

# The IP Enforcement Directive – a Threat to Competition and Liberty

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## 1 Executive Summary

Recent developments in European intellectual property law will pose very serious problems for a number of businesses and civil society interests in Europe. The main losers will include the communications industry, from phone companies to ISPs; supermarkets; parts of the software and computer gaming industry; libraries; and the education sector.

The European Commission wants to strengthen copyright law, under pressure from Microsoft and the music industry. This will upset a number of existing political balances.

1. The E-commerce directive limits the liabilities of communications service providers for copyright-infringing content carried on their wires, provided certain conditions are met
2. The Software Directive permits companies to reverse engineer their competitors' products in order to produce compatible, competing products
3. The doctrine of community exhaustion of trademarks prevents brand owners from using trademark law to stop trade in their products within the EU. (In effect, grey market importing becomes a civil right)
4. 'Fair use' and 'fair dealing' provisions in copyright law protect the interests of schools, universities, libraries, the blind and other social interests.

The Commission has produced a Draft Directive in Intellectual Property Enforcement whose aim is to "harmonise" EU law on penalties and powers against infringement to the highest levels found across the member states. We have summarised the bad effects that this Directive would have on industry and on civil society groups in a web page at:

<http://www.cl.cam.ac.uk/users/rja14/draftdir.html>

In the communications sector, the draft Directive will enable copyright owners - from Walt Disney to the pornographers - to harrass service providers with limitless injunctions, equipment seizures and damages claims in the hunt for people who swap copyrighted material on the Internet. This will be like the RIAA v Verizon case in the USA only worse.

In other sectors, the new directive will make it easier for incumbent large firms to harrass or suppress competitors, grey importers and aftermarket suppliers, using copyright, trade-mark or patent law, as well as technical 'anti-circumvention' provisions. In the computer business, for example, this may be good news for Microsoft, but will be bad news for open-system vendors like Sun, and for new startups. In the gaming business, it will enable Sony to increase its revenue from the Playstation, but will be bad news for companies that sell accessories; in future, it will be harder for them to escape paying royalties to Sony. In the motor industry, it will make life harder for traders who move cars and motorbikes to higher-price markets such as the UK, and for third-party manufacturers of spare parts.

Universities, libraries and the disabled stand to be hit by the restriction of 'fair use' and 'fair dealing' rights under copyright law. In future, publishers of electronic books will be able to use technical mechanisms to suppress the right to make copies for private study, or to use devices such as book readers that render published matter into accessible formats. There are many others who will lose out; for example, under the proposed IP enforcement directive, EU member states will have to criminalise busking - except for buskers who limit themselves to their own compositions, or to the works of composers who have been dead for at least 70 years. This may improve the quality of the music on offer on the London Underground, but is hardly compatible with most people's idea of a free society.

So far, the IP lobby has had things all their own way. There are several reasons for this. First, they have succeeded in portraying the issue as simply one of suppressing piracy, to which it is hard to object. Second, IP law is complex and abstruse. Third, the winners are a small number of large organisations (Time-WarnerAOL, Bertelsmann, Microsoft, Sony, Honda, Yves Saint Laurent...) who have been able to coordinate their activities and lobby internationally, while the losers have been more diverse.

However, the breadth and the depth of the damage threatened by the new directive makes resistance necessary. The copyright lobby has pushed the balance too far, and the number of companies and civil society interests that stand to lose is now so large, that the time has come to push back.

The Foundation for Information Policy Research now seeks to raise \$300K to lobby within Europe against the proposed Enforcement Directive, for the revision of the Copyright Directive and the Database Directive, and on related issues such as software patents.

## 2 FIPR

The Foundation for Information Policy Research (<http://www.fipr.org>) was founded in 1998 and has since become the leading think tank for Internet policy in Britain. It studies the interaction between IT, Government, business and civil society. It researches policy implications and alternatives, and promotes better understanding and dialogue between business, Government and NGOs across Europe.

