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Committee on Legal Affairs

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PE 382.372v02-00

AMENDMENTS 10-124

Draft report

(PE 378.855v01-00)

Nicola Zingaretti

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

Proposal for a directive (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD))

Draft legislative resolution

Amendment by Umberto Guidoni, Jens Holm

Amendment 10
Paragraph -1 (new)

-1. Agrees with the Dutch Parliament, which believes that there is no clear need for a directive of this kind and that the Commission is wrongly interpreting the judgment of the Court of Justice of the European Communities in Case C-176/03 Commission v Council¹, by seeking to extend its sphere of legislative intervention into an area in respect of which it has no competence;

Or. en

Amendment by Edith Mastenbroek

Amendment 11

¹ Not yet published in the European Court Reports.

The European Parliament rejects the Commission proposal.

Or. en

Justification

There are reasons to question the applicability of Article 95 of the Treaty establishing the European Community in this case as a legal base. Furthermore it is questionable whether the objective; the harmonisation of criminal provisions to combat counterfeiting and piracy in the internal market effectively will be accomplished by this specific proposal. Directive 2004/48/EC on the enforcement of intellectual property rights, already provides procedures, remedies and civil and administrative measures for the enforcement of IPR. This Directive, however, has not been implemented yet by all member states. To date, only 12 member states have implemented this legal instrument. Harmonising criminal penalties should be a last recourse, the first need being harmonisation of the civil and administrative measures. Therefore, it is of utmost importance to first implement Directive 2004/48/EC before any new initiative is taken.

Amendment by Umberto Guidoni, Jens Holm

Amendment 12

The European Parliament rejects the Commission proposal.

Or. en

Justification

As explained in the letter sent to Commissioner Frattini from Mr. Y.E.M.A. Timmerman-Buck, President of the Senate, and Mr. F.W. Weisglas, President of the House of Representatives, on 3 July 2006, “both Houses of the Nederland States-General conclude that no power has been granted to the Community in respect of the aim of the proposed action. Nonetheless, both Houses have – for the record – scrutinised the present proposal by reference to the principles of subsidiarity and proportionality and concluded that the proposal does not comply with them”.

Amendment by Edith Mastenbroek

Amendment 13

Recital 5

(5) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights lays down measures,

(5) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights lays down measures,

procedures and civil and administrative remedies. *A sufficiently dissuasive set of penalties applicable throughout the Community is needed to make the provisions laid down in this Directive complete. Certain criminal provisions need to be harmonised so that counterfeiting and piracy in the internal market can be combated effectively. The Community legislator has the power to take the criminal-law measures that are necessary to guarantee the full effectiveness of the rules it lays down on the protection of intellectual property.*

procedures and civil and administrative remedies. *Full implementation of those measures and remedies is a prerequisite for the development of any further measures and remedies.*

Or. en

Amendment by Edith Mastenbroek

Amendment 14
Recital 5

(5) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights lays down measures, procedures and civil and administrative remedies. *A sufficiently dissuasive set of penalties applicable throughout the Community is needed to make the provisions laid down in this Directive complete. Certain criminal provisions need to be harmonised so that counterfeiting and piracy in the internal market can be combated effectively. The Community legislator has the power to take the criminal-law measures that are necessary to guarantee the full effectiveness of the rules it lays down on the protection of intellectual property.*

(5) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights lays down measures, procedures and civil and administrative remedies. *Full implementation of that Directive is a prerequisite for the development of any further measures and remedies.*

Or. en

Amendment by Nicole Fontaine

Amendment 15
Recital 6 a (new)

(6a) In its resolution of 7 September 2006 on counterfeiting of medicinal products, the European Parliament took the view that the European Union should equip itself as a matter of urgency with the means to combat effectively illicit practices in the area of piracy and the counterfeiting of medicines.

Or. fr

Justification

According to 2005 customs statistics on the seizure of counterfeit goods at the European Union's frontiers, seizures of counterfeit medicines increased by 100% in 2005 compared to 2004.

Amendment by Edith Mastenbroek

Amendment 16
Recital 7

(7) The level of sentencing for natural and legal persons who have committed such offences must be harmonised. In particular, the rules on prison sentences, fines and confiscation must be harmonised. *deleted*

Or. en

Amendment by Edith Mastenbroek

Amendment 17
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 *deleted*

experts are allowed to assist the investigations carried out by joint investigation teams.

Or. en

Amendment by Umberto Guidoni, Jens Holm

Amendment 18
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**

Or. en

Justification

Such Provisions would give unprecedented, legally uncertain and disproportionate rights to the holders of intellectual property rights in investigations or criminal proceedings and would undermine the independency of state bodies responsible for carrying out the investigation. The victim of the intellectual property infringement must not be granted more rights in the investigation procedure than any other natural or legal persons.

Amendment by Hans-Peter Mayer

Amendment 19
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.

(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. ***The involvement of the holders of intellectual property rights concerned should constitute a supporting role that will not interfere with the***

neutrality of the state investigations.

Or. de

Justification

It should be made clear that the involvement of injured parties in investigations carried out by the police or public prosecutors' offices must not jeopardise the neutrality of those state investigation agencies. Maintaining objectivity and neutrality is part and parcel of the rule of law.

Amendment by Nicole Fontaine

Amendment 20

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.

(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, are allowed to assist the investigations carried out by joint investigation teams.

Or. fr

Justification

The concept of experts is very vague and it is preferable to delete it. Without a clearer definition, many different types of experts could intervene and delay an investigation in cases where cooperation between right holders and joint investigation teams should make it possible to resolve disputes under the best possible conditions.

Amendment by Edith Mastenbroek

Amendment 21

Recital 9

(9) To facilitate investigations or criminal proceedings concerning intellectual property offences, these may not be dependent on a report or accusation made by a person subjected to the offence.

(9) In order to promote mutual trust between Member States, uniform EU safeguards should be put in place to protect the fundamental rights of suspects and defendants in criminal proceedings. Common EU standards should be applied in the first instance, including: access to

legal representation, access to interpretation and translation, ensuring that persons in need of specific attention because they are unable to follow the proceedings receive it, consular assistance to foreign detainees and notifying suspects and defendants of their rights in writing. These safeguards should reflect the traditions of the Member States in following the provisions of the European Convention on Human Rights (ECHR) and of the Charter of Fundamental Rights of the European Union. In any case, the rights laid down in the ECHR should be regarded as minimum standards with which Member States should in any event comply, just as they should comply with the case-law of the European Court of Human Rights.

Or. en

Justification

Defendants' rights should be safeguarded as this proposal aims to implement criminal sanctions.

Amendment by Umberto Guidoni, Jens Holm

Amendment 22

Recital 9

(9) To facilitate investigations or criminal proceedings concerning intellectual property offences, these may not be dependent on a report or accusation made by a person subjected to the offence. *deleted*

Or. en

Amendment by Othmar Karas

Amendment 23

Recital 9

(9) To facilitate investigations or criminal proceedings concerning intellectual property offences, these may not be dependent on a report or accusation made by a person subjected to the offence.

(9) Member States should be allowed to provide for or retain either a system requiring proceedings to be initiated ex officio or a private prosecution system. Where a private prosecution system exists, the authorities should, however, inform right holders of suspected infringements of their rights, and it should be permissible, where a suspicion is sufficiently well founded, to temporarily confiscate goods constituting an infringement of rights.

Or. de

Justification

The Member States have different systems for the criminal prosecution of infringements of intellectual property rights. The Commission proposal lays down a binding system for prosecution via the official channels, that is to say, brought by public prosecutors' offices acting ex officio. However, some Member States have private prosecution systems, which on the whole have worked quite well. These enable specific prosecutions to be brought when the necessary opening is not available under civil law measures. Member States should be allowed to keep proven systems in the future. Whether or how right holders can find out about infringements of their rights is a crucial question in practice. What happens time and time again is that, as investigations proceed, clear product piracy offences are uncovered by, or brought to the notice of, the various authorities. The right holders concerned therefore need to be informed of the suspected infringement of their rights, and goods constituting a manifest infringement should be temporarily confiscated, as is also provided for in the regulation to combat piracy.

