I. Current law and practice

Please answer all questions in Part I on the basis of your Group’s current law.

1. Are there any statutory provisions which specifically apply to Joint Liability?

Yes

Please Explain

1. GENERAL INFORMATION

 Polish law does not contain any special provisions governing the indirect infringements of intellectual property rights [further: IPRs]. In cases of indirect infringements of IPRs the general provisions on liability for torts shall apply, in particular the provisions of:

a. Article 415 of the Polish Civil Code [further: CC] A person who has inflicted damage to another person by his own fault shall be obliged to redress it;

and

a. Article 422 CC. Not only a person who has directly inflicted damage but also the person who has induced another person to inflict the damage or who has assisted him, as well as the person who consciously benefited from the damage inflicted to another person shall be liable for the damage.

It should be emphasized that the abovementioned regulations and consequently the case-law, in large extent relate to regular civil claims (not IPRs), yet they do find appropriate application for IPRs cases, what is confirmed by jurisprudence:

a. the Supreme Court [further: SN] 24.06.2014, I CSK 540/13
According to the article 422 of the CC it is not only the direct perpetrator who is responsible for the damage, but also the one who knowingly took benefit of that damage. This provision also applies to claims arising from infringement of industrial property rights, including the one provided in the article 296 div 1 of the Industrial Property Law Act, it is a claim for unjustified benefits.

a. SN 30.04.1974, II CR 161/74

“On the basis of Act on Inventive Law, when it comes to the claims arising from an infringement of the right to exclusive use of an invention or utility model, the provision of the article 422 of the CC applies, which includes, apart from the direct perpetrator, the person who induced other person to cause damage or was helpful to him, as well as who consciously benefited from the damage caused to a third party.”

a. SN 11.08.2011, I CSK 633/10

“Provision included in the article 79 div 1 point 3 letter a) of the Act on Copyright and Related Rights – which is a reference to 'general principles' (Article 415 of the CC) is an alternative to the detailed regulation of damages in the article 79 div 1 point 3 letter b), which means that this second provision is a special provision with respect to the article 415 of the CC. The uniqueness of the regulation contained in the article 79 div 1 point 3 letter b) manifests itself only in a withdrawal from the principle of restitution in favour of a statutory compensation in lump sum (twice or three times the amount of remuneration), objectification of liability, and the introduction of a repressive element in the case of the perpetrator's guilt. The remaining elements of responsibility are characteristic of the classical approach to tort liability. For this reason, in both the case-law and the literature, the accepted view is that due to infringement of copyrights the assistant and instigator are liable on the basis of the article 422 of the CC.”

a. Appeal Court in Białystok 21.11.2013, I ACa 455/13

“The publisher of the plagiarised work should be treated as an assistant of the perpetrator due to the nature of the relationship existing between the author of plagiarism, who directly infringes the protected copyrights and the person duplicating plagiarism by publishing process and during the distribution of the plagiarised work. Article 422 CC constitutes a (related to the Article 415 CC) basis of liability for both of them.”

Indirect IPR infringements may take form of an assistance, instigation or benefiting from the damage caused by direct infringement. In order to effectively pursue claims for damages related to indirect infringements, it should be demonstrated that the actions of a given entity constitutes one of the forms of indirect infringement and an appropriate degree of guilt must be proven. The three elements must be present:

a. damage caused by the infringement,

b. normal relationship between the damage that occurred and the indirect infringement of IPRs,

c. guilt in a degree that is required for given form of perpetration,

Entity, that has suffered damage as a result of indirect IPR infringements, is entitled to claim only for damages. When there is a risk that the indirect infringement may occur in future, but it has not yet happened such entity can use preventive claim based on Article 439 of the CC) but is not entitled to file an interim injunction motion.

Due to the unique nature of the services provided via the Internet, liability for indirect IPR infringements as a result of these services is significantly limited. Party indirectly infringing IPRs in such way (service provider) may be released from liability on the conditions described point 1.4 below. The justification for the regulation are the principles of business transactions. It is emphasized that it should not be required that the entities providing hundreds of thousands of micro-services for many other entities, often anonymous, shall control all the data they deal with.

1. DAMAGE

Article 415 CC and article 422 CC indicate that there must be damage incurred to the entity that presents its claim. If there is no damage whatsoever, then one cannot claim tort liability of the infringing party. In other words, an entity violating the IPRs indirectly is liable only if its action has contributed to the damage.

