



POLICY BRIEF



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RESPONSE TO EC IPRED REPORT 2026

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CIP Policy Brief on EC IPRED Report 2026

A response to the European Commission IPRED follow-up study on proportionality and permanent injunctions

The Commission is right to care about proportionality, consistency, and public confidence in patent enforcement. But the report on the application of the IPRED published earlier this year does not provide a reliable empirical basis for policy changes or guidance, especially since the IPRED specifically requires that remedies be “effective, proportionate and dissuasive,” not merely proportionate. Given the report's methodological shortcomings, internal inconsistencies, and the risk of overcorrecting a system that is already evolving through case law, a better policy response is to strengthen the evidence base, improve transparency, and use the Unified Patent Court as the central mechanism for EU harmonization.

Policy Analysis

The recent EC IPRED report 2026, entitled Follow-up study on the application of the Directive on the Enforcement of Intellectual Property Rights, presents a rather confusing mix of evidence and draws an ambivalent conclusion regarding the implementation of the IPRED in the EU . While there is much to critique from legal, economic, and methodological perspectives, we have summarized our response in several brief comments for clarity and brevity.

1. The report's core quantitative study lacks validity

One of the core messages of the report is that injunctions in patent infringement cases are too “readily available” or “automatic” across the EU, which it deems inherently problematic. The report appears to rest its most policy-sensitive concern on a third-party patent study of 635 court decisions, reporting that permanent injunctions were granted in 94% of cases and that proportionality was assessed in only 0.6%. That statistic is rhetorically powerful because it suggests that proportionality exists in law but not in practice. Yet, without the dataset and coding method, the figure is not policy-ready.

The current use of the study suffers from three fundamental validity concerns:

- **Selection bias.** If the sample includes only cases in which patent owners prevailed, a high injunction rate is not surprising. If it purports to cover all patent disputes, the figure would imply an implausibly high patentee success rate and would require explanation. In addition, Germany amended its patent law to include the principle of proportionality in 2021, which falls outside the study's 2015-20 window.
- **Replicability.** The study was conducted by a 3rd party and is not publicly available, which means it cannot be independently checked for case selection, jurisdictional coverage,

treatment of settlements, coding of remedies, or whether proportionality was assessed implicitly, procedurally, or in connection with the scope of the order.

- Construct validity. “No explicit proportionality discussion” is not the same as “no proportionality analysis.” Courts may apply proportionality through the tailoring of orders, timing, bond/security requirements, carve-outs, stays, recall/destruction remedies, or the interaction between injunctions and damages. Courts may also apply proportionality without explicitly mentioning the word.

For policymakers already concerned by the report’s headline result, the appropriate question is therefore not whether proportionality matters. It plainly does. The question is whether the empirical claim accurately measures the phenomenon it is being used to describe. On the current presentation, that has not been shown.

2. The report’s own qualitative findings point in the opposite direction

The report’s qualitative material appears to show that proportionality is not absent from European IP enforcement, casting doubt on the claim, derived from a third-party study, that proportionality is considered in only 0.6% of cases. Indeed, the report describes proportionality as a general norm in EU law and Member State legal systems, notes only limited variation in national case law, and reports that most responding judges (10 of 11) say courts apply proportionality “always” or “very often” in infringement cases.

This matters because the policy diagnosis changes depending on which part of the report one credits. If the third-party statistic is taken at face value, the problem is judicial non-use of proportionality. If the report’s own case-law review and judicial survey are credited, the problem is narrower: proportionality is being applied, but the visibility and documentation of that analysis may be uneven.

That narrower diagnosis supports the need for a more robust review of the evidence and improved transparency and reasoning around proportionality in exceptional or complex cases. It does not support a broad recalibration of IPRED that would make injunctions presumptively suspect even after a court has found the asserted right valid and infringed.

3. IPRED already requires balance: effective enforcement and proportionality

Article 3 of IPRED does not set proportionality against enforcement. It requires remedies that are fair and equitable, not unnecessarily costly or delayed, and also “effective, proportionate and dissuasive.” In other words, proportionality is part of effective enforcement, not a policy lever for weakening enforcement as such.

This is particularly important in patent cases. A permanent injunction following a finding of validity and infringement is not, by itself, evidence of over-enforcement. It is often the legal consequence that gives the exclusive right practical meaning. Proportionality should remain available as a safety valve where case-specific facts justify tailoring or limiting relief, but it should not become a generalized invitation to convert patent rights into compulsory licenses.

For SMEs, universities, research-intensive firms, and technology developers without dominant downstream market power, the credibility of injunctive relief can be essential to licensing

negotiations. If enforcement becomes uncertain in the name of an unverified proportionality deficit, the result may be more holdout, more litigation, and weaker incentives to invest in innovation.

4. The policy risk is overcorrection

The Commission's understandable concern is consistency. But the central policy risk is that an alarming but unverified statistic could produce guidance that changes litigation behavior before the evidence has been tested. Overbroad guidance could create three unintended consequences:

- It could encourage strategic infringement by making exclusion less credible after infringement is proven.
- It could shift bargaining power away from smaller innovators and toward better-capitalized implementers that can absorb litigation delay.
- It could further fragment enforcement if national courts interpret the new guidance differently while the UPC is still developing its own remedies jurisprudence.

A reasonable policymaker response should therefore preserve the IPRED bargain: remedies must be effective enough to protect innovation and dissuade infringement, but tailored enough to avoid abuse and disproportionate outcomes.

5. A clear path: evidence, transparency, and the UPC

The most constructive response is not to dismiss proportionality concerns but to address them through better institutional design. The Commission can improve confidence in the system without destabilizing patent enforcement by pursuing four steps:

- Require transparency for evidence used in policy formation. Any empirical study relied upon for EU guidance should disclose its case list, inclusion criteria, coding protocol, treatment of validity and infringement outcomes, and how “proportionality assessment” was defined.
- Create a remedies database for patent cases. A structured EU evidence base should distinguish between preliminary and permanent injunctions, infringement findings, validity findings, stays, tailored orders, recall/destruction remedies, damages-only outcomes, settlements, and proportionality reasoning.
- Clarify what courts should record, not what outcome they should reach. The useful reform is to encourage transparent reasoning where proportionality is sufficiently raised, supported, and contested, not to predetermine that injunctions should be rare.
- Let the Unified Patent Court do the harmonization work it was built to do. The UPC offers a practical route to consistent patent-remedies doctrine across participating Member States, particularly if its decisions are monitored and analyzed as the case law develops.

Conclusion

The Commission should be cautious about converting a headline statistic into EU policy. The report raises a legitimate governance issue: European patent enforcement should be

transparent, proportionate, and consistent. But the evidence presented does not yet show a systemic failure of proportionality. It shows quite the opposite.

The recommended policy message is therefore simple: strengthen the evidence base, encourage transparent judicial reasoning, and allow the UPC to contribute to EU-wide harmonization.