

Rafal Sikorski, “Towards a More Orderly Application of Proportionality to Patent Injunctions in the European Union”, IIC 53, 19 January 2022

The intensity of IP protection has traditionally been determined by assessing the criteria that need to be satisfied for the protection to be granted, as well as the scope of rights and limitations of those rights. The enforcement stage and the remedies available to right holders have for long been, if not neglected, then certainly treated with lesser attention. The rise of aggressive litigation strategies, especially in the field of patents, has brought the enforcement stage to the forefront of the discussion about the proper level of IP protection in general and patent law in particular. Injunctions provide particularly strong leverage at the enforcement stage, allowing patentees in some cases to obtain royalties that exceed the value of the protected inventions. The principle of proportionality can play an important role as a check on excessive litigation strategies by patentees. Flexibility, however, comes at the price of uncertainty and unpredictability as to the outcome of patent disputes. Therefore, it is crucial to apply proportionality in an orderly and structured manner. For that purpose, the article identifies a set of factors that may be helpful in applying proportionality in patent disputes. That set of factors is well grounded in the traditions of the laws of the EU Member States.