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Committee on Civil Liberties, Justice and Home Affairs

23.11.2006 PE 380.845v01-00

AMENDMENTS 5-80

Draft opinion **(PE 380.583v01-00)**
Rainer Wieland
Amended proposal for a directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights
COM(2006)0168 – C6-0233/2005 – 2005/0127(COD))

Amended proposal for a directive (COM(2006)0168 – C6-0233/2005 – 2005/0127(COD) – amending act)

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 5

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal Affairs, as the committee responsible, to propose rejection of 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 6

The Committee on Civil Liberties, Justice and Home Affairs calls on the Committee on Legal Affairs, as the committee responsible, to propose rejection of 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.

Draft Legislative resolution

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 7
Citation -1 a (new)

-1a. Agrees with the Dutch Government, which in July 2006 stressed that the legal instruments to combat piracy already existed and rejected the present directive as unnecessary, taking the view also that the Commission has no competence to propose a directive making intellectual property rights infringement an offence.

Or. en

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 8
Citation -1 b (new)

-1b. 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 judgement of the Court of Justice of the European Communities in Case 176/03, extending its sphere of legislative intervention into an area for which it has no competence.

Or. en

Amendment by Marco Cappato

Amendment 9
Citation 1 a (new)

1a. Draws the attention on the statement of the Dutch Government of July 2006 that the legal instruments to combat piracy already exist and therefore deems the present Directive unnecessary, and moreover that the Commission has no competence to propose a directive making intellectual property rights infringement a criminal offence.

Or. en

Justification

Following a recent judgement of the European Court of Justice in case C-176/03, the Commission is proposing a directive on criminal measures and intellectual property rights (IPRs) under Article 95 of the Treaty. Without prejudice to the competence of the Committee on Legal Affaires it is worth to be noted that there are serious concerns about the European Commission's broad interpretation of the judgement as set out in Communication COM(2005)583; and, as a consequence, about the legal base of the proposal.

Proposal for a directive

Text proposed by the Commission	Amendments by Parliament

Amendment by Ignasi Guardans Cambó

Amendment 10
Title

Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights	Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights ***in the fight against counterfeiting and piracy.***

Or. en

Justification

The title of the Directive should be in accordance with its scope, which needs to be limited to copyright piracy and trade mark counterfeiting, in conformity with the TRIPS agreement, and according to the limits established in the judgement of the Court of Justice of the European Communities in case 176/03.

Amendment by Edith Mastenbroek

Amendment 11
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 rights11 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 rights11 lays down measures, procedures and civil and administrative remedies. ***The full implementation of these measures and remedies are a prerequisite for developing any other additional measures and remedies.***

Or. en

Amendment by Edith Mastenbroek

Amendment 12
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 rights11 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 rights11 lays down measures, procedures and civil and administrative remedies. ***The full implementation of directive 2004/48/EC is a prerequisite for developing any other additional measures and remedies.***

Or. en

Amendment by Edith Mastenbroek

Amendment 13
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 Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 14
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

Amendment by Ignasi Guardans Cambó

Amendment 15
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

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

Amendment by Edith Mastenbroek

Amendment 16
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

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 17
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

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 18
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 Marco Cappato

Amendment 19
Recital 9 a (new)

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

Or. en

Amendment by Edith Mastenbroek

Amendment 20
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 Rainer Wieland

Amendment 21
Article1

This Directive lays down the criminal	This Directive lays down the criminal

measures necessary to ensure the enforcement of intellectual property rights.	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.***	***At least the following*** intellectual property rights ***are covered by the scope of the Directive:*** ***a) copyright;*** ***b) rights related to copyright;*** ***c) sui generis right of a database maker;*** ***d) rights of the creator of the topographies of a semiconductor product;*** ***e) trademark rights;*** ***f) design rights;*** ***g) patent rights, including rights derived from supplementary protection certificates;*** ***h) geographical indications;*** ***i) utility model rights;*** ***j) plant variety rights;*** ***k) trade names, in so far as these are protected as exclusive property rights in the national law concerned.***

Or. de

Justification

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

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

The list based on Article 2 of Directive 2004/48/EC will, moreover, make it easier for the committee responsible to exclude specific areas of law from the scope of the provisions, if it considers this to be necessary, through separate votes.

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 22
Article 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 ***copyrights and trademark rights, in so far these rights systems are harmonised in Community legislation.***
These measures shall apply to intellectual property rights provided for in Community legislation and/or national legislation in the Member States.	

