

# IP JUSTICE

*An international civil liberties organization promoting balanced intellectual property laws.*

Phone: +1 415.553.6261 Fax: +1 415.553.6296 Web: [www.ipjustice.org](http://www.ipjustice.org)

11 Février 2004  
Strasbourg, France

## **IP Justice Statement to the EU Members of Parliament**

By IP Justice Executive Director Robin D. Gross ([robin@ipjustice.org](mailto:robin@ipjustice.org))

### ***“Protecting Civil Liberties, Competition and Innovation in the EU Intellectual Property Rights Enforcement Directive”***

IP Justice is grateful for the opportunity to participate in these important discussions among Members of the European Parliament regarding proposals for a Directive on the Enforcement of Intellectual Property Rights. IP Justice is an international civil liberties organization that promotes balanced intellectual property laws. We are a non-profit organization with members from over a dozen European nations. We primarily work on international treaties, trade agreements and directives to protect consumer rights and traditional civil liberties in setting intellectual property rights laws.

IP Justice is particularly concerned about the serious threat to civil liberties, scientific research, market competition and technological innovation from the proposed EU Directive on the Enforcement of Intellectual Property Rights.

While enforcement of intellectual property rights against large-scale commercial counterfeiters is a legitimate goal, this directive threatens to go far beyond that mark and treat users of file-sharing software the same as companies who market counterfeit pharmaceuticals.

Unless properly focused upon commercial counterfeiters, the directive threatens to unleash against ordinary consumers its “nuclear weapons” of IP law enforcement, such as *Anton Piller Orders*, which permit rightsholders to raid and ransack the home of an alleged infringer.

### **Comparison of 3 EU Proposals: Council Position is Most Balanced**

A wide disparity still exists between the three main proposals that shape the directive’s final text. The original proposal<sup>1</sup> published by the EU Commission on 31 January 2003 included controversial “anti-circumvention” laws, similar to the US Digital Millennium Copyright Act (DMCA), which outlaw scientific research and create monopolies for media giants over compatible devices. On August 11, 2003 an international coalition of 50 civil liberties groups

---

<sup>1</sup> EU Commission Proposal of 31 January 2003 available at:  
<http://www.europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Service-Search&LANGUAGE=en&GUILANGUAGE=en&SERVICE=all&COLLECTION=com&DOCID=503PC0046>

and consumer rights campaigns sent a letter<sup>2</sup> to Members of the European Parliament urging rejection of the Commission's proposal based on concerns about its impact on civil liberties, innovation, and market competition.<sup>3</sup>

Despite the growing concern, the European Parliament's Committee on Legal Affairs and the Internal Market (JURI), led by Rapporteur Janelly Fourtou (wife of Vivendi-Universal's CEO), introduced significantly more prohibitive "anti-circumvention" measures<sup>4</sup> and an amendment<sup>5</sup> to criminalize non-commercial infringements such as Peer-2-Peer (P2P) file-sharing.

Both proposals from the European Parliament and the European Commission treat small-scale innocuous infringements with the same force as large commercial counterfeiters.

*With a few key amendments, the EU Council's proposal<sup>6</sup> of 6 February 2004 would do much less harm to European's civil liberties and market competition than the Parliament and Commission proposals.*

Importantly, the scope of the enforcement directive should be narrowed to only civil cases of infringement done intentionally for commercial purposes. And the directive must include consumer safeguards to ensure that a court case has actually been filed and a judge has weighed evidence before personal information can be forcibly disclosed about an alleged infringer. The directive's inclusion of broad subpoena powers like those used by the Recording Industry Association of America (RIAA) in the US under the DMCA are easily abused and violate privacy protection laws.

The Council's proposal of 6 February to delete Article 21's ban on technical devices should definitely be followed. Five years of experience in the US under similar "anti-circumvention" laws have demonstrated the laws' unintended consequences of chilling freedom of expression and scientific research, stifling technological innovation, and preventing market competition. These "anti-circumvention" measures also threaten consumer privacy rights by making it illegal to remove or disable tiny Radio Frequency Identity Tags (RFIDs) that are used to guard against counterfeiting in clothing and other consumer products but can also be used to track consumers.

