

# Coalition Report

Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights - 2005/0127(COD)

FFII/EFF/EBLIDA/BEUC coalition report on the proposal as amended in Strasbourg by the European Parliament at its first reading on Wednesday, 25 April, 2007.

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# 1. Executive Summary

The original Commission proposal has been heavily criticized, and much of the concern can be traced to two major lines of analysis. First, many Member States submitted that the proposal went beyond the legislative competence of the European Community. For example, as the Dutch Parliament stated in a letter, the legal means to combat piracy are already available, so the proposal was not justified. Second, almost all position papers written about the proposal characterized it as disproportional, and noted that it fails to make adequate distinctions between commercial piracy enterprises, legitimate/lawful activities undertaken by business competitors, or even the common activities of ordinary Europeans.

It should not be forgotten that in almost all cases, civil enforcement (rapid injunctions and damages) work better to protect intellectual property rights. In many countries the IP criminal law - although well-developed - only plays a subordinate role in actual practice.

The directive as amended by the European Parliament (EP) raises a number of additional concerns because key concepts and definitions are left unacceptably vague, which amplifies the criticism that IPRED2 will be both **disproportional** and **ineffective**.

**The directive as amended by the EP is not proportional.** Instead of targeting commercial infringement enterprises -- those profit-seeking organizations that operate outside the law on a massive scale -- the directive criminalizes the behaviour of ordinary consumers and legitimate business enterprises. This results from a number of flaws in the adopted text. First, the definitions are weak. Second, the text creates an unprecedented scope of secondary liability for Internet intermediaries, ICTs, software vendors and a range of legitimate business activities. Third, it has an overbroad scope, including a number of untested new rights, as well as rights that are not harmonised in Community law. Fourth, one of the adopted amendments makes infringements "universal" crimes, prosecutable all across the Union.

The resulting text threatens to undermine the Internal Market's current predictable legal environment and will have detrimental consequences for consumers and industry alike.

**The directive's lack of clarity on central concepts will render it ineffective for its intended purpose, and it will force the European Court of Justice (ECJ) to take on an inappropriate legislative role.** Undefined legal concepts or poor definitions will not give the Member States more freedom to implement the Directive since eventually the ECJ will decide. The same is true with regards to the Member States' wish to leave the penalties undefined: eventually the ECJ may decide. Not only is the ECJ the wrong venue for setting EU-wide criminal policy, it is also likely to extend the era of legal uncertainty initiated by the Directive. The Community would in fact be making Carte Blanche criminal law, without any certainty about the final outcome and a deliberate lack of definitional clarity, which means the ECJ would be forced to take on a legislative role. In short, the promise to respect national sovereignty on law enforcement matters is empty if the directive is sure to require "interpretation" by the ECJ.

Conflicts over poorly defined Community legislation eventually end up in time-consuming ECJ preliminary rulings, but such hearings take an extraordinarily long time for criminal cases. In each case in which a preliminary ruling is asked, the case may be dismissed or the punishment may be lower. For

these reasons, Community criminal law is a major threat to effective law enforcement.

In contrast, an alternative approach, incorporating clear definitions is likely to be more effective to combat counterfeit and piracy. The more precise the definitions, the higher the likelihood that Member States' implementation of the directive would not interfere with national legislation in the field of criminal law and the lower the risk ECJ would have to take the role of the legislator.

**Recommended Action:** The Directive is fundamentally flawed. For these reasons, we are united in our belief that the best option would be to reject the directive in its entirety. A second best alternative would be to seek to ameliorate the most egregious impacts of the directive by incorporating legally precise definitions to safeguard legal certainty and proportionality. Even then, a solution must be found for the problem that preliminary rulings take too long for criminal cases.

## 2. Competence and subsidiarity

### 2.1 General remarks

Since much has been said on the competence issue already, we limit ourselves to the following few remarks.

