



## EC ENFORCEMENT DIRECTIVE 12 January 2004

### Urgent adoption of the proposed Directive to combat piracy and counterfeiting is essential

Piracy and counterfeiting are a real and urgent threat to European competitiveness, jobs, culture, consumer choice, and safety. These illegal activities deprive Member States of hundreds of thousands of lost jobs and billions of Euros in tax revenue. The Anti-Piracy Coalition, representing the European film, video, music, business software, leisure software, publishing and authors' communities, and many others depend on the protection of their products against unlawful copying and imitation in order to be able to make their livelihoods and finance creativity, growth and innovation. A Directive to ensure the practical enforcement of substantive rights already granted under Community legislation is an essential and urgently needed step to protect Europe's knowledge industries, creative sectors, and European economies and citizens.

The Legal Affairs Committee of the European Parliament has corrected a number of defects in the Commission's proposal. The Commission's proposal with its limited scope of application conflicted with the *acquis communautaire* and would have fallen below its international obligations, in particular Articles 41 and 61 of the WTO TRIPs Agreement. In the field of civil proceedings, the 5 December 2003 report of the Legal Affairs Committee recognised best practices from all Member States, while leaving unaffected the careful balance of rights, protections and responsibilities established by the Electronic Commerce and Copyright Directives.

It is important for the survival and success of the European knowledge industries and creative sectors that the Enforcement Directive is adopted as soon as possible and before EU enlargement this year. We urge the Council and the EP to work towards this.

In the hope of providing constructive comments for the discussion between the Council and the EP on this matter, the Anti-Piracy Coalition has compared the report of the EP Legal Committee with the working document of the Italian Presidency of 19 December, 2003, and would like to stress the following points.

## PRIORITIES:

1. **Article 2** - The WTO TRIPs Agreement obliges the EU and Member States to provide remedies against all infringements of intellectual property rights. This is currently recognized in the national laws of the Member States. It is therefore vital that the scope of the Directive not be limited to infringements ‘*carried out for commercial purposes or causing significant harm*’ or any other type of threshold. In addition to being unworkable in practice, such limitations would also send the dangerous message that the EU condones a certain level of IP violation. Both the EP report and Italian Presidency working document recognise this and properly delete the limits in Article 2.
2. **Article 6** - Reasonable copyright presumptions are of immense practical significance in infringement proceedings. To be fully effective, Article 6 should be amended to include a presumption of subsistence of copyright. Further, the presumption of authorship and subsistence of rights should be extended to also cover the ownership and subsistence of related rights. This is of great practical importance as in most piracy cases it is the producer that brings the legal action against the infringers. The presumption for related rights already exists for instance in Ireland, United Kingdom, Finland, Sweden and Lithuania. This extension would be in line with the aim of the proposal, which is to harmonise best practices in the EU. The EP has already taken up this point and we would urge the Council to do the same. We understand that a number of EU Member States would support this proposal.
3. **Article 8** – Civil *ex parte* searches ensure that right holders can gather evidence of infringements. To ensure Article 8 works in practice, it should be amended to allow *ex parte* orders to be based on anonymous evidence provided on behalf of a third party (the Irish Copyright Act provides a useful model in this regard). This ensures that witnesses can provide information about infringements without fear of reprisal from infringers. We agree with the Council that an “equivalent assurance” should suffice by way of security against possible damage to the defendant and that right holders must be given adequate time from date of the seizure to initiate infringement proceedings.
4. **Article 9** – The right of information is essential for the effective fight against piracy. Article 9 requires amendment to make it truly effective. The wording of Article 9 (1) (ba) of the Italian Presidency working document covering “persons found to be providing for commercial purposes services used in infringing activities” is similar to the amendment of the EP on Article 9 (1) (b). This should allow the Council and EP to come to an agreement on this point. As proposed in the report of the EP, the term “commercial purposes” should be deleted in Article 9 (1) (a) and (b) of the Italian Presidency text.
5. **Article 15** – We support the text of the Italian Presidency working document as it is clearer and more to the point than the amendments of the EP. Injunctions are essential remedies against infringements of intellectual property rights.
6. **Article 17** – To fulfill its obligations under the WTO TRIPs Agreement, the EU must implement civil remedies that deter and prevent piracy. As drafted by the Commission, Article 17 – which includes actual and multiple damages (already available in some Member States) – is an important first step in this regard. We encourage the Council to build upon Article 17 rather than to weaken it. First, consistent with EP amendment 38 and with the norm EU-wide, it is necessary to delete “the knowledge requirement” for actual damages in Article 17 (1) of the Italian Presidency working document. Right holders should further have the ability to recover all profits from the infringements; infringers should not benefit from their misdeeds. Finally, we support the EP amendments introducing pre-established damages. Pre-established damages, which are contemplated under TRIPs and which exist in some non-EU countries, permit the judge to assess the loss to an injured right holder on broad, equitable principles, based on a monetary range between a reasonable minimum and a reasonable maximum, set by each Member State in accordance with its national conditions. This ensures that right holders have a remedy even where their losses are difficult or impossible to quantify. Pre-established damages also reduce