Burden of proof of the existence of damage, its type and amount is held by the entity whose rights have been infringed. In the event that the damage or its amount is not proven, the claim against the indirect infringer cannot be effective. Apart from the damage itself and its amount, it is also necessary to demonstrate a normal relationship between the indirect violator's activity and the damage it caused.

1. PERPETRATION FORM / GUILT
Regarding the *actus reus* of the infringing party, the provisions establish three forms of indirect infringements of IPRs:

a. an assistant,

b. an instigator and

c. entity benefiting from the infringement.

If several people are liable for the damage inflicted by a tort, their liability shall be joint and several (art. 441(1) CC). Bearing in mind the above, the all infringers are jointly liable with the party that caused direct infringement of IPRs

1. ASSISTANT AND INSTIGATOR

Assistance and instigation are forms of performance that are very similar and often overlaps, thus they will be discussed jointly.

ASSISTANT

Assistant is an entity whose actions or omissions allow or simplify causing a direct infringement of IPRs by a third party. Any activity or inactivity of an assistant, which constitutes any and all ‘help’ to the direct violator, may be considered as such action or omission. “Assistance may therefore take a form of enabling or facilitating damage to another person, including, for example, conceptual support (so-called intellectual help), which means help in causing damage, but not facilitating the concealment the traces of the damage that had been previously caused by the direct perpetrator.” (SN 20.09.2013, II CSK 657/12). It is an open list of activities. The entity who claims that the indirect violator assisted the direct violator holds the burden of proof in such case.

INSTIGATOR

Instigator is an entity that induces a third party to inflict damage on the other party by infringing the IPRs. The Supreme Court stated that: “One who encourages others to do damage to others and gives advice on how to act contrary to the law, is an instigator within the meaning of art. 136 obligation code (now: art. 422 CC). The instigator, like an assistant, is responsible for all the damage he caused the perpetrator to do.” (6.12.1972 r., I PR 212/72).

The instigator, like an assistant, is jointly liable with the direct violator, for all the damage he caused. In practice, this is a very rare form of indirect infringement. Due to the nature of the acts that may constitute instigation (inducement), it is assumed that such actions have to be intentional - but this only concern the act of violation itself and not the type of damage or its size.

AWARENESS OF FAULT AND GUILT

In the case of both forms of an assistant and instigator, there is a *sine qua non* condition to attribute a liability to them by showing their awareness of fault and guilt. The jurisprudence stays that “assistance can only be committed intentionally, although both with direct intention or recklessly. Only a person who cooperates with the one causing the damage, i.e. person that helps him consciously, can be considered as an assistant. Awareness of assistance with unlawful action determines the assistant’s guilt. The opposite view, assuming that the person who acts unintentionally or does not realise that he is helping someone, would expand responsibility to an extent that could not be reconciled with the principles of equity. The view that assisting can only be committed intentionally connects with the assumption that unlawful (as an act contrary to the principles of social coexistence) is an intentional act or omission facilitating or conducive to causing damage by the direct perpetrator to another person, even if the act or omission was not unlawful itself.” (SN 18.05.2017, III CSK 190/16).

Intention should be understood as the awareness of an indirect infringing party of the fact that it helps or induces a third party (direct violator). Guilt may take form of any and all negligence, so it is defined by courts widely. In particular, it is not required to demonstrate that the assistant or instigator acted with willful misconduct. By contrast, inadvertent guilt should be understood as recklessness, this is when the entity is aware of the fact that its behaviour may cause damage, but unjustifiably thinks that the damage will not happen. Also, gross negligence is sufficient to attribute guilt, this is when the indirect infringing party did not foresee the possibility of causing damage, although it could and should have foreseen this.

It should be emphasized that even proving ‘any negligence’ might be in practice complicated, especially in cases, where the direct infringement itself causes doubts in a given case. The court shall assess each case individually, e.g. a much stricter caution rule will be required from professional entities (entrepreneurs) if it is a part of their business (SN 11.08.2011, I CSK 633/10).

As a consequence of the above considerations, it should be assumed that the assistant must not be the entity that ‘helped’ the direct violator only after the infringement, unless it had been assured about the willingness of such assistance before this infringement (SN 20.09.2013, II CSK 657/12). Similarly, with the definition of inducement itself - as activities encouraging to infringement, there can be no such action made after a direct infringement had been done.

