

## **Report 2: 2023 AIPPI World Congress – Istanbul – Copyright resolution**

In 2023, the annual AIPPI World Congress took place in Istanbul. I was given the opportunity to attend this annual AIPPI World Congress, among others thanks to the support of the AIPPI Belgian group.

This report contains (i) a general overview of the AIPPI World Congress in Istanbul and (ii) a summary of the resolutions that were voted during said AIPPI World Congress, with a particular focus on the resolution on collecting societies to which I contributed.

### **I. General remarks**

The AIPPI World Congress in Istanbul did not have a general theme or subject. Several sessions organised during the AIPPI World Congress however took into account two legal hot topics: the new IT developments and ecology.

For example, sessions were organised with respect to climate change in the Standard Essential Patents (SEPs) landscape, the do and don'ts for generative AI for IP practice, trade marks and patents in the Metaverse, greenwashing, use, re-use and recycle, NFTs in practice, copyright in AI, Web 3.0 & beyond and IP for games. Furthermore, a UPC mock trial was organised.

The AIPPI World Congress provides for many occasions to connect with IP colleagues from around the world, not only during networking events, but most importantly during substantive discussions on several aspects of IP law. One of the benefits of such substantive discussions concerns the useful insights on other countries' legal systems.

Furthermore, AIPPI encourages young professionals to attend the AIPPI World Congress to benefit from its opportunities, among others, by organising a first time attendees' drink and a young AIPPI event.

Moreover, as a Belgian AIPPI member, you are part of the group of delegates of AIPPI Belgium. This group is renowned for its active participation in the AIPPI World Congress and its esteemed contributions to the substantive discussions, both of which I can only confirm after my attendance at the AIPPI World Congress 2023 in Istanbul.

### **II. Resolutions**

During the AIPPI World Congress in Istanbul, five resolutions were voted, i.e. with respect to (i) collecting societies (copyright), (ii) proving trade mark use (trade marks), (iii) responsibility of online marketplaces for online infringement of industrial property rights, (iv) doctrine of equivalents (patents) and (v) experimental use and bolar-type exemptions (pharma).



The latter resolutions were based on the study questions to which, among others, the AIPPI Belgium group contributed by providing a summary of the existing law with respect to a specific topic and answering questions with respect to proposals for harmonisation.

Subsequently, a proposal for resolution based on the input received from the national groups is presented to the study committee meeting during the AIPPI World Congress, typically composed of the study committee members that have answered the respective study questions. The study committee members then discuss and amend the proposal for resolution. Afterwards, the (amended) proposal for resolution is additionally amended during a plenary session and finally voted during the executive committee.

Based on the input provided during the “Intro Study Questions 2024” session, I understand that the study questions to be addressed during the AIPPI World Congress of 2024 are: 1) the disclosure of prior art, 2) parody as a defence for copyright infringement, 3) composite trade marks or the distinctiveness of each constituent element and 4) unjustified allegations of infringements of intellectual property rights – the lack of sufficient legal grounds to enforce intellectual property rights against third parties.

### **Resolution on collecting societies**

Together with other Belgian colleagues, I contributed to the study question regarding collecting societies. The study question addressed, among others, the legal regime (of the collecting society and the rights entrusted to them), the stakeholders, the supervision, the type of managed materials and rights, mandatory collective management, the rightholder’s right to opt-out, competition and enforcement aspects, the relationship with users and the tariffication and distribution of rights revenue.

The topic “collecting societies” was addressed for the first time ever in the history of the AIPPI World Congress. As a result thereof, and due to the fact that (i) the collective management of copyright and related rights has not been addressed yet by international treaties and (ii) not all countries know a state-organised collecting licensing system, discussions on the proposal for resolution were quite extensive.

The revised first draft resolution contained, besides definitions, provisions on the availability of collecting societies, the scope of regulation of collecting societies, the selection by rightholders of collecting societies, the royalty rates, auditing, enforcement and mandatory collective licensing.

Whereas almost each provision of the draft resolution was subject to discussions, the definition of a collecting society and the enforcement provisions were the most heavily debated.

During the discussions, specific attention was given to the definition of a collecting society. The main question was whether agents and small groups of artists that cooperate to enforce their rights vis-à-vis users should be included in the definition, besides state organised societies. Indeed, the definition in the first draft resolution, i.e. “*an organisation that facilitates*



*the administration of copyright licences on behalf of Rightholders. Such organisations grant licences to use copyright material, collect royalties from users of copyright material and distribute revenues to Rightholders*”, did not exclude said first category of collective licensing from the resolution’s scope. Whereas consensus was quickly reached that agents and small groups should be excluded from the definition, the solution to exclude said category was obtained less quickly.

