



*European Economic and Social Committee*

**INT/840**  
**Intellectual property package**

## **OPINION**

Section for the Single Market, Production and Consumption

**Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – A balanced IP enforcement system responding to today's societal challenges**

[COM(2017) 707 final]

**Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights**

[COM(2017) 708 final]

**Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Setting out the EU approach to Standard Essential Patents**

[COM(2017) 712 final]

Rapporteur: **Franca SALIS-MADINIER**

Referral	European Commission, 18/01/2018
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	09/03/2018
Adopted at plenary	14/03/2018
Plenary session No	533
Outcome of vote (for/against/abstentions)	180/0/3

## 1. Conclusions and recommendations

- 1.1 The Innovation Union is one of the most valid Europe 2020 initiatives. To this end, it is crucial to foster the process of European innovation by helping businesses firmly located in Europe.
- 1.2 The European Economic and Social Committee (EESC) agrees with the Commission's objectives regarding the harmonisation of legal systems and the interpretation of the 2004 intellectual property rights enforcement directive (IPRED)<sup>1</sup>, which sets out to apply the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights (IPR) in civil proceedings and establish how damages can be calculated to compensate IPR holders in the Member States.
- 1.3 The Committee draws attention to the importance of safeguarding the general interest of society as a whole by ensuring that the value created is distributed fairly between the different intellectual property stakeholders, in order to ensure prosperity in Europe, respect for the interests of IPR holders, and the health and safety of consumers.
- 1.4 The EESC supports the FRAND (fair, reasonable and non-discriminatory) principles in relation to standard-essential patents (SEPs). The Committee considers that similar principles can also be transposed and applied *mutatis mutandis* to copyright and related rights, to patents, to trade marks, to designs, etc.
- 1.5 The Committee recommends that the principles governing technical "standards" be supplemented by social "standards" in order to strike a balance between private actors and public investors, who act in the general interest.
- 1.6 More specifically, the Committee advocates a balance between the fair recognition of intellectual property rights and the development of innovations that can bring real benefits to society as a whole. Without intending to limit the fundamental right to enforce private rights through the legal system, the Committee states that, if particular interests are in conflict with the general interest, arbitration that upholds the general interest must be brought to bear.
- 1.7 The EESC calls for a regulation that encourages young researchers to use their knowledge and skills to set up new business projects. The EU Member States must in particular adopt measures such as affordable prices that enable young entrepreneurs to build up their innovative projects.
- 1.8 The EESC considers that it is important, in combating counterfeiting, to accurately identify<sup>2</sup> the stakeholders (businesses, creators, inventors, artists<sup>3</sup>, consumers<sup>4</sup>, intermediaries, "right

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<sup>1</sup> [OJ L 195, 2.6.2004, p. 16.](#)

<sup>2</sup> COM(2017) 707 final, page 3, point 1): "measures to make it easier for IP stakeholders to benefit from a homogeneous, fair and effective judicial enforcement system in the EU".

<sup>3</sup> COM(2017) 708 final, introduction fourth paragraph, second sentence: "This is because, since the Directive provides for minimum harmonisation (i.e. Article 2 explicitly allows national legislation to provide for means that are more favourable to rightholders) ...".

<sup>4</sup> COM(2017) 712 final, page 1, second paragraph, second sentence.

holders"<sup>5</sup>, etc.) according to the type of intellectual property right (patents and designs), and for stakeholders to consult each other in order to define the relevant DPI holder.

- 1.9 In the struggle against counterfeiting, it is essential to persuade consumers to behave in a more socially responsible way with regard to "intangible" property, as they do where "tangible" property is concerned, without compromising their right to "private copying" in the field of copyright. The EESC appreciates very much the media campaigns set up by the EUIPO and the European Observatory on Infringements of Intellectual Property Rights to raise awareness about infringements of IPR, and will in future support proposals to strengthen and to repeat these campaigns.
- 1.10 The Committee considers that the open source principle must be correctly implemented in the field of public research. The open source concept and principle are applied in university research centres and warrant an appropriate legal framework.
- 1.11 The Committee supports a broader role for the European Union Intellectual Property Office (EUIPO).
- 1.12 In order to improve management of conflicts, the EESC recommends that a European mediation network be set up, to work in line with the decisions of the Court of Justice of the European Union.
- 1.13 With a view to strengthening the enforcement of intellectual property rights, the Committee supports all the Commission's recommendations aimed at improving the legal forum instrument.