Amendment by Nicole Fontaine

Amendment 24
Recital 9

(9) To facilitate investigations or criminal proceedings concerning intellectual property offences, these **may not be dependent on** a report or accusation made by a person subjected to the offence.

(9) To facilitate investigations or criminal proceedings concerning intellectual property offences, these **may be initiated even in the absence of** a report or accusation made by a person subjected to the offence.

Or. fr

Justification

The aim is to specify the conditions under which criminal proceedings may be initiated. They

should be as flexible as possible and it should be possible to initiate them with or without a report made by a person subjected to the events, making it possible to cover cases where public health may be jeopardised and the right holder is not known.

Amendment by Edith Mastenbroek

Amendment 25
Recital 10 a (new)

(10a) It is understood that the non-commercial sharing of files between individuals is excluded from the scope of this Directive.

Or. en

Amendment by Hans-Peter Mayer

Amendment 26
Article 1, paragraphs 2 a and 2 b (new)

The measures in question shall include, for example,

(a) copyright;

(b) rights related to copyright;

(c) sui generis rights of database makers;

(d) trademark rights;

(e) design rights;

(f) utility model rights.

Commercial rights under a patent shall be excluded from the provisions of this Directive.

Or. de

Justification

The substantive scope of the directive needs to be spelt out more exactly so as conform to the goal of better, more transparent, and more comprehensible law-making.

Given that most research projects are highly complex, inventors are constantly exposed, when carrying out their work, to the risk of infringing patent rights. Treating patent infringements

as criminal offences could deter inventors and academics from developing innovations.

Amendment by Zuzana Roithová

Amendment 27

Article 1

This Directive lays down the criminal measures necessary to ensure the enforcement of *intellectual property* rights.

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

This Directive lays down the criminal measures necessary to ensure the enforcement of *copyrights and trademark* rights, *in so far these rights systems are harmonised* in Community legislation.

Or. en

Justification

ECJ C-176/03 at least does not leave room to go any further than Community law. The Commission's justification only shows copyright piracy and trade mark counterfeiting. The scope has to be limited to these two issues. This is in conformity with the TRIPS treaty.

Amendment by Edith Mastenbroek

Amendment 28

Article 1

This Directive lays down the criminal measures necessary to ensure the enforcement of *intellectual property* rights.

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

This Directive lays down the criminal measures necessary to ensure the enforcement of *copyrights and trademark* rights, *in so far these rights systems are harmonised and* provided for in Community legislation.

Or. en

Justification

The European Court of Justice ruling should be respected. ECJ C-176/03 does not leave room to go further than Community law. The European Commission have put their focus on copyright piracy and trade mark counterfeiting, being the two major issues to be tackled and dealt with by this directive. Therefore, the scope has to be limited to these two issues. This is in conformity with the TRIPS treaty.

Amendment by Umberto Guidoni, Jens Holm

Amendment 29

Article 1

This Directive lays down the criminal measures necessary to ensure the enforcement of ***intellectual property rights***.

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

This Directive lays down the criminal measures necessary to ensure the enforcement of ***copyrights and trademark rights, in so far these rights systems are harmonised*** in Community legislation.

Or. en

Justification

ECJ C-176/03 at least does not leave room to go any further than Community law. The Commission's justification only shows copyright piracy and trade mark counterfeiting. The scope has to be limited to these two issues. This is in conformity with the TRIPS treaty.

Amendment by Klaus-Heiner Lehne

Amendment 30

Article 1

This Directive lays down the criminal measures necessary to ensure the enforcement of intellectual property rights.

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

This Directive lays down the criminal measures necessary to ensure the enforcement of intellectual property rights ***in the context of counterfeiting and piracy***.

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

Justification

The goals of the proposals will be best achieved if the Directive expressly focuses on counterfeiting and piracy. Its current wording could indeed criminalize IPR disputes that are essentially of a civil nature and occur between legitimate commercial enterprises.

Amendment by Eva Lichtenberger

Amendment 31
Article 1, paragraph 1

This Directive lays down the criminal measures necessary to ***ensure the enforcement of intellectual property rights.***

This Directive lays down the criminal measures necessary to ***combat trade mark counterfeiting and copyright piracy effectively.***

Justification

In its Explanatory Memorandum, the Commission explicitly states that the aim of this proposed Directive is to "strengthen and improve the fight against counterfeiting and piracy by providing additional legal tools to supplement Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights". To limit the scope of the Directive according to those line responds to the Commission's declared target.

Amendment by Friedrich-Wilhelm Graefe zu Baringdorf

Amendment 32
Article 1, paragraph 1

This Directive lays down the criminal measures necessary to ensure the enforcement of intellectual property rights.

This Directive lays down the criminal measures necessary to ensure the enforcement of intellectual property rights. ***These measures shall apply only to those intellectual property rights which are defined in Article 2.***

Amendment by Zuzana Roithová

Amendment 33
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***.

These measures shall apply to intellectual property rights, ***in so far these rights systems are harmonised*** in Community legislation.

Or. en

Justification

This amendment is an alternative for Legal Affairs Committee draft report amendment nr 4. It is not only necessary to limit the scope to “those intellectual property rights which are already regulated at Community level”, but also to in so far they are harmonised. This is conform ECJ C-176/03.

Amendment by Umberto Guidoni, Jens Holm

Amendment 34
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***.

These measures shall apply to intellectual property rights, ***in so far these rights systems are harmonised*** in Community legislation.

Or. en

Justification

This amendment is an alternative for Legal Affairs Committee draft report amendment nr 4. It is not only necessary to limit the scope to “those intellectual property rights which are already regulated at Community level”, but also to in so far they are harmonised. This is conform ECJ C-176/03.

Amendment by Nicola Zingaretti

Amendment 35
Article 1, paragraph 2

These measures shall apply to intellectual property rights provided for in Community

These measures shall apply to intellectual property rights, ***other than patents***, provided

legislation *and/or national legislation in the Member States.*

for in Community legislation.

Or. it

Justification

This amendment seeks to delimit the scope of the directive from the outset.

Amendment by Eva Lichtenberger

Amendment 36
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.

It harmonises criminal measures at EU level where this is necessary in order to combat trademark counterfeiting and copyright piracy carried out on a commercial scale.

Or. en

Justification

Reference to "commercial scale" aims to focus the scope of the Directive on big scale commercial activities.

Amendment by Edith Mastenbroek

Amendment 37
Article 1, paragraph 2 a (new)

Without prejudice to measures that already exist in Member States, the measures laid down in this Directive shall apply only to wilful, commercial and intentional trademark infringement or copyright piracy.

Or. en

Justification

It is of utmost importance to define the crime as this is a sensitive and important issue.

Amendment by Edith Mastenbroek

Amendment 38
Article 1, paragraph 2 b (new)

Exchanges of content between individuals on a not-for-profit basis shall be excluded from the scope of this Directive.

Or. en

Amendment by Eva Lichtenberger

Amendment 39
Article 2

Definition

For the purposes of this Directive, ***“legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.***

Definitions

For the purposes of this Directive:

- (a) the terms “counterfeiting” and “piracy” shall be interpreted by reference to Council Regulation (EC) No 1383/2003 of 22 July 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 rights¹;***
 - (b) “infringements on a commercial scale” means a large number of repeated infringements committed in pursuit of a direct pecuniary gain, but excluding infringements committed by private users for personal purposes;***
 - (c) “intentional infringement” of an intellectual property right means a deliberate and conscious infringement of an intellectual property right in bad faith and on a commercial scale.***
-

Justification

The amendment seeks to highlight the inappropriateness of the rapporteur's list of IP rights.

To refer to some: design rights are not examined for validity at the time that they are granted. This means that many hopelessly invalid design rights may be on the register. In addition, unlike trade marks, these rights are not specific to particular goods and so the scope of protection is extremely broad. The prospect of a party facing criminal sanctions for infringement of design right is highly unattractive.

Copyright: although copyright legislation is harmonised across the EU, it is not identical from one member state to the next. This would lead to lack of certainty for individuals and impracticality from the point of view of enforcement if criminal sanctions were to be introduced, as the applicability of sanctions would vary from one state to the next.

