringement? If so, describe it briefly, and indicate if how it is dealt with differs based on which rights holder requests it.	8) Does the notion of secondary copyright infringement in the digital world exist in your country? If so, describe it briefly.	9) Indicate for which rights collective management is available.	10) With respect to collective management, indicate who sets the tariffs and how they are set.	11) Indicate whether copyright remedies are within the power of specialized courts or common law courts, and in the case of a mixed system, please specify in which cases an action should be brought before one rather than the other.
ANSWERS TO QUESTIONS FOR THE SUMMARY TABLE	Yes. According to Section 211 (2) of the Portuguese Copyright and Neighbouring Rights Code, in determining the	There is no special provision for punitive damages in copyright and neighbouring rights and it was never applied as such.	There is no special provision regarding class actions for copyright matters and there hasn't been any case, so far.	Yes. According to Section 210-H of the Portuguese Copyright and Neighbouring Rights Code, in the case of an infringement	1)Yes. Under articles 195. to 202, 218 and 224 of the Portuguese Copyright and Neighbouring Rights Code, there are the following	Under art. 218 and 224 of the Portuguese Copyright and Neighbouring Rights Code, it is a criminal act to commit a	There is no mandatory N&N or NTD regime for intermediaries in the case of alleged copyright infringement. According to art 18	No, it doesn't exist as such. In civil law, however, there are some cases of no fault liability, which is somehow akin to vicarious liability.	Collective Management is available to all the rights granted by the framework. There are the following	According to Law 26/2015 of April 14, modified by Decree-Law 100/2017 of August, 23 (Law on CMOs,) the procedure of	There is a Specialized Court on Intellectual Property matters in Lisbon since 2011. It embraced all subjects

