

III

(Preparatory acts)

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE

477TH PLENARY SESSION HELD ON 18 AND 19 JANUARY 2012

Opinion of the European Economic and Social Committee on the ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Single Market for Intellectual Property Rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe’

COM(2011) 287 final

(2012/C 68/05)

Rapporteur: **Mr MEYNENT**

On 24 May 2011, the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe

COM(2011) 287 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 19 December 2011.

At its 477th plenary session, held on 18 and 19 January 2012 (meeting of 18 January), the European Economic and Social Committee adopted the following opinion by 160 votes to 3 with 7 abstentions.

1. Conclusions and recommendations

1.1 Intellectual Property Rights (IPR) must persevere in their traditional role of driving innovation and growth. The protection system which the Commission intends to develop needs to preserve this conventional aspect without shifting entirely towards a purely asset- and finance-based approach, although it must be acknowledged that the market capitalisation of the biggest multinationals is now based largely on their portfolio of intangible rights and licences, the value of which must be entered on the balance sheet in accordance with the International Financial Reporting Standards (IRFS).

1.2 The strategy set out by the Commission for IPR in the single market is both fundamental and designed to supplement

the Europe 2020 strategy, the Single Market Act and the European Digital Agenda. A strategy in this area is imperative in view of the growing intangible share and financialisation of the economy, but it must not be forgotten that current developments are founded on people’s increasing training and skills and their knowledge regarding the growth of the new economy. The human dimension and the public interest must be built into the strategy, and the Committee believes that the proposals and analyses fail to put this point across clearly.

1.3 Furthermore, as the Committee has consistently argued in previous opinions, priority must be given to enabling SMEs to protect their inventions and creations and to tap the

knowledge potential of patents and commercial and advertising strategies which vary widely across the knowledge and information-based society.

1.4 The Committee has long been waiting for the single European patent and the opportunity to unite national case-law throughout the single market, and hopes that these developments will now be put into effect in the interests of Europe's companies and economy, which are at a disadvantage compared to their external competitors. The Committee trusts that the Commission's initiatives will slash transaction costs, particularly for patents.

1.5 In 2012 the Commission will present a legislative proposal on collecting copyright revenue for online music distribution. The Committee insists on the need for advance, meaningful consultation of the organisations representing the rights and interests at stake, including those of users and employees; it also underscores the need for transparency and monitoring of the bodies managing copyright and related rights which must take precedence in the proposed system for collecting copyright revenue. As regards the private copying levy, the Committee believes that this is unfair given that private copying is an integral part of fair use. It should certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities.

1.6 Moreover, the idea of treating IPRs as potentially transferable securities for a specialised European stock market is not enough: SMI-SMEs and major transnational groups in the EU will not have the same level of access, which could accelerate the flight of European innovation to other continents. The Committee is keen to see the Commission's practical proposals on this point.

1.7 The future harmonised IPR policy must also accommodate the general interest and the rights of consumers, as well as the effective participation of all parts of society in deliberations and in the process of shaping a global, balanced strategy. The innovation and creation thus protected must be brought into society's common pool of knowledge; they must contribute to the promotion of culture, information, education and training, and more generally of fundamental collective rights in the Member States.

1.8 Approximating national laws on the protection of intangible rights and suppressing counterfeiting is necessary in the single market in order to facilitate administrative and customs cooperation and, where appropriate, police and judicial cooperation on investigations and the suppression of the most serious infringements of protected rights, where the violations serve commercial purposes and in particular where consumers' health and safety are endangered.

1.9 Large-scale counterfeiting and pirate copies made for commercial purposes are often directly linked to organised crime, as the chances of being caught and the penalties imposed for this type of crime are an inadequate deterrent.

1.10 The Committee therefore supports the Commission's strategy with a view to promoting the coordinated policies and actions and genuine administrative cooperation which are a core component of it, both in the interest of businesses and in the general interest.