Database rights: Database rights have no discernible connection with the kind of organised crime that the Directive sets out to target and should therefore not be included within its ambit. It is difficult to conceive how these rights could be the subject of counterfeit and piracy.

Semi-conductor topography: this right is rarely used in practice and, again, it is difficult to see how it could be the subject of counterfeiting or piracy.

Trade names rights in trade names are notoriously difficult to define and prove

Some alternative definitions on commercial scale and intentional infringements have also been drafted in the following amendment.

Amendment by Nicole Fontaine

Amendment 40 Article 2

Definition

For the purposes of this Directive, “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Definitions

1. For the purpose of this Directive:

(a) 'intellectual property rights' means one

or more of the following rights:

- *copyright,*
- *rights related to copyright,*
- *sui generis right of a database maker,*
- *rights of the creator of the topographies of a semiconductor product,*
- *trademark rights,*
- *design rights,*
- *geographical indications,*
- *trade names, in so far as these are protected as exclusive property rights in the national law concerned,*
- *and in any event the rights, in so far as provision is made for them at Community level, in respect of goods within the meaning of Article 2(1)(a) and (b) of Council Regulation (EC) No 1383/2003 of 22 July 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 rights¹;*

(b) 'infringements on a commercial scale' means any infringement of an intellectual property right committed to obtain direct or indirect economic or commercial advantage; this would normally exclude acts carried out by private users for personal and non-commercial purposes;

(c) 'intentional infringements of an intellectual property right' means deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale, and including in particular the counterfeiting of medicines as defined by the World Health Organisations;

(d) 'legal person' means any legal entity having such status under the applicable national law, except for States or any other

public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

2. For the purposes of this Directive, 'counterfeiting' means the fact of any person:

(a) holding with no legitimate reason, importing under any customs arrangements or exporting goods presented under a counterfeit trade mark;

(b) offering for sale or selling goods presented under a counterfeit trade mark;

(c) reproducing, imitating, using, affixing, deleting or modifying a trade mark, a collective mark or a certified collective mark in violation of the rights conferred by the registration thereof and of the prohibitions stemming therefrom;

(d) knowingly supplying a product or service other than that which is requested of that person under a registered trade mark.

OJ L 196, 2.8.2003, p. 7.

Or. fr

Justification

As a definition of counterfeiting is being added to this article, the heading should be in the plural.

Counterfeiting of medicines is the most immoral of all types of counterfeiting, since its aim is to deliberately mislead patients by making them believe that they are buying a medicine with a specific therapeutic action, whereas in fact the product contains only ineffective or even toxic substances which in some cases may even be fatal to the patient.

According to the World Health Organisation (WHO), 'a counterfeit medicine is one which is deliberately and fraudulently mislabelled with respect to identity and/or source. Counterfeiting can apply to both branded and generic products and counterfeit products may include products with the correct ingredients or with the wrong ingredients, without active ingredients, with insufficient active ingredients or with fake packaging'.

In order to be placed on the market, a medicine must obtain a marketing authorisation issued by a health authority. This authorisation guarantees the security, quality and effectiveness of

the product and sets out the information which must be included in the packaging leaflets, i.e. the document intended to provide information for the patient. Fake medicines do not abide by these requirements and pose a threat to health.

It is desirable for the concept of counterfeiting, which is crucial for the application of this proposal for a directive, to be defined.

Penalties can be applied only if there is a clear definition of the concept of counterfeiting and, with this in view, it must cover the holding of counterfeit goods by any person.

Amendment by Maria Berger

Amendment 41

Article 2

For the purposes of this Directive, “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

For the purposes of this Directive:

(a) “intellectual property rights” means one or more of the following rights:

- copyright,***
- rights related to copyright,***
- sui generis right of a database maker,***
- rights of the creator of the topographies of a semiconductor product,***
- trademark rights,***
- design rights,***
- trade names, in so far as these are protected as exclusive property rights under the national law concerned,***
- and in any event the rights, in so far as provision is made for them at Community level, in respect of goods within the meaning of Article 2(1)(a) and (b) of Council Regulation (EC) No 1383/2003 of 22 July 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 rights¹;
(b) “intentional infringement of an intellectual property right” means deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale;
(c) “on commercial scale” refers to a commercial activity carried on with an intention to earn a profit, which causes significant direct loss for the holder of that right; this would normally exclude acts carried out by private users for personal and non-commercial purposes;
(d) “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

¹ OJ L 196, 2.8.2003, p. 7.

Or. en

Justification

This amendment seeks to introduce the definitions required in order specify the exact scope of the directive and clarify the concepts of 'commercial scale' and 'intentional infringements' which are the criteria for punishable offences. It is necessary to have a precise definition of 'commercial scale' in the text to avoid the criminalization of consumers. The term 'on a commercial scale' must be sufficiently specific to fulfil the qualification characteristics of the elements of a crime. The legal term must be defined, and must unambiguously require financial benefits, profit or a commercial motive for activities to be identified as taking place on a 'commercial scale'.

Amendment by Hans-Peter Mayer

Amendment 42
Article 2

Definition

For the purposes of this Directive, “legal person” means any legal entity having such status under the applicable national law,

Definitions

For the purposes of this Directive,
I. “legal person” means any legal entity having such status under the applicable

except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations;

2. “infringements on a commercial scale” means any infringement of an intellectual property right committed to obtain direct or indirect economic or commercial advantage, but excludes acts carried out by private users for personal purposes not centred on profit;

3. “intentional infringements of an intellectual property right” means deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale.

Or. de

Justification

The purpose of the amendment is to define the concepts of ‘commercial scale’ and ‘deliberate infringement’, which are both elements serving to characterise specifically punishable acts and therefore have to be defined exactly.

Article 2 needs a new title because the amended text incorporates several definitions as opposed to the single definition in the original version of the proposal.

Amendment by Hans-Peter Mayer

Amendment 43

Article 2

Definition

For the purposes of this Directive, “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Definitions

For the purposes of this Directive,

1. “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations;

2. “infringements on a commercial scale” means any infringement of an intellectual property right committed to obtain direct or

indirect economic or commercial advantage, but excludes acts carried out by private users for personal purposes not centred on profit;

3. “intentional infringements of an intellectual property right” means deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale, or acceptance of such infringement.

Or. de

Justification

The purpose of the amendment is to define the concepts of ‘commercial scale’ and ‘deliberate infringement’, which are both elements serving to characterise specifically punishable acts and therefore have to be defined exactly.

Article 2 needs a new title because the amended text incorporates several definitions as opposed to the single definition in the original version of the proposal.

Amendment by Zuzana Roithová

Amendment 44
Article 2

Definition

For the purposes of this Directive, “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Definitions

For the purposes of this Directive:

(a) “intellectual property rights” means one or more of the following rights:

- copyright,

- trademark rights;

(b) “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their

prerogative of public power, as well as public international organisations.

Or. en

Justification

Alternative version for Legal Affairs Committee draft report amendment No 5. This version limits the scope to rights systems for which the Commission at least gave some examples. Note also that patents are not listed in Legal Affairs Committee draft report amendment nr 5, but Council Regulation (EC) No 1383/2003 of 22 July 2003, which is included in the amendment, does include patents.

Amendment by Umberto Guidoni, Jens Holm

Amendment 45
Article 2

Definition

For the purposes of this Directive, “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Definitions

For the purposes of this Directive:

(a) “intellectual property rights” means one or more of the following rights:

- copyright,

- trademark rights;

(b) “legal person” means any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

Or. en

Justification

Alternative version for Legal Affairs Committee draft report amendment No 5. This version limits the scope to rights systems for which the Commission at least gave some examples. Note also that patents are not listed in Legal Affairs Committee draft report amendment nr 5,

but Council Regulation (EC) No 1383/2003 of 22 July 2003, which is included in the amendment, does include patents.

