



# Position of the Anti-Piracy Coalition on the proposed Enforcement Directive

## 2 September 2003

### INTRODUCTION

Piracy on the massive scale that is seen today is undermining investment in European culture, costing national economies thousands of jobs and robbing national governments of millions of Euros in lost tax revenues. The Anti-Piracy Coalition, representing the European film, video, music, business software, leisure software and publishing and authors' communities, is therefore extremely concerned that the proposed Enforcement Directive, issued by the European Commission to ensure the proper enforcement of intellectual property rights across the European Union (and the Accession Countries) will do little to tackle this enormous problem.

Work on strengthening anti-piracy enforcement measures in Europe began four years ago with the aim of preventing pirates from taking advantage of inconsistencies between, and weaknesses in, national laws. As part of that process, the European Parliament demonstrated its commitment to combating piracy when it unanimously adopted its Resolution on the Commission's Green Paper on Combating Piracy and Counterfeiting in the Single Market in May 2000. That Resolution called for "harmonising legislation" to "eliminate the persistent disparities in intellectual property protection arrangements in the Single Market". However, the proposed Directive fails to introduce such harmonisation, and will not change the current problem of national differences being a major factor in dealing with piracy. If adopted in its current form, the Directive could actually make things worse.

Although the Directive contains some welcome measures that will assist in the fight against piracy, it does not create measures that reach the levels already available under many existing national laws. Certain parts of the Directive create measures that are lower than international standards of intellectual property protection, in particular those established by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement), to which the European Union, and its Member States, are signatories.

Members of the European Parliament recently reiterated their commitment to tackling piracy when they adopted a Declaration on the Fight Against Piracy and Counterfeiting in the Enlarged EU in June 2003. This Declaration called for concerted action to address the alarming levels of piracy in Member States and the EU Accession countries. In addition, at its meeting on 21 March 2003, the European Council adopted a statement calling on the Commission and Member States "to improve exploitation of intellectual property rights by taking forward measures against counterfeiting and piracy, which discourage the development of a market for digital goods and services".

Parliament now has the opportunity to take effective action by correcting the shortcomings of the Directive so that it becomes a truly effective tool in the fight against piracy.

The main issues that must be addressed are:

**Harmonised civil remedies should apply to all infringements of intellectual property rights (Article 2)**

Civil enforcement measures in the Directive are limited to infringements of intellectual property rights “when the infringement is committed for commercial purposes or causes significant harm to the right holder”. These restrictions do not appear in Member States’ laws or in the main international intellectual property treaties. They are completely contrary to the stated purpose of the Directive, which is to tackle piracy by “harmonising national legislation on the enforcement of intellectual property rights”. Further, by failing to provide effective remedies for all infringements, the Directive fails to comply with Article 41 of the TRIPs Agreement.

The proposal sends a message that infringements committed with no commercial purposes are acceptable: this is wholly against existing standards of protection and practice. Furthermore, it will create considerable legal uncertainty as the question of whether or not an act of infringement has a commercial purpose or causes significant harm will have to be assessed on a case by case basis by national courts. This means that cases involving the same facts might well be regarded differently by national courts, even within the same Member State. The Directive is supposed to correct the problem of uneven interpretation and application of intellectual property laws across the Community: but having an arbitrary cut-off point will increase, rather than alleviate, the problem of differing national laws.

The restriction applies to all the civil remedies available to right holders in the Directive. This means that in some cases it will be impossible for right holders to use the remedies in the Directive, as they will not know whether the piracy activities they wish to take action against are being conducted for “commercial purposes” or not.

A harmonising Directive is supposed to create certainty, not uncertainty. It should not leave the question of whether effective remedies are available to the subjective and variable assessment of national courts. The only solution is completely to do away with the “commercial purposes/significant harm” restriction in the Directive. The Parliamentary Declaration on the Fight Against Piracy and Counterfeiting specifically calls for strong civil sanctions against any intellectual property infringement.

**Representative organisations should be able to act on behalf of their members to protect their rights (Article 5)**

The proposal opens the way for professional organisations such as trade associations and collective management societies to take action on behalf of their members. This is helpful but amendments should be made to Article 5 to make it clear that only right holders, or bodies that they have authorised to act on their behalf, should be entitled to bring legal actions in cases involving their rights. The fact that professional organisations will be able to bring legal actions will not prevent right holders from taking actions on their own as well.

