

Italy

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A. THE LEGAL CONTEXT

Injunctive relief made its first appearance in Italian legislative texts with the adoption of the 1939 Law on Patents, which empowered a court dealing with an infringement action to issue, on request of the interested party and, at court's discretion, upon payment of a bond, an interim¹ injunction preventing the fabrication and use of the patented invention for the time needed to reach a decision on the merits and for such decision to become final.² For a long time, this has been the only provision mentioning injunctive relief in the Law on Patents.

Towards the end of the twentieth century, due to several factors, this started to change. Firstly, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, establishing an obligation for the member countries to make available provisional and final injunctive relief (see Chapter III of TRIPS). Secondly, the codification of the Italian laws on industrial property, which brought a unitary set of rules on remedies, including preliminary³ and final injunctions.⁴ Thirdly, harmonization thanks to European Union law, which approached the matter vertically, with the rules on remedies included in the community trademark⁵ and design⁶ regulations, and horizontally, with the Enforcement Directive. Fourthly, the revival of the project of a unitary European patent, which led to the Unified Patent Court

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¹ In the following, We will use the adjective “preliminary” for injunctions issued at the end of a summary proceeding; “interim” for injunctions issued during the proceeding on the merits; “final” for injunctions issued at the end of the proceeding on the merits.

² See Art. 83 of the 1939 Law on Patents. Interim injunctions could not be supplemented with penalties for non-compliance: see, e.g., *Eurofarmaco v. Glaxo* (App. Roma 1996).

³ Art. 131 of the Industrial Property Code enacted by the Legislative Decree no. 30 of 2005 (IPC).

⁴ Art. 124 IPC.

⁵ Art. 130 and Art. 131 of the Regulation on the EU trade mark (EUTMR).

⁶ Art. 89 and Art. 90 of the Regulation on Community Designs (CDR).

Agreement (UPCA) containing rules on both provisional⁷ and permanent⁸ injunctions.⁹

1. *Preliminary and Interim Injunctions*

Until the reform of the 1939 Law on Patents prompted by the TRIPS Agreement, it remained uncertain whether injunctive relief could be obtained, as an urgent and provisional measure, before starting a proceeding on the merits of the case.

According to one view, the answer should have been positive, considering that a general provision of civil procedure law allowed the judiciary to grant any order that, given the circumstances, appeared appropriate to anticipate the effects of the decision on the merits of the case, when the right to be protected was threatened by an imminent and irreparable prejudice.¹⁰

Others came to the opposite conclusion¹¹ on the basis of the residual nature of this general provision, which made it inapplicable whenever a specific remedy was available. As the Law on Patents expressly provided for interim injunctions, which were meant to deal urgently with the same risk but according to different rules, allowing preliminary injunctions seemed to run against the intention of the legislator.¹² Interim injunctions had to be issued by a panel of judges,¹³ not by a single judge. In their case, the start of the infringement action was a prerequisite for the order to be issued,¹⁴ and not just a condition to prolong its effects; they were issued by a decision of the court provisionally executive and susceptible of being immediately appealed in front of the Court of Appeal, not by an order of the examining judge.¹⁵ Their effects lasted until the decision on the merits of the case became final, unless revoked by the same,¹⁶ and not for the term assigned to the rightsholder to institute a proceeding on the merits of the case.

⁷ Art. 62 of the Unitary Patent Court Agreement (UPCA).

⁸ Art. 63 UPCA.

⁹ Art. 1 of the law no. 214/2016 authorized the president of the Italian republic to ratify the UPCA. Art. 2 of the same law gave full execution to the UPCA starting from its entering into force.

¹⁰ See Ascarelli 1960, 635; Frigani 1974, 364, 394 ff.; *Alaska v. Sammontana* (Trib. Firenze 1993), arguing that preliminary injunctive relief was admissible if, in view of the circumstances of the case, the other preliminary measures provided for by the 1939 Law on Patents, namely description and seizure of infringing goods and of equipment used in their production, would have been inadequate.

¹¹ Back in the mid-1980s, there were still decisions denying preliminary injunctions, although they were in the minority. See, e.g., *Matessi v. Alumina* (Pret. Milano 1986).

¹² See *Sifa Sitzfabrik v. Miotto* (T. Milano 1995) and *W. R. Grace & Co. v. Foreco* (Trib. Milano 1994).

¹³ See *W. R. Grace & Co. v. Foreco* (Trib. Milano 1994).

¹⁴ See *Sifa Sitzfabrik v. Miotto* (Trib. Milano 1995).

¹⁵ See *id.*; Greco & Vercellone 1968, 370 f.

¹⁶ See *id.*

For all these reasons, the opinion opposing preliminary injunctions went well beyond the expression of mere formalism. On the contrary, it seemed to articulate a certain degree of resistance against the idea of making available a remedy with potentially disruptive effects for the defendant through a summary proceeding and by way of a provisional order.

The problem of preliminary injunctions was still open in the mid-1990s, although the reform of civil procedure laws regarding precautionary proceedings in general offered new arguments in favour of their availability.¹⁷

Then, almost sixty years after its enactment, the Law on Patents was amended to include preliminary injunctions, in connection with the implementation of the TRIPS Agreement.¹⁸ Shortly thereafter, their regime was innovated with the enactment of the Industrial Property Code,¹⁹ which established that a preliminary injunction continues to produce effects even if the patentee does not institute a proceeding on the merits of the case.²⁰ While it remains uncertain whether this rule is compatible with international and European obligations, it has significantly expanded the practical relevance of preliminary measures.

2. Final Injunctions

Despite the lack of legislative recognition, which happened only recently, little doubt has ever existed on the capacity of courts to issue final injunctions. On the one hand, the exclusive nature of intellectual property (IP) rights²¹ seemed to call for a remedy specifically aimed at preventing the engaging in,²² continuation or repetition of infringing acts. On the other hand, it would have made little sense to let courts issue preliminary or interlocutory orders that could not be confirmed at the end of the trial.²³ At the end of the day, the law already provided for remedies clearly aimed at indirectly preventing further infringements. In particular, infringing goods, as well as means used to make them, could be assigned to the patentee or seized until the expiration of the patent;²⁴ an order to pay damages could also include the obligation to pay a fixed amount of money for post-decision infringements or in case of delay in complying with the decision.²⁵ Against this background, it did not seem

¹⁷ See Spolidoro 2005, 241. Not all decisions confirm this opinion, however: cf. *W. R. Grace & Co. v. Foreco* (Trib. Milano 1994) for the opposite view.

¹⁸ See Art. 26 of the Legislative Decree no. 198 of 19 March 1996.

¹⁹ See Art. 132(4) IPC.

²⁰ See Section D.1.

²¹ See Frignani 1974, 310 ff., 437, ff. 443, who mentions a decision of the Supreme Court of Cassation dated 3 October 1968, n. 3073, that connects the availability of injunctive relief to the exclusive nature of IP rights (in this case a trademark); Vanzetti 2010, 28.

