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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE
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COMMITTEE**

Enhancing the enforcement of intellectual property rights in the internal market

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1. ENFORCING INTELLECTUAL PROPERTY RIGHTS: TURNING A LONG-TERM COMMITMENT INTO ACTION

In today's knowledge-based society intellectual property rights (IPR) are vital business assets, encouraging innovation and creativity by ensuring a fair return on investment. IPR play an increasingly important role, fostering economic growth by protecting and enabling inventors, designers and artists to benefit from the commercial value of their creations. This results in an essential cycle of business development, knowledge and further innovation. Moreover, trade marks in particular can have a beneficial effect on consumers, in many cases signifying quality and a reassurance that the products and services they buy are legitimate, safe and reliable.

The EU is home to some of the largest and most successful businesses in the world, who consider IPR to be amongst their most precious commercial possessions. However, within the Single Market IPR are equally important to small and medium-sized enterprises (SMEs), who use them to protect their intangible assets and to gain access to vital 'start-up' finance and venture capital. It is essential that the European Union continues to support this environment through a high-standard intellectual property culture that protects and creates opportunities for vital European talent.

The growing value of IPR is an indicator of success. However, it also makes them attractive to counterfeiters and pirates, who are often well financed and have become organised, highly skilled entrepreneurs operating on an industrial scale. These infringers make full use of advances in technology and trade, adopting modern business models to control the production, distribution and sale of illicit goods across borders and continents. The internet is one such tool that is being used to drive a worldwide market in infringing products, which is stifling innovation and threatening jobs.

In Europe, counterfeiting and piracy¹ have a dramatic and damaging effect on business and they have the potential to become even more problematical due to the recent economic downturn and the growing range of fake products being sold. While luxury goods, fashion, music and film products have traditionally been targeted, today counterfeiting and piracy affect a wider variety of mass consumption goods such as foodstuffs, cosmetics, hygiene products, spare parts for cars, toys and various types of technical or electrical equipment².

¹ In this Communication, the term "counterfeiting and piracy" should be understood as covering the infringement of all intellectual property rights as referred to in the Statement by the Commission concerning Article 2 of Directive 2004/48/EC; OJ L 94, 13.4.2005, p. 37.

² The latest Commission Community Customs Report warns that the threat to consumer health and safety is increasing dramatically, with the seizure of items more than doubling in 2008 to 178 million, of which about 20 million potentially dangerous to health and safety of EU citizens, or 11% of all items intercepted; IP/09/1106 of 9.7.2009.

This has resulted in risks to the health and safety of European citizens. In particular, the increase in fake medicines³ is of growing concern⁴. The Commission has implemented a legal framework within the Single Market that provides the tools to enforce IPR in a fair, effective and proportionate way. The IPR Enforcement Directive⁵ is one of the cornerstones of this. It has harmonised the laws of Member States with regard to civil measures for the enforcement of all IPR and a proposal on criminal sanctions is currently under discussion in the Council⁶.

The EU Customs Regulation, which allows for the detention of goods suspected of infringing IPR, is another pillar of the legal framework⁷. The Commission is currently consulting Member States and stakeholders on how this Regulation can be further improved.

With a principal body of laws in place, the Commission now proposes to supplement the regulatory framework with complementary non-legislative measures, in line with Competitiveness Council Resolution of 25 September 2008 on a comprehensive European anti-counterfeiting and piracy-plan.

In this respect support for small and medium-sized enterprises (SMEs) is imperative. A survey carried out on behalf of the Commission in 2007 confirmed that infringements of IPR create major problems for European SMEs, many of which lack the resources and finances to pursue infringers⁸. The Commission has therefore focused on increasing support in this area, reflecting the strong emphasis being placed on IPR and knowledge management since the re-launch of the Lisbon Strategy in 2005. In April 2009, the final report of the advisory expert group, set up by the Commission, provided recommendations on the assistance required by SMEs⁹. In line with the findings of the report, the Commission is continuing with a number of related projects to help SMEs integrate IPR into their innovation strategies and business plans.

