

# INTELLECTUAL PROPERTY

## PRIORITIES FOR THE NEXT INSTITUTIONAL CYCLE

## WHO ARE WE ?

BusinessEurope is the leading advocate for growth and competitiveness at the European level, standing up for companies across the continent and campaigning on the issues that most influence their performance.

A recognised social partner, we speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

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## FOREWORD

In a world where intangibles have become by far the biggest asset, more than ever intellectual property (IP) is an essential tool for innovation, growth, competitiveness and job creation in Europe. IP protects fundamental knowledge-based assets which are essential for European companies' investments and efforts to provide concrete solutions that benefit the society.

IP-intensive industries generate around 42% of EU GDP translating into 28% of all jobs in the EU (60 millions). They also account for about 90% of EU trade with the rest of the world, generating a trade surplus for the EU of EUR 96 billion. Intellectual property is a great business opportunity and one of the essential building blocks of a strong EU industrial policy.

Innovators, creators and businesses in Europe must be able to rely on a solid IP system in Europe. Raising awareness of what IP has to offer for society (e.g. including creating an IP literacy) should also be a priority.

The EU should strive to make it accessible and attractive for innovative businesses, in particular small and-medium-sized companies and start-ups, to protect their inventions and creative works. Furthermore, we need an effective enforcement of IP rights. For example, counterfeiting and piracy already represent 6.8% of total EU imports and their negative impact on companies, economies and consumers will continue to grow in an increasingly globalised and digital market.

We hope that the priorities and practical ideas presented in this comprehensive BusinessEurope paper will be a useful contribution in shaping the IP strategy for the next legislature (2019-2024) and ensure that IP stays high on the EU agenda.

**Pierre Gattaz**  
President



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## EXECUTIVE SUMMARY

Intellectual property (IP) is a powerful tool to drive innovation, growth, competitiveness and job creation in Europe. IP helps European businesses thrive and unlock new sources of revenue. IP rights that are adequately protected and effectively used provide a substantial competitive advantage on the marketplace.

BusinessEurope proposes a comprehensive EU strategy on IP for the coming legislature which defines the main priorities – general and with respect to each IP right and knowledge-shared asset – later complemented by concrete ideas for action and key recommendations to help IP deliver its well-recognised benefits to companies, citizens and the society at large.

The EU should include IP among general EU industrial policy goals, as well as underline the positive impact of IP on various policy areas, e.g. the internal market, innovation, digital economy, health, energy, competition and trade matters. IP should be part of any industrial policy discussion, also covering innovation and competitiveness in Europe.

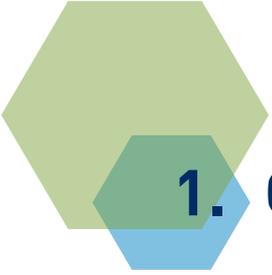
Raising awareness of the benefits of IP should also be a priority. Europe needs to develop an “IP literacy” intended to foster education on IP matters. The use of IP and knowledge-based assets (e.g. trade secrets) should be better promoted as a major business opportunity through international, EU and national projects.

EU businesses are facing intense competition from third-country competitors and need a level playing field, i.e. the same IP standards worldwide to apply. To ensure that this competition is fair, the EU should maintain a strong, high-quality and coherent IP strategy when it comes to discussing any bilateral trade agreements, as well as possible revisions of WTO rules. Strong and harmonised IP standards should be guaranteed in any attempts to reform bilateral and multilateral trade agreements. In addition, the fundamental principles laid down in the TRIPs agreement must remain a priority and the EU should be engaged in promoting TRIPs implementation and benefits in new emerging economies.

The acceleration of technological progress and digital revolution both create new challenges in the IP environment and open up new opportunities. New technologies such as 3D printing, artificial intelligence, the Internet of Things and data managing should be part of any policy discussion in the context of IP. The EU must ensure continuous efforts to achieve a good balance between strong IP protection, on the one hand, and legal certainty to encourage new technologies, on the other hand.

It is fundamental that EU upholds and strengthens its commitment to fighting counterfeiting, unlawful transfer of technology and other unlawful practices, which ultimately would deprive IP holders of their legitimate rights.





# 1. CONTEXT

Intellectual property (IP) is key to drive innovation, growth, competitiveness and job creation in Europe. European innovation is vital to ensure that the European Union (EU) can maintain its global leading role in developing sustainable solutions to cope with mutual challenges prompted e.g. by consumer safety, urbanisation, digitalisation, climate change, lack of food and clean water, a growing ageing population and health issues.

IP protects the fundamental intangible knowledge-based assets which are essential for European companies' investments and efforts to provide tangible solutions to society. IP generates business opportunities and should be considered one of the fundamental pillars of the EU industrial competitiveness.

Innovation may start with an idea, but it is only complete when its results reach the market. All forms of IP are necessary to render the commercialisation process possible. While patents and trade secrets will protect an invention, trademarks will bring it to the market. European companies innovate to devise a quality product, a unique service or creation. They link it with their brands, for which they register a trademark. A trademark's objective is to convey the required distinctiveness of a product to achieve recognition by the market. Customers will associate the product's quality and image with the brand. This connotation benefits all the company's products and services and helps the latter to meet customers' expectations in terms of quality and authenticity. IP is therefore a great business necessity and has become by far the most valuable business asset.



IP-intensive industries account for about **90% of EU trade** with the rest of the world, generating a trade surplus for the EU of **€ 96 billion**

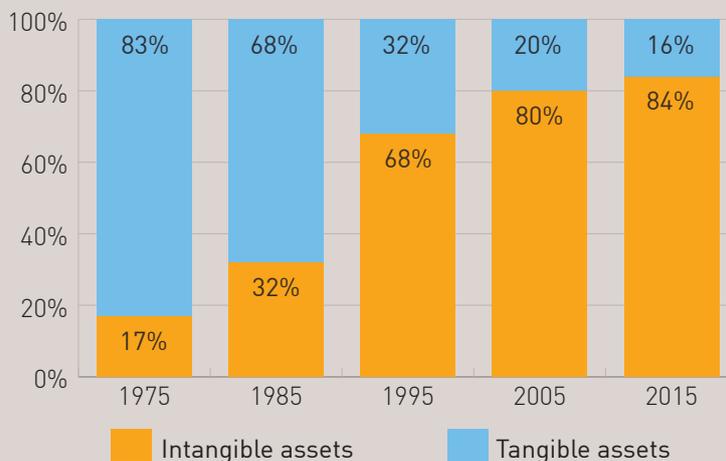
*(Source: EPO/EUIPO)*



IP-intensive industries generate around **42% of EU GDP** translating into **28 % of all jobs in the EU** (60 millions)

*(Source: EPO/EUIPO)*

**Figure 1**  
**Components of S&P 500 market value**



Source: S&P, intangible asset market value study, 2017

IP also plays a fundamental role to boost competitiveness of European businesses and provide a source of revenue. IP rights that are adequately protected and effectively used provide a powerful competitive advantage on the marketplace. In this regard, it is also important to consider the interplay of IP rights with competition policy<sup>1</sup>.