²² See Frignani 1974, 317–18 and 430–31.

²³ See *id.*, 457; Vanzetti 2010, 28.

²⁴ See Art. 85 of the 1939 Law on Patents.

²⁵ See Art. 86 of *id.*

particularly hard to imply a power of the court to issue final injunctions²⁶ and to safeguard their effectiveness through the provision of *astreintes*.²⁷

This traditional view assumes that injunctive relief – i.e. an order of the court enjoining the defendant from accomplishing, continuing or repeating an act that infringes a claimant’s IP right – can be distinguished in some material way from a mere declaratory relief – i.e. a declaration of the court that an act prepared or already committed by the defendant infringes a claimant’s IP right. This assumption was challenged under the pre-2005 laws but also thereafter.²⁸ On the one hand, it has been observed that a finding of infringement necessarily implies an obligation not to accomplish, continue or repeat the act that has been judged unlawful.²⁹ On the other hand, it has been pointed out that a judicial order to stop and never again repeat an unlawful act does not produce effects that go beyond those of a mere finding of infringement, apart from the fact that it concerns future acts instead of past ones.³⁰ The command issued by the court does not differ from the one already contained in the law, apart from the fact that it is addressed to a specific entity.³¹ Compliance with the court’s injunctive order depends on the infringer’s voluntary cooperation, no different from compliance with the legislative command on which the finding of infringement and the injunctive order are based. If the infringer does not comply voluntarily, the legal system does not provide for any legal means to enforce the injunction and impose compliance on the wrongdoer. Penalties are a separate, and discretionary, remedy; moreover, they can induce compliance by making it more convenient than infringement³² but cannot avoid disobedience as such.³³ Criminal sanctions should be considered as inappropriate in case of mere disobedience to the court’s order and, at any rate, the wording of current laws allows their application – at the most – only in case of fraudulent behaviour.³⁴

This opinion has never been challenged openly. However, there seems to be a general understanding reflected in the current legislative provisions³⁵ that injunctive relief is a remedy that goes beyond a mere declaration of infringement and has to be

²⁶ See, e.g., *Anzolin v. Officina Meccanica MM* (Trib. Vicenza 1990), and the comment published with the decision for further references.

²⁷ See *Ascarelli* 1960, 256, 635. See also, e.g., *Ing. Bono v. Ialchi* (Trib. Milano 1994). Penalties could be issued only to reinforce a final injunction, not an interlocutory or preliminary one: see *Spolidoro* 1982, 242.

²⁸ See *Spolidoro* 1982, 41 ff.; *Spolidoro* 2008a, 174 ff; see also, e.g., *Sassi Arredamenti v. Gemelli Gualtieri* (Trib. Reggio Emilia 1994).

²⁹ See *Spolidoro* 1982, 31–33.

³⁰ See *La Bruciata v. Podere della Bruciata* (App. Firenze 2017), which qualifies as “declaratory” the judgment issuing an injunction.

³¹ *Spolidoro* 1982, 34.

³² The amount to be paid is determined at the discretion of the court (*Scuffi* 2009, 544); however, it should be consistent with the aim of deterring further infringements (*Ricolfi* 2005, 101–02).

³³ *Spolidoro* 2008a, 179.

³⁴ *Id.*, 182–88.

³⁵ Final injunctions have entered the legislative texts with the enactment of the IPC (see Art. 124).

expressly sought by the claimant.³⁶ Admittedly, injunctive orders cannot be enforced against the will of their addressees. At the same time, the role of penalties is emphasized, as well as the availability of criminal sanctions. Indeed, there have been cases in which criminal courts punished non-compliance with injunctions aimed at protecting intellectual property rights, based on the assumption that these are orders protecting some kind of “property” as required by Article 388 of the Criminal Code.³⁷ Recently, Article 9 of the legislative decree on 11 May 2018 no. 63 inserted a new specific provision in Article 388 of the Criminal Code to expressly punish as a criminal offence the violation of injunctive orders issued by civil courts in disputes regarding intellectual property rights. As the only requirement for the criminal offence to arise is that disobedience be intentional, it seems that this rule offers a new argument in favour of the traditional view already reported.

As mentioned, injunctive relief is perceived as extending the effects of the finding of infringement, which by nature concerns acts that occurred before the judgment, to future acts of the same kind performed by the same defendant. Disobedience to the court’s order leads to the application of penalties and/or grant of damages without considering anew the question about infringement.³⁸ As the Supreme Court of Cassation affirmed,³⁹ the authority of *res judicata* also covers the final injunction, with the consequence that the court addressed with a request for penalties or damages should only consider whether the defendant engaged in activities that are substantially the same as those already prohibited.⁴⁰

B. REQUIREMENTS FOR THE GRANT OF INJUNCTIVE RELIEF

1. Preliminary and Interim Injunctions

In general, preliminary and interlocutory injunctions can be granted if two requirements are fulfilled: *fumus boni iuris*, i.e. if success on the merit of the case appears

³⁶ An injunction granted without having been solicited by the claimant should be considered *ultra petitem* according to Frignani 1974, 311; see also Rovati 2019, 777.

³⁷ O. A. and V. M. (Cass. pen. 1997); K. R. (Cass. pen. 2015); *Kauber Rodolfo* (Trib. Milano sez. pen. 2012). Such cases have been extremely rare (Spolidoro 2005, 242; Scuffi 2009, 545; Di Cataldo 2012, 69). For an attempt to reduce the impact of this case law in the field of intellectual property, see Spolidoro 2008b, 171 ff.

³⁸ See Scuffi 2009, 542–43.

³⁹ And previously *Alessandro Zegna v. Ermenegildo Zegna* (App. Torino 1989), which held that a final injunction issued in an earlier proceeding covers later infringements of the same trademark, and of the same kind, performed by the same defendant.

⁴⁰ See *Metra v. Indinvest* (Cass. 1995) and *Scifoni Renata v. Scifoni Fratelli* (Cass. 2008). The relevance of this principle should not be overestimated. As A. Vanzetti 2007, 170, points out, there remains room for disputes between the parties regarding the interference of new allegedly infringing acts with the content of the injunction. An example is offered by *Lodolo v. Netafim* (Trib. Bologna 2017), in which the exception of *res judicata* was disregarded because it remained unclear whether the products were the same as those previously deemed non-infringing. It is interesting to note that, even if they had been the same, a new trial would have been necessary because the parties of the two proceedings were not the same, as they involved two different distributors of goods originating from the same producer, who was party only to the first proceeding.

likely, and *periculum in mora*, i.e. risk that delaying relief until the end of the trial would cause irreparable harm to the claimant.

