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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

Evaluation of the Application of the Regulation (EU) No 386/2012 of 19 April 2012

{SWD(2020) 282 final}

I. CONTEXT OF THE EVALUATION

Intellectual property rights (IPR) support entrepreneurs and creators developing new, better, and more efficient, products, technology and services. IPR also provide incentives to produce and share academic and scientific research, artistic works and entertainment. IPR help inventors, authors and local communities receiving a retribution for their work and contribution to societal progress. IPR can help small businesses and start-ups in seeking investment and helps companies in expanding and exporting, making a wider choice of products available to more consumers, while creating new and well-paid jobs[1]. In addition, IP offers reassurance to consumers of the quality and origin of the products they purchase.

IP is particularly important for the EU. Europe excels in know-how, creativity and innovation. In 2016, EU IPR-intensive industries[2] generated 82% of EU exports, which translates into a trade surplus of around €182 billion[3]. Patents, trade marks, copyright, designs and geographic indications, protect EU industry from unfair copying carried out by competitors that have not invested in creativity, research and development. The IP system also provides protection against the activity of criminal organisations that deceive consumers and businesses with ill-manufactured (and often dangerous) knock-offs. Counterfeited goods can have serious impact on the health and safety of consumers, as well as negative environmental consequences. Counterfeiting and piracy is operated by criminal organisations with a global reach and can only be fought through the joint efforts between the public, private and civil society sectors, within the EU but also in cooperation with non-EU countries.

In 2009, the Commission set up an informal network of private and public stakeholders concerned by infringements of IPR, under the name 'Observatory on Counterfeiting and Piracy' ('the Observatory'). Its main goals were to:

- assess the scope, scale and impact of infringements of IPR in the EU;
- improve cooperation between those engaged in protecting and enforcing IPR;
- share best practice in enforcement; and
- raise awareness among consumers.

In 2010, the Council of the European Union invited the Commission to elaborate further on the scope of competences, tasks and role of the Observatory[4], leading the Commission to propose the transfer of the Observatory to the European Union Intellectual Property Office (EUIPO).

[1] On average, companies that own IPR generate 29 per cent higher revenue per employee, and they pay 20 per cent higher wages, than firms that do not use IPR - *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union,*, third edition, EPO and EUIPO (2019).

[2] *Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union*, third edition, EPO and EUIPO (2019). The OECD - EUIPO report considers as IPR-intensive, the industries that have more IPRs per employee, than the average of all industries. According to the report the IPR intensive industries are concentrated in the manufacturing, technology and business services sectors

[3] *Report on the protection and enforcement of intellectual property rights in third countries*, Commission Staff Working Document, 8 January 2020, SWD(2019) 452.

[4] Council Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market (2010/C 56/01).

In 2012, Regulation No 386/2012[5] ('the Regulation') entrusted the Observatory, now renamed European Observatory on Infringements of Intellectual Property Rights, to the EUIPO, together with a set of tasks aimed at facilitating the activities of national authorities, the private sector and the EU institutions in the fight against infringements of IPR. These tasks were added to the EUIPO's main mission of managing the EU trade marks and designs systems and offering registration of such rights at EU level.

The Regulation further specifies that "the Office shall organise, administer and support the gathering of experts, authorities and stakeholders assembled under the name 'European Observatory on Infringements of Intellectual Property Rights' ('the Observatory')". By 31 December 2019, the Observatory was composed of 123 representatives from national authorities, industry, consumer organisations and civil society, and various international organisations and institutional bodies, such as the OECD, the World Customs Organisations, the European Patent Office, the European Parliament and Europol. Officials from various departments of the Commission also participate at the meetings of the Observatory.

In this report, the Commission evaluates the implementation and functioning of the Regulation, assessing whether its initial objectives are still valid and whether they were met in an efficient and coherent way[6]. The report does not cover the activities of the EUIPO outside the Regulation, that is, the registration of trade marks and designs, and the overall functioning of the EUIPO.

The Commission initiated the evaluation in 2016. An external contractor carried out a study published on 2018[7]. The most significant limitation identified in the study was that the evaluation started too early, as the first results started to emerge between 2015 and 2017. To improve the evaluation, the Commission extended its scope to all activities carried out by the EUIPO, under the Regulation, until 31 December 2019.

The present report summarises the conclusions of the evaluation and the Commission will submit it to the European Parliament, the Council and the European Economic and Social Committee. The accompanying Staff Working Document gives a detailed explanation of the method, baseline scenario and the findings of the evaluation.