In case C-176/03 the Member States submitted: "27 Not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community (...)" .The European Court of Justice disregarded this objection and ruled that the Community can take measures which relate to the criminal law of the Member States. The decision in case C-176/03 was extremely controversial and has not been universally well-received. Put simply, it expands the sphere of legislative competence of the Community at the expense of Member States. For this reason, it has been called a "judicial coup d'état ", coming as it did, shortly after the Constitution was voted down. The Commission and the Parliament have adopted a broad interpretation of case C-176/03.

According to the Council, the Community legislator must leave to the Member States the choice of the criminal penalties to apply, as long as they are effective, proportionate and dissuasive. Consequently, Community legislation cannot determine in detail and exclusively the level of penalties to be introduced. This should be left to the discretion of the Member States. However, this approach may turn out to be ineffective in practice. Eventually the ECJ is likely to be called upon to decide whether particular penalties are "effective, proportionate and dissuasive", giving the Community the opportunity to define the penalties anyway. Only rejection of the directive may prevent this development and ensure that Member States retain sovereignty over penalty setting and administration in their national legal systems.

A European Parliament amendment proposed to remove the definitions of "on a commercial scale" and "intentional infringements". This approach would have led to legal uncertainty for many years, and eventually to an ECJ determination on the interpretation of those key terms. The Community would be

making carte blanche criminal law, without any certainty about the final outcome, and would be effectively forcing the ECJ to take on a legislative role. An alternative approach, focusing on incorporation of legally precise definitions of these key terms, is likely to be more effective at serving the interests of all stakeholders and retaining Member States' sovereignty in domestic law enforcement issues. The clearer the definitions, the higher the likelihood that Member States will not have to change their national laws, or, worse, have them decided by the ECJ.

Finally, both the Commission proposal and the Parliament text include trade names within the directive's scope. However, since trade names are not part of the body of harmonised Community law, this clearly demonstrates that the Community exceeded its competence as defined in the treaties when it adopted such an overbroad directive.

## 2.2 Legal means are already available

The [Dutch Parliament](#) and others have made clear that the legal means to combat piracy are already available. In fact, existing remedies are preferable to those outlined in the Directive because they have been drafted to work in cooperation with existing national laws. Therefore Community measures are not necessary in order to ensure the effectiveness of Community law. A review of the existing available measures and the policy justifications offered for the new directive makes this clear:

1. The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is binding on the Member States and the EU. Article 61 of TRIPS already requires criminal sanctions for willful trademark counterfeiting and copyright piracy. The Commission's proposal did not give any justification for creating an additional layer of Community-level criminal sanctions on top of TRIPS, or for requiring sanctions for other types of infringements. Indeed, the proposal only included examples of trademark counterfeiting and copyright piracy – the very matters already covered by TRIPS.
2. Member States already have more extensive national criminal provisions against IPR infringements.
3. Even the establishment of "harmonised" criminal penalties will not solve the problem of forum-shopping. The Commission submits that, in the event of a major difference in penalties across Member States, commercial infringers or counterfeiters would operate from the country that offers the lowest maximum sentences. They also claim that this would seriously hinder effective protection of intellectual property across the Internal Market. However, it is well documented that if criminals choose to operate in a particular country, that decision will be based on their calculation of the likelihood of being caught, not the relative severity of available penalties. The Community cannot influence prosecution priorities at the national level, so efforts to harmonise criminal sanctions at the Community level will have no bearing at all on where criminal enterprises choose to conduct their activities.
4. An offence committed in a Member State with lower penalties and/or chance to get caught will soon be prosecutable in other Member States, namely where the counterfeit goods end up in normal circulation in the other Member State.
5. In many countries the IP criminal law - although well-developed - only plays a subordinate role in actual practice. It has not been established that effective measures to combat piracy necessitate expansion of the existing range of measures and sanctions under procedural law. The establishment of priorities and the exchange of knowledge are of greater importance.

