

**Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee — Enhancing the enforcement of intellectual property rights in the internal market'**

COM(2009) 467 final

(2011/C 18/19)

Rapporteur: **Mr RETUREAU**

On 11 September 2009 the Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

*Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. Enhancing the enforcement of intellectual property rights in the internal market*

COM(2009) 467 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 2 March 2010.

At its 462nd plenary session, held on 28 and 29 April 2010 (meeting of 29 April), the European Economic and Social Committee adopted the following opinion by 132 votes to five with four abstentions.

## 1. Recommendations and conclusions

1.1 The Committee regrets that it has not been possible to take account of recent events in the Commission proposals, namely the ratification by the European Union and Member States of the World Intellectual Property Organization (WIPO) 'Internet treaties', i.e. the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

1.2 It also requests to be kept abreast of the ongoing ACTA (Anti-Counterfeiting Trade Agreement) negotiations and to be informed of any differences that may arise between this agreement and (i) the recently ratified WIPO treaties, with particular regard to the 'Internet' part of the ACTA, and (ii) Directive 2004/48/EC on the enforcement of intellectual property rights (the so-called 'counterfeiting directive' <sup>(1)</sup>).

1.3 Nonetheless, the Committee takes note of the Commission's intention to hold a meeting of stakeholders in the near future. It hopes that this will take place as soon as possible and before any final decision is taken; the European Parliament should also be involved at as early a stage as possible.

1.4 The Committee rejects the idea of any special set of rules of the kind introduced into the legislation of some Member States for the exercise of copyright on the internet, and which may infringe the individual's privacy. Instead, it advocates active education and training measures for consumers, especially young people.

1.5 The Committee supports the Commission's main proposal, which advocates the establishment of an EU Counterfeiting and Illegal Copies Observatory. This would collate and disseminate useful information on how counterfeiters operate; moreover, it would offer support specifically geared to SMEs and SMIs, who often fall victim to counterfeiting, in order to ensure that they are better informed of their rights.

1.6 The Committee considers the rapid information exchange network proposed by the Competitiveness Council, built on the IMI (Internal Market Information system), to be very useful, particularly if the Member States succeed in overcoming obstacles in administrative cooperation. This also depends on how effective contacts are at national level. In addition, the Commission should regularly publish a report on the data collected by the Observatory and its activities.

1.7 The need to fight organised crime in counterfeiting should be reflected in greater cooperation between customs services and enforcement agencies, with the involvement of Europol at EU level. The Committee considers that harmonised European criminal law is essential, as long as those involved adhere to the principle of the punishment fitting the crime, including the crime of selling illegal copies on the internet. Such copying activities should not lead to excessive or disproportionate legislation against illegal copying or commercial-scale counterfeiting.

1.8 Subject to its criticism of the lack of transparency with regard to ACTA, and allowing for the uncertainty generated by unilateral declarations from several Member States on ratification of the WIPO treaties in December 2009, the Committee can, then, endorse the Commission proposals. It supports a European position that does not go beyond the current *acquis*.

<sup>(1)</sup> Directive of the European Parliament and the Council of 29 April 2004, OJ L 157, 30.4.2004, pp. 45-86.

1.9 The Committee advocates, essentially for orphan works, a harmonised system for the registration of copyright and related rights, to be updated periodically so that rights holders can easily be found. This system could detail the character and title of the work, as well as the various rights holders. It calls on the Commission to look into the feasibility of such an idea.

1.10 Finally, the Committee insists that the European Union Patent be created and properly implemented in all Member States. It will provide less cumbersome and more effective protection for safeguarding the intangible rights of SMEs and SMIs related to innovation.

## 2. Commission proposals

2.1 The Commission stresses the need to reinforce Intellectual Property Rights (IPR) in the knowledge-based society. The protection afforded to IPR in the EU and at international level (TRIPS<sup>(2)</sup> and sectoral agreements) must be stepped up, since businesses – both large companies and SME-SMIs – are attaching increasing importance to these rights. Start-ups can thus protect their intangible assets and, on this basis, obtain capital or loans to launch their activities.

2.2 The EU must support them with an intellectual property (IP) culture which protects European talent and creates opportunities for businesses, as well as for academic research and campus spin-offs<sup>(3)</sup>.

2.3 The very value of IPR makes them a target for counterfeiters and pirates, who make use of a variety of devices to achieve their ends, including the Internet, which is an international tool for the market in illicit goods; this is stifling innovation and threatening jobs, with severe economic consequences for businesses, especially at a time of economic recession.

2.4 The market in illicit goods has expanded beyond the one in 'traditional' copied or counterfeited products (films, fashion, music, software and luxury goods) to include new mass-consumption goods: foodstuffs, hygiene products, spare parts for cars, toys, electrical and electronic equipment, etc.

2.5 The health sector is also affected by fake medicines, placing people's health at risk.

2.6 The effects of counterfeiting and trade in illegal copies are becoming increasingly worrying, especially since organised crime is heavily involved in counterfeiting.