II. FINDINGS OF THE EVALUATION

The evaluation assessed the Regulation, and its implementation by the EUIPO, along the five standard evaluation criteria: (i) effectiveness, (ii) efficiency, (iii) coherence, (iv) relevance and (v) EU added value.

A. Relevance

The relevance criterion examined the extent to which the initial objectives of the Regulation are appropriate and still correspond to the present needs.

[5] Regulation No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ EC No L 129 of 16.5.2012, p. 1).

[6] The evaluation is required by Article 8 of the Regulation.

[7] Technopolis, *Evaluation of the application of Regulation 386/2012*, 2017 available online at https://op.europa.eu/en/publication-detail/-/publication/f92d8b87-1dce-11e8-ac73-01aa75ed71a1/language-en

The tasks assigned to the EUIPO can be grouped in four main areas:

(1) research and knowledge sharing on the role of IP, on the volume and impact of IP infringements, as well as on best practice to enforce IPR and prevent infringements;

(2) awareness on IP including the risks and negative impact of counterfeiting and piracy;

(3) cooperation between authorities, as well as between authorities and owners of IPR, including through the development of tools and promotion of technologies to support enforcement of IPR; and

(4) cooperation with IP offices in non-EU countries on enforcement of IPR.

The evaluation concluded that the tasks assigned to the EUIPO are all relevant today.

Online illegal offer and consumption of copyright content such as movies, music and live sport events continues to be widespread. Between 2012 and 2016, piracy in the EU caused the recorded music industry an annual average loss of EUR 200 million and 1,300 jobs. Imports of counterfeit goods into the EU rose in value from EUR 85 billion in 2013 (equivalent to 5% of total EU imports) to EUR 121 billion (6.8% of total EU imports) in 2016[8], causing losses of business revenue, tax revenue and jobs.

The interviews carried out by the contractor and the feedback received through the public consultation showed a large consensus on the relevance of the tasks that the Regulation assigned to the EUIPO.

While some stakeholders, in particular some representing trade mark owners, expressed doubts on cooperation with authorities of non-EU countries, such cooperation was nevertheless considered important by 62% of respondents to the public consultation. Stakeholders interviewed by the contractor agreed in that *"(…) many counterfeited goods come from third countries. Much could be done to better understand and thus address counterfeiting in third countries, especially in China, South East Asia or South America."* Indeed, counterfeiting and piracy cannot be effectively tackled by acting in the Internal Market only and ignoring the places of manufacture or the routes used to distribute counterfeits. In addition, counterfeiting European brands and illegally distributing EU copyright protected content in non-EU countries also harm European businesses.

Not all stakeholders are equally supportive of the EUIPO's task of promoting tracking and tracing systems that help to distinguish genuine products from counterfeits. Some citizens expressed concerns relating to privacy, whereas right holders generally see such systems as unfit for standardisation, as there is no one-size-fits-all solution. While track and trace solutions should be left free to compete, SMEs and consumers should have easy access to information on the different technical solutions in use. The EUIPO can raise awareness and improve transparency without favouring particular products. Half of the respondents to the public consultation (54%), and 82% of those within the category of professionals and organisations, consider that the tasks of the EUIPO in this area are important.

The evaluation did not reveal any gaps in the tasks assigned to the EUIPO by the Regulation.

[8] *"Trends in Trade in Counterfeit and Pirated Goods"*, Illicit Trade, OECD Publishing, Paris/European Union Intellectual Property Office, 2019. The study in reference does not include domestically produced and consumed counterfeit and pirated products, or pirated digital products distributed online.

B. Effectiveness

The immediate operational objective sought by the Commission was ensuring that the Observatory had the necessary infrastructure to perform its activities effectively. Before the adoption of the Regulation, the departments of the Commission had three members of staff managing the Observatory. By the end of 2019, the EUIPO's Observatory Department had 55 members of staff. The EUIPO's expenditure with the activities under the Regulation was EUR 2.4 million in 2012 and EUR 11.7 million in 2019.

The EUIPO expanded the Observatory network, filling gaps in its earlier composition, adding civil society organisations and a number of organisations with relevant expertise. By the end of 2019 it was formed by 123 representatives, eight of which representing consumers and other civil society organisations. As a rule, the EUIPO maintains its network of stakeholders well engaged in the planning and implementation of its work programmes. Nevertheless, some stakeholders have pointed out that in a few exceptional cases the EUIPO did not consulted them enough.

The evaluation is also positive on activities carried out by the EUIPO. However, while the EUIPO's keeps good record of its activities, it should establish monitoring mechanisms to estimate their impact and cost-benefit, improve prioritisation and planning, and support future evaluations.

