

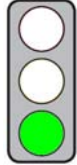
# A SINGLE MARKET FOR INTELLECTUAL PROPERTY RIGHTS

Status: 17 October

## MAIN ISSUES

**Objective of the Communication:** The Commission wishes to create a unitary European protection law for intellectual properties, including digital business models.

**Parties affected:** Consumers, companies and creators of intellectual property.



**Pros:** (1) Unitary patent protection fosters the spread of knowledge and increases innovation competition.

(2) A modernised European legal framework for copyright improves the preconditions for an EU-wide online provision of protected goods and services.

(3) The fight against counterfeiting and piracy is facilitated.

**Cons:** –

## CONTENT

### Title

**Communication COM(2011) 287** of 24 May 2011: A **Single Market for Intellectual Property Rights** – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe

### Brief Summary

Note: The pages quoted refer to the Communication COM(2011) 287 unless specified otherwise.

#### ► Background and objective

- Intellectual property rights (IPR) are:
  - technical property rights which must be registered, such as patents;
  - non-technical property rights which must be registered, such as trademarks or geographical indications;
  - non-technical property rights which are not subject to registration, such as copyright engendered by the creation of a work.
- The intellectual property right of a company is one of its largest economic values. It is estimated that 45% to 75% of the wealth of the Fortune 500 companies derives from their IPR (p. 4).
- According to the Commission, EU online markets are “fragmented by multiple barriers” (p. 9). Thus it becomes more difficult or even impossible to buy copyright protected works or services across borders on the internet.
- The Commission wishes to establish a legal framework for IPR to:
  - overcome the “fragmentation” of IPR in the EU (p. 6); and
  - to integrate digital business models such as e-music and audiovisual services (e.g. streams) (p. 4).
- With its “enabling framework”, the Commission wishes to take account of both the needs of the creators of intellectual property and the interests of consumers and users. To be promoted are
  - innovation and creativity through the “right incentives” for creation and investments, and
  - broad access to products and services which are protected by intellectual property rights.

#### ► Unitary patent protection and a unified patent litigation system

- Patent protection in the EU currently involves demanding translation and procedural requirements, for a European patent (“bundle” of national patents) must be “validated” at national level in order to gain legal effect in Member States (cp. [CEP Policy Brief](#)).
- As part of the enhanced cooperation framework of April 2011, the Commission already proposed two regulations allowing for an inexpensive unitary patent protection in 25 EU Member States (apart from Italy and Spain) (cp. [CEP Policy Brief](#)).
- EU-wide unitary patent protection is not complete without a European patent litigation system. A draft is currently being drawn up for an agreement on a European patents court, which is to be responsible for “bundled patents” and “European patents with unitary effect” (cp. [CEP-Analyse](#)).

#### ► Modernising the trade mark system

- The existing trade mark system in the EU consists of harmonised national trade mark entries (Trade mark Directive 2008/95/EC) and the Community Trade Mark [Regulation (EC) No. 207/2009].
- In the second half of 2011, the Commission wishes to propose amendments to these legal acts in order to make the trade mark system more “effective, efficient and consistent as a whole” (p. 9).

► **Modernising the EU legal framework for copyright**

- In the second half of 2011, the Commission wishes to propose a European legal framework for the “collective management of copyright”. This is to regulate – and notably for digital business models, too – :
  - the licensing of copyrights enabling multi-territorial licensing and a pan-European licensing;
  - the distribution of revenues for copyrights;
  - the creation of European “right brokers” able to license the world’s music repertoire on a multi-territorial level (p. 11).
- As of 2012, the Commission intends to examine the option of creating a “European Copyright Code” encompassing the existing [EU Directives](#) on copyrights. The Commission’s aim is to “harmonise and consolidate” the entitlements provided by copyright and related rights to a greater extent at EU level (p. 11). In this context, the Commission also wishes to examine
  - whether or not to introduce an optional “unitary” European copyright title complementing the Member States’ copyright titles;
  - if the current exceptions and limitations to copyright, which are defined in the Harmonisation Directive regarding certain aspects of copyrights and related protection rights (2001/29/EC), need to be “updated and harmonised”.
- Online contents are being increasingly generated by users in that they create their own works on the basis of copyright protected material and then upload these onto platforms on the internet [“user-generated content” (USG)]. The Commission wishes to establish “a simple and efficient permissions system” in order to allow for USG and, at the same time, protect existing copyright (p. 12). To this end, it wishes to conduct a public consultation in the second half of 2012.
- For the online distribution of audiovisual works, until 18 November 2011 the Commission is conducting a public consultation. It is based on a Green Paper [[COM\(2011\) 427](#)].
- In May 2011, the Commission proposed a Directive allowing for easier online access to so-called orphan works registered in digital libraries or archives [[COM\(2011\) 289](#)]. A work is orphan if its creator is unknown or undetectable.
- The Commission’s aim is to kick-start a “stakeholder agreement” on fee payments for private copies of copyright protected works. To this end, it wishes to appoint a “high-level mediator” in the second half of 2011 to determine how to harmonise the collection of fees at EU level. The Commission intends to publish legal rules in 2012.

