

CHECKLIST ON ISSUES ON ENFORCEMENT¹

Replies from France

I. INDUSTRIAL PROPERTY RIGHTS

The order followed in this description of measures for each type of intellectual property right generally corresponds to the model fixed by the TRIPS Council for the notification of laws and regulations under Article 63.2 (document IP/C/4). There are only a very limited number of provisions on layout designs for semi-conductors in the French Intellectual Property Code (CPI); where the reply to the questionnaire does not contain any specific information on layout designs, the general rules of law apply.

Civil and administrative procedures and remedies

(a) Civil judicial procedures and remedies

1. Specify the courts which have jurisdiction over IPR infringement cases.

Jurisdiction *ratione materiae* in the first instance:

With regard to marks, Article L. 716.3 of the CPI provides that "Civil proceedings relating to marks shall be heard by the First Instance Courts as also any proceedings involving both a matter of marks and a related matter of industrial designs or unfair competition."

As far as geographical indications and designations of origin are concerned, Article L. 115-10 of the Consumer Code states the following: "Legal action shall be brought before the First Instance Court in the place of origin of the designation contested ...". Article L. 115-9 of the aforementioned Code specifies that "The court hearing a case brought pursuant to Article L. 115-8 may take action to prohibit the use of any indication that might create confusion regarding the origin of the product on any products not entitled to the designation of origin or on their packaging and labels".

The provisions of the Consumer Code on civil proceedings do not apply to agricultural products or foodstuffs that have been given exclusive use of a registered designation of origin. (Article L. 115-5 of the Consumer Code). Criminal courts have jurisdiction.

There are no special provisions on jurisdiction for industrial designs and the general rules on assignment of cases apply. Usually, First Instance Courts have jurisdiction; Article R. 321-1 of the Code of Organization of Justice, however, provides that "In civil proceedings, a Court of First Instance has jurisdiction over all action to enforce a right *in personam* or action related to moveable assets up

¹Document IP/C/5.

to the amount of F 13,000 and on appeal up to the amount of F 30,000". Commercial courts may also have jurisdiction if the two parties are traders.

Regarding patents, Article L. 615-17 of the CPI states that "All litigation under this Title shall fall within the jurisdiction of the First Instance Courts and of the relevant Court of Appeal ...". Article R. 631-1 of the CPI refers back to Article R. 312-2 of the Code of Organization of Justice and establishes the list of First Instance Courts that have jurisdiction (numbering 10). In addition, Article L. 615-19 of the CPI provides that: "Proceedings for infringement of patents shall be heard exclusively by the First Instance Court." It then states that "All proceedings involving infringement of a patent and a related act of unfair competition shall be heard exclusively by the First Instance Court".

With regard to new plant variety certificates, the first paragraph of Article L. 623-31 of the CPI states that litigation concerning the protection of rights granted by the certificate shall be heard by the First Instance Courts and the corresponding Courts of Appeal.

For layout designs, Article L. 622-7 of the CPI refers to Article L. 615-17 on patents.

Regarding trade secrets, the injured party may bring an action for unfair competition before the First Instance Courts in most cases, and before the commercial courts when the two parties are traders. If the disclosure has been made by a person previously or currently employed by the company suffering the injury, the case may be brought before an industrial tribunal (Article L. 152-7 of the Labour Code, repeated in Article L. 621-1 of the CPI).

2. Which persons have standing to assert IPRs?

The owners² of intellectual property rights have standing to assert their rights before the courts. The word "owner" includes successors in title (i.e., heirs or assignees) of the authors or applicants for IP rights.

In relation to marks, Article L. 716-5 of the CPI provides that "Civil infringement proceedings shall be instituted by the owner of the mark. However, the beneficiary of an exclusive right of exploitation may institute infringement proceedings, unless otherwise laid down in the contract, if, after formal notice, the owner does not exercise such right".

In the case of geographical indications and designations of origin, Article L. 115-8 of the Consumer Code refers to "any person who claims that use of a designation of origin is directly or indirectly prejudicial to him and violates his rights ... The same action may be brought by trade unions or associations that have been regularly constituted for at least six months, in relation to rights it is their duty to defend ... ". Article L. 115-12 of the Code states that "any person, trade union or association meeting the duration and interest requirements set out in Article L. 115-8 may join in the proceedings".

Article L. 421-1 of the Consumer Code states that "Legally established associations whose specific statutory objective is to protect the interests of consumers may, if they are approved for this purpose, exercise the recognized rights of the civil party in respect of acts that directly or indirectly prejudice the collective interests of consumers ... ". Pursuant to Article L. 421-7 of the Code "The associations referred to in Article L. 421-1 may participate in proceedings before the civil courts ...

²In French, the word "titulaire" (owner) of a right is used in preference to "détenteur" (holder) as used in the TRIPS Agreement. The footnote to Article 42 of the TRIPS Agreement states that "For the purpose of this Part, the term 'right holder' includes federations and associations having legal standing to assert such rights."

where the purpose of the initial demand is to compensate for prejudice suffered by one or more consumers due to acts that do not constitute a criminal offence".

The owner of the right is the only person entitled to assert industrial design rights before the courts. An exclusive licensee is not entitled to do so.

With regard to patents, Article L. 615-2 of CPI provides that "Infringement proceedings shall be instituted by the owner of the patent. However, the beneficiary of an exclusive right of working may, except as otherwise stipulated in the licensing contract, institute infringement proceedings if, after notice, the owner of the patent does not institute such proceedings." The same applies to owners of licences, compulsory licences or ex officio licences.

For both marks and patents, the exclusive licence must have been registered in the National Register of Marks, or the National Patent Register.

In the case of new plant variety certificates, Article L. 623-25 of the CPI gives the owner of a certificate the right to institute civil liability proceedings and gives the same right to the beneficiaries of exclusive rights of exploitation or holders of ex officio licences if, after formal notification, the owner of the certificate fails to exercise this right. "The owner of the certificate shall be entitled to take part in proceedings brought by his licensee" and vice versa. For this purpose, the exclusive licence must have been registered in the National Register of New Plant Variety Certificates.

There is no special provision on civil or criminal action related to layout designs. Under general law, the creators and their successors in title are entitled to assert their rights, whereas licensees may not do so.

With regard to trade secrets, an action for unfair competition (based in tort: Articles 1382 and 1383 of the Civil Code) may be brought by the professional suffering injury. If the acts injure a number of traders or industrialists or a particular profession, professional associations may bring proceedings to compensate the material or moral injury suffered by their members (Versailles Appeal Court, 13th Chamber, 4 November 1993).

How may they be represented?

They must necessarily be represented by an attorney (*avocat*) if the dispute comes before a First Instance Court (pursuant to Article 751 of the New Code of Civil Procedure), so this applies to all litigation concerning marks, geographical indications and designations of origin, patents, new plant varieties and layout designs. On the other hand, if a dispute concerning industrial designs comes before a lower court (although in practice this is extremely rare) or a commercial court, an attorney is not required. This also applies to litigation concerning the disclosure of trade secrets brought before commercial courts or industrial tribunals.

Are there requirements for mandatory personal appearances before the court by the right holder?

The general rules of law in this respect are governed by Chapter III of the New Code of Civil Procedure (NCPC). Article 184 thereof provides that "The judge may, in all matters, order the parties or one of them, to appear in person". The following Articles (up to Article 198) complete this provision.

3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence which lies within its control?

The relevant general rules of law apply. Article 11 of the NCPC (which appears in Book I: provisions common to all courts) states that: "The parties are bound to cooperate in the investigation, leaving to the judge to draw any conclusions in the event of an abstention or refusal.

If one party withholds an item of evidence, the judge may, at the request of the other party, require him to produce it under penalty of a fine, if need be. He may, at the request of one of the parties, demand or order, under the same penalty, the production of all documents in the possession of third parties where there is no lawful impediment."

The first subtitle under Title VII (the judicial administration of the means of proof) in the NCPC concerns the evidence (exchange of documents between the parties and obtaining documents held by a third party). Article 132 of the NCPC states that "The party who relies on a document must make it available to every other party to the proceedings. The making available of the documents must be spontaneous." Articles 133 to 142 give further details on this aspect. For example, the judge may order a party to communicate the documents on pain of a fine.

Article 143 of the NCPC states that "The facts upon which the resolution of the suit depends, may, at the request of the parties or *sua sponte*, be the subject of any order of investigation legally admissible.". Pursuant to the subsequent Article, an investigation order may be rendered whenever the judge lacks sufficient basis to make a ruling. Lastly, Article 145 provides that: "If there is a legitimate reason to preserve or to establish, before any proceedings, the means of proving facts upon which the resolution of a suit might depend, orders of investigation legally permissible may be rendered at the request of any interested party, by petition or by an interim order."

In relation to geographical indications and designations of origin, Article L. 421-8 of the Consumer Code provides that "Notwithstanding legislative provisions to the contrary, the prosecuting authorities may present to the court hearing the case any records or reports of an inquiry in their possession whose communication would help to resolve the dispute".

Moreover, for intellectual property there is a special procedure for administration of the means of proof, namely, infringement seizure. The President of the First Instance Court authorizes such a procedure through an *ex parte* order, which may be issued *inaudita altera parte*, in accordance with Article 493 of the NCPC, which defines the nature of an *ex parte* order: see reply to question 11.

Seizure of the infringing goods consists either of actual seizure of copies (only in relation to copyright and related rights: Articles L. 332-1 and L. 332-3 of the CPI), or descriptive seizure (in the case of software: Article L. 332-4 of the CPI; industrial designs: Article L. 521-1 of the CPI; marks: Article L. 716-7 of the CPI; patents: Article L. 615-5 of the CPI; and new plant varieties: Article L. 623-27 of the CPI), or a combination of the two (the aforementioned Articles for software, industrial designs, marks, patents, and new plant variety certificates respectively).

For industrial designs, descriptive seizure becomes null and void if no proceedings are instituted or a summons issued within 2 weeks of the seizure. Nullity because of failure to institute proceedings within 2 weeks does not apply to descriptive seizure related to marks or patents.

For industrial designs, marks and patents, actual seizure becomes null and void if no proceedings are instituted within 2 weeks.