---

<sup>2</sup> The CODE Letter has been translated into nine languages and is available at: <http://www.ipjustice.org/CODE/translations.shtml>

<sup>3</sup> IP Justice White Paper - "Europe's Proposed Intellectual Property Enforcement Directive Unmasked: Overbroad Proposal Threatens Civil Rights, Innovation and Competition" available at <http://www.ipjustice.org/ipenforcewhitepaper.shtml>

<sup>4</sup> Final European Parliament JURI Committee Report of 5 December 2003 available at: <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+A5-2003-0468+0+DOC+XML+V0//EN&L=EN&LEVEL=0&NAV=S&LSTDOC=Y#Content5a68e8>

<sup>5</sup> See IP Justice Media Release of 24 October 2003 announcing introduction of controversial amendment by Rapporteur Fourtou to criminalize non-commercial infringements in directive available at: [http://www.ipjustice.org/CODE/update20031024\\_en.shtml](http://www.ipjustice.org/CODE/update20031024_en.shtml)

<sup>6</sup> 6 February 2004 EU Council Proposal available at: <http://www.ipjustice.org/CODE/020604EUIPED.html>

## **Article 2 – Scope Must be Narrowed to Large-Scale Commercial Infringements**

The possibly wide scope of the enforcement directive is of frightening concern to consumers. The directive should apply only in cases of large-scale infringement that is done intentionally for commercial purposes. Without a requirement that the scope be narrowed to only large commercial counterfeiting, the directive's powerful provisions could apply against innocuous and insignificant infringements done without any commercial purposes or gain. Patent law is particularly unsuitable for inclusion in this directive on enforcement measures.

The scope must also be narrowed to apply only to those infringements that are done intentionally, so as to not sweep too broadly and punish accidental infringements. Particularly considering how murky the line is between fair use (fair dealing) copying and infringement, limiting the directive to commercial infringements protects consumers who infringed nominally, but had a good faith belief in the lawfulness of their actions.

Under both the Commission's original proposal and an amendment introduced by Rapporteur Fourtou, non-commercial infringements such as P2P file-sharing could fall within the directive's overbroad scope. The directive's powerful new law enforcement arsenal should be targeted against major commercial counterfeiters, not average European teenagers and their families.

## **Article 9 – “Right of Information” Must Require Court Hearing with Judge**

The directive must also include safeguards to protect against abuse of the new enforcement tools, such as the “Right of Information”, which allows rightsholders to easily obtain personal information about consumers. In accordance with many countries' national laws, personal information should not be forcibly disclosed without first filing a court case and obtaining a ruling from a judge who orders the disclosure after a hearing.

The mere allegation of an infringement is insufficient to obtain personal information and violates consumer privacy protection laws. It is imperative that a legal case must have been filed and that a judge has weighed evidence to support an allegation of infringement before an individual's personal information must be turned over. Only a judge is competent to balance the competing interests and order an invasion of privacy. And the right of information should be limited to those who provide services for commercial purposes.

The DMCA in the US created similarly broad subpoena powers that have been routinely abused by the Recording Industry Association of America (RIAA) to obtain personal information on thousands of US consumers. Under the DMCA, a court clerk simply “rubber stamps” a request for information based on the mere allegation of infringement.

Although a recent court challenge<sup>7</sup> brought by Internet Service Provider (ISP) Verizon ruled these subpoena powers unconstitutional in the US, Europe appears to be heading down the same dangerous path of providing the recording industry with easy access to personal information

---

<sup>7</sup> “Verizon Wins Appeal Over RIAA Subpoenas” 6 January, 2004 available at: [http://www.out-law.com/php/page.php?page\\_id=verizonwinsappeal1073387806&area=news](http://www.out-law.com/php/page.php?page_id=verizonwinsappeal1073387806&area=news)

about millions of European consumers. There must be judicial safeguards built into this new right of information to protect consumers from the kind of abuse already experienced in the US.

### **Article 20 – Criminal Sanctions are Inappropriate for this First Pillar Proceeding**

This directive properly applies in the enforcement of civil cases only. The final directive should delete Article 20 on criminal sanctions altogether, or at most select the Council's position of 6 February that allows states to determine their own criminal sanctions for infringements of intellectual property.

