COUNCIL OF
THE EUROPEAN UNION

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REPORT
from: Presidency
to: Permanent Representatives Committee (Part 1)
No. prev. doc.: 5905/04 PI 15 CODEC 139
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 - Preparation of agreement at the first reading

A. INTRODUCTION


The Economic and Social Committee gave its Opinion on 29 October 2003 (OJ C 32 of 5.2.2004, p. 15).

The Committee of the Regions informed the Council by letter dated 22 May 2003 that it will not issue an opinion on this document.
2. The Committee on Legal Affairs and the Internal Market of the European Parliament voted a number of amendments to the Commission proposal on 27 November 2003. Shortly thereafter, it informed the Council of its hope that the European Parliament and the Council could adopt the Directive at first reading.

Since early January 2004, a number of informal meetings have been held to that end, while work has continued intensively in the Council's Working Party on Intellectual Property.

3. Since the European Parliament intends to adopt its Opinion at its session on 25 and 26 February 2004, it is necessary for the Permanent Representatives Committee to determine whether the conditions for agreement at first reading are met. To that end, the main outstanding questions are summarised in this report. Other reservations are mentioned in the footnotes to the text of the proposal set out in the Annex to this report\(^1\).

### B. MAIN OUTSTANDING QUESTIONS

**Criminal sanctions**

4. The Commission has proposed not only civil and administrative measures and procedures as means of ensuring the enforcement of intellectual property rights, but also an Article 20 concerning criminal law provisions. All delegations, while not contesting that criminal sanctions are an essential means of combating counterfeiting and piracy, and that all Member States are obliged under Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to provide for criminal procedures and penalties in this respect, consider that it is not appropriate to include criminal law provisions in a Directive based on Article 95 of the EC Treaty.

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\(^1\) The changes in relation to 5802/04 + ADD 1 are indicated.
5. The Legal Affairs Committee of the European Parliament, in which views are divided as
to whether or not criminal sanctions should be provided for explicitly in this Directive,
has proposed the following amendment: "Without prejudice to the civil and
administrative measures and procedures laid down by this Directive, Member States
shall apply appropriate sanctions in cases where intellectual property rights have been
infringed." No delegation is able to accept this amendment, since it would entail an
obligation in a Directive based on Article 95 of the EC Treaty for Member States to
apply sanctions which, implicitly, could only be criminal sanctions.

6. The Presidency has put forward a compromise proposal comprising the following
elements:

(a) Recital 25 which, while recognising that criminal sanctions constitute, in
appropriate cases, a means of ensuring the enforcement of intellectual property
rights, indicates that any approximation of criminal sanctions should be
undertaken under the relevant Treaty provisions;

(b) Article 2(3)(c), which states that the proposed Directive shall not affect any
national provisions in Member States relating to criminal procedures or penalties
in respect of infringement of intellectual property rights;

(c) Article 20, which follows closely the wording of the amendment proposed by the
Parliament's Legal Affairs Committee, but is optional for Member States.

All delegations have reserved their position on this compromise proposal but are
prepared to consider it in the light of the comments made by the Council Legal Service.

The Presidency considers that this compromise proposal is the only proposal which
might be acceptable to both Council and Parliament.

The Commission maintains its proposal.
7. **The Permanent Representatives Committee** is asked to decide whether it can accept this Presidency compromise proposal.

**Scope of the Directive**

8. **The Commission** proposed (Article 2) that the Directive should apply to "any infringement of rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex, and from the provisions adopted by the Member States in order to comply with those acts …".

The Parliament's Legal Affairs Committee proposed removing the reference to European acts and to the Annex. As a result of contacts between the Presidency and the European Parliament, there is a broad consensus in favour of the text of Article 2 whereby the Directive would apply "… to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned."

The Belgian, Netherlands and Swedish delegations could accept this text if it were to be accompanied by a list of the rights concerned. The Swedish delegation also has a reservation as to whether the Community has the competence to harmonise enforcement measures in respect of intellectual property rights where the Community has not harmonised the substantive rights. The Slovenian delegation would prefer to exclude patent rights and supplementary protection certificates from the scope of the Directive.

9. **The Permanent Representatives Committee** is invited to approve this text as it stands.

10. **The Commission** proposed that the Directive be limited to infringements committed for commercial purposes or which cause significant harm to the right holder. The Parliament's Legal Affairs Committee proposed that this limitation be removed.
The majority of delegations can accept a compromise solution whereby the scope of the Directive as a whole is not limited as proposed by the Commission, but certain provisions (Articles 7(2), 9(1) and 10(1a)) are limited to acts committed on a commercial scale. Recital 13a gives interpretative guidance to the term "on a commercial scale".

