Basic information

2005/0127(COD) COD - Ordinary legislative procedure (ex-codecision procedure) Directive	Procedure lapsed or withdrawn
Criminal measures aimed at ensuring the enforcement of intellectual property rights **Subject** 3.50.15 Intellectual property, copyright 7.30.30.10 Action against counterfeiting 7.40.04 Judicial cooperation in criminal matters	

Key players

European Parliament

Committee responsible	Rapporteur	Appointed
JURI Legal Affairs	ZINGARETTI Nicola (PSE)	15/09/2005

Committee for opinion	Rapporteur for opinion	Appointed
ITRE Industry, Research and Energy	HAMMERSTEIN David (Verts/ALE)	05/10/2005
IMCO Internal Market and Consumer Protection	The committee decided not to give an opinion.	
LIBE Civil Liberties, Justice and Home Affairs	WIELAND Rainer (PPE-DE)	13/10/2005

Council of the European Union

Council configuration	Meetings	Date
Justice and Home Affairs (JHA)	2752	2006-10-05

European Commission

Commission DG	Commissioner
Justice and Consumers	REDING Viviane

Key events

Date	Event	Reference	Summary
12/07/2005	Initial legislative proposal published	COM(2005)0276	Summary

06/09/2005	Committee referral announced in Parliament, 1st reading		
26/04/2006	Legislative proposal published	COM(2006)0168	Summary
05/10/2006	Debate in Council		Summary
20/03/2007	Vote in committee, 1st reading		Summary
23/03/2007	Committee report tabled for plenary, 1st reading	A6-0073/2007	
23/04/2007	Debate in Parliament		
25/04/2007	Decision by Parliament, 1st reading	T6-0145/2007	Summary
25/04/2007	Results of vote in Parliament		
18/09/2010	Proposal withdrawn by Commission		Summary

Technical information

Procedure reference	2005/0127(COD)
Procedure type	COD - Ordinary legislative procedure (ex-codecision procedure)
Procedure subtype	Legislation
Legislative instrument	Directive
Legal basis	Treaty on the Functioning of the European Union TFEU 083-p2 Treaty on the Functioning of the European Union TFEU 118-p1
Stage reached in procedure	Procedure lapsed or withdrawn
Committee dossier	JURI/6/29654

Documentation gateway

European Parliament

Document type	Committee	Reference	Date	Summary
Committee draft report		PE378.855	07/11/2006	
Committee opinion	ITRE	PE378.715	29/11/2006	
Committee opinion	LIBE	PE380.583	12/12/2006	
Amendments tabled in committee		PE382.372	09/01/2007	
Committee report tabled for plenary, 1st reading/single reading		A6-0073/2007	23/03/2007	
Text adopted by Parliament, 1st reading/single reading		T6-0145/2007	25/04/2007	Summary

European Commission

Document type	Reference	Date	Summary
Initial legislative proposal	COM(2005)0276	12/07/2005	Summary

Document attached to the procedure	SEC(2005)0848	12/07/2005	Summary
Legislative proposal	COM(2006)0168	26/04/2006	Summary

Other institutions and bodies

Institution/body	Document type	Reference	Date	Summary
EESC	Economic and Social Committee: opinion, report	CES0981/2007	12/07/2007	

Additional information		
Source	**Document**	**Date**
National parliaments	IPEX	
European Commission	EUR-Lex	

Criminal measures aimed at ensuring the enforcement of intellectual property rights

2005/0127(COD) - 25/04/2007 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted a resolution drafted by Nicola **ZINGARETTI** (PES, IT) amending the proposed directive on criminal measures aimed at ensuring the enforcement of intellectual property rights, by 374 votes in favour to 278 against with 17 abstentions. Parliament sought to reduce the directive's scope. Its amendments clarify that it should only apply to counterfeiting and piracy. Industrial property rights under a patent will be excluded from the provisions of this Directive. In particular, the Directive does not apply to any infringement of an intellectual property right related to patent rights, utility models and plant variety rights, including rights derived from supplementary protection certificates; and parallel importation of original goods from a third country which have been allowed by the rightholder. Accordingly, criminal sanctions shall not be applied in cases of parallel importation of original goods from a third country which have been allowed by the rightholder. The fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence.

