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#### NOTE

From:	Presidency
To:	Delegations
No. prev. doc.:	5753/18
Subject:	Revised draft Council Conclusions on IPR Enforcement

Delegations will find in the Annex a set of revised draft Council conclusions relating to the Commission Communication entitled "A balanced IP enforcement system responding to today's societal challenges", to be discussed at the meeting of the Working Party on Intellectual Property on 20 February 2018.

Changes in relation to the previous version are highlighted.

THE COUNCIL OF THE EUROPEAN UNION:

1. RECALLING:

- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights<sup>1</sup> (IPRED) harmonising the minimum means for to ensure **ensuring** the enforcement of IPR and establishes **establishing** a general framework for exchanging information, and thus supporting administrative co-operation between national authorities and the Commission;
- Council Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market<sup>2</sup>;
- the Council Conclusions of 4 December 2014 on the enforcement of intellectual property rights<sup>3</sup>, including its call on the Commission to consider the use of tools available to identify IPR infringers, the role of intermediaries in assisting the fight against IPR infringement, and the allocation of damages in IPR disputes;
- the Digital Single Market Strategy of 6 May 2015<sup>4</sup> and the Single Market Strategy of 28 October 2015<sup>5</sup>, in which the Commission undertook to review and modernise the EU intellectual property enforcement framework, supporting a ‘follow the money’ approach to commercial-scale infringements and as well as focusing on cross-border applicability;
- ~~its~~ **the Council** Conclusions of 29 February 2016 on the Single Market Strategy, in which the Council stressed ‘the importance of Europe’s intellectual property framework to foster innovation, competitiveness and job creation’;

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<sup>1</sup> OJ L 195, 2.6.2004

<sup>2</sup> OJ C 56, 6.3.2010

<sup>3</sup> 15321/14

<sup>4</sup> 8672/15

<sup>5</sup> 13370/15

## 2. RECOGNISING:

- that the recent evaluation of IPRED has shown that the measures, procedures and remedies it provides for, while effectively helping to better protect the IPR throughout the EU, have not been applied in a uniform manner among Member States and the EU legal framework for IPR enforcement, whilst fit for purpose, could benefit from further clarification;
- that ~~homogenous~~, fair and effective judicial enforcement of IPR is a key lever to promote investment in innovation and growth;
- the need for a clear, balanced and reasonable policy on ~~the~~ standard essential patents (SEPs) in the EU for the enhancement of ~~the innovations~~ innovation and ~~the~~ growth;
- that counterfeiting and piracy are growing problems in the EU and that collaboration between intermediaries through voluntary agreements ~~could play~~ plays an essential part in handling them.;

3. WELCOMES the Commission's IP Package of 29 November 2017, comprising a Communication on “A balanced IP enforcement system responding to today’s societal challenges”<sup>6</sup>; a Communication on “Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights”<sup>7</sup>; a Communication on “Setting out the EU approach to Standard Essential Patents”<sup>8</sup>; a Commission Staff Working Document “Evaluation of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights”<sup>9</sup> and a Commission Staff Working Document “Overview of the functioning of the memorandum of Understanding on the sale of counterfeit goods via the internet”<sup>10</sup>. These documents deliver ~~on a more~~ holistic approach in the field of IPR enforcement and contribute to the adjustment of the IPR system to the new realities: **and new technologies, in particular internet.**
4. STRESSES that the fight against IPR infringements requires concerted and coordinated efforts by all public and private actors **concerned.**
5. INVITES Member States to adjust, if necessary, their national civil enforcement systems in line with the provisions of ~~the IPRED Directive~~, as interpreted by the Court of Justice ~~and clarified by~~ **of the European Union, while respecting the principle of judicial independence. INVITES Member States to take under consideration the clarifications made in** the above-mentioned **IPRED** Guidance; **Communication, whilst noting that it is not a legally binding instrument.**

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<sup>6</sup> 15313/17  
<sup>7</sup> 15314/17  
<sup>8</sup> 15315/17  
<sup>9</sup> 15314/17 ADD 1  
<sup>10</sup> 15313/17 ADD 1