Despite the fundamental importance of IP, its contribution to innovation and society, innovative businesses, and in particular SMEs and start-ups, still experience particular problems when trying to protect their inventions and creative works. In addition, IP right enforcement – often linked to the fight against piracy and counterfeiting – has proven to be more difficult in the digitalised and global contexts, notably across national borders.

This paper provides some detail on the main challenges for the next political cycle in the field of IP. It presents BusinessEurope priorities and recommendations to promote IP, help companies to face the new global and technological challenges, explore and exploit opportunities, and ensure that they can rely on a strong and effective IP system in Europe.



In 2018, **71%** of patent applications originating from European countries were filed by **large companies**, **20%** by **SMEs and individual inventors**, and **9%** by **universities and public research organisations**

(Source: EPO)

<sup>1</sup> Regarding BusinessEurope position on competition policy, please see: “[Improving EU competition and state aid policy](#)”, 4 September 2019, and “[State aid modernisation – Fitness check](#)”, 23 July 2019



## 2. INTELLECTUAL PROPERTY PRIORITIES IN GENERAL

### A. IP AND ITS BENEFITS

IP fosters innovation, creativity and helps knowledge sharing, which is the basis for progress, growth and employment. IP protection balances interests of the society and innovators.

Major societal needs for the future - from the increased need for healthcare to clean energy, to improving the global food chain - need substantive R&D investments. IP protection enables not only proprietary, but also open innovation, whereby inventions and technologies can be exchanged with legal certainty between universities, research institutes, SMEs, government bodies and larger companies.



**96% of Europeans** agree that protecting IP is important

*(Source: EPO/EUIPO)*

IP also supports and fosters artistic creation and cultural expression that enrich and broaden our lives, such as films, music, art and architecture. IP rights are central to their owner's commercial success, and have turned Europe into a global powerhouse of cultural and artistic contents. Future generations can continue to build on the innovations of the past.

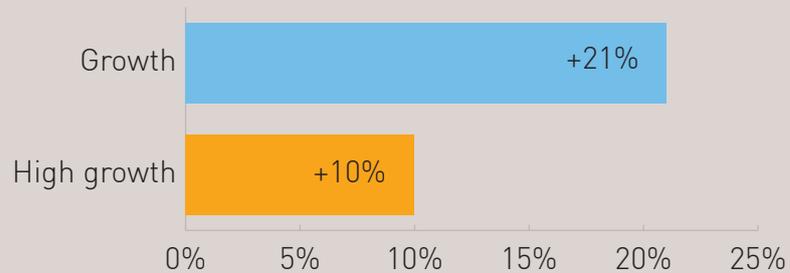


Companies applying for IPR protection **employ more people** than companies without IPR.

Firms registering IP rights have around **28% higher revenue per employee** and pay on **average 20% higher wages** than firms that do not register those rights.

*(Source: EPO/EUIPO)*

Figure 2  
Increase in odds of growth with prior IPR use



Source: EPO-EUIPO



SMEs with prior IPR activities are **more likely to grow** than other SMEs

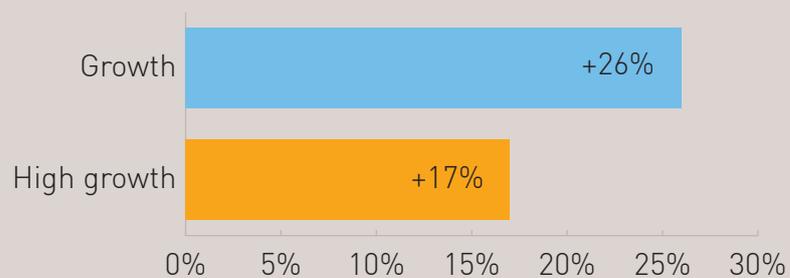
(Source: EPO/EUIPO)



The likelihood of becoming a **high-grow** firm is even higher for SMEs that have filed a **European IP right**

(Source: EPO/EUIPO)

Figure 3  
Increase in odds of growth with prior use of a European IPR



Source: EPO-EUIPO



BusinessEurope strongly believes that the European Commission (hereinafter “the Commission”) should include IP among general EU industrial policy goals, as well as underline IP positive impact while discussing various policy areas, e.g. the internal market, innovation, digital economy, health, energy, competition and trade matters. IP should be part of any industrial policy discussion.

Raising awareness of the benefits that IP offers should also be a priority. Information campaigns and education initiatives aiming at highlighting the positive impact of IP on various aspects of the EU economy, e.g. competitiveness in current and future technologies, growth, jobs, solutions to implement UN sustainable development goals, climate change, should be promoted and organised all over Europe. The use of IP and knowledge-based assets (e.g. trade secrets) should also be better promoted as a major business opportunity through international, EU and national projects.

## **B. NEED FOR IP EDUCATION**

BusinessEurope believes that it is fundamental to create an “IP literacy” intended to foster education on IP matters and benefits. Such literacy should be developed and promoted not only towards citizens and businesses, but also to decision-makers and central and local administrators.

There is much that Europe can do to promote IP education in younger generations. For instance, only a few Member States (e.g. Cyprus, Croatia, the Czech Republic, Estonia, France, Luxembourg, Poland) include IP in school curricula and education programmes, normally integrated into another specific subject, such as civics or economics.



**As leader in IP education for innovation matters, South Korea**  
also ranks No. 1 among most innovative countries.

*(Source: Bloomberg)*

IP education should not only mean awareness of the IP rights themselves, but also better knowledge of managing them in contracts and agreements. Better education regarding knowledge-based assets and better knowledge of the innovation support system should also be looked at. In this regard, silos are seen as a concern, especially where innovation policy is not necessarily linked to IP policy and where public procurement (even on innovation) is done without involving specific expertise in the field of IP.