The President of the First Instance Court may authorize seizure subject to prior deposit of security by the plaintiff and unfounded seizure may give rise to damages in favour of the defendant.

4. What means exist to identify and protect confidential information brought forward as evidence?

French law does not contain any special provisions on protecting the confidentiality of information provided in judicial proceedings concerning IPRs. The NCPC's general provisions allow either the judge in chambers or the judge directing the preparation of the trial (whose powers are broader and who acts when investigation is required before sending the case to trial) to take the measures requested by the parties in this respect.

Article 435 of the NCPC allows a judge to decide that, under certain circumstances, the hearings should be held or should continue in chambers.

If a patent is worked by the State or one of its co-contractors for the purposes of national defence, civil proceedings take place in the chambers of the First Instance Court (Article L. 615-10 of the CPI), i.e., the hearings are not public (Article 22 of the NCPC states that "Hearings are public, except where the law requires or permits them to take place in chambers.").

5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use:

- Injunctions

The purpose of remedies or civil penalties is to end the infringement and compensate for the prejudice caused. The judge must first of all prohibit any continuance of the infringing acts. Prohibition, which is not included in the list of remedies in the questionnaire, is nevertheless the first possible penalty. Judges may add injunctions to the prohibition measures in order to ensure that their decisions are carried out.

Fines, which are a special form of injunction, are much more commonly used as a provisional measure² or for the purpose of terminating acts of unfair competition.

There are no special provisions on IPRs. Consequently, the general rules of law on injunctions apply (Chapter I of Title IV of the NCPC deals with injunction procedures, in particular, mandatory injunctions in Articles 1425-1 to 1425-9). Article 1425-4, in particular, states that: "Where the judge considers that, on the basis of the documents produced, there are grounds for the demand, he issues an order of mandatory injunction that is not subject to appeal. He defines the purpose of the obligation and the time-limit and conditions within which it must be carried out. Moreover, the order specifies the place, date and time of the hearing at which the case will be considered, unless the plaintiff states that the injunction order has been carried out."

According to Article 1425-7 of the NCPC "Where the injunction order has been carried out within the time-limit fixed, the plaintiff informs the clerk of the court accordingly. The case is then withdrawn. In the absence of such information and if the plaintiff is not present at the hearing without justifying his absence, the court declares the mandatory injunction to be null and void ...".

²Cf. Article 491 of the NCPC: "The judge sitting in chambers may pronounce the imposition of fines. He may fix the amount thereof ...".

As far as geographical indications and designations of origin are concerned, Article 421-3 of the Consumer Code allows a criminal court hearing a case brought by a consumers' association, after having declared the defendant guilty "to postpone sentencing and to call on the person convicted, on pain of a fine if need be, to comply with the terms established by the court for the purpose of terminating the unlawful action, within the time-limit fixed ...".

- **Damages, including recovery of profits, and expenses, including attorney's fees**

There is no provision specific to IPRs. Compensation for the prejudice caused by infringing IPRs is dealt with according to the rules on civil liability laid down in Articles 1382 and 1383 of the Civil Code.

The philosophy and case law both confirm that the indemnity must compensate for the prejudice suffered, but only the prejudice suffered and not profits unlawfully earned. As legal precedents show, evaluating the indemnity comprises two elements: determination of the volume of infringement, and an estimate of the injury caused. The judge weighing the merits of the case is solely responsible for making this assessment.

Title XVIII of the NCPC (Articles 695 to 725-1) concerns costs. In general, the losing party must pay costs, unless the judge decides otherwise. In the absence of any special regulation to the contrary, payment of legal officials (lawyers, bailiffs ...) is not included in the costs. According to Article 700 of the NCPC, however, "When it appears inequitable to leave on one party the burden of the 'sums spent by the latter' and not included in the costs, the judge may order the other party to pay the first one a sum which the judge determines." He may, even ex officio, for reasons based on the same considerations, decide that this sentence is not warranted.

- **Destruction or other disposal of infringing goods and materials/implements for their production**

Case law in the Court of Cassation (First Civil Chamber, 3 November 1988, No. 86-16.538) reaffirms that a confiscation measure "can only be ordered in the cases prescribed by the law".

With regard to patents, Article L. 615-7 of the CPI, included in section 1 on civil proceedings, states that "At the request of the injured party, and where such measure is necessary to prevent continuing infringement, the Court may order confiscation, in favour of the petitioner, of the articles recognized as constituting an infringement, which are the property of the infringer, on the date of entry into force of the prohibition and, where appropriate, of the devices or means specifically intended for committing the infringement. The value of the articles confiscated shall be taken into account when computing the compensation to be awarded to the beneficiary of the decision."

In relation to new plant variety certificates, Article L. 623-28 of the CPI provides that "At the request of the injured party, the Court may order confiscation on behalf of the injured party of any plants or parts of plants or of any elements of reproduction or vegetative propagation obtained in violation of the rights of the owner of a new plant variety certificate and, where appropriate, of the instruments specifically intended for use in the reproductive cycle".

For industrial designs (Articles L. 521-3 and L. 521-3-1 of the CPI) and marks (Articles L. 716-8-1 and L. 716-14 of the CPI), these measures constitute criminal penalties. It would appear, however, that Civil Courts are sometimes allowed to order such measures when they relate to industrial designs in particular.

- **Any other remedies**

Publication of sentences may be ordered according to ordinary procedural rules.

The decision is published in a newspaper with broad circulation or in the professional press. Publication costs are borne by the infringer.

In the case of geographical indications and designations of origin, Article L. 421-9 of the Consumer Code states that "The competent court may order that the verdict pronounced should be disseminated to the public by all appropriate means The cost of dissemination shall be borne by the losing party, the party convicted or the association that instituted the civil action if the proceedings they instituted have been dismissed."

6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?

Such a measure, taken in the form of an injunction, would be contrary to the principle of presumption of innocence and the right to remain silent, which are recognized in criminal law in France.

At the European level, two decisions, one by the European Court of Human Rights (*Funcke vs. France*, 25 February 1993), and the other by the Court of Justice of the European Communities (*Orkem case*, 18 October 1989) confirm that an investigation measure cannot require self-incrimination by an accused person in relation to facts that still have to be proved.

7. Describe provisions relating to the indemnification of defendants wrongfully enjoined.

As far as industrial designs, new plant variety certificates or layout designs are concerned, there are no special provisions. The general rules of law apply (see reply to question 5). It is nevertheless provided that the President of the Court of First Instance who orders the infringement seizure may "order the person requesting seizure to provide adequate security" (Article L. 332-1 of the CPI) or "require from the petitioner security ... ". (Article L. 521-1 of the CPI) in order to compensate a defendant wrongfully enjoined. For new plant variety certificates, the last paragraph of Article L. 623-27 of the CPI provides for the payment of "any damages which may be claimed".

With regard to marks and patents, the last paragraphs of Articles L. 716-6 and L. 615-3 of the CPI contain similar provisions to the effect that "The judge may condition the injunction on the furnishing by the plaintiff of a guarantee to cover possible indemnification of damages suffered by the defendant if the infringement proceedings are subsequently judged to be unfounded."

In general, the NCPC makes dilatory or abusive action in the Court of First Instance or on appeal punishable by a civil fine of F 100 to F 10,000, without prejudice to any damages that may be claimed (Articles 32-1 and 559 of the NCPC).

- **To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?**

In the case of industrial designs, Article L. 521-1 of the CPI states that " ... any bailiff carry[ing] out a detailed description, with or without seizure, of the incriminated articles or instruments, under an order issued by the President of the First Instance Court" shall give a copy both of the order and of the instrument recording deposit to the holders of the articles described on pain of nullity and damages

awarded against the bailiff. The injured petitioner may claim these damages if the bailiff does not respect the procedural rules.

Regarding patents, the second paragraph of Article L. 615-10 of the CPI states that "Where the President of the Court orders an expert opinion or a description with or without effective seizure, as provided for in Article L. 615-5, the appointed law officer shall refrain from proceeding with seizure, description and any investigation into the archives and documents of the business if the contract for research or manufacture comprises a defence security classification." A similar provision in Article L. 623-30 of the CPI applies to new plant varieties (except that the word "manufacture" is replaced by the words "reproduction or propagation").

These examples do not relate directly to the question (they concern descriptive seizure and not injunctions), but they show that public officials may be held liable.

There are no special remedial measures applicable to public officials in cases where infringement proceedings are dismissed. Public officials act upon orders issued by the competent courts and if they are collecting evidence they could probably only be held liable in exceptional cases of misconduct (either personally or when carrying out their tasks, according to well-established administrative precedents).

The judicial authorities cannot be liable unless they refuse to grant justice or commit serious misconduct. Where the substance of a decision taken is contested, the authority of *res judicata* nullifies any liability (but opens the door to appeals).

8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

There are no special provisions on the cost and duration of proceedings.

The duration depends on the complexity of the case, the efforts of the parties and the court's workload. The channels of appeal used by the parties (appeal, cassation) also have a significant impact on the overall length of proceedings.

The cost of proceedings includes legal costs, mainly allowances paid to witnesses, payment of technicians, salaries of prosecuting officials and attorneys' fees.

The cost therefore varies greatly according to whether or not technical expertise is required and the amount of the fee paid by the client to his attorney. The court may order the losing party to pay the attorney's fee up to the amount it fixes.

Consequently, it is not possible to give details concerning the effective duration and cost of proceedings in this area.

(b) Administrative procedures and remedies

9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.

The administrative authorities do not have any role to play in relation to infringement of IPRs. The task of the National Institute of Industrial Property is to issue industrial property titles, but it is not competent to ensure respect for IPRs.

Administrative procedure related to geographical indications and designations of origin (covered by Articles L. 115-2 to 4 of the Consumer Code) only concern the granting of rights and not their protection.

PROVISIONAL MEASURES

(a) Judicial measures

10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.

The President of a Court of First Instance, sitting in chambers, may adopt two types of provisional measures: injunction and seizure (infringement seizure is different, see reply to question 3). The situation differs according to the category of intellectual property rights concerned.

