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Committee on Civil Liberties, Justice and Home Affairs

2005/0127(COD)

12.12.2006

OPINION

of the Committee on Civil Liberties, Justice and Home Affairs

for the Committee on Legal Affairs

on the amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights
(COM(2006)0168 – C6-0233/2005 – 2005/0127(COD))

Draftsman: Rainer Wieland

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SHORT JUSTIFICATION

Following the European Court of Justice's judgement of 13 September 2005 (Case C 176/03 Commission v Council), the European Commission amended its proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.

The issue of the protection of intellectual property is of particular importance for European companies, which need to make sure that their investments are going to be profitable. Without such a protection of intellectual property, investments and consequently innovation may slow down in Europe.

Some common grounds need to be defined at the European level so as to fight more effectively against counterfeiting and piracy: this proposal therefore establishes common definitions and common levels of penalties. This proposal also intends to facilitate criminal investigations related to infringements of intellectual property rights.

The draftsman supports the proposed Directive but draws attention to the need to precisely define important terms in the Directive, especially when they are a central component of the definition of the offence.

AMENDMENTS

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission¹

Amendments by Parliament

Amendment 1
Recital 8

(8) Provisions must be laid down to facilitate criminal investigations. The Member States must ensure that the holders of intellectual property rights concerned, or their representatives, and experts are allowed to assist the investigations carried out by joint investigation teams.

deleted

¹ Not yet published in OJ.

Justification

What may appear as the privatisation of criminal prosecution in favour of individual stakeholders' interests implied therein should be rejected for reasons of general legal policy. In democratic societies bound by the rule of law, the state is endowed with a legal monopoly over the use of force. Private parties are not entitled to avail themselves of criminal prosecution measures in order to combat violations of the law committed by fellow citizens.

Amendment 2 Recital 9 a (new)

(9a) The rights set out in the Charter of Fundamental Rights of the European Union should be fully respected when defining criminal acts and penalties, during investigations and in the course of judicial proceedings.

Amendment 3 Article 1, paragraph 2

These measures shall apply to intellectual property rights provided for in Community legislation and/or national legislation in the Member States.

At least the following intellectual property rights are covered by the scope of the Directive:

- a) copyright;***
- b) rights related to copyright;***
- c) sui generis right of a database maker;***
- d) rights of the creator of the topographies of a semiconductor product;***
- e) trademark rights;***
- f) design rights;***
- g) utility model rights;***

Justification

The material scope of the directive must be defined more precisely, in order to achieve the objective of better, more transparent and more readily comprehensible legislation.

It cannot be the task of the Commission to bypass - through the publication of opinions - the legislature in defining the way in which directives are to be interpreted, with such far-reaching implications.

The list based on Article 2 of Directive 2004/48/EC will, moreover, make it easier for the

committee responsible to exclude specific areas of law from the scope of the provisions, if it considers this to be necessary, through separate votes.

Amendment 4
Article 1, paragraph 2 a (new)

In particular, this Directive does not apply to any infringement of an intellectual property right related with:

- ***patents, utility models and supplementary protection certificates;***
- ***parallel importation of original goods, which have been marketed with the agreement of the rightholder in a third country.***

Justification

The scope of this Directive needs to be limited.

Amendment 5
Article 2, paragraph 1 a (new)

“On a commercial scale” means acts carried out with the intention to earn a direct economic or commercial profit, or acts carried out at such a large scale that may cause a significant direct loss for the holder of that right.

Justification

The term “commercial scale” is central to the definition of the offence, and needs to be precisely defined. It must include not only acts that have an economic or commercial intention, but also serious acts of piracy at a large scale, that is, for more than individual or personal use, which may have no economic advantage for the offender but which may cause a very substantial harm to the rightholder.

Amendment 6
Article 3, paragraph 1 a (new)

Member States shall ensure the treatment as criminal offences, when committed on a commercial scale, of all intentional trade mark infringements consisting in the use of a sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered.

Justification

It is convenient to define separately copyright and trademark infringements

Amendment 7
Article 4, paragraph 2

2. For the offences referred to in Article 3, the Member States shall provide ***that the following penalties are also available*** in appropriate cases:

- (a) ***destruction of the goods infringing an intellectual property right;***
- (b) ***total or partial closure, on a permanent or temporary basis, of the establishment used primarily to commit the offence;***
- (c) ***a permanent or temporary ban on engaging in commercial activities;***
- (d) ***placing under judicial supervision;***
- (e) ***judicial winding-up;***
- (f) ***a ban on access to public assistance or subsidies;***
- (g) ***publication of judicial decisions.***

2. For the offences referred to in Article 3, the Member States shall ***also*** provide, in appropriate cases, ***for the necessary measures to ensure that a natural or legal person held liable is punishable by effective, proportionate and dissuasive penalties, such as:***

- (a) ***exclusion from entitlement to public benefits or aid;***
- (b) ***temporary or permanent disqualification from the practice of commercial activities;***
- (c) ***placing under judicial supervision;***
- (d) ***a judicial winding-up order;***
- (e) ***temporary or permanent closure of establishments which have been used for committing the offence;***
- (f) ***publication of judicial decisions;***
- (g) ***destruction of the goods infringing an intellectual property right.***

Justification

See justification relating to first amendment. Furthermore, the substance and wording of the relevant list of penalties should not be 'reinvented' in the case of every legislative text. The penalties proposed under (a) to (e) have therefore been taken from the Council's proposed text for a Council Framework Decision on the fight against organised crime, 8496/1/06 (2005/003(CNS)), and supplemented by specific proposals in the original text relating to the current matter.