The remaining amendments were as follows:

Parliament introduced a number of definitions: "intellectual property rights" (this would include copyright and related rights, sui generis right of a database maker, rights of the creator of the topographies of a semiconductor product, trademark rights, "in so far as extending to them the protection of criminal law is not inimical to free market rules and research activities", design rights, geographical indications and trade names); "infringements on a commercial scale", and "intentional infringements of an intellectual property right";

- penalties will include criminal fines for natural persons and criminal or non-criminal fines for legal persons. These include an order requiring the infringer to pay the costs of keeping seized good;

- repeated offences committed by natural and legal persons in a Member State other than their country of origin or domicile must be taken into account when determining the level of penalty;

- Member States should ensure that the misuse of threats of criminal sanctions is prohibited and made subject to penalties. Member States should prohibit "procedural misuse, especially where criminal measures are employed for the enforcement of the requirements of civil law;

- Member States shall ensure that the rights of defendants are duly protected and guaranteed;

- with regard to joint investigation teams, Member States must put in place adequate safeguards to ensure that such cooperation does not compromise the rights of the accused person, for example by affecting the accuracy, integrity or impartiality of evidence;

- Article 8 of the Charter of Fundamental Rights of the European Union, which concerns the protection of personal data, and Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data must be fully respected in the course of investigations and judicial proceedings;

- lastly, a new article 10 provides that, where law enforcement authorities seize infringing items or obtain other evidence of infringement, the authorities must make such evidence available for use in pending or contemplated civil proceedings against the alleged infringer brought by the right-holder before a court of competent jurisdiction within the European Union. Where practicable, those authorities must inform the right-holder concerned that they are in possession of such items or evidence. Member States may require that any such provision of evidence to the right-holder be made subject to reasonable access, security or other requirements so as to ensure the integrity of the evidence and to avoid prejudice to any criminal proceedings that may ensue.

Criminal measures aimed at ensuring the enforcement of intellectual property rights

2005/0127(COD) - 12/07/2005 - Initial legislative proposal

PURPOSE: introduction of measures aimed at ensuring the enforcement of intellectual property rights.

PROPOSED ACT: Directive of the European Parliament and of the Council.

CONTENT: Counterfeiting and piracy, and infringements of intellectual property in general, are a constantly growing phenomenon which nowadays has an international dimension, since they are a serious threat to national economies and governments. The disparities between the national systems of penalties, apart from hampering the proper functioning of the internal market, make it difficult to combat counterfeiting and piracy effectively. In addition to the economic and social consequences, counterfeiting and piracy also pose problems for consumer protection, particularly when health and safety are at stake. Increasing use of the Internet enables pirated products to be distributed instantly around the globe. Lastly, this phenomenon appears to be increasingly linked to organised crime. Combating this phenomenon is therefore of vital importance for the Community. Counterfeiting and pirating have become lucrative activities in the same way as other large-scale criminal activities such as drug trafficking. There are high potential profits to be made without risk of serious legal penalties. Additional provisions to strengthen and improve the fight against counterfeiting and piracy are therefore necessary to supplement Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights. In addition to the civil and administrative measures, procedures and remedies provided for in Directive 2004/48/EC, criminal penalties also constitute, in appropriate cases, a means of enforcing intellectual property rights.

A start was made on harmonisation with the entry into force of the TRIPS agreement which lays down minimum provisions on means of enforcing trade-related intellectual property rights. These include the implementation of criminal procedures and criminal penalties, but there are still major disparities in the legal situation in the Community which do not allow the holders of intellectual property rights to benefit from an equivalent level of protection throughout the Community. As regards criminal penalties, there are considerable differences, particularly as regards the level of punishment laid down by national legislation.

As regards impact on fundamental rights, it should be emphasised that the direct objective of this initiative is to implement Article 17(2) of the Charter of Fundamental Rights which states that “Intellectual property shall be protected”; it does this by approximation of legislation while respecting the different legal traditions and systems of the Member States as well as other fundamental rights and principles recognised by the Charter. The level of sentences has been chosen pursuant to the seriousness of the different forms of wrongful conduct, in accordance with Article 49(3) of the Charter to the effect that sentences should not be disproportionate to the offence.

Since this objective may be better achieved at Community level, the Community may take measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty.

A framework decision is required to supplement existing provisions as regards matters which fall under Title VI of the TEU (see procedure 2005/0128 (CNS)).

Criminal measures aimed at ensuring the enforcement of intellectual property rights

2005/0127(COD) - 26/04/2006 - Legislative proposal

The Commission has decided, in application of Article 250 paragraph 2 TEC, to amend the proposed Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights. It puts into effect the Communication from the Commission of 23.11.2005 (COM(2005)583 final) on the implications of the Court’s judgment of 13.09.2005 (Case C 176/03 Commission v Council). It was held in that judgment that provisions of criminal law required for the effective implementation of Community law come under the EC Treaty. The Commission states in its Communication that it will make the necessary changes to pending proposals as and when required. It specifically mentions the proposal for a Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and the proposal for a Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences (CNS/2005/0128). Consequently, the proposal for a Framework Decision has been withdrawn and a proposal drawn up amending the proposal for a Directive on criminal measures.