Both the assistant and the instigator are liable only for the damage that is in normal relation to their own infringement, but to its full extent, regardless of their knowledge or foreseeability of its scope.
1. ENTITY BENEFITING FROM THE INFRINGEMENT

The indirect IPRs infringement in the form of benefiting from the direct infringement is a very specific form of infringement and is connected with additional rigors imposed on the plaintiff (entity whose IPRs were violated).

The definition of the benefit-making is simple - the indirectly infringing entity obtains a property advantage as a result of third party direct infringement. The liability of such an entity is limited by the degree of guilt which must be attributed to it. It should be demonstrated that it jointly occurred:

a. entity benefited from the damage done to a third party,

b. there is a normal relationship between the direct infringement of IPRs and the profit of the indirectly infringing party,

c. awareness of this entity that it obtains the benefit from the damage done to a third party and the desire to obtain this benefit, i.e. intentional fault.

Intentional fault should be understood as the behaviour of the indirectly infringing party when it wants to cause damage or, at least, does not want to cause such damage, but is aware of the possibility of doing it and nevertheless it behaves in a manner that can lead to this damage and agrees with its possible consequences.

The above was confirmed by the jurisprudence, which stayed that “one’s liability on the basis of the article 422 of the CC, that is, among other things, for the conscious benefitting from the damage caused by someone else’s fault, is the liability for his own deed, but it is not the kind of doer’s liability, because the one is not the perpetrator of this damage. Three elements must be included in such action: benefits must be obtained, the benefitting person must be aware of the benefits gained and be aware of the damage that was done to another, and the source of the benefit must be this damage. By benefit coming from the damage is understood any property advantage or gain in the form of an increase in assets, reduction of liabilities, avoidance of a possible decrease in assets, or any non-property gain (personal). However, in order to impute fulfillment of a crime by the beneficiary, he must be aware of benefitting from the damage caused to another person, this is a situation when the one who has benefited from the damage can be attributed with intention or gross negligence.” (SA in Katowice 13.02.2014, I ACa 1090/13). The awareness of the fact that benefits come from someone else’s forbidden act, was underlined by Supreme Court (SN 21.12.2017, III CZP 89/17).

1. EXCLUSION OF LIABILITY OF SERVICE PROVIDERS VIA INTERNET

Issues related to the technological development and a relatively new type of indirect IPRs violations, this is indirect infringement of IPRs that may be caused by service providers via Internet, needs to be discussed separately.

In Polish law, these issues have been separately regulated in the Act on Electronic Services of July 18, 2002. For the purposes of this report, these amendments (in comparison to the general tort provisions described above) will be presented with a breakdown due to the type of services that are provided.

SHEER TRANSFER SERVICES

Entities that provide sheer transmission services, this is entities that only provide tools enabling data transmission on the network, are released from liability for indirect IPRs infringements of the content they transfer.

In order to effectively release from such liability, these entities have to fulfil the following conditions jointly:

a. they do not initiate the transfer of data,

b. they do not choose the recipient of transfer,

c. they do not the data being transferred.

CACHING SERVICE

Entities that provide caching services, are the entities that exclusively provide services consisting of automated, short-term and indirect storage of data in order to speed up the re-access to that data on request of a third party, released from liability for indirect IPRs infringements of the content they send.

In order to effectively release from such liability, these entities have to immediately delete infringing data or prevent access to it if:

a. data has been deleted from the original source of the transmission or access to it has been prevented,
or

a. the caching provider is notified that the court or other competent authority has ordered that the data has to be removed or access to this data has to be prevented.

HOSTING SERVICE

Entities that provide hosting services, this is entities providing tools to enable the storage of data by third parties, are released from liability for indirect IPRs infringements of the content they storage.

In order to effectively release from such liability, these entities have to fulfil the following conditions:

a. the entity must not know about the unlawful nature of data stored for a third party or unlawful nature of related to that data activities,

b. in the event of obtaining information about the unlawful nature of stored data or unlawful nature of related to that data activities, it will immediately prevent access to that data.

2 Under the case law or judicial or administrative practice in your jurisdiction, are there rules which specifically apply to Joint Liability?

Yes

Please Explain

There is a case law, which establishes ‘rules’ relating to joint liability of indirectly infringing parties. As well as there is case-law that indicates that the provisions regarding the liability under Article 422 CC should be applied accordingly for IPRs infringements, see the citation in answer to the question 1) above. Note that, case-law in Poland is not a source of law itself, but it is only a supplement to the provisions contained in the statutes. It indicates the direction in which any given provision of statute law should be interpreted.