## C. “RULEBOOK” FOR FUTURE ACTIONS IN IP

The starting point for EU IP-related policies should be about creating business opportunities for European companies taking account of their global competitiveness. A long-term stable legislative framework on how to better use IP rights, how to licence them and respect the freedom to contract, how to get financial resources is essential to facilitate investments and attract highly skilled talents and staff, and ultimately to ensure that European companies continue innovating, growing and being competitive, not only in the EU but also globally.

Any possible legislative initiatives that may be undertaken in the future - for instance, in the context of protection of innovations in the area of digitalisation, design protection, copyright enforcement and pharma incentives - should ensure that the fundamental principles of legal certainty, transparency, predictability and effectiveness are duly respected. Such initiatives should be preceded by trustable impact assessments, consultations and studies intended to evaluate and predict the actual benefits and costs for both European innovative and creative businesses and society. Similarly, substantial proposals for amendments put forward during the legislative process should be always accompanied by impact assessments. In addition, the Commission should be committed to withdrawing proposals during the legislative process when amendments prove counterproductive to European innovation and creation. Lastly, full harmonisation should be the preferred option insofar as the regulatory framework and enforcement activities are concerned.

Legislative changes are sometimes difficult to achieve, require a lot of time and may quickly become obsolete. Thus, BusinessEurope would equally welcome “soft law” actions, such as recommendations, memoranda of understanding, self-regulatory initiatives, that could be more flexible and are often easier to come into reality.

## D. IP IN THE GLOBAL DIMENSION

Global competition in facilitating domestic growth and employment through means of an innovation-friendly IP system is increasing rapidly. EU businesses are facing intense competition from third-country competitors and need a level playing field, i.e. the same IP standards worldwide to apply. Inventors, both domestic and foreign, are increasingly confronted with a challenging IP environment in some third countries.



**More than half of all PCT applications filed in 2018 came from Asia (50.5%). China has become the second largest filer of PCT applications in the world (53,345 applications in 2018)**

*(Source: WIPO)*





To ensure that this competition is fair on a global level, BusinessEurope expects the EU to maintain a strong, high-quality and coherent IP strategy when it comes to having high-level political meetings, as well as discussing any bilateral trade agreements or possible revisions of WTO rules. Strong and harmonised IP standards should be guaranteed in any attempts to reform bilateral and multilateral trade agreements, in particular at WTO level. The EU should seek to regain its position as the “standard setter” on the global scene.

BusinessEurope believes that there is a need for a global forum for IP policy discussions that would cover horizontal issues (e.g. artificial intelligence) and would look for solutions based on best practices.

The EU also should strengthen access to IP and promote and support open innovation projects. For instance, tax benefits for highly innovative companies could be an appropriate answer to the governmentally funded tax reductions for IP-intensive businesses in certain third countries such as China.

Furthermore, the systemic practices that force European companies to share and transfer sensitive technology and know-how as a precondition for doing business in third countries, in particular China, are a concern. These practices, also known as “technology transfer”, prevent beneficial competition, clearly undermine multilaterally agreed rules and are clear obstacles to enter third-country markets. The EU should map the situation and deepen its action to find an appropriate response.



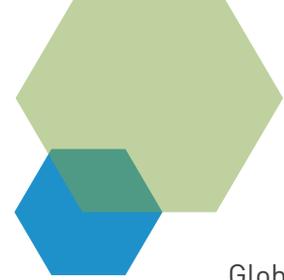
### **China leadership in IP filings**

**3.17 million patent** applications filed in 2017  
CNIPA: 1.38 billions - EPO: 166,585

**9.11 million trademark** applications filed in 2017  
CNIPA: 5.7 millions - EUIPO: 371,508

*(Source: WIPO)*

International trade and global supply chains also trigger the need to strengthen IP right enforcement worldwide. In recent years, the EU has boosted its efforts to tackle IP enforcement challenges and misuses in third countries. IP dialogues, bilateral trade agreements and technical cooperation programmes have been used and should be the way forward. In this context, the fundamental principles laid down in the TRIPs and subsequent WIPO treaties and agreements must remain a minimum benchmark of protection and a priority. The EU should also be engaged in promoting TRIPs implementation and their benefits in emerging economies.



Global challenges have prompted the IP offices to cooperate to streamline rules and procedures. BusinessEurope considers the current cooperation framework between the IP offices of Europe, Japan, South Korea, China and the United States (i.e. within IP5, TM5 and ID5) the way forward. Its focus on common projects aiming at harmonisation of IP procedures and standards should continue to deliver tangible results that benefit European businesses. BusinessEurope also appreciates the Patent Prosecution Highway (PPH) efforts; more trust in examination results by IP offices would probably be needed to improve efficiency of this system.

Substantive patent law harmonisation converging to a new patent system should be pursued as such system would benefit the industry in terms of simplification, cost reduction and legal certainty. BusinessEurope is fully committed to continue participating in these discussions with its industry counterparts in other parts of the world.

## **E. IP AND NEW TECHNOLOGIES**

The acceleration of technological progress and digital revolution both create new challenges in the IP environment and open new opportunities. New technologies such as 3D printing, artificial intelligence, 5G, the Internet of Things (IoT) and data managing should be part of any policy discussion in the future. BusinessEurope urges the next Commission and European Parliament to ensure continuous efforts to achieve a good balance between strong IP protection, on the one hand, and legal certainty to encourage new technologies, on the other hand.

For instance, 3D printing technology will be a central technology in maintaining Europe as a world leader in manufacturing. It will be increasingly applied in development and production processes in sectors as diverse as car manufacturing, aviation, mechanical engineering, and health devices. At the same time, it will provide challenges to IP rights and their protection.

5G-based new products and services are already generating a new breed of IP rights. Policy-makers and European companies should be aware of new opportunities and their overall impact.

To guarantee the IP right protection and to facilitate continued technological progress, it is crucial to examine these developments both on the national and European levels. It is important to make sure that regulations are consistent. 3D printing and other emerging technologies are intertwined with legal areas such as product liability, copyright, IP rights, environmental regulation and trade rules. These rules may need to be adjusted based on practical experiences and in consultation with stakeholders. Technological neutrality has to be the guiding principle.

## F. IP AND ONLINE MARKETPLACES

E-commerce is of high importance for almost every business. Online sales have introduced clear advantages: they are generally less expensive for both the producer and the consumer and are less time-consuming and more easily available. Despite these benefits, IP right infringements increasingly take place in the online environment. E-commerce has proven to be an easy way to distribute counterfeits, which do not only create economic damage or have a negative impact on brands reputation but may also significantly impact consumers from a safety and health perspective and often finance illegal activities.