6. The previous IPR Enforcement Directive 2004/48/EC of 29 April 2004 (IPRED1) allows for making the losing party pay for the costs of the trial. Thus, that directive already provides for disincentives against large-scale infringement enterprises since these costs act as a form of punitive damages.
7. The effects of IPRED1 are not yet known however, since it was only required to be implemented by 29 April 2006. They have to be evaluated before the need for extra criminal sanctions can be properly assessed.
8. Endangering public health, e.g. by selling fake or non-approved medicines, is already criminally prosecutable, regardless of whether patents or trademarks were violated in the process.
9. Most importantly, only a thorough investigation as to the current legal and factual conditions in the Member States could provide the justification for introducing more harmonised criminal measures. Apart from very general remarks regarding its competence, nothing in the explanatory memorandum to the proposal indicates that such an investigation was undertaken by the Commission, and, if so, what specific results it produced.

## 2.3 Harmonisation issues

### 2.3.1 Preliminary ruling incompatible with right to a fair trial

Preliminary rulings are an essential aspect of harmonisation. If Community law is not clear, and a court has to ask the ECJ for a preliminary ruling, the process commonly takes 2-3 years. In the context of criminal law, this presents serious problems for prosecutors **and** defendants.

According to Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone is entitled to a fair and public hearing within a reasonable time. However, it is impossible to request a preliminary ruling and have a conclusion of the trial within a reasonable amount of time. In each case in which a preliminary ruling is asked, the suspect's right to a timely trial will almost certainly be breached, since such requests normally take 2-3 years to move through the system. This is unacceptable as a matter of human rights.

Moreover, the Directive undermines the State's ability to effectively prosecute the very crimes it describes. Dutch courts have already reduced the punishment, or even dismissed cases, if the suspect is forced to wait too long before his or her trial, in view of the above ECHR article. In short, the State may lose its case or have its desired punishment drastically lowered because the ECJ -- a crucial component of harmonisation -- is fundamentally incompatible with criminal proceedings. The ECJ may try to provide an "expressway" for criminal cases - but a rush procedure is hard to reconcile with the requirements of a fair trial and the *presumptio innocentiae*.

The system of harmonisation is designed without criminal law in mind. Preliminary rulings make it impossible to add criminal law without redesigning the system of harmonisation on a fundamental level.

### 2.3.2 Underlying substantive law not harmonised

The directive is supposed to create uniform enforcement, but the underlying substantive law is not harmonised. Even limitation to those areas of intellectual property law that have been harmonised would not help. For example, copyright law is still fairly different in the Member States, even though the minimum standards have been harmonised by directives. E.g, only in the Netherlands is every piece of printed matter protected by copyright, regardless of its level of originality (normally an explicit requirement in copyright law). Germany has a large body of copyright contract law, while the Netherlands has nothing in this area.

Criminal law systems differ considerably as well: e.g. in some Member States "legal persons" (companies) can only be fined, while in others the "factual leaders" can be imprisoned.

### 2.3.3 Distortion of carefully balanced national law systems

Unless the Directive is rejected or drastically amended, the carefully balanced national procedural law systems will be distorted. For instance, in the case of trade names, penalties may go up more than a hundred times in the Netherlands, without any compelling justification.

Moreover, criminal law should be malleable, in case it fails to achieve the effects intended by the legislator. On a national level it is possible to change criminal laws when these problems inevitably arise. This will be much harder on a Community level. Criminal law may lose its precision and adaptability, and therefore its legitimacy.

## 3. Proportionality

Nearly all [position papers](#) written about the Commission proposal observe that it does not make a distinction between piracy and legitimate competition. The industry wants criminal law to address only real cases of piracy. For other infringements, civil enforcement (rapid injunctions and damages) work better to protect intellectual property rights. In many countries the IP criminal law - although well-developed - only plays a subordinate role in actual practice.

The [Max Planck Institute](#) (MPI) stated for the directive to be proportional, it is essential to define the qualification characteristics of the elements of a crime as clearly and narrowly as possible. Proportionality is a **conditio sine qua non** for Community legislation (art. 5 TEC). At the bare minimum, "infringing item", "commercial scale" and "intentional infringement" have to be more clearly defined.