Marks: Both prohibition and seizure may be ordered. Regarding the former, Article L. 716-6 of the CPI is based on Article L. 615-3 (see below); Article L. 716-8-1 provides for seizure after the infringement caused by the infringing goods and any material and equipment used to manufacture them have been recorded.

Industrial designs, geographical indications and designations of origin, layout designs, new plant variety certificates: There is no special prohibition measure. Nevertheless, the general competence (broader, see reply to question 12) of the judge in chambers to take injunction measures applies.

Patents: No seizure measure exists in the area of patents. Article L. 615-3 of the CPI provides for the provisional enjoinder, under penalty of a daily fine, or the furnishing of security to indemnify the patent owner.

Disclosure of trade secrets: A judge sitting in chambers may not take any measures in this area (although he may be able to do so in other types of unfair competition proceedings where the offence consists of producing objects).

11. In what circumstances may such measures be ordered *inaudita altera parte*?

Proceedings in chambers (where the Court of First Instance is competent to decide on the merits of a case and the President decides to take an emergency provisional decision) always require the presence of the parties. This is a constitutionally protected principle. Article 484 of the NCPC provides that "The *ordonnance du référé* (order given in chambers) is a provisional order given at the request of one party, the other party present or having been summoned, in cases where the law confers upon a judge who has not been empowered to hear the main issue the power to make the necessary order immediately." Article 486 of the NCPC states that: "The judge ensures that sufficient time has elapsed between the service of the complaint and the hearing for the party summoned to have been able to prepare his case."

Regarding fraud or the forgery of products, Article L. 215-9 of the Consumer Code states that "All the expert examinations required [in connection with implementation of emergency measures liable to lead to criminal proceedings, initiated by prosecuting authorities - see reply to question 14] shall take place in the presence of the parties and the price of samples recognized as authentic shall be reimbursed according to their value on the day they were removed".

Moreover, in France it is not possible to adopt injunction measures *ex parte* if there are no adversarial proceedings. Notwithstanding this exception, the principle is that "An *ex parte* order is

a provisional order rendered *inaudita altere parte* in cases where the petitioner is justified in not summoning the opposing party." (Article 493 of the NCPC).

This rule also applies to infringement seizure proceedings, authorized by an *ex parte* order issued by the President of the Court of First Instance upon application, but this procedure goes beyond provisional measures *stricto sensu* (it concerns means of proof: see reply to question 3).

Nevertheless, the President of a Court of First Instance has the power to take provisional measures without adversarial proceedings in connection with infringement seizure of software (O.J. Parliamentary Debates - National Assembly, 31 October 1994, written question No. 18617 of 3 October 1994 interpreting Article L. 332-4 of the CPI).

12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.

- Industrial designs, geographical indications and designations of origin, layout designs, and new plant variety certificates:
 - Procedure for initiating action and time-limit for maintaining the measure in force: The general rules of law relating to decisions in chambers apply. Article 485 of the NCPC provides that "The demand is brought by means of a complaint at a hearing held for that purpose at the usual time and day for *référés* [cases heard in chambers]."
 - Safeguarding the interests of the defendant: According to Articles 489 and 517 to 522 of the NCPC, "*Référé* orders [orders rendered in chambers] are provisionally executory without security unless the judge has ordered it to be furnished." (Article 489 of the NCPC) "[security] sufficient to cover all restitutions or damages" (Article 517 of the NCPC). The third paragraph of Article 771 of the NCPC gives the same powers to the judge directing preparation of the case.
- Marks and patents:
 - Procedure for initiating action and terms for maintaining the measure in force: Action concerning the merits of the case must be admissible and have been initiated within a short period from the date on which the owner of the rights or, but only in the case of marks, the beneficiary of an exclusive right of exploitation, became aware of the facts that constitute the grounds for the proceedings.
 - Safeguarding the interests of the defendant: The President of the Court of First Instance may require the plaintiff to furnish security to provide compensation for any prejudice suffered by the defendant (Articles L. 716-6 and L. 615-3 of the CPI).

In any event, the general rules of law apply. With regard to safeguarding the interests of the defendant, Article 32-1 of the NCPC provides that "A person instituting dilatory or abusive proceedings may be sentenced to a civil fine of F 100 to F 10,000 without prejudice to any damages that may be claimed". Likewise, if the matter is brought before the judge responsible for preparing the case (see reply to question 4), the first paragraph 1 of Article 771 of the NCPC empowers him to decide upon dilatory pleas.

Furthermore, if the losing party is sentenced to pay costs - in order to establish a parallel with question 5 - the last paragraph of Article 491 of the NCPC states that the judge in chambers shall rule

upon costs. If the case is brought before the judge responsible for preparing the case, Article 772 of the NCPC gives him the same powers in this respect.

13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

See reply to question 8.

(b) Administrative measures

14. Reply to the above questions in relation to any administrative provisional measures.

Firstly, it is necessary to explain the powers granted for provisional measures *stricto sensu* (injunction, seizure) in connection with marks, under Article 9 of Law No. 89-1008 of 31 December 1989, to officials of the *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (DGCCRF) (Directorate-General of Competition, Consumer Protection and the Repression of Fraud), which is under the authority of the Ministry of the Economy and Finance.

The aforementioned law allows officials of the DGCCRF to remove evidence from the place of sale in order to examine products which they suspect may unlawfully bear a mark, either on their initiative or following a written complaint by the owner of the rights addressed to the Departmental Directorate of Competition, Consumer Protection and the Repression of Fraud. The officials may also penalize false indications of origin or composition of a product, which are often associated with the offence of infringement.

They are also empowered to request the President of the Court of First Instance to issue an *ex parte* order authorizing the impoundment of the goods. The President of the Court of First Instance may require the furnishing of security with a view to compensating the owner of the goods for any damage. The goods can be impounded for 2 weeks, which can be extended for a further 2 weeks following a new order by the President of the Court of First Instance.

If examination of the products removed or impounded leads to a presumption of infringement of the mark, the officials of the DGCCRF transmit a report on the offence to the public prosecutor. Where the services of the DGCCRF act on their own initiative, the prosecuting authority dealing with the case contacts the owner of the rights in the mark for the purposes of the subsequent criminal proceedings (see description in the reply to questions 20 to 24).

In addition, in cases of falsification or fraud concerning the nature, composition or origin of a product, Article L. 215-1 of the Consumer Code empowers officials of the DGCCRF and the DGDDI, police officers, and State officials approved and authorized by the Ministry of Agriculture to carry out investigations and report on the offences.

Article L. 215-3 of the Consumer Code authorizes these officials to carry out an investigation either on the spot or on the basis of documentation regarding the place of manufacture, processing and storage, and the vehicles used to transport the goods, as well as to seize "documents of any type, whosoever possesses them, liable to facilitate the performance of their task".

Article L. 215-5 of the Consumer Code authorizes these officials to seize goods in the street, in the absence of a judicial authorization, if there is a flagrant case of falsification or where the measures concern *inter alia* products recognized as forged, adulterated or toxic, products recognized as being unfit for consumption, or products, objects or equipment used to forge the goods. The subsequent Article states: "... if products are recognized to be adulterated or toxic, seizure shall be obligatory.

The official may then destroy the products, sterilize them or denature them. Such operations shall be recorded in the report and the reasons given".

Article L. 215.8 of the Consumer Code provides for legal impoundment of goods, authorized by the President of the Court of First Instance within whose jurisdiction the disputed goods are being held "where leaving them on the market would lead to serious and immediate injury to the interests of consumers". The President acts following a request and takes a decision within 24 hours. He must ensure that there are grounds for the request for impoundment submitted to him. The impoundment measure may not exceed a duration of 2 weeks, which can be extended for one further period of 2 weeks upon a reasoned order from the President of the Court of First Instance.

"The President of the Court of First Instance may order the lifting of the impoundment at any time. Release shall be automatic in cases where the competent authorities have ascertained that the goods impounded are authentic or have been made authentic following a commitment by the person who first marketed them or by the person possessing them" (Article L. 215-8 of the Consumer Code).

Lastly, administrative impoundment measures can also be adopted while awaiting the findings of the verification to be carried out. According to Article L. 215-7 of the Consumer Code "The competent authorities shall draw up a report mentioning the products which have been impounded. This report shall be transmitted to the public prosecutor within 24 hours. The impoundment measure may not exceed 2 weeks unless otherwise authorized by the public prosecutor. It may be lifted at any time by the competent authorities or by the public prosecutor".

Articles L. 215-9 to L. 215-17 of the Consumer Code provide further details concerning the manner of carrying out expert examinations related to implementation of these measures.

The only other administrative measures are border measures or measures related to movement within customs territory, which are referred to in the following questions.

Special requirements related to border measures

15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?

Pursuant to Articles L. 521-7 and L. 716-8 of the CPI, the customs administration may, at the written request of the owner of a deposited industrial design or the owner of a registered mark, or the beneficiary of an exclusive right of exploitation, withhold in the course of its inspections goods alleged by him to be infringing the said industrial design or mark for which they have obtained registration or with regard to which they enjoy an exclusive right of use.

Patents are clearly excluded from this type of measure and there is no such provision either for new plant variety certificates or layout designs for semi-conductors.

In addition, Law No. 94-102 of 5 February 1994 (partly repeated in the CPI in Articles L. 716-8 to 12) establishes a total ban on imports or exports of goods bearing an infringing mark. Article L. 716-9(b) of the CPI establishes this ban, Article 428 of the Customs Code defines the criteria

for accusations of customs offences (under this Article, any violation of the provisions on prohibited imports under all customs regimes is deemed to be import or export of banned goods) and Article 414 of the aforementioned Code establishes the penalty for this offence.

Article 215 (applicable to goods from third countries) and Articles 38-4 and 215 *bis* of the Customs Code (concerning Community goods) allow inspections to be carried out throughout France and the seizure of infringing goods if the person in possession of them is unable to produce an import document or a commercial document proving that they are authentic.

French legislation does not exclude any customs regime from this provision, not even infringing goods imported in travellers' luggage. Persons in possession of goods of French, Community or third country origin presumed to be infringing goods must prove that they are authentic.