**Online sales** are expected to overtake traditional sales by 2035 representing **57%** of total retail

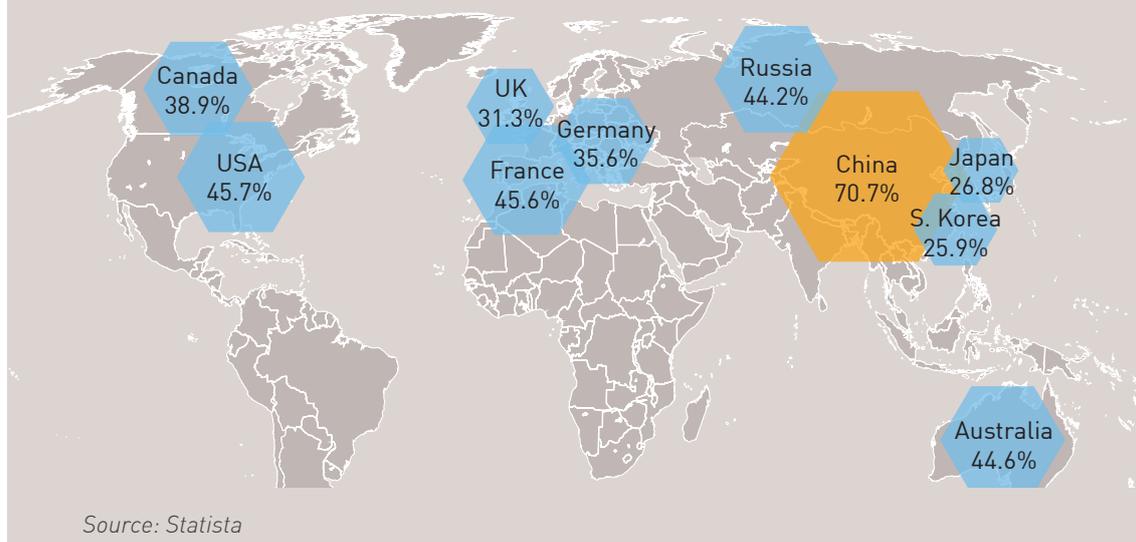
*(Source: EUIPO)*

Imposing obligations regarding fighting online IP right infringements only on the e-commerce industry would not be enough. Right holders should engage more actively in protecting their rights on the Internet. Close cooperation between online marketplaces and authors is essential to protect IP rights effectively.

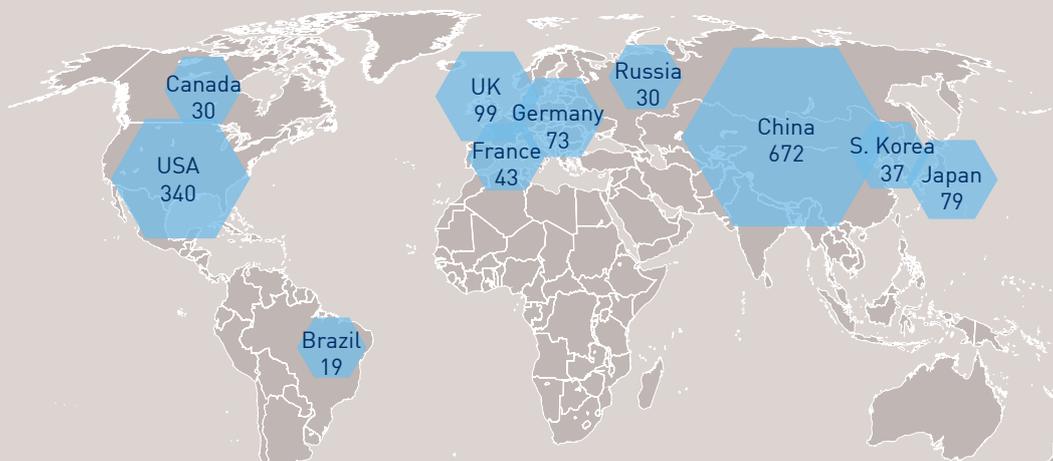
BusinessEurope believes that harmonised legislative measures specifically aimed at preventing and combating online IP right infringements should be adopted at EU level, keeping in mind the roles of different stakeholders in the online environment and allowing for adaptations to a rapidly developing technological landscape.

**Figure 4**

**Five-year growth rate of global e-commerce from 2018 to 2023**



**Figure 5**  
**Largest e-commerce marketplaces in 2018 (in USD billions)**



Source: Statista



**Over 50% of the medicines sold on illegal websites are reported to be counterfeit**

*(Source: World Health Organisation)*

## **G. ENFORCEMENT**

Despite the fundamental importance of protecting IP, innovative businesses, and in particular SMEs and start-ups, still experience some problems when trying to protect their inventions and creative content. IP right enforcement - often linked to the fight against piracy and counterfeiting - has proven to be more challenging and sometime ineffective if infringement activities are happening in digital and global contexts.



**In 2016 imports of counterfeit and pirated products into the EU amounted to EUR 121 billion, which represents up to 6.8% of EU imports, against 5% of EU imports in 2013**

*(Source: OECD/EUIPO)*



To ensure a strong, efficient and reliable IP framework, BusinessEurope urges the Commission to uphold and strengthen its commitment to combat counterfeiting, piracy, unlawful transfer of technology and other unlawful practices or restrictions on contractual freedom, which ultimately would deprive IP right holders of their legitimate rights or interfere with the IP right holder's ability to exercise them.



Almost **60,000 detention cases** were registered by customs in 2017. The value of the equivalent genuine products is estimated to be **over 580 million euros**.

*(Source: European Commission)*

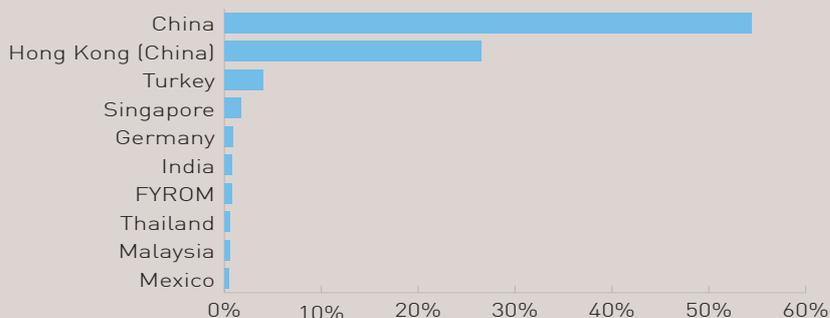
For instance, the European Observatory on Infringements of Intellectual Property Rights should be empowered with additional and more pragmatic tasks aimed at facilitating actions against counterfeiting and piracy at both EU and national level. Further to disseminating studies and statistics, the Observatory could serve as instrument to share information on concrete cases and best practices among competent authorities. It is important that IP right holders are kept involved in the Observatory's activities as they have first-hand experience of their cases and procedures, and can bring an added value to these enforcement efforts.

