



**COUNCIL OF
THE EUROPEAN UNION**

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**PI 116
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WORKING DOCUMENT

from : Presidency
to : Working Party on Intellectual Property
No. prev. doc. : 14001/03 PI 106 CODEC 1471
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
– Revised Presidency proposal for Articles 1 to 9

Delegations will find in Annex a revised compromise proposal from the Presidency concerning Articles 1 and 9 of the above proposal for a Directive.

The amendments in relation to 12450/03 PI 82 CODEC 1161 are indicated.

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Subject-matter

This Directive concerns the measures necessary to ensure the enforcement of intellectual 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 provided for by this Directive shall apply to any infringement of copyright, related rights, sui generis rights of a database manufacturer and of the creator of the topographies of a semiconductor product, trademark law, patent law, law of geographical indications, law of designs, law of utility models and law of plant varieties. In this respect, Member States shall ensure that the judicial authorities take due account of the specific characteristics of each case when determining the applicable penalties and relevant arrangements.
2. This Directive shall be without prejudice to the particular provisions on the enforcement of rights and derogations contained in Community legislation concerning copyright and related rights, notably those found in Directive 2001/29/EC and, in particular, Articles 2 to 5 and Article 8 thereof.

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 thereof in particular;
 - (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 measures, procedures and penalties needed to ensure the enforcement of the intellectual property rights covered by this Directive. These measures, procedures and penalties shall be fair and equitable, and shall not be unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays.

The measures and penalties 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.

Article 4

Penalties

Merged with Article 3.

Article 5

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

1. Member States shall recognise as persons entitled to seek 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. This entitlement shall also be accorded to exclusive licensees and sub-licensees or their representatives if the holder of the rights so permits or if, following formal notification, the holder fails to apply to the court within a reasonable period of time.
2. Member States shall confer upon rights management or professional defence bodies, wherever they have a mandate to 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. This entitlement shall also be accorded to exclusive licensees and sub-licensees under the conditions laid down in paragraph 1.

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

Article 6

Presumption of copyright tenure

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 the work, or whose authorship is referred to on the work by way of a statement, label or other mark.

SECTION 2

EVIDENCE

Article 7

Evidence

1. Member States shall lay down that, on application by a party which has presented reasonably accessible evidence sufficient to support its claims, and has, in substantiating those claims, cited evidence which is to be found under 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.

2. Under the same conditions and in order to identify those involved in the infringement, Member States shall take such measures as are necessary to enable the competent judicial authorities to order, at the request of the plaintiff, the communication or seizure of banking, financial or commercial documents under the control of the defendant, subject to the protection of confidential information.

Article 8

Measures for protecting evidence

1. Member States shall lay down that, where there is a demonstrable risk that evidence may be destroyed even before the commencement of proceedings on the merits of the case, the competent judicial authorities may, in the event of an actual or imminent infringement of an intellectual property right, authorise in any place either the detailed description, with or without the taking of samples, or the physical seizure of the infringing goods, and, in appropriate cases, the documents relating thereto. These measures shall be taken by order issued on application, if necessary without the other party having been heard.

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 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 lay down that physical seizure may be subject to the applicant's lodging of an adequate guarantee intended to ensure compensation for any prejudice suffered by the defendant if the proceedings instituted against him are subsequently judged to be unfounded.

3. Member States shall lay down that the seizure shall be revoked at the request of 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 interval, which shall be specified by the judicial authority ordering the measures when the law of a Member State permits or, in the absence of such specification, within an interval not exceeding 20 working days or 31 calendar days [...] if longer.

Where the evidence protection measures have been revoked, or where they lapse owing 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, the judicial authorities shall be empowered to order the applicant, at the defendant's request, to provide the defendant with adequate compensation for any injury caused by the measures.

SECTION 3

RIGHT OF INFORMATION

Article 9

Right of information

1. Member States shall lay down that, in the context of proceedings concerning an alleged infringement of an intellectual property right, or in order to comply with a request for provisional or precautionary measures, the competent judicial authorities may order, at the request of the right holder or of the persons or bodies referred to in Article 5, in appropriate cases and unless particular reasons are invoked for not doing so, any person to provide

information on the origin of the goods or services which are thought to infringe an intellectual property right and on the networks for their distribution or provision, respectively, if that person:

- (a) was found in possession, for commercial purposes, of the infringing goods;
- (b) was found to be using the infringing services for commercial purposes; or
- (c) was indicated by the person referred to in point (a) or (b) as being the producer or distributor of the goods or the provider of the services.

2. The information referred to in paragraph 1 shall comprise:

- (a) the names and addresses of the producers, distributors, suppliers and other previous holders of the product or service, as well as the intended wholesalers and retailers;
- (b) information on the quantities produced, 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 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; or
- (d) afford an opportunity for refusing to provide information which would force the person referred to in paragraph 1 to admit to involvement in an infringement of an intellectual property right.

4. Apart from the cases referred to in paragraph 1, Member States shall lay down that, when the responsible administrative authorities are in possession of the information referred to in paragraph 2, they may so inform the right holder, provided the latter is known, while complying with the rules on the protection of confidential information [...].