costs for all parties, by allowing the judge to assess a fair award of compensation by a quick, non-technical procedure. In this regard, pre-established damages are an especially important measure for SMEs.

7. **Article 20** - It is important that the Enforcement Directive sends the message that infringements of intellectual property rights are not only covered by civil measures and procedures, but that, in certain cases, Member States can also impose criminal sanctions. For this reason we support the text of the EP report and the Italian Presidency working document.
8. **Article 22** – A source identification code (“SID” code) is a serial number that identifies the plant where the optical discs are mastered and/or manufactured. In a number of countries around the world, optical disc manufacturers are obliged to apply such industry standard codes on their discs, which has resulted in a significant reduction in pirate manufacturing in those countries. The obligation to use such industry standard codes has proven to be an effective proactive tool to fight piracy, as it creates an incentive for replicators to check that the customer placing the order has the right to do so. The broad use of identification codes also improves the ability of law enforcement agencies to determine whether a product is pirate or not and to identify the source of such pirate products. In the EU, factories making 80% of all optical discs voluntarily use SID codes. These responsible factories support the mandatory use of an industry standard code. Despite this, the Commission’s proposal only recommends the voluntary use of such codes in the EU. This would do nothing to encourage the remaining 20% of the manufacturers to use the code. The copyright industries and the organisation representing the optical disc plants (iODRA) therefore support the amendment of the EP to make the use of unique identification codes on optical discs (CDs, CD-roms and DVDs) mandatory.

#### **ADDITIONAL AMENDMENTS REQUIRED:**

In addition to our main priorities as stated above we would also like to suggest the following changes to the text of the Italian Presidency working document.

**Article 5** – The text of the Italian Presidency working document on Article 5 (1) should be amended as follows to bring it into line with the amendment of the EP: “Member States shall recognise as persons entitled to seek application of the measures and procedures referred to in this Chapter the holders of intellectual property rights, as well as natural or legal persons authorised by the right holders to bring legal actions to protect the rights covered by this Directive. This entitlement shall [...] be accorded to [...] their exclusive licensees and their exclusive sub-licensees.

**Article 7** – We support the amendment of the EP adding “sampling” as a means of providing evidence in large piracy cases. Sampling is an essential tool in the fight against large scale and organized piracy and counterfeiting.

**Article 10** – We propose the deletion of the term “commercial scale” in the new Article 10 (1a). This term is superfluous. The infringements covered by this Article are by nature infringements carried out on a commercial scale, so there is no need to state this specifically in the text.

**Article 12** – The last part of the second paragraph “unless particular reasons are invoked for not doing so” should be deleted as the third paragraph already makes it clear that the corrective measures must be commensurate with the seriousness of the infringement.

**Article 16** – We would suggest that the last part of the first paragraph of Article 16 should be amended as follows “and if the injured party agrees to such pecuniary compensation in lieu of the above measures”. The second paragraph of Article 16 should be deleted. Unless these changes are made, the article could unwittingly create a sweeping *de facto* compulsory license regime for all uses of intellectual property rights.

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