Amendment by Nicola Zingaretti

Amendment 46

Article 2, paragraph -1 (new)

For the purpose of this directive:

(a) 'intellectual property rights' means one or more of the following rights:

- copyright,*
- rights related to copyright,*
- sui generis right of a database maker,*
- rights of the creator of the topographies of a semiconductor product,*
- trademark rights, in so far as extending to them the protection of the criminal law is not inimical to free market rules and research activities,*
- design rights,*
- geographical indications,*
- trade names, in so far as these are protected as exclusive property rights in the national law concerned,*
- and in any event the rights, in so far as provision is made for them at Community level, in respect of goods within the meaning of Article 2(1)(a) and (b) of Council Regulation (EC) No 1383/2003 of 22 July 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 rights¹, and in any event with the exclusion of patents;*

(b) 'infringements on a commercial scale' means any infringement of an intellectual property right committed to obtain

economic or commercial advantage; this would normally exclude acts carried out by private users for personal and non-commercial purposes;

(c) 'intentional infringements of an intellectual property right' means deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale.

¹ OJ L 196 of 2.8.2003, p. 7.

Or. it

Justification

This amendment seeks to introduce the definitions required in order to specify the exact scope of the directive.

Amendment by Zuzana Roithová

Amendment 47

Article 2, paragraph 1 a (new)

For the purposes of this Directive, “infringement” means an infringement where the infringing item emulates the characteristic elements of a protected product or distinctive sign in an unmodified fashion.

Or. en

Justification

It is essential to define the crime with precision. The harmonisation of IP criminal sanctions must be limited to cases of obvious pirating. For ambiguous cases, in particular questions concerning the extent of protection in the area of similarity, civil sanctions are sufficient. The formulation is based on recommendations by the Max Planck Institute.

Amendment by Małgorzata Handzlik

Amendment 48

Article 2, paragraph 1 a (new)

For the purposes of this Directive, “infringement” means an infringement where the infringing item emulates the characteristic elements of a protected product or distinctive sign in an unmodified fashion. For the purposes of this Directive, “commercial scale” refers to a commercial activity with an intention to earn a profit.

Or. en

Justification

The term 'commercial scale' mixes aspects and fails to define the elements of a crime precisely enough. It is essential to define the crime with precision. The harmonisation of IP criminal sanctions must be limited to cases of obvious pirating. For ambiguous cases, in particular questions concerning the extent of protection in the area of similarity, civil sanctions are sufficient. “Commercial scale” is not clear enough. There needs to be an activity which can be used to deduct a particular intention, since judges cannot read minds to discover the intention. The formulation is based on recommendations by Prof. Dr. Reto Hilty from the Max Planck Institute for Intellectual Property, Competition and Tax Law.

Amendment by Edith Mastenbroek

Amendment 49

Article 2, paragraph 1 a (new)

For the purposes of this Directive, “commercial scale” means the scale of a commercial activity carried on with a view to directly earning a financial profit.

Or. en

Amendment by Arlene McCarthy

Amendment 50

Article 2, paragraph 1 a (new)

For the purposes of the Directive, “infringement on a commercial scale” means any infringement of an intellectual property right committed for the purpose of obtaining a direct or indirect economic or commercial advantage, including any act which causes significant harm to rightholders.

Copying by a natural person for private use and for ends that are neither directly nor indirectly commercial, within the meaning of Article 5(2)(b) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society¹ shall not fall within the scope of this Directive.

¹ OJ L 167, 22.6.2001, p. 10.

Or. en

Justification

To achieve legal certainty this definition is compliant with international obligations. See Article 61 of the WTO/TRIPS agreement 1994.

Private copying by private users as defined by the EU Copyright Directive and national laws is not an infringement of copyright. When it takes place therefore does not attract sanctions and does not fall under the scope of this directive.

Amendment by Umberto Guidoni, Jens Holm

Amendment 51
Article 2, paragraph 1 a (new)

For the purposes of this Directive, “infringement” means an infringement where the infringing item emulates the characteristic elements of a protected product or distinctive sign in an unmodified fashion.

Or. en

Justification

It is essential to define the crime with precision. The harmonization of IP criminal sanctions must be limited to cases of obvious pirating. For ambiguous cases, in particular questions concerning the extent of protection in the area of similarity, civil sanctions are sufficient. The formulation is based on recommendations by the Max Planck Institute.

Amendment by Arlene McCarthy

Amendment 52

Article 2, paragraph 1 b (new)

***For the purposes of the Directive,
“intentional infringement of an intellectual
property right” means an infringement of
the right concerned committed with
knowledge of the relevant facts.***

Or. en

Justification

The above definition is essential for legal certainty for the appropriate application of sanctions and is already a legal definition used at Member States' level.

Amendment by Umberto Guidoni, Jens Holm

Amendment 53

Article 2, paragraph 1 b (new)

***For the purposes of this Directive,
“commercial scale” means the scale of a
commercial activity carried on with the
intention to earn a profit.***

Or. en

Justification

It is essential to define the crime with precision. “Commercial scale” is not clear enough. There needs to be an activity which can be used to deduct a particular intention, since judges cannot read minds to discover the intention. The formulation is based on recommendations by the Max Planck Institute.

Amendment by Zuzana Roithová

Amendment 54
Article 2, paragraph 1 b (new)

***For the purposes of this Directive,
“commercial scale” means the scale of a
commercial activity carried on with a view
to earning a profit.***

Or. en

Justification

It is essential to define the crime with precision. “Commercial scale” is not clear enough. There needs to be an activity which can be used to deduct a particular intention, since judges cannot read minds to discover the intention. The formulation is based on recommendations by the Max Planck Institute.

Amendment by Edith Mastenbroek

Amendment 55
Article 2, paragraph 1 b (new)

***For the purposes of this Directive,
“infringement on a commercial scale”
means infringement for profit of an
intellectual property right which is
designed to cause significant direct
financial loss to the holder of that right.***

Or. en

Amendment by Zuzana Roithová

Amendment 56
Article 2, paragraph 1 c (new)

***For the purposes of this Directive,
“infringement on a commercial scale”
means a commercial activity with an
intention to earn a profit, which causes
significant direct loss for the holder of that
right.***

Justification

This amendment is almost the same as ITRE draft amendment 6. It changes 'for-profit infringement' to 'commercial activity with an intention to earn a profit'. Both 'intention' and 'activity' are needed, since we cannot be sure about intention if no activity is involved.

Amendment by Umberto Guidoni, Jens Holm

Amendment 57

Article 2, paragraph 1 c (new)

***For the purposes of this Directive,
“infringement on a commercial scale”
means commercial activity with an
intention to earn a profit, which causes
significant direct loss for the holder of that
right.***

Or. en

Justification

This amendment changes 'for-profit infringement' to 'commercial activity with an intention to earn a profit'. Both 'intention' and 'activity' are needed, since we cannot be sure about intention if no activity is involved.

Amendment by Edith Mastenbroek

Amendment 58

Article 2, paragraph 1 c (new)

***For the purposes of this Directive,
“intentional infringement of an intellectual
property right” means deliberate and wilful
infringement of that right.***

Or. en

Amendment by Umberto Guidoni, Jens Holm

Amendment 59

Article 3

Member States shall ensure that ***all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements***, are treated as criminal offences.

Member States shall ensure that ***copyright*** infringements are treated as criminal offences, ***if the following elements are fulfilled cumulatively:***

(a) emulation in an unmodified fashion of protected material;

(b) commercial activity with the intention to earn a profit;

(c) significant direct loss caused to the rightholder; and

(d) intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.

Or. en

Justification

Art 3 is the heart of the directive, here the crime is defined. A solid definition is needed to prevent that normal business conflicts are criminalised. In common law jurisdictions, condition (d) is often expressed as the requirement that an infringer "knows, or has reason to believe", that his act would be infringing: as for example section 107 the UK Copyright, Designs and Patents Act (1988. National law systems have their own systems for "attempting, aiding or abetting and inciting". The Community does not have the right to harmonise these systems, not even after C-176/03. Harmonisation on a directive by directive basis may create different solutions. The end result will be more fragmented than the current situation.

Amendment by Edith Mastenbroek

Amendment 60

Article 3

Member States shall ensure that ***all intentional infringements*** of an intellectual property right on a commercial scale, ***and attempting, aiding or abetting and inciting such infringements***, are treated as criminal

1. Member States shall ensure that the intentional infringement of an intellectual property right on a commercial scale ***is treated as a criminal offence.***

offences.