**Proving ownership and existence of copyright needs to be simpler (Article 6)**

The Directive tries to help right holders by creating a “presumption” that if right holders state that they are the authors of a work, then this should be regarded as being so (unless the contrary is proved). But this does not go far enough. The presumption should extend to producers’ and performers’ so called “related rights”, and there should also be a presumption that copyright and related rights subsist in the work in question unless otherwise proven. Article 6 simply restates existing international obligations relating to the creation of presumptions under the Berne Convention, which all Member States have implemented anyway.



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Reasonable presumptions are of immense practical importance as they eliminate the need for vast amounts of evidence in relation to matters that are, in the majority of cases, clear and obvious. Such presumptions already exist under international treaties and have been extended in a number of Member States. It is very important to note that these presumptions are as to basic facts, not presumptions of guilt. Defendants can always counter these presumptions by providing their own evidence. But - if there is a dispute, the right holder should be able to deal with this by submitting statements or other written evidence. The rightholder should not always be obliged to deal with all allegations in person.

A recent case illustrates the importance of these presumptions. A discotheque was alleged to have been playing music without having paid the appropriate costs to the relevant collecting society. In the proceedings that followed, the disco owner asked the society to prove that copyright existed in respect of the music involved, and required that rights holders appear in person to testify. This meant that a number of artists, producers and musicians had to give evidence, many of whom were based overseas - evidence on matters that the disco owner had no reason to doubt. The only reason the disco owner raised the issue was to cause cost and inconvenience: and thereby to pressure the society into dropping the case.

**“Sampling” should be permitted as a means of providing evidence (Article 7)**

The Directive needs to allow right holders to use samples as a method of providing evidence in large piracy cases. A recent example illustrates why this is so necessary.

In May 2002, FACT, a UK anti-piracy organisation, obtained a court warrant to search a large container situated at a farm in Lanarkshire, Scotland. 10,000 pirate DVDs and associated equipment were seized. Intelligence gained from the raid permitted the identification of the defendant’s shop, which was subsequently raided and a further 5,000 DVDs seized. However, local evidential rules required the examination of each of the 15,000 discs seized, a process which took 2 staff a period of 6 weeks to complete. All were pirate copies. This costly process could be largely avoided, without prejudice to the fairness of the proceedings, by the intelligent use of sampling. Where a reasonable sample of seized copies proves to be pirated, it should be assumed that the remainder of the seizure is also pirated unless the defendant can show otherwise. The principle of sampling has been recognised in the recently adopted EU Customs Regulation.

**Civil Search and Seizures Procedures need to be made workable (Article 8)**

It is universally recognised that right holders need to be able to enforce their rights by taking quick action against suspected pirates, especially by taking “surprise” seizure actions to prevent pirates from hiding or destroying evidence of piracy. These “civil searches” are an essential enforcement tool, and are present in the laws of all EU Member States, as well as some Accession Countries. But like many remedies across the EU, civil search laws vary enormously. The Directive needs to make sure that the remedy is equally useful everywhere.

When appropriate, civil search and seizure orders should be based on “anonymous” evidence provided on behalf of a third party, if that third party does not wish to be identified to the pirate. This can be because the third party has legitimate social, economic or personal safety reasons for not wishing his or her identity to be known by the pirate. This is vital for the measure to be an effective and workable tool for right holders. This already happens in a number of Member States. In addition -

- Right holders provide guarantees to make sure that defendants are compensated if the search action uncovers no evidence - but how these guarantees should be dealt with needs clarifying
- Under the Directive, if evidence is found by a right holder during a search, it must start legal action within 31 days - or lose the right to use the evidence it





seized (and even have to give back that evidence, which may be counterfeit goods). This will encourage pirates to avoid the right holder while the 31 days run out. The time limit within which the right holder must start action should be either the 31 day period, or a different period that can be set by the national courts. This is the position required by the TRIPs Agreement.