3 In the following hypotheticals, would party A be liable for Joint Infringement with party X? In each case, please explain why or why not.

Yes

Please Explain

X sells handbags in a shop which is a small stall located in a shopping mall owned by A. The handbags infringe the registered design of Z. A knows that X (and other tenants) sells infringing goods.

Given the fact that A is aware that the sale of goods infringes the rights of other entities, it should be found liable for indirect infringement of IPRs as an assistant and might be found liable as the entity benefiting from the damage caused by direct infringement.

As an assistant, A should be liable for an indirect IPRs infringement, this is because A is aware of infringements done by X and other entities, and nevertheless assists them by providing surface that is necessary to trade and due to that A should be found acting in guilt. There is a normal connection between actions of A and the direct infringements committed by X, i.e. if A did not provide to X its premises, X could not sell goods that violates the rights of other entities.

As a benefit recipient, A might be liable for an indirect IPRs infringement, this is because A benefits from the damage resulting from direct infringement of X (A gets the rent). There is also a normal relationship between action A and the violation committed by X, as explained above. We assume that A knows about infringements committed by X, in a real case, however, it would have to be proved that A is aware of it (consciousness). Moreover, it would be extraordinarily difficult to prove that A benefits from this very damage done to the third part and not only benefits from the regular rent that would be paid regardless of the infringement.
Having regard to the provision of Article 441 of the CC, A would be jointly liable with X.

**X sells handbags in an online shop which is hosted by a large market place platform owned by A. The handbags infringe the registered design of Z. A knows that X (and other web shop operators hosted by A's market place platform) sells infringing goods via their respective outline shops.**

Yes

Please Explain

Given the fact that A is aware that the sale of goods infringes the rights of other entities, it should be found liable for indirect infringement of IPRs as an assistant and might be found liable as the entity benefiting from the damage caused by direct infringement.

A should be found liable on the very same basis and for the very same reasons as in answer to question a), however the assistance act would be manifested by providing hosting service.

Note mentioned in div 1.4.C. above restrictions on the liability of entities providing the hosting service, but given that the entity is aware of infringements, it should be responsible for the indirect infringement. Again, it would be extraordinarily difficult to prove that A benefits from this very damage done to the third part and not only benefits from the regular payment for services that would be paid regardless of the infringement – this would be much easier to be proved if A received a fee for each transaction done by X.

Having regard to the provision of Article 441 of the CC, A would be jointly liable with X.

**X sells handbags in an online shop. The handbags infringe the registered design of Z. A designed the online advertising campaign for X’s shop and books online advertising resources for X on websites and in in search engines. A knows that X sells infringing goods.**

Yes

Please Explain

Given the fact that A is aware that the sale of goods infringes the rights of other entities, it should be found liable for indirect infringement of IPRs as an assistant and might be found liable as the entity benefiting from the damage caused by direct infringement.

As an assistant, A should be liable for an indirect IPRs infringement, this is because A is aware of infringements done by X and other entities, and nevertheless assists them by advertising their goods and due to that A should be found acting in guilt. There is a normal connection between actions of A and the direct infringements committed by X, i.e. if A did not provide to X its services, X could not sell so many goods that infringes third party’s IPRs.

As a benefit recipient, A might be liable for an indirect IPRs infringement; this is because A benefits from the damage resulting from direct infringement of X (A gets the payment). There is also a normal relationship between action A and the violation committed by X, as explained above. We assume that A knows about infringements committed by X, in a real case, however, it would have to be proved that A is aware of it (consciousness). Again, it would be extraordinarily difficult to prove that A benefits from this very damage done to the third part and not only benefits from the regular payment for services that would be paid regardless of the infringement, unless this is the only service A provides for X.

Having regard to the provision of Article 441 of the CC, A would be jointly liable with X.

For each of the hypotheticals in (a) to (c) above, does it make a difference if A merely suspects that X sells infringing goods? If yes, what is the level of “suspicion” required, and how is it demonstrated?
A should be considered as an assistant if it could be demonstrated that A was aware of the infringement or was guilty of (any) negligence in this regard. In theory, an appropriate level of ‘suspicion’ would be any suspicion in this respect, but in practice it would cause vast difficulties in proving this, e.g. it would be difficult to demonstrate that A had any suspicions and this is due to a lack of appropriate evidences.

