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from : Presidency

to : Working Party on Intellectual Property

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

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 compromise proposal from the Presidency relating to Articles 10 to 27

Delegations will find in the Annex a revised compromise proposal from the Presidency concerning Articles 10 to 27 of the above proposal for a Directive.

The amendments to 13155/03 and 14001/03 are indicated.

SECTION 4

PROVISIONAL AND PRECAUTIONARY MEASURES

Article 10

Provisional measures

1. Member States shall lay down that the judicial authorities may, at the request of the applicant:
 - (a) serve the alleged infringer, or the intermediary whose services are being used by a third party to infringe a right, with an interlocutory injunction intended to prevent any impending infringement of an intellectual property right, or to forbid, on a provisional basis and subject to a recurrent fine, the continuation of the alleged infringements of an intellectual property right, or to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the right holder;
 - (b) authorise the seizure of the goods suspected of infringing an intellectual property right so as to prevent their introduction into or movement within channels of commerce.

The judicial authorities shall be empowered 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.

- 1a. In cases of infringement committed on a commercial scale, the Member States shall lay down that, [...] if the injured party demonstrates circumstances likely to endanger the

recovery of damages, the judicial authorities may authorise the precautionary seizure of the movable and immovable property of the alleged infringer, including the blocking of his bank accounts and other assets and to this end the communication or seizure of bank, financial or commercial documents.

2. Member States shall lay down 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 at the request of the defendant in order to decide, within a reasonable time after notification of the measures, whether they are to be amended, revoked or confirmed.

3. Member States shall lay down that the provisional measures referred to in paragraphs 1 and 1a shall be revoked, at the defendant's request 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 which orders these measures where the Member State 's legislation so permits or, failing such determination, within a period not exceeding 20 working days or 31 calendar days if the latter period is longer.
4. The competent judicial authorities may make the injunction or the seizure subject to the lodging by the applicant of adequate guarantees intended to ensure any compensation of the prejudice suffered by the defendant as provided for in paragraph 5.
5. Where the provisional 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 an intellectual property right, the judicial authorities must be empowered to order the applicant, at the request of the defendant, to provide the defendant with adequate compensation for any injury caused by these measures.

Article 11

Precautionary measures

Deleted (merged with Article 10).

SECTION 5

MEASURES RESULTING FROM A DECISION ON THE MERITS OF THE CASE

Article 12

Corrective measures

Without prejudice to the damages due to the right holder by reason of the infringement, and without compensation of any kind, Member States shall lay down that the competent judicial authorities may order that the goods in respect of which they have established that they infringe an intellectual property right and, in appropriate cases, the materials and instruments principally used in the creation or manufacture of these goods, be:

- (a) recalled from the channels of commerce,
- (b) removed definitively from the channels of commerce or
- (c) destroyed [...].

In appropriate cases, these measures shall be taken by the judicial authorities at the expense of the infringer.

The corrective measures must be commensurate with the seriousness of the infringement and take account of the interests of third parties.

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 lay down that, when a judicial decision has been taken finding an infringement of an intellectual property right, the judicial authorities may serve the infringer with an injunction aimed at prohibiting the continuation of the infringement.
2. [...] Right holders must be able to apply for an injunction to be addressed to intermediaries whose services are used by third parties to infringe an intellectual property right.

Article 16

Alternative measures

Member States shall lay down that the competent judicial authorities may alternatively in appropriate cases and at the request of the person liable to be subjected to the measures provided for in this Section, 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, if execution of the measures in question would cause him disproportionate harm and if pecuniary compensation appears reasonably satisfactory to the injured party.

However, the commercial use of goods and of counterfeit goods and the supply of services shall remain prohibited where they constitute an infringement of the law or are likely to harm consumers.

[SECTION 6

DAMAGES AND LEGAL COSTS]

Article 17

Damages

1. Member States shall lay down that the competent judicial authorities 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 the damages, this end, the competent judicial authorities shall award:

- (a) either, fixed-sum, damages set at up to double the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question;

- (b) or damages which take into account all appropriate aspects such as the economic consequences for the injured Party as a result of the infringement, and the unfair profits made by the infringer.

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.

2. Deleted.
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.

Article 18

Legal costs

Member States shall lay down that the legal costs, lawyer's fees and any other expenses incurred by the successful party shall be borne by the other party, unless equity does not allow this. The competent authorities shall determine the sum to be paid.

SECTION 7

PUBLICITY MEASURES

Article 19

Publication of judicial decisions

Member States shall lay down that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authorities may order, 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 in the media.

CHAPTER III

CRIMINAL LAW PROVISIONS

Article 20

Criminal law provisions

1. Without prejudice to the civil and/or administrative measures provided for under this Directive, Member States shall adopt the necessary measures to ensure that at least every [...] infringement [...] of an intellectual property right of a serious and intentional nature is liable to penal sanctions.
2. Deleted.

CHAPTER IV

TECHNICAL MEASURES

Article 21

Legal protection of technical devices

1. Without prejudice to particular provisions applicable in the field of copyright, related rights and the *sui generis* right of the creator of a database, Member States shall provide for appropriate legal protection against the manufacture, import, distribution and use of illegal technical devices.

2. For the purposes of this Chapter,
 - (a) "technical device" means any technology, device or component which, in the normal course of its functioning, is designed for the incorporation in tangible products protected by an industrial property right of elements which are manifestly identifiable by customers and consumers and which make it easier to recognise the goods as being authentic;

 - (b) "illegal technical device" means any technology, device or component which is designed to incorporate in tangible products elements designed to deceive or mislead any person as to the authenticity of the products in question.

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.

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.

Article 24

Exchange of information and correspondents

1. Member States shall ensure that flexible and appropriate procedures for cooperation are established between them, in particular the exchange of information, using telematic means, between, on the one hand, the administrative authorities responsible for the protection of intellectual property and, on the other hand, those which hold information on the origin and networks for the distribution of goods or the supply of services or other information relating to the infringement of intellectual property rights.
2. For this purpose, each Member shall designate one or more national correspondents who shall coordinate cooperation with the other Member States and with the Commission to ensure as rapidly as possible that the information referred to in paragraph 1 is provided and that cooperation is effective. The details of the correspondents shall be communicated to the other Member States and to the Commission.

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 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.