### 3.1 Infringing item

The first element that has to be defined is the infringing item. The MPI recommended the following standard: "Identity with the infringed object of protection (the infringing item emulates the characteristic elements of a protected product or distinctive sign in an unmodified fashion

[construction, assembly, etc.]). This found its way into two EP amendments: *"For the purposes of this Directive, trademark infringement consists of the use of a sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered."* (nr 52) and: *"For the purposes of this Directive, infringement of other rights than trademark rights, consists of the identical or virtually identical reproduction of a protected work or product. This excludes the creation of derivate products or works."* (nr 53).

With these amendments, fake Rolex and Gucci manufacturers would be prosecutable, while legitimate competition conflicts (ambiguous cases of trademark confusion) are not. Such cases belong in civil courts. By refusing to adopt these amendments, the EP failed to make a clear distinction between piracy and legitimate competition.

Instead, Parliament adopted nr 8: *"This Directive lays down the criminal measures necessary to ensure the enforcement of intellectual property rights, as defined below, in the context of counterfeiting and piracy."* Astoundingly, the concepts "piracy" and "counterfeiting" are not defined. This will lead to legal uncertainty for many years. The concepts "piracy" and "counterfeiting" come from the TRIPS agreement. Unlike Community Directives, however, the TRIPS agreement leaves Member states substantial freedom to implement it.

Parliament also adopted amendment 39=59: " - trademark rights, in so far as extending to them the protection of criminal law is not inimical to free market rules and research activities." This formulation is much too vague as well.

Directives are harmonising, which means the ECJ will decide any areas of ambiguity or uncertainty. While loose concepts may be appropriate in the TRIPS agreement, they lead to legal uncertainty and an unknown final outcome in directives. This makes it impossible to assess the likely impact of the policy, or whether the proposed measures are proportional. Loose concepts in a directive will force the ECJ to take on a legislative role.

### 3.2 Commercial scale

The European Parliament clearly wanted to avoid making criminals out of children and average consumers (i.e. no prosecution of file sharing teenagers). Unfortunately, Parliament failed in this. The definition is simply badly drafted.

The adopted amendment nr 39=59 reads: "(b) "infringements on a commercial scale" means any infringement of an intellectual property right committed to obtain a commercial advantage; this excludes acts carried out by private users for personal and not-for-profit purposes;". However, "obtaining a commercial advantage" can be interpreted as "spending less money". For example when someone downloads a song from the Internet without authorization, that person has gained a commercial advantage by not paying for it. The amendment would criminalise the behavior of millions of Europeans who have downloaded music or movies via the Internet.

Moreover, noncommercial publication of a document on the Internet is not covered by the amendment since such an activity would not be pursued for "personal purpose."

Worse, even a single mistake may lead to prosecution. If an office worker emails a copy of a market research report to his colleague at work, he may be considered to have infringed copyright if it could be argued that his firm could have saved the cost of another individual subscription or purchase. He could also be criminally liable under the adopted amendment. This serves no good policy outcome.

A better amendment, nr 46, was tabled: "(b) For the purpose of this directive "on a commercial scale" means a large number of repeated infringements committed in pursuit of a direct pecuniary gain, excluding in particular any act carried out by a private person not intended to earn a profit." This amendment clearly would have allowed the prosecution of those involved in illegal factories copying CDs and DVDs massively, but not individual file-sharing teenagers. It would have defined commercial scale in a proportional way. Unfortunately, it was not adopted by Parliament.

### 3.3 Intention

Amendment 39=59, adopted by Parliament, is confused: "(c) "intentional infringements of an intellectual property right" means deliberate and conscious infringement of the right concerned for the purpose of obtaining an economic advantage on a commercial scale". It does not make sense to refer to commercial scale in this amendment. Normal intention is not sufficient for criminal liability, since all commercial acts are intentional acts. This section requires the inclusion of **dolus malus** (with malice), the knowledge one is infringing. This is expressed in amendment 46: "(c) "intentional infringement" of an intellectual property right means a deliberate, conscious and malicious infringement with regard to the existence of the infringed right." Unfortunately, this amendment was also rejected by Parliament.