1a. Member States shall ensure that intentional copyright infringements are treated as criminal offences, if the following elements are fulfilled cumulatively:

(a) commercial activity with a view to earning a financial profit;

(b) the aim of causing significant direct financial loss for the rightholder; and

(c) deliberate and conscious infringement of the copyright involved.

1b. Member States shall ensure that intentional trademark infringements are treated as criminal offences, if the following elements are fulfilled cumulatively:

(a) use of a sign which is identical with the trademark in relation to goods or services which are identical with those for which the trade mark is registered;

(b) commercial activity with a view to earning a financial profit;

(c) the aim of causing significant direct financial loss for the rightholder; and

(d) deliberate and conscious infringement of the trademark involved.

Or. en

Amendment by Zuzana Roithová

Amendment 61

Article 3

Member States shall ensure that ***all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements***, are treated as criminal offences.

Member States shall ensure that ***copyright*** infringements are treated as criminal offences, ***if the following elements are fulfilled cumulatively:***

(a) emulation in an unmodified fashion of protected material;

(b) commercial activity with a view to earning a profit;

(c) significant direct loss caused to the rightholder; and

(d) intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.

Or. en

Justification

Art 3 is the heart of the directive, here the crime is defined. A solid definition is needed to prevent that normal business conflicts are criminalised.

In common law jurisdictions, condition (d) is often expressed as the requirement that an infringer "knows, or has reason to believe", that his act would be infringing: as for example section 107 the UK Copyright, Designs and Patents Act (1988)

National law systems have their own systems for "attempting, aiding or abetting and inciting". The Community does not have the right to harmonise these systems, not even after C-176/03. Harmonisation on a directive by directive basis may create different solutions. The end result will be more fragmented than the current situation.

Amendment by Zuzana Roithová

Amendment 62 Article 3

Member States shall ensure that ***all intentional*** infringements ***of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements***, are treated as criminal offences.

Member States shall ensure that ***copyright*** infringements are treated as criminal offences, ***if the following elements are fulfilled cumulatively:***

(a) emulation in an unmodified fashion of protected material;

(b) commercial activity with a view to earning a profit;

(c) intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.

Or. en

Justification

A lighter version of amendment 7, containing the Max Planck Institute minimum requirements. These conditions have to be met, the Community does not have the competence to take disproportional measures. The first condition is needed to keep normal business conflicts on the extent of protection out. The second is needed to keep consumers' actions out. Including normal business conflicts or consumers' actions would be disproportionate. Max Planck Institute:

“15 . Indeed, when proper account is taken of the proportionality principle (see above, 6), harmonisation of criminal penalties can only be justified in relation to acts fulfilling the following elements cumulatively:

~ Identity with the infringed object of protection (the infringing item emulates the characteristic elements of a protected product or distinctive sign in an unmodified fashion [construction, assembly, etc.]).

~ Commercial activity with an intention to earn a profit .

Intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.”

Amendment by Eva Lichtenberger

Amendment 63 Article 3

Member States shall ensure that ***all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements***, are treated as criminal offences.

Member States shall ensure that attempting, aiding or abetting and inciting ***trademark counterfeiting and copyright piracy*** are treated as criminal offences ***where the attempting, aiding or abetting and/or inciting:***

***(a) is conducted for the purposes of assisting organised crime, or
(b) constitutes a serious threat to health or safety.***

Or. en

Justification

Criminal sanctions for abetting and inciting any criminal act must be reserved for the most serious crimes.

Amendment by Klaus-Heiner Lehne

Amendment 64

Article 3

Member States shall ensure that all **intentional infringements of an intellectual property right on a commercial scale**, and attempting, aiding or abetting and inciting **such infringements**, are treated as criminal offences.

Member States shall ensure that all **acts of counterfeiting and piracy**, and attempting, aiding or abetting and inciting **counterfeiting and piracy**, are treated as criminal offences.

Or. en

Justification

There is scope for material differences in the way in which the term “intentional infringement” can be interpreted by national courts in Member States. In some, the term includes only direct intention; in others it is likely to do or might also include species of recklessness. There also seems to be scope for disagreement as to whether a person commits an “intentional infringement” where he has obtained legal advice that the particular right in question is invalid.

Additionally, the requirement of commercial scale should be eliminated as Member States need clear standards. Introducing a standard of commercial scale will oblige courts of Member States to inquire as to what commercial scale is. Although this criterion of commercial scale is said to conform to TRIPS Article 61, it has been observed over the years that confusion prevails in various jurisdictions as to the meaning of words/phrases that have been used to denote commercial scale in their respective national legislation. The ambiguity surrounding the threshold of commercial scale leaves room for legal uncertainty, which is exploited by offenders during prosecution, as it is difficult to collect quantifiable information on their infringing activities.

Amendment by Janelly Fourteen

Amendment 65

Article 3

Member States shall ensure that all intentional infringements of an intellectual property right **on a commercial scale**, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences.

Member States shall ensure that all intentional infringements of an intellectual property right, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences, **taking due account of the specific features of each intellectual property right**.

Justification

The reference to an infringement committed 'on a commercial scale' should be removed. Any intentional infringement of an intellectual property right must be punished, without reference to any notion of quantity.

The latter part of the amendment takes up the wording used in recital 17 of Directive 2004/48/EC.

Amendment by Sharon Bowles

Amendment 66
Article 3

Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences.

Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences *when there are aggravating circumstances of organised crime, counterfeiting, piracy or serious risk to health or safety.*

Justification

With most intellectual property rights infringement is often chosen rather than expensive litigation for invalidation when it is known that the right is probably invalid.

Amendment by Nicole Fontaine

Amendment 67
Article 3

Member States shall ensure that all intentional infringements of an intellectual property right *on a commercial scale*, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences.

Member States shall ensure that all intentional infringements of an intellectual property right, and attempting, aiding or abetting and inciting such infringements, are treated as criminal offences.

Justification

The reference to an infringement committed 'on a commercial scale' should be removed. Any intentional infringement of an intellectual property right must be punished, without reference to any notion of quantity. In this connection, the authorities concerned (customs, frontier police, etc.) must be given effective means to halt the constant flow of counterfeit goods occurring at present, in some cases on a very small scale.

Amendment by Zuzana Roithová

Amendment 68

Article 3, paragraph 1a (new)

Member States shall ensure that trademark infringements are treated as criminal offences, if the following elements are fulfilled cumulatively:

(a) use of a sign which is identical with the trademark in relation to goods or services which are identical with those for which the trademark is registered;

(b) commercial activity with a view to earning a profit;

(c) significant direct loss caused to the rightholder; and

(d) intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.

Or.

Justification

Like amendment 7, now for trade mark counterfeiting. Point (a) is conform Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, art 1 (a).

Amendment by Umberto Guidoni

Amendment 69

Article 3, paragraph 1 a (new)

Member States shall ensure that trademark infringements are treated as criminal offences, if the following elements are fulfilled cumulatively:

(a) 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;

(b) commercial activity with the intention to earn a profit;

(c) significant direct loss caused to the rightholder; and

(d) intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.

Or. en

Justification

Point (a) is conform Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, art 1 (a).

Amendment by Zuzana Roithová

Amendment 70

Article 3, paragraph 1b (new)

Member States shall ensure that trademark infringements are treated as criminal offences, if the following elements are fulfilled cumulatively:

(a) use of a sign which is identical with the trademark in relation to goods or services which are identical with those for which the trademark is registered;

(b) commercial activity with a view to earning a profit;

(c) intent or contingent intent (dolus eventualis) with regard to the existence of the infringed right.

Or. en

Justification

A lighter version of amendment 9, containing the Max Planck Institute minimum requirements. These conditions have to be met, the Community does not have the competence to take disproportional measures. Point (a) is conform Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, art 1 (a).

Amendment by Umberto Guidoni, Jens Holm

Amendment 71

Article 3, paragraph 1 b (new)

Criminal sanctions shall not be applied in cases of parallel importation of original goods which have been marketed with the agreement of the rightholder in a country outside the European Union.

Or. en

Justification

Parallel importation of original goods, which have been marketed with the agreement of the rightholder in a country outside the EU reveals no pirating.