EU and national customs authorities should have adequate resources to detect whether goods are counterfeit, pirated, modified in any manner without the IP right owner's consent or illegally imported into the EU.

IP enforcement should be a priority also at international level. The Commission should make sure that IP enforcement is part of any discussion with its global partners. The first step would be raising awareness about the importance of the development and implementation of a solid IP enforcement policy and exchanging best practices. Possible joint actions and solutions to tackle this problem should be identified.

In particular, BusinessEurope urges the Commission to assist China (and other relevant countries from Asia and Africa) with ensuring their proposed changes to their IP protection and enforcement system are aimed at creating efficient and transparent procedures and at increasing legal certainty.

**Figure 6**  
**Seizures of counterfeit and pirated goods: top provenance economies 2016**



*Source: OECD/EUIPO*



In 2016 the volume of international trade in **counterfeit and pirated goods** amounted to **USD 509 billion**, representing up to **3.3% of world trade**. This amount does not include domestically produced and consumed counterfeit and pirated products, or pirated digital products being distributed via the Internet.

*(Source: OECD-EUIPO)*

## H. IP GOVERNANCE IN EUROPE

IP represents a set of intangible assets that have a great and strategic value for businesses. It is essential that IP stays high on the agenda of the EU institutions. The impression however is that various IP rights are considered (and regulated) separately and independently by the various EU institutions and bodies that are in charge of IP policy in Europe.

IP rights and their related aspects (e.g. IP regulation, economics of IP and trade-related matters) fall within the competence of different entities (i.e. the Commission, the European Patent Office and European Union Intellectual Property Office) and different Directorates General in the Commission. This “decentralisation” leads sometimes to the perception that these entities do not sufficiently coordinate in terms of strategy and information sharing.

Businesses need to see a stronger and accountable IP governance and a better coordination among the various institutions and bodies, in order to guarantee a horizontal and stringent IP strategy aimed at defining the state-of-the-art of EU IP policy. This more focused and efficient coordination including regular meetings should occur at both political and technical level. Similar to the IP offices in other parts of the world, EU institutions and other bodies should be able to speak with “one single voice” both in Europe and on the global scene.

European businesses also need a more strategic approach to IP, focusing on how IP policy can contribute to European industrial competitiveness as a whole. IP should be put at the centre of any discussions about innovation and competitiveness. For instance, regular discussions on IP should take place in the High-Level Working Group on Competitiveness and Growth and in the Strategic Forum for Important Projects of Common European Interest.

A more coordinated and strategic approach could also be advantageous when facing challenges and opportunities of global nature. European companies, but also EU citizens and public administrations would benefit from increased communication, further cooperation and possibly better use of resources.



### 3. PRIORITIES IN THE FIELDS OF PATENTS, TRADEMARKS, DESIGNS, TRADE SECRETS AND COPYRIGHT

As a policy instrument, the IP legal framework provides individuals, SMEs, start-ups and businesses with incentives to undertake creative and innovative activity, by granting them limited exclusive legal rights to the results of their inventive and creative works, and by enabling them to exercise these rights and to share those results, e.g. via licencing.

Further to the general IP priorities explained under Section 2, this section specifies BusinessEurope's expectations and recommendations with respect to each type of IP right and knowledge-shared asset (i.e. trade secrets) having an impact on industry.<sup>2</sup>

#### A. PATENTS

BusinessEurope considers the current European Patent Convention (EPC) system as the best option to promote the legitimate interest of innovative industries to protect their investments in valuable technical ideas. The EPC system and its high-level standards should therefore be guaranteed and promoted both in Europe and abroad. In no way these regulations and standards should be lowered or given up for the sake of trade negotiations.

BusinessEurope supports efforts by the European Patent Office to increase the quality of examination of the patents filed. This should be a priority as it would result in higher quality of the patents granted and legal certainty.

**Patent protection** covers inventions, which are products, systems or processes that provide, in general, a new way of doing something, or offer a new technical solution to a problem. To be patentable, inventions must be new, non-obvious (i.e. include an inventive step) and industrially applicable.

<sup>2</sup> Geographical indications and plant variety rights are excluded from the scope of the present paper.



## Unitary Patent system

The Unitary Patent and the Unified Patent Court will open a new opportunity for companies to protect their inventions. The rapid entry into operation of the Unitary Patent system, preferably including the UK, and the Unified Patent Court Agreement remain the highest of priorities as these tools would boost competitiveness and economic growth in Europe.<sup>3</sup>

## Supplementary protection certificates (SPCs)

BusinessEurope would welcome any initiative aimed at introducing a fair and balanced unitary supplementary protection certificate (SPC). If and when the Unitary Patent Court does enter into force, the unitary patent should be complemented by SPCs having the same territorial scope to ensure that companies which choose unitary patent protection can benefit from the SPC extension in all territories where the products are marketed. By contrast, if the unitary patent does not become a reality, the possible introduction of an EU harmonised SPC framework would be welcome.

It is important that the recently adopted exemption to the SPC patent protection of an original medicine (“SPC manufacturing waiver”) is properly implemented with a view to ensure that Europe can continue to deliver on its commitment to long-term stable incentives for innovation to maintain a strong knowledge-based manufacturing industry in Europe. It is also essential that this instrument does not lead to any further dilution of IP rights, and that the safeguards set out in the new regulation are duly respected and used fairly.

## Standard Essential Patents (SEPs)

Standardisation based on patent-protected technologies is a key driver of European industrial innovation and competitiveness. BusinessEurope supports the principles set out in the Commission communication of 29 November 2017, and in particular the principle that a fair and reliable system for the licencing, use and enforcement of standard essential patents has to be ensured to guarantee the balance between the need for standardisation, required for public use, and the private rights of SEP holders. The promotion of fair SEP licensing practices is also essential.