In this case, A could not be found liable as an entity benefiting from the infringement, this is because it would require proof that A gained benefit from this damage consciously (intentionally), i.e. A knew about the infringements and intended to profit from them.

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**Hypothetical B**

A should be considered as an assistant if it could be demonstrated that A was aware of the infringement or was guilty of (any) negligence in this regard. In theory, an appropriate level of ‘suspicion’ would be any suspicion in this respect, but in practice it would cause vast difficulties in proving this, e.g. it would be difficult to demonstrate that A, while conducting a hosting service for many entities, investigated this very case of its services. A specific circumstance would have to be revealed, which would indicate that A had a basis for the suspicion, but in such case any and all suspicion is sufficient.

In this case, A could not be found liable as an entity benefiting from the infringement, this is because it would require proof that A gained benefit from this damage consciously (intentionally), i.e. A knew about the infringements and intended to profit from them.

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**Hypothetical C**

In such case A should be responsible as an assistant on the same basis and on the same conditions as in answer for a) above, this is it must be shown that A was aware of the infringement or was guilty of (any) negligence in this regard.

A could not be found liable as an entity benefiting from the infringement, this is because it would require proof that A gained benefit from this damage consciously (intentionally), i.e. A knew about the infringements and intended to profit from them.

It should be pointed out that the additional ‘care’ might be required from A, which is an entity that professionally provides advertising services (vide I ACa 455/13).

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4 In the following hypothetical, would party A be liable for Joint Infringement with party X? In your answer, please explain why or why not?

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Z owns a patent claiming a method for addressing memory space within a memory chip which is built into telecommunication device having further features (main processor, suitable software etc.). A manufactures memory chips. The chips are objectively suitable to be used for the claimed method. A’s memory chips are distributed over multiple distribution levels to a plethora of device manufacturers. A has no knowledge of the actual end use of its memory chips.

No
Such actions of A should not be considered as direct or indirect IPRs infringement on the basis of Polish law.

Such behaviour of A should, at most, qualify as a ‘threat’ of a future infringement. As a consequence, Z could on the basis of the Article 439 of the CC demand from A to take an action that would prevent future infringements, e.g. the appropriate programming of chips.

Due to a lack of A’s awareness and lack of a ‘normal’ relationship between its actions and the damage that occurred it is impossible to recognise this as an indirect IPRs infringement. It is also not possible to acknowledge joint liability A with X (vide III CSK 190/16).

Further, under your Group’s law, would it be considered obvious (in the sense of Q204P) that A’s chips would be put to one or more infringing uses and if so, why?

Yes

Please Explain

It should not be considered as obvious that A’s chips would be put to one or more infringing uses. The fact that suitability and intended use were known to the supplier or obvious under the circumstances shall be proven by patent owner.

In the following hypotheticals, would party A be liable for Joint Infringement with party X? Please explain why or why not.

Yes

Z owns a patent claiming a method for exchanging (sending / receiving) encrypted messages between server “a” and server “b”. A operates server “a” in your country, which exchanges encrypted messages with server “b” operated by X, also located in your country. A and B know that their servers exchange encrypted messages according to the patented method.

Please Explain

For the purposes of this hypothetical, we assume that the Z’s patent is valid on the territory of Poland. Such behaviour of A should constitute a direct IPRs infringement and provision regarding direct infringement shall apply.

Z owns a patent claiming a method for exchanging (sending / receiving) encrypted messages between server “a” and server “b”. A operates server “a” in your country, which exchanges encrypted messages with server “b” operated by X, located outside your country. A and B know that their servers exchange encrypted messages according to the patented method.

Please Explain

For the purposes of this hypothetical, we assume that the Z’s patent is valid on the territory of Poland. Similarly, to the point a) above, behaviour of A would constitute a direct IPRs infringement.

Z owns a patent claiming a method for exchanging (sending / receiving) encrypted messages between server “a” and server “b”. X operates server “a” outside your country, which exchanges encrypted messages with server “b” operated by Y, located in another country outside your country. A, located in your country, is a software consultant advising X and Y how to use the patented method (but A does not supply any software).
For the purposes of this hypothetical, we assume that the Z’s patent is valid on the territory of X’s country and/or Y’s country.