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 Ignasi Guardans Cambó

Amendment 23
Article 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 ***copyrights and trademark rights, in so far these rights systems are harmonised in Community legislation.***
These measures shall apply to intellectual property rights provided for in Community legislation and/or national legislation in the Member States.	

Or. en

Justification

The scope of this Directive needs to be limited to copyright piracy and trade mark counterfeiting, in conformity with the TRIPS agreement, and according to the limits

established in the judgement of the Court of Justice of the European Communities in case 176/03

Amendment by Edith Mastenbroek

Amendment 24
Article 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 ***copyrights and trademark rights, in so far these rights' systems are harmonised and provided for in Community legislation.***
These measures shall apply to intellectual property rights provided for in Community legislation and/or national legislation in the Member States.	

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 Marco Cappato

Amendment 25
Article 1, paragraph 1

This Directive lays down ***the*** criminal measures necessary to ***ensure the enforcement*** of intellectual property rights.	This Directive lays down criminal measures necessary to ***combat and deter the intentional infringement*** of intellectual property rights ***on a commercial scale***.

Or. en

Justification

This amendment restores the language used by the TRIPS agreement (Art. 61), upon which this proposal is based.

Amendment by Marco Cappato

Amendment 26
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 these criminal*** measures ***at EU level where this is necessary to combat the intentional infringement of*** intellectual property rights ***committed under the aegis of a criminal organisation, or where they carry a health or safety risk.***

Or. en

Justification

This amendment restores the language used by the TRIPS agreement (Art. 61), upon which this proposal is based. There is a distinction between patent infringements in the normal course of commercial activity, such as the legitimate development of products, and counterfeiting and piracy with fraudulent and deliberate intent. There are civil remedies for patent infringements and alleged patent infringers should not be equated with criminals like pirates and counterfeiters. In cases of patent infringements this would interfere with the civil law systems of the Member States

Amendment by Ignasi Guardans Cambó

Amendment 27
Article 1, paragraph 2 a (new)

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

- ***patents, utility models and supplementary protection certificates;***

- ***parallel importation of original goods, which have been marketed with the agreement of the rightholder in a third country.***

Or. en

Justification

The scope of this Directive needs to be limited to copyright piracy and trade mark counterfeiting,

Amendment by Marco Cappato

Amendment 28
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 trademark infringement or copyright piracy.

Or. en

Justification

There is a distinction between patent infringements in the normal course of commercial activity, such as the legitimate development of products, and counterfeiting and piracy with fraudulent and deliberate intent. There are civil remedies for patent infringements and alleged patent infringers should not be equated with criminals like pirates and counterfeiters. In cases of patent infringements this would interfere with the civil law systems of the Member States.

Amendment by Edith Mastenbroek

Amendment 29
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 Marco Cappato

Amendment 30
Article 1, paragraph 2 b (new)

The non-profit exchange between individuals of legally acquired content is excluded from the scope of this Directive.

Or. en

Justification

The Directive should specify that criminal sanctions do not apply in the case legally acquired content is exchanged without profit between individual persons

Amendment by Edith Mastenbroek

Amendment 31
Article 1, paragraph 2 b (new)

The non-profit exchange between individuals of content is excluded from the scope of this Directive.

Or. en

Amendment by Rainer Wieland

Amendment 32
Article 2 , paragraph 1 a (new)

For the purposes of this Directive, acts carried out "in a commercial manner" means acts committed with the intention of obtaining, through their repeated commission, a source of income of a certain permanence and significance.

Or. de

Justification

The term 'commercial scale' is of key importance to the definition of a criminal offence. It must be defined precisely. It should be an important factor that the perpetrator commits the offence in order to obtain a source of income.

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 33
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 Marco Cappato

Amendment 34
Article 2, paragraph 1 a (new)

For the purposes of this Directive, "infringement on a commercial scale" means for-profit infringement of an intellectual property right which causes significant direct loss to the holder of that right.

Or. en

Justification

Though the proposal intends to penalize infringement on commercial scale only (Art. 3), this notion is not defined; clear definition must be established to avoid legal uncertainty. Though the TRIPS Agreement does not define what is meant by "commercial scale", the context of the TRIPS, the use of that expression throughout the whole text, and the analysis of the negotiation process of the TRIPS make the definition clear.

