

ROADMAP	
TITLE OF THE INITIATIVE	Proposal for a revision of the Directive on the enforcement of intellectual property rights (Directive 2004/48/EC)
TYPE OF INITIATIVE	<input checked="" type="checkbox"/> CWP <input type="checkbox"/> Non-CWP <input type="checkbox"/> Implementing act/Delegated act
LEAD DG – RESPONSIBLE UNIT	DG Internal Market and Services, MARKT D3
EXPECTED DATE OF ADOPTION	September 2012
VERSION OF ROADMAP	No: 3 Last modification: January 2012

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A. Context, problem definition	
(i) What is the political context of the initiative? (ii) How does it relate to past and possible future initiatives, and to other EU policies? (iii) What ex-post analysis of the existing policy has been carried out and what results are relevant for this initiative?	
<p>The proposal for a review of the Directive on the enforcement of intellectual property rights (Directive 2004/48/EC), that is part of the Commission Communication 'A Single Market adopted by the Commission on 24 May 2011 (COM(2011)287), will provide the follow-up to the report on the Directive's application which is provided for under Article 18 of Directive 2004/48 and which was adopted on 22 December 2010 (COM(2010)779).</p> <p>This initial assessment as well as a public consultation early in 2011 have revealed that certain provisions in the Directive may not be sufficiently clear and that this has led to diverging interpretations in national courts. In addition, the Directive seems not to be sufficient to effectively tackle IPR infringements on the Internet. A number of other issues have been raised, that could be hampering a proper enforcement of intellectual property rights in particular for SMEs, such as the use of provisional and precautionary measures, procedures to gather and preserve evidence (problem of relation between the right of information and protection of privacy), the meaning of various corrective measures, including the costs of destruction, the calculation of damages.</p> <p>The review of the Directive will constitute one element of the action against counterfeiting and piracy announced in the Commission Communication 'A Single Market for IPR'. Other elements of the Communication are to provide the European Observatory on Counterfeiting and Piracy with the right resources for its current and future tasks (proposal for a Regulation 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), and to encourage tangible results of the dialogues between stakeholders, in particular in the context of the follow-up to the Memorandum of Understanding against the sale of counterfeit goods over the Internet signed by stakeholders on 4 May 2011.</p>	
What are the main problems which this initiative will address?	
<p>The Directive has not been designed to deal with the challenges posed by the internet. The internet and digital technologies have added a new dimension to enforcement of intellectual property rights. On the one hand, the internet has allowed creators, inventors and their commercial partners to find new ways to market their products, but on the other hand it has also opened the door to new forms of infringements, some of which have proved difficult to combat. The relative anonymity of the internet, its cross-border nature and its consumer- and user-friendly services accessible from all around the globe have created an online environment where the infringers cannot be easily identified, digital evidence is hard to preserve, damages from internet sales are difficult to quantify and, after having been discovered, infringers quickly "re-appear" under a different name. Furthermore, the online services will continue to develop and to diversify, adding to the challenge facing any enforcement policy. As a result, there is a need to modernize the Directive to make it a suitable legal tool for the infringements committed on the internet.</p> <p>Furthermore, a number of provisions of the Directive lack sufficient clarity and have led to very diverging interpretations by Member States and the national courts. This resulted in an inconsistent enforcement. These provisions should therefore be clarified. These are in particular those concerning the scope of the Directive, the role of intermediaries, the scope of the injunctions, the right of information, the calculation of damages and corrective measures.</p>	

Who will be affected by it?
Rightholders would benefit from clearer and more deterrent legal framework to better enforce their rights. This would bring also benefits to consumers, who often unknowingly become the victims of counterfeiting or piracy. Other authorities, for example judicial authorities (or other agencies charged with the enforcement of intellectual property rights) would benefit from enhanced clarity of the legal provisions. Other possible impacted parties may include various intermediaries such as Internet Platforms, Internet Service Providers or transport establishments who could play an important role in the fight against infringements of intellectual property rights.
(i) Is EU action justified on grounds of subsidiarity? (ii) Why can Member States not achieve the objectives of the proposed action sufficiently by themselves? (Necessity Test) (iii) Can the EU achieve the objectives better? (Test of EU Value Added)
Yes. There is a need for a higher level of convergence on various issues which cannot be achieved by Member States acting alone. The fragmentation of the laws and national practices has resulted in inconsistencies on enforcement of intellectual property rights which hampers the functioning internal market between Member States, as guaranteed by article 95 of the Treaty on the Functioning of the European Union. The situation is self-explanatory in particular with regard to infringements of intellectual property rights committed over the internet which, given their cross-border nature, often have an impact in several Member States. These problems can be best resolved by revising the Directive to clarify certain provisions and enhance consistency in national enforcement.