### 3.4 Secondary liability

The Commission text creates an unprecedented scope of secondary liability for Internet intermediaries, ICTs, software vendors and a range of legitimate business activity. Parliament adopted amendment 14: "Member States shall ensure that all intentional infringements of an intellectual property right on a commercial scale, and aiding or abetting and inciting the actual infringement, are treated as criminal offences." Such a regime would have dire consequences for the commercial sector, where litigation around these definitions is sure to erupt.

National legal systems have their own general methods for dealing with recognized criminal offences like "attempting, aiding or abetting". The Community does not have the authority to harmonise these systems, not even after decision C-176/03. Harmonisation on a directive by directive basis will create different rules for aiding/abetting/... depending on the crime committed. The end result will be more fragmented than the current situation while losing the national context in which the original statutes were drafted.

An alternative amendment, nr 50=64, which would have removed the dangerous secondary liability regime, was not adopted: "Member States shall ensure that the intentional infringement of an intellectual property right on a commercial scale is treated as a criminal offence."

For example, it could be argued that the ready availability of mp3 players incites IPR infringements. Consider the following example: Apple sells the popular iPod mp3 player. These devices can both play



purchased music, and music downloaded without authorization from the Internet. According to Apple, the average iPod holds about 1,000 songs, but the iTunes Music Store has only sold enough "legitimate" music to put 22 songs on each player. The other 978 songs have to come from somewhere else – a personal CD collection, authorized downloads from non-iTunes sources, or, more likely, unauthorized downloads. If these players were not be able to play music downloaded from the Internet, their appeal would be significantly lower. Apple could therefore be seen to be inciting people to infringe copyright by downloading music and putting it on their iPod mp3 players. In fact, the CEO of Universal Music has already said this in public. UMG chairman/CEO Doug Morris wants part of Apple's income from iPod sales because, he says, "these devices are just repositories for stolen music, and they all know it [...] So it's time to get paid for it." In other words, Apple is supposedly knowingly selling devices for storing "stolen music", thus arguably inciting/aiding/abetting infringements under the Directive.

### 3.5 Unsolved issues - scope

Even if "infringing item", "commercial scale" and "intentional infringement" are defined as sharply as possible, not all proportionality issues are solved. It is essential to limit the scope as well.

The Commission proposal does not list the concerned rights in the directive itself. The MPI wrote about that: "19 . Ambiguities must be avoided with regard to the question of which (national) IP rights are encompassed by the harmonisation of criminal penalties. A catalogue, like the one contained in the statement of the Commission concerning Directive 2004/48,9 needs to be set out in the directive itself."

Furthermore, the communication the Commission proposal refers to uses the formulation "at least the following intellectual property rights are covered by the scope of the Directive:". The Commission proposal is open-ended on this point, which is a major threat to legal certainty, furthermore, it is impossible to establish whether open ended criminal law is proportional.

The Parliament text (amendment 39=59) does list the rights concerned, but also refers to rights in Article 2(1)(a) and (b) of Council Regulation (EC) No 1383/2003 of 22 July 2003. Some of the formulations in the regulation are broad, and it is unclear what will happen if this regulation is changed. Again, all rights under the scope have to be mentioned in the Directive itself.

Design rights and database rights should not be under the scope for two reasons. First, they are relatively new, and the case law is still evolving. Second, these rights are unexamined and may often be invalid. And if they are valid, it is unclear whether the actions in question fall within the valid scope of the right.

Similar problems plague the definition of database rights, which are, according to the Commission's own report, surrounded by "considerable legal uncertainty" due to vague legal drafting. This stems largely from the unclear criterion of what constitutes "substantial investment" by the database owner, and which has recently been challenged in several ECJ decisions.

Allowing untested rights under the scope of the Directive leads to disproportional criminal law. The [Chartered Institute of Patent Agents](#) believes "that criminal sanctions should generally be restricted to registered trade marks and copyright, and the Directive should generally not seek to criminalise acts in relation to other intellectual property rights." The Commission only gives examples of trademark

counterfeiting and copyright piracy.