**With assumption that A is aware of the fact that X and Y violate Z’s patent:**

As an assistant, A should be liable for an indirect IPRs infringement, this is because A is aware of infringements done by X and Y but assists them by consulting them. A should be found acting in guilt. There is a normal connection between actions of A and the direct infringements committed by X and Y, i.e. if A did not advise to X and Y, they would be unable to violate that very patent.

As a benefit recipient, A might be liable for an indirect IPRs infringement, this is because A benefits from the damage resulting from direct infringement of X and Y (A gets payment for its services). There is also a normal relationship between action A and the violation committed by X and Y as explained above. We assume that A knows about infringements committed by X and Y, in a real case, however, it would have to be proved that A is aware of it (consciousness). Moreover, it would be extraordinarily difficult to prove that A benefits from this very damage done to the third party, unless this is the only service A provides to X and Y.

Having regard to the provision of Article 441 of the CC, A would be jointly liable with X and Y.

**With assumption that A is not aware of the fact that X and Y violate Z’s patent:**

In such case A should be responsible as an assistant on the same basis and on the same conditions as in first part of this answer, this is it must be shown that A was aware of the infringement or was guilty of (any) negligence in this regard.

A could not be found liable as an entity benefiting from the infringement, this is because it would require proof that A gained benefit from this damage consciously (intentionally), i.e. A knew about the infringements and intended to profit from them.

It should be pointed out that the additional ‘care’ might be required from A, which is an entity that professionally advises. A having knowledge about the application of a given patent at a level that allows advising indicates the professionalism of A (vide I ACa 455/13).

Having regard to the provision of Article 441 of the CC, A would be jointly liable with X and Y.

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**Are there any other scenarios which result in Joint Liability for IPR infringement under your Group’s current law?**

Yes

Please Explain

The instigator, who is described in detail in div 1. above, also can be found liable for indirect IPRs infringement.

**What remedies are available against a party found liable for Joint Infringement? In particular:**

**Is an injunction available?**

No

Please Explain

The classic injunction (based on art. 730 an next of Polish Proceeding code) as refers to direct infringement is not available for the indirect infringement. Nevertheless, based on the general civil law provisions, a person who is threatened directly by damage as a result of another person’s behaviour, may demand that such a person undertakes measures indispensable to ward off the peril and where necessary, to provide an adequate collateral (439 CC). It shall be noticed that this is just a prohibition claim and not an prohibition in injunction mode.
II. Policy considerations and proposals for improvements of your Group's current law

Are damages or any other form of monetary compensation available?

Yes

On what basis?

Obtaining appropriate compensation for indirect IPRs infringements is allowed on the basis of the articles 415 and 422 CC. The plaintiff (damaged party) who claims this compensation is obliged to prove the scope of the damage.

Article 441 CC statutes that each of the violators (direct and indirect) is jointly liable for the damage to which he contributed. This means that it is possible to claim damages from each offender up to the full amount of the damage that occurred, and it is sufficient that only one of the perpetrators will pay compensation to release all others from the liability.

Are any of the available remedies different in scope to the remedies available against any acts of direct infringement or Contributory Infringement?

Yes

Please Explain

Yes, there are differences. In case of direct infringement, the plaintiff may claim:

a. discontinue of the infringement,

b. remove the effects of the infringement,

c. surrender of any benefits gained,

d. redress the damage.

Moreover, it is possible to demand the distribution of the unlawfully manufactured or marked goods and materials that were used to make the goods or mark them. In particular, it might be demanded that these goods and materials will be withdrawn from the market and transferred to the party that was damaged on the account of the amount awarded to this party (art. 286 of the Act of June 30, 2000 - Industrial Property Law). The court, in its adjudication on infringement, may rule, on the petition of the proprietor, that part of or the whole ruling or information on the ruling may be made publicly available to the extent and in the manner determined by the court (art. 287(2) of Industrial Property Law; art. 79(2) Copyright law). Notwithstanding the above claims, the copyright's right holder may request publication of one or more than one press statements of the appropriate content (art. 79(2) Copyright law).

In case of indirect infringement, the entity whose rights have been infringed may only claim compensation for the damage already incurred as a result of an indirect IPRs infringement.

Are there aspects of your Group's current law that could be improved?