The exhaustion of rights within the European Union invalidates the application of measures to suspend marketing provided that the goods for which such an application has been made are not infringing goods or have been put up for sale on the Community market with the consent of the owner of the rights.

16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?

- Competent authorities: the customs administration and the *Direction Nationale du Renseignement et des Enquêtes Douanières* (DRNED) (National Directorate of Customs Information and Enquiries) with regard to the filing and investigation of written applications to withhold goods made by owners of the right.
- Requirements for an application: Written application by the owner of a deposited industrial design indicating the plaintiff's status with regard to the rights claimed together with "the object and national number of the industrial design concerned, together with an identity certificate issued by the National Institute of Industrial Property and a description of the goods alleged to be infringing the design" (Articles L. 521-7 and R. 521-1 of the CPI).

Application by the owner of a registered mark or of the beneficiary of an exclusive right of exploitation indicating the status of the plaintiff with regard to the rights claimed, together with "the designation and registration number of the mark concerned and a description of the goods alleged to be infringing the mark" (Articles L. 716-8 and R. 716-1 of the CPI).

The application may be made prior to the import into France of the allegedly infringing goods, in which case it is valid for one year and may be extended.

- Requirements relating to the duration of suspension: Articles L. 521-7 and L. 716-8 of the CPI concerning industrial designs and marks respectively provide for a period of ten working days. The President of the First Instance Court has sole competence to take the preventive measures referred to.

- Security or equivalent guarantee: Pursuant to the aforementioned Articles, if the plaintiff has had an infringement seizure carried out, the President of the First Instance Court may make the measure subject to furnishing of security (security is always required for industrial designs when the plaintiff is a foreigner: Article L. 521-1 of the CPI).

Domestic legislation does not currently provide for any deposit of security by the owner of a right when making a written application for the withholding of goods in case his application is without grounds. On the other hand, Article 3.6 of the Regulation of 22 December 1994 allows member States to require owners of rights to furnish security when filing an application for intervention or withholding of goods based on this Regulation in order to cover their liability if the request is groundless and/or to ensure payment of the costs incurred during the withholding procedure.

- Compensation for the importer and the owner of the goods: See the explanations concerning Article 700 of the NCPC in the reply to question 5.
- Right of inspection and information: In the case of industrial designs and marks, the last paragraphs of Articles L. 521-7 and L. 716-8 of the CPI provide that: "For the purpose of the institution of the legal proceedings referred to in the foregoing paragraph, the plaintiff may require the customs administration to communicate the names and addresses of the sender, the importer and the consignee of the goods withheld or of the holder thereof, and also the quantity thereof, notwithstanding the provisions of Article 59 *bis* of the Customs Code concerning the professional secrecy to which all officials of the customs administration are bound."

17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?

In connection with the cost of the procedure for withholding infringing goods, no charges or deposit of security to cover the cost of withholding goods is required from owners of rights who apply to the customs administration in writing requesting the withholding of goods.

For the customs authority, applying a withholding measure implies payment of storage and maintenance costs for the infringing goods, which vary according to the type and volume of the goods concerned. As there are no provisions at the national level requiring the deposit of security by the owner of the right in order to cover these charges, they usually have to be met by the customs administration.

With regard to the duration of suspension of the release of allegedly infringing goods, the indications given in the reply to question 16 "provisions concerning the duration of suspension" apply.

Within ten working days from the date of withholding of the infringing goods, in cases where the owner of the right has requested infringement seizure, the goods are handed over to the judicial authorities.

The customs service terminates the withholding when it has been informed of the seizure order. In this particular case, if the order designates the customs administration as the custodian of the goods, they are handed over to it and not released.

18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to ex officio action?

In the case of infringing marks, if a customs ban has been imposed, the customs administration may establish that there has been a violation of customs regulations without receiving a prior request from the owner of the right, either in the context of customs controls within France or when verifying goods subject to restrictions on circulation within the European Community (Article 38.4 of the Customs Code).

Partial lifting of the professional secrecy to which customs officials are bound, with reference to the last sentence of the reply to question 16, does not apply when the customs administration acts on its own initiative. In this case, the owner of the mark is only informed of the total volume of each article seized from travellers (Circular of 21 March 1995, No. CRIM-95-9 from the Minister of Justice concerning the prevention of infringement of marks).

19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.

The customs service seizes all the goods it suspects of infringing marks. It then draws up a report on the seizure. If customs regulations have been violated, the customs administration may initiate proceedings with a view to the application of customs penalties. It may therefore enter into negotiations with the violators if no action has been brought by the prosecuting authorities or the owner of the right or it may bring the matter before the courts.

The customs offence of infringement is usually coupled with an ordinary law violation. The public prosecutor is therefore informed through the transmission of the report on the customs seizure. In any event, he is empowered to decide whether or not to initiate proceedings.

If the public prosecutor decides to initiate proceedings for the ordinary law offence, the customs administration usually combines its action with the ordinary law action so that the judge can consider all aspects of the case.

Criminal proceedings are thus linked to customs proceedings. The customs offence is punishable by the penalties laid down in Article 414 of the Customs Code, namely a maximum term of three years' imprisonment, a fine of between one and two times the value of the infringing object, and its confiscation.

CRIMINAL PROCEDURES

20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.

For both industrial designs and marks, Articles L. 521-1, L. 521-7 and L. 716-8 of the CPI give the plaintiff in an action for infringement the choice of instituting proceedings by civil action or criminal action. For geographical indications and designations of origin, criminal courts have jurisdiction. In the case of patents and layout designs, proceedings are initially brought before the First Instance Court and thereafter by the Courts of Appeal (Article L. 615-19 of the CPI). Criminal action concerning new plant variety certificates is heard by criminal courts, which "may not take a decision until the Civil Court has confirmed the existence of the offence in the final decision" (Articles L. 623-29 and L. 623-33 of the CPI). In relation to the disclosure of trade secrets, if the plaintiff considers that an offence has been committed, he may bring the matter before the investigating magistrate, the public prosecutor, or the criminal court.

In general, First Instance Courts have jurisdiction for proceedings, investigation and, if an offence has been committed, judging violations of the Intellectual Property Code, pursuant to Article 704.5 of the Code of Criminal Procedure.

21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?

Criminal procedures and penalties are available for any act of infringement of any intellectual property right.

- Industrial designs

The relevant provisions are Articles L. 521-2 to L. 521-6 of the CPI.

The offence of infringement is not defined. On the other hand, it is stipulated that it must consist of events subsequent to filing. Events following filing but prior to publication are only actionable if the plaintiff establishes the defendant's bad faith. In principle, no proceedings may be instituted until the filing has been made public. After publication, the persons having committed potentially infringing acts may plead good faith on condition that they furnish proof thereof.

- Marks

The relevant provisions are Articles L. 716-8-1 to L. 716-14 of the CPI.

According to Article L. 716-9 of the CPI, the offence of infringement is defined as the reproduction, imitation, use, affixing, removal or alteration of a mark, a collective mark or a collective certification mark. Article L. 716-10 provides that any person who without lawful reason holds goods he knows to bear an infringing mark or has knowingly sold, offered for sale, furnished or offered to furnish goods or services under such a mark, or has knowingly delivered a product or furnished a service other than that requested of him under a registered mark shall be liable to the penalties laid down in Article L. 716-9.

There are special provisions on infringement of collective marks or collective certification marks: use in a manner other than that laid down in the regulations accompanying the registration or carrying out one of the aforementioned acts within a period of ten years as from the date of termination of the protection granted by a collective certification mark.

- Geographical indications and designations of origin

The relevant provisions are Articles L. 115-16 and L. 115-18, together with Articles L. 213-1 to L. 213-5 and L. 217-6 to L. 217-8 of the Consumer Code.

Misuse of an incorrect designation of origin, on the one hand, or affixing it or causing it to appear by removal, addition or alteration, on natural or manufactured products offered for sale or to be offered for sale, on the other, all constitute offences. The sale, offer for sale or circulation of such products is liable to the same penalties (Articles L. 115-16 and L. 115-18).

Moreover, in general, geographical indications and designations of origin are subject to the general requirement of conformity laid down in Articles L. 212-1 et seq. of the Consumer Code. For example, fraud concerning the nature, composition or origin of a product (Article L. 217-6 of the Consumer Code), as well as adulteration of foodstuffs, beverages, agricultural or natural products to be sold, as well as the possession, display, offer for sale or sale of such products are punishable.

- Patents

The relevant provisions are Articles L. 615-12 to L. 615-20 of the CPI, as well as Articles 410-1 and 411-6 to 8 of the new Criminal Code.

Article L. 615-12 of the CPI imposes penalties on any person who improperly claims to be the owner of a patent or a patent application. Article L. 615-14 of the CPI defines the offence of infringement. This offence may also be combined with violation of State security according to Articles L. 615-13, L. 615-15 and L. 615-16 of the CPI if the infringement relates to a patent or patent application of interest for national defence (under the conditions stipulated in Articles L. 612-8 to L. 612-10 of the CPI).

Article 410-1 of the new Criminal Code specifies that the essential elements of France's scientific and economic potential are among its fundamental interests. Violating these interests by giving information, processes, objects, documents ... to a foreign power gives rise to the criminal penalties laid down in Articles 411-6 to 8 of the new Criminal Code as described in the reply to question 24.

These Articles apply to the communication of information on patent applications kept secret in the interests of national defence.

- New plant variety certificates

Article L. 623-25 of the CPI states that "Any violation of the rights of an owner of a new plant variety certificate as defined in Article L. 623-4³ shall constitute an infringement incurring the civil liability of the person committing the act."

"Subject to Article L. 623-4, use of a protected variety as a source of initial variation with a view to obtaining a new variety shall not constitute violation of the rights of the owner of a new plant variety certificate."

The second paragraph facilitates interpretation of the scope of Article L. 623-32 of the CPI, which defines the offence liable to criminal action as "Any intentional violation of the rights of the owner of a new plant variety certificate, as defined in Article L. 623-4 ...".

Article L. 623-26 of the CPI provides that "Acts committed prior to publication of the issue of the certificate shall not be held to violate the rights deriving from the certificate. However, acts committed after a true copy of the application for a certificate has been notified to a person presumed liable may be ascertained and prosecuted."

