

PROPOSED E.U. DIRECTIVE ON INTELLECTUAL PROPERTY ENFORCEMENT

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The European Parliament is poised to adopt a controversial directive on Intellectual Property Rights Enforcement that would give rights-holders incredibly powerful tools in their fight against intellectual property infringers. While this might sound like a good idea at first, a closer look reveals that the directive doesn't distinguish between unintentional, non-commercial infringers and for-profit, criminal counterfeiting organizations. If this directive is adopted, a person who unwittingly infringes copyright – even if it has no effect on the market – could potentially have her assets seized, bank accounts frozen and home invaded. Don't let these tactics become the latest weapons in intellectual property rights-holders' destructive war on “piracy.”

The IP Enforcement Directive grew out of a 1998 EU Green Paper on counterfeiting and commercial piracy. It recommended harmonizing European countries' IP enforcement penalties for commercial infringement in order to remove distortions created by differences in each country's laws and to combat counterfeiting by organized crime. However, both the first draft released by the European Commission last year and the current version of the draft directive agreed upon by the EU Parliament's Legal Affairs and Internal Market Committee go much further and would allow rights-holders to use their powerful new arsenal of tools against any infringement of any intellectual property right by an individual consumer. Of course, what constitutes infringement varies from one European country to another, so the harsher penalties might apply to a particular act in some countries but not others.

The key to the directive is the definition of “commercial scale.” Several of the more extreme new remedies are only available for commercial- scale infringement. However, this is largely undermined by the definition in new recital 13a of the directive, which states, “The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage.”

Although it goes on to say, “This would normally exclude acts done by end consumers acting in good faith,” the meaning of “indirect economic advantage” is unclear and the directive is not limited to intentional infringements. Therefore, there is concern that rights-holders will be able to use the new tougher penalties against consumers who accidentally or unknowingly infringe, including those who commit minor infringements without any commercial purpose or impact.

In addition, many of the new powers may be used against innocent third party intermediaries like ISPs, network administrators, telecommunications and service companies. This will threaten their businesses and increase their operation costs.

New Remedies:

The directive gives rights-holders, licensees and collective rights management agencies the following new powers prior to commencing legal proceedings. However, unlike the English procedures from which some of these remedies are derived, the proposed directive does not

require a judge to review and weigh evidence before an order is granted, so the proposed directive has less procedural protections against abuse:

(a) Search and Seizure Orders: the right to obtain U.K.-style “Anton Piller” orders to search and seize property at an alleged infringer’s premises, without prior notice if a “judicial authority” fears that delay will cause irreparable harm or lead to the destruction of evidence. (Article 8) These orders can also be used against non-infringing third party intermediaries. An Anton Piller order targeting the distributors of the KaZaA P2P software was recently used to seize control of Australian ISPs' and universities' assets.

(b) Injunctions: allows rights-holders to obtain an injunction to prevent impending infringement or to forbid an alleged infringer from continuing allegedly infringing behavior. (Article 10 (1)) Rights-holders can also obtain pre-lawsuit injunctions against intermediaries whose services are being used by a third party. For instance, a rights-holder might obtain an injunction against an ISP requiring it to monitor its users’ behavior or to terminate a particular user’s Internet account based on alleged infringement.

(c) Freezing Bank Accounts and Obtaining Commercial Documents: rights-holders can obtain an order (“Mareva injunction”) to freeze the bank accounts and seize the assets of an alleged infringer. Rights-holders can also obtain an order requiring banks and other intermediaries to communicate or provide access to an alleged infringer’s financial and commercial documents. (Article 10(2))

(d) Right of Information: rights-holders can obtain an order requiring the disclosure of the name, address and other information about an alleged infringer from any person in the distribution chain of an alleged infringing product or service. (Article 9) A similar approach was rejected by a U.S. court in 2003 when Verizon successfully challenged the RIAA’s search for P2P users’ identifying information.

Although there is widespread agreement that commercial counterfeiters and pirates should be subject to tough penalties, the overbreadth and ambiguity of the proposed directive’s language allows rights-holders to use these new penalties against consumers and innocent intermediaries for any infringement of an intellectual property right. As a result, these provisions are likely to:

- Endanger consumers’ privacy and expose them to strident enforcement remedies for unintentional and non-commercial infringement;
- Harm free software and open source software distributors, stifling technological innovation, impairing competition and reducing consumer choice.
- Place significant cost burdens on ISPs, network operators and small businesses, which are likely to lead to increased costs for end-users.

Timeframe for Action:

- The EU Parliament’s Committee on Legal Affairs and the Internal Market - whose rapporteur Janelly Fourtou is championing the directive - met and approved the draft on February 23, 2004.
- The full plenary vote of the EU Parliament is expected to take place March 8, 2004.
- The Council of Ministers is likely to vote to approve the EU Parliament’s Plenary vote on March 11, 2004.

Links:

Proposed directive text as agreed between the EU Parliament and Council on February 16, 2004 (the Common Council Position):

<http://register.consilium.eu.int/pdf/en/04/st06/st06376.en04.pdf>

Foundation for a Free Information Infrastructure's webpages on the proposed directive:

http://www.ffii.org.uk/ip_enforce/ipred.html

http://www.ffii.org.uk/ip_enforce/legitimate.html

IP Justice's CODE resource page on the proposed directive:

<http://www.ipjustice.org/CODE/>

EDRI/ FFII's proposed amendments to text of the EU IPRED Common Council Position:

http://www.ffii.org.uk/ip_enforce/andreas2.html