Amendment by Ignasi Guardans Cambó

Amendment 35
Article 2, paragraph 1 a (new)

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

Or. en

Justification

The term "commercial scale" is central to the definition of the offence, and needs to be precisely defined. It must include not only acts that have an economic or commercial intention, but also serious acts of piracy at a large scale, that is, for more than individual or

personal use, which may have no economic advantage for the offender but which may cause a very substantial harm to the rightsholder.

Amendment by Edith Mastenbroek

Amendment 36
Article 2, paragraph 1 a (new)

For the purposes of this Directive, "commercial scale" means "commercial activity with an intention to directly earn a financial profit".

Or. en

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 37
Article 2, paragraph 1 b (new)

For the purposes of this Directive, "commercial scale" means "commercial activity with an 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 Marco Cappato

Amendment 38
Article 2, paragraph 1 b (new)

For the purposes of this Directive,

"intentional infringement of an intellectual property right" means deliberate and knowing infringement of that right.

Or. en

Amendment by Edith Mastenbroek

Amendment 39
Article 2, paragraph 1 b (new)

For the purposes of this Directive, "infringement on a commercial scale" means for-profit infringement of an intellectual property right which aims to cause significant direct financial loss to the holder of that right.

Or. en

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 40
Article 2, paragraph 1 c (new)

For the purposes of this Directive, "infringement on 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 41
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 Marco Cappato

Amendment 42
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 ***the*** intentional infringement of an intellectual property right on a commercial scale ***is*** treated as ***a*** criminal ***offence***.

Or. en

Justification

Criminal sanctions for abetting and inciting any criminal act must be reserved for the most serious crimes; to penalize abetting and inciting could be disproportionate in case of infringement of intellectual property rights.

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 43
Article 3

Member States shall ensure that ***all***	Member States shall ensure that ***copyright***

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.	infringements are treated as criminal offences***, if the following elements are fulfilled cumulatively:***
	(a) unmodified copying;
	(b) commercial activity with an intention to earn a profit;
	(c) cause of significant direct loss for the rightsholder; and
	(d) deliberate and knowing infringement of the copyright involved.

Or. en

Justification

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 Ignasi Guardans Cambó

Amendment 44
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 ***the treatment as criminal offences of all intentional copyright infringements committed on a commercial scale.***

Or. en

Justification

It is convenient to define separately copyright and trademark infringements

Amendment by Edith Mastenbroek

Amendment 45
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.***	***(1)*** Member States shall ensure that ***the*** intentional ***infringement*** of an intellectual property right on a commercial scale ***is*** treated as ***a*** criminal ***offence.***
	(2) Member States shall ensure that intentional copyright infringements are treated as criminal offences, if the following elements are fulfilled cumulatively: ***a) commercial activity with an intention to earn a financial profit;*** ***(b) aim to cause significant direct financial loss for the rightsholder; and*** ***(c) deliberate and knowing infringement of the copyright involved.*** ***(3) Member States shall ensure that intentional trade mark 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 an intention to earn a financial profit;*** ***(c)aim to cause significant direct financial loss for the rightsholder; and*** ***(d) deliberate and knowing infringement of the trade mark involved.***

Or. en

Amendment by Marco Cappato

Amendment 46
Article 3, paragraph 1 a (new)

Furthermore, Member States shall ensure that attempting, aiding, or abetting and inciting such infringements are treated as criminal offences where the attempting, aiding, or abetting and inciting:

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

Or. en

Justification

It is important to distinguish between patent infringements in the normal course of commercial activity (legitimate development of products) that can lead to break invalid patents and counterfeiting and piracy with fraudulent and deliberate intent, which are often carried out by criminal organizations. Criminal sanctions for abetting and inciting any criminal act must be reserved for the most serious crimes; to penalize abetting and inciting could be disproportionate in case of infringement of intellectual property rights.

Amendment by Marco Cappato

Amendment 47
Article 3, paragraph 1 b (new)

Criminal sanctions are not to be applied in cases of the parallel importation of original goods which have been marketed with the agreement of the holder of the right in a third country.

Or. en

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 48
Article 3, paragraph 2 (new)

Member States shall ensure that trade mark 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 an intention to earn a profit;

(c) cause of significant direct loss for the rightsholder; and

(d) deliberate and knowing infringement of the trade mark involved.