Lastly, criminal liability can only apply in this area when the interests of national defence are at stake.

- Layout designs

Article L. 622-5 of the CPI prohibits any third person from:

³Article L. 623-4 of the CPI: "Any new plant variety may be the subject of a title known as a 'new plant variety certificate', which shall afford to its owner an exclusive right to produce, introduce onto the territory to which this Chapter applies, sell or offer for sale all or part of the plant or any element for the reproduction or vegetative propagation of the variety or of varieties derived from it by hybridization where their reproduction requires the repeated use of the original variety."

- Reproduction of a protected topography, unless reproduction is for the purpose of evaluation, analysis or teaching and this analysis or evaluation leads to the creation of a different topography eligible for protection.
- Commercial exploitation or importation to that end of such a reproduction or of any semi-conductor product incorporating it, unless the acquirer of a semi-conductor product can prove his good faith (but he is still liable for appropriate indemnification if he intends to engage in commercial exploitation of the products so acquired).

Action prohibited by this Article may lead to civil proceedings; the Intellectual Property Code does not, on the other hand, provide for any specific criminal penalty.

- Trade secrets

Disclosing or attempting to disclose trade secrets and acts of unfair competition constitute offences.

Proceedings for unfair competition are based on Articles 1382 and 1383 of the Civil Code. The former requires a person causing an injury to repair it and the latter states that a person is liable for the injury he has caused by his action, but also by his negligence or carelessness.

Legal precedents define a manufacturing secret as any manufacturing process of practical or commercial interest exploited by an industrialist and kept from his competitors (Court of Cassation, Criminal Chamber, 29 March 1935, 29 June 1960, 12 June 1974).

The disclosure of a manufacturing secret may not only injure the enterprise possessing the secret, but also the interests of the economy or national defence. The aforementioned provisions of the new Criminal Code (Article 410-1, 411-6 to 8) are applicable in such cases.

22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?

The only administrative authorities empowered to initiate criminal proceedings are the DGCCRF and the DGDDI mentioned above (in connection with the procedure explained in reply to question 14 and on the basis of Article 343-2 of the Customs Code). Under certain circumstances, but only in connection with marks, they may do so on their own initiative. The public prosecutor initiates criminal proceedings if he considers them to be warranted.

Criminal proceedings concerning designations of origin or geographical indications are regularly initiated by the National Institute of Designations of Origin, which is a public institution of an administrative nature responsible for controlling, promoting and protecting designations of origin, the wine market and the economic regime governing alcohol, under the supervision of the Ministry of Agriculture.⁴

23. Do private persons have standing to initiate criminal proceedings and, if so, who?

Private persons may initiate criminal proceedings provided that they have an interest therein.

⁴Pursuant to Article 23 of the Decree Law of 30 July 1935 on Protection of the Wine Market and the Economic Regime Governing Alcohol, published in the OJ of 31 July 1935.

The "injured party", for industrial designs (Articles L. 521-1, L. 521-3 and L. 521-6 of the CPI), owners of patents or patent applications (Article L. 615-12 of the CPI) or their exclusive licensees (subject to the conditions explained in the reply to question 2), owners of marks or of exclusive rights of exploitation may all initiate criminal proceedings. For geographical indications and designations of origin, private individuals, producers' groups and professional associations regularly constituted for over six months (Articles L. 115-8 and L. 115-17 of the Consumer Code are entitled to initiate proceedings). Consumers' associations are also authorized to act pursuant to Articles L. 421-1 to 3 of the Consumer Code. Regarding new plant variety certificates and trade secrets, see reply to question 2.

24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:

- **Imprisonment**

- Industrial designs and marks

Articles L. 521-4, L. 521-6 of the CPI for industrial designs, and Articles L. 716-9 to L. 716-11 and L. 716-12 of the CPI for marks, provide for a two-year prison term, which is doubled if the infringement is repeated or if the offender is or has been contractually bound to the injured party.

- Geographical indications and designations of origin

The offences described in Articles L. 115-16 and L. 115-18 of the Consumer Code are punishable by a term of imprisonment of between three months and one year. Where this penalty is imposed, it is combined with a fine.

Fraud concerning the nature, origin or composition of products or the forgery of food, agricultural or natural products, or the display, offer for sale or selling of forged products are punishable by a term of imprisonment of three months to two years, together with a fine (Articles L. 213-1, L. 213-3 and L. 217-6 of the Consumer Code). This penalty may be doubled when the fraud makes utilization of the good dangerous for human or animal health (Article L. 213-2).

The possession of forged goods is punishable by a term of imprisonment of six days to three months, which may be combined with a fine (Article L. 213-4).

All these penalties are increased if the offence is repeated (Article L. 213-5 of the Consumer Code).

- Patents

Infringement is punishable by a prison term of two years pursuant to Article L. 615-14 of the CPI. In the event of repetition, or if the offender is or has been contractually bound to the injured party, the penalties are doubled (Article L. 615-14-1 of the CPI).

If a patent application has been made public before the Ministry of Defence has authorized it or before the expiry of the period of five months from the date of filing the application and if this violation of procedure has prejudiced national defence, imprisonment of five years may be ordered (Article L. 615-13 of the CPI). Violation of the procedure in relation to international patent applications or applications for European patents is subject to the same penalty (Articles L. 615-15 and L. 615-16 of the CPI).

If disclosure was for the benefit of a foreign power, imprisonment of ten years may be ordered, depending on whether the purpose of the offender's activity was to obtain or furnish information, processes, documents ..., or whether he collected or compiled information, processes, documents ... in order to hand them over to a foreign power, a foreign or foreign-controlled enterprise or organization.

Where the offence consisted of furnishing or giving access to information, processes, and documents ... whose exploitation, disclosure or compilation could prejudice France's fundamental interests, the term of imprisonment is 15 years (Articles 411-6 to 411-8 of the new Criminal Code).

- New plant variety certificates

Under Article L. 623-32 of the CPI, if there is repeated infringement of a new plant variety certificate, a term of imprisonment of six months can be ordered in addition to the fine specified below.

The term of imprisonment is five years if a new plant variety that is the subject of an application for a certificate is made public or exploited before the Ministry of Defence has authorized it or before the expiry of a period of five months from the date of filing the application and if violation of the procedure prejudices national defence (Article L. 623-35 of the CPI). The provisions of Articles 411-6 to 8 of the new Criminal Code apply where appropriate.

- Trade secrets

The penalty specified in Article L. 621-1 of the CPI is two years' imprisonment. The provisions of Articles 411-6 to 8 of the new Criminal Code also apply where appropriate.

- **Monetary fines**

- Industrial designs and marks

Articles L. 521-4 to L. 521-6 of the CPI in the case of industrial designs, and Articles L. 716-9 to L. 716-11, together with Article L. 716-12 of the CPI for marks, provide for the term of imprisonment described above, together with a fine of F 1,000,000, which is doubled if the offence is repeated or if the offender is or has been contractually bound to the injured party.

A fine also applies to legal persons under the conditions applicable to copyright and related rights.

- Geographical indications and designations of origin

The offences of affixing, altering or misusing designations of origin or indications of source are punishable by a fine of F 250,000, which may be combined with a term of imprisonment.

Fraud concerning the nature, composition or origin of a product, *inter alia* when the fraud has harmful consequences for human or animal health, or forgery of food, agricultural or natural products, is punishable by a fine of F 250,000, which may be combined with a term of imprisonment.

The offence of possessing forged goods is punishable by a fine of F 30,000, which may be combined with a term of imprisonment.

All these penalties are increased if the offence is repeated (Article L. 213-5 of the Consumer Code).

- Patents

Any person improperly claiming to be the owner of a patent or of a patent application is liable to a fine of F 50,000, which may be doubled if the offence is repeated within five years (Article L. 615-12 of the CPI).

Infringement is punishable by a fine of F 1,000,000, together with a term of imprisonment, which are doubled if the offence is repeated or if the offender is or has been contractually bound to the injured party (Articles L. 615-14 and L. 615-14-1 of the CPI).

Violation of the procedure covered by Articles L. 612-9 and L. 612-10 of the CPI (protecting the interests of national defence) is subject to a fine of F 30,000, even if the violation has not prejudiced national defence (Article L. 615-13 of the CPI).

Violation of this procedure in connection with international patent applications or applications for European patents is punishable by a fine of F 40,000 (Articles L. 615-15 and L. 615-16 of the CPI).

If disclosure was for the benefit of a foreign power, a fine of F 1,000,000 may be ordered, depending on whether the purpose of the offender's activity was to obtain or furnish information, processes, documents ... or whether he collected or compiled information, processes, documents ... in order to hand them over to a foreign power, a foreign or foreign-controlled enterprise or organization. Where the offence consisted of furnishing or giving access to information, processes, documents ... whose exploitation, disclosure or compilation could prejudice France's fundamental interests, the amount of the fine is increased to F 1,500,000 (Articles 411-6 to 411-8 of the new Criminal Code).

- New plant variety certificates

Article L. 623-34 of the CPI states that "Any person improperly claiming to be the owner of a certificate or an application for a new plant variety certificate shall be liable to a fine of F 10,000. In the event of a repeated offence [within five years], the fine may be doubled ...".

Article L. 623-32 of the CPI provides that "Any intentional violation of the rights of the owner of a new plant variety certificate, as defined in Article L. 623-4, shall constitute an offence punishable by a fine of ... F 15,000".

In addition, Article L. 623-35 of the CPI provides that violation of a procedure at a stage that concerns protection of the interests of national defence is punishable by a fine of F 30,000 (which is not combined with the term of imprisonment mentioned above unless the violation has prejudiced the interests of national defence).

The provisions of Articles 411-6 to 8 of the new Criminal Code may apply.

- Trade secrets

The fine specified in Article L. 621-1 of the CPI, which is combined with the term of imprisonment, amounts to F 200,000. The provisions of Articles 411-6 to 8 of the new Criminal Code also apply where appropriate.