1.11 Today, examples of online, fee-paying distribution, developed for instance by Apple, Amazon, Google or Deezer, show that copyright can be valorised without criminalising young people; if prices are reasonable and affordable, private pirate copies will lose most of their appeal.

1.12 Civil courts are competent for the majority of cases brought for infringement of intangible rights but, in addition to the customary slow pace of proceedings, the burden of proof incumbent on SMEs is often excessive, particularly for cases of infringement committed outside their own country, and specific procedures should be considered in the context of the single market for investigations, seizures, mutual recognition of administrative and judicial acts and reversing the burden of proof.

1.13 Payment of damages to plaintiffs can also be problematic in an international context and the countries concerned should cooperate in order to ensure that right holders are awarded damages as closely proportionate to the actual harm done as possible, independent of the fines and other penalties which may be handed down by the courts.

1.14 A clear legislative framework is needed regarding private 'solutions' (codes, etc.); and, above all, initiatives of this kind should be replaced by judicial monitoring and guarantees of procedures and respect for personal rights, which must prevail: the right to information, to privacy and to freedom of expression and communication, and guarantees on internet-neutrality.

1.15 At the same time, the general principle of proportionality between offences and penalties should be applied effectively; some highly intrusive and punitive national laws on illegal copying of audio-visual material, made on a small scale by individuals via internet with no commercial purpose in mind, should be revised accordingly. It is important to avoid giving the impression that laws are shaped in response to pressure brought to bear by lobbies rather than in response to a fundamental principal of criminal law.

1.16 The Committee also awaits with interest the Commission's proposals on overhauling trademark law and harmonising and revamping it in the context of the single market. It believes that revamping the law and stepping up protection is necessary in view of the role played by these factors in assessing companies' value.

2. The Commission's proposals

2.1 The notion of intangibles usually brings to mind research, patents and, more generally, technological innovation. However, while these elements are certainly key assets when it comes to competitiveness, there is also another category of intangible asset: the entire field of intangibles linked to the imagination. This covers a whole range of activities, concepts and sectors, encompassing cultural and artistic creation in the broadest sense, design, advertising and trademarks, etc. All these elements have one thing in common: they are based on notions of creation and creativity.

2.2 It was not possible for the Commission's 2009 proposal to take into account the changes brought about by the ratification of the WIPO internet treaties (WCT, WPPT) by the European Union and the Member States. The present Communication takes this new status quo and also ACTA (the Anti-Counterfeiting Trade Agreement) into account.

2.3 A distinction is drawn between two forms of intangible (or intellectual) property, industrial property and literary and artistic property.

2.4 Traditionally, the two main types of protection for inventors and authors are patents, for inventions with the potential for industrial applications, and copyright (including its more restrictive common law form) for publications and other literary, audiovisual or artistic works, understood in the broadest sense.

2.5 This communication aims to present the Commission's comprehensive strategy for establishing the genuine single market for intellectual property that is currently lacking in Europe – a European IPR (Intellectual Property Rights) system fit for the economy of the future, which rewards innovative and creative efforts, generates the incentives needed to encourage EU-based innovation and allows cultural diversity to flourish by offering additional outlets for content in an open and competitive market.

2.6 It includes a collection of proposals, some returning to long-standing policies that need harmonising and adapting, and other, new proposals for the incorporation and integration of IPR in the single European market.

2.7 Some of the proposals have yet to be fleshed out, and it will be months before practical proposals are available on how the European IPR market should be organised and what changes are needed when it comes to harmonising trademark protection. In 2012, the Commission will present proposals on managing online music rights.

2.8 Other proposals have been on the table for a long time already, such as the unitary patent, which seems to be approaching completion following three decades of work, and the harmonisation of legislation and practical measures for combating product counterfeiting and piracy, and parasitic branding; these proposals have now been brought together within a harmonised and coherent framework in order to combine with others to make the proposed strategy more effective.