In patent infringement cases, the patentee profits from the rule established by Article 121(1) of the Industrial Property Code (IPC), which places on the alleged infringer the burden of proving that the patent is invalid, if the wish is to offer such a defence.⁴¹ Over the years, courts have become increasingly inclined to imply from this rule a rebuttable presumption of validity of the patent,⁴² particularly after the introduction in 2008 of substantive examination of national applications,⁴³ which approximated the perceived “strength” of titles granted by the Italian IP office to that traditionally attributed to European patents.⁴⁴ Such presumption can be enjoyed also in preliminary and interlocutory proceedings,⁴⁵ as long as they pertain to patents already examined and granted.⁴⁶

While it is certainly true that the allocation of the burden of proof operated by Article 121(1) of the IPC makes more sense after the reform of examination procedures,⁴⁷ it must be stressed that the impact of this reform on the quality of patents granted by our national IP office should not be overestimated. National applications are examined on the basis of a search report and opinion outsourced to the European Patent Office, which finds itself in the difficult position of having to deal with patent applications written in a language other than its official working languages. This, in turn, seems to lead not infrequently to misunderstandings that put the prior art search and evaluation in question. Moreover, patents tend to be granted despite a negative report of the European Patent Office (EPO) examiner if the applicant provides reasonable counterarguments, without further inquiries from the national office. All this considered, courts might be advised to apply Article 121(1) of the IPC *cum grano salis*, particularly in preliminary and interim proceedings,

⁴¹ A court seized with an action for infringement can adjudicate upon the plea as to alleged invalidity of the patent, which can be raised by the defendant either by way of an action or a plea in objection. Although the court does not have the power to declare the invalidity *ex officio*, it can prompt the intervention of the public prosecutor who can promote the action for invalidation. See *Buonvicino v. MISE* (Cass. 2020).

⁴² On the link between the two see the editorial comment to *Salus Researches v. Allen & Hambury's Limited* (Trib. Roma 1991).

⁴³ See Di Fazio 2019, 726–29, for a summary of the opinions expressed specially before the introduction of substantive examination.

⁴⁴ Opposition might play a role, i.e. reducing the strength of the presumption, only for European patents, considering that national patents cannot be opposed. See, e.g., *Innovapac v. Barberan* (Trib. Bologna 2008), which denied a preliminary injunction mentioning *obiter* that the European patent actioned by the claimant had been opposed by the defendant.

⁴⁵ See *Signature v. Axel Weinbrecht* (Trib. Milano 2019). Obviously, the same reasoning does not apply to patents granted without substantive examination (Di Cataldo 2012, 16–17), in respect of which the court has to make a *prima facie* assessment of validity in case of objection by the alleged infringer. This seems to be adequately reflected in the relevant case law: see for instance *Unknown v. Selex* (Trib. Roma 2017).

⁴⁶ See *Hair Products v. Diffitalia* (Trib. Napoli 2017).

⁴⁷ See Di Cataldo 2012, 16–18; Vanzetti & Di Cataldo 2018, 536, 551–52.

considering the disruptive effects that an injunction might have on the defendant's business. In practice, objective elements offered by the alleged infringer that lead to doubt of the validity of the actioned patent should normally be considered sufficient to overcome the presumption of validity within preliminary and interlocutory proceedings, particularly if the prosecution history shows that such elements have not been considered by the EPO examiner or if the reply of the patentee to the objections raised by the examiner does not appear entirely persuasive.

In this connection, it should be considered that validity and infringement are typically assessed with the support of a technical expert appointed by the court, who is requested to provide an opinion on the case after having examined the documents filed by the experts appointed by the parties and heard their arguments. Until 2010 it was unclear, and therefore disputed, whether this could also happen in preliminary and interim proceedings, considering that the law was silent on this point and that the implicit, inevitable delays appeared at odds with the intrinsic urgency characterizing these proceedings. Since 2010, Article 132(5) of the IPC expressly allows courts to order a summary technical evaluation in all precautionary proceedings. Generally, courts tend to make use of this power, which helps them avoid a dismissal of cases that would otherwise appear too complex from a technical point of view to be decided without a full trial. This is not always the case though. Despite the legislative clarification, some courts have recently dismissed claims for injunctive relief considering the case unfit for a summary evaluation.⁴⁸

In this respect it should be considered that preliminary and interim injunctions, by essence, have to be granted on the basis of a summary evaluation of the case. The risk of false positives or negatives is unavoidable and, arguably, greater than in the case of final injunctions. This leads to a question, which is sometimes reflected in the relevant case law:⁴⁹ Does the gravity of the consequences for the defendant of a preliminary or interim injunction authorize the court to adopt a more rigorous approach in the evaluation of the *fumus boni iuris*? It is probably a futile question, as a prudent judge will never grant a provisional or interim injunction with potentially disruptive effects on the defendant's business unless thoroughly convinced as to the prima facie validity and infringement of the relevant patent. Whether we should call this a flexibility or not seems scarcely relevant. As to its substance, it seems better to have it than not.

A dispute exists on the other precondition already mentioned, namely, *periculum in mora*, i.e. risk that delaying injunctive relief until the end of the trial would cause

⁴⁸ See *Hair Products v. Diffitalia* (Trib. Napoli 2017); *SFC Intec v. Unifix SWG* (Trib. Genova 2014), both regarding disputes in which the defendant also held a patent, or a patent application, covering the allegedly infringing goods. In its reasoning, the court in *SFC Intec v. Unifix SWG* (Trib. Genova 2014) mentions the protection of third parties' interests (such as consumers and free competition) as a reason to avoid a summary decision that would have involved a complex and lengthy technical assessment of the case.

⁴⁹ See, for instance, *SFC Intec v. Unifix* (Trib. Genova 2014).

the patentee a harm that could not be repaired by a judgment to pay damages and disgorge profits. *Periculum in mora* is required by Article 700 of the Code of Civil Procedure (CPC), which was invoked – with mixed fortunes⁵⁰ – to claim preliminary injunctions before the amendment of the Law on Patents.⁵¹ As the specific provisions introduced in the Law on Patents and then confirmed in the Industrial Property Code (IPC) do not mention this requirement, some argue that it is no longer in the law⁵² and, at any rate, should be considered as running against the monopolistic nature of intellectual property rights. According to this view, courts cannot tolerate an ongoing infringement for the time needed to reach a decision on the merits of the case, which can take up to three years. Others highlight that preliminary injunctions have the same precautionary nature of orders issued under Article 700 CPC and, on this basis, argue that they should be made conditional on the same requirement of *periculum in mora*, which should be considered as applicable by analogy.⁵³

Courts tend to sit in between. A considerable number of decisions consider *periculum in mora* irrelevant or, at any rate, *in re ipsa*, i.e. a natural consequence of infringement that should be taken for granted.⁵⁴ However, a more nuanced approach seems to be gaining ground. On the one hand, courts frequently claim that *periculum in mora* needs to exist. On the other hand, they are ready to accept that it can be presumed *juris tantum*, considering that damages caused by a violation of an exclusive right are not easy to calculate and repair.⁵⁵ The burden of proof returns to the claimant if there are reasons to believe that during the time needed to reach a decision on the merits the patentee will not suffer any (additional) prejudice that cannot be repaired *ex post*. This is the case, according to some decisions, if the parties are not operative in the same geographic area,⁵⁶ or if infringing activity stopped, particularly if desistence is accompanied by a pledge not to use the invention in the wake of the proceedings on the merits⁵⁷ or if use of

⁵⁰ See above, Section A.1.

