

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.

SPAIN Name of the person(s) answering the questionnaire Montserrat Benzal Ricardo Cabaleiro Llanos Cabedo Serna Fernando Carbajo Cascón Ramón Casas Vallès Antonio Castán Begoña González Otero Álvaro Hernández-Pinzón Vanessa Jiménez Serranía Juan José Marín Rafael Sánchez-Aristi Nerea Sanjuan											
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	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.

							rights holder requests it.				
ANSWERS TO QUESTIONS FOR THE SUMMARY TABLE	<p>Neither the Spanish intellectual property (copyright and related rights) legislation, particularly Royal Legislative Decree No. 1/1996 of 12 April, approving the Revised Text of the Intellectual Property Act ("SIPA") nor its implementing regulations provide for statutory damages.</p> <p>In this regard, it should be specified that by the term "statutory damages" we understand those fixed amounts established by the relevant national intellectual property legislation which the plaintiff could choose to claim as a way to be compensated rather than claiming the damages based on the degree of harm actually suffered.</p>	<p>Neither the SIPA nor its implementing regulations provide for punitive damages. In this regard, it should be specified that by "punitive damages" we understand those damages that go beyond the actual harm suffered by the rightholder. In other words, punitive damages pursue the intention of acting as a deterrent for further wrongdoing and a punishment of the infringer in an exemplary manner. In general terms, with regards to damages, the SIPA only provides for compensatory damages. Thus, art. 138 SIPA allows the holder of the allegedly infringed rights to seek compensation for material and moral damages incurred in accordance with art. 140 SIPA.</p>	<p>Collective management organisations ("CMOs") are entitled, under the terms of their own statutes, to exercise intellectual rights entrusted to them by rightholders in all types of administrative and judicial proceedings (art. 150, first paragraph, SIPA). This <i>locus standi</i> is established by the SIPA since 1987 (under Act 22/1987 of November 11th on Intellectual Property). In order to prove this <i>locus standi</i>, the CMO shall provide a copy of its statutes and the certification of its administrative authorization at the beginning of the legal proceedings (art. 150, second paragraph, SIPA). The defendant may only base his/her opposition to the CMO's <i>locus standi</i> in the lack of general power</p>	<p>4.1. In general, judicial remedies and sanctions in the field of intellectual property follow in Spain the ruling of Directive 2004/48/EC, implemented in Spain by Act 19/2006, of 5 June, which modified both the SIPA and the Spanish Civil Procedural Act. The later establishes the Spanish general civil procedural regime.</p> <p>4.2. The Spanish <i>substantive</i> regulation expressly establishes the possibility of adopting precautionary measures in intellectual property. According to art. 141 SIPA, in case of infringement or when there is a rational and justified fear of such infringement to occur, the judicial authority may decide to adopt, at the</p>	<p>1.- Criminal remedies: Until the entry into force of the Organic Law 1/2015 of March 30th (which took place on July 1th, 2015), whereby the Spanish Criminal Code ("Spanish Criminal Code") was modified, there was a notable disconnection between criminal provisions and civil provisions (SIPA) protecting copyright. Before then, there were only criminal penalties for the infringement of copyright and a very limited number of related rights. Furthermore, the forms of copyright exploitation constituting a criminal offence were limited. Nowadays, criminal offences against copyright are listed under arts. 270 to 272 of the Spanish Criminal Code. The basic criminal offence (i.e. any</p>	<p>Technical protection measures ("TPMs") are ruled in Title VI, arts. 196 to 198 SIPA. These articles are the result of the implementation of arts. 6 and 7 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("Directive 2001/29/EC"). According to the regime established in these articles, the mere circumvention of effective TPMs constitutes a case of direct liability and entitles the copyright rightholder to make use of the general copyright remedies as regulated in arts. 138 to 141 SIPA (injunctions, restraining of the unlawful activity and damages).</p>	<p>The SIPA does not establish any mandatory notice and notice regime or notice and take down regime for intermediaries to comply with in the case of alleged copyright infringement. In the Spanish legislation, there is a specific administrative procedure for the blocking of access and removal of potentially illicit content in the digital environment. Such administrative procedure is described in our response to question 11. On the other hand, some private online service providers have established their own notice and take down procedures to which end users of their services must submit.</p>	<p>After being modified by Act 21/2014, of November 4, article 138, second paragraph SIPA expressly refers to those entities so-called "responsible for the infringement". These are defined as subjects who must assume the consequences of the infringement together with the direct offender, although they are not those who commit the usurpatory exploitation, but those who induce or have induced the primary offender, cooperate with the offense or obtain a benefit from the infringing conduct, provided that they can control such behavior. Literally, article 138, second paragraph, SIPA states that "it shall also be considered responsible for the offense the entity who knowingly induces the</p>	<p>All economic intellectual property rights can be subject to collective management through CMOs. Therefore, any right holder is free to decide if she intends to manage her rights individually or if through a CMO or, if available, an independent management operator ("IMO"). However, there is a group of rights subject to mandatory collective management, which means that they can only be managed by CMOs. It is for the legislator to decide which are those rights, based - particularly- on the impossibility or great difficulty in individually manage those rights. When a right is legally defined as subject to mandatory collective management, the consequence is</p>	<p>CMOs must establish general, simple and clear tariffs in order to set out the remuneration due to the use of their repertoire. Together with these general tariffs, CMOs must provide an economic report - which content to be legally settled- in order to provide a detailed explanation of each tariff for each category of user (art. 164.2 SIPA). General tariffs must establish reductions for non-profit cultural organizations. Regarding the amounts of the general tariffs, they must be set out in reasonable conditions, according to the law taking into account the economic value of the use of rights as related to the works or other subject-matters protected in the activity of the user, and looking</p>	<p>Since September 2004, specialized commercial courts exist in Spain within the civil jurisdiction, one of each of them to be created in each territorial province. They were created by art. 2.7 of the Spanish Organic Law 8/2003, of 9 July, which modified Organic Law 6/1985 of the Judicial Power ("LOPJ"), by including in the latter a new art. 86 ter. The implementation of these courts in the first instance of the civil jurisdiction also required their implementation in second instance. For that purpose, one or several sections in each Provincial Appellate Court must be in charge of the cases related to this specialized jurisdiction. The purpose of the legislator was to advance in the judicial</p>