When it was founded, the community faced a similar crisis, but over surveillance rather than copyright. An inexperienced incoming UK government had been persuaded by the police and intelligence agencies to propose sweeping powers of Internet surveillance that would have created many official jobs, but would also have created huge costs for UK businesses and made it difficult for UK residents to use standard software products that incorporate encryption. It was also felt to be profoundly offensive by many NGOs and individuals, including many who had supported the new government's election (after it had promised not to do anything of the sort).

The situation then on surveillance was similar to that on copyright now, in that many businesses and NGOs wished to block the proposals but lacked coordination and leadership.

The Foundation for Information Policy Research was set up to provide the missing leadership. We set out to raise £200K from industry; we got £100K from Microsoft, £50K from Demon's founder Cliff Stanford, £30K from the late Professor Roger Needham, £20K from Hewlett-Packard and \$10K from John Gilmore. We hired a full-time director/lobbyist, Caspar Bowden, and over the next two years lobbied hard to make the Government see sense and abide by its pre-election promises. By the time the Regulation of Investigatory Powers Bill was passed in 2000, we had managed to draw the worst of its teeth. We are still following through the implementation of the RIP Act and have managed to fix up many other problems that arise in draft regulations and in the course of consultation exercises. The history of this effort can be found at (<http://www.fipr.org/rip/>).

Since then, FIPR has become involved with a number of other technology policy issues, from electronic elections to export control (where we managed to insert a research exemption in the recent Export Control Act, which would otherwise have compelled both academic and industrial researchers to register or even licence many of their overseas collaborations down to the level of keeping all emails for official inspection).

We are already active in the field of copyright. We obtained a grant from the Soros Foundation to analyse and compare the implementations of the EU Copyright Directive in the existing member states, so that we can provide sound advice to the new accession states about how to draft their own regulations. This has taught us that the EU CD need not be a monopolist's charter, or expunge fair-use rights; for example, the Spanish implementation stipulates fines of Eu 6000 per day for companies that abuse electronic copyright-control mechanisms to override existing fair-use rights. We are making other countries aware of

precedents like this as they work on their own regulations.

We have also undertaken an economic analysis of Microsoft's 'Trusted Computing' initiative, which purports to include DRM in future PCs. We showed that its main beneficiary was not the music industry, as had been claimed, or even the PC owner, as was then claimed; its main beneficiary is Microsoft, as it will increase the level of customer lock-in and thus enable Microsoft to raise its prices. This analysis was formally submitted to Mario Monti, the Commissioner in charge of the Competition Directorate. Subsequently, the Commission has announced a four-month delay in producing a judgement in the current anti-trust case against Microsoft, and that it is considering ordering Microsoft to unbundle Media Player from Windows. This is a far tougher sanction than was ever considered in the US anti-trust action.

We met with the German ministry of economics and labour in Berlin, at a conference they organised on 2nd July specially to let us meet opinion leaders in their country. This led to an opinion by the law professor who advises them that 'Trusted Computing' violates European competition law on six counts. The following week we met the European Commission, at another conference that they in turn organised for us on 8th July to meet people there. We met senior officials of DG Infosoc and, the following day, DG Competition. They have both agreed to push amendments to the draft Directive internally once we come up with suitable texts that have industrial support. We also met with NGOs from France and Germany and got assurances of their help in lobbying the European Parliament. On 15th July I spoke at the PODC conference near Boston and met with prospective funders. Meanwhile, I have briefed the UK Patent Office's point man and got him to understand that the Directive as standards can be seriously damaging to UK industry. I have also briefed the data protection unit in DG Internal Market - the DG promoting the Directive. They are starting to realise that there are potentially serious privacy problems. Finally, my colleague Ian Brown attended the European NGOs' copyright conference at Metz where he made many groups aware of the Enforcement Directive for the first time.

So we are quickly making allies and building momentum. Our achievements so far are useful first steps. But they are not enough.

### 3 Proposed Work Plan

What we propose is a major lobbying campaign to get the European Union to abandon or greatly scale back the proposed Enforcement Directive. This will be merely the first battle in a longer campaign to rein in the excesses of the copyright lobby and re-establish a proper balance between the rights of intellectual property owners on the one hand and the social interests in competition policy, free trade and the digital commons on the other. We propose to follow through by lobbying for amendments to the EU CD and for abolition of the Database Directive, and finally for a Directive on Digital Rights to settle the balance for the longer term.