6. INVITES the Commission and Member States to further analyse concrete challenges relating to civil enforcement of IPR in the EU and, ~~where appropriate,~~ to work together **with judges at national level,** in order to complement **fortify common interpretation of the provisions of IPRED, including by complementing** the Guidance with additional – more targeted – guidelines, drawing on best practice in Member States ~~and the expertise of judges at national level.~~ On this basis, INVITES the Commission to monitor progress, including within the ~~context of fighting IPR infringements worldwide.~~
7. INVITES Member States to encourage ~~the specialisation of judges for IP and IPR enforcement-related matters in particular by organising special trainings and seminars; and to publish systematically~~ **and systematic publication of** judgements in IPR enforcement cases.
8. CALLS on industry and in particular online intermediaries to step up efforts to fight counterfeiting and piracy. ENCOURAGES the ~~better~~ **effective** use of voluntary agreements, including dedicated MoUs involving all relevant stakeholders, including social media, price-comparison websites, etc. and ~~calls~~ **CALLS** on the intermediaries that are currently signatories of the MoU on the sale of counterfeit goods via the internet to join that MoU with all their platforms. INVITES the Commission and the European Observatory on Infringements of IPR to promote the benefits of MoUs, ~~to~~ **including by dissemination of best practice, to regularly** monitor their functioning and effectiveness; **while identifying areas for future improvement** and to present the results in 2019. Supports ~~INVITES~~ the exploration of the potential of proactive **Member States** and preventive measures **the Commission to coordinate the national initiatives already taken by the industry in order to spread best practice, stimulate new initiatives** and new technologies (such as blockchain) to fight IPR infringements **improve respect for IPRs within the EU.**

**9. SUPPORTS the exploration of the potential of proactive and preventive measures and new technologies to fight IPR infringements. ENCOURAGES industry to better protect their supply chains against counterfeiting. INVITES the Member States and the Commission to promote the use of new tools and to help to build and expand best practice in order to increase supply chain security.**

**9.10. ACKNOWLEDGES the idea for strengthened administrative cooperation for better protection and respect of IPR in the EU. URGES the ~~Member States and the~~ Commission to offer more targeted assistance to the national customs authorities for the fight with ~~against~~ IPR infringements on the EU's borders and to ~~ENCOURAGES the Member States and the Commission to~~ continue their collaboration ~~on~~ under the new future Customs Action Plan which will further complement the combat with the IPR infringements.**

**10.11. EMPHASISES the importance of encouraging effective IPR enforcement in third countries and looks forward to the next report of the Commission on the subject in the first half of 2018. NOTES the efforts to launch new IP technical cooperation programmes with third countries and to set up an IP markets watch-list, which would assist in the prevention of ~~the~~ IPR infringements in the global context.**

**11.12. SUPPORTS the holistic and balanced approach on SEPs as set out in the Communication, including its vision for the development of and access to the open standards that are needed, notably for the emerging technologies, where those of 5G and IoT play a pivotal role today. INVITES the Commission and all relevant stakeholders to develop best practice, monitor industry developments and offer, where appropriate, complementary guidance to ~~SEPs users.~~ SEP owners and users, recognising that a wide range of models exist in relation to the use of SEPs and that the guidance should provide for this. This would incentivise the development and inclusion of new technologies in standards and the dissemination of standardised technologies based on ~~fair access~~ FRAND conditions; ~~it could also contribute to avoiding,~~ as well as avoid litigation in this context.**

~~12.~~**13.**CALLS on the Standard Developing Organisations (SDOs) to ensure that their databases ~~comply with~~**observe** the main quality features of SEPs**as set out in the Communication.** STRESSES the importance of increasing the transparency of SDO databases and CALLS on SDOs to update their declaration system, in collaboration with the Commission and other public authorities, including, where applicable, Intellectual Property Offices. INVITES the SDOs to improve the information flow on the existence, scope and relevance of SEPs, which would ease licencing negotiations and address **litigation** risks related to SEPs.

**14. INVITES the Commission to propose actions to support Open Source projects in Europe in interaction with standardization activities.**

~~13.~~**15.**EMPHASISES the importance of ~~better control of~~**more transparency related to** the essentiality of patents and invites the Commission, together with relevant stakeholders – including, where applicable, Intellectual Property Offices – to develop a system that ensures better scrutiny.

~~14.~~**16.**STRESSES the imperative of ensuring the **high level** representation and **effective** protection of the EU's ~~IP~~ interests in **IP matters on** international fora, and in particular within WIPO. To this end, RECALLS that it is essential that all relevant EU actors – Member States, the Commission and the EEAS – continue to fully play their respective roles within WIPO.

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