		<p>The compensation provided for under art. 140 may include not only the value of the loss suffered by the rightholder, but also the value of the profit that he or she has failed to obtain because of the infringement of his or her right. Moreover, the awarded compensation may include, where appropriate, the investigation expenses in which the rightholder has incurred in order to obtain reasonable evidence of the infringement subject of the ongoing legal proceedings. Furthermore, compensation for damages shall be calculated on the basis of one of the following criteria, at the discretion of the aggrieved party:</p> <p>a) Negative economic consequences, including the loss of benefits suffered by the aggrieved party and the benefits</p>	<p>of representation of the CMO in the authorization by the holder of an exclusive right or in the payment of the corresponding remuneration (art. 150 SIPA). Thus, the SIPA establishes limited causes of opposition to the CMO's <i>locus standi</i>. Art. 150 is consistent with the obligation to recognize CMO's <i>locus standi</i> imposed by art. 4(c) of Directive 2004/48/EC of the European Parliament and of the Council of 29 April on the enforcement of intellectual property rights ("Directive 2004/48/EC"). The Spanish Supreme Court subscribes to a broad interpretation of art. 150 SIPA. Thus, CMO's <i>locus standi</i> recognized by that provision is applied in proceedings regarding both exclusive rights and remuneration rights, regardless of whether the rights are under</p>	<p>request of the legally identified rightholders, the precautionary measures that may be necessary to urgently protect those rights, and specifically:</p> <p>1. The intervention and deposit of all income obtained from the illicit activity or, if applicable, the consignment or deposit of any amount dues as remuneration.</p> <p>2. The suspension of the reproduction, distribution and public communication, as it may apply, or any other activity that will constitute an infraction under the SIPA, as well as the prohibition of conducting those activities if they have not started yet.</p> <p>3. The seizure of any copy produced or used and the material mainly use for the reproduction and public communication.</p> <p>4. The seizure of the tools, devices, products and</p>	<p>form of copyright exploitation for profit of a protected work or related right) is punishable by imprisonment of six (6) months to four (4) years and a fine of twelve (12) to twenty-four (24) months. Nevertheless, there is an exception regarding the case of itinerant or merely occasional distribution or commercialization, which is punishable by imprisonment from six (6) months to two (2) years or, in milder cases, by a fine or performance of community service from thirty-one (31) to sixty (60) days. Moreover, information society service providers who actively and non-neutrally provide access or location of copyright works or related rights for profit without authorisation from the rightholders will be punished by imprisonment of six (6) months to four (4) years</p>	<p>Circumvention of TPMs can cause also criminal liability, according to Art. 270.5(c) and (d) of the Spanish Criminal Code. This direct liability and its sanctions are independent of other civil and criminal remedies that may arise due to the copyright infringement of the work protected by TPMs as a consequence of its circumvention. In particular, those who manufacture, import, distribute, sell, rent or publish for sell or rental or possess for commercial purposes any device, product or component, as well as those who provide any kind of service meant to circumvent an effective TPM can be found either secondary or contributory liable in civil jurisdiction (Judgement by the Madrid Provincial Court (Sec. 28) of March 31, 2014 – AC/2014/385), irrespective of their criminal liability.</p>		<p>infringing conduct; cooperates with the same, knowing the infringing conduct or having reasonable indications to know it; and, having a direct economic interest in the results of the infringing conduct, has a capacity to control the conduct of the offender". With this reform, the range of responsible subjects for the infringement has widened in Spain, not only in relation to injunctions, but also in respect of actions to claim damages. It seems that it is a joint responsibility, so that the inducers, cooperators or beneficiaries of the infringing activity have to assume <i>ad extra</i> all the compensatory consequences of the infringement, regardless of the possible return action against the direct offender. Although not specifically or exclusively</p>	<p>that the right holder cannot manage it individually, nor can this right be managed by an IMO. With regards to the mandatory collective management, the corresponding CMO in charge carries out the management of those right holder's rights, whether those right holders are members of the CMO. At present, the Spanish legislation establishes that the following rights must be subject to mandatory collective management: (1) the right of equitable remuneration for the private copying of works distributed in the form of books or other publications that are legally declared as similar to then, as well as phonograms and videograms or other sound, visual or audiovisual media (art. 25.1 and 9 SIPA); (2) author's</p>	<p>for a fair balance between the parties. CMOs must also take into account the following criteria in order to approve their general tariffs: (a) the actual use of the repertoire in the activity of the user as a whole; (b) the intensity and relevance of the use of the repertoire in the activity of the user as a whole; (c) the extent of the repertoire of the CMOs (in this context, the concept of