The Council's position recognizes that attempting to create any substantive criminal law for Europe is outside the scope of this law-making procedure. Criminalizing non-commercial infringements as suggested by proposals put forth by the Commission and JURI Rapporteur Fortour would require changes to substantive criminal law in many states. As a First Pillar procedure, creating criminal provisions is not permitted and would be vulnerable to a legal challenge in the European Court of Justice. The creation of any criminal provisions must go through a Third Pillar procedure to be valid.

### **Article 21 – Delete Ban on Technical Devices to Protect Consumer Rights and Competition**

The 6 February 2004 Council proposal wisely recommends deleting Article 21 and its ban on technical devices. The Commission originally proposed broad DMCA-like "anti-circumvention" measures to apply to devices protecting any type of intellectual property right. Then, Rapporteur Fourtjou's Final JURI Report proposed extending this ban even further to include computers, since they are devices or components capable of removing or disabling watermarks. Since their enforcement has been felt in the US and abroad, public opposition to DMCA-like "anti-circumvention" measures is growing around the world.

These "anti-circumvention" laws have been widely criticized as chilling freedom of expression and scientific research since they ban technical information about a system's weakness.<sup>8</sup> In the US, the DMCA's "anti-circumvention" measures have been used to threaten the publication of technical papers at research conferences. And a Princeton University student was threatened under the law when he revealed that holding down a computer's "shift-key" disables a company's CD "copy protection" technology.<sup>9</sup>

"Anti-circumvention" laws often have the unintended effect of creating monopolies for adjacent products and after-market replacement parts. Because devices and components must interoperate with each other to work properly, any "unauthorized" components are classified as illegal technical devices under these circumvention bans.

---

<sup>8</sup> See "*Unintended Consequences: Five Years under the DMCA*" available at: [http://www.eff.org/IP/DMCA/unintended\\_consequences.php](http://www.eff.org/IP/DMCA/unintended_consequences.php)

<sup>9</sup> "*Shift Key Breaks CD Copy Locks*" from CNET News available at: [http://news.com.com/2100-1025\\_3-5087875.html](http://news.com.com/2100-1025_3-5087875.html)

In the US, the DMCA has been used to prevent a competitor in the printer toner cartridge business from providing consumers with less expensive replacement cartridges that are compatible with their printers (*Lexmark v. Static Control Components*)<sup>10</sup>. And a manufacturer of garage door openers used the DMCA to sue a competitor for selling replacement garage door openers to consumers who break or misplace their original garage door opener (*Chamberlain Group v. Skylink Technologies*)<sup>11</sup>.

These measures produce the dangerous result of stifling innovation because neither competitors nor hobbyists can build interoperable devices without fear of litigation. Mounting public opposition to the DMCA has inspired the introduction of two bills into the US Congress that would repeal the DMCA's most extreme parts.<sup>12</sup>

While the Parliament's proposal recognized that these measures produce an anti-competitive effect and made an attempt to permit the *use* of circumventing technical devices in order to maintain competition, the proposal still banned the *manufacture and distribution* of any such technical devices, so the protection is actually meaningless.

The proposal suggested in Rapporteur Fourtou's Final JURI Report is the most extreme implementation of these measures and would theoretically extend to a ban on computers since they are devices capable of disabling watermarks or other authentication measures.

Article 21 also threatens consumer privacy protections since it could be illegal for consumers to deactivate or remove Radio Frequency Identity (RFID) tags, which are tiny micro-chips embedded in consumer products used to track the product, and subsequently the consumer who purchases the product.

*IP Justice strongly urges the Members to join with the Council in deleting Article 21's ban on technical devices from the directive altogether.* These laws have been shown to be ripe for abuse against consumers, competitors, scientists, and journalists and would amount to the creation of substantive intellectual property law in many states while this directive is specifically limited to enforcement provisions. Thank you.

---

<sup>10</sup> "*Lexmark Wins Injunction Against Competitor's Printer Toner Cartridges*" 3 March 2003 available at <http://www.ipjustice.org/030303.scc.shtml>

<sup>11</sup> Legal documents in *Chamberlain Group v. Skylink Technologies* available at: <http://www.ipjustice.org/skylink.shtml>

<sup>12</sup> The Digital Media Consumers' Rights Act (DMCRA) and the Benefit Authors Without Limiting Advancement of Net Consumer Expectations Act (BALANCE)