Amendment by Umberto Guidoni, Jens Holm

Amendment 72

Article 3, paragraph 1 c (new)

Member States shall ensure that the fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence.

Or. en

Justification

The freedom of the press needs protection from criminal measures. Professionals like journalists, scientists and school teachers are not criminals. Newspapers, research

institutions and schools are not criminal organisations. This does not leave rights unprotected: civil damages are possible.

Amendment by Zuzana Roithová

Amendment 73

Article 3, paragraph 1 c (new)

Criminal sanctions shall not be applied in cases of parallel importation of original goods which have been marketed with the agreement of the rightholder in a country outside the European Union.

Or. en

Justification

Parallel importation of original goods, which have been marketed with the agreement of the rightholder in a country outside the EU reveals no pirating. Like ITRE Opinion, but with a repair, since parallel importation normally does not involve a 3rd party.

Amendment by Zuzana Roithová

Amendment 74

Article 3, paragraph 1 d (new)

Member States shall ensure that the fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence.

Or. en

Justification

The freedom of the press needs protection from criminal measures. Professionals like journalists, scientists and school teachers are not criminals. Newspapers, research institutions and schools are not criminal organisations. This does not leave rights unprotected: civil damages are possible.

Article 4

deleted

Nature of penalties

1. For the offences referred to in Article 3, the Member States shall provide for the following penalties:

a) for natural persons: custodial sentences;

b) for natural and legal persons:

i) fines;

ii) confiscation of the object, instruments and products stemming from infringements or of goods whose value corresponds to those products.

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.

Or. en

Justification

The amendment seeks to remind that it is not within the Community's competence to set down the nature and the level of criminal penalties, particularly in relation to penalties affecting

personal liberty. The setting of monetary penalties at a Community level seems impractical, on the basis that economic status varies considerably between Member States.

Amendment by Zuzana Roithová

Amendment 76
Article 4

1. For the offences referred to in Article 3, the Member States shall provide for ***the following*** penalties:

a) for natural persons: custodial sentences;

b) for natural and legal persons:

i) fines;

ii) confiscation of the object, instruments and products stemming from infringements or of goods whose value corresponds to those products.

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.

For the offences referred to in Article 3, the Member States shall provide for ***effective, proportionate and dissuasive*** penalties.

Or. en

Justification

A detailed description of the penalties creates problems since national legal systems differ. Formulation in conformity with Council Regulation (EC) No 1383/2003 of 22.7.2003

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. To use this formulation was suggested by the Dutch Parliament and the Law Society of England and Wales. It is conform ECJ C-176/03.

Amendment by Edith Mastenbroek

Amendment 77
Article 4

*1. For the offences referred to in Article 3, the Member States shall provide for **the following** penalties:*

a) for natural persons: custodial sentences;

b) for natural and legal persons:

i) fines;

ii) confiscation of the object, instruments and products stemming from infringements or of goods whose value corresponds to those products.

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.

For the offences referred to in Article 3, the Member States shall provide for **effective, proportionate and dissuasive** penalties **in accordance with national laws**.

Or. en

Amendment 78

Article 4

1. For the offences referred to in Article 3, the Member States shall provide for ***the following*** penalties:

a) for natural persons: custodial sentences;

b) for natural and legal persons:

i) fines;

ii) confiscation of the object, instruments and products stemming from infringements or of goods whose value corresponds to those products.

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.

For the offences referred to in Article 3, the Member States shall provide for ***effective, proportional and dissuasive*** penalties.

Or. en

Justification

A detailed description of the penalties creates problems since national legal systems differ. Formulation in conformity with Council Regulation (EC) No 1383/2003 of 22.7.2003 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. To use this formulation was suggested by the Dutch Parliament and the Law Society of England and Wales. It is conform ECJ C-176/03.

Amendment by Edith Mastenbroek

Amendment 79
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: *deleted*

(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.

Or. en

Justification

The penalties as described in paragraph 2 are already determined in Directive 2004/48 on the enforcement of Intellectual Property Rights.

Amendment by Nicole Fontaine

Amendment 80
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;

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) *speedy* destruction of *all* the goods infringing an intellectual property right, *save for the retention, without a bond, of*

- 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.

samples as evidence;

- b) 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.

ga) payment by the counterfeiter of costs of guarding the goods.

Or. fr

Justification

It is proposed that all goods infringing intellectual property rights be speedily destroyed, except for items needed for the purposes of the investigation (establishment of the infringement, evidence, etc.). This measure should be carried out quickly to ensure that companies which are victims of counterfeiting do not have to meet costly expenses for guarding the goods. It is important to retain a number of samples as evidence enabling the investigators to perform their work under the best possible conditions.

A visual record of the stock can be made by photographing it when it is discovered. If appropriate, the destruction of the stock may be subject to the consent, or non-opposition, of the alleged perpetrator, if he or she is identified at that stage, without this constituting an admission of guilt.

As an additional penalty, it must be possible for the counterfeiter to be required to pay the costs regarding the goods retained for the purposes of the investigation, especially as such costs may be substantial as the products retained, even in limited number, are bulky and the investigation is lengthy. This option must also be considered in the light of the remarks made in connection with Article 4.

Amendment by Toine Manders

Amendment 81

Article 4, paragraph 2, point (a)

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

(a) destruction of the goods, ***including materials or equipment used for*** infringing

an intellectual property right;

Or. en

Justification

This amendment will bring Article 4.2(a) of the Proposal for a Directive in line with Article 10 of the Enforcement Directive.

Amendment by Hans-Peter Mayer

Amendment 82

Article 4, paragraph 2, point b)

b) total or partial closure, on a permanent or temporary basis, of the establishment used **primarily** to commit the offence;

b) total or partial closure, on a permanent or temporary basis, of the establishment used to commit the offence;

Or. de

Justification

All establishments used to commit an offence should be subject to the same range of penalties.

Amendment by Toine Manders

Amendment 83

Article 4, paragraph 2a (new)

2a. Member States shall take the necessary measures to ensure that any purchase of goods infringing an intellectual property right is considered as fencing.

Or. en

Justification

If consumers buy goods of which they could know that it's a clear violation of IPR, it should be considered as fencing.

Amendment by Zuzana Roithová

Amendment 84

Article 5

Article 5

deleted

Level of penalties

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment when 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

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and non criminal fines:

(a) to a maximum of at least EUR 100 000 for cases other than the most serious cases;

(b) to a maximum of at least EUR 300 000 for cases referred to in paragraph 1.

Or. en

Justification

Article 4 already mentions the sanctions conform ECJ C-176/03.

Amendment by Eva Lichtenberger

Amendment 85

Article 5

Article 5

deleted

Level of penalties

1. Each Member State shall take the necessary measures to ensure that, when

committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment when 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.

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and non criminal fines:

(a) to a maximum of at least EUR 100 000 for cases other than the most serious cases;

(b) to a maximum of at least EUR 300 000 for cases referred to in paragraph 1.

Or. en

Justification

The amendment seeks to remind that It is not within the Community's competence to set down the nature and the level of criminal penalties, particularly in relation to penalties affecting personal liberty. The setting of monetary penalties at a Community level seems impractical, on the basis that economic status varies considerably between Member States.

Amendment by Umberto Guidoni, Jens Holm

Amendment 86
Article 5

Article 5

deleted

Level of penalties

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment when 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.

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and non criminal fines:

(a) to a maximum of at least EUR 100 000 for cases other than the most serious cases;

(b) to a maximum of at least EUR 300 000 for cases referred to in paragraph 1.

Or. en

Justification

Article 4 already mentions the sanctions conform ECJ C-176/03.

Amendment by Nicole Fontaine

Amendment 87 Article 5

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment when 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.

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and non-criminal fines:

(a) to a maximum of at least EUR 100 000 for cases other than the most

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment when 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.

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and non-criminal fines:

(a) to a maximum of at least EUR 300 000 for cases other than the most

serious cases; ;

(b) to a maximum of at least **EUR 300 000** for cases referred to in paragraph 1.

serious cases, **and up to 5 times the amount of profit made by the counterfeiter;**

(b) to a maximum of at least **EUR 600 000** for cases referred to in paragraph 1 **and up to ten times the amount of profit made by the counterfeiter.**

Or. fr

Justification

It is preferable to extend the cases where a natural person may be punished by adopting an alternative rather than a cumulative formula for the infringements committed.

