

I. INTRODUCTION

The IP Enforcement Portal (“IPEP”), developed by the European Observatory on Infringements of IP Rights, is an online tool, the legal basis for which lies in the provisions of Regulation (EU) No 386/2012. Originally it was designed to exchange information between right holders of IP rights and enforcement authorities – customs, police, market surveillance authorities. By exchanging information enforcement authorities would have the support of IPR holders to detect and combat infringements easier. Enforcement authorities would report statistical data on IPR enforcement.

As from 13 December 2021, all customs applications for action (AFAs) pursuant to Regulation (EU) 608/2013 should be filed and managed electronically. From this date, IPR holders and their representatives could use IPEP to file electronic AFAs (eAFAs). Starting from 3 October 2024, all AFAs must be filed exclusively via the IPEP (or national portals available in Germany, Italy and Spain).

This raises significant problems for legal representatives in practice.

II. EXECUTIVE SUMMARY

Legal representatives' access to IPEP is burdensome and depending on IPR holders instead of being easy and independent. The current functioning of the tool does not fully take into account the role of legal representatives in managing client portfolios and AFAs, nor in the process of applying the provisions of Reg. 608/2013. This is especially true when large international/overseas IPR holders and several legal representatives in different Member States are involved.

III. COMMENTS

The purpose of IPEP is to establish a more efficient, coordinated, and effective system for combating counterfeit goods and other IPR infringements by bridging the gap between IPR holders and enforcement authorities. However, the implementation of the tool seems to neglect, to a large degree, legal representatives and their role in practice. In the vast majority of cases enforcement authorities correspond with IPR holders through their (local) legal representatives and they should play an important role in bridging this gap.

Legal representatives are fundamental in enforcing the IPR holder's strategy under Regulation (EU) 608/2013, ensuring the effective protection of IPR across EU borders. It is essential to recognize that, although 608/2013 is an EU Regulation, its implementation in practice differs across Member States. As a result, the role of the local legal representative carries significant responsibility.

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What are the roles / responsibilities:

- 1) Filing AFAs – the vast majority of AFAs are filed not by the IPR holders directly but through a legal representative. The same applies to national AFAs, filed within the very short-term following an *ex-officio* seizure.
- 2) Legal representatives act as intermediaries, ensuring smooth communication between rights holders and customs. They respond to requests for additional information or clarification about suspected infringing goods.
- 3) If customs detain goods, legal representatives may initiate legal action to determine if the goods actually infringe IPRs. They play a key role in advising the rights holder on whether to pursue litigation or settlement.
- 4) Legal representatives provide expert opinions and evidence regarding the authenticity of goods. They assist IPR holders in monitoring detained goods and reporting on the outcomes of interventions, including organizing destructions. This feedback loop is essential for refining strategies against counterfeiters.
- 5) Legal representatives advise on strategic use of border measures, helping rights holders understand the scope and limitations of the regulation. They ensure compliance with procedural requirements, minimizing risks of procedural errors.

While some of the above can be managed by IPR holders in-house, in practice this is rarely the case. Additionally, in many countries customs authorities insist on corresponding with local counsel in order to overcome language barriers, to ensure speedier development of the entire procedure, etc.

The current setup of IPEP foresees very burdensome access for legal representatives to the system and to the management of the portfolio/AFAs. The requirement to always include the IPR holder in the process, who grants access to the legal representative poses significant hurdles. Apart from it being in stark contrast to the access granted to legal representatives before the EUIPO, it does not take into account the reality of how most IPR holders manage their portfolios and AFAs, respectively actions taken by customs on the basis of such AFAs. While before the EUIPO a registered legal representative does not even have to provide a Power of Attorney, in order to file an AFA through IPEP, the legal representative needs to be granted access which includes a procedure of sending a paper letter to the client, who then forwards the security information on it to the legal representative.

