

## THE EUROPEAN COMMUNITY ANTI-PIRACY POLICY

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Counterfeiting and piracy are a growing international phenomena which pose a serious and continuous threat to economies.

### **The Community measures in the fight against counterfeiting and piracy aim at:**

#### **Promoting innovation and business competitiveness.**

Counterfeiting and piracy can have the effect of discouraging operators in the Internal Market and endanger innovation and creativity in the Community;

#### **Promoting the preservation and development of the cultural sector.**

This sector losses through counterfeiting and piracy more than 4.5 billion euro annually. Piracy of works deprives the author's of their rights and makes it impossible to preserve cultural diversity and plurality;

#### **Preserving employment in Europe.**

The damage suffered by businesses is reflected ultimately in the volume of employment they offer;

#### **Preventing tax losses and market destabilisation.**

Infringements of intellectual property rights are a threat to market equilibrium. In the multimedia products industry, counterfeiting and piracy via the Internet are increasing and represent considerable losses;

#### **Ensuring consumer protection.**

Counterfeiting and piracy are a deliberate cheating of the consumer as to the quality of the products, which do not comply with minimum quality standards. The consumer does not benefit from a guarantee, after-sales service or effective remedy in the event of damage. These activities may also pose a real threat to the health of the

consumer (counterfeit medicines) or to his safety (counterfeit toys or parts for cars or aircraft);

**Ensuring the maintenance of public order.** Counterfeiting and piracy infringe labour legislation (clandestine labour), tax legislation (loss of government revenue), health legislation and the legislation on product safety. The phenomena are increasingly linked to the organised crime, which finds in these activities a means of recycling and laundering earnings from other illicit trafficking (arms, drugs). In the Internet context, the rapidity of illegal operations and the difficulty to track the operations reduce the risk for the criminal.

The functioning and success of the Internal Market depend on the elimination of disparities in the regulation of intellectual property rights by different Member States, which can be exploited in favour of activities infringing intellectual property rights.

The ultimate goal of the regulation of intellectual property rights in the European Community is the achievement of an equivalent level of protection throughout the Internal Market.

This goal was gradually achieved through **(1) the harmonisation of the substantive provisions of intellectual property law** and through **(2) the effective enforcement of intellectual property rights**. An essential measure in the fight against counterfeiting and piracy is **the improved control at external borders (3)** of the European Community. The legal framework in the intellectual property field is subject to **continuous adaptations and improvements (4)**.

**(1) Regulation of copyright law in the European Community was harmonised by the adoption of:**

- Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (**the Software Directive**),
- Council Directive 92/100/EEC of 19 November 1992 on rental and lending right and on certain rights related to copyright (**the Rental Right Directive**),
- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (**the Satellite and Cable Directive**),
- Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (**the Term Directive**),

- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (**the Database Directive**),
- Directive 2001/29/EC of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the information society (**the Information Society Directive**),
- Directive 2001/84/EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art (**the Resale Right Directive**).

As part of the **Better Regulation Action Plan**, the Commission envisages the review of the copyright legislation enacted between 1991 and 1996. The review started in 2002 at the Conference on "European Copyright Revisited" in Santiago de Compostela. The public consultations were opened until the 31st of October 2004.

The first objective of the *acquis communautaire* review is **to improve the coherence and the operation of the legislative framework**, by ensuring the **compliance with the standards set by the Information Society Directive**. The second is to **safeguard the good functioning of the Internal Market**, by analysing whether the existing legislative framework contains shortcomings which may entail negative effects.

**The Commission working paper** assesses whether inconsistencies between different Directives hamper the application of copyright law in Member States or damage the balance between right holder's interests, users and consumers and the interests of the European economy as a whole.

According to the **working paper**, minor adjustments are necessary in order to give consistency and coherence to the existing *acquis*.

**The definition of the reproduction right**, differently worded in Directives, needs to be amended, without entailing changes of the scope of the right.

**The mandatory exception** regarding certain temporary acts of reproduction provided by Art.5 (1) of the Information Society Directive needs to be introduced with respect to **transient or incidental acts of reproduction of databases and computer programs**, in order to provide legal certainty for the activity of intermediaries.

The question **whether authors of computer programs enjoy the right of communication to the public** needs a clear statement from the part of the European Parliament.

**The provisions on decompilation** allowing two or more computer hardware devices or software components to connect and exchange information are of a key importance to competition, innovation and market entry in the software market. The issue of the scope for decompilation, in the light of the evolution of computing networks, is in the Commission's attention.

**The public lending right** has been only partially harmonised and the application of legislative measures vary to a large extent from one Member State to another. The Commission observes the continuous digital technological developments and changes in the role of libraries and the media market.