► **Extension of the protection of indications of geographic origin**

The Commission plans to introduce an EU-wide protection scheme for geographical indication of origin on agricultural products and food. Provisions already exist for wine and spirits [Regulation (EEC) No. 2081/92]. In the second half of 2012, the Commission wishes to submit a feasibility study on extending protection to non-agricultural products.

► **Harmonisation of the level of protection for trade secrets and parasitic copies**

- Trade secrets are the intangible assets of a company, such as technical or commercial trade secrets (e.g. customer lists). According to the Commission, the statutory requirements in Member States provide different levels of protection.
- Parasitic copies of products are designed to resemble well-established brand products but are not deemed counterfeits due to deviating features. According to the Commission, the legal requirements in Member States provide for different levels of protection.
- In 2012, the Commission wishes to conduct studies and a consultation on the economic impact of such “fragmentation” and on the economic benefit an EU unitary legal framework would have on both areas.

► **Fight against counterfeiting and piracy**

- Counterfeiting and piracy results in damages of up to 8 billion Euro per year (p. 17). The Commission has identified an increase of more than 60% within 5 years since 2005.
- In order to facilitate the fight against counterfeiting and piracy the Commission wishes amongst other things to:
  - consolidate the European Observatory on Counterfeiting and Piracy, which was set up in 2009, with the Office for Harmonisation in the Internal Market (OHIM) [[COM\(2011\) 288](#)]; the OHIM is to support the cooperation between the authorities involved in the enforcement of IPR;
  - in spring 2012, review the IPR Enforcement Directive (2004/48/EC) in order to tackle the infringements “at the source” of intermediaries (e.g. internet access providers) (p. 19);
  - replace the EU Customs Regulation [No. 1383/2003] with a new one [Proposal [COM\(2011\) 285](#)], which allows for a better enforcement of IPR through custom authorities;
  - further the ratification of the ACTA Agreement (Anti-Counterfeiting Trade Agreement) and to adjust IPR protection provisions in free trade agreements with third countries to EU protection standards.

## Statement on Subsidiarity by the Commission

The Commission does not address the question of subsidiarity.

## Policy Context

In the [European Competitiveness Report 2010](#), the Commission states that 3.3% of total EU GDP and 3% of employment can be put down to the creative industries. According to the Commission, the creative industries (e.g. design, film, TV, radio, new media and music) belong to the most dynamic sectors in the EU. Apart from a few very large companies, 95% of this industry is made up of small-sized enterprises (p. 12 of the Report).

In a resolution, the European Parliament calls on the Commission “to propose a comprehensive strategy on IPRs which will remove obstacles to creating a single market in the online environment” [No. 4, 2009/2178 (INI)].

## Options for Influencing the Political Process

Leading Directorate General: DG Internal market and Services

# ASSESSMENT

## Economic Impact Assessment

### Ordoliberal Assessment

IPR are to boost innovation and creativity within an economy and to prevent progress from being slowed down by keeping intellectual property confidential for fear of counterfeiting. Due to different national rules, the single market for goods and services only works to a limited degree in certain areas. This holds true for the existing national patent system and the trade with online contents.

A real **single market for IPR** enables the effective enforcement of these rights and thus **protects investments in innovation. The innovation incentives** for companies and creators of intellectual property **are enhanced** if the protection of IPR is ensured throughout the entire EU. Only then can the pro-innovation effects of the single market be fully realised.

### Impact on Efficiency and Individual Freedom of Choice

**Unitary patent protection in the EU**, including a European patent litigation system, significantly **increases legal certainty**, thereby **fostering the spread of knowledge and strengthening innovation competition**. The high costs of EU patent protection, which are mainly generated by expensive translation and administration requirements, can be reduced to 20% (cp. [CEP Policy Brief](#)). Also the complexity of the existing patent system will be reduced. Thus companies can obtain patent protection more easily. This affects small and medium-sized enterprises (SME) in particular. A European patent litigation system facilitates law enforcement, reduces its costs and increases legal certainty.

