

**FOLLOW-UP TO THE GREEN PAPER  
ON COMBATING COUNTERFEITING AND PIRACY IN THE SINGLE MARKET  
–  
COMMISSION COMMUNICATION COM (2000) 789**

**EXECUTIVE SUMMARY**

UNICE very much welcomes the Commission Communication on the follow-up to the Green Paper on combating counterfeiting and piracy in the Single Market.

In UNICE's view, the Action Plan together with the measures proposed in this Communication address the most important problems in the field; namely, aiming to promote the development of a new EC Directive which will in turn encourage EU member countries to unify and upgrade the legal and practical measures they offer to both law enforcement authorities and intellectual property (IP) owners to **combat counterfeiting and piracy inside Europe more effectively**.

Given the large loss suffered by IP owners on a daily basis, UNICE would like to call upon the Commission and the Member States to ensure that the proposed Directive is adopted as quickly as possible and implemented without undue delay.

UNICE is of the strong opinion that the new tools and standards for anti-counterfeiting work to be incorporated in the new Directive will effectively function **as new reference standards for countries outside the EU and establish a possible basis for amending or supplementing the TRIPs Agreement**.

In this context, and with respect to the Commission Communication, UNICE believes that:

- A high level of cooperation is needed between the public and private sectors in the fight against fakes;
- Establishment of EU-wide minimum standards for **criminal prosecution and civil remedies** should be strongly supported;
- Significantly **greater funding** should be provided;
- **Timely enforcement** of judgments relating to intellectual property disputes between Member States should be efficiently ensured;
- Right for **professional bodies** to take legal action should be supported;
- Unlawful circumvention of technical devices must be adequately penalised;
- Broader **exchange of information** is clearly required, regardless of when the proposed Directive is issued;
- The Commission and the Member States must take the lead with respect to **training** and cooperate with the private sector in both planning and execution;
- **Awareness campaigns** should focus on both the results of individual enforcement efforts and general education;
- State of play in many of the **EU candidate countries** should be considered when the Directive is being drafted.

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**UNICE COMMENTS**

**I. GENERAL COMMENTS**

Counterfeiting and piracy of consumer goods is increasingly posing a critical challenge to consumers and industry in Europe. The problem is global in scope; with competing counterfeit products imported to the European market from all over the world.

While much remains to be done outside the European Union to address the problem and stop it at its source, there is also a **great deal to be accomplished inside the European Union itself**.

In this perspective, European industry welcomes the Commission Action Plan to overhaul anti-counterfeiting and anti-piracy measures in the Single Market, as outlined in its November 2000 Communication (hereafter the "Communication"). Given the large loss suffered by intellectual property owners on a daily basis, UNICE calls upon the Commission and the Member States to ensure that the proposed Directive is adopted as quickly as possible and implemented without undue delay. This Communication is intended to promote the development of a new EU Directive which will in turn encourage EU member countries to unify and upgrade the legal and practical measures they offer to both law enforcement authorities and brand owners to combat counterfeiting inside Europe more effectively.

Any good protected by an intellectual property rights (IPR) in the market is today a **target** for counterfeiters. While the problem was previously considered to affect only limited sectors of industry, counterfeiters are now targeting just about every type of consumer and industrial product. This is an issue that confronts IPR owners on a daily basis and it is **having an increasingly large impact on the integrity and value of intellectual property, ability to create and maintain employment opportunities and on innovation in general**.

The scope of the problem can be measured in part by the enormous expenditures by each company in pursuing counterfeiters, both inside and outside the EU – expenditures that very often run to millions and sometimes tens of millions of Euros annually. Notwithstanding these expenditures, few IPR owners who suffer from serious counterfeiting problems can report that the level of infringements is going down. At best, companies believe they are merely containing the growth of the problem.

However, the counterfeiting problem extends beyond the private sector. In many cases, it has links with organised criminal networks, and feeds the creation and growth of such networks. Counterfeiting and piracy also frequently go hand-in-hand **with other commercial crimes**, such as tax evasion, fraud and embezzlement.

Dangers to **consumer health and safety are also to be closely considered**, as most counterfeits are of inferior quality, contain harmful ingredients or have no effective ingredients at all.

Given the substantial scale of counterfeiting and piracy problems, both within the EU and abroad, UNICE agrees with the Commission's stated view that the public **and** private sectors must both be actively and aggressively involved, not only in day-to-day enforcement work, but also in the crafting of solutions, such as that foreseen in the proposed Directive.

Both European industry and government experts involved in this policy work must keep in mind that the new tools and standards for anti-counterfeiting work that are incorporated into any new Directive will effectively function as new standards for reference by countries outside the EU and establish a possible basis for amending or supplementing the WTO TRIPs Agreement. Thus, the work of the EU in developing **a new Directive is critical to longer-term work** on combating counterfeiting worldwide.

UNICE fully supports the fight against counterfeiting and piracy. In its previous comments to the Green Paper, UNICE welcomed the broad definition of counterfeiting and piracy as infringement of intellectual property and *sui generis* rights. However, as the representative of wider European industry it draws attention to the **need to draw a clear distinction between counterfeiting in the conventional sense of a deliberate intention to deceive the consumer, and intellectual property disputes where there are genuine disagreements between the parties as to the scope and validity of a right.**

Measures that are appropriate to deal with the former are not necessarily suitable for the latter.