2.7 A Community regulatory framework has been put in place, including Directive 2004/48/EC<sup>(4)</sup> on IPR enforcement;

civil law has been harmonised; and a proposal on criminal sanctions is currently before the Council. The EU Customs Regulation provides for the seizure of illicit copies and penalties for trade in such items; moreover, the Commission is currently consulting Member States on how it can be improved.

2.8 As part of a comprehensive European anti-counterfeiting plan, the Commission wants to adopt complementary non-legislative measures in line with the Competitiveness Council Resolution of 25 September 2008.

2.9 In line with the findings of the advisory expert group, which focused in particular on the situation of SMEs, the Commission wants to increase support for pursuing offenders, and is planning a number of related projects to help SMEs incorporate IPR into their innovation strategies and business plans.

2.10 At global level, the Commission is developing a protection strategy in relation to third countries (e.g. EU-China anti-counterfeiting agreements, customs inspection initiatives). A China-IPR-SME Helpdesk is now in operation.

2.11 Public-private partnerships (PPPs) should be consolidated with a view to a more participatory European strategy. The May 2008 High Level Conference was followed by the Commission's Industrial Property Rights Strategy for Europe and the adoption of the aforementioned Competitiveness Council Resolution on an anti-counterfeiting and anti-piracy plan. The Competitiveness Council also called on the Commission to step up border controls in cooperation with the Member States.

2.12 However, it is particularly difficult to assemble information on the nature and extent of counterfeiting and trade in illegal copies and to assess their actual impact on our economy. Information held by various national bodies is hard to collate and assimilate, apart from the data collected by the Commission on border detentions, which in any case only shows a small part of the picture. The source database should be widened to fully assess the global, but also local, implications of illegal activities linked to counterfeiting and to understand why some products, sectors and regions are more vulnerable than others. That would enable better-targeted action plans to be devised.

2.13 The Competitiveness Council advocated the creation of a European Counterfeiting and Piracy Observatory to generate a more precise understanding of these phenomena. The Commission is now establishing such an observatory in order to gather all possible information on IPR infringements. However, it believes that the observatory should play a much wider role, becoming a platform for representatives from the relevant national authorities and stakeholders to exchange information and expertise on best practice, with a view to developing joint strategies for combating counterfeiting and piracy and to making recommendations to policymakers.

<sup>(2)</sup> International agreements on the aspects of intellectual property rights relating to trade, including trade in counterfeit goods (TRIPS).

<sup>(3)</sup> See INT/325, OJ C 256, 27.10.2007, p. 17; INT/448, OJ C 218, 11.9.2009, p. 8; INT/461, OJ C 306/2009, p. 13 and INT/486 (not yet published).

<sup>(4)</sup> OJ L 157, 30.4.2004, pp. 45-86 (CESE Opinion in OJ C 32, 5.2.2004, p. 15).

2.14 If the observatory is to become a key resource, it must provide a forum for close cooperation between the Commission, the Member States and the private sector and feed into a partnership with consumer organisations in order to define practical recommendations and raise consumer awareness. The publication of an annual report would enable the public to understand the problems and ways of resolving them.

2.15 The Commission then sets out the observatory's role for achieving the afore-mentioned goals.

2.16 The observatory would become a platform serving all stakeholders, with one representative per country, reflecting a broad range of European and national bodies and the sectors that are most affected and most experienced in this domain. Consumers and SME representatives would also be invited.

2.17 Consistent IPR enforcement means enhancing and expanding genuine administrative cooperation to combat counterfeiting and piracy, establishing a real partnership to implement a border-free internal market. To this end, an efficient network of contact points across the European Union is necessary.

2.18 Internally, better coordination in combating counterfeiting is also needed. For this purpose, national coordinators with a clear mandate should be appointed.

2.19 Transparency also needs to be promoted in respect of national structures at cross-border level to facilitate legal action by businesses thus despoiled. National IP and copyright offices likewise have a role to play in providing information. They must also take on new functions such as awareness-raising and providing specific support for SMEs, in association with the European Patent Office (EPO), national offices and the Office of Harmonisation of the Internal Market (OHIM) in respect of trade marks.

2.20 The Competitiveness Council also called on the Commission to set up a cross-border network for the rapid exchange of key information, drawing on national contact points and modern information-sharing tools. An electronic network for rapid, effective information-sharing on IPR infringements will need to be available to all enforcement agencies and national industrial property offices.

2.21 The Commission is currently analysing how an appropriate interface could be designed and how it could build on the existing IMI system network so that essential information can circulate easily.

2.22 In setting out all the serious consequences of IPR infringements, the Commission is trying to encourage holders

of these rights and all stakeholders in the commercial chain to join forces to combat piracy and counterfeiting in their common interest. One approach worth exploring would be voluntary agreements to combat counterfeiting and piracy on the ground, and to find technological solutions for detecting counterfeit goods; these agreements could extend beyond Europe's borders. Whatever approaches are adopted must naturally remain strictly within the bounds of legality.

2.23 Trading in counterfeit goods on the Internet raises very specific issues, and the Commission has launched a structured dialogue with stakeholders, since the Internet gives counterfeiters and pirates particular flexibility to operate globally and evade local law. Meetings are already being held with a view to drawing up specific procedures to force offers of counterfeit goods to be removed from websites under the terms of voluntary agreements. In the absence of agreements between trademark proprietors and Internet businesses, the Commission will need to consider legislative solutions, in particular under the IPR Enforcement Directive.