## 2. **Commission proposal**

- 2.1 Intellectual property systems are a crucial tool for innovation and growth and enable **companies, creators and inventors** to generate **a return on their investment in knowledge and creation**. Studies estimate that IPR (intellectual property right)-intensive sectors account for around 42% of EU GDP (worth some EUR 5.7 trillion annually), generate 38% of all jobs, and contribute to as much as 90% of EU exports<sup>6</sup>.
- 2.2 The digital revolution has opened up a wealth of new opportunities, but has also exposed EU IPRs to new and greater risks by facilitating the **on-line movement** of counterfeit goods and content, confusing consumers as to what is counterfeit and what is genuine and legal, and making it more difficult to **identify criminals**. This has led to a widespread increase in the number of IP infringements.

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<sup>5</sup> COM(2017) 707 final, page 3, end of the second paragraph: "... ensuring that patent-holders are rewarded for their investments in R&D and standardisation activities and are thus incentivised to offer their best technologies for inclusion in standards".

<sup>6</sup> European Union Intellectual Property Office (EUIPO), *Intellectual property rights intensive industries and economic performance in the EU*, 2016.

- 2.3 **Counterfeit** or **pirated** goods currently account for 2.5% of global trade and EU industry is badly affected<sup>7</sup>, especially in sectors where EU businesses are **world leaders**.
- 2.4 The present package of measures from the Commission seeks to further improve the **application** and **enforcement** of IPRs within the EU Member States, at our borders and internationally. The package contains:
- a communication on a balanced IP enforcement system responding to **today's societal challenges** [COM(2017) 707 final];
  - a communication providing guidance on how to apply the directive on the **enforcement of intellectual property rights** (IPRED) [COM(2017) 708 final];
  - a Commission staff working document containing an evaluation of the IPRED [SWD(2017) 431 final and SWD(2017) 432 final];
  - a communication on **standard essential patents** [COM(2017) 712 final];
  - a Commission staff working document on the evaluation of the Memorandum of Understanding on **the sale of counterfeit goods via the internet** [SWD(2017) 430 final].
- 2.5 The package set out measures in four main sections:
- 1) measures to make it easier for IP stakeholders to **benefit from a homogeneous, fair and effective judicial enforcement system in the EU**;
  - 2) actions to support **industry-led** initiatives to combat IP infringements;
  - 3) initiatives to **strengthen the capacity of customs and other authorities** to enforce IP rights;
  - 4) measures to strengthen efforts to fight IP infringements **on a global scale**, by promoting best practices and stepping up cooperation with third countries.

### 3. **General comments**

- 3.1 The texts proposed by the Commission are relevant and cover many aspects concerning intellectual property law. The purpose of the EESC's proposals is to define actions and recommendations that strengthen the enforcement of intellectual property rights in light of the institutional mandate of the EESC, which focuses mainly on social and economic perspectives.
- 3.2 The three Commission documents should be taken together and cover all aspects of intellectual property rights. While emphasising the Memorandum of Understanding and the rather narrow interpretation of the standard essential patents (SEPs) and the FRAND principles, there is a risk that the consultation will be limited to innovations in the digital world. However, our comments and recommendations want to draw attention to all areas of intellectual property law.
- 3.3 Although the EESC agrees with the Commission's concerns regarding the impact of digitalisation on risks to IPRs, it proposes that the question of intellectual property rights,

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According to a recent study, 5% of all imports into the EU are counterfeit and pirated goods: this illegal trade has an estimated value of EUR 85 billion.

creativity and innovation is approached from the legal as well as the social point of view, with the aim of increasing the protection of these rights.