The Portuguese delegation and the Commission continue to support the Commission's proposal. The Netherlands delegation considers that the scope should be limited to cases of serious and systematic infringements committed on a commercial scale and in bad faith. The French delegation proposes that Articles 7(2) and 9(1) refer to "acts committed on a commercial scale and/or with a view to a direct or indirect economic interest", proposes no limitation in Article 10(1a), and would prefer to delete Recital 13a. The Belgian, German, Austrian and Portuguese delegations have scrutiny reservations on the wording of Recital 13a.

11. **The Permanent Representatives Committee is invited to approve the solution acceptable to the majority of delegations.**

12. The proposal for a Directive is a minimum Directive in the sense that it is "without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders" (Article 2(1)).

The Belgian, French, Spanish, United Kingdom and Luxembourg delegations have expressed reservations with regard to certain aspects of Article 8(1) which they consider to be less favourable to rightholders than provisions in their national laws. The Belgian, French and Italian delegations have also expressed reservations with regard to Article 16, which they consider to be contrary to the aim of combating piracy and counterfeiting. These delegations have been invited to review their positions in the light of the above clause in Article 2(1).
**Intermediaries**

13. The Belgian, German, Luxembourg and United Kingdom delegations have expressed reservations with regard to the possibility of an interlocutory injunction being issued against an intermediary under Article 10(1)(a), and the Belgian, Spanish and United Kingdom delegations have expressed similar reservations with regard to the corresponding provision in Article 15.

These provisions have been reformulated to make it clear that they relate to industrial property rights only, as the question of injunctions against intermediaries with regard to copyright and related rights is regulated in Directive 2001/29/EC, and the proposed Directive is without prejudice to the relevant provisions of that Directive by virtue of Article 2(2) of the proposed Directive. In addition, an explanatory Recital 22a has been added.

The delegations concerned have been invited to review their positions in the light of the reformulations and the recital referred to above.

**Right of information**

14. Article 47 of the TRIPS Agreement contains an option for States to provide for judicial authorities to order an infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

The Commission proposed a binding, rather than an optional, provision, which would also allow the right of information to be used in relation to certain persons other than the infringer, and would allow it to be used not only where an infringement has been established, but also where an infringement has been alleged (Article 9).
The amendments proposed by the Parliament's Legal Affairs Committee correspond broadly to the scope of this right as proposed by the Commission, while introducing some additional safeguards.

Following reservations from several delegations in respect of several aspects of this Article, the text as now proposed by the Presidency, while maintaining a binding provision, limits its scope to cases where an infringement has already been established by the courts. This right may be used not only in relation to the infringer, but also to the persons listed in paragraph 1(a), (b), (ba) and (c). Delegations have been asked to review their positions in the light of the changes made to this Article.

**Legal basis**

15. The Commission has proposed Article 95 of the EC Treaty as the legal basis for the proposed Directive.

The Danish delegation has raised the question whether, since Articles 7 to 15 of the proposal relate to questions of civil law and civil procedural law, Article 65 should also be used as a legal basis.

The Council Legal Service has been requested to give an opinion on this question.

**C. CONCLUSION**

16. The Permanent Representatives Committee is invited to examine the questions set out above, as well as the other reservations mentioned in footnotes, with a view to determining whether the conditions are met for agreement at first reading on the proposal for a Directive.
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 Commission,
Having regard to the opinion of the European Economic and Social Committee,
Having regard to the opinion of the Committee of the Regions,
Acting in accordance with the procedure laid down in Article 251 of the Treaty,
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

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2 F, UK: parliamentary scrutiny reservations.
3 DK: request for an opinion by the Council Legal Service on whether the present Directive does not fall under Article 65 ECT.
4 OJ C [...], […], p.[…].
5 OJ C […], […], p.[…].
6 OJ C […], […], p.[…].
7 OJ C […], […], p.[…].
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.

(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/EC⁸ 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

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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) The measures provided for in Articles 7(2), 9(1) and 10(1a) of this Directive need to be applied only in respect of acts committed on a commercial scale. This is without prejudice to the possibility for Member States to apply these measures also in respect of other acts. The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally\(^9\) exclude acts done by end consumers acting in good faith.\(^10\)


(15) The provisions of this Directive are without prejudice to the particular provisions for the enforcement of rights and on exceptions in the domain of copyright and related rights set out in Community instruments and notably those found in Council Directive 91/250/EEC of

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\(^9\) A, P : delete "normally".