### 3. The EESC's comments

3.1 The Commission proposal focuses on the protection of European SMEs' IPR. The EESC feels that they do need particular support to help them enforce their rights in accordance with the provisions of the relevant legislation and Directive 2004/48. However, the criminal law aspect is still missing and it would be useful for the Member States to look for a balanced, proportionate solution. The EESC is hoping that a solution will be found, based on the TFEU <sup>(5)</sup>, to support holders of intangible rights.

3.2 The observatory should help combat all forms of IPR infringement, irrespective of the size of the business involved, whilst placing particular emphasis on the specific needs of SMEs and SMIs.

3.3 Some proposals, such as voluntary agreements, are already being implemented, while others are still at the draft stage, and the communication does not point out the obstacles to be overcome in some areas, such as administrative cooperation, which in many cases does not seem to function properly.

3.4 A new element has emerged in unlawful copying and counterfeiting via the Internet: the European Union and the Member States ratified the WIPO 'Internet treaties' last December, which will, in principle, result in uniform application of European law, but, for all that, declarations at national level made upon ratification risk jeopardising a unified European approach. These treaties require action to be taken against unlawful copying and counterfeiting for commercial purposes, as provided for in Directive 2004/48 on Copyright and Related Rights in the Information Society.

<sup>(5)</sup> Treaty on the Functioning of the European Union.

3.5 At the same time, however, 'secret negotiations' are taking place between the USA, the EU and certain 'selected' countries with a view to drawing up an international treaty to prevent counterfeiting (ACTA). The American side wants this treaty to share many similarities with the Digital Millennium Copyright Act (DMCA). According to the American negotiator, the secrecy is designed to forestall a general outcry from civil society in the United States and in Europe. European consumers, whose organisations have not been invited to the negotiations, and European businesses condemn these procedures for their lack of transparency<sup>(6)</sup> and democratic accountability, and for the fact that they can potentially be used, in the guise of combating Internet counterfeiting (one of the headings of the draft treaty), by the forces of law and order - including private police forces - to monitor Internet trade and communications. In certain quarters, moreover, it is thought that the distinction between a commercial counterfeiting activity and the making of a private copy would be lost. In a situation where North American producer lobbies are accorded permanent access to the negotiations, it is a matter of urgency that these negotiations be made more transparent and that civil society be allowed to have its say.

3.6 The EESC wishes to be kept abreast of discussions and proposals currently on the table and to be able to put forward its point of view on them. It would be a matter of regret if the contested provisions in the American DMCA were to be transposed into an international treaty, only then to compete with the WIPO treaties and add to the confusion surrounding copyright and related rights at European and international level. In any case, the European position should not go beyond the current *acquis*.

3.7 In the Committee's view, a special set of rules on Internet copyright does not entitle right holders either to monitor the use of technology, as the national legislation cited above currently tends to specify, or to interfere in private communication. The excessive length of the protection period (from 50 or 75 years after the author's death or 75 years for a corporate body) and the over-generous rights granted to multinational entertainment companies for media control would very clearly stifle innovation and technological development and would not create an environment open to competition. The aim of this protection is to secure a fair reward for authors and

entertainers, not a guaranteed income for the distributors (the 'majors') coupled with an entitlement to interfere.

3.8 The Committee advocates unifying copyright on its traditional basis, without a punitive set of rules for the Internet.

3.9 The Committee suggests compulsory registration - in the case of a European copyright, for example, in a harmonised Register of Copyrights and Related Rights - for a very small fee covering registration costs only, to be updated every 10 or 20 years, for instance, so that right holders and their addresses are known. Such a tool, freely accessible and constantly updated, would mean that orphan works could be more easily re-used and allow any interested company that wanted to use a work for commercial purposes to translate them more easily into other media or languages and to obtain the necessary licences and permissions more easily.

3.10 It would also enable backup copies of works (films, tape recordings, etc.) to be made, especially if the storage media were fragile. Works are often lost, never re-edited or re-used, and some media - old films, for instance - risk being lost forever.

3.11 The lack of registration or fee requirements already sets copyright apart from patents and other industrial property rights. Its length of protection is also considered by many to be excessive given the information society's and the knowledge economy's need for innovation and exchange of know-how. The Committee advocates the registration of copyright and related rights in such a way as to detail the character and title of the work, the copyright and other rights related to the work, and the name and address of the right holders. This information should be updated every 10 or 20 years, if it is possible to do so, for a minimum fee covering the actual cost of registration. Those wishing to make commercial use of a work would thus be able to obtain the necessary licences and permissions more easily. In other words, copyright is often confused with the right to property, but should be considered as a temporary monopoly on use and an exclusive right to issue usage licences for protected works for as long as they remain protected.

Brussels, 29 April 2010.

The President  
of the European Economic and Social Committee  
Mario SEPI

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<sup>(6)</sup> Declaration on ACTA, European consumers, Transatlantic dialogue (see BEUC – European Consumers' Organisations - site).