One of the solutions proposed during the study committee meetings was to specify that the collecting organisation should be “*supervised, regulated or created by a public authority*”. Several country delegates, including the US delegate, however objected against this proposal due to the lack of state-organised supervision in their country. Other than the addition of the word “*collective*” prior to the word “*administration*” in the definition (“*collective administration*”), said issue remained unaddressed after the discussions in the study committee meetings.

During the plenary session, the delegate of the Italian group and the delegates of the Belgian group established a coalition to solve this issue. They suggested to include the following amendments “*on behalf of one or more categories of Rightholders*” and “*for their collective benefit*”, which were approved with 71,5%, respectively 59,3% of the votes. The amendment “*for their collective benefit*” specifically aims at excluding agents and small groups of rightholders, as they generally operate to benefit their own rights.

As a result of this coalition, together with other minor consistency amendments, the following definition was approved with 97,7% of the votes during the plenary session: “*Collecting Society means an organisation that facilitates the collective administration of copyright and/or related rights on behalf of one or more categories of Rightholders for their collective benefit. Such organisations grant licences to use Protected Material, collect royalties from users, distribute revenues to Rightholders and, if necessary, enforce the copyright and/or related rights in the Protected Material.*” This definition was approved during the executive committee as well.

Furthermore, the first draft resolution initially contained five provisions regarding the enforcement by collecting societies of collectively licensed protected material, i.e. provisions articulating the principle that: 1) collectively licensed works and non-licensed works shall be enforced according to the same procedures, 2) collecting societies shall be authorised by contract or by statute to enforce a collectively licensed work, 3) rightholders shall not need to be joined as a party to enforcement proceedings, but may provide origination and ownership evidence, 4) fair use and non-commercial use shall be exceptions to the payment of royalties pursuant to collective licensing and 5) a *de minimis* threshold shall be an exception to payment of royalties pursuant to collective licensing.

Contrary to the principles regarding identical enforcement (first enforcement provision) and the authorisation ground (second enforcement provision), the principles regarding the role of the rightholder in enforcement proceedings (third enforcement provision) and the exceptions to royalty payment (fourth and fifth enforcement provision) caused quite some discussions.



With regard to the role of the rightholder in enforcement proceedings, it was debated whether the resolution should contain a positive obligation, rather than a possibility, for collecting societies to involve a rightholder in enforcement proceedings and/or a positive obligation for the rightholder to provide evidence when such is requested by the collecting society. According to some countries, the latter hypothesis also implied that certain (procedural) consequences should be included vis-à-vis a rightholder not providing evidence. As a result of the active interference of, among others, the delegates of the Belgian group, the final provision does not contain a positive obligation for collecting societies to involve a rightholder, nor a positive obligation for a rightholder to provide evidence. Instead, the final provision merely contains the possibility for collecting societies to obtain evidence from the rightholder.

Furthermore, the delegates of the Belgian group actively participated in the debate on removing the provisions regarding the exceptions to the payment of royalties. Several delegates rightly argued that the resolution was not intended to create additional exceptions to copyright and related rights (the exception of fair use is e.g. not a known concept in many countries), in addition to the fact that an obligation to implement a *de minimis* threshold detracts from the particularities of each specific type of use. Ultimately, a more neutral provision on the role of collecting societies with respect to copyright exceptions was voted in the final resolution. Based on this provision, collecting societies “*shall not be entitled to collect royalties where the application of copyright exceptions does not require the payment of royalties.*” Collecting societies may however be designated to collect payment of a royalty “*where the application of certain copyright exceptions is contingent on the payment of a royalty.*” The provision containing the *de minimis* threshold was deleted in its entirety.

Taking into account the length of the abovementioned discussions during the study committee meetings and the sensitivities and controversies associated to the topic, the leadership of the study committee decided to remove the provisions regarding mandatory collective licensing from the resolution that was proposed during the plenary session. According to the leadership of the study committee, this topic should be addressed as a study question on its own. Although the Belgian contributors looked forward to contributing to the discussions on this topic, we concurred that mandatory collecting licensing requires such specific attention.

The lengthy discussions ultimately caused the five-page draft resolution to be reduced to a two-pager in which all controversialities were removed. It was therefore no surprise that the resolution was passed almost unanimously during the executive committee.

Although the resolution can be deemed non-controversial for countries like Belgium, the passed resolution on collecting societies remains an important milestone and instrument to incite other (non-EU) countries to establish a legal framework on collecting societies.