Yes

Please Explain


Pursuant to the Directive 2004/48/EC, Member States law shall ensure that courts may, at the request of the applicant, issue against the alleged indirect infringer an interlocutory injunction intended to prevent any imminent infringement of IPRs (art. 9.1.a Directive 2004/48). Additionally, where a judicial decision is taken finding an infringement of an IPRs, the judicial authorities may issue against the indirect infringer an injunction aimed at prohibiting the continuation of the infringement (art. 11 Directive 2004/48). The analyse of the Polish law shows that there is a risk that the above Directive 2004/48 regulations have not been implemented.
properly. There are voices that the injunction is possible based on art. 439 CC. Nevertheless, it shall be noticed that this is the civil law provision and it is just a prohibition claim. It is not an injunction in procedural meaning. Considering the above the IPRs holder is devoid of procedural tools to fight with the IPRs indirect infringements.

The entity whose IPRs have been infringed indirectly shall have the right to use all remedies available against any acts of direct infringement. In Poland based on article 422 CC and 415 CC, just the damage claim is available, which is contrary to Directive 2004/48 and EU case law (vide: ECJ dated 07.07.2016, C-494/15 Tommy Hilfiger and others vs. Delta Center).

As the claim for compensation is the only relief, the law should ensure a more efficient way to: (i) calculate the claim; and (ii) enforce the obligation to disclose information and documents regarding proving the quantum of actual loss when such obligation is imposed by the court in accordance with the current procedure.

The provisions on indirect infringements described in the article 422 CC should be incorporated directly into the acts related to intellectual property. At the moment there are no specific provisions regarding indirect IPRs infringements that would reflect the nature of these infringements.

It shall be noticed that the draft law amending the Industrial Property Law of 30 June 2000 (O.J. of 2017, item 776) (further: IPL), which was first made publicly available on 6 December 2017, includes amendments regarding joint liability. Pursuant to the proposed amendment:

(i) the patentee shall have the right to forbid a third party who does not hold his authorisation from supplying or offering to supply an unauthorized person to use from the invention protected by a patent, into measures relating to the essential element of this invention enabling its use, if the third party knows or should have known that such means are suitable and intended for use with this invention. The above provision should not apply when the means are standard products commercial use, except in cases where a third party inducers to patent infringement (new art. 66).

(ii) as to the trademark infringement, the novel includes new art. 296.3 IPL, which clearly stays that all claims available for the direct infringement shall apply to the indirect infringement.

Unfortunately, the IPL’s amendment does not include provision expanding all claims available for the direct infringement to the indirect infringement in case of patent infringement.

The amending draft is following an extensive consultation process. It is expected to be adopted by the Parliament by the end of 2018. Due to the consultation process regulations regarding the joint liability could be modified.

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9 Should acts outside the scope of direct infringement or Contributory Infringement give rise to Joint Liability for IPR infringement?

Yes

Should that sound in availability of injunctive relieve and/or damages? Please explain why or why not.

Acts outside of the scope of direct infringement and Contributory Infringement should also lead to joint liability of the indirect infringer. Such liability shall be imposed upon assistants, instigators and entities benefitting from the damaged caused by direct infringement. The damaged party shall also be able to seek injunctions against such indirect infringements.

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10 Should Joint Liability be excluded if one or more acts being necessary for establishing Joint Liability for IPR infringement are committed outside the domestic jurisdiction? Please explain why or why not.

No

Please Explain

Joint Liability should not be excluded in such case, this is because with currently available technologies it might be easily abused. Specifically, entities that seek to profit from such infringements would vastly abuse this exclusion of liability, while seeking compensation would become too complicated or impossible.

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11 Are there any other policy considerations and/or proposals for improvement to your Group’s current law falling within the scope of this Study Question?


Please consult with relevant in-house / industry members of your Group in responding to Part III.

**Is a consolidated doctrine of Joint Liability for IPR infringement desirable?**

Yes

Please Explain

The answers for questions 12. and 13. are congruous and they overlap, thus both will be discussed jointly.

Any and all attempt to consolidate and harmonize regulations in this area is necessary and this is due to the fact it simplify the protection of IPRs. Consistency and transparency of regulations due to their harmonisation would make it easier to avoid accidental infringements of IPRs and would facilitate the pursuit of possible claims. The nature of IPRs and technological progress should be taken into account - at present, it is virtually irrelevant where the entity is located in relation to where its rights might be violated.

Unifying the regulations and adapting them to the same standards would introduce legal certainty and ensure the safety of rights holders and their work.

**Is harmonisation of the laws of Joint Liability for IPR infringement desirable?**

Yes

Please Explain

The answers for questions 12. and 13. are congruous and they overlap, thus both will be discussed jointly.