⁵¹ See above, Section A.1.

⁵² *Periculum in mora* is required by Art. 700 of the Code of Civil Procedure, which was used to issue preliminary injunctions before the introduction of specific provisions in the IPC.

⁵³ See *Job Joint v. Lectra* (Trib. Milano 1996).

⁵⁴ See Frignani 1974, 357 See, e.g., *Millauro v. Betamed* (Trib. Roma 2012); *IMT v. TVA* (App. Milano 1989), considering use of the invention to make and sell infringing products incompatible with the exclusive nature of the patentee's right.

⁵⁵ See, e.g., *Signature v. Axel Weinbrecht* (Trib. Milano 2019); *Fiat v. Great Wall* (Trib. Torino 2008), in a case regarding threatened infringement of a registered community design; *4B-Four Bind v. KGS* (Trib. Torino 2013).

⁵⁶ See *Unknown v. Pref.Edi.L. I and II* (Trib. Catania 2005 and 2006) and (probably, as the description of the case appears rather deficient) *SFC Intex v. Unifix WG* (Trib. Genova 2014).

⁵⁷ A declaration of the defendant, stating that production and/or distribution stopped and will not start again, has been considered insufficient in *Signature v. Axel Weinbrecht* (Trib. Milano 2019); *La Marzocco v. Nuova Simonelli* (Trib. Ancona 2018); *Sisvel v. ZTE* (Trib. Torino 2016), which quotes the decision taken by the ECJ on 14 December 2006 in *Nokia v. Joacim Wärdeell* (ECJ 2006), without giving weight to the fact that it concerns Community trademarks and

the invention cannot restart easily,⁵⁸ for instance due to redesign of the allegedly infringing device.⁵⁹ Also, if the patentee delayed action without an objective justification,⁶⁰ it could be argued that no serious harm is being suffered⁶¹ or the consequences of the infringement on the market have already become irreversible.⁶²

A denial of precautionary injunctive relief based on an evaluation of the seriousness of the harm or the effects of infringement in the market postulates the idea that the interest of the patentee to immediately stop an ongoing infringing activity does not enjoy absolute protection. This is far from obvious, considering the exclusive nature of patent rights, and shows a tendency to embed in the test for *periculum in mora* an assessment of the hardships that the patentee and the alleged infringer would encounter should the injunction be denied or granted. In fact, the relatively few decisions that dismissed patentees' claims on this ground usually refer to the invasiveness of the requested remedy, accepting therefore as relevant, and sometimes pre-eminent, the interest of the alleged infringer to carry on its business.⁶³

The same tendency seems to inspire another small group of decisions that denied precautionary injunctive relief on the basis of a (supposed) mere economic nature of

might reflect their specificities; *Plein Air v. Providus* (Trib. Milano 2015), in respect of an interim injunction. On the contrary, a formal pledge undertaken by the legal representative of the defendant has been accepted as relevant to deny *periculum in mora* in *Alaska v. Sarmontana* (Trib. Firenze 1993) and in *Job Joint v. Lectra* (Trib. Milano 1996). Criticism has been expressed by Scuffi 2009, 364, considering that the pledge can be broken by the defendant if it has not led to a settlement or a court decision.

⁵⁸ Desistance from commercialization of the allegedly infringing goods does not prevent the grant of provisional injunctions: see *Cartier v. Iannetti* (Trib. Roma 2017); *BMW v. Cassini* (Trib. Bologna 2008), which considered insufficient a withdrawal from eBay of offers regarding the allegedly infringing goods. Desistance due to the suspension or revocation of the required ministerial authorization to market a pharmaceutical product was not considered decisive to deny an interim injunction in *Pieffe v. Janssen-Cilag* (Trib. Monza 1995), considering that disobedience to an injunction would have led to consequences more serious than the marketing of the product without the required ministerial authorization.

⁵⁹ *Biesse v. Macotec* (Trib. Milano 2014). In this case, the court considered relevant the fact that redesign required relevant planning and financial efforts. Therefore, the court considered sufficient to deny interim injunctive relief a mere undertaking (without penalty) of the defendant that infringement would not occur again. An interim injunction was granted despite redesign of the infringing machine in *Stefanati v. Dominioni* (T. Genova 1993) in view of the ongoing state of belligerency of the parties and the allegation by the patentee that the redesigned machine should be considered as infringing.

⁶⁰ Dismissals based on delayed action are not frequent. Usually, the idea prevails that the right-holder should be allowed some time to ponder over the case before taking action. For instance, in *Nestec v. Casa del Caffè Vergnano* (Trib. Torino 2012), nine months of delay was deemed acceptable given the complexity of the case.

⁶¹ See *Audi v. Pneusgarda* (Trib. Milano 2012). According to Spolidoro 2005, 244–45, delayed action should be considered under the principles concerning tolerance or inaction in intellectual property law and, therefore, as a matter regarding *fumus boni juris* more than *periculum in mora*.

⁶² Other decisions went so far as to require evidence that infringement had already caused irreversible consequences: see, e.g., *4B-Four Bind v. KGS* (Trib. Torino 2013).

⁶³ See *Unknown v. Pref.Edi.L. I and II* (Trib. Catania 2005 and 2006).

the prejudice suffered by the patentee during the time needed to get a decision on the merits. The idea here is that if the alleged infringer is not a direct competitor of the patentee, the latter cannot suffer a trade diversion due the violation of the patent. The prejudice the patentee suffers consists – according to this opinion – only in the loss of royalties that the alleged infringer would have had to pay. As it is neither impossible nor particularly difficult to calculate *ex post* the amount of royalties due, it is not necessary to grant precautionary injunctive relief to avoid the risk that a decision on the merits in favour of the patentee would come too late to adequately protect his right, particularly if the infringer appears solvent.⁶⁴

This reasoning has been applied to cases in which the patentee was a natural person – usually the inventor – who exploited the patent only through licensing, and in consideration of the fact that the parties failed to settle their dispute because they disagreed on the amount of royalties due.⁶⁵ The same approach offered a framework to deal with disputes regarding standard essential patents, in which the reference to concepts such as proportionality and balancing of rights became commonplace.⁶⁶ Finally, an attempt was made to extend the reach of the reasoning to cases in which a failure to agree on royalties occurred in a dispute between direct competitors, just as happens in many disputes regarding standard essential patents, but with the relevant difference that the owner of the right had not committed to grant licences on FRAND terms. A decision on first instance denying precautionary injunctive relief was reversed on appeal precisely for this reason.⁶⁷ However, on appeal the court did not confine itself to distinguishing these two cases and offered arguments that brings us back to a more orthodox approach, according to which the strategy of exploitation of the patent adopted by the owner of the right – apart from the specific case of standard essential patents – seems to remain irrelevant for the availability of precautionary injunctive relief. In particular, the court observed that even when a patentee exploits the patent through licensing deals, this does not mean that the

⁶⁴ See *Samsung v. Apple* (Trib. Milano 2012).