BusinessEurope supports the Commission’s efforts in this field and encourages it to continue this work. For instance, the following line of actions could also be considered:

- › Increasing transparency and encouraging greater cooperation between standard-setting organisations and SEP holders in this regard, while ensuring that standardisation work can continue in an efficient manner;
- › Introducing publicly available databases providing information on the current owner of a patent and the status of that patent; and
- › Maintaining a balanced and predictable enforcement regime.

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3 This paragraph is not supported by the Spanish Confederation of Employers and Industries (CEOE), the Confederation of Industry of the Czech Republic (SPCR) and the Confederação Empresarial de Portugal (CIP).





## Artificial intelligence and new emerging technologies

Artificial intelligence (AI) is related to patents in two ways. The first is that technology advancements can be protected by patents and the second is that artificial intelligence can be applied to the patent procedures and related patent data to eliminate inefficiencies and improve knowledge.

From the substantive patent law perspective, it should be made sure that the current legal framework is adequate to respond to the technological revolution. For instance, comprehensive, transparent and reliable standards of patentability should be elaborated within the current framework to ensure that AI inventions are not excluded from protection as stated in the report from the IP5 expert round table on artificial intelligence (that was held in Munich on 31 October 2018). As clear from this report, sufficiency of disclosure is to be given close attention in AI cases, especially as regards disclosure of algorithms and access of datasets relied upon for learning processes. Examination criteria should not be relaxed to adapt to certain AI inventions. On artificial intelligence, the competition for patent protection is already at full speed at international level and the European industry cannot be penalised.

From the procedural perspective, new technologies offer new opportunities in terms of search, classification and electronic tools to manage the patent granting process online. BusinessEurope trusts that the EPO will continually improve and develop its processes and services to best adapt with changing needs and render them more and more user-friendly.

Biotechnology can be a driver for a transformation process into a more biobased, sustainable economy. To enable this, an effective and clear legal framework is necessary. To promote innovation in this field and meet new challenges in food production and climate change, adequate IP protection should also be maintained according to the fundamental principles laid down in the 'biotech' directive<sup>4</sup>.

## Patent information

BusinessEurope believes that there is much that can be done on the use of patent information. So far, there are only a few, if any, incentives to use patent information for research and only a few companies realise how they could make the most of their patent information. This is not consistent with having detailed categorisation and easy searchability of patent information which makes patent information one of the best documented and most valuable sources of technical information. If patent information was used more broadly by researchers in universities and founders of start-up companies, they could get a quick and comprehensive overview on the state of the art in a certain technology. By systematically monitoring the latest publications of patent documents, SMEs and also large companies could avoid problems with third-party patent rights from the outset.

New technologies like semantic searching, automatic translations and the use of artificial intelligence searching, and analysing algorithms will bring the patent information even closer to non-professional users.

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<sup>4</sup> Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions

BusinessEurope therefore encourages the EPO and national patent offices to offer support for searching patent information and patent documents with a special view to SMEs and start-up companies. BusinessEurope further encourages universities to make the use of patent information a part of their curricula in particular for students in technical faculties that need to draft a bachelor or master thesis. Such course could be completed with guidance on how information from the Internet and other sources may or may not be used.

## Patent enforcement

BusinessEurope urges the Commission to make sure that Member States effectively implement Directive 2004/48/EC on the enforcement of IP rights<sup>5</sup>. In particular, it should be made sure that Member States (i) provide the opportunity to obtain injunctions in a reasonable time frame (i.e. months, rather than years), and (ii) foresee realistic damages are available to the parties involved when infringement is determined in a court action.

With respect to IP laws and enforcement outside the European area, the situation is of concern. Where appropriate, the Commission should act to ensure that EU trading partners maintain a high level of IP protection consistent with their international commitments.

## **B. TRADEMARKS**

**A trademark** is a distinctive sign, design or expression that identifies certain goods or services as those provided by a specific person or enterprise, thereby distinguishing them from those of other enterprises. To be protected, trademarks must be distinctive.



BusinessEurope supports the actions of the Commission to ensure completeness and conformity of the transposition of the EU trademarks package (that was due by 15 January 2019) and has not been completed in each Member States yet. Besides this package, BusinessEurope would like to put some additional comments forward.

<sup>5</sup> Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (“IPRED”)





## Stronger cooperation in Europe

BusinessEurope sees substantial added value in the cooperation within the European Union Intellectual Property Network (EUIPN). BusinessEurope welcomes the efforts to improve the interoperability of tools provided by different IP national offices as this would allow to improve efficiency, reduce costs and increase access to the IP system.

On the harmonisation of practices, the approach developed in the convergence programmes should be continued and accelerated as sometimes it takes a considerable amount of time until trademark granting practices have been harmonised and implemented by all national IP offices. In particular, the EUIPO and national offices are expected to apply the same standards for registrability of trademarks, especially vis-à-vis the new forms of trademarks (so-called “non-traditional trademarks”) to ensure legal certainty.



The Commission and the EUIPO should take a more active role in their educational efforts also when it comes to enforcement of trademarks and designs at national level.

## International cooperation

BusinessEurope considers the current trademark and design cooperation framework between the five IP offices of Japan, South Korea, Europe, China and the United States (i.e. TM5 and ID5) as a priority and the way forward. Its focus on common projects aiming at the harmonisation of trademark and design procedures should continue to deliver tangible results that benefit European businesses. Users clearly benefit from the cooperation framework if, as a result of such cooperation, they can directly access the databases of various IP offices. Visibility of the benefits brought via the international cooperation should be strengthened.

BusinessEurope would like the users involvement within TM5 and ID5 to be intensified. The creation of a special and “institutional” forum of exchange between IP offices, on the one hand, and users, on the other hand, should be envisaged also insofar as trademarks and designs are concerned. The successful synergy between industry and the five patent offices (IP5) is an excellent example that should be looked at.

## Trademarks and digital economy

The E-Commerce Directive<sup>6</sup> dates back to 2000, when the EU wanted to promote the e-commerce platforms, protect freedom of expression and boost the internal market. Almost twenty years later, it is probably a good moment to reflect whether these rules are still “fit-for-purpose”. Irrespective of a possible review of the E-Commerce Directive, self-regulation should be promoted as an important part of the business and legal environment.

New uses of trademarks linked to the platform economy have started to create problems for IP right holders, especially “brand bidding”. This recent development has to be in focus in the next political cycle.

