

Opinion of the European Economic and Social Committee on the ‘Proposal for a Regulation of the European Parliament and of the Council on entrusting the Office for harmonisation in the Internal Market (Trade Marks and Designs) with certain tasks related to the protection of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Counterfeiting and Piracy’

COM(2011) 288 final — 2011/0135 (COD)

(2011/C 376/11)

Rapporteur: **Mr McDONOGH**

On 15 June 2011 and 7 June respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Article 114 and 118 (1) of the Treaty on the Functioning of the European Union, on the

Proposal for a Regulation of the European Parliament and of the Council on entrusting the Office for harmonisation in the Internal Market (Trade Marks and Designs) with certain tasks related to the protection of intellectual property rights, including the assembling of public and private sector representatives as a European Observatory on Counterfeiting and Piracy

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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 30 August 2011.

At its 474th plenary session, held on 21 and 22 September 2011 (meeting of 21 September), the European Economic and Social Committee adopted the following opinion by 152 votes to one with four abstentions.

1. Observations and recommendations

1.1 The Committee welcomes the Proposal from the Commission concerning the Regulation to reinforce the European Observatory on Counterfeiting and Piracy by entrusting its responsibilities to the Office for Harmonisation in the Internal Market (OHIM). The work of the Observatory is vital to Europe’s system of Intellectual Property (IP) protection and it needs more resources to carry out its functions.

1.2 The Committee is preparing a separate opinion on the recent Communication from the Commission that proposes a strategy for a Single Market for Intellectual Property⁽¹⁾. IPR is a key enabler of the technological and commercial innovation on which Europe will depend for economic recovery and future growth⁽²⁾. The nature of IPR governance is also crucial to the flourishing of European culture and the quality of life enjoyed by European citizens.

1.3 The Committee does not believe that the Europe 2020 Strategy for smart, sustainable and inclusive growth can be achieved without the creation of a genuine Single Market for

IP. For many years the Committee has been calling for the harmonisation of European and national rules to promote innovation, creativity and the welfare of citizens, while also supporting initiatives that bring works, goods and services within reach of the largest possible number of people⁽³⁾.

1.4 The Committee agrees in general with the proposed Regulation to entrust the OHIM with the tasks and activities relating to the management of the European Observatory on Counterfeiting and Piracy, including those concerning copyright, rights related to copyright and patents. The EESC agrees that the proposal to entrust the tasks to the OHIM, an existing EU agency, would allow the Observatory to benefit from the OHIM’s existing IP expertise, resources and financing and to become operational quickly. The Committee is also pleased that in budgetary terms it would offer a cost-efficient solution.

1.5 The Committee agrees in principle with the proposal to extend the range of tasks that the OHIM should be carrying out in relation to the Observatory to include education of the public and enforcement agencies on the importance of IPR and how to

⁽¹⁾ COM(2011) 287 final ‘A Single Market for Intellectual Property Rights’.

⁽²⁾ See: Europe 2020 Strategy (COM(2010) 2020 final), the Annual Growth Survey 2011 (COM(2011) 11 final), the Digital Agenda for Europe (COM(2010) 245 final), the Single Market Act (COM(2011) 206 final) and the Innovation Union (COM(2010) 546 final).

⁽³⁾ OJ C 116, 28.4.1999, p. 35; OJ C 155, 29.5.2001, p. 80; OJ C 221, 7.8.2001, p. 20; OJ C 32, 2.2.2004, p. 15; OJ C 108, 30.4.2004, p. 23; OJ C 324, 30.12.2006, p. 7; OJ C 256, 27.10.2007, p. 3; OJ C 182, 4.8.2009, p. 36; OJ C 218, 11.9.2009, p. 8; OJ C 228, 22.9.2009, p. 52; OJ C 306, 16.12.2009, p. 7; OJ C 18, 19.1.2011, p. 105; OJ C 54, 19.2.2011, p. 58.

best to protect it, research on counterfeiting and IPR regulation, and the improvement of online information exchange to enhance enforcement.

1.6 However, the Committee feels strongly that it should be included in the list of organisations invited to Meetings of the Observatory stipulated in Article 4 of the Regulation.

1.7 The Committee strongly requests that it be mentioned in Article 8 of the Regulation, along with the Council and the Parliament, as a recipient of the evaluation report on the application of the Regulation.