- Applications for civil search orders need to be dealt with quickly by courts

**Courts should be given powers to require pirates to disclose information about pirate goods (Article 9)**

When an act of piracy is discovered, courts should have the authority to ask the infringer, or other involved parties, to reveal where the pirated goods came from. The Commission’s proposal implements this principle, but it is limited to cases where the piracy is taking place for “commercial purposes”. This limits the use of this provision as it may restrict the detection of “up-stream” production and distribution, which are likely to be large-scale criminal operations.

The ability to obtain information regarding the origin of pirate goods and their distribution networks is essential in the fight against piracy. This provision should not be limited only to cases where the infringement is carried out for “commercial purposes”. Judges will obviously exercise their discretion under this Article with due regard to data privacy laws.

**The provision on damages needs to be strengthened (Article 17)**

The current proposal is weaker than remedies already available across the EU. It is an established principle that right holders should have a remedy whenever their rights have been used without their permission - regardless of whether the infringer knew he was infringing. The award of actual damages should not, therefore, be made subject to infringers’ knowledge as suggested in the current proposal: the question of knowledge should be limited to the award of “double damages” only.

Some infringers try and avoid paying any damages by buying a licence for a work after they have been “found out” by the right holder: in Norway, an organisation that was blatantly using illegally copied software avoided paying any damages by simply buying licences once court action against it started. This cannot be allowed in the EU, otherwise there is simply no deterrent to piracy of this sort. Also - the Directive states that a right holder “may” recover all profits made by an infringer as a result of its activities: this needs to be changed, as there should not be any circumstances in which an infringer can gain financially from piracy.

In some cases, assessing damages can be very difficult. Pirates are rarely found in possession of anything but a fraction of the total number of infringing products they have made or distributed: this problem is made worse in the digital environment, where there is often no physical evidence of any copies having been made. As a result, right holders are left uncompensated and pirates are undeterred. A French lower court in Montauban ruled that it could not award any real damages against a provider of illegal downloads, because it was impossible to provide evidence on how many of the users that connected to the website had actually made illegal copies. Courts therefore need an option which allows the judge to make a fair estimate of the loss on the basis of surrounding circumstances. The Directive should therefore allow courts to award “pre-established” damages within a set range, if they so choose.

**Criminal sanctions should exist at least for all intentional infringements (Article 20)**

Most Member States already provide for criminal sanctions for all intentional infringement of copyright and related rights. The Commission’s proposal only applies criminal sanctions to infringements that are committed for “commercial purposes”. The proposal is clearly inadequate. There are plenty of harmful,

deliberate actions taken by infringers that cannot be said to be committed for “commercial purposes”.

The “commercial purpose” requirement seriously weakens the potential effectiveness of the Directive in fighting piracy. It fails to live up to the EU’s commitment, under Article 61 of the TRIPs Agreement, to criminalise intentional infringements committed “on a commercial scale”. The Directive’s subjective “commercial purposes” test waters down this standard, and will encourage bad-faith defences to criminal prosecutions. The wording should be changed: all intentional infringements that are either committed for direct or indirect financial gain, or cause substantial injury to right holders, must be criminalised.

### ***Use of identification codes on discs should be mandatory (Article 22)***

The Directive encourages makers of “optical discs” (CDs, CD-Roms and DVDs) to adopt codes of conduct “aimed at helping manufacturers of optical discs to combat infringement of intellectual property”. A voluntary code is not enough. In its May 2000 Resolution, Parliament called for a “requirement that all digital media produced in Europe be inscribed with an industry standard identification code.” The Source Identification Code, or “SID” code, is such an industry standard code. It is a serial number that identifies the plant where discs are mastered and/or manufactured.

The code is embedded in the machinery that makes the discs, so that it automatically appears on each manufactured disc. Since the discs can then be traced back to origin, the scheme acts as an incentive to factories to check that the customer placing a manufacturing order has the right to do so. It also improves the ability of law enforcement agencies to determine whether the disc is pirate or not.

In a number of countries round the world, optical disc manufacturers are obliged to apply industry standard identification codes on their discs, which has resulted in a significant reduction in pirate manufacturing in those countries. In Europe, factories making 80% of all CDs, DVDs and CD-Roms manufactured voluntarily use SID codes. These responsible factories support the mandatory use of SID codes. Despite this, the Commission’s draft only recommends the voluntary use of the SID code in Europe - this would do nothing to encourage the remaining 20% of manufacturers to use the code.





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