At global level the Commission has developed a long-term strategy for the enforcement of IPR in third countries¹⁰. In the framework of this strategy, a list of "priority countries" has been put together and this is regularly updated¹¹. Other major initiatives concern negotiations on an Anti-Counterfeiting Trade Agreement (ACTA) and an EU-China Action Plan to increase customs cooperation on protecting IPR. In addition to this, the Commission has launched its China IPR SME Helpdesk. This provides SMEs with the business tools they need to develop their IP rights and manage related risks.

Consolidating public and private sector partnerships is also imperative. In May 2008, a High Level Conference on Counterfeiting and Piracy was organised, together with Members of the European Parliament, to launch a sustainable EU strategy for a more participative approach¹². The Conference was followed by the Commission's Industrial Property Rights Strategy for

³ See <http://www.ip-talk.eu/?p=607> 'Medi-Fake' action results (February 2009) – over 34 million illegal medicines seized.

⁴ <http://www.interpol.int/Public/ICPO/PressReleases/PR2008/PR200865.asp> and <http://www.icc-ccs.co.uk/bascap/article.php?articleid=780>.

⁵ Directive 2004/48/EC of 29.4.2004; OJ L157, 30.4.2004, p. 16.

⁶ COM(2006)168 of 26.4.2006.

⁷ Council Regulation (EC) No 1383/2003 of 22.7.2003; OJ L196, 2.8.2003, p. 7.

⁸ Technopolis, 'Effects of counterfeiting on EU SMEs'.

⁹ http://ec.europa.eu/enterprise/enterprise_policy/industry/doc/Counterfeiting_Main%20Report_Final.pdf

¹⁰ http://ec.europa.eu/enterprise/enterprise_policy/industry/ipr_report.htm.

¹¹ COM(2004)749 of 8.11.2004; OJ C 129, 26.5.2005, p.3.

¹² http://ec.europa.eu/trade/issues/sectoral/intell_property/ipr_epc_countries_en.htm

Press release IP/08/652.

Europe¹³ and the adoption of the Competitiveness Council Resolution on a comprehensive European anti-counterfeiting and anti-piracy plan¹⁴. The Council's conclusions confirmed the need to make IPR enforcement work better within the Single Market by complementing legislation with a range of non-legislative measures. It also called on the Commission to continue to focus firmly on border controls in the form of an anti-counterfeiting customs plan for 2009-2012. This plan has been developed by the Commission in conjunction with the Member States¹⁵.

2. UNDERSTANDING THE CHALLENGES AND REDUCING THE RISKS: AN EU COUNTERFEITING AND PIRACY OBSERVATORY

The broad facts about the widespread damage caused by infringements of IP rights are well documented. However, comprehensive information to help develop priorities and target enforcement more effectively, and thus pave the way for better collaboration and evidence-based policies, has been more difficult to assemble.

In 2006, a report by the OECD¹⁶ reflected that one of the biggest challenges facing governments and business is getting reliable and up-to-date information on the extent of counterfeiting and piracy and the impact on our economies and society, including employment in Europe. Despite work carried out in some sectors to analyse the scope and scale of the problem the figures use different methods and sources, with the resulting lack of comparative data.

Moreover, a wide range of information is held by national enforcement bodies, European and national IP offices and assorted professional business organisations. This data is often difficult to assimilate. One of the more robust sources of information available is published by the Commission and is based on annual customs detentions at EU borders¹⁷. However, border detentions only show part of the picture, since they only relate to goods entering or leaving the EU territory. It is necessary to widen the overall knowledge base to fully assess the economic and societal implications of counterfeiting and piracy and to understand why some products, sectors and geographical areas within the EU are more vulnerable than others. Comprehensive and comparable data will also help to establish agreed priorities and programmes, targets for enforcement and more focused consumer awareness campaigns.

To achieve this, the Competitiveness Council advocated the creation of the European Counterfeiting and Piracy Observatory as the principal EU instrument to *'enable regular assessments, on the basis of the data which the public and private sectors wish to provide, of the extent of counterfeiting and piracy and a more precise analysis of these phenomena'*¹⁸.

¹³ COM(2008)465 of 16.7.2008.

¹⁴ Council Resolution of 25.9.2008, OJ C 253, 4.10.2008, p. 1.

¹⁵ OJ C 71 of 25.3.2009, p. 1.