1.8 The national intellectual property offices (NIPO) play a crucial role in the enforcement of IPR. The EESC welcomes the advice of the Commission that the NIPO are understood as being included by the phrase 'representatives from public administrations, bodies and organisations dealing with the protection of intellectual property rights' (listed in Article 4.1), who are invited to the Meetings of the Observatory.

1.9 Fast, equitable and consistent resolution of disputes involving charges of counterfeiting or piracy would increase confidence in IPR law and improve the climate for enforcement. Therefore, the Committee calls on the Commission to specifically task the OHIM in Article 2 with helping to improve the knowledge and understanding of best practice concerning IPR dispute resolution by including a focus on the relevant case law in Member States. Nevertheless recourse to the responsible courts shall not be hindered.

1.10 The Committee looks forward to commenting in due course more fully on collective rights management in the EU. However, the OHIM could make a significant contribution to improving the climate for copyright enforcement by gathering information on the diverse practices of the copyright collecting societies across the EU. The Committee calls on the Commission to consider such a focus in Article 2 of the Regulation.

2. Background

2.1 Intellectual property rights (IPR), which comprise patents, trademarks, designs and geographical indications, as well as copyright (authors' rights) and rights related to copyright (for performers, producers and broadcasters), is a cornerstone of the EU economy and a key driver for its further growth.

2.2 In 2009, the value of the top 10 brands in EU countries amounted to almost 9 % of GDP on average. Copyright-based creative industries such as software, book and newspaper publishing, music and film, contributed 3.3 % to EU GDP in

2006 and account for approximately 1.4 million SMEs, representing 8.5 million jobs. Employment in 'knowledge-economy' industries increased by 24 % between 1996 and 2006 compared to 6 % for other industries.

2.3 Various studies published by industry and international organisations confirm the steady growth of trade in counterfeit and pirated goods and conclude that it:

- significantly reduces investment in innovation and destroys jobs ⁽⁴⁾;
- threatens the health and safety of European consumers ⁽⁵⁾;
- creates serious problems for European SMEs ⁽⁶⁾;
- results in tax loss revenues due to reductions in declared sales ⁽⁷⁾;
- is attractive to organised crime ⁽⁸⁾.

2.4 In 2009 the Council ⁽⁹⁾ and the Commission ⁽¹⁰⁾ set up a European Observatory on Counterfeiting and Piracy to improve understanding of intellectual property rights (IPR) infringements ('the Observatory').

2.5 The Observatory is a centre of expertise for gathering, monitoring and reporting information and data related to all IPR infringements, and as a platform for cooperation between 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.

⁽⁴⁾ TERA Consultants, Building a Digital Economy: March 2010, <http://www.iccwbo.org/bascap/id35360/index.html>.

⁽⁵⁾ European Commission, Taxation and Customs Union Directorate General, 'Report on EU Customs enforcement of intellectual property rights – 2009', http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/statistics_2009.pdf.

⁽⁶⁾ Technopolis (2007), 'Effects of counterfeiting on EU SMEs', http://ec.europa.eu/enterprise/enterprise_policy/industry/doc/Counterfeiting_Main%20Report_Final.pdf.

⁽⁷⁾ Frontier Economics, (May 2009), 'The impact of counterfeiting on Governments and Consumers': <http://www.iccwbo.org/uploadedFiles/BASCAP/Pages/Impact%20of%20Counterfeiting%20on%20Governments%20and%20Consumers%20-%20final%20doc.pdf-%20Final%20doc.pdf>

⁽⁸⁾ UNICRI, 'Counterfeiting: a global spread', 2008, <http://counterfeiting.unicri.it/report2008.php>.

⁽⁹⁾ Council Resolution of 25.9.2008 (OJ C 253, 4.10.2008, p. 1).

⁽¹⁰⁾ Commission Communication of 11 September 2009: 'Enhancing the enforcement of intellectual property rights in the internal market' - COM(2009) 467 final.

2.6 Although there is an increasing need for the Observatory to do more, there is no scope for expanding its remit and developing its operational activities, both of which require a sustainable infrastructure in terms of human resources, financing and IT equipment as well as access to the necessary expertise.

2.7 The Commission has proposed a comprehensive new IPR Strategy⁽¹¹⁾ as part of the overall agenda to foster sustainable growth and jobs in the Single Market and improve Europe's competitiveness on a global level. The Strategy is complementary to and an important element of the Europe 2020 Strategy, the Single Market Act⁽¹²⁾ and the Digital Agenda for Europe.