In order to make criminal or non-criminal fines more dissuasive and consistent with the economic and financial stakes, it is proposed to:

- raise the ceilings imposed,
- stipulate that the fines may be proportionate to the profits made by the counterfeiter.

In the financial sector, the financial markets authority can impose fines up to ten times the amount of profits made

Amendment by Nicola Zingaretti

Amendment 88 Article 5, paragraph 1

1. 1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment **when** 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.

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment **where they are serious crimes within the meaning of Article 3 (5) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing¹ or 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.

¹ OJ C 309 of 25.11.2005, p. 15.

Or. it

Justification

This amendment is justified in view of the fact that many national legal systems have already adopted very rigorous measures to protect intellectual property rights regardless of whether the offences in question are committed under the aegis of a criminal organisation. Making the imposition of the more severe penalties conditional on the involvement of a criminal organisation could prevent national protection measures from being properly enforced.

Amendment by Toine Manders

Amendment 89
Article 5, paragraph 1

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment ***when 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.***

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons ***or criminal organisations, or where they carry a health or safety risk***, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment. ***Moreover, Member States shall ensure that the punishment imposed is proportionate to the offence committed.***

Or. en

Amendment by Hans-Peter Mayer

Amendment 90
Article 5, paragraph 1

1. Each Member State shall take the necessary measures to ensure that, when committed by natural persons, the offences referred to in Article 3 are punishable by a maximum sentence of at least four years' imprisonment when committed under the aegis of a criminal organisation within the meaning of Framework Decision on the

(Does not affect English version.)

fight against organised crime, or where they carry a health or safety risk.

Or. de

Justification

(Does not affect English version.)

Amendment by Hans-Peter Mayer

Amendment 91

Article 5, paragraph 2, introduction

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and non criminal fines:

2. Member States shall take the necessary measures to ensure that, when committed by natural persons or legal entities, the offences referred to in Article 3 are punishable by effective, proportionate and dissuasive penalties. These penalties shall include criminal and/or non criminal fines:

Or. de

Justification

The present wording of Article 5(2) could be taken to mean that a natural or legal person also has to be fined even when a custodial sentence has been imposed.

Amendment by Arlene McCarthy

Amendment 92

Article 5, paragraph 2, point (a)

(a) to a maximum of at least **EUR 100 000** for cases other than the most serious cases;

(a) to a maximum of at least **EUR 300 000** for cases other than the most serious cases;

Or. en

Justification

If penalties are to be genuinely deterrent, they need to be set at a level which is truly dissuasive. Given that a legal person (i.e. a company or business) cannot be imprisoned and that financial penalties are an important criminal remedy, these penalties should be set at a higher level.

Amendment by Arlene McCarthy

Amendment 93
Article 5, paragraph 2, point (b)

(b) to a maximum of at least EUR **300 000**
for cases referred to in paragraph 1.

(b) to a maximum of at least EUR **500 000**
for cases referred to in paragraph 1.

Or. en

Justification

If penalties are to be genuinely deterrent, they need to be set at a level which is truly dissuasive. Given that a legal person (i.e. a company or business) cannot be imprisoned and that financial penalties are an important criminal remedy, these penalties should be set at a higher level.

Amendment by Hans-Peter Mayer

Amendment 94
Article 5, paragraph 2 a (new)

2a. Member States shall take the necessary measures to ensure that repeated offences within the meaning of Article 3 committed by natural and legal persons in a Member State other than their country of origin or domicile are taken into account when determining the level of penalties in accordance with paragraphs 1 and 2 of this Article.

Or. de

Justification

To make penalties effective and dissuasive, national courts need to take into account intellectual property offences committed in Member States other than the offender's country of origin, when they determine the level of penalty to be imposed.

Amendment by Toine Manders

Amendment 95

Article 5, paragraph 2 a (new)

2a. Member States shall take the necessary measures to ensure, when determining the level of the penalties to be imposed on natural persons or legal entities for offences referred to in Article 3, that previous offences committed in another Member State by the persons or entities concerned are taken into account.

Or. en

Justification

This measure will ensure that serious infringers will not be able to take advantage of the Internal Market by just moving to another Member after having been convicted in one of the EU Member State of having committed an IPR crime.

Amendment by Zuzana Roithová

Amendment 96

Article 6

Article 6

deleted

Extended powers of confiscation

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.

Or. en

Justification

Conform ECJ C-176/03, this Directive should state only that sanctions should be proportionate, legitimate and persuasive.

Amendment by Nicola Zingaretti

Amendment 97 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..

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, where the offences are ***serious crimes within the meaning of Article 3 (5) of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing¹ or 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.

¹ OJ C 309 of 25.11.2005, p. 15.

Or. it

Justification

This amendment is justified in view of the fact that many national legal systems have already adopted very rigorous measures to protect intellectual property rights regardless of whether the offences in question are committed under the aegis of a criminal organisation. Making the imposition of the more severe penalties conditional on the involvement of a criminal organisation could prevent national protection measures from being properly enforced.

Amendment by Toine Manders

Amendment 98

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 the Framework Decision 2005/212/JHA of 24 of 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 the Framework Decision ... on the fight against organised*** crime, or where they carry a health or safety risk.

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 the Framework Decision 2005/212/JHA of 24 of February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, at least where the offences ***constitute a serious*** crime, or where they carry a health or safety risk.

Or. en

Justification

It is a concern that Article 6 is restricted to offences only committed in the context of “organised crime”. This Article will only be useful if they apply to all offences causing serious commercial harm to right holders, irrespective of whether these infringements were committed in the context of organised crime. Article 6 of the Proposal for a Framework Decision should therefore delete the reference to “organised crime” and replace it by the term “serious crimes”.

Amendment by Hans-Peter Mayer

Amendment 99

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***

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 of a serious nature*** ***or*** are committed under the aegis of a criminal organisation, within the meaning of Framework Decision on the fight against

carry a health or safety risk..

organised crime.

Or. de

Justification

The amendment is justified in view of the fact that in many Member States national law has already provided for very stringent measures to protect intellectual property rights, without imposing the condition that an offence has to be committed under the aegis of a criminal organisation. Treating this element of an offence as a prerequisite for confiscation could prevent national protection measures from being properly enforced.

Under Article 6 as it now stands, confiscation is subject to the condition that an offence has to carry a health or safety risk. If that stipulation were to remain in place, the offender's assets could be confiscated even if the offence could be considered more petty than not; this might pose serious problems as regards the proportionality of the measures taken.

Amendment by Umberto Guidoni, Jens Holm

Amendment 100
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.

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, 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.

Or. fr

Amendment by Edith Mastenbroek

Amendment 101
Article 6

The Member States shall take the necessary measures to allow the total or partial

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.

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 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.

Or. en

Amendment by Nicole Fontaine

Amendment 102
Article 6

Not applicable to the English version.

Amendment by Zuzana Roithová

Amendment 103
Article 6 a (new)

Article 6a

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

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

Or. en

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 by Eva Lichtenberger

Amendment 104
Article 6 a (new)

Article 6a

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

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

Or. en

Justification

It is essential to oblige Member States to provide measures against the abuse of criminal proceedings.

Amendment by Umberto Guidoni, Jens Holm

Amendment 105
Article 6a (new)

Article 6a

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

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

Or. en

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 by Edith Mastenbroek

Amendment 106
Article 6 a (new)

Article 6a

Member States shall ensure that, through criminal, civil and procedural measures, the misuse of threats of criminal sanctions is prohibited and made subject to penalties. Member States shall also prohibit procedural misuse.

Or. en

Justification

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

Amendment by Edith Mastenbroek

Amendment 107
Article 6 b (new)

Article 6b

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

Or. en

Amendment by Eva Lichtenberger

Amendment 108
Article 7

Article 7

deleted

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.

Or. en

Justification

Direct involvement of the representatives of the holder of the IPRs into the investigation could jeopardize the criminal procedures by endangering the impartial and fair investigation.

Rapporteur's proposal imposes upon national rules of criminal procedure in a manner that is disproportionate.