repertoire must include works and other subject-matters whose rights are managed by the CMO at stake; (d) the income obtained by the user due to the commercial exploitation of the repertoire; (e) the economic value of the CMO's service provided to the rightholders in order to the make the tariffs effective; (f) the tariffs set out by the CMO for other users for the same kind of use; and</p>	<p>specialization in order to provide more efficient and rapid responses to the complex social and economic reality of our time in some special matter, which include liquidations, corporate, competition, advertising and intellectual property laws. The designation of "commercial" refers to the prevailing commercial nature of the matters subject to these courts, not to a global identification to all commercial law. As a result, all matters under these courts' jurisdiction are of exclusive commercial matter, as it occurs with copyright and related rights. With regards to criminal acts of copyright infringement (arts. 270 and 272 of the Spanish Criminal Code), the responsible courts are the Courts of Instruction (art. 87 LOPJ). Instruction</p>
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		<p>that the infringer has derived from the illegal use.</p> <p>b) The amount that the aggrieved party would have received as remuneration, if the infringer had requested authorization to use the relevant intellectual property right. Regardless of the choice for the assessment of damages, the aggrieved party may also request compensation for moral damages, even if the existence of economic damage has not been proven. For its assessment, the circumstances and the severity of the infringement as well as the degree of illicit dissemination of the work will be considered. The right to claim damages lapses after five years from the time at which the aggrieved party could first bring an action, or from first knowledge of the infringement.</p>	<p>voluntary collective management or under compulsory collective management. Furthermore, CMO's <i>locus standi</i> covers all types of claims made on behalf of the rightholder (cessation of illegal activity, compensation, etc.).</p>	<p>components whose only use is to facilitate the non authorized suppression, elusion or neutralization of any technical device used to protect intellectual works or used for the suppression or modification of the information for the electronic management of those rights.</p> <p>5. The confiscation of equipment, devices and material media related to the private copy equitable compensation, which will be affected to the payment of the claimed compensation and to the corresponding damages indemnification.</p> <p>6. The suspension of services provided by intermediate service providers to third parties using them to infringe intellectual property rights.</p> <p>4.3. The Spanish <i>procedural</i> law establishes two</p>	<p>and a fine of twelve (12) to twenty-four (24) months. In these cases, the judge will enjoin the information society service providers to remove infringing works. When the service provided by an information society service providers is used exclusively or predominantly to disseminate infringing works, the judge shall order the interruption of this service as well as any precautionary measure to ensure copyright protection. Furthermore, anyone who manufactures, imports, puts into circulation or possesses for commercial purposes any means that are mainly conceived, produced, adapted or carried out to facilitate the suppression or neutralisation of technical copyright protection devices, is punishable by</p>	<p>A TPM is considered efficient as per art. 196.3 SIPA in case that "the use of the protected work or other subject-matter is controlled by the rightholder through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective". Software is excluded of this regime, as it has its own regulation (art. 102 SIPA). However, some minor Spanish jurisprudence (Judgemente of First instance Court of Lugo, dated June 5, confirmed by the Provincial Court Decision on November 8, 2012; and Judgement of First instance court of Barcelona, dated May 2, 2012) have allowed the</p>		<p>conceived for being applied in the digital environment, this will be the most typical area in which these cases of indirect liability will arise: for instance, an Internet service provider, or a marketer of a double use technology, who makes an offer of the service or product in such a way that, either by the content of its advertising or promotional activity, either by the information or tutorials that accompany the product or service, it can be understood as an invitation to use it in order to carry out a copyright infringement (induction of infringement). Or, if the service or product, while potentially capable of proper lawful uses, is also, to an equal or greater extent, capable to commit copyright infringements (cooperation to infringement). In the third type of</p>	<p>right of remuneration for the distribution of their works, in the form of lending, when it is carried out by certain entities such as museums, archives, libraries or similar archiving audio, video and paper publications entities which are public or that belong to non-profit entities with a general cultural, scientific or educational interest, or to educational institutions integrated in the public educational system (art. 37.2 SIPA); (3) the right of equitable remuneration to authors for the distribution, in the form of rental of phonograms or audiovisual recordings (arts. 90.2 and 7 SIPA); (4) the exclusive right to authorize the cable retransmission (art. 20.4.b) SIPA), including the exclusive right of audiovisual producers to authorize the cable</p>	<p>(g) the tariffs