⁶⁵ See *Hakan Lans v. Dell* (Trib. Monza 1997), which considered also the rapid obsolescence of the products targeted by the injunction, and *Rolando Nammucci v. Renault* (Trib. Firenze 2003).

⁶⁶ See in particular *Samsung v. Apple* (Trib. Milano 2012); *Intec v. Unifix* (Trib. Genova 2014). Proportionality is sometimes also mentioned in decisions that do not regard standard essential patents. Often it is used as a synonym for reasonableness. See, e.g., *Aqvadesign v. G. M. Rubinetteri* (Trib. Torino 2019); *Ericsson v. Onda* (Trib. Trieste 2011). Attempts to balance interests can be found also in *Audi v. Pneusgarda* (Trans. Milano 2012). A rather articulated evaluation of the potential effects of granting or denying relief on the interests of the parties (but not of third parties, such as drugs providers and users) can be found in *Teva v. Mylan* (Trib. Milano 2017), which confirmed – for the time required to make a preliminary assessment as to the validity and infringement of a patent – an injunction already granted *ex parte* against the marketing of an allegedly infringing compound but at the same time lifted an order to freeze the request for authorization to sell the product on the Italian market presented by the defendants to the Italian Medicine Agency.

⁶⁷ See *JP Steel Plantech Corp. v. Danieli & C. Officine Meccaniche* (Trib. Venezia 2018).

prejudice in case of infringement would be “merely economic” and easy to calculate, as the trade diversion caused by the infringer would affect the licensee and, indirectly, the patentee, diminishing the amount of royalties that the patentee is able to earn and damaging the attractiveness of the patent for prospective licensees.

Not surprisingly, the same decision also refused to relax the protection granted to the patentee if the expiry date of the patent is relatively close and the alleged infringer commits to pay a bond,⁶⁸ which should protect the interest of the patentee to obtain damages at the end of the trial, if due. The message seems to be that exclusivity is exclusivity, so long it lasts.

A denial of injunctive relief, whatever the reason, comes with an obligation to pay the expenses of the proceedings, including the costs borne by the defendant to resist. The court might decide to compensate the expenses afforded by the parties but only if none of them could be considered entirely successful.⁶⁹ These principles have been generally observed in the decisions examined but not without exceptions.⁷⁰

2. Final Injunctions

The general assumption⁷¹ seems to be that a court reaching a finding of infringement must also grant injunctive relief,⁷² if requested to do so,⁷³ unless the patent has expired⁷⁴ or infringement has definitively stopped.⁷⁵ Intent or fault by the infringer and harm caused to the rightsowner are not required,⁷⁶ considering the preventive function of this remedy.⁷⁷

It has been held that a final injunction, being a future-oriented remedy, presupposes the risk of continuation, or repetition of an infringing activity.⁷⁸ As the legal system is certainly oriented towards the prevention of the accomplishment of

⁶⁸ As the court in *id.* mentions, our law does not provide for such an option (which is however contemplated in Art. 9.2 of the Enforcement Directive). On the other hand, a bond can be imposed by the court on the claimant in order to protect the interest of the defendant to obtain the payment of damages suffered if the remedy turns out later to be unjustified. See Art. 669-undecies CPC and Art. 81 of the 1939 Law on Patents.

⁶⁹ See Rossi 2020.

⁷⁰ See *Rolando Nannucci v. Renault* (Trib. Firenze 2003).

⁷¹ See, for instance, Greco & Vercellone 1968, 375.

⁷² It is disputed whether a court requested to declare infringement can also issue an injunctive order without adopting a decision *ultra petitum*. In favour, see Spolidoro 1982, 46, 178; against Frignani 1974, 311.

⁷³ Frignani 1974, 311, stressing that the court does not have a discretionary power to deny the injunction.

⁷⁴ Scuffi 2009, 488; Sena 2011, 379. See also *Pfizer v. Dott. Bonapace* (Trib. Milano 1987); *Staar v. Nuova Autovox* (Trib. Milano 1992).

⁷⁵ Scuffi 2009, 488–89.

⁷⁶ Frignani 1974, 312.

⁷⁷ Spolidoro 1982, 161–63; Nivarra 2000, 325; Scuffi 2009, 488; Sena, 2011, 379–80; Di Cataldo 2012, 69.

⁷⁸ Frignani 1974, 428 ff.

wrongful acts, it is also accepted that injunctive relief can be granted to stop preparatory acts that would otherwise lead to an infringement.⁷⁹ Although current legal texts mention “imminent” infringements only in connection with provisional injunctions,⁸⁰ it does not seem reasonable to imply that such orders cannot be confirmed at the end of the proceeding on the merits.

Some argue that courts must grant final injunctions even if continuation, or repetition, of the infringement appears unlikely.⁸¹ A first argument supporting this view comes from the legal nature of injunctive orders. Being of the same nature as declaratory decisions, they depend on the same precondition, namely, the mere finding of infringement. More prosaically, it has been added that an injunction would do no harm to a defendant that is truly committed to respecting the plaintiff's property.⁸²

Courts seem to be of the opposite opinion,⁸³ although cases in which final injunctive relief has been denied due to lack of risk of continuation or repetition of the infringement are extremely rare.⁸⁴ Mere desistance from infringement pending the trial, either spontaneously or in compliance with a preliminary or interim injunction, has not always been considered a valid reason to deny injunctive relief.⁸⁵ Also, redesign of the product and modification of moulds are not enough, considering that they express a reversible decision.⁸⁶ In the field of designs, injunctive relief has been denied because garments bearing the infringing design were meant to be marketed for one season only.⁸⁷ Apparently, there seems to be little room for arguments like this in the field of utility patents.

In view of the evolution of the legal texts that started at the end of the last century, a relatively large consensus emerged in the relevant Italian literature on the idea that

⁷⁹ Ascarelli 1960, 256 and 634; Frignani 1974, 430, noting that if the infringement has been already accomplished, this would speak in favour of the existence of a risk of continuation or repetition; otherwise, it would be harder to prove the risk which the injunction is meant to cure; Spolidoro 1982, 176–177.

⁸⁰ Compare Art. 124 and Art. 131 IPC, which correspond to Art. 9 and Art. 11 of the Enforcement Directive.