- 3.4 The Commission's IPR proposals are intended to boost economic growth and create more jobs in Europe. The Committee supports these aims, while considering that all innovation and creation is founded on the creativity of individuals and of the teams to which creators or inventors belong. Creativity is an inherent human capacity and a prerequisite for innovation.
- 3.5 In this regard, the EESC recommends a clearer European framework on the transfer of rights between the various stakeholders. Under existing national and European regulations, it is not within the scope of this IPRED consultation to define in concrete terms the "right holders" e.g. creators, companies, intermediaries or publishers, since they are defined in the EU and national material law on IPR, not in the IPRED.
  - 3.5.1 Intellectual property law covers a diverse range of perspectives (copyright and neighbouring rights, patents, trade marks, industrial designs, geographical indications, etc.). If we ultimately want to achieve one European single market, we will have to move towards a common understanding and pay attention to more precisely defining the concept of "holder of the right" by creating the conditions to allow all stakeholders to discuss and settle their interests and disputes. The Committee recommends that the national and the European level should be better attuned to each other in order to avoid conflicts or ambiguities. The Committee recommends that the national and the European level should be better attuned to each other in order to avoid conflicts or ambiguities.
- 3.6 The EESC considers that even if the directive cannot provide a uniform framework for the whole of Europe, it can do more to encourage the Member States to lay down a foundation of principles for harmonisation, e.g. by drawing up specific and tailor-made "codes" for each intellectual property right. The EESC strongly backs applying ethical principles such as fairness, proportionality and non-discrimination to IPRs.
- 3.7 The EESC backs the European Commission's efforts in the field of data accessibility. It is clear that a European approach to intellectual property rights represents a major economy of scale, offering new economic opportunities in terms of growth and job creation.
- 3.8 The economic process takes place between the individual creator and the consumer who buys products. In between, there is a whole range of economic activity in which different interests have to find their right place. The consumer is at the end of this process. Consumers often fall prey to counterfeiting and piracy, paying exorbitant prices for counterfeit products.
  - 3.8.1 The development of digital processes has generated numerous innovations. The pace of innovation in the digital sector is particularly rapid. This raises issues of security and confidentiality and makes the protection of "intellectual property" considerably harder, but not impossible. All parties, especially those with an internet presence, should be identified properly so that false accounts that trade unfairly can be unmasked.

- 3.8.2 The EESC agrees with the Commission's proposals for granting licences and for the enforcement of rights. It regrets, however, that in the proposals concerning the resolution of conflicts of interest, the Commission addresses only legal disputes (Unified Patent Court) and does not put forward practical tools, such as a mediation centre through which stakeholders could themselves manage their disputes with regard to the general legal rules and engage in a mutual dialogue before going to court.
- 3.8.3 The Committee made the analysis and believes that a specific platform can give an important added value. A suitable instrument like an "IPR-platform", preferably with a constitutional recognised status, can organise and coordinate the extra judicial dialogue between the representative stakeholders to afford mediation, arbitration and reconciliation. This platform will meet the needs by bringing the parties together around the table to discuss their concerns and different points of view and to put forward appropriate codes of conduct for adoption.
- 3.8.4 This platform can collect best practices that already exist in Europe and present them as a basis for others. The EESC itself represents civil society as a whole, where dialogue is conducted in Europe and in the Member States, but this remains rather general and it should be possible to connect more closely with specific professional groups, like writers, journalists and publishers, and to link researchers and institutes, so as to ensure proper allocation of property rights and avoid disputes.

#### 4. **Specific comments**

##### 4.1 **Innovation in Europe**

4.1.1 Innovation lies at the heart of the Europe 2020 strategy. Innovation from companies based in Europe must be fostered and maintained. Many innovative projects are developed in start-ups and SMEs. They often have a weak financial base and are easily bought out by large companies who, in the longer term, relocate to other continents. Their added value and jobs are consequently of no benefit to Europe.

4.1.2 SMEs are expanding across Europe at the expense of large conventional companies. Conventional companies sometimes disappear as new business projects begin to flourish. Transition processes are key to innovation in these businesses. As part of this process, particular attention should be focused on workers, enabling them to keep up by means of forward-looking and appropriate vocational training arrangements.

##### 4.2 **Ethical principles**

4.2.1 In the same way as the Commission proposes the FRAND principles in connection with standard essential patents, the Committee advocates applying principles and standards of fairness *mutatis mutandis* to other areas of intellectual property rights. However, the FRAND principles strictly imply a legal limitation of patent law. The principles cannot simply be adopted in other sectors but must be viewed and discussed case by case<sup>8</sup>.

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See point 1.6.

4.2.2 Similarly, the open source principle must be implemented without penalising public research. Public institutions frequently finance scientific research. Prior to publication in specialist journals, the ensuing articles must be peer-reviewed, subjecting researchers' work to critical assessment. These journals are available in university research centres via global digital networks such as the "Web of Science", which universities have to pay significant amounts to access. This content should be accessible for a reasonable price; universities should not have to pay again to provide their students with the benefit of access to past research papers. This double use of public funds is inefficient and clashes with the values of fairness and reasonable use.