¹⁶ OECD; 'The Economic Impact of Counterfeiting and Piracy' (2006); <http://www.oecd.org/sti/counterfeiting>.

¹⁷ Report on EU Customs enforcement of intellectual property rights; results at the European border – 2008; http://ec.europa.eu/taxation_customs/.

¹⁸ Supra note 14, point 15.

2.1. Supporting IPR enforcement through comprehensive information and sharing of best practices

The Commission is now establishing an Observatory to serve as the central resource for gathering, monitoring and reporting information and data related to all IPR infringements. However, the Observatory should play a much wider role, becoming the platform for representatives from national authorities and stakeholders to exchange ideas and expertise on best practices, to develop joint enforcement strategies and to make recommendations to policy-makers.

Ensuring that the Observatory becomes the pan-European source of knowledge and a central resource for stakeholders and public authorities engaged in IPR enforcement activities will require close collaboration between the Commission, the Member States and the private sector. The aim therefore is to involve public and private representatives from across the European Union and to bring them together in partnership with consumers to cultivate a broader understanding of the problems. This will facilitate the development of practical solutions, more focused awareness raising strategies and more collaborative action. An important deliverable would be a publicly available Annual Report, presented by the Commission and providing specific information on core work areas.

In particular, the Observatory will:

- improve the collection and use of independent, reliable information and data;
 - developing a benchmark methodology for the collection, analysis and reporting of independent data relating to IPR infringements ensuring that the information is aggregated objectively and in a balanced manner;
 - carrying out detailed analyses and providing regular assessments of the economic and societal implications, including the impact on innovation, competitiveness and employment in Europe, the involvement of organised crime and risks to the health and safety of European citizens;
 - using comprehensive data from public authorities and private organisations to assess the strengths and weaknesses of IPR enforcement throughout the Internal Market;
 - providing regular and specific reports to identify vulnerabilities within the Internal Market, to highlight the threats and challenges and to drive evidence-based enforcement strategies. The publicly available reports will provide a solid knowledge base, and will become central tools in setting priorities and measuring progress;
- promote and spread best practice amongst public authorities;
 - identifying and assessing IPR enforcement coordination in the Member States;
 - promoting and spreading best practice in particular through innovative and successful cooperation initiatives between different enforcement authorities as well as other relevant national authorities;

- identifying and documenting enforcement training programmes carried out in different Member States and spreading best practice;
- encouraging that publicly funded projects fully respect intellectual property rights;
- fostering public and private sector cooperation, in particular with respect to awareness-raising and the training of enforcement agencies;
- spread successful private sector strategies;
 - identifying and assessing successful anti-counterfeiting and piracy strategies and action undertaken by the private sector and spreading best practice;
 - reaching out to a wide range of stakeholders in the distribution chain, such as organisers of trade fairs, transport and logistics companies and payment service providers;
 - encouraging efforts to enhance the quality of intellectual property rights in order to enable effective enforcement;
 - identifying successful public awareness campaigns, developing strategies and initiatives and spreading best practice throughout economic sectors and across national borders;
 - exploring how awareness and education about IPR can be promoted among young people;
- identify, report and propose solutions to key problems;
 - assessing and highlighting problems in specific geographical areas and specific sectors and delivering recommendations to policy-makers, enforcement agencies and stakeholders.

2.2. Shaping the Observatory as a platform for stakeholders and Member States

In its Resolution the Council suggested that the Observatory should be based on existing Commission structures, which should be light and flexible and, where necessary, make use of external expertise. Therefore, the Commission will provide the central administrative resource. However, Member States' representatives and stakeholders will play an integral part in the work of the Observatory and the achievement of its objectives.

Member States will be asked to appoint a national representative and the participation of stakeholders will need to reflect a broad range of European and national bodies, representing the different economic sectors most concerned by and most experienced in the fight against counterfeiting and piracy. European consumers also need to be properly represented and invited to play an active role. In this way the Observatory could help consumers to become active and responsible partners. In addition, particular attention needs to be given to the representation of SMEs.

3. FOSTERING ADMINISTRATIVE COOPERATION ACROSS EUROPE

Administrative cooperation between different enforcement authorities needs to be improved to ensure consistent and efficient IPR enforcement across the Internal Market. Due to the international nature of IPR infringements, improving internal cross-frontier cooperation is not only a legislative obligation, it is a clear necessity, and while administrative cooperation already operates in the area of Customs it is clearly lacking in other areas and needs to be developed¹⁹.