\(^10\) NL, F : reservation on recital 13a. If it were to be maintained, F would like to see the reference to Article 10(1a) and the last sentence deleted. B, D scrutiny reservations on the wording of this recital.


\(^12\) OJ L 13, 19.1.2000, p. 12.

14 May 1991 on the legal protection of computer programs\textsuperscript{14} or Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society\textsuperscript{15}.

(16) The measures and remedies provided for in this Directive should be determined in each case in such a manner as to take due account of the specific characteristics of that case, including the specific features of each intellectual property right and, where appropriate, the intentional or unintentional character of the infringement.\textsuperscript{16} \textsuperscript{17}

(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 so far as permitted by and in accordance with the applicable law, which may include 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 [...] , 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 [...].

(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.

\textsuperscript{14} OJ L 122, 17.5.1991, p. 42.
\textsuperscript{15} OJ L 167, 22.6.2001, p. 10.
\textsuperscript{16} P : delete " and, where appropriate, the intentional or unintentional character of the infringement".
\textsuperscript{17} COM : add "and whether the infringement is committed on a commercial scale or causes significant harm to the right holder".
(20) Deleted.\textsuperscript{18}

(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.

(22a) Without prejudice to any other measures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder's right. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(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.

\textsuperscript{18} F suggested a new recital 20: "Carriers incorporating intellectual property rights constitute goods within the meaning of Article 8".
(23a) Member States should have the option of providing, in cases where an infringement has been carried out unintentionally and without negligence and where the corrective measures or injunctions provided for by this Directive would be disproportionate, for the possibility, in appropriate cases, of pecuniary compensation being awarded to the injured party as an alternative measure. However, where the commercial use of counterfeit goods or the supply of services would constitute an infringement of law other than intellectual property law or would be likely to harm consumers, such use or supply should remain prohibited.

(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 take account of all appropriate aspects, such as loss of earnings incurred by the right holder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the right holder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as 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) […].

(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, to the extent that any approximation of
criminal sanctions is deemed necessary, it should be undertaken under the relevant Treaty provisions [...].

(26) Deleted.

(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 [...] cooperation and the exchange of information 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. [...] 

(29) Since, for the reasons already described, the objectives of this Directive [...] can best be 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),

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures and procedures necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term "intellectual property rights" includes industrial property rights.

Article 2

Scope

1. Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures and procedures provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.\textsuperscript{20} \textsuperscript{21} \textsuperscript{22}

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\textsuperscript{20} S : reservation on the competence of the Community to harmonise measures and/or procedures regarding the enforcement of national intellectual property rights, for which no substantive harmonisation has taken place in the Community. SL requested exemption of patent rights and of supplementary protection certificates.

\textsuperscript{21} S, NL, B : for legal certainty, need to list all the IP rights covered by the Directive.

\textsuperscript{22} P, COM : reservation on the deletion of the limitation of the scope appearing in the Commission proposal. NL would prefer a limitation of the scope to cases of serious and systematic infringements committed on a commercial scale and in bad faith.
2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and on exceptions contained in Community legislation concerning copyright and rights related to copyright, notably those found in Directive 91/250/EEC or Directive 2001/29/EC and, in particular, Articles 2 to 5 and Article 8 of that Directive.²³

3. This Directive shall not affect:

(a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive;

(b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”), including those relating to criminal procedures and penalties;

[(c) any national provisions in Member States relating to criminal procedures or penalties in respect of infringement of intellectual property rights.⁴]

²³ F, D, S, NL, B, E, UK : reservation on the appropriateness of referring to specific Articles in (2) and (3)(a) but broad agreement to consider it positively in the context of a package deal with the EP. UK : if such reference is maintained, need to add Article 6 of Directive 2001/29/EC.

²⁴ D, UK, S, NL, DK, E : reservation on references to criminal law in (3)(b) and (c).
CHAPTER II
MEASURES AND PROCEDURES

SECTION 1
GENERAL PROVISIONS

Article 3
General obligation

Member States shall provide for the measures, procedures and remedies needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and remedies shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

The measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

[…]25

Article 4
Penalties

Merged with Article 3.