	<p>amount of the compensation for damages, both material and immaterial, the Court must attend to the profit obtained by the tortfeasor, to the lost profits and damages suffered by the injured party, the expenses incurred in connection with the protection of copyright and neighbouring rights as well as with the investigation and termination of the infringing conduct.</p> <p>According to Section 211 (3) the Court must also attend to the unfair profits generated by the illicit actions, namely the unlawfully performed show(s).</p> <p>According to Section 211(4) the Court must attend to the moral prejudice caused by the tortfeasor's actions, as well as to the circumstances of the infringement, the seriousness of the injury suffered and the degree of the work's or performance's illicit broadcast.</p> <p>According to Section 211(5) in the event of impossible</p>	<p>However, some academics say that Section 211(6) is clearly compatible with punitive damages. There have been punitive damages awarded but not in Copyright Cases, so far.</p>		<p>committed on a commercial scale which is ongoing or (merely) imminent and if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his/her bank accounts and other assets. To that end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.</p> <p>Under Section 210-H (2) whenever there is an ongoing or imminent infringement of copyright or Neighbouring rights, the Court may, at the request of the applicant, order the seizure of the goods suspected of infringing an intellectual property right as well as the tools which serve specifically to</p>	<p>crimes in relation to Copyright:</p> <ul style="list-style-type: none"> <li>• Usurpation - any unauthorised use of a work or performance protected by copyright or neighbouring rights (up to 3 years imprisonment);</li> <li>• Counter faction- any use of a protected third-party's work or performance as if it were own (up to 3 years imprisonment);</li> <li>• Breach of moral rights (up to 3 years imprisonment);</li> <li>• Taking advantage of the usurped or counterfeited work or performance (up to 3 years imprisonment);</li> <li>• Circumvention of any effective technological measures (up to 1 year imprisonment);</li> <li>• Removal or alteration of any electronic rights-management information;</li> <li>• distribution, importation for distribution, broadcasting, communication making available to the public of works or other subject-matter from which electronic rights-management</li> </ul>	<p>circumvention of TPM and there is also a penalty for preparatory acts such as the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:</p> <p>(a) are promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent, or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures (up to 6 months imprisonment).</p>	<p>of Decree-Law 7/2004 of January, 7, which implements EC Directive 2000/31/EC of June, 8, (the Electronic Commerce Directive) the intermediaries that host third-party content or search engines, provide hyperlinks or any analog procedures that may facilitate access to illicit content DO NOT have to remove content, or to prevent such access, at the request of an interested person in case the illegal activity or information is not apparent. However, any interested parties may apply to the (sectorial) competent supervisory entity, that must provide a provisional solution within 48 hours and convey this solution to the contenders. Should the provisional decision lead to the removal or access prevention, the party who is interested in preserving such content online may, in turn, apply to the same supervisory entity in order to obtain a provisional solution for the</p>		<p>collective management organisations: SPA (Sociedade Portuguesa de Autores); GDA (Gestão de Direitos dos Artistas) for performers; AUDIOGEST (Associação para a Gestão e Distribuição de Direitos) for phonogram producers; GEDIPE (Associação para Gestão Coletiva de Direitos de Autor e de Produtores Cinematográficos e Audiovisuais) for audiovisual producers; VISAPRESS-Gestão de Conteúdos dos Media, CRL for publishers of newspapers, magazines and other regular publications; AGECOP (Associação para a Gestão da Cópia Privada) for the collection and distribution of private copy levies (this Entity encompasses all the others for the purpose of sharing private copy levies.</p> <p>Nevertheless, the only mandatory collective management</p>	<p>general tariffs setting is driven by means of collective negotiation between CMOs and associations which are representative of users and there is currently a provision empowering an expert committee, in case of negotiations' failure. While the negotiation is still pending, previously agreed tariffs apply, instead of those unilaterally established by CMOs. Also according to the new CMOs Law, such unilateral tariffs will be suspended during the negotiation procedure, and interim licenses shall be issued and applied, simply based on a statement made by users, according to which they will accept the final result of the negotiation or the tariffs determined by CMOs.</p>	<p>Related to IP conflicts. It has three Sections. However, the Court of Appeals of Lisbon, which decides on appeal from the IP Court of Lisbon, and the Supreme Court of Law, which settles all legal matters, do not have any specialized sections.</p>
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	<p>determination of the real damage suffered by the injured party, and as long as the latter doesn't oppose, the Court may, as an alternative, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question, as well as the expenses incurred for the protection of copyright or neighbouring rights as well as with the investigation and termination of the violation of his/her rights.</p> <p>Lastly, under Section 211 (6) when, in relation to the injured party, the infringement is persistent or particularly serious, the Court may set the compensation cumulating all or only a some of the criteria above, from numbers (2) to (5).</p>			<p>accomplish the infringement.</p> <p>Under Section 210-H (3) for the purpose of applying the previous paragraphs the Court shall require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the rightholder or that the applicant has a licence the copyright or Neighbouring rights and that the applicant's right is being infringed, or that such infringement is imminent.</p> <p>Under Section 210-H (4) and (5), the provisional measures referred to in paragraphs 1 and 2 (such as the seizures) may, in appropriate cases, be taken without the defendant having been heard, in particular where any delay would cause irreparable harm to the rightholder. In that event, the parties shall be so informed without delay after the execution of the measures at the latest.</p>	<p>information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights Related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC (up to 1 year imprisonment)</p> <p>2)Yes. Under Decree-Law nr 360/2007 of 2 November 2007, Customs Authorities may be required to intervene in relation to the goods likely to infringe IP rights, in accordance with Regulation (EC) nr 1383/2003 of the Council, of 22 July 2003. Concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.</p>		<p>case. Such decision may be modified at all times, by the same supervisory authority. This procedure should have been the subject of specific regulation, but it wasn't, so far. There is a special provision exempting the supervisory entity as well as the intermediary of all responsibility for removing or preventing access to the content, or failing to do so, in case the illegal activity or information is not apparent. There is also the possibility of settling the case in the Courts of Law.</p>		<p>cases are the following:  1)Cable retransmission, except for broadcasters;  2) Private use reproduction;  3) performer's rights to equitable remuneration following a contract with broadcasters or audiovisual producers.</p>		
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			<p>A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within ten days after notification of the measures, whether those measures shall be modified, revoked or confirmed.</p> <p>The provisional measures referred to in paragraphs 1 and 2 (including the seizures) may be revoked or otherwise cease to have effect, upon request of the defendant, under the General Civil Procedure Code, unless they assume the nature of injunctions.</p> <p>The provisional measures referred to in paragraphs 1 and 2 (including seizures) may be subject by the Court to the lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in the following paragraph.</p> <p>Where the seizures are revoked or where they lapse due to any act or</p>								
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				omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by those measures.							
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QUESTION: Are there recent legislative or jurisprudential developments in your country that would be interesting to share with the ALAI public?

