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to: Working Party on Intellectual Property
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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
- Consolidated text: Recitals


Changes in relation to 6777/03 are indicated.
ANNEX

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on measures and procedures to ensure the enforcement of intellectual property rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,
Having regard to the proposal from the Commission¹,
Having regard to the opinion of the European Economic and Social Committee²,
Having regard to the opinion of the Committee of the Regions³,
Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,
Whereas:

(1) The achievement of the Internal Market entails eliminating restrictions on freedom of movement and distortions of competition, while creating an environment conducive to innovation and investment. In this context, the protection of intellectual property is an essential element for the success of the Internal Market. The protection of intellectual property is important not only for promoting innovation and creativity, but also for developing employment and improving competitiveness.

(2) The protection of intellectual property must allow the inventor or creator to derive a legitimate profit from his invention or creation. It must also allow the widest possible dissemination of works, ideas and new know-how. At the same time, the protection of intellectual property must not hamper freedom of expression or the free movement of information, or the protection of personal data, including on the Internet.

¹ OJ C [...] , [...] , p.[…].
² OJ C [...] , [...] , p.[…].
³ OJ C [...] , [...] , p.[…].
⁴ OJ C [...] , [...] , p.[…].
(3) However, without effective means of enforcing intellectual property, innovation and creativity are discouraged and investment diminished. It is therefore necessary to ensure that the substantive law on intellectual property, which is nowadays largely part of the *acquis communautaire*, is applied effectively in the Community. In this respect, the means of enforcing intellectual property rights are of paramount importance for the success of the single market.

(4) At international level, all Member States, as well as the Community itself as regards matters within its competence, are bound by the Agreement on Trade-Related Aspects of Intellectual Property (the "TRIPS Agreement"), approved, as part of the multilateral negotiations of the Uruguay Round, by Council Decision 94/800/EC\(^5\) concluded in the framework of the World Trade Organisation.

(5) The TRIPS Agreement contains, in particular, provisions on the means of enforcing intellectual property rights which are common standards applicable at international level and implemented in all Member States. The provisions of this Directive should not affect Member States’ international obligations, including those under the TRIPS Agreement.

(6) There are also international conventions to which all Member States are parties and which also contain provisions on the means of enforcing intellectual property rights. These include, in particular, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works, and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

(7) It emerges from the consultations held by the Commission on this question that, in the Member States, and despite the provisions of the TRIPS Agreement, there are still major disparities as regards the means of enforcing intellectual property rights. For instance, the arrangements for applying provisional measures, which are used in particular to safeguard

evidence, the calculation of damages, or the arrangements for applying injunctions, vary widely from one Member State to another. In some Member States, there are no measures and procedures such as the right of information and the recall, at the infringer's expense, of the infringing goods placed on the market.

(8) The disparities between the systems of the Member States for enforcing intellectual property rights are prejudicial to the proper functioning of the Internal Market and make it impossible to ensure that intellectual property rights enjoy an equivalent level of protection throughout the Community. This situation does not promote free movement within the Internal Market nor create an environment conducive to healthy competition.

(9) The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the Internal Market in this field. This causes a loss of confidence in the Internal Market in business circles, with a consequent reduction in investment in innovation and creation. Infringements appear to be increasingly linked to organised crime. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Effective enforcement of the substantive law on intellectual property, which is nowadays largely part of the acquis communautaire, must be ensured by specific action at Community level. Approximation of the legislation of the Member States in this field is therefore an essential prerequisite for the implementation of the Internal Market.

(10) The objective of this Directive is to approximate legislative systems so as to ensure a high, equivalent and homogeneous level of protection in the Internal Market. […]

(11) This Directive does not aim to establish harmonised rules for judicial cooperation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, nor to deal with applicable law. There are Community instruments which govern such matters in general terms and are, in principle, equally applicable to intellectual property.

(12) This Directive should not affect the application of the rules of competition, and in particular Articles 81 and 82 of the Treaty.
(13) It is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned [...]. Nevertheless, that requirement does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition, including parasitic copies, or similar activities.

(13a) Certain measures specifically identified in this Directive need to be applied only in respect of acts committed on a commercial scale. The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts done by end consumers acting in good faith.


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(16) [...] 

(17) [...] The persons entitled to request application of these measures and procedures should be not only the right holders but also persons who have a direct interest and legal standing in accordance with the applicable law, which includes professional organisations in charge of the management of those rights or for the defence of the collective and individual interests for which they are responsible.