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 Ignasi Guardans Cambó

Amendment 49
Article 3, paragraph 2 (new)

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

Or. en

Justification

It is convenient to define separately copyright and trademark infringements

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 50
Article 3, paragraph 3 (new)

Criminal sanctions are not to 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 EU.

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 Guardans Cambó

Amendment 51
Article 3, paragraph 3 (new)

The offence definition shall include as well the acts of attempting, organising, directing, aiding or abetting, facilitating and inciting the infringements specified in this article.

Or. en

Justification

All kinds of forms of participation in such infringements should also be treated as criminal offences.

Amendment by Rainer Wieland

Amendment 52
Article 3 a (new)

Article 3a

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Article 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following:

(a) a power of representation of the legal person;
(b) an authority to take decisions on behalf of the legal person;
(c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Article 3 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators of or accessories to any of the offences referred to in Article 3.
4. For the purpose of this Directive "legal

person" shall mean any entity having such status under the applicable law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Or. de

Justification

In the light of the disparities between systems of penalties in the Member States in relation to legal persons, a uniform approach is needed within the context of criminal law.

The proposed wording has been taken from the Council's proposed text for a Council Framework Decision on the fight against organised crime, 8496/1/06 (2005/003(CNS)).

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 53
Article 4

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

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 Rainer Wieland

Amendment 54
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:	2. For the offences referred to in Article 3, the Member States shall ***also*** provide***,*** in appropriate cases***, for the necessary measures to ensure that a natural or legal person held liable is punishable by effective, proportionate and dissuasive penalties, which may include criminal or non-criminal fines and other penalties, such as:***
(a) ***destruction of the goods infringing an***	(a) ***exclusion from entitlement to public***

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

Or. de

Justification

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

Amendment by Edith Mastenbroek

Amendment 55
Article 4, paragraph 2

2. For the offences referred to in Article 3, the Member States shall provide that the following penalties are also available in appropriate cases: ***(a) destruction of the goods infringing an intellectual property right;*** ***(b) total or partial closure, on a permanent or temporary basis, of the establishment used primarily to commit the offence;***	***deleted***

(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 Ignasi Guardans Cambó

Amendment 56
Article 4, paragraph 2, point a)

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

Or. en

Justification

Clarification

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 57
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 Ignasi Guardans Cambó

Amendment 58
Article 5, paragraph 1

1.Each Member State shall take the necessary measures to ensure that, when	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.	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, ***when they have caused an important quantitative damage to the rightsholder***, or where they carry a health or safety risk.

Or. en

Justification

Criminal prosecution should be extended also to natural persons who, even if acting outside any criminal organisation, have caused a serious or important quantitative damage to the rightsholder. Otherwise an individual could do thousands of acts of copyright piracy, even to promote it or to organise it by any means, in a very large scale, and not be covered by any criminal sanction as long as he or she is acting alone.

Amendment by Bill Newton Dunn

Amendment 59
Article 5, paragraph 1

1. Each Member States 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 States 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 ***they are considered to be a serious crime,*** or where they carry a health or safety risk.

Or. en

Justification

It is a concern that the scope of application of Article 5 is restricted to offences committed in the context of "organised crime". The restrictive criteria for its application will prevent the creation of a truly effective European framework for criminal enforcement. This sends a wrong signal and adds an element that is neither found in national laws (with the exception of France) nor in the WTO TRIPS Agreement. Improved sentencing guidelines for criminal violation of intellectual property rights are sorely needed. Such guidelines, as provided in the Proposal for a Directive 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 5 of the Proposal for a Directive should therefore delete the reference to "organised crime" and replace it by the term "serious crimes".

Amendment by Bill Newton Dunn

Amendment 60
Article 5, paragraph 2, points a) and b)

(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;
(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

The Commission's suggested minimum levels for the maximum fines are too low and therefore not dissuasive. In certain cases of commercial piracy or counterfeiting a fine of EUR 100,000 would be totally inadequate. 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 Bill Newton Dunn

Amendment 61
Article 5, paragraph 2 a (new)

	2a. ***Member States shall take the necessary measures to ensure that repeat offences***

committed by natural persons or legal entities in another Member State of the offences referred to in Article 3 are taken into account when deterring the level of the penalties referred o in paragraph 1 and 2 of this Article.