**The duration of copyright** was harmonised and set to run until 70 years after the death of the author. **The term of protection for related rights** was set until 50 years after the event which triggers the term running. At present, there are no trade distortions due to differences in the term of protection in the Internal Market and there is no need to extend copyright protection for recorded music from 50 years to 95, to bring the European legislation in line with the US.

**Criteria for calculating the term for protection of co-written musical works** (regarded as works of joint authorship or as collective works in different Member States) need to be provided by the introduction of a similar rule as for film works, i.e. by relation with the last surviving author.

**An exception for the benefit of disabled**, allowing, for example, visually impaired people to put material into an alternative, accessible format, at no extra cost, need to be allowed **under the Database Directive**. The provision should apply both to databases covered by copyright and to those covered by the *sui generis* right.

**An exception to the reproduction right** under the copyright chapter of the Database Directive **for the benefit of libraries** should be considered.

**The issue of the initial ownership of rights** is to be analysed further by the Commission.

**The question of points of attachment for the protection of producers of phonograms and of broadcasting organisations** needs to be harmonised at Community level.

The gradual harmonisation of substantive law on intellectual property rights has promoted the free movement of goods and services between the Member States and has made the rules applicable more transparent. However, difficulties in the proper functioning of the Internal Market were due to differences in the enforcement of the substantive law in the Community.

**(2) The issue of enforcement of intellectual property rights** was addressed by the Commission in its **Green Paper on the fight against counterfeiting and piracy in the Single Market** (on the 15th of October 1998). Public debates on the matter revealed the lack of uniformity in the systems of sanctions. The disparities meant that counterfeiting and piracy were concentrated in the countries where the repression of counterfeiting and piracy was less effective than in others. **The follow-up Communication to the Green Paper** presented an **action plan** which set out: **1. urgent measures** for which Commission proposals will be presented speedily, **2. medium-term** Commission measures and **3. other initiatives** involving public authorities and the private sector.

### **2.1. Activities proposed by the Commission to be carried out as a matter of urgency:**

The adoption of the **Directive 2004/48/EC on the enforcement of intellectual property rights** (on the 29th of April 2004, to be implemented until the 29th of April 2006).

**The measures provided for by this Directive apply to any infringement of the intellectual property rights** as provided for by Community law and/or by the national law of the Member State concerned, which cover, at least: copyright, rights related to copyright, *sui generis* right of a database maker, rights of the creator of the topographies of a semiconductor product, trade mark rights, design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, trade names, in so far as these are protected as exclusive property rights in the national law concerned<sup>1</sup>.

**The persons entitled to apply for the application of the measures and procedures** are not only the rightholders, but any persons having a direct interest and legal standing, including professional organisations in charge of the management of those

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<sup>1</sup> Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights;

rights or for the defence of the collective and individual interests for which they are responsible.

**Effective means of presenting, obtaining and preserving evidence** are made available. The procedures guarantee the rights of the defence and provide the protection of confidential information. For infringements committed on a commercial scale, courts may order access to banking, financial or commercial documents under the control of the alleged infringer.

**Provisional measures** are provided for the immediate termination of infringements, without awaiting a decision on the substance of the case, where any delay would cause irreparable harm to the rightholder. The right holder may request either the detailed description or the physical seizure of the infringing goods. The rights of the defence, the proportionality of the provisional measures and the guarantees needed to cover the costs and injury caused to the defendant are observed.

The rightholder may apply for an injunction against an intermediary whose services are being used by a third party to infringe his intellectual property right, under the conditions and procedures of national law of Member States.

These provisional measures can be adopted without the other party having been heard, in particular where any delay would cause irreparable harm to the rightholder. These provisional measures cease to have effect, upon request of the defendant, if the applicant has not instituted, within a reasonable period, proceedings leading to a decision on the merits of the case before the competent judicial authority.

**The right of information** allows the obtaining of precise information on the origin of the infringing goods or services, the networks for their distribution or provision, the identities of third parties involved in the infringement.

Judicial authorities may authorise the **precautionary seizure of the assets** of the alleged infringer, including the blocking of his bank accounts and other assets.

**Corrective measures**, such as the recall and definitive removal from the channels of commerce, or destruction of the infringing goods and of the materials and implements used in the creation or manufacture of these goods are provided, at the expense of the infringer.

**Pecuniary compensation** may be awarded to the injured party where an infringement is committed unintentionally and without negligence and where the corrective measures or injunctions would be disproportionate.

**The damages** awarded to the rightholder are calculated on an objective basis, taking account of the loss of earnings incurred by the rightholder, the unfair profit made by the infringer, or any moral prejudice caused to the rightholder. The amount of damages may be derived from elements such as the royalties or fees which would have been due, had the infringer requested the rightholder's consent.

**The judicial decisions** in intellectual property infringement cases **are made public**, as a deterrent to further infringers and information of the public at large.

Member States are free to apply criminal sanctions for enforcing intellectual property rights.