Amendment 8

Article 4, paragraph 2, point (a)

(a) destruction of the goods infringing an intellectual property right;

(a) destruction of the goods infringing an intellectual property right **and, in appropriate cases seizure or destruction of the materials or elements principally used for the creation or manufacture of those goods;**

Justification

Clarification

Amendment 9

Article 6

The Member States shall take the necessary measures to allow the total or partial confiscation of goods belonging to convicted natural or legal persons in accordance with Article 3 of Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime Related Proceeds, Instrumentalities and Property, **at least where the offences are committed under the aegis of a criminal organisation, within the meaning of Framework Decision on the fight against organised crime, or where they carry a health or safety risk.**

In the cases provided for in article 5 of this Directive, the Member States shall take the necessary measures to allow the total or partial confiscation of goods belonging to convicted natural or legal persons in accordance with Article 3 of Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime Related Proceeds, Instrumentalities and Property.

Justification

These extended confiscation powers should refer to the same infringements and offences to which the Directive applies.

Amendment 10
Article 6 a (new)

Article 6a

Misuse of powers

Member States shall ensure that through criminal, civil and procedural measures, the misuse of threats of criminal sanctions can be prohibited and subject to penalties.

Member States shall prohibit procedural misuse, especially as criminal measures are employed for the enforcement of the requirements of civil law.

Justification

The potential for a rightholder to deter potential infringers (i.e., competitors) increases considerably if he can threaten them with criminal penalties. Both international and European law require the prevention of misuse of IP rights. Misuse disrupts free competition, in contravention of Art. 28 et seq. and 81 et seq. EC.

Amendment 11
Article 6 b (new)

Article 6b

Defendants' rights

Member States shall ensure that the rights of defendants shall be duly protected and guaranteed.

Amendment 12
Article 7

Article 7

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Joint investigation teams

The Member States must ensure that the holders of intellectual property rights concerned, or their representatives, and experts, are allowed to assist the investigations carried out by joint investigation teams into the offences referred to in Article 3.

Justification

What may appear as the privatisation of criminal prosecution in favour of individual stakeholders' interests implied therein should be rejected for reasons of general legal policy. In democratic societies bound by the rule of law, the state is endowed with a legal monopoly over the use of force. Private parties are not entitled to avail themselves of criminal prosecution measures in order to combat violations of the law committed by fellow citizens.

Amendment 13
Article 8 a (new)

Article 8a

Protection of personal data

Article 8 of the Charter of Fundamental Rights of the European Union, which concerns the protection of personal data, and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data¹ shall be fully respected in the course of investigations and judicial proceedings.

¹ OJ L 281, 23.11.1995, p. 31.

Justification

Article 8 of the Charter declares that "(e)veryone has the right to the protection of personal data concerning him or her", and "(s)uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified." The Directive aims to protect the rights and freedoms of persons with respect to the processing of personal data by laying down guidelines determining when this processing is lawful.

PROCEDURE

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| Title | The amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights |
| References | COM(2006)0168 – C6-0233/2005 – 2005/0127(COD) |
| Committee responsible | JURI |
| Opinion by Date announced in plenary | LIBE 6.9.2005 |
| Enhanced cooperation – date announced in plenary | |
| Drafts(wo)man Date appointed | Rainer Wieland 13.10.2005 |
| Previous drafts(wo)man | |
| Discussed in committee | 6.11.2006 11.12.2006 |
| Date adopted | 11.12.2006 |
| Result of final vote | +: 23 -: 17 0: 0 |
| Members present for the final vote | Edit Bauer, Johannes Blokland, Mihael Brejc, Kathalijne Maria Buitenweg, Giusto Catania, Carlos Coelho, Fausto Correia, Kinga Gál, Patrick Gaubert, Elly de Groen-Kouwenhoven, Adeline Hazan, Ewa Klant, Wolfgang Kreissl-Dörfler, Barbara Kudrycka, Stavros Lambrinidis, Henrik Lax, Sarah Ludford, Edith Mastenbroek, Hartmut Nassauer, Martine Roure, Luciana Sbarbati, Inger Segelström, Ioannis Varvitsiotis, Donato Tommaso Veraldi, Manfred Weber, Stefano Zappalà, Tatjana Ždanoka |
| Substitute(s) present for the final vote | Richard Corbett, Panayiotis Demetriou, Camiel Eurlings, Ignasi Guardans Cambó, Jeanine Hennis-Plasschaert, Sophia in 't Veld, Javier Moreno Sánchez, Bill Newton Dunn, Hubert Pirker, Marie-Line Reynaud, Kyriacos Triantaphyllides, Rainer Wieland |
| Substitute(s) under Rule 178(2) present for the final vote | Kartika Tamara Liotard |
| Comments (available in one language only) | |