



Commission Consultation on the Enforcement Directive

The Enforcement Directive 2004/48/EC relates to the enforcement of all intellectual property rights. It was intended in particular to provide access to information concerning an alleged infringing activity to enable a right holder to make a case in Court, and even seizure of materials. The necessary powers were already possessed, for instance, by the Courts in England and France, but not in all other EU countries. The European Commission invited comments (due by 31 March 2011) on the functioning of the Directive from interested parties, with a view to its amendment in due course. The Directive has been felt wanting with regard to Internet-related infringements.

The Federation did not respond initially to the invitation to consult, leaving more specialised representative bodies to deal with the matter of Internet-related infringements. However, it did make a belated submission in the light of the submissions of other consultees, and this submission was acknowledged by the Commission. For instance, BASCAP,¹ which is focused on counterfeiting and piracy, made proposals which might well be appropriate purely from that admittedly important perspective, but which if applied to other infringements could have economically disruptive effects.

The Federation's submission (a) endorsed the cautious approach to change which had been adopted in the submission of the UK government, and (b) made the following key points:-

- (i) That anything should be avoided which increased the practical value of invalid patents, or encouraged trolls.
- (ii) That nothing should be done that changed the current UK provisions on damages.
- (iii) That the Directive should continue to confine itself to civil enforcement, and that no attempt should be made to direct member states to introduce criminal penalties.

(iii) above, in particular, is consistent with long-standing Federation policy. Criminal law generally is still so unharmonised across the EU that central direction relating just to IP is wrong. In any case, any extension of criminal penalties for IP infringement beyond their present scope in UK needs special and cautious consideration. Criminal penalties have no place in UK for infringement of patents (*Trends & Events*, 2004/5, second page of Preface) or registered designs or unregistered design rights (*Trends and Events*, December 2010, page 13).

Mike Jewess, 12 December 2011

¹ Business Action to Stop Counterfeiting and Piracy, based at the International Chamber of Commerce in Paris, but effectively independent of ICC.