3. General comments

3.1 It is the Committee's opinion that a modern, integrated European IPR system would contribute in a major way to growth, the creation of lasting jobs and the competitiveness of the European economy: the primary objectives of the Europe 2020 strategy. The Committee has regularly expressed its views in the past and put forward suggestions concerning industrial property and literary and artistic property in the single market ⁽¹⁾.

3.2 Intellectual property rights comprise industrial and commercial property rights, such as patents and utility models, trademarks, new plant varieties, ownership of databases, electronic layouts, designs and models, geographical indications, copyright and related rights, trade secrets, etc.

3.3 Knowledge-based industries alone comprise 1.4 million SMEs in Europe and 8.5 million jobs; they are growing rapidly and steadily compared to other sectors of the economy, and so are helping put the economy back on track.

3.4 The Commission states that: 'IPR are property rights ...'. They are seen as property rights but are in fact intangible rights protecting the holders from copies and competition. They constitute exceptions to free competition and take the form of temporary monopolies protected by a deed or certificate issued by a competent state authority (patents, etc.), or recognised under government legislation (copyright and related rights).

3.5 The holders of these rights may surrender them or sell sole reproduction rights in the form of licences; in this way they resemble intangible property rights, but in practice the protection provided is less certain than for material property rights, owing to their different basis. Temporary monopolies are only recognised and protected to serve the general interest, in order to increase the potential of knowledge and technology and thus boost industrial or cultural development.

⁽¹⁾ OJ C 18, 19.1.2011, p. 105.
OJ C 116, 28.4.1999, p. 35.
OJ C 32, 5.2.2004, p. 15.
OJ C 77, 31.3.2009, p. 63.

3.6 This general interest dimension no longer exists in the area of software, for which there is no obligation to publish sources when patents are issued for their protection. European law, meanwhile, rules out patent protection for software (Munich Convention) and uses a right deriving from copyright to protect not the sources but only the effects generated by what is known as proprietary software. This nevertheless poses a problem since the same effects may be obtained from different programmes; furthermore, protecting software copyright involves specific obligations, with a view to the interoperability of various programmes, which might allow for decompilation. The usual 50 year term of protection, however, seems excessive in a field where the pace of renewal and innovation is extremely rapid and in a market where technologies and programmes are constantly evolving and changing and where the winner takes all.

3.7 In contrast, there are movements that oppose traditional forms of protection by creating free public licences, such as the General Public Licence for software and the creative commons for the literary and artistic domains; they object to conventional protection that they consider obstructs the knowledge- and information-based society. These free licences, which represent a large share of the global market, should be recognised and protected in the same way as other licences that represent ownership rights.

3.8 Derogations can affect temporary protection for reasons of general interest (compulsory licences when right holders refuse to grant licences in certain countries, or the case of medicines in the event of human or animal epidemics). In the past, before the TRIPS agreements and the recent WIPO treaties made the scope of intangible rights linked to international trade broader if not universal, many countries did not offer real or sufficient protection and some tolerated violations of industrial and literary property rights with the aim of building up their industrial base and developing their knowledge (Japan, certain European countries, etc.). Such practices are in decline, but the fact is that States can be more or less repressive or tolerant in their treatment of counterfeits (China, India, etc.).

3.9 The development of intangible assets (trademarks) enables a company to set itself apart from its competitors, put new products and concepts on the market and, more generally, gain in terms of non-price competition, which in the long run generates additional customers and profit and new jobs. Counterfeiting and parasitic practices are expanding and threaten both jobs and investments; they also threaten consumers' health and safety and their confidence in brands that have been counterfeited or pirated, reducing opportunities for licensing as well as the expected profits and tax revenue.