**Industry should take an active part in the fight against counterfeiting and piracy and should develop codes of conduct**, as a supplementary means of bolstering the regulatory framework.

**Monitoring of the manufacture of optical discs**, by means of identification code embedded in discs produced in the Community is a way of limiting piracy.

**A system of cooperation and the exchange of information** between Member States on the one hand and between the Member States and the Commission, by creating a network of correspondents designated by the Member States and by providing regular reports assessing the application of the Directive is provided.

Romania has complied with the legal requirements of the Directive 2004/48/EC on the enforcement of intellectual property rights, by enacting the **Law no.280/2005** (M. Of. no.897/07.10.2005, in force from the 10.10.2005).

Other urgent measures in the action plan are:

**Training and exchange of officials**, so that better account is taken of the aspects relating to the fight against counterfeiting and piracy.

**Stepping up training and technical assistance for the applicant countries.** The enlargement negotiations should give priority to combating counterfeiting and piracy. Training and technical assistance

in this field should be stepped up, in order for these countries to introduce without delay the instruments and infrastructures needed for enforcing intellectual property rights.

**Public awareness and information** on the negative consequences of counterfeiting and piracy.

**Defining a methodology for collecting, analysing and comparing data** that will enable the interested parties, the Member States and the Commission to define and apply the appropriate measures for combating counterfeiting and piracy.

**Commission-level contact point** in order to permit greater transparency vis-à-vis businesses and the Member States on all questions relating to counterfeiting and piracy in the single market.

## **2.2. The medium-term activities proposed in the Commission's action plan for the fight against counterfeiting and piracy are:**

**Administrative cooperation** between the competent national authorities and between national authorities and the Commission, by establishing mutual assistance for exchanging information on matters including specific cases of counterfeiting and piracy, by carrying out joint surveys and checks and by establishing Community-level cooperation between these national authorities and the Commission.

**Harmonisation of the elements constituting criminal infringements and the minimum thresholds for criminal sanctions.**

**Extension of the powers of Europol**, in accordance with the provisions of the Europol Convention<sup>2</sup>.

**Improving access to information** for businesses and associations, by setting up a website, through which legal decisions published in the Member States would be accessible, to operators and the law-enforcement authorities.

## **2.3. Other initiatives of the action plan are:**

**Improving cooperation between the private sector and public authorities**, by a better use of the databases and information systems and by concluding protocols of agreement for cooperation and exchange of information.

**European judicial cooperation** through the implementation of the European Judicial Network in civil and commercial matters, the

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<sup>2</sup> Art. 2(2), indent 3, of the Europol Convention, OJ C 316 of 27/11/1995, p. 1.



coordination of legal proceedings through EUROJUST, the mutual recognition of final decisions in criminal matters or the mutual recognition of judgments on civil and commercial matters. Consideration should be given to establishing a specialised tribunal with jurisdiction particularly in cases concerning the validity and counterfeiting of intellectual property rights.

**(3) Improved controls at external borders of the European Community** constitute an important measure in the fight against counterfeiting and piracy.

**3.1. The Council Regulation No. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights** (adopted on the of 22nd of July 2003) simplifies the procedure for the lodging of applications for action with the customs authorities and for the destruction of fraudulent goods.

Where goods are suspected of infringing intellectual property rights, the right-holder may lodge a **written application** with the relevant customs authorities. The right-holder may also **request the intervention of the customs authorities** of one or more Member States if he is the holder of a Community trademark, design or model, a Community protection, a new plant variety, a designation of origin, or a geographical indication or designation protected by the Community.

If the customs authorities have sufficient reason to suspect that goods are infringing an intellectual property right, they may suspend the release of goods or retain goods for three working days, during which time the right-holder must submit an application for action.

The competent customs office sets a time-limit for the action to take place, which may not exceed one year.

The law applicable when deciding whether an intellectual property right has been infringed is the law in force in the Member State where the goods were found.

Goods found to infringe an intellectual property right may not be: brought into the customs territory of the Community; withdrawn from the customs territory of the Community; released for free circulation; exported; re-exported; placed under a suspensive arrangement, in a free zone or free warehouse.

Member States may now set up a **simplified procedure to enable the customs authorities to have the goods destroyed.**

If the infringement of an intellectual property right is not established within a set deadline, the detention order is lifted and the goods are released once the necessary customs formalities have been discharged.

**3.2. The Commission Regulation No 1891/2004 of 21 October 2004** clarifies the provisions for the implementation of Council Regulation No 1383/2003.

It defines the **natural and legal persons which may represent** the holder of a right or any other person authorised to use the right. It specifies the **nature of the proof of ownership of intellectual property rights**.

The Regulation harmonises the **application for action**, by providing a model form specifying the type of information to be included and the language requirements. It also lays down the type of **right-holder liability declaration** that must accompany the application for action.