- **Seizure, forfeiture and destruction of infringing goods and materials and implements for their production**

- Industrial designs

Articles L. 521-3 and L. 521-3-1 of the CPI provide that, even if the defendant is released, the objects infringing rights may be confiscated and, in the event of conviction also "the instruments having served specifically to manufacture the incriminated articles".

- Marks

Under Article L. 716-8-1 of the CPI "Officers of the judicial police may, as soon as offences under Articles L. 716-9 and L. 716-10 have been reported, effect the seizure of goods unlawfully manufactured, imported, stocked, placed on sale, delivered or supplied, and of any material and equipment specially installed for the purposes of such unlawful acts." Moreover Article L. 716-14 of the CPI authorizes the court to order that the confiscated goods be delivered up to the owner of the mark that has been infringed, without prejudice to any damages, or that the goods be destroyed.

- **Other**

- Marks

Articles L. 716-11-1, L. 716-11-2 and L. 716-12 of the CPI repeat all the provisions described above for industrial designs, making them applicable to marks (including those on the criminal liability of legal persons).

Furthermore, Article L. 716-13 of the CPI gives the court the possibility of ordering the posting of the decision in accordance with the conditions laid down in the second paragraph of Article L. 335-6 of the CPI (concerning copyright).

- Geographical indications and designations of origin

The recognized offence of affixing, altering or misusing a geographical indication or designation of origin may lead to the posting of the decision and its full or partial publication in newspapers specified by the judge, at the expense of the person convicted (paragraph 2 of L. 115-16 of the Consumer Code).

- Industrial designs

Article L. 521-4 of the CPI provides that "... the court may order the total or partial, permanent or temporary closure, for a period not exceeding five years of the establishment that has served for the commission of the offence" and specifies the measures to be taken if staff are dismissed, at the expense of the person convicted. If the offence is repeated, in addition to doubling the penalties, the second paragraph of Article 521-6 of the CPI provides that "The guilty parties may ... be deprived, for a period not exceeding five years, of the right to elect and be elected to commercial courts, chambers of commerce and industry and professional chambers and to joint conciliation boards."

The penalties provided under Article 131-39 of the new Criminal Code, for criminal liability of legal persons, apply.

- Patents

If the offence is repeated, in addition to doubling of the penalties, the second paragraph of Article L. 615-14-1 of the CPI provides that "The guilty parties may ... in addition be deprived, for a period not exceeding five years, of the right to elect and be elected to commercial courts, chambers of commerce and industry and professional chambers and to joint conciliation boards."

- Trade secrets

Paragraph 2 of Article L. 152-7 of the Labour Code prescribes that "The court may also order, as a complementary penalty, the deprivation of civic, civil and family rights for a maximum period of five years as provided by Article 131-26 of the Criminal Code".

25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.

See reply to question 8.

II. LITERARY AND ARTISTIC PROPERTY RIGHTS

Civil and administrative procedures and remedies

(a) Civil judicial procedures and remedies

1. Specify the courts which have jurisdiction over IPR infringement cases

Preliminary remark:

The first paragraph of Article L. 331-1 of the CPI provides that "All disputes relative to the application of the provisions of Part One of this Code which are within the jurisdiction of the civil courts shall be submitted to the competent courts, without prejudice to the right of the injured party to institute criminal proceedings under the general rules of law." A plaintiff whose literary and artistic rights have been infringed may institute civil or criminal proceedings and the first paragraph of Article L. 331-1 of the CPI refers to the general rules of law governing the sharing of jurisdiction between administrative and civil courts.

Civil courts which have jurisdiction over IPR infringement cases

The Code does not prescribe the sole jurisdiction of First Instance Courts for infringement of literary and artistic property rights and the general rules of law concerning the sharing of jurisdiction and geographical scope apply.

In principle, a First Instance Court has jurisdiction for all litigation involving claims exceeding F 30,000, whereas the Court of Instance is competent to hear cases involving a smaller amount (see Article 321-1 of the Code of the Organization of Justice). Commercial courts have jurisdiction if the dispute is between two traders. However, if the dispute involves one natural person and a trader, the plaintiff who is a natural person has the option of bringing the case to the Court of First Instance or the commercial court.

Industrial tribunals have jurisdiction in all individual cases relating to a labour contract.

Administrative courts with jurisdiction for infringement of literary and artistic property rights

In accordance with the general rules of law, administrative courts have jurisdiction to hear cases of infringement involving public law persons.

Exceptions

The second paragraph of Article L. 113.9 of the CPI gives sole jurisdiction to the First Instance Court of the registered place of business of the employer in cases relating to economic rights in software and its documentation created by employees in the exercise of their duties.

Article L. 122.9 of the CPI provides that First Instance Courts should hear cases of manifest abuse in the exercise or non-exercise of the rights of exploitation by a deceased author's representatives and any dispute between such representatives.

The President of a First Instance Court alone is allowed to decide upon matters of infringement seizure in the cases specified in Article L. 332.1 of the CPI, to the exclusion of all other courts.

2. Which persons have standing to assert IPRs?

In literary and artistic property law, the following persons are empowered to assert their rights:

- (1) Owners of rights: authors, performers, producers of phonograms and videograms, and audiovisual communication enterprises, but only to the extent that they have not been deprived of their economic rights. In any event, the artist and performer retain the right of action related to moral rights.
- (2) Assignees of rights may assert their literary and artistic property rights if the economic rights have been transferred to them.
- (3) According to Article L. 331.1 of the CPI, regularly constituted bodies for professional defence are entitled to institute legal proceedings to defend the interests entrusted to them under their statutes. The same applies to civil companies for the collection and distribution of royalties and related rights (Article L. 321.1 of the CPI).
- (4) The Minister responsible for culture may refer a matter to the courts in the absence of a recognized representative or heir (Articles L. 122.9 and L.112.2 of the CPI).
- (5) According to Article L. 331.3 of the CPI, the National Centre for Cinematography may exercise the rights acknowledged for the civil party with respect to the offence of infringement of an audiovisual work where the public proceedings have been initiated by the public prosecutor or by the injured party.

How may they be represented?

In accordance with the general rules of law, the parties must be represented by an attorney when the dispute comes before a First Instance Court. An attorney is also necessary in cases being heard by administrative courts when there is a claim for compensation. On the other hand, an attorney is not required if the dispute is heard by a Court of Instance, a commercial court or an industrial tribunal. In proceedings heard in chambers, the parties may put their own case and the law does not contain any special provisions regarding their representation (except in Paris, where according to a judicial decision cases in chambers following a summons are put by a lawyer).

Are there requirements for mandatory personal appearances before the court by the right holder?

The general rules of law in this respect are to be found in Chapter III of the New Code of Civil Procedure (NCPC). Article 184 thereof provides that "The judge may, in all matters, order the parties, or one of them, to appear in person." The subsequent Articles (up to Article 198) complete this provision.

3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence which lies within its control?

The general rules of law apply. Article 11 of the NCPC (to be found in Book I, Provisions Common to all Courts) states that:

"The parties are bound to cooperate in the investigation, leaving the judge to draw any conclusions in the event of an abstention or refusal.

If one party withholds an item of evidence, the judge may, at the request of the other party, require him to produce it under penalty of a fine, if need be. He may, at the request of one of the parties, demand or order, under the same penalty, if necessary, the production of all documents in the possession of third parties where there is no lawful impediment."

The subtitle of Title VII of the NCPC (the judicial administration of the means of proof) concerns the evidence (exchange of documents between the parties and obtaining documents held by a third party). Article 132 of the NCPC provides that "The party who relies on a document must make it available to every other party to the proceedings. The making available of the documents must be spontaneous." Articles 133 to 142 give further details on this aspect. For example, the judge may order a party to communicate the documents on pain of a fine.

Article 143 of the NCPC states that "The facts upon which the resolution of the suit depends, may, at the request of the parties or *sua sponte*, be the subject of any order of investigation legally permissible." Pursuant to the subsequent Article, the investigation order may be rendered whenever the judge lacks sufficient basis to make a ruling. Lastly, Article 145 provides that "If there is a legitimate reason to preserve or to establish, before any proceedings, the means of proving facts upon which the resolution of a suit might depend, orders of investigation legally permissible may be rendered at the request of any interested party, by petition or by an interim order".

Moreover, for intellectual property there is a special procedure for dealing with the means of proof, namely, infringement seizure. This is allowed by Articles L. 332.1 to L.332.4 of the CPI.

If a work is unlawfully reproduced, infringement seizure may be ordered by a police commissioner, but in other cases cited in Article L.332.1 (see reply to question 10), as well as in the case of software (Article L.334.4 of the CPI), it must be authorized by the President of the First Instance Court through an order issued on demand and it may be non-contentious (see Article 493 of the NCPC, which defines an *ex parte* order).

In the case of copyright and software, infringement seizure consists either of actual seizure of copies or descriptive seizure (Article L. 332.1 of the CPI for copyright and L.332.4 for software).

As far as copyright is concerned, if the distrainer fails to submit the matter to the competent court within 30 days of seizure, the distrainee or the garnishee may request the President of the First Instance Court, acting in chambers, to lift the seizure (Article L 332.3 of the CPI).

In the case of software, descriptive seizure and actual seizure become null and void if there is no writ or summons within 2 weeks of the seizure (Article L. 332.4 of the CPI).

The President of the First Instance Court may make authorization to carry out the seizure subject to prior deposit of adequate security by the person requesting seizure (last paragraph of Article L. 332.1 of the CPI).

As far as related rights are concerned, the Code does not provide for any infringement seizure procedure, thus the general rules of law apply. Nevertheless, Article L. 335.1 of the CPI authorizes competent police officers to effect seizure of unlawfully produced phonograms and videograms after having established the offences referred to in Article L. 335.4 of the CPI (see reply to question 10).

4. What means exist to identify and protect confidential information brought forward as evidence?

French law does not contain any special provisions on protecting the confidentiality of information provided in judicial proceedings concerning IPRs. The NCPC's general provisions allow either the judge in chambers or the judge directing the preparation of the trial (whose powers are broader and who acts when investigation is required before sending the case to trial) to take the measures requested by the parties in this respect.

Article 435 of the NCPC allows a judge to decide that, under certain circumstances, the hearings should be held or should continue in chambers.