We welcome the general acceptance that patents should be excluded from the scope of the Directive; but excluding patents is not enough.

Example one: design rights. Dyson makes vacuum cleaners. Another company, Qualtex, made spare parts for these vacuum cleaners. Dyson sued Qualtex for infringing on its unregistered design rights, because the spare parts had the same appearance as the originals. Qualtex tried to defend itself by saying the parts had to be designed that way because of "must match" and "must fit" requirements, and in those cases design rights do not apply. The judge, however, ruled that those exceptions did not hold in this case.

This was a civil suit, and the result is that Qualtex had to stop making spare parts. In general, if criminal sanctions are possible for spare parts makers because their replacement parts might infringe on a design right and not fall under the exceptions of the law, this will significantly stifle the spare parts market. After all, which director wants to risk criminal sanctions for providing spare parts? Consumers will experience significant harm, since they will be locked into buying spare parts only from the manufacturer itself, leading to monopoly-based prices.

Example two: database rights. In 1999, a Belgian pharmacy chain (Belpharma) copied a list of addresses of self-help groups from the website of a national health service organisation (UNMS), and distributed it as flyers in its pharmacies. After a complaint by UNMS, the judge decided that this list of addresses constituted a database and ordered Belpharma to cease infringing on UNMS' database rights.

This infringement was clearly intentional (they copied the list of addresses, including mistakes) and on a commercial scale (Belpharma offered an extra service for attracting more customers). Threatening the management of Belpharma with criminal penalties for distributing a copied – though freely available -- list of addresses of self-help groups is disproportionate.

### 3.6 Unsolved issues – public cause

Even if infringing item, commercial scale and intentional are defined as sharply as possible, and even if untested rights are removed from the scope, not all proportionality issues will be solved. It is essential to protect journalists, scientists, etc. Parliament adopted amendment 16: "Member States shall ensure that the fair use of a protected work, including such use by reproduction in copies or audio or by any other means, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research, does not constitute a criminal offence."

Further scrutiny is needed to establish whether this amendment will adequately address public interest concerns. For instance, will the amendment adequately protect a non professional journalist, like a weblogger? Should archiving be explicitly mentioned? Take for instance the following example:

- In order to preserve digital sound recordings for posterity, a library unlawfully breaks the technical protection measure wrapping the digital recording each time it lawfully receives a sound recording either by purchase or by legal deposit. This is intentional infringement (in pursuit of a lawful purpose) in order to reformat the recordings for sensible preservation. It

happens routinely for hundreds of recordings. It is thus probably on a commercial scale, and it is certainly intentional. Should Europe adopt laws that can jail librarians?

### 3.7 Parallel importation

Parallel importation does not involve copying at all: genuine products are sold after being imported from a country where they are already being offered to the public. Parallel importation is not piracy.

There are two kinds of parallel importation, from within and from outside the EU. Parallel importation from within the EU is not an infringement, yet there may be exceptions, as ECJ Case C-348/04 shows. In those cases that parallel importation from within the EU is an infringement, it should not be a crime. This issue has not yet been addressed.

Parallel importation from outside the EU is an infringement. The MPI wrote in its position paper: "16 . Parallel importation of genuine goods which have been marketed with the consent of the right-holder in a non-EU country and/or measures accessory to such imports cannot be considered as piracy or counterfeiting. In accordance with what was said above, harmonisation of IP penalties should not be contemplated for such cases."

Parliament adopted two amendments on parallel importation. Amendment 15: "Criminal sanctions shall not be applied in cases of parallel importation of original goods which have been marketed with the agreement of the right-holder in a country outside the European Union." This seems to be an effective formulation with regards to parallel importation from outside the EU.

The other amendment is number 38, it excludes "parallel importation of original goods from a third country which have been allowed by the rightholder".