The provisions in the proposal for a Framework Decision relating to penalties and extended powers of confiscation have now been incorporated in the new proposal for a Directive.

The only provisions that have not been taken over are those relating to jurisdiction and the coordination of proceedings, contained in Article 5 of the proposal for a Framework Decision. The Commission plans to take a horizontal approach to this subject under its Green Paper on conflicts of jurisdiction and the principle of ne bis in idem in criminal proceedings, adopted on 23 December 2005. It does not consider it essential to lay down specific arrangements for the protection of intellectual property.

Criminal measures aimed at ensuring the enforcement of intellectual property rights

2005/0127(COD) - 05/10/2006

The Council discussed specific questions relating to a proposal for a Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.

The Council focused its debate on the need for criminal measures in the field of intellectual property rights, on whether and to what extent the Community has competence to adopt criminal law measures in the field of intellectual property rights on the basis of Article 95 of the Treaty establishing the European Community, and on the scope of the Directive (the list of rights which should be included in the Directive: only those harmonised at Community level or also the possibility of including national rights).

The Council broadly agreed with the following:

1) the protection of intellectual property rights is of utmost importance. Bearing in mind the principle of subsidiarity and the fact that the use of criminal law is considered as a means of last resort, further scrutiny is needed regarding the need for criminal measures at EU level in order to protect intellectual property rights;

2) noting further that the current evaluation of Directive 2004/48/EC should provide information on the efficacy of EU provisions on civil and administrative measures to protect intellectual property rights, and that fundamental questions concerning Community competence in adopting criminal law measures can better be addressed after the Court of Justice has given its judgment in case C-440/05, discussions should nonetheless be continued at Working Party level on the substantive provisions of the proposed instrument;

3) these substantive provisions of the proposed instrument should be discussed on the basis of a limitation of its scope to intellectual property rights harmonised in Community legislation, in line with the principles stated in the conclusions of the informal JHA meeting in Vienna on 13 and 14 January 2006.

By judgment of 13 September 2005, the European Court of Justice annulled Framework Decision 2003/80/JHA on the protection of the environment through criminal law (C-176/03 Commission v. Council). The European Court was of the view that Article 175 TEC, which refers to Community measures intended to protect the environment, gave the Community competence to adopt measures relating to the criminal law of the Member States. On this basis, the European Court ruled that the framework decision encroached on Community competence, and did not respect Article 47 TEU.

The Commission submitted a communication to the Council and the Parliament on the consequences of the Court's judgment (COM(2005) 583 final). The proposal which was examined by the Council was issued in line with that communication.

Criminal measures aimed at ensuring the enforcement of intellectual property rights

2005/0127(COD) - 12/07/2005 - Document attached to the procedure

COMMISSION'S IMPACT ASSESSMENT

For further information concerning the background to this issue, please refer to the summary of the Commission's initial proposal of 12 July 2005 for a Council Directive introducing measures aimed at ensuring the enforcement of intellectual property rights – COM(2005)0276.

Note: This document refers to a package of 2 proposals tabled by the Commission dealing with: 1) the introduction of measures aimed at ensuring the enforcement of intellectual property rights and 2) a strengthening of the criminal law framework to combat intellectual property offences. (Please refer to summary of procedure CNS/2005/0128).

1- POLICY OPTIONS AND IMPACT

The Commission examined four potential policy options.

1.1- Option 1: Leaving the approximation of penal measures up to the discretion of Member States, while promoting awareness among consumers of the damage caused by counterfeiting and piracy. This first option consists of combating the demand for counterfeit or pirated products by creating awareness among consumers, in particular by organising information campaigns against counterfeiting. However, even if an awareness campaign is very useful not to mention necessary, it cannot on its own be considered to constitute a policy combating counterfeiting.

1.2- Option 2: Action at international level. Counterfeiting and piracy are phenomena that have been the focus of attention of a certain number of international organisations which contribute to the combat against counterfeiting. The best known manifestation of this work undertaken at international level is the TRIPS agreement which lays down minimum provisions on means of enforcing trade-related intellectual property rights concluded on 15 April 1994 and which entered into force on 1 January 1995). However, even if the majority of WTO members have now adopted legislation aimed at implementing these minimal standards, the incidence of piracy and piracy has continued to rise year after year. For some years, other types of actions have been carried out at international level (for example, the Interpol Intellectual Property Crime Action Group). The Commission is also involved in various actions at international level (the adoption on 10 November 2004 of a strategy aimed at contributing to an improvement of the situation in third countries). However, if action at international level is required, it has to be reinforced by internal mechanisms within the Union that are based on high standards.