5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use:

- **Injunctions**

The purpose of remedies or civil penalties is to end the infringement and compensate for the prejudice caused. The judge must first of all prohibit any continuance of the infringing acts. Prohibition, which is not included in the list of remedies in the questionnaire, is nevertheless the first possible penalty. Judges may add injunctions to the prohibition measures in order to ensure that their decisions are carried out.

Fines, which are a special form of injunction, are much more commonly used as a provisional measure or for the purpose of terminating acts of unfair competition.

There are no special provisions on IPRs. Consequently, the general rules of law on injunctions apply (Chapter I of Title IV of the NCPC deals with enjoinder in Articles 1425-1 to 1425-9). Article 1425-4, in particular, states that "Where the judge considers that, on the basis of the documents produced, there are grounds for the demand, he issues an order of enjoinder that is not subject to appeal. He defines the purpose of the obligation and the time-limit and conditions within which it must be carried out. Moreover, the order specifies the place, date and time of the hearing at which the case will be considered, unless the plaintiff states that the enjoinder order has been carried out."

According to Article 1425-7 of the NCPC "Where the enjoinder order has been carried out within the time-limit fixed, the plaintiff informs the clerk of the court accordingly. The case is then withdrawn. In the absence of such information and if the plaintiff is not present at the hearing without justifying his absence, the court declares the enjoinder to be null and void ...".

- **Damages, including recovery of profits, and expenses, including attorney's fees**

In accordance with the general rules of law, compensation for the prejudice caused by infringement is dealt with according to the rules on civil liability laid down in Articles 1382 and 1383

of the Civil Code. For cases involving literary and artistic property rights, however, the victim of infringement has a choice between the compensation provided in ordinary law and seizure. Article L. 335-7 of the CPI provides that, if there has been infringement, "... the equipment, the infringing articles and the receipts that have been confiscated shall be handed to the victim or his successors in title to compensate them for the prejudice they have suffered; the remaining indemnity, or the entire indemnity if there is no confiscation of equipment, infringing articles or of receipts, shall be settled through ordinary channels".

With regard to attorneys' fees, traditional case law is that "in order to estimate the compensation due by the infringer, the irrecoverable costs paid out by the author to ensure respect for his rights shall be taken into account".

- **Destruction or other disposal of infringing goods and materials/implements for their production**

Pursuant to the general rules of law, the judge is empowered to order all appropriate measures for compensation in kind and can therefore order the destruction or disposal of the goods.

As regards literary and artistic property, the question of whether civil courts can order the seizure provided for in criminal law under Articles L. 335-6 and L. 335-7 of the CPI has been settled. According to legal precedents, the measure may be ordered by the civil courts separately from any criminal penalties. Civil courts may therefore order the confiscation of all or part of the proceeds obtained by reason of the infringement, as well as the confiscation of all phonograms, videograms, articles and copies that are infringing or have been unlawfully reproduced and of the equipment specifically installed for the purpose of committing the offence.

- **Any other remedies**

In the case of literary and artistic property, a judge may order all appropriate compensation measures in kind, including the publication of sentences and other measures.

6. In what circumstances, if any, do judicial authorities have the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the goods or services found to be infringing and of their channels of distribution?

Such a measure, taken in the form of an injunction, would be contrary to the principle of presumption of innocence and the right to remain silent, which are recognized in criminal law in France.

At the European level, two decisions, one by the European Court of Human Rights (Funcke vs. France, 25 February 1993), and the other by the Court of Justice of the European Communities (Orkem case, 18 October 1989) confirm that an investigation measure cannot impose self-incrimination by an accused person in relation to facts that still have to be proved.

7. Describe provisions relating to the indemnification of defendants wrongfully enjoined.

There are no special provisions in literary and artistic property law. Nevertheless, legal precedents show that infringement proceedings wrongfully instituted in bad faith may give rise to counter-claims on the basis of Article 1382 of the Civil Code. The courts may then order the payment of damages to the defendant and publication of extracts from the sentence at the expense of the plaintiff.

To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?

There are no special provisions relating to literary and artistic property as far as the liability of public authorities and/or officials is concerned.

8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

See reply to Part I question 8.

(b) Administrative procedures and remedies

9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.

There is no provision in the Code allowing the administration to implement procedures relating to the merits of the case or to impose administrative penalties.

Provisional measures

(a) Judicial measures

10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.

In relation to copyright:

In the context of an infringement seizure procedure, the first paragraph of Article L. 332-1 of the CPI allows police commissioners to seize "... copies constituting an unlawful reproduction of the work".

The second paragraph of this Article also states that:

"If seizure will have the effect of retarding or suspending public performances which are in progress or which have already been announced, a special authorization must be obtained from the President of the First Instance Court, by an order issued on demand. The President of the First Instance Court may also order, in the same form:

1. Suspension of all manufacture in progress serving the unlawful reproduction of a work;
2. seizure, whatever the day or time, of the copies constituting an unlawful reproduction of a work, whether already manufactured or in the process of manufacture, of the receipts obtained and of copies unlawfully used;
3. seizure of receipts from any reproduction, performance or dissemination, by any means whatsoever, of a work of the mind, carried out in violation of the author's rights."

In relation to software:

The first paragraph of Article L. 332-4 of the CPI provides that infringement seizure "... shall be carried out under an order issued on request by the President of the First Instance Court. The President shall authorize distraint where appropriate".

In connection with related rights:

Article L. 335-1 of the CPI provides that "As soon as offences under Article L. 335-4 ... have been established, the competent police officers may effect seizure of the unlawfully reproduced phonograms and videograms, of the copies and articles manufactured or imported unlawfully and of the equipment specially installed for the purpose of such acts."

In the case of an ordinary law action in chambers, the judge sitting in chambers is competent to order any preventive measures necessary in order to prevent imminent injury that may be caused to the author.

11. In what circumstances may such measures be ordered *inaudita altera parte*?

The only exception to the adversarial principle as far as literary and artistic property is concerned relates to infringement seizure procedure. All the measures provided in Articles L. 332.1 and L. 332.4 of the CPI can therefore be taken *inaudita altera parte* (see Article 493 of the NCPC, which provides that an *ex parte* order is an interim decision taken *inaudita altera parte*).

12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.

Procedures for initiating action

In relation to copyright:

In an infringement seizure procedure, Article L. 332.1 of the CPI provides that copies constituting an unlawful reproduction of the work may be seized "at the request of an author of a work ... or his successors in title" addressed to the police commissioner or the courts in places where there are no police commissioners.

Special authorization by the President of the First Instance Court, through an order issued on demand, must be obtained in the other cases referred to in this Article and for the effective seizure of software (see reply to question 10).

As far as related rights are concerned, the law does not provide for any infringement seizure procedure, therefore, the general rules of law apply. Article L. 335.1 of the CPI, however, allows the owners of related rights, through police officers, to effect seizure of phonograms and videograms unlawfully reproduced or imported, as well as the equipment used to reproduce them.

Time-limits for maintaining provisional measures in force

For copyright: In relation to infringement seizure procedure, Article L. 332.3 of the CPI provides that "If the distrainer fails to submit the matter to the competent court within 30 days of seizure, the lifting of the seizure may be ordered by the President of the First Instance Court, acting in chambers."

In the case of software, Article L. 332-4 provides that infringement seizure shall be null and void failing a writ of summons within 2 weeks of the seizure.

For related rights, no special time-limit for maintaining provisional measures in force is provided in the CPI.

Safeguards to protect the legitimate interests of the defendant

For copyright, the third paragraph of Article L. 332.1 of the CPI provides that in an infringement seizure procedure, "When issuing the orders referred to above [cf. the cases mentioned in the reply to question 10], the President of the First Instance Court may order the person requesting seizure to provide prior adequate security."

The first paragraph of Article L. 332-2 of the CPI gives the distrainee or the garnishee the possibility of requesting the President of the First Instance Court, within 30 days of the report of seizure or of the date of the order referred to in Article L. 332-1, "... to order the lifting of the seizure or to limit its effect or again to authorize resumption of manufacture or of the public performances, under the authority of an administrator appointed as receiver, to hold the proceeds from such manufacture or performance on behalf of the person to whom the work belongs". If he allows the request of the distrainee or garnishee, the President of the First Instance Court, acting in chambers, may order the petitioner to deposit a sum as a guarantee for any damages to which the author might be entitled (second paragraph of Article L. 332.2 of the CPI).

13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

See reply to Part I question 8.

(b) Administrative measures

14. Reply to the above questions in relation to any administrative provisional measures.

Administrative bodies are not empowered to order provisional measures in relation to infringement of copyright or related rights.

Nevertheless, Article L. 331.2 of the CPI on reports on infringement provides that proof of the existence of "... any infringement of the provisions of Books I, II and III ... may be provided by the statement of a sworn agent designated, as appropriate, by the National Centre for Cinematography, by the professional bodies of authors or by the societies [for the collection and distribution of authors' royalties]. Such agents shall be approved by the Minister responsible for culture ...".

Special requirements related to border measures

15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?

Pursuant to Article L. 335-10 of the CPI, the customs administration may, at the written request of an owner of copyright or a neighbouring right, withhold in the course of its inspections goods alleged by him to be infringing that right.

The exhaustion of rights within the European Union invalidates the application of measures to suspend marketing provided that the goods for which the request has been made are not infringing goods or have been offered for sale on the Community market with the consent of the owner of the rights.

16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?

Competent authority: the customs administration, more specifically the *Direction Nationale du Renseignement et des Enquêtes Douanières* (DRNED) (National Directorate of Customs Information and Enquiries).

Requirements for an application: written application by the owner of copyright or a related right, accompanied by proof of his right and a description of the goods allegedly infringing that right (Article L. 335.10 of the CPI). Article R. 335.1 of the CPI fixes the procedures for the request and states that it "may be made prior to the import of the allegedly infringing goods into France. In which case, it is valid for one year and may be renewed".

Requirements relating to the duration of suspension: Article L. 335.10 of the CPI prescribes that the withholding measure requested by the owner of a copyright or a related right ... "shall be lifted as of right where the plaintiff fails, within 10 working days following notification of the withholding of the goods, to prove to the customs services:

- Either that precautionary measures under Article L. 332-1 have been taken;
- or that he has instituted proceedings before the civil court or the court of misdemeanours and has provided the necessary guarantees to cover his liability in the event of the infringement claim being eventually considered unfounded."