3.10 Increasingly, however, the value generated by these assets is being taken into account when determining the stock

market value of major companies as part of the financialisation of the intangible economy. Up to 90 % of the market capitalisation of companies like Microsoft, Apple, IBM (portfolio of 40 000 patents), Google and Facebook, consists of intangible assets; this percentage varies from one economic sector to another but remains considerable: between 90 % and 40 % of market capitalisation for listed companies. The new accounting standards call for intangible assets to be entered on the balance sheet, but pose serious problems in terms of assessment.

3.11 This change in scale has direct consequences for the concept of intellectual property, which has indeed changed in comparison with the traditional usages of patents and copyright, as reflected in the more recent WIPO conventions. The Commission has asked WIPO to address database protection in a forthcoming conference with a view to an international treaty.

3.12 This also accounts for ACTA and the way it was adopted (though it is no justification); this is a treaty designed to implement cross-border protection measures for property covered by patents and copyright as written into the WTO's TRIPS agreements. Certain countries such as China and India are blocking the adoption of TRIPS implementing measures in Geneva, thus preventing any effective protection of intangible rights in international trade.

3.13 In principle, ACTA should not alter the community *acquis*; nevertheless, its exclusive focus on increasing protection for rights holders by means of customs, police and administrative cooperation measures continues to favour a certain view of rights ownership. Other doubtless more fundamental human rights, such as the right to information, health, sufficient food, the right of farmers to select seeds and the right to culture, are not taken sufficiently into consideration, and this will impact on future European legislation geared towards the harmonisation of Member States' legislation. The individualised and exclusive, proprietary view of temporary exceptions to free competition therefore clearly has an impact on the future of the knowledge- and information-based society and the third-generation human rights included in the EU's Charter of Fundamental Rights.

3.14 It should be noted that what is deemed a patentable invention varies considerably from one country to another, especially when it comes to new technologies: software has specific features and is protected by patents in some countries (USA) and by a special form of copyright in others (Europe), but these contradictory systems form major obstacles to innovation and are at the root of disproportionate legal defence costs, for instance in the US. The issuing of trivial patents creates intense legal uncertainty. The US has recently reformed the USPTO and revised its system for protecting new technologies, in particular software, so as to issue good quality patents in order to enhance innovation and legal certainty.

3.15 The procedure for examining applications for the future unitary patent is fundamental and must be recognised to be of the highest quality, so as to anchor the patent's value and avoid disputes and court cases as far as possible. The EPO has qualified staff, but they must be given sufficient time to study each file in order to secure the quality that should be the hallmark of European innovation. Similarly, translation from national languages into the official languages named in the London Agreement must be subject to the same care regarding quality and carried out by specialist technical translators; it is the Committee's opinion that current translation software still cannot deliver the necessary quality of highly specialised technical-legal language used in patents ⁽²⁾.

4. Specific comments

4.1 Using patents to protect inventions

4.1.1 Under the Munich Convention, patent applications can be made for inventions that offer novelty and the potential for industrial application; software, business methods, algorithms, equations and scientific discoveries cannot be patented. Questioning these principles when it comes to software (based on algorithms) and genetic discoveries (the human genome, the role of genes) has proved highly controversial. The United States issues patents in the area of European exceptions (in accordance with Supreme Court case-law) which are now posing serious problems and generating disproportionate protection costs in the case of disputes.

4.2 Software protection

4.2.1 'Council Directive 91/250/EEC gives copyright protection to computer programmes as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works (Paris, 1971). The question of authorship is widely left to the EU Member States. Employers are entitled to exercise the economic rights in programs created by their employees. Moral rights are excluded from the scope of the Directive' ⁽³⁾. This directive does not solve the problem of the rights of wage-earning creators as regards either copyright or patents.

4.2.2 The Committee would suggest that the Commission assess the possibility of specific, extremely limited duration protection for software; Directive 91/250/EEC ⁽⁴⁾ could be revised in order to significantly reduce the protection term for instance to five years, and then to require the publication of sources, in the light of the rapid pace of innovation and of the renewal of programmes by major publishers.