We propose to repeat our formula from the 'crypto wars' or 1998-2000, by

raising money - substantially from industry, though contributions from individuals are also welcome - to hire professional staff who will anchor a broad coalition of industrial and civil society groups.

Europe is harder to lobby than Westminster not just because it is larger, but because power is more diffuse and opaque. Rather than one full-time staff member we reckon we will need two - a Director in London and a lobbyist in Brussels.

In addition to these paid staff, we will retain access to a large number of volunteers; many members of FIPR's advisory council are interested in IP, competitiveness or both, including Ross Anderson, Nicholas Bohm, Ian Walden, Julian Midgley and Martin Keegan (the last two of whom also run the Campaign for Digital Rights). We also have an advisory board assembled for the Soros project that includes Pamela Samuelson, Barbara Simons, Fred von Lohmann and Robin Gross. We also have strong links with IP activists such as Jamie Boyle, who ran a workshop recently in London to help pull concerned people together. These groups will provide the intellectual leadership, while the full-time staff provide the organisational muscle.

The following tasks will be undertaken:

1. we will produce a stream of information and analyses for the Commission, member state governments and the press. We will continue to research the conflicts between IP law, competition policy and liberty, and to promote the results of this research aggressively to all the principals who can influence decisions, directly or indirectly. This will involve running a mailing list, building a campaign website and a number of other network-building activities
2. We will make a particular effort to lobby the European Parliament, whose legal affairs committee will consider the Enforcement Directive on the 11th September. According to our sources near the Commission, the Parliament is gung-ho on the Directive, seeing it as a simple matter of beating up the 'pirates' and thus gaining the gratitude of the music and software industries. We must educate them about the more complex realities of the world.
3. This will involve not just professional lobbying but also coordinating the activities of groups in a number of different countries that have different agendas. In the German-speaking world, for example, the largest group of activists is concerned with the spear of US-style software patents and the threat they pose to free software. Free software will clearly suffer if the Directive passes, and we have been assuaged by Francois Pellegrini of the support of the Eurolinux movement. Richard Stallman has also offered to help. However, we will have to work to feed in arguments, to motivate and to coordinate all this volunteer activity.
4. We will continue with formal and informal representations to the Commission and in particular to DG Infosoc and Competition, which oppose the

Directive internally and have already managed to water it down. We will feed them with proposed amendments, letters of support from companies large and small, economic analysis and evidence. We will also attempt to undermine DG Internal Market which is currently driving the directive. We have already started work on their data protection unit, and will follow through by appealing to DG officials with experience in DG Comp or DG Industry. We will also attempt to organise political representations to Commissioner Bolkestein (who is an economic liberal).

5. We will organise meetings in member states of affected business and NGO interests, to help inspire and coordinate national lobby groups.
6. We will attend a series of conferences being held over the summer, including Metz, ISSE and Helsinki, as well as technical conferences such as PODC. We aim to organise our own event later in the year, along the lines of the ‘Scrambling for Safety’ conferences that FIPR used to push the anti-surveillance agenda in the UK.
7. We will work with existing transnational umbrella groups that have relevant interests, such as the Transatlantic Consumer Dialogue (<http://www.tacd.org/>), and endeavour to bring them into the fray.
8. We will work hard to reach out to the accession states, and to those member states that have so far had little involvement in the copyright debate, so we can build the widest possible political constituency for common sense. The more countries take a sensible line on EU CD, as Spain has done, the harder it will be for DR Internal Market to push the Enforcement Directive too far beyond that.
9. We will work upwards towards WIPO and the Doha round of trade talks to try to influence the environment in which IP law gets made. Above all, the message must be that free trade is good, that artificially maintained monopolies are especially bad, and that on a wide range of issues the interests of most businesses coincide with those of NGOs and other civil society groups. The overall FIPR message so far has been that governments should not be pro-business but pro-market.
10. We will make concrete proposals, not just complain about the anticompetitive effect of the existing draft. For example, copyright is not a property right but a social contract. On the right hand, the creator of a work gets to enjoy a monopoly for his lifetime and 70 years thereafter. On the left hand, society gets a number of rights too: the work becomes public domain 70 years after the author’s death, there is a right to satire, there is a right to make a personal copy, there are access rights for the disabled, and so on. Some member states in their EU CD implementations are strengthening only the right hand side, while some are strengthening both. In Spain, for example, the draft law will punish with fines of Eu 6000 a day anyone who uses a technical protection mechanism to deny an established