Greater administrative cooperation in the field of IPR enforcement should also be seen in the wider context of a partnership between the Commission and the Member States in implementing a borderless internal market²⁰. To this end, an efficient network of contact points across the European Union is essential to promote rapid exchanges of information on suspect products, manufacturing sites, distribution routes and key sales points. This will generate synergy, which in turn will help to coordinate national policies and to provide mutual assistance.

Developing better coordination is also necessary within Member States between those involved in the enforcement of IPR. To ensure more effective exchanges of information, national authorities must be in regular contact with each other and with relevant private sector bodies. Therefore, Member States are called upon to appoint National Coordinators with a firm mandate to synchronise IPR enforcement issues between their respective national enforcement agencies. These National Coordinators should be directly linked through a central system and should act as pivotal contact points for industry bodies, liaising with stakeholders and facilitating cross-frontier collaboration.

As the national centres of IPR expertise, National IP Offices have an important contribution to make. They could play a valuable role in building platforms and strategies to drive coordinated approaches and spreading best practices. This role could be extended to new functions such as awareness-raising, specific support for SMEs and coordination. Other international IP focal points, such as the European Patent Office, may also wish to reach out with their expertise and best practices. Moreover, in respect of trade marks and designs, cooperation between the OHIM and the national offices could be further extended to cover EU cooperation and future enforcement programmes and action.

3.1. Increasing the transparency of national structures and systems

Transparency needs to be improved in respect of the national structures to provide support to stakeholders at cross-border levels, particularly SMEs. Following a comprehensive round of consultation, in which all Member States have participated and produced information, the Commission is currently analysing the structures that Member States have put in place to combat IPR infringements. This will result in a report that will map existing frameworks and strategies and provide best practice indicators. The report will be presented at meetings of stakeholders and Member States, in the context of the Observatory, in the second half of 2009.

¹⁹ EC Treaty, Article 10; Directive 2004/48/EC, Article 19.

²⁰ Commission Recommendation 2009/524/EC of 29.6.2009 on measures to improve the functioning of the single market ; OJ L 176 of 7.7.2009, p. 17.

3.2. Promoting cross-border cooperation through modern information-sharing tools

Improving the exchange of up-to-date information to promote cross-border cooperation is a vital need. In its Resolution the Competitiveness Council called on the Commission to set up a network for rapid exchange of key information, drawing on national contact points and modern information-sharing tools.

To achieve this aim an electronic network for information sharing on IPR infringements in the Internal Market will need to be available to a wide range of national bodies, including different enforcement agencies and national IP offices. It will need to:

- support ‘real-time’ exchanges of information on goods and services infringing IPR in the internal market;
- allow the swift exchange of alerts concerning specific products, trends and potential threats, and
- provide facilities to overcome language barriers for national authorities.

Building on its experience with other Internal Market systems, such as the Internal Market Information Exchange system (IMI)²¹ and the market surveillance information exchange system (ICSMS)²², the Commission is currently analysing how a modern system could be designed to respond best to users’ needs by way of an interface for essential information to be shared and exchanged and how it could build on existing networks, such as for example IMI.

4. BUILDING COALITIONS: FACILITATING VOLUNTARY ARRANGEMENTS BETWEEN STAKEHOLDERS

4.1. Focusing on common ground amongst stakeholders

The fight against counterfeiting and piracy is not only of benefit to rights owners, it is also in the interest of other stakeholders, such as importers, trade fair organisers, retailers, including e-commerce platforms.

Counterfeiting and piracy severely damage trust and confidence in the trade of goods and services, in particular on the internet or across borders. For business this can result in the loss of opportunities. For consumers, counterfeiting could cause a reluctance to make the best use of new distribution channels, or to take advantage of bargains throughout the Internal Market.

Moreover, the wide variety of counterfeit goods which potentially affect the health and safety of any European citizen, such as fake pharmaceuticals, foodstuffs, cosmetics, hygiene products, electronic and technical equipment and spare parts for cars etc., demonstrate that it is in the common interest of all concerned to work together to fight this growing phenomenon.