25 F : reservation on the transfer of the third subparagraph of Article 3 to the recitals (recital 16).
COM : scrutiny reservation.
Article 5

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

26 Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter:

- the holders of intellectual property rights in accordance with the provisions of the applicable law, 27

- all other persons authorised to use those rights, in particular licensees, in so far as permitted by and in accordance with the provisions of the applicable law,

- intellectual property collective rights management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law, 28

- professional defence bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the applicable law. 29

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26 B : Insert "Unless otherwise provided by this Directive, ..." in order to be able in specific Articles to limit the persons entitled to act.
27 E : replace "applicable law" by "law of the Member State in which the court is situated" throughout Article 5.
28 DK : reservation on third indent.
29 F : scrutiny reservation on Article 5.
Article 6

Presumption of authorship or ownership

For the purposes of applying the measures and procedures provided for in this Directive,

(a) in order that the author of a literary or artistic work, in the absence of proof to the contrary, be regarded as such, and consequently be entitled to institute infringement proceedings, it shall be sufficient for his name to appear on the work in the usual manner;

(b) the provision under (a) shall apply mutatis mutandis to the holders of rights related to copyright with regard to their protected subject matter.  

SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall ensure that, on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be produced by the opposing party, subject to the protection of confidential information. For the purposes of this paragraph, Member States may provide that a reasonable sample of a substantial number of copies of a work or any other protected object be considered by the competent judicial authorities to constitute reasonable evidence.

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30 F: add "as such".
31 UK: scrutiny reservation, in particular in relation to performers’ rights.
32 DK, B: clarify that "confidential information" shall be determined by national law.
33 F: replace the last sentence of (1) by "When a substantial number of goods allegedly infringes an intellectual property right, the judiciary authorities may consider, on the basis of a significant sample of these goods, that evidence of the alleged infringement has been sufficiently provided".
2. Under the same conditions, in the case of an infringement carried out on a commercial scale,\(^34\) Member States shall take such measures as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information.\(^35\)

Article 8

Measures for protecting evidence\(^36\)

1. Member States shall ensure that even before the commencement of proceedings on the merits of the case the competent judicial authorities may, on application by a party who has presented reasonably available evidence to support his claims\(^37\) that his intellectual property right has been infringed or is about to be infringed, order prompt and effective provisional measures to preserve relevant evidence in regard to the alleged infringement, subject to the protection of confidential information. Such measures may include the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto.\(^38\) These measures shall be taken, if necessary without the other party having been heard, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

Where evidence-protection measures have been adopted without the other party having been heard, the affected parties shall be given notice immediately after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of

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\(^34\) F: insert "and/or with a view to a direct or indirect economic interest"

\(^35\) I, P: scrutiny reservation.

\(^36\) DK: reservation on Article 8, too detailed.

\(^37\) F: replace "who has presented reasonably available evidence to support his claims" by "who alleges". B, E, UK, LUX share the French concerns but indicated their willingness to reconsider in the light of clarifications given by the Council Legal Service regarding Article 2(1).

\(^38\) F: delete "and, in appropriate cases, the materials and implements used in the production and/or distribution of these goods and the documents relating thereto".
the affected parties with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

2. Member States shall ensure that the evidence-protection measures may be subject to the applicant’s lodging of an adequate security or equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant as provided for in paragraph 4.

3. Member States shall ensure that the evidence-protection measures shall be revoked or otherwise cease to have effect upon request by the defendant, without prejudice to the damages which may be claimed, if the applicant has not instituted legal proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period, to be determined by the judicial authority ordering the measures when the law of a Member State so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. Where the evidence-protection measures have been revoked, or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of any intellectual property right\(^{39}\), the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

5. Member States may take measures to protect witnesses' identity.\(^{40}\)

\(^{39}\) NL : insert "or where it is subsequently found that the measures have been disproportionate in relation to the seriousness of the infringement".

\(^{40}\) F, FIN, P, S, DK, D, A, E, NL, : reservation on (5), it is a criminal law measure. But F, D, E could accept it in the context of a global compromise.
SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall ensure that, [...] in appropriate cases, and in response to a justified and proportionate request of the claimant, the competent judicial authorities may order [...] that information on the origin and distribution networks of the goods or services which [...] infringe an intellectual property right [...] be provided by the infringer and/or any other person who:

(a) was found in possession of the infringing goods on a commercial scale; \(^{43, 44}\)

(b) was found to be using the infringing services on a commercial scale;

(ba) was found to be providing on a commercial scale services used in infringing activities; \(^{45}\)

or

(c) was indicated by the person referred to in point (a), (b) or (ba) as being involved in the production, manufacture or distribution of the goods or the provision of the services.


\(^{42}\) B proposed alternative drafting on Article 9 as in 6065/04/04 PI 18 CODEC 168. This proposal is supported by NL, D.