Right of inspection and information: in the case of literary and artistic property, the last paragraph of Article L. 335.10 of the CPI provides that "For the purpose of the institution of the legal proceedings referred to in the foregoing paragraph, the plaintiff may require the customs administration to communicate the names and addresses of the sender, the importer and the consignee of the goods withheld, or of the holder thereof, and also the quantity thereof, notwithstanding the provisions of Article 59 bis of the Customs Code concerning the professional secrecy to which officials of the customs administration are bound."

17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?

In the absence of special provisions in the CPI on copyright and related rights, the general rules of law apply.

18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to ex officio action?

See reply to question 17 above.

19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.

See reply to question 17 above.

Criminal procedures

20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.

In the case of literary and artistic property, Article L. 331.1 of the CPI allows the injured party "to institute criminal proceedings under the general rules of law", i.e. before a magistrate's court in the first instance.

21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?

The provisions on literary and artistic property are to be found in Articles L. 335.1 to L. 335.9 of the CPI and Articles 323.1 to 323.7, 410.1 and 411.6 to 411.8 of the new Code of Criminal Procedure.

For copyright: the first paragraph of Article L. 335.2 of the CPI provides that "Any edition of writings, musical compositions, drawings, paintings or other printed or engraved production made in whole or in part contrary to the laws and regulations relating to the property of authors shall constitute an infringement." "The sale, exportation and importation of infringing works" also constitute infringement (third paragraph of Article L. 335.2 of the CPI).

Pursuant to Article L. 335.3 of the CPI "Any reproduction, performance or dissemination of a work of the mind, by any means whatsoever, in violation of the author's rights as defined and regulated by law shall also constitute an infringement. The violation of any of the rights of an author of software as defined in Article L. 122-6 shall also constitute an infringement."

For related rights: Article L. 335.4 of the CPI states that the following are offences: "Any fixation, reproduction, communication or making available to the public, on payment or free of charge, or any telediffusion of a performance, a phonogram, a videogram, or a program made without authorization, where such is required, of the performer, the phonogram or videogram producer or the audiovisual communication enterprise ...".

This Article also imposes penalties for "Any importation or exportation of phonograms or videograms made without the authorization of the producer or the performer, where such is required ..." (second paragraph of Article L. 335-4), and "Failure to pay the remuneration due to the author, the performer or the phonogram or videogram producer in respect of private copying or public communication or of the telediffusion of phonograms ..." (third paragraph of Article L. 335.4).

Other relevant texts are Article 79-1 of Law No. 86-1067 of 30 September 1986 on freedom of communication, implemented by Law No. 92-1336 of 16 December 1992 on penalties for unlawfully receiving broadcast programmes defined in the following terms: "the manufacture, importation for sale or rental, offering for sale, possessing with a view to selling, or the installation of equipment, materials, devices or instruments wholly or partly designed for the unlawful receiving of broadcast programmes when these programmes are restricted to a specified audience that has access to them subject to remuneration paid to the person operating the service".

Articles 323.1 to 7 of the new Criminal Code punish infringement of "automatic data processing systems". The offences covered by these Articles are "the fact of unlawfully accessing or remaining in all or part of an automatic data processing system, the fact of hindering or altering the operation of such a system or the fact of unlawfully entering data into such a system or unlawfully modifying or deleting the data contained therein".

According to Article 323.7 "attempts to carry out the offences specified in Articles 323.1 to 323.3 shall be subject to the same penalties".

Lastly, Article 410 of the NCP includes the essential elements of France's cultural heritage among the country's fundamental interests. Violations of these interests in the form of furnishing objects, documents, computer data ... to a foreign power incurs the criminal penalties laid down in Articles 411.6 to 8 of the NCP.

22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?

The public prosecutor's office may initiate criminal proceedings. If there has been an infringement seizure, a copy of the report on the seizure is transmitted to the prosecuting authorities and the public prosecutor's office may decide on its own initiative to institute proceedings against the infringer before the criminal courts. In practice, the public prosecutor's office is party to the infringement proceedings if the author or his successors in title brings the matter before the criminal courts, by becoming a plaintiff or by a direct summons addressed to the infringer.

23. Do private persons have standing to initiate criminal proceedings and, if so, who?

Pursuant to the general rules of law, owners of rights and their successors in title may initiate criminal proceedings. In addition, the second paragraph of Article L. 321-1 of the CPI allows duly established societies for the collection and distribution of authors' royalties and related rights to take legal action to defend the rights for which they are responsible under their statutes. The same applies to professional associations (second paragraph of Article L. 331.1 of the CPI).

24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:

In the case of literary and artistic property rights:

- Imprisonment

Article L. 335.2 of the CPI makes "Infringement in France of works published in France or abroad" and "The sale, exportation and importation of infringing works" punishable by a two-year prison term and the fine specified below.

Article 335.4 of the CPI imposes the same penalties for "Any fixation, reproduction, communication or making available to the public, on payment or free of charge, or any telediffusion of a performance, a phonogram, a videogram or a program made without authorization, where such is required, of the performer, the phonogram or videogram producer or the audiovisual communication enterprise ...".

Article L. 335-9 of the CPI doubles the penalties if the offences defined in Articles L. 335-2 to L. 335-4 are repeated or if the offender has been contractually bound to the injured party.

Unlawfully accessing or remaining in all or part of an automatic data processing system is punishable by a one-year term of imprisonment (Article 323.1 of the NCP). Hindering or altering the operation of such a system or unlawfully entering data, unlawfully deleting or modifying the data contained therein, are punishable by a three-year prison term (Articles 323.2 and 3 of the NCP). Article 323.4 of the NCP provides that "Participation in a group set up or an understanding reached for the purpose of preparing one or more of the offences specified in Articles 323.1 to 323.3, if one or more material facts have occurred, is punishable by the same penalties provided for the offence itself or for the offence most severely punished."

- **Monetary fines**

In the case of literary and artistic property:

The aforementioned offences concerning the production or dissemination of works, phonograms or videograms, are punishable by a fine (combined with the term of imprisonment) of F 1,000,000.

The same fine is imposed in the case of "Failure to pay the remuneration due to the author, the performer or phonogram or videogram producer in respect of private copying or public communication or of the telediffusion of phonograms ..." (third paragraph of Article L. 335-4 of the CPI).

Pursuant to Article L. 335-9 of the CPI, these penalties are doubled in the event of repetition.

Article L. 335-8 of the CPI provides for the criminal liability of legal persons for the aforementioned offences, and refers to the new Criminal Code. According to Article 131-38 of this Code, the maximum fine imposed on legal persons is an amount corresponding to "five times that specified for natural persons under the law that punishes the offence", in this particular case F 5,000,000.

Unlawful access to an automatic data processing system is subject to a fine of F 100,000, in addition to a term of imprisonment (Article 323-1 of the NCP). Hindering the operation or unlawful alteration of the system's operation, or the unlawful entry, deletion or modification of data, are punishable by a fine of F 300,000, combined with a term of imprisonment (Articles 323-2 and 3 of the NCP). Article 323-4 referred to above imposes the same penalties for participating in a group of "hackers". Article 323-6 of the NCP provides for the criminal liability of legal persons by referring to Articles 131-38 and 131-39 of the NCP. The fine applicable to legal persons therefore varies from F 500,000 to F 1,500,000 depending on the offence committed.

- **Seizure, forfeiture and destruction of infringing goods and materials and implements for their production**

In the case of literary and artistic property:

Pursuant to Articles L. 335-6 and L. 335-7 of the CPI, if there is a conviction "... the court may order confiscation of all or part of the proceeds obtained by reason of the infringement and confiscation of all phonograms, videograms, articles and copies that are infringing or have been unlawfully reproduced and of the equipment specifically installed for the purpose of committing the offence" (first paragraph of Article L. 335-6 of the CPI).

The receipts, the articles and the equipment confiscated are handed to the victim or his successors in title to compensate them, without prejudice to payment of an indemnity (Article L. 335-7 of the CPI).

With regard to infringement of automated databanks or databases by natural persons, Article 323-5 of the NCP provides for "the confiscation of the object used or to be used to commit the offence or the object that is the result, with the exception of objects liable to be restored".

- **Other**

In the case of literary and artistic property:

The second paragraph of Article L. 335-6 of the CPI states that the court may order, at the cost of the convicted person, the posting of the judgement, and its publication in full or as extracts in such newspapers as it may designate, without the costs of such publication exceeding the amount of the fine incurred.

Article L. 335-5 of the CPI provides that "... the court may order the total or partial, permanent or temporary closure, for a period not exceeding five years, of the establishment that has served for the commission of the offence" and the accompanying measures, at the expense of the person convicted, if staff are dismissed.

With regard to the criminal liability of legal persons, Article L. 335-8 of the CPI refers to Article 131-39 of the Criminal Code. The latter states that legal persons other than public law legal persons or professional associations are liable to one or more of the following penalties, combined with the confiscation, publication and closure referred to above:

- A ban, either permanently or for a period of five years, on directly or indirectly exercising one or more professional or social activities;
- probation for a maximum period of five years;
- exclusion from government procurement, either permanently or for a maximum period of five years;
- ban on making a public issue, either permanently or for a maximum period of five years;
- ban on issuing cheques (subject to certain limitations) or using credit cards, for a maximum period of five years.

In the case of infringement of an automatic data processing system, Article 323-5 of the new Criminal Code provides that natural persons who have committed one of the aforementioned offences should be subject to the following penalties in addition to the penalties applicable to legal persons (including confiscation of the articles or equipment, publication of the judgement and closure of one or more of the company's establishments):

- Deprivation of civic, civil and family rights for a maximum period of five years;
- a ban on holding public office or exercising the professional or social activity in which or in the course of which the offence was committed, for a maximum period of five years.

Article 323-6 of the NCP refers to Article 131-39 in respect of penalties other than fines applicable to legal persons.

25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.

See reply to Part I question 8.