established by CMOs of other Member States of the EU for the same kind of use, only in case there are equal basis of comparison (art. 164.3 SIPA). CMOs must publish in their website information about their current general tariffs, to be easily accessible, and updating the available information. They also shall public the economic report mentioned above for every kind of use of their repertoire, including discounts and the circumstances to apply them (art. 185.e) SIPA). Additionally, CMOs must inform the Administration about their general tariffs and their changes, and also with respect to the economic report, according to the rules to be specifically set forth in its regard (art. 186.d) SIPA). Since January 1st, 2015, as per the modification to</p>	<p>Courts instruct (investigate) criminal acts and the Criminal Courts decide on the criminal acts previously instructed (investigated) by those Courts of Instruction. Also, art. 195 SIPA rules a specific administrative procedure for the protection of copyright and related rights in the digital environment against their infringement by entities responsible of information society services. The Second Chamber of the IPC ("SC") is in charge of this procedure, as a specialized administrative body within the Ministry of Education and Culture. This body may adopt measures for the blocking of the provision of an information society service which may infringe copyrights or related rights or to withdraw any infringing content,</p>
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				<p>procedures for requesting and adopting those precautionary measures: a general procedure involving the parties or a procedure without the affected party (<i>inaudita altera parte</i>). Once a precautionary measures injunction is filed, the court has a five days deadline from the date when the defendant was informed of the procedure to call for a hearing, to be celebrated within the following ten days (art. 734 of the Spanish Civil Procedural Act); however, when the plaintiff requests so by justified reasons (urgency or the fact that a pre-trial hearing may compromise the effect of the precautionary measures), the court may impose those measures without hearing the defendant, within five days following (art. 733.2 of the Spanish Civil</p>	<p>imprisonment from six (6) months to three (3) years. The Spanish Criminal Code provides for an “aggravated” offence when any of the following circumstances apply: a) the actual or potential benefit is particularly substantial; b) the facts are especially serious due to either the value of the objects produced, or the number of infringed copyright works and/or related rights or the special importance of the damages caused; c) the infringer belongs to an organization, even of a temporary nature, which aims to carry infringements of copyright or related rights; d) minors under 18 years of age are used for the commission of these crimes. This “aggravated” offence is punishable by imprisonment from two (2) to six</p>	<p>application of the combination of both arts. 102 and 190 SIPA to complex works as videogames. With regards to exceptions and limitations, art. 197 SIPA indicates which are the exceptions and limitations excluded of the TPM’s regime. Yet, to enjoy this waiver, access to the protected work or subject-matter must have been lawful. Otherwise, it will not apply. Other than the exceptions and limitations of art. 197 SIPA, there are three options to lawfully circumvent TPMs: a) a unilateral voluntary decision of the copyright rightholder; b) access beyond the TPM can be reach through agreement between the copyright rightholder(s) and the interest party; c) in the case of consumers, as beneficiaries of an exception or limitation, they are entitled to</p>		<p>secondary liability, the control must refer to the infringing conduct and not to the person of the infringer. Thus, it does not need to exist a relationship of dependence or subordination between both subjects, but it is enough that the offender is a user who has registered in a service or in a social network, the participant of a forum on the Internet that uploads content to it, or someone who makes contributions within a collaborative network project.</p>	<p>retransmission of works and audiovisual recordings (arts. 88.1 and 122.1, second paragraph SIPA, as related to art. 20. b) and c) SIPA); (5) the right to a remuneration of performers for the distribution in the form of rental of phonograms or audiovisual recordings (art. 109.3 SIPA); (6) the right of remuneration of authors of audiovisual works for (i) the exhibition of those works in public places for a price, (ii) the exhibition without for free, and (iii) the wire or wireless transmission to the public by any means or procedure including, among others, the interactive making available to the public (art. 90.3, 4 and 7 SIPA); (7) the right to a sole and equitable remuneration to performers and producers of works and audiovisual recordings for certain acts of</p>	<p>SIPA by Act 21/2014, of November 4, there is an administrative procedure in place that can be initiated in order to set out the applicable general tariffs in some cases. In fact, the First Chamber (“FC”) of the Intellectual Property Commission (“IPC”) is in charge of purse such determination of tariffs for the exploitation of the rights under mandatory collective management, regarding the same category of rightholders, as well as those subject to voluntary management that may apply to the same category of rightholders when concurrent with a remuneration right over the same work or other subject-matters (art. 194.3 SIPA). The CMO itself, user associations, broadcasting organizations or an especially</p>	<p>provided that the service provers has caused or may have caused an economic damage. The measures to be applied may be of technical nature or diligence obligations to be required from the infringing service provider, with the aim to guarantee that the infraction ends and that it will not be reproduced. The SC’s decisions end the administrative procedure and they can be judicially appealed. At the end of this questionnaire, in optional questions, some additional information with regards to this procedure is provided.</p>