(18) Since copyright exists from the creation of a work and does not require formal registration as in the case of industrial property, it is appropriate to adopt the rule in Article 15 of the Berne Convention, which establishes the presumption whereby the author of a literary or artistic work is regarded as such if his name appears on the work. [...] A similar presumption should be applied to the owners of related rights since often it is the holder of a related right, such as a phonogram producer, who will seek to defend rights and engage in fighting acts of piracy also on behalf of other right holders such as authors.

(19) Given that evidence is an element of paramount importance for establishing the infringement of intellectual property rights, it is appropriate to ensure that effective means of presenting, [...] obtaining and protecting evidence are available [...]. The procedures must have regard to the rights of the defence and must provide the necessary guarantees including the protection of confidential information. For infringements carried out on a commercial scale it is also important that the courts may order access, where appropriate, to banking, financial or commercial documents under the control of the alleged infringer.

(20) [...] 

(21) Other measures designed to ensure a high level of protection exist in certain countries and must be made available in all the Member States. This is the case with the right of information, which allows precise information to be obtained on the origin of the infringing goods or services, the distribution channels and the identity of the third parties involved in the infringement [...].
(22) It is also essential to provide for provisional measures allowing for the immediate termination of the infringement without awaiting a decision on the substance of the case, while observing the rights of the defence, ensuring the proportionality of the provisional measures as appropriate to the characteristics of the case in question and providing the guarantees needed to cover the costs and the injury caused to the defendant by an unjustified request. Such measures are particularly justified when any delay would cause irreparable prejudice to the holder of an intellectual property right.

(23) Depending on the particular case, and if justified by circumstances, the measures and procedures to be provided for should include prohibitory measures aimed at preventing further infringements of intellectual property rights. Moreover there should be […] corrective measures, where appropriate at the expense of the infringer, […] such as the recall […], the removal definitively from the channels of commerce, or destruction […] of the infringing goods and in appropriate cases the materials and implements principally used in the creation or manufacture of these goods. These corrective measures should take account of the interests of third parties including, in particular, consumers and private parties acting in good faith.

(24) With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who has engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the right holder should be set either as a lump sum of up to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question (the aim being not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the right holder, such as the costs of identification and research), or according to the actual prejudice (including loss of earnings) suffered by the right holder […], to which must be added any unfair profits made by the infringer […]. In the latter case, it must also be possible to take into account other elements, such as the moral prejudice caused to the right holder.
(24a) To act as a supplementary deterrent to future infringers and contribute to the awareness of the public at large, it is useful to publicise judgments in intellectual property infringement cases.

(25) In addition to the civil and administrative measures and procedures provided for under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights. However, any approximation of criminal sanctions should be undertaken, if deemed necessary, under the relevant Treaty provisions, rather than in this Directive.

(26) [Protection measures make a major contribution towards combating infringements of intellectual property.] Appropriate legal protection of security and authentication devices which protect against copying, manipulation or neutralisation is [therefore] necessary in the field of industrial property, and already exists in the field of copyright. Moreover, these protection measures targeting the abuse of technical devices to infringe intellectual property rights are in line with Article 6 of the Convention on Cybercrime adopted by the Council of Europe in Budapest on 23 November 2001.

(27) Industry must take an active part in the fight against piracy and counterfeiting. The development of codes of conduct in the circles directly affected is a supplementary means of bolstering the regulatory framework. The Member States, in collaboration with the Commission, should encourage the development of codes of conduct in general. Monitoring of the manufacture of optical discs, particularly by means of an identification code embedded in discs produced on the territory of the Community, helps to limit infringements of intellectual property in this sector which suffers from piracy on a large scale. However, these technical protection measures must not be misused with a view to protecting markets and preventing parallel imports.
(28) In order to facilitate the uniform application of the provisions set out in this Directive, it is appropriate to provide for systems of cooperation and mutual assistance between Member States, on the one hand, and between the Member States and the Commission on the other, in particular by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of this Directive and the effectiveness of the measures taken by the various national bodies. Within this framework, a Contact Committee made up of national correspondents could also be set up within the Commission.

(29) Since the objectives of this Directive cannot be sufficiently achieved by the Member States for the reasons already described, and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve its objectives.

(30) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for intellectual property (Article 17(2) of the Charter of Fundamental Rights of the European Union),

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