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ADDENDUM to WORKING DOCUMENT

from: United Kingdom delegation
to: Working Party on Intellectual Property
No. prev. doc.: 5832/04 PI 11 CODEC 129
No. Cion prop.: 6777/03 PI 19 CULT 17 CODEC 204
Subject: Proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights - Further suggestions for drafting amendments to 16289/03

Delegations will find attached further drafting suggestions, in addition to those made in 5657/04.
Article 5

Persons entitled to apply for the application of the measures and procedures

Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter, in accordance with and as permitted by the applicable law:
- holders of intellectual property rights;
- licensees of the holders of intellectual property rights as determined by the applicable law;
- rights management bodies, federations and associations who have the legal standing to assert such rights under the applicable law.

Justification

This suggestion essentially follows the helpful framework set out in the drafting suggestion made by France. However, the reference to “all other persons authorised by the right holders to use those rights” is too broad; this could lead to action being possible by a very wide spectrum of people who have no direct interest in the intellectual property right which is inappropriate. It is also important in all cases that Member States are able to make provision limiting and applying conditions on those who can seek application of the measures, to avoid, for example, a very large number of people or bodies taking action against the same infringement at different times.

Article 12

Corrective Measures

Without compensation of any kind, Member States shall ensure that the competent judicial authorities may order that the goods in respect of which they have established that they infringe an intellectual property right and, in appropriate cases, the materials and instruments principally used in the creation or manufacture of these goods, be:
(a) removed definitively from the channels of commerce or
(b) destroyed [...].

The judicial authorities may order that **the infringer must take such measures as are within his power to recall the infringing goods from the channels of commerce.** These measures shall be carried out at the expense of the infringer, unless the judicial authorities order otherwise.

The corrective measures must be commensurate with the seriousness of the infringement and take account of the legitimate interests of third parties.

*Justification*

*When awarding corrective measures, it must be possible to assess what other remedies are being awarded, such as damages, to ensure that the overall burden on the defendant is not punitive (hence the deletion of the first line).*

*For clarification there needs to be a clear reference to the judicial authorities ordering measures about recall of infringing goods against the infringer. It would not be appropriate for an order to be made against third parties directly or for recall to be required to be carried out by a public authority.*

*Article 21*

Legal protection of technical devices

Deletion - despite extensive discussion we still do not understand how this provision will operate and so cannot assess what its impact might be. It is particularly important that any provision here does not conflict with the existing provisions in the Copyright Directive.