\(^{43}\) UK : reservation on "on a commercial scale" throughout Article 9.

\(^{44}\) F : add "and/or with a view to a direct or indirect economic interest" to points (a), (b) and (ba) of paragraph 1.

\(^{45}\) UK, D, NL : reservation on (1)(ba). P: scrutiny reservation.
2. The information referred to in paragraph 1 shall, as appropriate, comprise:

(a) the names and addresses of the producers, manufacturers, distributors, suppliers and other previous holders of the goods or services, as well as the intended wholesalers and retailers;

(b) information on the quantities produced, manufactured, delivered, received or ordered, as well as the price obtained for the goods or services in question.

3. Paragraphs 1 and 2 shall apply without prejudice to other statutory provisions which:

(a) grant the right holder rights to receive fuller information;

(b) govern the use in civil or criminal proceedings of the information communicated pursuant to this Article;

(c) govern responsibility for misuse of the right of information;

(d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to his own participation or that of his close relatives\(^{46}\) in an infringement of an intellectual property right; or

(e) govern the protection of confidentiality of information sources or the treatment of personal data.

(4) Deleted.

\(^{46}\) UK: reservation on "or that of his close relatives".
SECTION 4

PROVISIONAL MEASURES

Article 10

Provisional measures\(^{47}\)

1. Member States shall ensure that the judicial authorities may, at the request of the applicant:

(a) issue against the alleged infringer [...] an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject, where appropriate, to a recurring penalty payment where provided for by national law, the continuation of the alleged infringements of that right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder; an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an industrial property right;

(b) order the seizure\(^{48}\) or delivery up of the goods suspected of infringing an intellectual property right so as to prevent their entry into or movement within the channels of commerce.

[...]

1a. In cases of infringement committed on a commercial scale,\(^{49}\) the Member States shall ensure that, if the injured party demonstrates circumstances likely to endanger the recovery of damages, the judicial authorities may order the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets. To this end, the competent authorities may order the communication of bank, financial or commercial documents, or appropriate access to the relevant information.\(^{50}\)

\(^{47}\) B : scrutiny reservation on Article 10.

\(^{48}\) LUX, DK : reservation on "seizure".

\(^{49}\) F : reservation on "committed on a commercial scale".

\(^{50}\) LUX, E : reservation on last sentence of paragraph 1a.
1b. The judicial authorities shall, in respect of the measures referred to in paragraphs 1 and 1a, have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed, or that such infringement is imminent.

2. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a may, in appropriate cases, be taken without the defendant having been heard, in particular when any delay would cause irreparable prejudice to the right holder. In the event of this happening, the parties shall be so informed without delay after the execution of the measures at the latest.

A review, including the right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable time after notification of the measures, whether these measures shall be modified, revoked or confirmed.

3. Member States shall ensure that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, or otherwise cease to have effect, upon request by the defendant, if the applicant does not institute proceedings leading to a decision on the merits of the case before the competent judicial authority within a reasonable period to be determined by the judicial authority ordering the measures where the Member State’s law so permits or, in the absence of such determination, within a period not to exceed 20 working days or 31 calendar days, whichever is the longer.

4. The competent judicial authorities may make the provisional measures referred to in paragraphs 1 and 1a subject to the lodging by the applicant of adequate security or equivalent assurance intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.
5. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of an intellectual property right\textsuperscript{51}, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant with appropriate compensation for any injury caused by these measures.

\textit{Article 11}

\textbf{Precautionary measures}

Deleted (merged with Article 10).

\textbf{SECTION 5}

\textbf{MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE}

\textit{Article 12}

\textbf{Corrective measures}

Without prejudice to any damages due to the right holder by reason of the infringement,\textsuperscript{52} and without compensation of any sort, Member States shall ensure that the competent judicial authorities may order, at the request of the applicant, that \textit{appropriate measures be taken with regard to} goods that they have found to be infringing an intellectual property right and, in appropriate cases, \textit{with regard to} materials and implements principally used in the creation or manufacture of these goods. \textit{Such measures shall include:}

\textsuperscript{51} \textbf{NL} : insert "or where it is subsequently found that the measures have been disproportionate in relation to the seriousness of the infringement".

\textsuperscript{52} \textbf{UK} : reservation on "Without prejudice to any damages due to the right holder by reason of the infringement".
(a) **recall** from the channels of commerce,
(b) **definitive removal** from the channels of commerce or
(c) **destruction**.