The contractor's study concluded that the EUIPO clearly contributed to the effective protection of IPR by delivering on all different objectives, in a manner that is independent from industry. Likewise, 43% of respondents to the public consultation believe that the EUIPO has achieved good or very good results in helping to improve the protection of IPR The rate of approval is higher among professionals and organisations (68%).

The EUIPO developed a transparent methodology for determining the volume and impact of infringements of IPR, a task of fundamental importance. The EUIPO has also delivered on its research into the contribution of IP intensive industries to the economy and the role of IP in the performance of businesses. Among many other topics, the EUIPO has also provided valuable insights into the extent to which SMEs hold IPR, and the difficulties that they face in fully benefiting from the IP system, as well as on the perception that consumers and young people have of IP and their behaviour towards counterfeits and piracy. The EUIPO's extensive research and publication activities feed into policy making at EU and national levels. The publications of the EUIPO under the Regulation are available online[9]. However, the EUIPO needs to improve the access to its extensive library. The current display of publications and associated search functionality are not satisfactory.

The publishing activity of the EUIPO contributes to raise awareness. The EUIPO's studies were mentioned in nearly 2,000 published articles and generated a value of EUR 8.3 million in advertising value equivalency. In addition, the EUIPO has invested EUR 1.5 million in different awareness campaigns with high outreach levels. The campaigns implemented in 2018 and 2019 reached 60 million Europeans.

The EUIPO provides training for law enforcement officials involved in combating counterfeiting and piracy. The training is delivered in collaboration with the relevant law enforcement departments of the Commission, such as, for example, the European Anti-Fraud

[9] https://euipo.europa.eu/ohimportal/en/web/observatory/observatory-publications.

Office (OLAF), and other EU bodies (such as CEPOL, Europol or Eurojust) and various national and international authorities and organisations. The EUIPO's training programme has filled a gap in the development of the necessary expertise. Today, training on IP enforcement is no longer limited to customs officials. It also reaches police officials, judges and prosecutors, with an average satisfaction rate of 97.4% among attendants.

The EUIPO achieved meaningful results in developing tools for IP right holders and enforcement authorities. By the end of 2019, there were 63 enforcement authorities with access to the EUIPO's Intellectual Property Enforcement Portal, including all EU Customs, Europol, OLAF, and police forces from 17 Member States. Among other features, the Portal assembles data collected by the departments of the Commission on border detentions, data transmitted by national enforcement authorities on internal market detentions, as well as data transmitted by more than 800 businesses.

The EUIPO plays an important role in implementing EU funded projects in non-EU countries. The public consultation and the study revealed globally positive approval rates on the EUIPO's international cooperation, but less than in other areas of its activity. According to the contractor "*Some stakeholders lacked awareness of the Observatory's responsibilities towards international cooperation with third countries.*" The EUIPO should therefore reinforce the input to and follow-up by representatives to the Observatory of its activities related to non-EU countries.

The Regulation requires Member States to inform the EUIPO of their policies on enforcing IPR, provide statistical data on IP infringements as well as information on in case-law. The EUIPO has agreed with Member States representatives on a procedure that has improved the situation, but in general, data collection from Member States remains a challenge, in particular as regards seizures of IPR infringing goods in the internal market, and case law.

Overall, the EUIPO has been able to implement its work programmes as planned. However, a small proportion of projects faced delays due to changes in priorities. The EUIPO should therefore ensure that all agreed projects are supported by sufficient resources in order to meet its commitments.

The overall result of the evaluation is positive. Both the study by the contractor and the feedback received through the public consultation indicate that the EUIPO contributed to improve enforcement of IPR and delivered on the objectives of the Regulation.

C. Efficiency

The Regulation aims at reinforcing and extending the activities of the Observatory, while ensuring its sustainable financing with no costs to the EU budget. Entrusting the Observatory to the EUIPO achieved both these aims. All of the EUIPO's activities are financed by the fees paid by the users of the EU trade mark and designs systems. In order to pursue the tasks entrusted by the Regulation, the EUIPO allocates to its Observatory department around 5% of its annual spending.

The average budget of the Observatory department between 2012 and 2019 was EUR 9.25 million, including average staff costs EUR 3.75 million. The level of spending is comparable

with similar EU bodies, such as the European Monitoring Centre for Drugs and Drug Addiction, which was given a positive evaluation in 2019[10].