Any and all attempt to consolidate and harmonize regulations in this area is necessary and this is due to the fact it simplify the protection of IPRs. Consistency and transparency of regulations due to their harmonisation would make it easier to avoid accidental infringements of IPRs and would facilitate the pursuit of possible claims. The nature of IPRs and technological progress should be taken into account - at present, it is virtually irrelevant where the entity is located in relation to where its rights might be violated.

Unifying the regulations and adapting them to the same standards would introduce legal certainty and ensure the safety of rights holders and their work.

**If YES, please respond to the following questions without regard to your Group’s current law.**

**Even if NO, please address the following questions to the extent your Group considers your Group’s current law could be improved.**

**Please propose a suitable framework for Joint Liability for IPR infringement, focussing on the hypotheticals set out in Questions 3 to 5 above:**
The acts in question are limited to activities such as renting retail space, hosting websites, advertising etc. (as further described in Question 3 (a) to (d) above)

The answers for questions a), b) and c) are compatible and they overlap, thus all of them will be discussed jointly as they concern the general principles of determining liability.

The liability shall base on the principle of three elements:

a. consciousness,

b. normal relationship between the activity of the infringer and the damage incurred,

c. guilt,

It is a concept that may make difficulties with proving guilt of infringer in practice, but it allows to balance between the protection of IPRs of creators and the freedom of other entities. This solution introduces general principles that are convenient to understand, yet allow to deal with each and every matter individually.

The means supplied or offered by the contributory infringer related to a substantial element of the subject matter of the protected IPR, but at the time of offering or supply, the suitability and intended use were not known to the supplier or obvious under the circumstances (as further described in Question 4 above)

The answers for questions a), b) and c) are compatible and they overlap, thus all of them will be discussed jointly as they concern the general principles of determining liability.

The liability shall base on the principle of three elements:

a. consciousness,

b. normal relationship between the activity of the infringer and the damage incurred,

c. guilt,

It is a concept that may make difficulties with proving guilt of infringer in practice, but it allows to balance between the protection of IPRs of creators and the freedom of other entities. This solution introduces general principles that are convenient to understand, yet allow to deal with each and every matter individually.

The infringing acts are divided between two parties, and the acts of each party do not qualify as direct infringement or Contributory Infringement, as further described in Question 5 (a) to (c) above.

The answers for questions a), b) and c) are compatible and they overlap, thus all of them will be discussed jointly as they concern the general principles of determining liability.

The liability shall base on the principle of three elements:

a. consciousness,

b. normal relationship between the activity of the infringer and the damage incurred,

c. guilt,

It is a concept that may make difficulties with proving guilt of infringer in practice, but it allows to balance between the protection of IPRs of creators and the freedom of other entities. This solution introduces general principles that are convenient to understand, yet allow to deal with
15 Are there any other scenarios which should result in Joint Liability for IPR infringement, and where harmonisation is desirable?

Yes

Please Explain

The additional scenario which should result in Joint Liability for IPR is the instigator, i.e. an entity that does not commit a direct infringement itself, but induces a third party to commit such a tort (see div 1.3.1 above). The instigation form of an indirect infringement is vastly similar to assistance and it happens rarely in practice, yet it has enough distinct features that should be regulated separately.

16 What remedies should be available against a party found liable for Joint Infringement? In particular:

6a Should an injunction be available?

Yes

Please Explain

The remedies against indirect and direct infringements should not differ. Since the injunction is subject to judicial and administrative control anyway, there is no risk of abuse of this right, while it significantly increases the security of the entity whose IPRs are being violated.

6b Should damages or any other form of monetary compensation be available?

Yes

On what basis?

Compensation is an appropriate form of redress. It should be allowed to claim compensation at least in the amount of the damage incurred.

6c Should any available remedies be different in scope to the remedies available against any acts of direct infringement or Contributory Infringement?

No

Please Explain

Remedies should be the very same in relation to all infringers, irrespective of their form. Only this solution allows solid protection of IPRs. Identity in remedies shall prevent situations where an IPRs infringer will try to avoid all the liability by dividing an infringement on several different entities.

17 Please comment on any additional issues concerning any aspect of Joint Liability you consider relevant to this Study Question, having regard to the scope of this Study Question as set out in paragraphs 7 to 13 above.
Please indicate which industry sector views are included in your Group's answers to Part III.

N/A