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				<p>Procedural Act). In this case, the defendant may oppose in writing to the granted measures within a twenty days deadline from the notice of the decision of the court issued against her.</p> <p>4.4. The adoption of all precautionary measures is subject to the following requirements to be complied with:</p> <p>(i) <i>fumus boni iuris</i>: it is necessary an initial justification of the right held by the claimant;</p> <p>(ii) <i>periculum in mora</i>: it is necessary to provide evidence as to the risk derived from the infraction, which tends to relate to the urgency in ordering the measures to be adopted.</p> <p>In the case of precautionary measures without hearing, it is also necessary to provide evidence as to the extra urgency factor: such urgency is so extreme that</p>	<p>(6) years, a fine of eighteen (18) to thirty-six (36) months and professional disqualification from two to five years.</p> <p>Moreover, any civil liability derived from these offences is governed by the provisions of the SIPA. In the event of a conviction, the publication of the judgment in an official newspaper may be ordered at the expense of the infringer.</p> <p>Furthermore, another criminal offence indirectly related to copyright is provided under art. 286 of the Spanish Criminal Code, regarding the facilitation of unauthorized access to sound or television broadcasting services or interactive services provided at a distance electronically. This offence is punished by imprisonment of six (6) months to two (2) years and a fine of six (6) to</p>	<p>pursue civil action under Spanish Consumer Law regime.</p>			<p>public communication (arts. 108.6 and 122.2 SIPA); (8) the right to a remuneration for performers for the making available of an original or a copy of an audiovisual recording or phonogram (art. 108.3 SIPA); and (9) the right to a sole and equitable remuneration to performers and phonogram producers for the public communication, excluding the making available to the public, of a phonogram commercially published (arts. 108.4 and 116.2 and 3 SIPA).</p>	<p>relevant user -at the FC's discretion- may initiate such procedure, when an agreement has not been reached between the interested parties in a six-month period of negotiations. In its decision, the FC will establish the applicable general tariffs for the use of works and other subject-matters of the CMO's repertoire, the means of payment and other conditions needed for the respect of the intellectual property rights in its resolution. In the fixing of general tariffs, the FC will take into consideration the criteria aforementioned and established in art. 164.3 SIPA. FC's resolutions will be published at the Spanish Official Gazette (Boletín Oficial del Estado) and they can be applied from the day after their publication to every rightholder and responsible party,</p>	
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				<p>there is no time for a hearing in which the parties may initiate a contradictory debate.</p>	<p>twenty-four (24) months.</p> <p>2.- Customs Measures</p> <p>In Spain, Regulation (EU) nº 608/2013 of the European Parliament and of the Council of 12 June 2013, concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 ("Regulation 608/2013") applies. The application for action in this field has recently been updated by the Implementing Regulation (EU) 2018/582 of 12 April 2018, dated 12 April 2018. In Spain, the "competent custom department" referred to in art. 5 of the Regulation EU 608/2013 is the Custom Vigilance Service, subject to the Tax Agency's authority. According to these customs proceedings, customs authorities may</p>						<p>with respect to the same kind of use of the works and other subject-matters and for the exact same category of users.</p>	
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					<p>identify goods suspected of infringing any intellectual property rights and suspend their release or retain them and, if applicable, according to the decision adopted, proceed with the destruction of the infringing goods. Those who are qualified to file these proceeding applications are the right holders of the affected rights and, in general, individual and collective representatives and associations of those right holders. The request for intervention may affect the whole European Union ("EU") or certain member states of the EU ("Member States"). Additionally, if the detention is pursued without the prior application of a legitimated entity, the customs service itself would identify and inform the affected entities of its actions.</p>						
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Even though the procedure establishes that the protected rights include the “author right or any other related right according to the national or Union’s legislation”, in practice, the relationship of this procedure with the protection of copyright is minimal, and its major scope relates to goods which infringe trade mark rights. This is mostly due to the increasing separation between author rights and physical media and, even for their production, the little utility of importing the goods instead of producing them at the place of destination.