The judicial authorities shall order that these measures shall be carried out at the expense of the infringer, unless particular reasons are invoked for not doing so.

In considering a request for corrective measures, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account.

*Article 13*

**Disposal outside the channels of commerce**

Deleted (merged with Article 12).

*Article 14*

**Destruction of goods**

Deleted (merged with Article 12).

*Article 15*

**Injunctions**

1. Member States shall ensure that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer [...] an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. An **injunction** may also be issued, under the same conditions, against an **intermediary** whose services are used by third parties to infringe an **industrial** property right.
2. Deleted (merged with paragraph 1)

Article 16

Alternative measures\(^{53}\)

Member States may provide that, in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, the competent judicial authorities may [...] order pecuniary compensation to be paid to the injured party instead of applying the above measures if that person has acted unintentionally and without negligence\(^{54}\), if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation to the injured party appears reasonably satisfactory.\(^{55}\)

[...]\(^{56}\)

SECTION 6

DAMAGES AND LEGAL COSTS

Article 17

Damages

1. Member States shall ensure that the competent judicial authorities, on application by the injured party, shall order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement.

\(^{53}\) F : reservation on Article 16. If maintained, is should be made conditional upon the agreement of the injured party. DK : scrutiny reservation.

\(^{54}\) S, E: reservation on "if that person has acted unintentionally and without negligence".

\(^{55}\) NL: doubts on the compatibility of this provision with TRIPS.

\(^{56}\) I, F : reservation on the deletion of the second subparagraph of Article 16.
When the judicial authorities set the damages, they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, as well as any unfair profits made by the infringer and, in appropriate cases, [...] elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

As an alternative to the above, the judicial authorities may, in appropriate cases, set the damages as a lump sum on the basis of elements such as the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Deleted.

3. In cases where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits [...] or the payment of damages which may or may not be pre-established.\(^{57}\)

\[^{57}\text{UK scrutiny reservation on this Article.}\]

**Article 18**

**Legal costs**

Member States shall ensure that reasonable and proportionate legal costs [...] and other expenses incurred by the successful party shall as a general rule be borne by the unsuccessful party. [...]
SECTION 7
PUBLICITY MEASURES

Article 19
Publication of judicial decisions

Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part [...].

Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising.

[CHAPTER III
OTHER SANCTIONS

Article 20
Other sanctions

1. Without prejudice to the civil and administrative measures and procedures laid down by this Directive, Member States may apply other appropriate sanctions in cases where intellectual property rights have been infringed.

2. to 4. Deleted.]

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58 I : reservation on "at the request of the applicant".
CHAPTER IV
TECHNICAL MEASURES

Article 21
Legal protection of technical devices

Deleted

Article 22
Codes of conduct

1. Member States shall encourage:
   (a) the development by trade or professional associations or organisations of codes of
   conduct at Community level aimed at contributing towards the enforcement of the
   intellectual property rights referred to in Article 2, particularly by recommending the
   use on optical discs of a source code enabling the identification of the origin of their
   manufacture;
   (b) the submission to the Commission of draft codes of conduct at national and Community
   level and of any evaluations of the application of these codes of conduct.

2. Deleted
CHAPTER V

ADMINISTRATIVE COOPERATION

Article 23

Assessment

1. Three years after the date laid down in Article 25(1), each Member State shall submit to the Commission a report informing it of the situation with regard to implementation of this Directive.

On the basis of those reports, the Commission shall draw up a report on the application of this Directive, including an assessment of the effectiveness of the measures taken, […] as well as an evaluation of its impact on innovation and the development of the information society. That report shall be transmitted to the European Parliament, the Council and the European Economic and Social Committee. It shall be accompanied, if necessary, by proposals for amendments to this Directive.

2. Member States shall provide the Commission with all the aid and assistance it may need when drawing up the report referred to in the second subparagraph of paragraph 1.60

Article 24

Exchange of information and correspondents

[…]

For the purpose of promoting cooperation, including the exchange of information, among Member States and between Member States and the Commission, each Member State shall designate one or more national correspondents for any questions relating to the implementation of the measures provided for by this Directive. It shall communicate the details of the correspondents […] to the other Member States and to the Commission.

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60 EL : reservation on Article 23.
CHAPTER VI

FINAL PROVISIONS

Article 25

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … [eighteen] [twenty-four]61 months after the date of adoption of this Directive] at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 26

Entry into force

This Directive shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

Article 27

Addresses

This Directive is addressed to the Member States.

61 NL, UK, B, LUX, D, I, EL, CZ : request for 24 months. S needs more.