ANSWER :

The most important Court Decision in the field of anti-piracy, is the one held by the Intellectual Property Court of Lisbon, 2<sup>nd</sup> section, case nr. 153/14.0YHLSB, on the 24<sup>th</sup> February 2015, where the CSOs asked the Court to order all Portuguese based ISPs to block access to the website “The Pirate Bay” (TPB), all its domains and subdomains, their respective IP addresses, known Mirrors or Proxies, exhibiting that webpage, and to determine a penalty of € 1.000,00 per each day of non-compliance. The Court held that the ISPs had legal standing to be prosecuted, as intermediary service providers, thus necessarily involved on the transmission of an illicit action through the Internet, between one of its clients and a third party, by granting access to the internet, they allow this transmission to be possible, so their services are being used to infringe Copyright or Neighbouring Rights.

The Court also described the most commonly used techniques for blocking access to illegal websites: DNS (Domain Name System) blocking; IP (Internet Protocol) address blocking; URL (Uniform Resource Locator) blocking and DPI-based URL (Data Packet Inspection) blocking. The latter was set aside as having considerable higher costs than the other three. IP blocking was rejected as not being suitable on account of the IP variation and correspondence to various other websites, probably legitimate and of discrete nature, where each IP -address may possibly correspond to up to 80 different websites.

The Court referred to the EUCJ Case-Law, namely to the Case C-70/10 where the EUCJ held in 24.11.2011 that European legislation is opposed to the imposition of filtering all of the electronic communications running through their services, namely through the use of P2P software, unstintingly applied to all its customers with a preventive nature, exclusively financed by the ISP, for unlimited amount of time, capable of identifying electronic files containing a musical, cinematographic or audiovisual over which the right-holder claims to have rights, with the purpose of blocking the transfer of files in breach of Copyright or Neighbouring Rights.

The Court confronted the pretension of CMOs with Freedom of Speech, and considered DNS blocking or website suspension as being an extreme measure, highly problematic, only justified by the protection of children against sexual abuse.

The most problematic measure is IP address blocking, since it affects several other legitimate websites. In addition, IP addresses are Personal Data, as the UECJ General Advocate concluded in case C-70/10, because it may lead to the Identification of a Physical Person. It also concluded that the damages caused by P2P were to be demonstrated, despite of the several attempts made by international studies and research, namely the TNO Report of 18.02.2009 by the Amsterdam University.

Despite all those arguments, the Court considered that the illicit character of the sharing and the infringing of Copyright is not acceptable in a State under the rule of Law, whereas 28% of all internet users have access to unauthorised services on a monthly basis, of which 50% through P2P networks, enquiries demonstrate that piracy prejudices the incentive for paid and legitimate business models and reduces spending even from those consumers willing to buy music.