⁸¹ Spolidoro 1982, 178 ff.; *Job Joint v. Lectra* (Trib. Milano 1996), as *obiter dictum*. Contra Frignani 1974, 408, 418.

⁸² Spolidoro 1982, 180; Spolidoro 2008. See also *Plein Air v. Providus* (Trib. Milano 2015), in respect of an interim injunction, confirmed on appeal (Trib. Milano 2016); *Sisvel v. ZTE* (Trib. Torino 2016).

⁸³ See Scuffi 2009, 363.

⁸⁴ Scuffi 2009, 488.

⁸⁵ In *Metallurgica Bugatti v. Framplast* (App. Milano 2012) injunctive relief was granted; on the contrary, in *Gruppo v. Specialized Bicycle Components* (App. Milano 2019) the court gave weight to the fact that the infringer had not been using the contested trademark for the previous ten years, having desisted when the proceeding on the merits began.

⁸⁶ See *Lasar v. Betonform* (Trib. Venezia 2009); *Vibram v. Gommarr* (Trib. Bologna 2009), considering that products and corresponding moulds could be reversed to their original infringing shape.

⁸⁷ See *Fuzzi v. Commerciale Stib* (Trib. Bologna 2009). Similar arguments have been used to deny a preliminary injunction by *Diesel v. Industria de Dieseno Textil* (Trib. Milano 2016).

a court should be considered entitled to adapt injunctive relief in view of the circumstances of the case, in particular if the infringer acted in good faith.⁸⁸ Some authors referred explicitly to proportionality as the guiding criterion to deploy courts' discretion in tailoring injunctive relief.⁸⁹ It remains unclear whether proportionality could also support a denial of injunctive relief in cases in which there is a risk of accomplishment, continuation or repetition of the infringing activity.⁹⁰ Considering the choice of the Italian legislator not to introduce alternative measures as allowed by Article 12 of the Enforcement Directive, some have argued that a denial of injunctive relief cannot be based on the “disproportionate harm” that the remedy would cause to the infringer.⁹¹ Others have gone as far as to deny the applicability of Article 12 of the Enforcement Directive to injunctive relief, arguing that an injunction – i.e. an order to behave in conformity with the law – cannot cause a juridically relevant “disproportionate harm”.⁹² On the contrary, others maintain that Article 12 of the Enforcement Directive offers an argument to hold that injunctive relief could be denied – in relatively exceptional circumstances and despite the choice of our legislator not to introduce the alternative measures mentioned therein – on the theory of abuse of intellectual property rights.⁹³

Although this is certainly a relevant question,⁹⁴ it should not be forgotten that – particularly in the field of patents, in which the duration of the exclusive rights is limited, the time needed to bring technologies to the market is not negligible, and litigation tends to be lengthy – the flexibility that courts already enjoy in administering provisional injunctions might considerably alleviate the risk that a final injunction would come too soon and cause disproportionate damage to the infringer. This circumstance, which might be seen as an implicit flexibility of the current system as practised, helps in understanding why a demand to reconsider the traditional equation of exclusivity/injunctive relief in conventional situations has not emerged so far.

Both provisional and final injunctions are typically supplemented by an order to pay penalties in case of non-compliance. Although penalties are discretionary

⁸⁸ See Spolidoro 2005, 246.

⁸⁹ See Auteri 2007, 40. For a similar opinion see also Spaccasassi 2005, 81; Vanzetti 2010, 68. This view finds support in Art. 124(6) IPC, which may be read as extending to all remedies, including final injunctions, the principle affirmed by Art. 10(3) Enf. Dir. in relation to corrective measures.

⁹⁰ On the other hand, proportionality has been used to support a denial of injunctive relief in a case in which such risks were absent: see *Gruppo v. Specialized Bicycle Components* (App. Milano 2019).

⁹¹ See Spolidoro 2005, 246 and 251.

⁹² See Sarti 2004, 136.

⁹³ See Bertani 2017, 486 ff. and 503–04. Among the cases considered by the author there is the exercise of intellectual property rights in such a manner as to bring undue prejudice to other fundamental rights: see on this point *infra*, Section E).

⁹⁴ There has also been extensive use of the principle of proportionality by the Italian Agency for Communications (AGCOM) in administering blocking orders: see Cogo & Ricolfi 2020, §5.5.

remedies,⁹⁵ it is hard to find cases in which they have not been ordered to protect the exclusivity granted by a patent. Rare examples of injunctions not supplemented by penalties can be found in the field of copyright, both in traditional settings⁹⁶ and in the relatively new realm of online intermediaries' liability.⁹⁷ Particularly in the second case, the dismissal of the request of the claimant to provide for penalties seems to express an attempt to balance the hardships of the parties,⁹⁸ considering that an order to "stay down" infringing contents from a sharing platform already places a serious burden on the enjoined party.

C. CONTENT OF COURTS' ORDERS

Usually, orders refer explicitly or implicitly to the facts of the case and enjoin the infringer from doing the same again. Despite their apparent narrowness, such orders have been considered capable of extending their effects beyond the specific facts of the case.

Occasionally, there have been decisions more carefully defining the content of the injunction granted. In the field of trademarks, orders worded to cover "similar" or "analogous" cases have been issued and confirmed on appeal.⁹⁹ The same happened in the field of registered designs, with the important qualification that, in case of multiple designs, the order concerns only designs identical or similar to those which have been actioned. In other cases, serial numbers identifying infringing goods are mentioned; however, where this is the case, the order might be supplemented by a reference to identical goods not bearing the said codes.¹⁰⁰

The approach usually followed by courts does not seem to be overly problematic in the case of preliminary injunctions, as the court which issued the order retains the power to define its reach more precisely, if need be, in particular in respect of behaviours that present minor differences from the one considered *prima facie* infringing.¹⁰¹

In respect of final injunctions, the usual, generic reference to the facts of the case causes some degree of uncertainty, which may lead to further litigation when the rightsholder tries to enforce the injunction by asking the court to apply penalties. In such a case, any variations attributed to the allegedly infringing product requires the

⁹⁵ See *ex multis* Rovati 2019.

⁹⁶ *Martino v. Menegatti* (Trib. Venezia 2007), which considered relevant the small number of products already marketed and the lack of evidence regarding the manufacturing of new items.

⁹⁷ *Dailymotion v. Delta TV* (Trib. Torino 2018).

⁹⁸ Such attempts seem to find a theoretical support in the arguments developed in Ricolfi 2005, 107 ff.

⁹⁹ See *Simod v. Asies* (Trib. Venezia 2006).

¹⁰⁰ See *Ennepi v. Gaudi* (Trib. Bologna 2011); *Gaudi v. Ennepi* (Trib. Bologna 2015); *Canon v. Alphaink* (Trib. Roma 2019).