The benefits achieved through the Regulation include the availability of objective, reliable and comparable data on the value of IP, on the volume and impact of IP infringements, the tools made available under the IP enforcement portal, the extensive training programmes for enforcement officials, and a permanent framework for public awareness actions coordinated at EU level. In addition, the Observatory enables the sharing of information, knowledge and best practices and it has a valuable network effect, which facilitates cross-border and cross-sector cooperation, generated by the bringing together, on a regular basis, of a substantial number of authorities and stakeholders under a stable and durable collaborative framework.

The EUIPO provides good value for money. Increases in budget and staff generated increases in outputs and the cost of managing its activities, under the Regulation, is in line with those of other EU bodies carrying out similar activities. A single national body could not deliver the same benefits at European level, and representatives from the public and private sector find that participating in the Observatory's work is cost effective.

The evaluation carried out by the contractor concluded, *"the Regulation under evaluation was implemented in an efficient manner. There are differences of views by different stakeholders on some particularities of the EUIPO's work under the Regulation. However, the activities and projects carried out by the EUIPO are in general viewed as positive contributions to the enforcement of IPR, to raising awareness, to generate knowledge and expertise, and to strengthen cooperation between all relevant stakeholders, while keeping to a minimum the costs incurred by all involved in the work of the Observatory (such as time expenditure). There are no indications that the Observatory team is over resourced or incurring in disproportionate expenditure in the pursuit of the tasks that were attributed to it by the Regulation"*[11].

As mentioned above, the EUIPO should increase its efforts on monitoring the impact of its different initiatives, including a cost-benefit analysis.

D. Coherence

The tasks attributed to the EUIPO under the Regulation are mutually supportive and consistent with the overall policy objective of lowering levels of IP infringements. More fact-based knowledge serves training and awareness, better enforcement tools reinforces cooperation and efficiency, more enforcement efforts helps tackling the supply of IP infringing products and awareness raising addresses demand. Reducing IP infringements within the EU also requires reaching out to countries and regions where most counterfeits originate. The views collected by the contractor and the public consultation indicate that there is a broad consensus on the coherence of the tasks assigned by the Regulation to the EUIPO.

The EUIPO prepares and implements its annual work programmes in consultation with the departments of the Commission. As a result, the EUIPO's activities complement and support

[10] Evaluation of the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), 14 May 2019, COM(2019) 228. The EMCDDA has been operating with an average of 105 full-time equivalents staff per year and an average annual budget of EUR 16 million. Unlike the Observatory department of the EUIPO, the EMCDDA, being an agency on its own, needs additional staff for support services (management human resources, infrastructure, IT systems, etc.).

[11] Technopolis, page 70.

the activities of the Commission in this area, be it on copyright or industrial property rights (such as patents, trade marks; designs, or geographic indications) and whether focused on the internal market, the EU border or on non-EU countries and regions. The EUIPO is providing valuable support to several Commission initiatives. For example, the EUIPO holds training programmes to the experts that are performing the IP pre-diagnostics that the Commission has been making available to innovative SMEs. The EUIPO also supports the departments of the Commission in facilitating collaboration between right holders and internet platforms in the fight against online sale of counterfeits. The EUIPO helps the Commission in organising events for customs authorities, focused on stopping imports of counterfeits. The EUIPO also complements the Commission's work in the fight against piracy, through different databases and tools (Agorateka, orphan works database, etc.). In addition, it implements EU funded projects on IP in non-EU countries. The EUIPO's published studies are often referenced in EU policy documents, such as the 2015 Single market strategy, the 2016 Copyright package, the 2016 Start-up initiative, the 2017 IP package. The EUIPO has also ensured cooperation with the relevant EU bodies such as Europol[12], Cepol[13] and Eurojust[14] in particular in the area of training. The close cooperation between the departments of the Commission and the EUIPO has ensured that its activities are aligned with the Commission's priorities. However, it is important that, in its communications, the EUIPO makes such links clear to stakeholders.

E. EU added value

The results achieved with the creation of the Observatory and the adoption of the Regulation would not have been possible without EU intervention. The EUIPO holds substantial expertise and resources, but it is also informed by the input that it regularly receives from stakeholders and different national and EU authorities. Such a wealth of resources are not available to Member States working independently. Member States would not have been able to draw on the same level of data, and in particular would not have been able to collect and assess it under one commonly agreed methodology. Fragmentation of resources and the lack of a platform to join forces and share best practices would mean that national authorities and stakeholders would not have, as much information, tools, databases and support as they currently have. The economy of scale generated by the gathering of all relevant parties around the EUIPO enabled a series of initiatives that would not otherwise materialise.