2.8 In a recent communication, on which the Committee is drawing up a separate opinion, the Commission envisages the creation of a single market for intellectual property⁽¹³⁾. Among the first deliverables of this IPR strategy is the proposed Regulation to reinforce the European Observatory on Counterfeiting and Piracy by entrusting its tasks to the Office for Harmonisation in the Internal Market (OHIM). This will allow the Observatory to expand the scope of its activities and to benefit from OHIM's intellectual property expertise and strong record of delivery in trademarks and designs.

2.9 Article 2 of the proposed Regulation includes a comprehensive list of tasks and activities to be entrusted to the OHIM, which include strengthening enforcement capability across the Union, improving the public awareness of the impact of IPR infringements and fostering a general climate for effective enforcement.

2.10 The Commission carried-out an impact assessment of the various options for increasing the capacity of the Observatory to meet the needs of the new IPR strategy⁽¹⁴⁾. It concluded that transferring the Observatory to the OHIM would be the preferred option, given that the latter has appropriate financing and structures and will be capable of delivering on the Observatory's aims as soon as its basic Regulation has been amended.

3. Comments

3.1 The Committee unites the different economic and social interests in the EU, including all the civil society actors, and by synthesising the diverse perspectives and experience of its members this unique institution plays a crucial role in the consideration and formulation of policy. Furthermore, the

EESC cares deeply about the protection of IPR and has worked assiduously over the years to help shape European IPR policy. Therefore, the Committee is very surprised and disappointed to be excluded from the list of organisations invited to Meetings of the Observatory in the proposed Article 4 of the Regulation. This omission should be rectified to ensure that the EESC can contribute to the work of the Observatory and the knowledge that it develops.

3.2 The composition of the Observatory should include representatives from the various civil society organisations, including employers' organisations, trade unions, authors' organisations and consumer interests.

3.3 The Committee also feels strongly that it should be mentioned in Article 8 of the Regulation, along with the Council and the Parliament, as a recipient of the evaluation report on the application of the Regulation.

3.4 The damage done by weak IPR management and enforcement includes the funding of criminal and terrorist networks; money laundering and counterfeiting are criminal acts that must be vigorously combated. The Observatory needs to include studies on the nature and scale of criminal behaviour in its work.

3.5 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.

3.6 Citizens and businesses in every Member State need to know which organisation to contact for information and support in dealing with IPR enforcement. The national intellectual property offices (NIPO), should be promoted by the Observatory as a primary contact point on IPR enforcement in each Member State.

3.7 With due regard for the principle of subsidiarity, the NIPOs should be included by Member States in the organisations invited to meetings of the Observatory under the proposed Article 4.1 of the Regulation. Their involvement would strengthen the practical expertise of the Observatory and the enforcement capability across the EU.

3.8 An electronic network for rapid, effective information sharing on IPR infringements will need to be available to all enforcement agencies and national intellectual property offices. Getting this network in place should be a priority for the Observatory.

⁽¹¹⁾ COM(2011) 287 final 'A Single Market for Intellectual Property Rights'.

⁽¹²⁾ COM(2011) 206 final 'Single Market Act -Twelve levers to boost growth and strengthen confidence "Working together to create new growth" '.

⁽¹³⁾ COM(2011) 287 final.

⁽¹⁴⁾ SEC(2011) 612 final 'Impact assessment accompanying the proposal for a regulation entrusting the Office for Harmonisation ...'.

3.9 Disputes about IP ownership and charges of counterfeiting and piracy are often difficult to resolve. Under Article 2.2 of the proposed regulation the OHIM could collate case law on IPR disputes and help improve dispute resolution across the EU without hindering recourse to the responsible courts.

3.10 The OHMI should particularly 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. For the Europe 2020 Strategy to succeed we have to become more focused on nurturing start-ups and SMEs.

3.11 The Regulation on entrusting the OHIM with certain tasks relating to IPR includes the intent of improving the climate for IPR enforcement across the Union and to collect relevant information, including case law, which can help to achieve this goal. In this regard, it is important that information is collected by the OHIM on the practices of collecting societies, and relevant case law concerning copyright disputes, with a view to increasing understanding and awareness of the problems caused by inadequate regulation.

Brussels, 21 September 2011.

The President
of the European Economic and Social Committee
Staffan NILSSON