In this perspective, UNICE would like to call upon the Commission to be very cautious when dealing with these concepts, in particular by **using the term "piracy" with due diligence**: this expression may cause problems as it can be interpreted as extending to any intellectual property infringement, whereas it can be envisaged that some types of egregious and deliberate infringement falling short of counterfeiting as defined above could also be included in measures aimed at counterfeiting.

## **II. DETAILED COMMENTS**

### **1. RESPONSIBILITY FOR THE ANTI-COUNTERFEITING AND PIRACY FIGHT**

The Communication suggests that rights holders should bear primary responsibility for dealing with counterfeiting, and this is understandable, given the critical role IP owners play in detecting, investigating and filing legal complaints against violators.

Given the growing size of the problem throughout the Single Market, the essential role of public criminal prosecution – rather than civil litigation – as a significant means of addressing it, and the extensive public interest ramifications – tax avoidance, the impact on job creation, the link with other types of criminal activity, etc. – UNICE believes that, as a practical matter, **leadership** in the fight against fakes will more appropriately rest with **the public sector**.

That said, a high level of **cooperation** between the public **and** private sectors is critical for combating infringing conduct effectively. To that end, the private sector clearly has a very important role to play in both criminal enforcement and in taking back-up civil enforcement action, as and when necessary, to supplement government efforts.

Also vital to the effective combating of piracy and counterfeiting is cooperation between different enforcement bodies within the public sector.

### **2. GREATER HARMONISATION AND MINIMUM CRIMINAL LIABILITY STANDARDS**

UNICE fully supports the proposal in the Communication that there be should significantly greater harmonisation of criminal enforcement, civil litigation and customs procedures. UNICE is especially supportive of proposals **to establish minimum standards** throughout the EU for criminal prosecution and civil remedies. However, UNICE has very strong reservations concerning the application of criminal sanctions in the area of patent infringement.

While European industry expects that this task of harmonisation in all these areas will be substantial, it is unquestionably one of the most important and necessary for ensuring effective action in the fight against counterfeiting and piracy.

### 3. GREATER COOPERATION BETWEEN MEMBER STATES

Cooperation between national authorities within and between Member States requires significant improvement. Both the Commission and Member-State governments must provide significantly **greater funding** and dedicated personnel for these purposes.

### 4. ENFORCEMENT OF JUDGEMENTS

Although there are much broader implications, consideration should be given to the need for ensuring the **timely enforcement** of judgements and judicial orders relating to intellectual property disputes between Member States.

### 5. REPRESENTATION BY PROFESSIONAL BODIES

The proposal within the Communication to give the right to professional bodies to take legal action on behalf of their members is enthusiastically supported. This proposal will need to be refined further in due course to take into consideration the fact that such professional bodies and associations to serve the needs of companies may not exist in certain industries. It may therefore in some circumstances be more appropriate for the right to be exercised by smaller and less formally established groups formed along industry lines.

### 6. TECHNICAL DEVICES

The adoption of technical devices to protect intellectual property rights is normally quite costly and their efficacy is relative to the ability of infringers to “crack” or “mimic” them.

With the view that the Copyright Directive no.2001/29/EC provides that adequate legal protection must be provided by Member States against the circumvention of technical measures as used by the copyright industry, UNICE acknowledges that there are many protection measures and devices that do not fit into the criteria of the Copyright Directive but which should nevertheless benefit from protection.

However, at this stage, the majority of UNICE's members see no need for legislation to provide for remedies against those who seek to copy or “mimic” technical devices *in addition* to the legal protection set out in the Copyright Directive.

### 7. INFORMATION EXCHANGE

As suggested in the Communication, the exchange of information regarding counterfeiting and piracy – both general information and data that is specific to individual cases – is critical to successful public / private cooperation in the war against counterfeiting and piracy.

Although some degree of communication takes place regularly between IPR owners and customs authorities in various countries, a much **broader, organised and sustained initiative is clearly required**. To that end, UNICE is of the strong opinion that it is essential for any future Directive to contain detailed provisions that promote the establishment of regular lines of communication between Member States, national authorities, trade associations, rights holders and the Commission itself. UNICE believes that the Commission together with national governments should commence work on this aspect immediately, and **regardless of when the proposed Directive is issued**.

### 8. TRAINING AND AWARENESS OF ENFORCEMENT PERSONNEL

The training of law enforcement authorities is also critical to combating counterfeiting. Training must naturally include instruction on the nature of counterfeiting cases and appropriate methods of investigation. Training should also aim to increase the awareness of enforcement authorities regarding the nature of counterfeiting and its impact not only on companies but also **the significant public interest ramifications**. Such training will of course require funding and staffing. The Commission and Member States must take the lead with respect to training, but the private sector will also need to provide significant support and cooperation, in both planning and execution.

## 9. PUBLIC AWARENESS

Public information and awareness campaigns in relation to counterfeiting will be critical to the long-term success of anti-counterfeiting efforts. Such campaigns will need to **focus on both the results of individual enforcement efforts and general education**. Enforcement authorities, trade associations and rights holders will need to cooperate closely in this regard in order to change public perceptions and ensure that consumers and policy-makers are fully aware of the true impact of counterfeiting.

## 10. EU APPLICANTS

Counterfeiting poses an even more serious challenge in many countries which are candidates for admission to the EU. The draft Directive should accordingly take into consideration the special conditions in many of these countries. In the meantime, the EC should make greater efforts to raise applicant countries' awareness of counterfeiting, including in ongoing enlargement negotiations. In conjunction with these negotiations, the EU should consider **expanding its training and technical assistance programmes**, and provide related funds and dedicated personnel.

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