**A modernised European legal framework for copyright**, which is intended to enable the “collective management” of such rights and multi-territorial and pan-European licensing, **improves** in particular the **conditions for an EU-wide online provision of copyright protected works**. Currently licensing is still based on national policies. Multi-territorial licensing, which can be distributed directly by a rights broker, facilitate cross-border copyright protection in the EU and thus allow for easier access to protected online contents. The introduction of a unitary European copyright title can simplify the licensing of copyrights significantly, as registration must only be applied for once; this is possible at low costs. Thus small and medium-sized enterprises in particular can protect, enforce and market their creative and innovative performances to a justifiable degree at an EU-wide level.

A European legal framework for copyright can, in particular when using online services, make copyright protected works available at cross-border level throughout Europe. This increases the range of legal offers for such products and services. Both consumers and commercial users benefit from the greater choice. However, in the case of the cross-border development of online trade, one must consider that besides language barriers, in particular the different national consumer rights represent various obstacles (cp. [CEP Policy Brief](#)).

Counterfeiting and piracy is becoming ever more important as competition becomes increasingly global. In particular, global networking via the internet and the huge scale movement of goods that accompanies globalisation challenge the effectiveness of the established system for the protection of intellectual property.

The transfer of tasks from the European Observatory on Counterfeiting and Piracy to the OHIM meets the requirements for efficient cooperation within the EU in the fight against counterfeiting and piracy. However, as counterfeited and copied products enter the EU mainly from third countries, counterfeiting and piracy is mainly a global problem. Therefore, the efficient enforcement within the EU is not enough. **Entitling customs authorities to enforce IPR, and IPR protection provisions** that are adjusted to EU standards **in free trade agreements with third countries, facilitate the fight against counterfeiting and piracy at EU borders** and in cooperation with non-EU countries.

### Impact on Growth and Employment

A unitary single market for IPR facilitates the spread of knowledge and strengthens innovation competition. This has a positive impact on growth and employment.

### Impact on Europe as a Business Location

The EU-wide protection of IPR sets innovation incentives. Thus the attractiveness of Europe as a business location for research-intensive, innovative and creative companies is increased. The quality of Europe as a business location is enhanced.

## Legal Assessment

### Legislative Competency

The legal adjustment to overcome obstacles in the single market can in principle be based on Art. 114 TFEU (internal market competency). The EU has the power to introduce a European copyright title on the basis of Art. 118 (1) TFEU (unitary protection of IPR).

### Subsidiarity

Unproblematic, provided that issues of cross-border relevance are regulated.

### Compatibility with EU Law

The Commission's aim to put an end to territorially limited licensing is in line with the principles of freedom of competition (Art. 101 TFEU) and of the free movement of goods (Art. 56 TFEU). This was confirmed recently by the ECJ in the case of *Murphy et al.* ([C-403/08 and C-429/08](#)), which concerned the question of whether or not territorially limited (football) licences infringed EU law: the court held that such licences infringe the freedom to provide services as they "guarantee absolute territorial exclusivity, which is sufficient to lead to artificial price differences between the partitioned national markets". Therefore, such licences also infringe the freedom of competition.

### Compatibility with German Law

Under German law, the Commission's measures affect the German Trade Mark Law (MarkenG), the German Copyright Law (UrheberG) and the German Law on Unfair Competition (UWG). An adjustment might be required regarding, amongst other things, the registration procedures for trade marks (§§ 32 et sqq. MarkenG), community trade marks (§§ 125a et sqq. MarkenG) and the protection of geographical indications of origin (§§ 126 et sqq. MarkenG). The limitations stipulated under the copyright law (§§ 44a to 63a UrhG) would have to be adjusted accordingly in the case of an amendment to the exceptions and limitations of protection rights at EU level. A need for adjustment in the case of the UWG could result from the adjustment of the protection level at EU level: the UWG protects trade secrets by means of the criminal sanctions pursuant to §§ 17 et sqq. UWG; protection against copy is granted by § 4 No. 9 in conjunction with §§ 8, 9 UWG. Depending on the extent of the regulation, the need for amendments to German law could be substantial.

## Conclusion

A single market for IPR protects investments in innovations and creates innovation incentives. A unitary patent protection in the EU significantly increases legal certainty and thus fosters the spread of knowledge and increases innovation competition. A modernised European legal framework for copyrights increases the possibility of creating an EU-wide online provision of copyright protected goods and services. Entitling custom authorities to enforce IPR and the inclusion of such rights into free trade agreements with third countries facilitates the fight against counterfeiting and piracy.