Both the study and the public consultation showed very strong indications that stakeholders see the clear added value of the Regulation and of the EUIPO.

Repealing the Regulation would put an end to the EUIPO's multi-disciplinary and multi-stakeholder approach. It would terminate the EU-wide knowledge base and networking of the Observatory and increase the burden on national authorities.

III. CONCLUSIONS AND LESSONS LEARNED

The evaluation, supported by the study and a public consultation, concludes that the Regulation is working well and that the EUIPO has been carrying out its tasks satisfactorily. The evaluation is positive on all five evaluation criteria, even if some improvements can still be made in areas that are set out below and covered in more detail in the accompanying Staff Working Document.

[12] European Union Agency for Law Enforcement Cooperation.
[13] European Union Agency for Law Enforcement Training.
[14] European Union Agency for Criminal Justice Cooperation.

The EUIPO took up its new tasks with determination and provided the Observatory with a solid infrastructure in terms of budget, expertise, meeting facilities, communication tools and other necessary resources. The EUIPO has also widened the network of stakeholders participating at the activities of the Observatory, ensuring the engagement of the national authorities most concerned by IP infringements, at both EU and national level, and the participation of private sector stakeholders and civil society organisations.

With the help of the representatives to the Observatory, the EUIPO has delivered on all the tasks covered by the Regulation. It developed transparent and objective methodologies and regularly conducted valuable research. The information produced by the EUIPO and its partners, such as the OECD and Europol, is considered factual, objective, reliable and robust. As a result, it informs not only training of enforcement officials, awareness-raising initiatives and campaigns, but also enforcement strategies and IP policy actions such as SME support. The EUIPO has also developed tools to facilitate the fight against counterfeiting and piracy.

The increasing volume of counterfeits being imported into the EU show that the EUIPO's tasks are even more relevant today than they were on the adoption of the Regulation. The EUIPO's work is coherent with the EU's overall policy objectives of promoting innovation, well-being and job creation. The fight against illegal manufacturing and dissemination of counterfeits by criminal organisations is also a fight for the health and safety of consumers, and for compliance with environmental and social regulations. The EU added value of the EUIPO's work is high. Concentrating resources and expertise in one single body at EU level created an opportunity to reach a much higher output than it would have reached at national level only. The activities carried out by the EUIPO under the Regulation are entirely funded by the EUIPO's own revenues and therefore without costs to the general EU budget. Within the limitations of the available data, the evaluation concluded that the EUIPO has used the available human and financial resources efficiently.

The evaluation has also revealed that there is room for improvement. The EUIPO should step up its efforts to implement a transparent and comprehensive monitoring of the possible impact, but also cost-benefit, of its activities under the Regulation, in particular on its awareness-raising actions. Accordingly, the EUIPO's annual reports should provide a good overview of the activities carried out and results obtained in the areas covered by the Regulation. The EUIPO should seek to involve the representatives from national authorities and other stakeholders earlier in the planning of its activities under the Regulation. This is particularly true for the EUIPO's activities in non-EU countries. The evaluation has shown that there is a certain deficit in stakeholders' awareness on the activities of the EUIPO in third countries. It is also important that the planning and communication of the EUIPO's actions under the Regulation take account of the broader EU IP policy context. In particular, the actions of the EUIPO in non-EU countries need to be well communicated and in alignment with the relevant Commission policies. The access to the EUIPO's valuable publishing activity could be improved, as the current system is not satisfactory. By embracing an ever-growing number of projects, the EUIPO has occasionally failed to deliver results on time, and therefore it should make sure to allocate sufficient resources to each of the projects covered by its annual work programmes in order to meet its commitments. This will help the EUIPO in avoiding that certain agreed actions suffer delays for lack of resources. Finally, the collection of data from national authorities is still a challenge, and the EUIPO should therefore continue its efforts to encourage national authorities to share relevant information as required by the Regulation, and to the extent possible support the work of the representatives of Member States to the Observatory in collecting such data at national level.

The overall conclusion of the evaluation is that the Regulation has met its objectives. The EUIPO's close cooperation with the members of the Observatory and the departments of the Commission means that the work of EU bodies, national authorities and right holders in IP enforcement is now made easier.

The EUIPO has become a hub of excellence on IP infringements, a central source of knowledge, development and sharing of best practice in the EU and internationally. The EUIPO acts as a facilitator and driver for cooperation between national authorities and right holders across the EU, and is an important contributor to the Commission's initiatives in IP within the EU and further afield.