Or. en

Justification

In order to ensure that criminal sanctions become more effective, deterrent and dissuasive measures to combat piracy and counterfeiting in the Internal Market of the European Union, it is essential that the national courts take into account the IPR offences committed in another Member States when determining the penalties to be imposed on the infringer. 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 Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 62
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 Rainer Wieland

Amendment 63
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, 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. de

Amendment by Ignasi Guardans Cambó

Amendment 64
Article 6

The Member States shall take the necessary measures to allow the total or partial confiscation of goods belonging to convicted natural or legal persons in accordance with Article 3 of Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime Related Proceeds, Instrumentalities and Property, ***at least where the offences are committed under the aegis of a criminal organisation, within the meaning of Framework Decision …. on the fight against organised crime, or where they carry a health or safety risk.***	***In the cases provided for in article 5 of this Directive***, the Member States shall take the necessary measures to allow the total or partial confiscation of goods belonging to convicted natural or legal persons in accordance with Article 3 of Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime Related Proceeds, Instrumentalities and Property.

Or. en

Justification

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

Amendment by Edith Mastenbroek

Amendment 65
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. en

Amendment by Bill Newton Dunn

Amendment 66
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 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 ***a serious crime,*** or where they carry a health or safety risk.

the fight against organised 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 Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 67
Article 6 a (new)

Article 6a

Misuse of powers

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

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

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 68
Article 6 a (new)

Article 6a

Misuse

Member States shall ensure that through criminal, civil and procedural measures, the misuse of threats of criminal sanctions will be prohibited and 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 69
Article 6 b(new)

Article 6b

Defendants' rights

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

Or. en

Justification

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 70
Article 7

Article 7	***deleted***
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 Ignasi Guardans Cambó

Amendment 71
Article 7

Article 7	***deleted***
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

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

Amendment by Edith Mastenbroek

Amendment 72
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 Rainer Wieland

Amendment 73
Article 7

The Member States must ensure that the holders of intellectual property rights concerned, or their representatives, and	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***.	experts, are ***able*** to ***contribute in an appropriate way to the success of*** the investigations.

Or. de

Justification

The text proposed by the Commission could create the erroneous impression that the injured party is to have a (legally enforceable) right to participate in investigations or to be provided with information by the authorities.

Amendment by Marco Cappato

Amendment 74
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 ***the*** intellectual property rights concerned, or their ***duly mandated*** representatives and experts, ***shall provide information to the*** joint investigation teams ***investigating*** the offences referred to in Article 3.

Or. en

Justification

The wording of this article is too vague: it is legitimate that the Court allows each of the parties to have their experts. However, direct involvement of the representatives of the holder of the IPRs into the investigation must be limited; otherwise right-holders could jeopardize the criminal procedures by endangering the impartial and fair investigation. The text proposed by the Commission is disproportionate; as this should be left to the Courts to interpret.

Amendment by Edith Mastenbroek

Amendment 75
Article 7

Joint investigation teams ***The Member States must ensure that*** *the*	Investigation teams *The* holders of intellectual property rights

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.	concerned, or their representatives, and experts, are allowed to ***provide information to the*** investigation teams ***investigating*** the offences referred to in Article 3.

Or. en

Amendment by Kathalijne Maria Buitenweg, Giusto Catania, Umberto Guidoni

Amendment 76
Article 8

Article 8 ***Initiation of criminal proceedings***	***deleted***
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

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 77
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 Marco Cappato

Amendment 78
Article 8 a (new)

Article 8a
Protection of personal data

Article 8 of the Charter of Fundamental Rights of the European Union, which concerns the protection of personal data, and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[1] shall be fully respected in the course of investigations and judicial proceedings.

[1] OJ L 281, 23.11.1995, p. 31.

Or. en

Justification

Article 8 of the Charter declares that "(e)veryone has the right to the protection of personal data concerning him or her", and "(s)uch data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid

down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified." The Directive aims to protect the rights and freedoms of persons with respect to the processing of personal data by laying down guidelines determining when this processing is lawful.

Amendment by Edith Mastenbroek

Amendment 79
Article 8 a (new)

Article 8a

Protection of personal data

Article 8 of the Charter of Fundamental Rights of the European Union, which concerns the protection of personal data, and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[1] shall be fully respected in the course of investigations and judicial proceedings.

_____

[1] OJ L 281, 23.11.1995, p. 31.

Or. en

Amendment by Edith Mastenbroek

Amendment 80
Article 9, paragraph 1, subparagraph 1

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.	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] **and *only after Directive 2004/48 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.