FURTHER QUESTIONS (OPTIONAL)

QUESTION: Are there recent legislative or jurisprudential developments in your country that would be interesting to share with the ALAI public?

ANSWER :

From a legislative perspective, the Spanish Royal Decree-law 2/2018, of 13 April, modifying the SIPA and implementing Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 and Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 (“Directive 2014/26/EU”) entered into force early this year 2018.

As to the implementation of Directive 2014/26/EU, it is important to underline -among others- that the Royal Decree-law allows CMOs of other Member States of the UE and IMOs to operate in Spain, as far as they comply with certain requirements, being such management also subject to certain limitations with regards to the rights that they can manage in Spain and the means of such management. Additionally, the Royal Decree-Law rules for the first time the granting and management of multi-territorial licenses for several Member States with regards to online musical works’ rights.

With respect to the implementation of Directive (EU) 2017/1564, the Royal Decree-law essentially modifies art. 31 SIPA in order to rule in more detail the limit to the exclusive management of author rights in the benefit of individuals with visual disabilities or other difficulties to access printed texts, with the purpose of improving the availability and access within the European internal market to certain protected works and other subject-matters in an form accessible to these individuals.

Concerning the [recent case law](#), it is interesting to mention the decision issued by the Appellate Court of Barcelona on 20th February 2018 in the context of a cease action initiated by the CMO representing in Spain music producers (“AGEDI”) against the most important telecommunication operators in Spain (Orange España, S.A.U., Vodafone España, S.A.U. y Telefónica España, S.A.U., among others).