Amendment by Umberto Guidoni, Jens Holm

Amendment 109

Article 7

Article 7

deleted

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.

Or. en

Justification

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. Instead, each individual only has the right to claim protection by the state, if necessary to be ensured by means of criminal law. The clearly defined rules of criminal procedure are only binding upon the criminal

prosecution authorities. And even if criminal procedural law were equally applicable to all members of joint investigation teams, democratically legitimised control would be lacking, as proprietors of IP rights do not hold a public office and are therefore not bound by internal directions issued by the prosecuting authority. The obligation of Member States to delegate functions within the conduct of criminal investigations to private parties in such a diffuse manner is therefore incompatible with the fundamental structure of a democratic society.

Amendment by Zuzana Roithová

Amendment 110

Article 7

Article 7

deleted

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.

Or. en

Justification

Max Planck Institute: 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. Instead, each individual only has the right to claim protection by the state, if necessary to be ensured by means of criminal law. The clearly defined rules of criminal procedure are only binding upon the criminal prosecution authorities. And even if criminal procedural law were equally applicable to all members of joint investigation teams, democratically legitimised control would be lacking, as proprietors of IP rights do not hold a public office and are therefore not bound by internal directions issued by the prosecuting authority. The obligation of Member States to delegate functions within the conduct of criminal investigations to private parties in such a diffuse manner is therefore incompatible with the fundamental structure of a democratic society.

Amendment by Edith Mastenbroek

Amendment 111

Article 7

Article 7

deleted

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.

Or. en

Amendment by Nicole Fontaine

Amendment 112

Article 7

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.

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

With this in view, holders of intellectual property rights shall be provided with information in particular on:

- details of the circumstances and place of the seizure,***
- the number of persons apprehended,***
- the quantity of products or goods concerned.***

Or. fr

Justification

The aim is to be consistent with Recital 6.

It is important for holders of intellectual property rights to be given information concerning the infringements concerned to enable them to provide informed assistance to investigators.

It is therefore proposed that they should at least be provided with information on the details of the infringements (circumstances, location, persons detained, quantities involved, etc.).

Amendment by Diana Wallis, Sharon Bowles

Amendment 113

Article 7

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.

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. ***The Member States shall put in place adequate safeguards to ensure that such assistance does not compromise the rights of the accused person, for example by affecting the accuracy, integrity or impartiality of evidence.***

Or. en

Justification

The involvement of intellectual property rights holders in Joint Investigation Teams presents risks in terms of the impartial nature of any investigation, the evidence presented and the protection of defence rights. Member States must ensure that the rights of the defence are protected adequately and the requisite standards of evidence and proof in criminal prosecutions are upheld.

Amendment by Nicola Zingaretti

Amendment 114

Article 7

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

The Member States must ensure that the holders of intellectual property rights concerned, or their representatives and ***advisers***, are allowed to assist the investigations carried out by joint

investigation teams into the offences referred to in Article 3,

investigation teams into the offences referred to in Article 3 *in accordance with the arrangements for which provision is made in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams*¹.

¹ OJ L 162 of 20.6.2002, p. 1

Or. it

Justification

The amendment seeks to provide legal certainty with regard to the arrangements governing the organisation of investigations.

Amendment by Edith Mastenbroek

Amendment 115
Article 7

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.

The holders of intellectual property rights concerned, or their representatives, and experts, shall be allowed to provide information to the investigation teams investigating the offences referred to in Article 3.

Or. en

Amendment by Janelly Fourtou

Amendment 116
Article 7, paragraph 1 a (new)

With this in view, holders of intellectual property rights shall be provided with information in particular on:

- details of the circumstances and place of the seizure,*
- the number of persons apprehended,*

- the quantity of products or goods concerned.

Or. fr

Justification

Holders of intellectual property rights must be given detailed information on infringements to enable them to provide informed assistance to investigators.

Amendment by Edith Mastenbroek

Amendment 117
Article 7 a (new)

Article 7a

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. Directive as amended by Regulation (EC) No 1883/2003 (OJ L 284, 31.10.2003, p. 1.)

Or. en

Amendment by Arlene McCarthy

Amendment 118
Article 7 a (new)

Article 7a

Right to receive information from law enforcement authorities
Member States shall provide that, where

law enforcement authorities seize infringing items or obtain other evidence of infringement, the authorities make such evidence available for use in pending or contemplated civil proceedings against the alleged infringer brought by the rightholder in a jurisdiction within the European Union, and, where practicable, that those authorities inform the relevant rightholder or his representative of such seizure or evidence. Member States may require that any such provision of evidence to the rightholder be made subject to reasonable access, security or other requirements to ensure the integrity of the evidence and to avoid prejudice to any criminal proceedings that may ensue.

Or. en

Justification

Cooperation at EU level between the public and private sectors should be encouraged. Public authorities including law enforcement authorities should be given the ability to share information and evidence with the private sector in order to ensure that legal actions, both civil and criminal, can be taken effectively and proportionately based on sound factual evidence against counterfeiters and pirates. This is in full respect to data protection law, in particular, Directive 95/46/EC on data Protection.

Amendment by Zuzana Roithová

Amendment 119

Article 8

Article 8

deleted

Initiation of criminal proceedings

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.

Justification

Criminal investigation authorities should not be able to act on their own initiative without a prior complaint of the rights owner, because licensing arrangements are not published and the rights owner has the fundamental right to dispose of his rights as he desires.

Amendment by Umberto Guidoni, Jens Holm

Amendment 120

Article 8

Article 8

deleted

Initiation of criminal proceedings

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.

Justification

Criminal investigation authorities should not be able to act on their own initiative prior complaint of the rights owner because licensing arrangements are not published the rights owner has the fundamental right to dispose of his rights as he desires.

Amendment by Edith Mastenbroek

Amendment 121

Article 8

Article 8

deleted

Initiation of criminal proceedings

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 are not dependent on a report or

accusation made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.

Or. en

Amendment by Othmar Karas

Amendment 122
Article 8

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.

Where a Member State makes prosecution of offences covered by Article 3 dependent on a report or application by the right holder, it shall take the steps required to ensure that at least those authorities and agencies competent for the purposes of criminal investigations,

(a) where goods are suspected to infringe an intellectual property right, notify the right holder of the suspected infringement of his rights and,

(b) where the suspicion is sufficiently well founded, are in a position to confiscate the goods for three working days following receipt of the notification by the right holder, so as to enable the right holder to make a report or apply for prosecution.

Or. de

Justification

The Member States have different systems for the criminal prosecution of infringements of intellectual property rights. The Commission proposal lays down a binding system for prosecution via the official channels, that is to say, brought by public prosecutors' offices acting ex officio. However, some Member States have private prosecution systems, which on the whole have worked quite well. These enable specific prosecutions to be brought when the necessary opening is not available under civil law measures. Member States should be allowed to keep proven systems in the future. Whether or how right holders can find out about infringements of their rights is a crucial question in practice. What happens time and time again is that, as investigations proceed, clear product piracy offences are uncovered by, or brought to the notice of, the various authorities. The right holders concerned therefore need

to be informed of the suspected infringement of their rights, and goods constituting a manifest infringement should be temporarily confiscated, as is also provided for in the regulation to combat piracy.

Amendment by Nicole Fontaine

Amendment 123

Article 8

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 **are not dependent on a report or accusation** made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.

Member States shall ensure that the possibility of initiating investigations into, or prosecution of, offences covered by Article 3 **is available even in the absence of a report or accusation** made by a person subjected to the offence, at least if the acts were committed in the territory of the Member State.

Or. fr

Justification

The aim is to be consistent with Recital 8.

Amendment by Edith Mastenbroek

Amendment 124

Article 9, paragraph 1

Member States shall bring into force the provisions necessary to comply with this Directive by at the latest [eighteen months after the date of its adoption]. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

Member States shall bring into force the provisions necessary to comply with this Directive by at the latest [eighteen months after the date of its adoption] **and only after Directive 2004/48/EC has been fully implemented**. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

Or. en

Justification

As per October 2006, implementation of Directive 2004/48 on the enforcement of intellectual property rights has only taken place in 12 Member States.