B. Objectives of the initiative
What are the main policy objectives?
The main objective would be to adapt the Directive to today's challenges in order to make sure that intellectual property rights can be protected effectively and uniformly in the EU. Several provisions of the Directive should be clarified in order to achieve consistent interpretation and enforcement.
Do the objectives imply developing EU policy in new areas?
No.

C. Options
(i) What are the policy options being considered? (ii) What legislative or 'soft law' instruments could be considered? (iii) How do the options respect the proportionality principle?
The policy options being considered include: (a) rendering the rules on obtaining evidence from intermediaries more detailed thus making possible the identification of those infringing intellectual property rights on a commercial scale and of the financial circuits involved. This would be particularly important to fight IPR infringement in the on-line environment. This would also require a clearer definition of "commercial scale", so as to make sure that professional counterfeiters rather than individual consumers are targeted; (b) fast-track low-cost civil procedures (including as regards the granting of injunctions, the award of damages, the use of corrective measures etc) for straightforward infringements of intellectual property rights when SMEs are victims; and (c) the possibility to act against webpages holding content that violates intellectual property rights (see in this regard the Roadmap regarding the initiative on procedures for notifying and acting on illegal online content). These policy options would require the amendment of the existing directive. Complementary measures in soft-law instruments designed at disrupting the business/value chain of counterfeiters and at increasing the cooperation between intellectual property rights holders and intermediaries (e.g. internet service providers, shippers and couriers, payment-service providers etc) could not be excluded (e.g. further expansion of the 2011 Memorandum of Understanding on the selling of counterfeit goods over the internet). Other measures aiming at promoting the legal offer could also be envisaged. The proportionality of the policy options will be examined in the impact assessment, with a particular stress on the respect of the right to privacy and other fundamental rights protected by the European Charter and the question of the accessibility to licit offer (in particular as regards copyright protected material). The question of the intellectual property rights holders' own due-diligence over their supply and distribution chain will also be examined in this context.

D. Initial assessment of impacts

What are the benefits and costs of each of the policy options?

Detailed analysis will be made for each of the options.

Could any or all of the options have significant impacts on (i) simplification, (ii) administrative burden and (iii) on relations with other countries, (iv) implementation arrangements? And (v) could any be difficult to transpose for certain Member States?

No.

(i) Will an IA be carried out for this initiative and/or possible follow-up initiatives? (ii) When will the IA work start? (iii) When will you set up the IA Steering Group and how often will it meet? (iv) What DGs will be invited?

The work on the IA has started early in 2011. An IA Steering Group was set up in May 2011 and a first meeting of the group was held on 17 June 2011. The group will meet about four times. DGs invited to the Steering group are: INFOS, TRADE, SANCO, ENTR, TAXUD, JUST, HOME, COMP, AGRI, OLAF, JRC, RTD, BUDG, EAC, EMPL, the SG and the LS. Submission to the Impact Assessment Board is scheduled for July 2012; the launch of the Interservice-consultation is scheduled for July 2012.

(i) Is any of options likely to have impacts on the EU budget above €5m?
(ii) If so, will this IA serve also as an ex-ante evaluation, as required by the Financial regulation? If not, provide information about the timing of the ex-ante evaluation.

No.

E. Evidence base, planning of further work and consultation

- (i) What information and data are already available? Will existing impact assessment and evaluation work be used?
- (ii) What further information needs to be gathered, how will this be done (*e.g. internally or by an external contractor*), and by when?
- (iii) What is the timing for the procurement process & the contract for any external contracts that you are planning (*e.g. for analytical studies, information gathering, etc.*)?
- (iv) Is any particular communication or information activity foreseen? If so, what, and by when?

Significant amount of information was gathered in preparation of the report on the application of the Directive that was presented in December 2010. A public consultation on that report that ran from December 2010 to end of March 2011 and a public hearing on the application of the Directive in a digital environment that was held on 7 June 2011 at Brussels provided further information on the issues at stake.

Which stakeholders & experts have been or will be consulted, how, and at what stage?

Two conferences on the enforcement of intellectual property rights were held in 2008 and 2009 and regular stakeholders consultations have been organized. The issues have been also discussed on numerous occasions in the context of the European Observatory on Counterfeiting and Piracy.

In the preparation of the report on the application of the Directive, legal practitioners from all EU Member States have been consulted through the Legal Subgroup of the European Observatory on counterfeiting and piracy.

Rightholders, consumers, Internet platforms and Internet Service providers (ISPs) have been consulted through the stakeholders' meetings. Member States' authorities have likewise been consulted.

Furthermore, a public consultation on the report on the application of the Enforcement Directive was carried out between December 2010 and March 2011 via the internet. Through this public consultation and the public hearing held on 7 June 2011, all stakeholders have had the opportunity to express their views on the subjects raised in the report.