

**CHECKLIST OF ISSUES ON ENFORCEMENT<sup>1</sup>**

Responses from Swaziland

**Civil and Administrative Procedures and Remedies**

(a) *Civil judicial procedures and remedies*

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

The High Court and the Supreme Court (Court of Appeal).

**2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the court by the right holder?**

Owners of the intellectual property rights may be represented by intellectual property practitioners. There are no mandatory personal appearances before the court by the right holder.

**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 that lies within its control?**

Judiciary authorities are empowered to order an opposing party to produce evidence by the relevant legislation.

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

All intellectual property matters are treated with a high degree of confidentiality.

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

- **injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**
- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

The legal system of Swaziland is the Common Law system which has absorbed certain principles of Roman Dutch Law. Matters relating to evidence, injunctions, damages and other remedies are dealt with under the general law of civil procedure for all civil wrongs.

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<sup>1</sup> Document IP/C/5.

- 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 of services found to be infringing and of their channels of distribution?**

The legislation does not provide authority to Judicial Authorities to order infringers to inform the right holder of the identity of third parties involved in the production of infringing goods.

- 7. Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?**

Defendants wrongfully enjoined can raise a special plea of mis-joinder. A successful invocation of this plea results in the dismissal of proceedings against the Defendants who have been wrongfully joined. Public authorities and/or officials are liable in the same way as non-State actors.

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

The length of pre-trial proceedings is primarily regulated by the rules of court. The rules prescribe the time limits within which court process must be filed. The length of proceedings is also affected by the backlog of pending cases as well as the availability of judges.

The cost of proceedings is governed by a tariff of fees which is contained in the rules. However, the tariff of fees does not reflect the actual cost of proceedings. There are two reasons for this. Firstly, the tariff has not been reviewed since 1990. Secondly, the fees in the tariff are subject to taxation by the taxing master.

There is no available data on the actual duration of proceedings and the costs thereof. There has been no case involving the infringement of intellectual property rights.

*(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 law of civil procedure is silent on administrative procedures and remedies applicable to enforcement of intellectual property rights.

### **Provisional Measures**

*(a) Judicial measures*

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

Provisional measures may broadly speaking be divided into two categories: civil and criminal. The criminal provisional measure is the search of the premises of the alleged infringer and seizure of alleged infringing goods.

A civil provisional measure is the Anton Piller Order which is an interim order that aims to preserve evidence.

The legal basis for the court's authority to order provisional measures is the common law, the Criminal Procedure and Evidence Act as well as the Merchandise Marks Act.

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

The afore-mentioned measures are ordered *inaudita altera parte* where there is a real and well-founded apprehension that the alleged infringing goods, the equipment used to manufacture them and other records of the alleged infringing business activities may be hidden or destroyed or in some other manner be spirited away by the time the case comes to court.

**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.**

A search and seizure order is initiated by approaching a magistrate for a search warrant authorizing the search and seizure. The magistrate will issue the warrant if he/she is satisfied that there are reasonable grounds for believing that there are infringing goods or other records in the possession of any person or at any premises.

Usually the seized goods remain in the custody of law enforcement agents until criminal proceedings have been concluded. There are no specific time limits within which criminal proceedings have to be concluded. However, the criminal trial has to commence and conclude within a reasonable time.

The person from whom the goods were seized can protect their legitimate interests by approaching the High Court and challenging the issuing of the search warrant. The High Court has the power to set aside the issuing of the search warrant and ordering the return of the seized goods.

An Anton Pillar Order is sought by way of an *inaudita altera parte in camera*. The order shall stipulate that any of the acts to be performed under it ought to be performed by the deputy sheriff under the supervision of applicant's attorney and a "supervising attorney". The order should also provide that the sheriff keeps in their possession the material pending directions by the court.

A judicial officer before whom an application for an Anton Piller Order is made has to be vigilant so as to protect the respondent's legitimate interests. He or she has to weigh the potential harm that will be suffered by the respondent if the order is granted against the potential harm to the applicant if relief is refused. The order granted should not be more onerous than is necessary to protect the applicant's interests.

An Anton Pillar order is an *interim* order. The respondent is entitled, as soon as he or she is aware of the existence, to approach the Court for relief setting aside the Anton Piller order.

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

The length of the pre-trial proceedings is primarily regulated by rules of the court. The rules prescribe the time limits within which court process must be filed. The length of proceedings is also affected by the backlog of pending cases as well as the availability of judges.

The cost of the proceedings is governed by a tariff of fees which is contained in the rules. However, the tariff of fees does not reflect the actual cost of proceedings. There are two reasons for this. Firstly, the tariff has not been reviewed since 1990. Secondly, the fees in the tariff are subject to taxation by the taxing master.

There is no available data on the actual duration of proceedings and the costs thereof. There has been no case involving the infringement of intellectual property rights.

(b) *Administrative procedures*

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

The administrative provisional measures, if any, should be in the legislation regulating Patents, Designs and Copyright. The law of civil procedure is silent on this topic.

**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?**

All materials, machinery and goods that are patented in Swaziland.

**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?**

Not applicable in our legislations.

**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?**

Not applicable in our legislations.

**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?**

Not applicable in our legislations.

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

Not applicable in our legislations.

## **Criminal Procedures**

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

High Court and the Supreme Court (Court of Appeal).

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

There are no provisions for criminal procedures. However, a person convicted of an offence of infringement can be fined or be sentenced to a term of imprisonment or both.

**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?**

Our legislation does not provide for criminal procedures yet.

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

Our legislation does not provide for criminal procedures yet.

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

- **imprisonment;**
- **monetary fines;**
- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production;**
- **other.**

Any person who is convicted of an offence under the Trademarks Act shall be liable to a fine of E2000 (\$285) or imprisonment for six months or both. In respect of patents, any person who performs as defined in sub-section (1) shall upon conviction be guilty of an offence punishable by a fine not exceeding E10, 000 (\$1,429) or imprisonment for a term not exceeding five years or both. In terms of the Merchandise Marks Act 24/1937, a person convicted of any offences of infringements, shall be liable to a fine not exceeding E400 (\$57), or, in default of payment thereof to imprisonment not exceeding two years, or to both such fine and imprisonment.

**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.**

No provision in the legislation for the length and costs of proceedings.

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