1.3- Option 3: take counterfeiting and piracy into account in police and judicial cooperation texts. Certain cooperation mechanisms are laid down for certain types of infringements: this involves texts that seek to improve police and judicial cooperation between the Member States adopted under Title VI of the TEU. These instruments seek to assist the fight against serious crime, in particular organized crime. There is the proposal for a framework decision adopted by the Commission concerning a European evidence warrant aimed at obtaining objects, documents and data for use in proceedings in criminal matters (see CNS/2003)0270). However, this could never replace the creation of a legislative platform on the criminal law front.

1.4- Option 4: introduce a specific instrument to deal with this crime within the Union. To respond effectively to the counterfeiting and piracy phenomenon within the European Union, **two texts** could be envisaged to supplement current provisions and, in particular Directive 2004/48/EC concerning the enforcement of intellectual property rights: one text under the first pillar and a second under the third pillar:

- a proposal for a **Directive** which could ensure that all intentional infringements of an intellectual property right on a commercial scale, and attempting, aiding or abetting and inciting such infringements are treated as criminal offences. The text is accompanied by various criminal sanctions: these could include, for individuals, imprisonment and, for both individuals and legal persons, fines, confiscation of the goods in question, as well as materials, instruments or supports that serve in the production or distribution of the goods.

- a second text, taking the legal form of a **Framework-Decision** which would complement the provisions of the Directive and would lay down measures for the approximation of criminal legislation and cooperation under Title VI of the TEU.

CONCLUSION: The Commission selected **Option 4** because it was the only one that could offer the Community the solution of **a common minimal criminal penalty**.

IMPACT :

Whereas it is necessary to look at the positive impacts of the measure, it needs to be borne in mind that, for the most part, they will only result in a reduction in illegal activities while the absence of a measure would have the effect of aggravating the consequences.

Improvement of cooperation between police forces and judicial authorities

The level of cooperation between the authorities competent to investigate, pursue and judge counterfeiting and piracy offences will be improved. The authorities responsible for the application of the law will be granted appropriate powers of investigation. The establishment of contact points for the exchange of information will facilitate and accelerate the investigations. The agreement of competence criteria should prevent any conflicts of competence arising and the common investigation teams will ensure the cross-border approach that is vital in the fight against counterfeiting and piracy.

Reduced crime

Heavier sanctions with the introduction of minimal levels of maximum penalties, as well as the improvement in cooperation will make it more difficult and dissuade infringements of intellectual property rights. The measures taken have to have a dissuasive character by creating a sense of insecurity among criminals. These classic criminal law mechanisms will reduce the attraction of counterfeiting and piracy for criminal organisations and will contribute to the overall reduction in the levels of the crime.

Impact on businesses

Reduced levels of counterfeiting and piracy will naturally be reflected in a drop in the financial losses of those companies that are victims to these crimes. The measures to ensure enforcement of intellectual property rights are designed to protect both large and small companies, in particular those that are active in design and innovation.

Impact on employment

The damage suffered by companies due to intellectual property infringements has an effect on the volume of jobs their industries can offer, although this effect is hard to measure accurately. The effectiveness of measures taken under criminal law will result in the fight against counterfeiting and piracy being strengthened and, as a consequence, to improve the employment situation in the Community. To the extent that counterfeiting, in its most serious forms, contributes, as do other criminal activities, to fuelling illegal work, the dismantling of criminal organisations using criminal legislation should contribute to improving the state of the employment market.

Impact on investment and competitiveness of European companies

Companies should benefit from an equivalent level of protection throughout EU territory. This favourable context will reassure companies in regard to the trust they place in the internal market for developing their creative and innovative activities in an environment that has been made more secure;

Impact on tax receipts

The illegal by nature trade in counterfeit or pirated goods deprives the State of considerable tax receipts (VAT, customs duties, etc.). The effective combat of these phenomena will reduce the amount that States would have missed out upon in terms of tax receipts.

Improvement of awareness of the criminal nature of intellectual property infringements

The benefit of the enhanced criminal penalties in the framework defined above is likely to result in the increased awareness of decision-makers, players and the public. In the first place, the individual consumer, who has take responsibility for his actions, has to be made understand that his actions are not without consequence. In second place, the players have to be made aware of the penalties. In fact, it has been observed that criminal proceedings on the basis of the infringement of an intellectual property right are generally rare and the judgments of limited scope.

2- FOLLOW-UP:

The measure will be followed up as part of the work of the Forum on the prevention of organised crime in conjunction with the representatives concerned from the public and private sectors. Furthermore, the Member States, in collaboration with the Commission, will have to carry out an objective and impartial evaluation of the implementation of the measures adopted, by the authorities of the Member States.