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ADDENDUM TO OUTCOME OF PROCEEDINGS
of: Working Party on Intellectual Property
on: 3 June 2003
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
CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter
This Directive concerns the measures\(^1\) necessary to ensure the enforcement of intellectual property rights.\(^2\)

Article 2

Scope\(^3\)

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 provided for by this Directive shall apply to any infringement of the rights deriving from Community and European acts on the protection of intellectual property, as listed in the Annex,\(^4\) and from the provisions adopted by the Member States in order to comply with those acts when the infringement is committed for\(^5\) commercial purposes or causes significant harm to the right holder.\(^6\)\(^7\)

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\(^1\) D observed that the draft Directive uses indiscriminately the terms "measures" or "measures and procedures" in different Articles and requested that "measures" be used throughout the Directive.

\(^2\) IT observed that under the current wording of Article 2, not all intellectual property rights are covered by the proposed Directive. The wording of Articles 1 and 2 needs therefore to be aligned.

\(^3\) IT requested that the scope of the proposed Directive be extended to cover the enforcement of all intellectual property rights, irrespective of whether these stem from national, European or Community law.

\(^4\) NL, IRL: reservation on the insertion of the Convention on the Grant of European Patents (EPC), which is not a Community instrument, in the Annex. According to COM, this is linked to future developments relating to Community Patents.

\(^5\) B: insert "direct or indirect".

\(^6\) F, P, A, D, IT, ES, HU: reservation on "when the infringement is committed for commercial purposes or causes significant harm to the right holder", which restricts too much the scope of the Directive as regards copyright infringements, especially over computer networks. For COM, the latter could be covered by the term "significant harm". UK, FIN and HU also expressed concerns about the appropriateness of applying the same measures for both copyright and industrial property rights.

\(^7\) UK, NL: need to clarify what is meant by "commercial purposes" and "significant harm".
2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights contained in Community legislation concerning copyright and notably those found in Directive 2001/29/EC.

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;

b) Member States’ international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the “TRIPS Agreement”).

CHAPTER II

MEASURES AND PROCEDURES

SECTION 1

GENERAL PROVISIONS

Article 3

General obligation

Member States shall provide for the proportionate measures and procedures needed to ensure the enforcement of the intellectual property rights covered by this Directive.

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8 B: insert "and related rights".
9 D observed that one uses "without prejudice" in paragraph 2 and "shall not affect" in paragraph 3 and requested that the two paragraphs be aligned.
10 A, D suggest adding references to Directive 98/84/EC (conditional access) and more recent Community legislation on data protection.
11 IT observed that Article 3 is equivalent in substance to Article 41 TRIPS. The only additional element of this Article is the first sentence of the second subparagraph, but this sentence should be deleted as superfluous.
These measures and procedures shall be such as to remove from those responsible for an infringement of an intellectual-property right the economic benefits of that infringement. They shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

These measures and procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.

Article 4

Penalties

Member States shall ensure that any infringement of an intellectual property right covered by Article 2 is punishable by penalties. These penalties must be effective, proportionate and deterrent.

Article 5

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

1. Member States shall recognise as persons entitled to apply for application of the measures referred to in this Chapter the holders of intellectual property rights, as well as all other persons authorised to use those rights in accordance with the applicable law, or their representatives.

2. Member States shall confer upon rights management or professional defence bodies, wherever they represent intellectual property right holders or other persons authorised to use these rights according to the applicable law, an entitlement to seek application of the measures and procedures referred to in this Chapter, including the authority to initiate legal proceedings for the defence of those rights or of the collective or individual interests for which they are responsible.

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12 A, D, NL: concerns that the first sentence of the second subparagraph of Article 3 contradicts Article 17(2).
13 D, NL, A, UK: reservation on the term "penalties", which is traditionally used in the field of criminal law.
14 IT: Reservation on Article 4, on the grounds that as a rule on substantive intellectual property law it does not fit in the proposed Directive.
15 A, NL: not all licensees but only those having an exclusive licence should be entitled to apply for application of the measures referred to in the Directive to persons. For GR, licensees should be entitled to initiate proceedings only if they have received a special authorisation by the rightsholder.
16 In reply to UK, COM explained that "or their representatives" means any other person having a special authorisation to initiate proceedings provide for by the Directive. IT wondered whether this term does not cover also Article 5(2).
17 FIN, D, IT, S: reservation on Article 5(1) on the grounds that it is too vague.
18 P requested clarification of the first subparagraph of paragraph 2.
Such entitlement shall be accorded to any properly constituted rights management body or professional defence body, regardless of the Member State in which it is established.\textsuperscript{19}

The first and second subparagraphs shall be without prejudice to the applicable rules on the representation of parties in court proceedings.\textsuperscript{20, 21}

\textit{Article 6}

\textbf{Presumption of copyright tenure}\textsuperscript{22}

Until proved otherwise, authorship of a work shall be presumed to be vested in the person whose name, presented as being that of the author, is featured on copies of the work, or whose authorship is referred to on a copy of the work by way of a statement, label or other mark.\textsuperscript{23, 24}

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\textsuperscript{19} IT: scrutiny reservation on this provision.
\textsuperscript{20} IT: reservation on the need for the last subparagraph of Article 5(2).
\textsuperscript{21} A, DK, NL, FIN, S, GR: reservation on Article 5(2). P shares this reservation to the extent that this provision goes beyond TRIPS standards. D: scrutiny reservation. F, UK strongly support this Article.
\textsuperscript{22} NL: doubts need for this Article in the light of Article 15 of the Berne Convention. DK requested deletion of this provision, on the grounds that it is a provision of substantive intellectual property law. COM and HU insisted on the need for this provision in the Directive.
\textsuperscript{23} ES seeks clarification that this provision concerns not only physical copies of a work.
\textsuperscript{24} A, HU suggest that this provision should concern not only authors but also holders of rights related to copyright.