fair use right. We will propose as an amendment that, in the interests of justice and of the single market, that all member states should have to enforce the left hand side as well as the right hand side. That will be enough to block many of the obvious anticompetitive abuses. We will also propose that all member states should follow the example in Denmark and Portugal of setting up a special tribunal to deal with abuses of copyright enforcement mechanisms.

## 4 Fundraising target

We seek to raise \$300K (roughly the same amount in dollars or Euros), and in line with our previous experience we are looking for a key donor to provide half of this, a second key donor to provide about a quarter, and a number of substantial donors to make up the rest with five-figure sums.

Prospective \$150K donors are

- computer companies such as Sun and Oracle that suffer from Microsoft's monopony and would suffer more from its extension
- telcos such as BT and T-mobil
- supermarkets and other large resellers or grey imports

Prospective \$50-75K donors are:

- Computer games firms who suffer from the tying and bundling strategies of Sony, Microsoft
- large ISPs who would suffer if made criminally liable for copyright material transmitted through their networks

Prospective \$10-20K donors include high net worth individuals, civil liberties groups, artists, and trade unions.

We particularly want to hire an experienced Brussels lobbyist; the bill for this would be \$3500 per month for six months plus extras, a budget figure of \$30K. This might be attractive to a single donor as a targeted gift. Salary support for FIPR's director for six months would be \$50K; he would concentrate on organising NGOs and volunteers (70%) and building industry support (30%).

## 5 How we will spend the money

The budget of \$300K will be spent as follows:

1. We will hire Ian Brown full time as campaign director, at a salary of \$70K plus overheads plus expenses – say \$120K per annum given the amount of travelling

2. We will retain a lobbyist in Brussels for \$3500 per month, plus extra funds for lobbying effort spikes – say \$60K per annum
3. We will make a big push ahead of the European Parliament meeting next September, and get a number of groups there on the ground to lobby MEPs in person during the crucial period between the MEPs' return from holiday in the last week of August until the hearing on the 11th September – say \$30K
4. We will organise a big conference in Brussels in the autumn to bring together EU interests. Magnet speakers such as Prof Christain Koenig, the German competition law expert, are willing to speak and will attract many senior EU officials. Conference plus follow-through – say \$25K

The cash flow will depend on how quickly a significant starter donation can be raised, so that we can engage staff. If this happens quickly, so that staff begin at the start of August, then we will have

Cash burn July – December: \$140K

Cash burn Jan – June \$90K

If we raise \$300K this will give us reserves for contingency / follow-through of \$70K.

## 6 Prospects of Success

Because the draft Enforcement Directive is so clearly a step too far, and because many member states are already objecting to it, there is a superb opportunity to kill the momentum of the copyright lobby and restore some sanity to the IP-based business environment.

It is not inevitable, as some claim, that the ratchet of IP lawmaking can move in only one direction. A precedent can be found in UK law, where during the 1960s the combination of trademark and copyright law gave overly string protection to manufacturers against third parties who manufactured compatible parts. The effect was that car parts, among others, became extremely expensive; after a while the Ford Motor Company in the UK was earning more from spare parts than from sales of new cars. UK-made cars became unreliable and dangerous. Eventually the pressure mounted to the point that the Copyright, Designs and Patents Act of 1988 tackled the problem.

The opportunity we now face may be even better, because of the confluence of industrial, retail and civil society interests. The concerns over the digital commons so ably expressed by Larry Lessig have motivated many; the fear that Microsoft will use 'Trusted Computing' to abolish free software motivates many more. Above all, the overall economic interests of society are quite clear, and the IP extremists have been far too greedy.

Now is the time to push hard.