This amendment is unclear, "have been allowed" refers to "original goods". Its meaning is ambiguous. An example. Suppose a company is shipping in Levi jeans from the USA, where let's say they happen to be cheaper. The difference is between

- (i) the rightsholder allowing the jeans to be sold in the USA
- (ii) the rightsholder allowing the jeans to be imported into the EU

In this amendment it seems (ii) is the test. A parallel importation which is allowed by the rightholder is not even an infringement. The amendment is ineffective with regards to parallel importation from outside the EU. Furthermore, in parallel importation often no third country is involved, just the country where the product was marketed and the EU are involved.

## 4. Misuse

### 4.1 Countermeasures

The Max Planck Institute: "20. The potential of a rightholder to deter potential infringers increases considerably if criminal penalties are threatened. Furthermore, procedural misuses are conceivable. A harmonisation of IP criminal sanctions, therefore, calls for countermeasures."

Parliament adopted amendment 24: "Misuse of rights Member States shall ensure that, through criminal, civil and procedural measures, the misuse of threats of criminal sanctions is prohibited and made subject to penalties.

Member States shall prohibit procedural misuse, especially where criminal measures are employed for the enforcement of the requirements of civil law."

Further scrutiny is needed to establish whether this amendment solves this issue.

### 4.2 Article 7 - the rights holder's role

Special care has to be taken with article 7. The Commission text allowed rights holders to assist in the investigations by joint investigation teams. This sparked much criticism. The MPI wrote: "The obligation of Member States to delegate functions within the conduct of criminal investigations to private parties in such a diffuse manner is therefore incompatible with the fundamental structure of a democratic society."

The Parliament text turns it around: "Member States must ensure the cooperation of the holders of intellectual property rights with joint investigation teams in accordance with the arrangements provided for in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams [1]." (Amendment 26)

This amendment raises many questions. How must the Member States ensure that right holders will cooperate? Will it become a crime if a rights holder does not want to enforce his or her rights? The amendments does not reference "the offences referred to in Article 3", as did the Commission text. A subject like this should be left to the discretion of the Member States, and Article 7 should be deleted.

### 4.3 Information gathered can be used in civil cases

Parliament adopted amendment 29: "Right to receive information from law enforcement authorities Member States shall provide that, where law enforcement authorities seize infringing items or obtain other evidence of infringement, the authorities make such evidence available for use in pending or contemplated civil proceedings against the alleged infringer brought by the right-holder before a court of competent jurisdiction within the European Union, and, where practicable, that those authorities inform the right-holder concerned or his representative that they are in possession of such items or

evidence. Member States may require that any such provision of evidence to the right-holder be made subject to reasonable access, security or other requirements so as to ensure the integrity of the evidence and to avoid prejudice to any criminal proceedings that may ensue."

Criminal law gives broader possibilities to gather information. The Directive effectively allows private rights holders to bootstrap intelligence gathered by the government for use in civil cases. Maintaining a distinction between public and private action is essential to an equitable justice system.

## 5. More issues

### 5.1 Universal crimes

Parliament adopted amendment 22, which may lead to cross border criminalisation: "2a. Member States shall take the necessary measures to ensure that repeated offences within the meaning of Article 3 committed by natural and legal persons in a Member State other than their country of origin or domicile are taken into account when determining the level of penalties in accordance with paragraphs 1 and 2 of this Article."

An act in your own country, where it is not a crime, or it is not prosecuted, can be prosecuted in an other country if you are there for a conference, a holiday, etc. The amendment risks making infringements "universal" crimes, prosecutable all over the Union.

This further undermines Member States' ability to determine appropriate criminal penalties for their own citizens.

### 5.2 Prior complaint

Criminal investigation authorities should not be able to act on their own initiative without a prior complaint of the rights owner, because licensing arrangements are not published and the rights owner has the fundamental right to dispose of his rights as he desires. Article 8 should be deleted.

## 6. On line version with links

[http://action.ffii.org/ipred2/Report\\_on\\_EP\\_vote](http://action.ffii.org/ipred2/Report_on_EP_vote)