In the interests of legal certainty, the Regulation specifies when the **time periods** for establishing infringement commence.

Procedures for the **exchange of information** between Member States and the Commission are provided for, making possible for the Commission to monitor the effective application of the procedure and recognise patterns of fraud and for the Member States to introduce appropriate risk analysis.

Romania has enacted the **Law no.344/2005** (M.Of. no.1093 of 05.12.2005, in force since 03.02.2006), which implements similar provisions on the measures and conditions for customs action against goods suspected of infringing certain intellectual property rights.

#### **(4) Steps for further harmonisation of European intellectual property law were taken by the Commission:**

**4.1. Proposals for further customs measures** aimed at protecting EU more effectively against counterfeiting and piracy were made in the **Commission Communication** on a customs response to latest trends in counterfeiting and piracy (on the 11th of October 2005).

Improvement of customs **controls on inbound traffic** is needed, because travellers are currently permitted to import small quantities of personal-use items that may be counterfeit or pirated goods.

New techniques and instruments are needed to ensure a **high operational capacity**. Actions have to be developed and brought together in a new operational control plan based on risk management. The EU's **Customs Information System (CIS)**, set up by the Council

Regulation (EC) No 515/97 of 13 March 1997<sup>3</sup> enables the national customs services of Member States to exchange and search for customs information.

Businesses shall be fully involved in order to guarantee the effective customs enforcement. Early **exchange of information between businesses and customs** is important. The Commission envisages the possible solution under the form of an EU electronic information system for intellectual property rights.

A **simplified destruction procedure** that will reduce costs to businesses and public administrations alike is envisaged.

**International cooperation** is crucial in halting the production and export of counterfeit and pirated goods. The Commission intends to: introduce export and transshipment controls; exploit and extend Customs Cooperation Agreements to cover regions where there is a significant level of counterfeit and pirated goods; enhance the World Trade Organization (WTO) agreement on trade-related aspects of intellectual property rights (TRIPS); strengthen cooperation with the World Customs Organization (WCO), Europol and Interpol; enter into bilateral arrangements, especially with China.

**4.2. The Proposal for a Directive on criminal measures** aimed at ensuring the enforcement of intellectual property rights (adopted on the 12th of July 2005) establishes **a criminal-law response to infringements of intellectual property rights.**

According to the Proposal, any **wilful trademark counterfeiting or copyright piracy on a commercial scale** shall be considered as a **criminal offence.**

The range of penalties to be imposed are fines and the seizure of goods belonging to the offender, the destruction of infringing goods and closure of the establishment or shop primarily used to commit the offence.

Counterfeiting and piracy are punished by means of a maximum term of four years' **imprisonment** when they are committed under the aegis of a criminal organisation or where they carry a serious risk to people's health or safety.

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<sup>3</sup> on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters

Provision is made for permanent or temporary ban on engaging in commercial activities and placement under judicial supervision.

The judicial decisions shall be made public.

**4.3. The Recommendation on collective cross-border management of copyright and related rights for legitimate online music services** (adopted on the 18th of May 2005) invites Member States to promote a regulatory environment best suited to the management at Community level of copyright and related rights, in order to facilitate the growth of legitimate online services in the Community.

At present, licensing of online rights is restricted by territory, and commercial users negotiate in each Member State with each of the respective collective rights managers for each right that is included in the online exploitation.

The absence of EU-wide copyright licenses makes difficult for new Internet-based services such as webcasting or on-demand music downloads to develop their full potential, given the multi-territoriality of the online environment.

Right holders shall be given the right to freely choose the collective rights manager, to entrust or transfer online rights to a collective rights manager, irrespective of the Member State of residence or the nationality of either the rightholder or the collective rights manager, to determine the territorial scope of the mandate of collective rights managers and to withdraw any of the online rights.

Collective rights managers shall comply with competition rules and the obligation to treat right-holders without discrimination based on nationality. They should inform right-holders of the repertoire they represent, of existing reciprocal representation agreements, of the territorial scope of their mandates and of applicable tariffs.

**4.4. Copyright levy reform** is included in the Commission Work Program for 2006. In October 2004, the Commission consulted Member States on the scope of the private copying exception and the existing systems of remuneration.

The policy objective is to ensure that the scope and the level of systems of fair compensation for acts of private copying takes account of the application of digital rights management technologies.

Criteria should be established to assist Member States on what constitutes availability and use of digital rights management

technologies. Also, criteria should be established to ensure transparency in relation to the application, collection and distribution of copyright levies to right-holders.

The European Community Copyright Policy envisages the process of simplification and fine-tuning of the acquis. This process is of crucial importance to the success of the European Community Anti-piracy Policy, aiming at providing an equivalent level of protection of intellectual property rights in the Internal Market. The good functioning of the Internal Market requires from the part of the Community legislator a constant adaptation and updating of the acquis in the field of intellectual property rights.