In conclusion, DNS blocking was ordered, in view of its proportionality in relation to all the other alternatives, necessity and adequacy to the purpose of preventing the illicit sharing of protected works, as referred in the “EU Human Rights Guidelines on Freedom of Expression Online and Offline” from EU Council of 12.05.2014. So, DNS blocking, including subdomains, proxies and mirrors, fits the requirements of art. 3(1) and (2) of Directive 2004/48/EC Directive of 29.04.2004. (Enforcement Directive) of

In terms of its effectiveness, the Court acknowledged the technological limitations of this solution, however, there is a slight reduction of traffic towards illicit websites, and there are also moral and pedagogic effects over the users, who shall gain conscience that they are exercising wrong actions or contributing to an illicit and illegal activity, criminally persecuted.

Furthermore, the Court has determined that this imposition doesn't imply any legal liability on behalf of the ISPs, and the required daily penalties are only meant to ensure compliance with the Court's order, and cannot be seen as a form of redress.

The Court imposed such daily penalty but only in the amount of 250€, which was regarded as proportional for the desired purpose.

QUESTION: Are there any special remedies in your jurisdiction that, to your knowledge, are less or not available in other jurisdictions?

ANSWER :

The Memorandum of Understanding signed between all the Portuguese CMOs, the private television broadcasters, the Press Association, MAPINET (civic association against digital piracy), DGC (General-Directorate for Consumer Affairs), IGAC (Portuguese Supervisory Authority for the Copyright Sector), APRITEL (the Portuguese ISP Association), APAP, APAN, APAME and DNS.pt. have jointly enabled a currently functioning system of Domain Name blocking whenever there is evidence of substantial infringement of third-parties' rights. The system has succeeded in streamlining a common procedure for detecting and blocking access from Portugal to Internet sites which are mainly engaged in the unauthorized provision of works or services protected by copyright and related rights, performed by MAPINET (a civic association called- Anti-Internet Piracy Movement composed of several producers and / or managers of contents protected by Intellectual Property Rights). MAPINET, after having tried, without success, to obtain the respective removal of contents or proven that no contacts are made available for this purpose, proceeds with the blocking or removal requests.

The MoU deals with DNS blocking of websites allowing illegal access, each one, to more than 500 protected works or performances, or essentially devoted to making illicit contents available (if more than two thirds of the contents available are illicit) and it is regularly set in motion by complaint of the CMOs, television broadcasters, or other rightholders themselves, which list the domains and send it to MAPINET. Then, MAPINET attempts to establish contact with those who appear responsible for each website, prepares a list with around 50 illegal websites and sends it twice a month to IGAC, the supervisory entity which belongs to the Ministry of Culture. It is this Authority who resends the lists to the ISPs Association, APRITEL, who then distributes it among its associates. The latter proceed immediately to DNS blocking, without delay.

As part of its daily activity, MAPINET detects the presence and availability of content that is not authorized by the respective owners and includes them in the lists in order for them to be blocked or removed from public access or availability.

MAPINET's mission is also to promote the awareness of citizens and organizations about the illegal copying of digital content through the Internet, the intervention aimed at preserving the property rights and economic exploitation of works protected by Copyright and Related Rights, the defense of the interests of its members and the promotion of appreciation and recognition of the importance of cultural works in the Knowledge Society.

At the same time, MAPINET participates in awareness and education campaigns for responsible and lawful access to the contents made available on the Internet.

Last year, more than a billion websites were blocked, of which 40% movies, 39% serials, videogames and other audiovisual programmes; 14% streaming services and 7% games.

Also, under the same Memorandum, a total of 366 websites were removed, of which 43% serials, videogames and other audiovisual programmes, 39% movies, 15% streaming services and 3% games.

From those 43% of serials, videogames and other audiovisual programmes' websites, 57% (156) have been effectively and permanently banned from the Internet

In terms of illegal movies' displaying websites, from a total of 282, 50% were successfully removed. Strictly speaking of illegal streaming services, from a total of 102, 55% were successfully removed.

One of the circumstances which helps to explain this level of success is the fact that a significant number of them are proxies, so the fight against replicants of the most damaging websites on an international level leads to a higher rate of law enforcement.