²¹ <http://ec.europa.eu/idabc/en/document/5378/5970>.

²² <http://www.icsms.org/icsms/App/index.jsp>.

Therefore, rights holders and other stakeholders should be encouraged to exploit the potential of collaborative approaches and to place more emphasis on joining forces to combat counterfeiting and piracy in the common interest, also taking advantage of possible alternatives to court proceedings for settling disputes.

4.2. Combating IPR infringements through Stakeholders' Dialogues

The focus on common interests should allow voluntary arrangements to be fostered between stakeholders and thus practical solutions to be found. Voluntary arrangements to combat counterfeiting and piracy on the ground can give stakeholders the flexibility to adapt quickly to new technological developments. Moreover, this approach empowers stakeholders themselves to work out optimal measures, particularly technological solutions. Voluntary agreements can also be more easily extended beyond the European Union and become a foundation for best practice in the fight against counterfeiting and piracy at global level.

For voluntary arrangements to be agreed and implemented it is vital for stakeholders to engage in constructive dialogues, focusing on concrete problems and workable and practical solutions, which must be realistic, balanced, proportionate and fair for all concerned. Any voluntary inter-industry solution has to be compliant with the existing legal framework and should neither restrict in any way the fundamental rights of EU citizens, such as the freedom of expression and information, the right to privacy and the protection of personal data,²³ nor impinge on legislative negotiations at EU level. The Commission offers to act as a facilitator for such stakeholder dialogues on concrete topics by inviting the parties to get together, by organising meetings, by providing the administrative and logistical support and by safeguarding, where necessary, a fair balance between all the different interests at stake, including the legitimate rights and expectations of EU citizens. The Commission will carefully monitor the development and functioning of voluntary arrangements and remains ready to consider alternative approaches, if needed in the future.

4.3. Tackling the sale of counterfeit goods over the internet

As a first example, the Commission has launched a stakeholders' dialogue on the sale of counterfeit goods over the internet. While the internet is not in itself the source of counterfeiting, it has nevertheless become an important vehicle for the sale of fake goods world-wide. Its global reach and accessibility, the possibility for traders to remain anonymous and for offers to be placed and withdrawn instantly has made it one of the most attractive tools for the sale of counterfeit goods. The enormous growth of the phenomenon makes this an area for priority action. It is also an area where voluntary arrangements would seem to be particularly promising, given the rapid progress of technological developments and the resulting need for practical technology-based solutions.

Brand owners and internet companies alike have recognised this and have committed themselves to developing a collaborative way forward. Consequently, the Commission has organised a structured dialogue between stakeholders to facilitate mutual understanding and to find solutions that will be in the interests of all concerned. A series of meetings have already taken place to address specific issues relating to the sale of counterfeit goods over the internet. Further meetings have been scheduled before the end of the year, which could lead to a

²³ Charter of Fundamental Rights of the European Union, Articles 7, 8 and 11; OJ C 303 of 14.12.2007, p. 4.

Memorandum of Understanding, dealing with issues such as prevention, identification and removal of infringing offers (e.g. Notice and Take-Down procedures) and sellers from internet platforms. However, if voluntary arrangements cannot be agreed, the Commission will need to consider legislative solutions, in particular in the context of the IPR Enforcement Directive²⁴.

5. CONCLUSIONS

By providing incentives to create, innovate and trade, intellectual property rights are one of the cornerstones of a competitive, wealth-generating, knowledge-based society. IPR infringements cause widespread economic harm and an increasing number of counterfeit products now pose a real threat to consumer health and safety. It is therefore in the interest of stakeholders and consumers alike to have a responsive enforcement system which is robust, proportionate and fair.

The Commission seeks to ensure this by complementing the existing regulatory framework with non-legislative measures to make for more collaborative and focused enforcement across the Internal Market, in particular by:

- supporting enforcement through an EU Counterfeiting and Piracy Observatory;
- fostering administrative cooperation throughout the Internal Market;
- facilitating voluntary arrangements between stakeholders.

The Commission is convinced that these measures will significantly strengthen the fight against counterfeiting and piracy, in the common interest of European citizens, business and the economy as a whole.

²⁴ Supra note 5.