In practice, especially, IPR holders with large portfolios, holders residing outside the EU, etc. engage a law firm to handle such matters. These law firms, in turn, work with local counsel in the respective Member States. This means that IPEP needs to provide for an easy and quick access to a legal representative in charge of the entire AFA as well as to the individual legal representatives in the MS. This applies to all stages of the correspondence between legal representatives and enforcement authorities – from filing an eAFA to notifications of suspicious cases. In this scenario, for example, if a local counsel were to be informed by customs of an *ex officio* seizure and the IPR holder is a large US corporation, local counsel would need to contact the primarily responsible law firm to seek instructions, who would in turn contact the IPR holder. If a national AFA is to be filed on the IPR holder's instructions and the local legal representative does not already have rights in the IPR holder's account, completing the process in time is extremely difficult. While the IPEP Team on site in Alicante provides much appreciated support in such cases, it is profoundly wrong to have to rely on such support, instead of having the tools to do it swiftly and efficiently on one's own.

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Especially given that the previous way of corresponding with local customs on paper or by “traditional” electronic means of communication provided for a much easier correspondence and completion of such procedures.

Generally speaking, if legal representatives face restricted or no access to IPEP or if obstacles hinder their ability to obtain access, they are unable to effectively fulfill their obligations. IPEP serves as a crucial tool for monitoring, reporting, and coordinating enforcement actions related to intellectual property rights. Limited access prevents legal representatives from efficiently communicating with customs authorities, tracking detained goods, and ensuring timely intervention against potential infringements. As a result, any barriers to accessing IPEP can significantly undermine the enforcement process and the protection of intellectual property rights.

The overall functionality of IPEP, its setup and development leave legal representatives under the impression that their role is significantly overlooked and underestimated. The stark contrast with access to the EUIPO User Area and all actions which can be taken from there has already been mentioned. The dependency of legal representatives' accounts on client accounts and the restrictions this entails need to be reconsidered and changed.

The feeling of not being taken into account was also underlined by the recent IPEP Forum in Alicante at the end of 2024. It was promoted as directed at IPEP users, however, for legal representatives to be able to attend, they needed to register under one of their clients' names, i.e. to represent a client there and not themselves/their law office. This again shows that legal representatives are not considered an important factor for IPEP, while in everyday practice their role is crucial.

Further specific problems which legal representatives experience in IPEP include:

- Transmission of COPIS data to IPEP is not automatic. The creation of an account through authentication safe code is always needed.
- The "Suspicious Case" box allows customs authorities to submit notifications regarding detentions. However, a legal representative can only access this box if they are specifically added as a legal representative. If they are designated as an "enforcement contact", they will not have access to these notifications. Furthermore, the IPEP registered legal representative does not receive a notification about a new case if the submitting country is not added to their 'covered countries'. This can lead to an outcome where the party who can access the case is not aware of it, while the other party is notified, but cannot get access to the uploaded files.

The feedback which the IPEP team has received from IPR holders, keen on managing their own portfolios, is very unlikely to reflect the actual market reality. In legal representatives' experience the vast majority of IPR holders prefer not to handle such matters directly and it is unlikely that they will also provide feedback to the IPEP team. Furthermore, enforcement authorities from various countries have expressed on several instances that they prefer to deal with local legal representatives directly and support easy access to IPEP for legal representatives, as it facilitates their own work.

IV. FINAL REMARKS

The development of the IPEP tool should take into account the important role legal representatives play in practice in relation to Reg. 608/2013. Their registration and access to the tool should be easy and independent from any client accounts. Access to current information, AFAs, portfolios and correspondence with customs should facilitate legal representatives' work and not hinder it, as this is ultimately in the interest of IPR holders and enforcement authorities.

ECTA, which was formed in 1980, is an organisation concerned primarily with intellectual property matters. ECTA has approximately 1,300 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world.

ECTA brings together those practicing in the field of IP, in particular, trade marks, designs, geographical indications, patents, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields.

The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
 - European Union Trade Mark Regulation and Directive;
 - European Union Design Regulation and Directive;
 - Organisation and practice of the EUIPO.

In addition to having close cooperation with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a Non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.