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6 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market

## New technologies and trademarks

The technological revolution also entails new challenges in the field of trademarks. The EU should continue and strengthen its efforts to promote a discussion on the effects of these new technologies, such as artificial intelligence and big data, on its future work and how it should respond to it. An assessment of the current framework aimed at verifying whether these rules are still “fit-for-purpose” in the new context would be definitely welcome.

From the procedural perspective, it should be ensured that the procedures are properly applied, and the principles of high quality, efficiency and timeliness are duly respected regardless of the technology involved. The use of new technologies should not interfere with the achievement of these fundamental goals.

## C. DESIGNS

An **industrial design** is the ornamental and aesthetic aspect of an article. The design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines or colour. To be protected, industrial designs must be new and have an individual character.



BusinessEurope has taken positive note of the evaluation of the EU legislation on design protection launched by the Commission since 2018 in order to analyse to what extent the EU legislation on design protection has achieved its objectives in terms of efficiency, effectiveness, relevance, coherence and EU added value.

## Harmonisation is key

BusinessEurope has always supported the harmonisation of national rules and the creation of the Community design protection system. The harmonisation has been a major change from which businesses have certainly benefited insofar as, among other things, it has provided the same protection of designs everywhere in the EU, has contributed to preventing counterfeiting and copying of Community designs, and has introduced a simple registration procedure. Further harmonisation should be the way forward.





## Spare parts

Different rules on spare parts protection in the Member States is seen as a problem by businesses. Consequently, such rules should be harmonised to ensure legal certainty and uniformity across the EU whilst contributing to meeting circular economy objectives.

## Registration without prior examination

The current design system is based on a registration system without prior examination. This means that the EUIPO does not, of its own motion, check whether a design applied for is new or if it possesses individual character. There are several problems caused by this lack of examination before registration, the most important may lead to the underuse of the design and its diminished value. The absence of a prior examination also leads companies to constantly be updated regarding registrations from their competitors on the market. This may be overwhelming, especially for SMEs. The lack of examination before registration may penalise innovative and creative businesses that face legal uncertainty and unnecessary costs resulting from cancellation procedures.

The introduction of a substantive examination phase in the registration process should thus be considered. To help examiners in their task, the possibility to use digital aids in examination could be explored.

## Awareness

BusinessEurope highlights that, unfortunately, there is not sufficient awareness among designers and entrepreneurs (including SMEs) of the availability, benefits and ways of protecting designs in the EU. Although designs are an important competitive factor, their protection is underused. Companies are also not sufficiently familiar with differences between the protection provided by trademark law, copyright law, patent law and rules on unfair competition.

Increasing companies awareness is a joint exercise of the Commission, the EUIPO, IP national offices and stakeholders. Informative campaigns and specific trainings could be the first step to be undertaken.

## Enforcement

It goes without saying that enforcement should be part of the discussion on the design protection reform. A specific issue emphasised by some BusinessEurope members concerns the possibility to obtain damages in case of infringements. Currently national legislations differ significantly. This situation is unfortunate and should be addressed.

## Designs and circular economy

Particular attention should be given to the interplay between the design protection system and the transition to a circular economy. There is a wide range of possible policy instruments that can be applied to improve product circularity throughout a product's lifecycle (e.g. relating to preparation for reuse in terms of spare parts). Any reform should take such policies into account to ensure the consistency among policy measures and avoid conflicting incentives for businesses and consumers.

## Designs and new technologies

Any discussion on a reform of the design protection system should comprise new technologies. In particular, it is necessary to ensure that applicable rules are able to deal with the rise of 3D printing and other disruptive technologies. It should be ensured that any revised design protection system also covers interface designs.

## D. TRADE SECRETS



**Trade secrets** is a valuable piece of information for a company that is treated as confidential and gives to that company a competitive advantage, e.g. formulation of a substance, marketing study, list of clients, inventions prior to patenting.

The adoption of the Trade Secrets Directive<sup>7</sup> in 2016 was a real breakthrough in the EU to enhance the protection of trade secrets. This directive aims at harmonising the national laws against unlawful acquisition, disclosure and use of trade secrets, starting with a common definition of trade secrets.



**Industrial espionage and theft of trade secrets** caused **€ 60 billion loss** of economic growth, innovation and put **289,000 jobs at risk** in 2018.

*(Source: European Commission)*

<sup>7</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure





BusinessEurope supports the actions of the Commission to ensure completeness and conformity of the transposition of the Trade Secrets Directive by Member States (that was due by June 2018 and is not yet completed in each of them). However, cybertheft has become a serious problem for businesses and further action is definitely needed in this field. Initiatives should primarily focus on prevention, rather than on the punitive aspect only.

The practical implementation of measures to protect trade secrets represents a challenge for many companies. Therefore, the promotion of educational actions focused on practical real-world case studies on the implementation of trade secret protection would be welcome.

## **E. COPYRIGHT**

BusinessEurope looks forward to the entry into force and implementation of Directive (EU) 2019/790 on copyright and related rights in the digital single market (the “new Copyright Directive”) adopted on 17 April 2019. It should be ensured that the new rules are transposed in the national legal orders in a coherent and transparent manner.

Implementation of core issues of the new Copyright Directive has to be pushed forward. It may be useful if the Commission could give some guidance on the interpretation of newly introduced concepts, such as “best efforts” under Article 17(4) of the new Copyright Directive, to ensure legal certainty and avoid diverging notions being introduced in different Member States.

Implementation of very disputed topics, like Article 17 on online content sharing service providers, has to be based on an intense and transparent dialogue on European level between stakeholders and their best practices. BusinessEurope looks forward to engaging in this stakeholder dialogue with the Commission. Similarly, stakeholders should be encouraged and allowed to take part in dialogues to jointly define what best practices could be to apply on the Text-and-Data-Mining exception to ensure proper implementation of the new Copyright Directive at national level.



**Copyright** and related rights give right holders exclusive rights to control the use (or economic exploitation) of their works or other protected subject matter, e.g. reproduction, distribution, adaptation, translation, performance or public display. To be protected, works must be original irrespective of their literary or artistic merit.



## Further harmonisation

Beside the recent reform, the current EU framework for copyright and related rights (acquis) still remains highly complex<sup>8</sup>. It comprises a set of eleven directives and two regulations. Provisions which are relevant to the exercise and enforcement of copyright are also included in other EU instruments as well as in various international agreements. There is a clear need for simplification and further harmonisation efforts to render such framework less complex.

## Copyright collective societies

Because of their competition and cross-borders implications, a reflection on the role and framework around copyright collective societies, especially in light of the recently adopted copyright directive, should take place in the next political cycle.