¹⁰¹ Scuffi 2009, 540.

court to decide whether the injunction already issued applies or a new trial is due. In this respect, the Supreme Court of Cassation pointed out that minor variations, which do not fall outside the “genus and species” of the infringement already ascertained, are not enough to escape the effects of an injunction already granted.¹⁰² This does not seem to mean that the court that issued the injunction and has competence on the application of penalties¹⁰³ can make a new assessment of the scope of the exclusive right and the interference of the (new) allegedly infringing acts.¹⁰⁴ It should limit itself to comparing the facts of the case leading to the grant of the injunction with the new facts that entail, according to the claimant’s view, a repetition of the enjoined behaviour. In this regard, whether a difference could be considered as irrelevant seems to depend on the arguments on which the finding of infringement had been based.¹⁰⁵

The relevant literature has frequently highlighted the importance of an accurate definition of the prohibited behaviour.¹⁰⁶ In particular, it has been stressed that an order too narrowly framed can be easily circumvented, while a broad command is equally ineffective,¹⁰⁷ considering that it imposes a new trial of the case if the defendant circumvents the injunction. However, the same literature stressed the difficulty of finding a proper balance and suggested a close look at the models emerged in other countries, particularly Germany, to help develop a catalogue of formulations to be selected depending on the facts of the case.¹⁰⁸

Greater attention is required by contributory infringement cases, in which court orders need to be drafted in such a way as to prevent further contributions to downstream infringements, while leaving the defendant free to perform activities that might be legal. Italian courts do not seem to have a lot of experience in this field, considering that until 2016 our patent law did not deal with indirect infringement.¹⁰⁹ Before then, courts did not care much about the extent of orders issued, probably because in most instances the means supplied by the defendant had no other significant use than that covered by the claimant’s patent.¹¹⁰

¹⁰² See *Metra v. Indinvest* (Cass. 1995).

¹⁰³ See Art. 124(7) IPC.

¹⁰⁴ See, e.g., *General Vacuum v. Sela Cars* (Trib. Torino 2014).

¹⁰⁵ See *Edizione Property v. S.I.G.A.T.* (Cass. 2017).

¹⁰⁶ See Vanzetti & Di Cataldo 2018, 553–54.

¹⁰⁷ See, for instance, *Lasar v. Betanform* (Trib. Venezia 2009), which enjoined the defendant from making, selling, offering to sell, and advertising the infringing product or any other product that infringes on the patent.

¹⁰⁸ Spolidoro 2008a, 183.

¹⁰⁹ Now the issue is getting more attention: see Cuonzo & Ampollini 2018, §4.

¹¹⁰ A noteworthy exception is *Eurosider v. Carrozzeria Stefano Carservice* (Trib. Genova 2016), which differentiated the position of the supplier from that of the maker of means capable of non-infringing uses.

D. VALIDITY OF COURT ORDERS

1. *Preliminary and Interim Injunctions*

Once granted, a preliminary injunction continues to produce its effects until the exclusive right expires, unless (a) the decision issuing the preliminary injunction is successfully appealed;¹¹¹ (b) the preliminary injunction is lifted, on request of the enjoined party, due to a change in the circumstances or the emergence of facts previously unknown;¹¹² or (c) either of the parties institutes a proceeding on the merits which ends with a decision denying the existence of the right protected by the injunction.¹¹³ Either party has the right to institute a proceeding leading to a decision on the merits but none of them has an obligation to do so.¹¹⁴ Therefore, the preliminary injunction can produce its effects indefinitely, i.e. until any of the above-mentioned situations occurs. It remains to be seen whether this rule, which was introduced in 2010, is compatible with Article 50, paragraph 6 of the TRIPS and Article 9, paragraph 5 of the Enforcement Directive. So far, courts have taken for granted that it does.¹¹⁵ Recently, however, a decision of the court in Florence refused to insist the infringer pay penalties theoretically due on the basis of a preliminary injunction not followed by the institution of a proceedings on the merit by the patentee.¹¹⁶

If the injunction is supplemented by penalties, as is usually the case, the court might delay their application for the time needed for the enjoined party to comply.¹¹⁷

2. *Final Injunctions*

Article 282 of the CPC establishes that first-instance decisions are immediately executive; however, according to Article 283 of the CPC, they may be stayed pending appeal if grave and well-founded reasons support the motion for suspension. Similarly, Article 373 of the CPC allows suspension of the effects of the decision of second instance pending appeal in front of the Supreme Court of

¹¹¹ See Art. 131 IPC and Art. 669-terdecies CPC.

¹¹² See Art. 669-decies paras. 1 and 2 CPC.

¹¹³ See Art. 669-novies para. 3 CPC. If the proceedings end in favour of the patentee, the preliminary or interim injunction ceases to produce effects when the decision becomes final. See *A. O. and V. M.* (Cass. pen. 1997).

¹¹⁴ See Art. 132 para. 4 IPC.

¹¹⁵ The same view has been expressed by Vanzetti & Di Cataldo 2018, 552. *Contra see* Ricolfi 2005, 97–98; Spolidoro 2008a, 187–88.

¹¹⁶ *Mangusta v. Service de Navigation de Plaisance* (Trib. Firenze 2016).

¹¹⁷ See *Thun v. Casati* (Trib. Milano 2019), in a trademark case regarding sale of genuine goods by a seller not (any longer) part of a selective distribution network.

Cassation if immediate execution of the decision would cause a grave and irreparable harm to the losing party.

These rules are prevalently interpreted as referring only to decisions that can be enforced against the will of their addressees.¹¹⁸ Injunctions, as already mentioned, do not fall into this category and therefore cannot be suspended in their effects.¹¹⁹

Broader interpretations of Article 282 of the CPC are nonetheless attested¹²⁰ and offer support for the idea that injunctions are immediately effective, unless suspended pending appeal.¹²¹ In the field of intellectual property rights, this opinion does not seem to be opposed by the courts.¹²² Motions for suspension are relatively frequently presented and courts decide them without raising objections as to their admissibility and relevance from the point of view of the applicant's interest.¹²³ Suspension, if granted, impacts on the obligation of the enjoined party to voluntarily comply with the court's order.¹²⁴ If the order was supplemented by the provision of penalties, the latter would not apply either. Criminal sanctions are also out of question, lacking an effective court order that can be disobeyed.¹²⁵

The effects of a first-instance decision can be suspended if the chances of revision on appeal appear high and/or the execution of the decision would cause an irreparable harm to the losing party. In the case of second-instance decisions, the only ground for suspension is grave and irreparable harm.¹²⁶ Room for the exercise of discretionary power by the court appears greater in respect of first-instance decisions.¹²⁷ Reported decisions seem to ordinarily engage in the balancing of the respective inconveniences of the parties. At the beginning of the 1990s, the attitude of the courts was openly in favour of the alleged infringer, on the assumption that the prejudice suffered by the infringer to comply with an injunction subsequently lifted could have been irreparable, while the patentee could always be compensated

¹¹⁸ See Canella 2020, 1384.