### **Other resolutions**

Due to my involvement in the study question and study committee meetings on collecting societies, I did not participate to the preparation of the Belgian Group’s report on the other



study questions, nor could I attend the study committee meetings with respect to these other study questions (considering the conflicting timetable).

Based on the discussions during some plenary sessions and the executive committee meeting, as well as input provided by other members of the Belgian group, I hereinafter point out some of the debated issues.

### **Resolution on proving trade mark use**

Contrary to the topic on collecting societies, trade mark use has been the subject of different AIPPI resolutions in the past. The resolution voted on during the AIPPI World Congress of 2023 particularly focused on the context of the genuine use requirement to maintain a trade mark registration and was accepted during the executive committee with 99,2% of the votes.

The resolution contains several basic principles, such as the lack of a quantitative minimum level or duration threshold for the genuine use evidence, the lack of restrictions on the type of acceptable genuine use evidence and the principle of equal treatment between “normal” trade marks and “reputable/ well-known/ famous/ historical” trade marks.

The resolution also touches upon the question of genuine use in an online/virtual environment. For example, the resolution contains the principle that online use of a trade mark may constitute genuine use as well. One of the main discussion points with respect to this provision concerned the delineation of the scope of the provision by means of the terminology used. In other words: which use should the provision exactly cover? By way of example, suggestions were raised to use the terminology “*not-offline*” instead of “*online*” in an attempt to broaden the scope or to use the wording “*use of a trade mark on the internet / on a website*” to narrow down the scope. The final resolution contains the wording “*online use of a trade mark, e.g. on the internet, on a website or in social media except as provided in paragraphs 10 and 11* [regarding the virtual world/ metaverse]. The virtual world/ metaverse is thus considered a different environment, for which the resolution contains separate rules on proving genuine use.

The resolution furthermore answers questions regarding the justification for non-use in case of a widely known event, such as the COVID-19 pandemic. Following the provision contained in the final resolution, the burden of proof to justify non-use remains the same as otherwise, except that the widely known event should not be proven. The trade mark owner does need to prove proper reasons for non-use beyond the control of the trade mark owner and beyond the mere fact of the widely-known event.

### **Resolution on the responsibility of online marketplaces for online infringement of industrial property rights**



The resolution on the responsibility of online marketplaces for online infringement of industrial property rights only addresses the civil responsibility of online marketplaces offering for sale third parties' goods and services for online infringement of industrial property rights.

The resolution thus does not address (i) the liability for the online marketplaces' own offers for sale of products and services, (ii) liability for online infringement of e.g. copyright, and (iii) criminal liability, consumer liability and international private law issues.

The resolution was passed with 97,8% of the votes during the executive committee.

One of the main discussion points concerned the question whether the elements to be taken into account for the special digital law regime to be applicable to online marketplaces and for the online marketplaces to benefit the safe harbour from responsibility provided by the special digital law regime are to be deemed strict requirements or guiding factors.

The principle was voted that the elements to be taken into account for the special digital law regime to be applicable to online marketplaces must be deemed as "general factors", rather than strict requirements. On the other hand, the elements taken into account for the online marketplaces to benefit the safe harbour from responsibility provided by the special digital law regime are deemed as requirements.

Furthermore, after in-depth debate, the study committee voted against an obligation for the alleged infringer to file a qualified counternotice after receiving a notice provided by the IPR holder.

### **Resolution on the doctrine of equivalents**

The resolution on the doctrine of equivalents is quite short, as it only addresses issues that were not considered by previously adopted resolutions on "the role of equivalents and prosecution history in defining the scope of patent protection" (Q175, 2003) and on "the use of prosecution history in post-grant patent proceedings" (Q229, 2012). During the executive committee, one more amendment originating from the UK, Hungarian and Italian country delegates was accepted with respect to the wording of the lack of infringement of an embodiment under the doctrine of equivalents, if the embodiment corresponds to the prior art or is obvious over the prior art. The resolution was passed during the executive committee with 92% of the votes.

### **Resolution on experimental use and bolar-type exemptions**

Although AIPPI made several studies of experimental use or Bolar-type exemptions in the past, the rapid advancements in technology and a significant increase in international collaboration in research and development required an update of the existing resolutions. The resolution on experimental use and bolar-type exemptions voted during the AIPPI World Congress 2023 contains affirmations, continuations and interpretation clarifications of the



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previous resolutions. It, among others, defines the differences between the two concepts that serve different purposes, as well as the scope of the Bolar-type exemptions.

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