## Copyright and new technologies

The impact of new technologies and artificial intelligence should also be examined from the copyright perspective. As copyright protects the originality of a work and the creator's right to reproduce it, protecting an object from being printed in 3D without authorisation should not raise any specific IP issues. However, the fact that 3D printing would allow individuals to reproduce copyright-protected objects at home and potentially sell them may open the door to a potentially exponential number of infringements and generate difficulties in terms of enforcement. These problems deserve a deep evaluation and appropriate actions should be taken to ensure a prompt and adequate response.

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8 Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property; Directive 2001/84/EC of 27 September 2001 on the resale right for the benefit of the author of an original work of art; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission; Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programmes; Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; Directive 96/9/EC of 11 March 1996 on the legal protection of databases; Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights; Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works; Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market; Directive (EU) 2017/1564 of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled; Regulation (EU) 2017/1128 of 14 June 2017 on cross-border portability of online content services in the internal market.



## Database protection and new technologies

A database is a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. In the EU, databases are legally protected by copyright provided that they are original. The current legal framework dates back 1996<sup>9</sup>. An evaluation of the Database Directive was performed in 2018 with a view to determining whether it was still “fit-for-purpose” in light of the recent technological developments and the emerging data economy. The evaluation study has concluded that some key definitions (e.g. “database”, “database maker”, “database owner”, “substantial investment”) need to be clarified and some provisions have to be adapted to the digital environment. For instance, data-intensive technologies such as the IoT have generated a debate on which players should have property rights over data generated in scenarios where multiple stakeholders are involved (e.g. individual, owner of the device, owner of the network, etc.).

In this context, the Commission should address the problems highlighted in the evaluation study, further consult stakeholders and determine whether a reform of the Database Directive is necessary to adapt it to the changing digital context while safeguarding the balance between the respective interests of database users and makers.

<sup>9</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the “database directive”).



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## CONCRETE IDEAS FOR ACTION AND KEY RECOMMENDATIONS

### INTELLECTUAL PROPERTY PRIORITIES IN GENERAL

#### IP and its societal benefits

- Promote and support relevant open innovation projects to achieve high-level results for society
- Launch education campaigns at European and national levels to raise awareness on the societal benefits of IP

#### “Rulebook” for future actions in IP

- Ensure the fundamental principles of legal certainty, proportionality, transparency, predictability and effectiveness
- Precede any legislative initiative by trustable impact assessments, consultations and studies
- Consider, where possible, the adoption of “soft law” actions

#### IP in the global dimension

- Align global IP standards through various EU bilateral trade agreements
- Promote the fundamental principles laid down in the TRIPs and subsequent WIPO treaties and agreements
- Boost closer cooperation between IP offices in different regions of the world
- Pursue substantive patent law harmonisation

#### IP and new technologies

- Ensure continuous efforts to achieve a good balance between strong IP protection, on the one hand, and legal certainty to encourage new technologies, on the other hand
- Educate on business opportunities regarding new emerging technologies and introduce adequate rules to guarantee IP protection while gaining profit from new technologies like 3D printing
- Reflect on the possible adoption of adequate measures to deal with the rise of 3D printing, and other disruptive technologies

#### IP and online marketplaces

- Introduce harmonised legislative measures specifically aimed at preventing and combating online IP right infringements, while considering sectoral differences
- Promote self-regulation referring to elimination of the counterfeit products
- Support further control of the goods imported from non-EU countries, which offer the widest range of counterfeit goods





Enforcement

- Continue and strengthen the commitment to combat counterfeiting, unlawful transfer of technology and other unlawful practices
- Ensure blocking of websites through which predominantly counterfeit goods or copyright-infringing works are offered. The top-level domain providers should offer reliable tools to report violations and close the website. Care must be taken to ensure that such pages are not restarted under a different top-level domain
- Ensure that IP enforcement is part of the discussions with global partners
- Ensure that customs authorities have adequate resources to detect whether goods are counterfeit, pirated, modified in any manner without the IP right owner's consent or illegally imported into the EU

IP governance in Europe

- Establish a stronger and accountable IP governance and a better coordination among the various institutions and bodies in charge of IP policy in Europe, at both technical and political levels
- Ensure a more strategic approach focusing on how IP policy can contribute to European industrial competitiveness as a whole and make sure that IP is put at the centre of any discussions about innovation and competitiveness in Europe

PRIORITIES IN THE FIELDS OF PATENTS, TRADEMARKS, DESIGNS, TRADE SECRETS AND COPYRIGHT

Patents

- Ensure the rapid entry into operation of the Unitary Patent system<sup>10</sup>
- Enquire the proper implementation of the SPC manufacturing waiver
- Ensure and promote a fair and reliable system for the licencing, use and enforcement of standard essential patents
- Offer support for searching patent information and patent document with a special view to SME and start-up companies
- Support effective implementation of the IPRED

Trademarks

- Continue the harmonisation efforts and improve the interoperability of tools within the EUIPN
- Increase the users involvement in international cooperation activities and better promote the benefits derived from such cooperation
- Promote the discussion on the effect of new emerging technologies in the field of trademarks

<sup>10</sup> This paragraph is not supported by the Spanish Confederation of Employers and Industries (CEOE), the Confederation of Industry of the Czech Republic (SPCR) and the Confederação Empresarial de Portugal (CIP).

- Designs**

  - Introduce further harmonisation in the European designs protection system, also covering spare parts and enforcement
  - Promote initiatives aimed at raising awareness about the availability, benefits and ways of protecting designs in the EU
  
- Trade secrets**

  - Ensure the rapid and conform transposition of the Trade Secrets Directive
  - Work on additional and effective actions aimed at tackling cybertheft
  - Promote educational actions focused on practical real-world case studies on the implementation of trade secret protection
  
- Copyright**

  - Ensure the fast and faithful implementation of the new Copyright Directive, including the TDM exception for AI innovations
  - Ensure the fast and faithful transposition of the Online SatCab regulation<sup>11</sup>
  - Promote the introduction of technology-neutral alternatives
  - Further consult stakeholders and determine whether the Database Directive should be reformed
  - Promote the stakeholders dialogue laid down in Article 17(10) of the new Copyright Directive to discuss best practices for cooperation between online content-sharing service providers and right holders

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# BUSINESSEUROPE



**BusinessEurope** is the leading advocate for growth and competitiveness at the European level, standing up for companies across the continent and campaigning on the issues that most influence their performance. A recognised social partner, we speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.



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