¹¹⁹ See Scuffi 2009, 551, 559, where the author mentions at fn. 50 an unpublished decision of the Court of Appeal of Milan dated 8 May 1996 affirming that an injunction not accompanied by restitutionary remedies cannot be enforced against the will of the enjoined party and, therefore, is not capable of being stayed pending appeal. The same conclusion is reached by *La Bruciata v. Podere della Bruciata* (App. Firenze 2017) on the basis of the declaratory nature of decisions issuing an injunction (see Section A.2), which implies that they become effective only when they are final and, in turn, that the enjoined party does not have interest to obtain the suspension pending appeal.

¹²⁰ See Izzo 2020, §3.

¹²¹ Further references in Rovati 2019, 781.

¹²² See Vanzetti, 2010, 40 ff.; Rovati 2019, 781.

¹²³ See the comment to *La Bruciata v. Podere della Bruciata* (App. Firenze 2017) for further references.

¹²⁴ See the comment to *Industrie Meccaniche CGZ Almec v. Macchine Soncini Alberto* (App. Bologna 1990).

¹²⁵ Cf., *a contrario*, K. R. (Cass. pen. 2015).

¹²⁶ Scuffi 2009, 555, 557–58.

¹²⁷ *Id.*, 557.

with damages.¹²⁸ Then, when all first- and second-instance decisions became immediately effective *by default*, the attitude of the courts changed.

In consideration of its precautionary nature, suspension depends on the two prerequisites already discussed with reference to preliminary and interim injunctions, i.e. *fumus boni iuris* and *periculum in mora*. Also in this case it is accepted that the court can take into account the respective inconveniences of the parties.¹²⁹

Little attention has been paid to the issue regarding the duration of a final injunction. In this regard, it has been affirmed that an injunction lasts as long as the effects of the decision in which it is stated.¹³⁰ As the effects of the decision cannot endure longer than the substantive right on which it is based, this seems to correspond to the – apparently obvious – idea that an invention in the public domain can be freely used by everybody, including the (once) infringer.

E. CONCLUSIONS

After having discussed thoroughly the theoretical reasons which favour or oppose judges' discretion in granting final injunctions, let us just add a practical one which is patent-specific. It has been convincingly shown that granting patents on components of multi-component products is not really a novelty: this was already current practice in the car and aircraft industries in the United States between the two world wars.¹³¹ However, today, patents on individual components of multi-component products have become the rule in whole areas, such as information and communication technology (ICT). Actually, a smartphone is composed of tens of thousands of patented components. If violation of any of these patents were to lead to an injunction, or maybe to an insufficiently well-crafted injunction, then all innovation in the area would grind to a screeching halt. Royalties in the form of assessment of damages seem the better solution, as Judge Posner has convincingly shown. Surprisingly, this crucial matter never turns up before Italian courts. Now we also have a textual ground to come back to the issue, at least as far as patent law is concerned.¹³²

¹²⁸ For instance, the interest of the enjoined party not to stop production of a machine has been protected against the interest of the rightsholder to prevent a theoretical decline in sales, considering that the latter could be adequately compensated by paying damages. See *Morra Macchine Agricole v. Maschinenfabriecken Bernard Krone* (App. Milano 1989) with reference to past rules, according to which the court had to decide, if required by the winning party, whether the decision should be declared immediately effective. A similar point of view seems to be reflected by *Industrie Meccaniche CGZ Alimec v. Macchine Soncini Alberto* (App. Bologna 1990).

¹²⁹ Scuffi 2009, 555–56.

¹³⁰ Frignani 1974, 407.

¹³¹ See Merges 1996, 1293 ff., 1341 ff.

¹³² See the very pertinent comments to Art. 63(1) chapter IV UPCA by Leistner and Pless; and their notations on the – long overdue – emergence of the principle of proportionality also in connection with injunctive relief.

Turning to a different issue, if an injunction is issued, be it final, temporary or interim, the question arises as to establishing its scope. Let us try to add two dimensions which may lead in opposite directions. First, we are fascinated by the unerring pragmatism of British courts, which, after issuing an injunction, are also prepared to devise “dynamic” orders and set up an updating machinery which delegates to service providers the task of monitoring whether new violations occur.¹³³ We wonder whether in Italy we could set up something along these lines: a fact-finding expert witness, reporting to court and, given opportunity for the parties to comment, providing a basis for an automatic extension of the order.¹³⁴ Second, from efficiency to respect of fundamental rights. Indeed, we suspect that the perspective of fundamental rights has a lot to tell us here: much more than the mere reference to proportionality can convey. Here we are mainly referring to the online world, on which, it seems to us, we have to think hard about the dangers of blocking and filtering orders. It is high time too, as the implementation of the Copyright Digital Single Market Directive is possibly taking us towards the next step: algorithmic decision making which has the same effect as courts’ injunctive orders. So, in a nutshell, we should make progress along two dimensions: more efficiency, yes; but also more respect for fundamental rights. Injunctions need not be a blunt instrument; they should resemble the lancet, not the hammer, as the saying goes.

Finally, we end with a remark about innocent infringers and costs. Let us just say that the matter of costs is fundamental here; and we should not leave it forever to a footnote. The importance of the issue can hardly be overstated.¹³⁵ Here European courts seem to diverge to some extent. An Italian administrative court held that it is only natural that innocent infringers such as internet service providers (ISPs) should bear the costs of the “negative externalities” they generate.¹³⁶ Similarly Cour de Cassation 6 July 2017, *SFR, Orange, Free, Bouyegues v. Union des producteurs de cinéma* and others,¹³⁷ comes to the same conclusion under French law by arguing that the basis is not the liability of the ISP, which may well be lacking, but its duty to avoid violation of private legal rights. In contrast, British courts resort to differentiating, under relevant English law, between rules applicable to access and hosting providers, and holding the former entitled to be reimbursed their own costs by claimant rightsholders.¹³⁸ On the other hand, the possibility for rightsholders to recover costs incurred in giving notice to ISPs is considered in *Mc Fadden v. Sony*.¹³⁹

¹³³ See *Cartier v. BSKyB* (EWHC 2014), para. 122 ff.

¹³⁴ We have given some thought to this in connection with “dynamic” orders, on which also Prof. Husovec has written extensively (see Husovec 2017, *passim*), in Cogo & Ricolfi 2020.

¹³⁵ See again Husovec 2017.

¹³⁶ *Altroconsumo v. AGCOM* (TAR Lazio 2014), para. 15.

¹³⁷ Available at www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/909_6_37275.html

¹³⁸ *Cartier v. British Telecommunications* (UK Supreme Court 2018), at para. 37.

¹³⁹ *Mc Fadden v. Sony Music* (EUCJ 2016), paras. 72–79.

We know that legal costs are not so sexy as an issue for legal scholarship and young brilliant scholars; but still they play a paramount role in litigation strategies.

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