The conflict had its origins in the procedure initiated by AGEDI in 2012 before the FC against the owner of the website [www.exvagos.com](#). That proceeding ended as the owner voluntarily withdraw the service. However, the service was reactivated some time later. Therefore, AGEDI initiated judicial actions against the intermediate service providers mentioned above, based on arts. 138 and 139 SIPA, requesting them to be condemned to adopt all necessary measures to impede in an effective and real manner access, from the Spanish territory, to the website considered infringing by the plaintiff. In first instance, the Commercial Court accepted all grounds of the plaintiff. The Appellate Court of Barcelona confirmed such decision. The Court considered, on the one side, that the claim against the access service providers can be initiated without the need of acting also in those same proceedings against the infringer of intellectual property rights and, secondly, that the action against the service providers may not only be initiated not only as a precautionary measure, but also as a main claim.

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

ANSWER :

Administrative proceeding before the SC of the IPC:

There is the specific administrative proceeding, to be filed before the SC of the IPC, as referred to in the answer to question 11) of this questionnaire. This proceeding is different to most of the proceeding that exist in other neighbour jurisdictions.

The procedure may be initiated against those information society service providers who, for profit: (i) offer protected content apparently without an authorization, in which case the SC must determine if a proceeding has to be initiated, on the basis of the level of audience that the service may have in Spain, the number of works or other subject-matters that may be offered without authorization; and (ii) offer the description or localization of works or other subject-matters (including those who offer organized and classified lists of links) which may appear to be offered without authorization, not being those description and localization actions merely technical.

The procedure may be initiated upon request by the corresponding right holder of intellectual property rights apparently infringed or by the entity who may have been granted its exercise. In the claim, the claimant must provide reasonable evidence as to having previously requested the potential infringer to withdraw the potentially illicit content from its service. The content must have been clearly identified, as well as its localization in the denounced service. These requirements will be considered unproductive if the service provider does not respond or if notwithstanding its response, the content has not been withdraw or access has not been blocked within a three days deadline.

As to the possible measures to be adopted, the SC may require (i) suspension of the infringing service, or (ii) withdrawal of the illicit content, provided that the service provider has caused or may cause an economic damage. Additionally, in case of specially serious infringements or cases of special social impact, additional measures may be adopted by the SC, related to making the sanctioning resolution public or even requesting the cessation of the infringing activities for a period of one year.

Prior to adopting these measures, the infringer has a 48 hours deadline to voluntarily withdraw the illicit content or to oppose to the measures requested, providing evidence as to the authorizations to use or the applicability or a limit to the intellectual property right at stake.

If the infringer does not voluntarily withdraw the illicit content, the SC may also require the cooperation of intermediate service providers, providers of electronic payment services or advertising service providers, requesting from them the suspension of the provision of their services to the infringer. Such order of suspension requires a judicial authorization as per the procedure ruled in section 2 of art. 122 bis of the Spanish Act 29/1998, of 13 July, ruling the Administrative procedural jurisdiction. Also, in case the infringing service is provided using the territorial level domain name corresponding to Spain (.es), or any other top level domain name registered in Spain, the SC will notify those registries for them to cancel the domain name, which cannot be granted again for a period of six months.

This procedure before the SC of the IPC may be followed notwithstanding any other civil, criminal and administrative procedural actions which may correspond to the rightholders.

Principle of exclusion of liability by links and search engines:

At the European level and regarding the digital environment (i.e., not with regards to intellectual property issues in particular), and contrary to the provisions of Directive 2000/31/EC, in its art. 17, establishes an additional case of intermediate service providers excluded from liability, particularly with regards to those providing links and searching tools.

As to this category of service providers, Directive 2000/31/EC rules that they will not be responsible for the information to which they may redirect the users of their services, as long as: (a) they do not have actual knowledge of the activity or information to which they redirect or recommend being illicit or infringing goods or rights of a third party which may be indemnified, or (b) if they have such knowledge, the act diligently in suppressing or rendering unusable the relevant link.

It will be considered that a service provider has “actual knowledge” as per (a) above, when a competent authority -as the IPC- will have declared the illicit nature of the data, having ordered their withdrawal or the suspension of access to it, or a damage would have been declared, and the intermediate service provider is aware of such decision, notwithstanding the procedures of identifying and withdrawing the content that the providers may apply as per voluntary agreements and any other means of actual knowledge that may be implemented.

On the other hand, this exemption of liability will not apply in case that the content provider linked or identified operates under the direction, authority or control by the intermediate service provider offering the service of localization of content.