#### 4.3 **Social protection**

4.3.1 85% of inventions are made by employees. This is a major issue for the Commission, which is setting up a balanced IP enforcement system responding to today's societal challenges<sup>9</sup>. The Committee emphasises that the social protection of creative workers is also part of this balance. It could significantly improve the status of artists and of researchers.

### 5. **Tools to better protect and channel stakeholder interests**

#### 5.1 **Organising stakeholders**<sup>10</sup>

5.1.1 Under a cross-sector approach, best practice can be transferred to other sectors: for example, organisations representing journalists can engage in negotiations with the publishers' professional organisation on the transfer of their copyright in exchange for fair remuneration, together with the further use of their texts in other (digital) applications. Journalists will also be able to conclude agreements on the principles of press freedom, protection of whistleblowers, data confidentiality codes and reader copyright.

5.1.2 In order to develop a credible extra-legal framework, all stakeholders should consult with each other to identify how to transfer IPRs and implement codes of conduct or appropriate, viable agreements tailored to specific situations and reflecting the specific nature of each sector and the area of law in question.

5.1.3 A forum for consultation and dialogue between stakeholders could establish the scope of the negotiated agreements. There is a long-standing tradition of European consultation for the balanced expression of national and European interests. Such a consultation forum could also play a mediating role, bringing together representatives of authors, researchers, artists, NGOs, the social partners (trade unions and employers), universities, professional organisations, intermediaries and public bodies to share in the operation of the legal forum in cooperation with the Commission and the EUIPO and Observatory as European institutions.

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<sup>9</sup> COM(2017) 707 final.

<sup>10</sup> See point 3.8.1.

## 5.2 **Organising and informing consumers**

5.2.1 Combating counterfeiting also involves informing consumers via media campaigns urging greater respect of intangible property rights, without compromising their right to "private copying" in the field of copyright. These campaigns should also alert consumers to the danger for their health and safety of using some specific counterfeit goods.

## 5.3 **Improving the effectiveness of judicial enforcement systems**

5.3.1 In order to enhance the effectiveness of judicial enforcement systems, the Committee supports the Commission's proposals<sup>11</sup> when it calls on the Member States "to systematically publish judicial decisions in proceedings relating to IPR infringements" and for a major role to be given to EUIPO and the Observatory. It is up to the Commission to decide which is the most suitable body for organising debate between stakeholders within an "IPR platform", if this makes IPR policy in Europe more coherent and appropriate to the Single Market. The EESC also believes that it is worth looking at the possibility of developing other alternative dispute resolution (ADR) tools in order to safeguard the principle of fairness.

5.3.2 Without prejudice to the protection of intellectual property rights under criminal law, which has not been taken up by the Commission at EU level, the EESC endorses the work carried out by the Commission to improve global compliance with IPRs. To this end, coordination between WIPO (World Intellectual Property Organization) and EUIPO must be stepped up.

## 6. **Evaluation of the Commission communication**

6.1 The EESC notes that the Commission's recommendations in this regard mainly concern the legal sphere.

6.2 Without prejudice to the working of the courts, it would be advisable to create a more robust framework for legal mediation between stakeholders so they can draw up conciliation proposals. This conciliation procedure could enable conflicts between the parties to be resolved and prevent much time being lost in complicated, costly and prolonged legal proceedings. This principle is already in place in the Unitary Patent System, which has an Arbitration and Mediation Centre. The EESC supports the Commission's efforts to further examine this issue in cooperation with the EUIPO, and welcomes and supports the idea in other areas of intellectual property rights.

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<sup>11</sup> COM(2017) 707 final, page 6.

6.3 The Committee supports the Commission's call for industry to undertake the necessary diligence steps to combat IP infringements. It would however be advisable firstly to provide specific institutional instruments to organise all stakeholders and bring them to the table in order to open and (where it already exists, e.g. in the form of an MoU) continue a dialogue and allocate IPRs to their lawful holders. Voluntary agreements bringing together right holders, internet platforms, online advertising, distribution and financial service providers should be improved and further developed.

Brussels, 14 March 2018

Georges Dassis

The president of the European Economic and Social Committee

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