4.3 Database protection

4.3.1 This is *sui generis* protection as for literary and artistic property, but for a 15 year term, whereas the works referenced

or quoted by certain databases remain subject to copyright. European legislation is one of the few systems to offer protection to database authors, who are largely ignored in the rest of the world.

4.4 Protection for computer designs

4.4.1 Electronic cards and computer processors are subject to universal *ad hoc* protection against copying, which is written into the Marrakech agreement (1994) establishing the WTO.

4.5 Protection of literary and artistic property

4.5.1 Copyright (which breaks down into copyright plus the moral right of the author) and artists' resale rights are also subject to universal protection in Europe.

4.5.2 The protection of works, in particular books, film and music, has been affected by modern means of digital reproduction and transmission via the internet, that can make it easy to make copies of the same quality as the original and sell them. This is illegal practice in Europe, but national legislations diverge; the Committee is in favour of the thorough harmonisation of legislation with a view to proportionality and balance of controls and penalties.

4.5.3 The European law that has developed in this field is extremely protective of the holders of copyright and related rights. This is also the case in the United States, which goes a long way towards explaining ACTA, the 'secretive' drafting process limited to only a few countries and, above all, its enforcement objectives in the face of the impossibility of having the practical procedures and obligations accepted by the WTO, given the need for unanimity and the veto of certain countries, such as China or India.

4.5.4 Meanwhile, according to the Committee, ACTA's approach is aimed at further strengthening the position of rights holders vis-à-vis the 'public', certain of whose fundamental rights (privacy, freedom of information, secrecy of correspondence, presumption of innocence) are becoming increasingly undermined by laws that are heavily biased in favour of content distributors.

4.5.5 'Professional' copyright pirates are perfectly capable of eluding any form of control on the flow of data on the internet, and the penalties imposed as an example on a handful of teenagers cannot conceal the fact that audio-visual producers are a decade behind in creating a business model that matches the new information and communication technologies. In order to cut down on procedural costs and settlement delays, codes of conduct have been established piecemeal, sometimes at the government's urging, which force internet access providers to supply audio-visual and music providers (a sector with a high level of concentration) with the names and addresses of alleged

⁽²⁾ The European Patent Office (EPO) offers translation tools but these are limited to the three official languages.

⁽³⁾ See COM(2000) 199 final.

⁽⁴⁾ OJ L 122, 17.5.1991, p. 42.

'copiers' of content acquired illegally on the internet. This entails a certain level of risk of error. This form of accusation may be compounded by cutting off the alleged counterfeiters' internet access. Although this may reduce the workload of overburdened courts and spare the legislator the need to act and propose official institutions to combat counterfeiting at a time of budget cuts, private practices of this type may ultimately have undesirable consequences. The same applies to laws shaped under the excessive pressure exerted by film and music distribution lobbies in various countries - generally to highly doubtful effect, and at the cost of violating the rights of consumers, who by and large are totally ignored and considered without distinction to be potential pirates.

4.5.6 While it is necessary in itself to enforce anti-counterfeit laws, which in most cases protect consumers against health- and safety-related risks and also defend skilled jobs and workers' rights, it would be preferable to set out the general shape of literary and artistic property more clearly, so as to redress the balance in the legislation to be harmonised in such a way as to give due consideration to the rights of consumers and users, as well as workers, and involve their representative organisations in framing laws in these areas.

4.5.7 A directive ⁽⁵⁾ governs satellite broadcasting and cable retransmission. There are other European laws:

- a directive on orphan works (under examination by the legislator) ⁽⁶⁾,
- a directive on rental and lending rights ⁽⁷⁾,
- and exceptions to copyright ⁽⁸⁾.

This legislation is the subject of periodical reports. 'Exceptions' or 'allowances' should be reconsidered so as to give clear affirmation to the rights of users by means of legislation that protects their fundamental rights and by establishing exceptions, for instance in the case of disabilities ⁽⁹⁾.

