



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 28 November 2003 (01.12)
(OR. fr)**

**Interinstitutional File:
2003/0024 (COD)**

**15295/03
ADD 1**

**PI 125
CODEC 1674**

WORKING DOCUMENT

from : Presidency

to : Working Party on Intellectual Property

No. prev. doc. : 14862/03 PI 116 CODEC 1618

No. Cion prop. : 6777/03 PI 19 CILT 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 compromise proposal for Articles 10 to 27

Delegations will find attached an alternative for Article 17 of the proposed Directive.

The amendments to 13155/03 are indicated.

Article 17

Damages

1. Member States shall lay down that the competent judicial authorities, at the request of the injured party, shall order an infringer to pay the right holder adequate damages in reparation of the damage incurred by the latter as a result of his intellectual property right being infringed through the infringer having engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement.

To calculate damages corresponding to the actual prejudice, including lost profits, suffered by the right holder as a result of the infringement, the competent judicial authorities shall take into account all relevant aspects including, in appropriate cases, profits lost by the injured party and/or profits made by the infringer.

As a calculation method, damages may also consist of the equivalent of the amount of the licence fee which would have been due if the infringer had applied for authorisation to use the intellectual property, which may be increased up to double that amount.

In appropriate cases, Member States shall lay down that the prejudice suffered can also be deemed to include elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement.

[Damages shall not be punitive.]

For calculating the amount of the profits made by the infringer, the right holder is bound to provide evidence only with regard to the amount of the gross income achieved by the infringer, with the latter being bound to provide evidence of his deductible expenses and profits attributable to factors other than the protected object.

2. [Member States may provide that the recovery, for the benefit of the right holder, of all the profits made by the infringer which are attributable to the infringement shall be added, where appropriate, to the damages determined in accordance with paragraph 1, provided they have not already been taken into account when calculating the amount of the damages.]

(Second subparagraph moved to paragraph 1)

3. Member States may lay down that the judicial authorities may order the recovery of profits and/or the payment of damages even if the infringer has carried out an activity which infringes an intellectual property right without being aware of it or without having reasonable grounds for being aware of it.

