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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Council conclusions on the enforcement of Intellectual Property Rights

1. On 29 November 2017, the Commission adopted a set of Communications relating to the enforcement of intellectual property rights (IPR)¹.
2. Following an exchange of views on these Communications within the Working Party on Intellectual Property, the Presidency tabled a set of draft Council conclusions. These were discussed at the Working Party on 5 and 20 February 2018.
3. At the end of the meeting on 20 February 2018, the Presidency launched a silence procedure on the latest draft, set out in WK 2103/18, asking delegations to notify the General Secretariat of the Council of any opposition to these conclusions by 27 February 2018 at the latest.
4. No such opposition has been notified to the General Secretariat of the Council so far.

¹ Documents 15313/17+ADD1, 15314/17 + ADD1+ADD2, 15315/17

5. The Council is therefore invited to adopt, under the A items of one of its future meetings, the conclusions set out in the Annex to this Note.

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 rights² (IPRED) harmonising the minimum means for ensuring the enforcement of IPR and 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 market³;
- the Council Conclusions of 4 December 2014 on the enforcement of intellectual property rights⁴, 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 2015⁵ and the Single Market Strategy of 28 October 2015⁶, 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;
- 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’;

² OJ L 195, 2.6.2004

³ OJ C 56, 6.3.2010

⁴ 15321/14

⁵ 8672/15

⁶ 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 that the EU legal framework for IPR enforcement, could benefit from further clarification;
- that 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 standard essential patents (SEPs) in the EU for the enhancement of innovation and growth;
- that counterfeiting and piracy are growing problems in the EU and that collaboration between intermediaries through voluntary agreements 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”⁷; 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”⁸; a Communication on “Setting out the EU approach to Standard Essential Patents”⁹; 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”¹⁰ and a Commission Staff Working Document “Overview of the functioning of the memorandum of Understanding on the sale of counterfeit goods via the internet”¹¹. These documents deliver a holistic approach in the field of IPR enforcement and contribute to the adjustment of the IPR system to the digital era and new technologies, in particular the 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 IPRED, as interpreted by the Court of Justice of the European Union. INVITES Member States to take under consideration the clarifications made in the above-mentioned non legally binding IPRED Guidance Communication, while respecting the principle of judicial independence.

⁷ 15313/17

⁸ 15314/17

⁹ 15315/17

¹⁰ 15314/17 ADD 1

¹¹ 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. INVITES the Commission, where appropriate, to fortify the common interpretation of the provisions of IPRED, including by complementing the Guidance with additional – more targeted – guidelines, drawing on best practice in Member States.
7. INVITES Member States to consider, where appropriate, the specialisation of judges for IPR enforcement and, in cooperation with the European Observatory on Infringements of IPR, the 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 including measures against advertising on websites infringing intellectual property rights. ENCOURAGES the effective use of voluntary agreements, including dedicated MoUs involving all relevant stakeholders, including social media, price-comparison websites, etc. and CALLS on the intermediaries that are currently signatories of the MoU on the sale of counterfeit goods via the internet to include all their platforms in that MoU. INVITES the Commission to promote the benefits of MoUs, 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. ACKNOWLEDGES that the Commission will continue assessing the need for future follow-up actions, legislative or non-legislative. INVITES the Member States and the Commission to coordinate the national initiatives already taken by the industry in order to spread best practice, stimulate new initiatives and 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 and piracy. 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.

10. ACKNOWLEDGES the idea for strengthened administrative cooperation for better protection and respect of IPR in the EU. URGES the Commission to offer more targeted assistance to national customs authorities for the fight against IPR infringements on the EU's borders and ENCOURAGES the Member States and the Commission to continue their collaboration under the future Customs Action Plan to combat IPR infringements.
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 IPR infringements in the global context.
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 standards¹² that are needed, notably for the emerging technologies, where those of 5G and IoT play a pivotal role today. SUPPORTS the establishment of common licensing practices based on the IP valuation principles set out in the Communication, including key signposts on the concept of fair, reasonable and non-discriminatory (FRAND) licensing terms, so as to provide for a more stable and efficient standardisation ecosystem. ACKNOWLEDGES the importance of measures for a balanced licensing system for SEPs, ensuring a fair return on investment for SEPs holders as well as a fair access to SEPs for all players and especially SMEs.

¹² Open standards are understood as those developed within standard developing organisations in accordance with WTO principles (i.e. based on transparent, open, impartial and consensus based processes) and available to fair, reasonable and non-discriminatory (FRAND) terms.

- 12a. INVITES the Commission and all relevant stakeholders to develop best practice, monitor industry developments and offer, where appropriate, complementary guidance to 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 conditions, as well as helping to reduce litigation in this context.
13. CALLS on the Standard Developing Organisations (SDOs) to ensure that their databases observe the main quality features as set out in the Communication, while recognising that they are voluntary cooperative organisations and that any obligations imposed on them should be proportionate. 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 e.g. via links to their databases. 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 support Open Source projects in Europe in interaction with standardization activities.
15. EMPHASISES the importance 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.
16. STRESSES the imperative of ensuring the high level representation and effective protection of the EU’s 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.