4.6 *The Commission's proposal on the single market for intellectual property rights and the Committee's comments*

4.6.1 There is a deep-rooted and growing tendency to treat temporary rights to protection by patent, copyright and other *sui generis* systems (for circuit layouts, designs, and models, plant

varieties, etc.) like property rights similar to the right to ownership of movable and immovable property. This trend, which may or may not last, has been detected by the Commission and has had a profound influence on the proposed strategy.

4.6.2 The resulting confusion between temporary exceptions and ownership based on Roman law has a downside, if not for rights holders. Suspending the right to competition and making it subject to a system of authorisation by right holders in the form of licences does not amount to a genuine property right with all that entails. Limitations to protection exist for reasons of public interest (compulsory licences), the geographical nature of patents, and divergences in national legislation, not least in Europe, etc.

4.6.3 Nevertheless, the current tendency is to treat patents and licences as investment securities and guarantees, and we are even seeing securitisation with a view to financial speculation. This is the result of the financialisation of the economy alongside the deployment of an intangible economy linked to the new information and communication technologies and the new IFRS accounting standards. The Commission should soon be finalising its strategy in the area of the market for patents in the form of an IPR valorisation instrument (a European stock market?). The chief problem besetting innovative start-ups in Europe is the inadequate interlinkage between basic, applied and university-business research, as well as the crying lack of venture capital for innovative businesses. The Committee again draws attention to the practices of multinationals operating in high-technology sectors, consisting of acquiring SMEs and engineers with the innovative companies' portfolios of patents, rather than licences which could also be granted to competitors, the aim being to use the patents and other industrial property rights in pursuit of monopolist, anti-competitive strategies.

4.6.4 Another pillar in the strategy reaffirms a key role for the unitary European patent and a higher European jurisdiction designed to unify case law, with a view to remedying the serious difficulties encountered by companies, especially problems that largely prevent SMEs from securing protection for their industrial property, and promoting improved awareness of technological progress in the single market.

4.6.5 The Committee has always given strong backing to the Commission's work to establish a unitary patent, while also expressing concerns regarding certain EPO practices that do not fully comply with the clauses of the Munich Convention when it comes to the explicit exclusion of software, whereas all patents relating to software or business methods have been annulled by the national courts with which complaints have been lodged; such practices seriously undermine the legal certainty that should be associated with obtaining a patent,

⁽⁵⁾ Directive 93/83/EEC (OJ L 248, 6.10.1993, p. 15).

⁽⁶⁾ EESC opinion: OJ C 376, 22.12.2011, p. 66.

⁽⁷⁾ Directive 2006/115/EC (L 376, 27.12.2006, p. 28).

⁽⁸⁾ Directive 2001/29/EC (OJ L 167, 22.6.2001, p. 10).

⁽⁹⁾ EESC opinion: OJ C 228, 22.9.2009, p. 52.

which is a costly procedure (examination and translation costs, annual fees, employment of patent agents). These practices must find no echo in the future patent.

4.6.6 As regards the Commission's suggestions to establish a European Copyright Code and to examine the feasibility of creating an optional 'unitary' copyright title, the Committee considers that while these are very ambitious proposals which would support the harmonisation and completion of the single market, it would be premature to give its views on what are only hypotheses; the Committee therefore calls on the

Commission to continue looking into this question and to present practical proposals which take due account of pertinent developments in the various Member States.

4.6.7 The Committee believes that the tax levied on any form of electronic and magnetic media in order to cover the cost of private copying is based on the presumption of guilt. Instead, the Committee holds the view that private copying is a legitimate practice which enables the user to change media or hardware and which should be recognised as a right of the legal holder of the license for use under the concept of fair use ⁽¹⁰⁾.

Brussels, 18 January 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON

⁽¹⁰⁾ The CJEU espouses this view in its Padawan ruling.