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Ms Mary Harney T.D.  
President Competitiveness Council  
Tánaiste and Minister for Enterprise,  
Trade & Employment  
Dept of Enterprise, Trade & Employment  
Kildare Street, Dublin 2

Dublin, February 2004

**Open letter to the President of the Competitiveness Council**

**Directive on enforcement of intellectual property rights  
threatens to stifle competition in Europe**

Dear Ms Harney,

IFSO acknowledges that effective law enforcement is required to combat organised crime. However, this Directive goes further than international obligations, and recent amendments to the text by the European Parliament and the Council extend its effect to include unintentional, trivial, and non-commercial infringements, which may be punishable with penal sanctions.

This undermines the user side of the "copyright bargain" by turning fair dealing into a minefield. Not only will this be harmful to society, but it is clearly beyond the remit of the Directive.

**More prescriptive than international obligations**

IFSO believes that the current text under discussion within the Council<sup>1</sup> is over prescriptive, as it goes further than international agreements and introduces extra obligations, so called "TRIPS plus" elements on EU member states.

We also believe that the proposal fails the tests of proportionality and subsidiarity. *Anton Piller* and *Mareva orders* exist in the common law systems of Ireland and the UK and are used in exceptional circumstances to deal with the raiding of premises, the seizure of goods and the freezing of bank accounts. The "draconian and essentially unfair nature of Anton Piller orders"<sup>2</sup> has led the courts to develop stringent pre conditions which must be met before they will issue such an order.

The Directive will raise their status from common law to statute law and may dramatically increase requests for these extreme measures in Ireland and the UK. For the rest of Europe, they will be introduced without any safeguards.

**Holding back the Information Society**

Internet Service Providers (ISPs) could face limitless injunctions, equipment seizures and could be ordered to disclose customer names, block content or undertake surveillance, thus removing the "mere conduit" status awarded to ISPs in the e commerce directive, with regards to IPR issues and raising data privacy concerns.

On receiving a take down request from a rightholder, an ISP will be required to comply.

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<sup>1</sup> st16289[1].en03.PA 19.12.2003

<sup>2</sup> *Colombia Picture Industries v Robinson* [1987] Ch 38, 76 Scott J

Failure to comply could result in asset seizures. If the request is subsequently proved to be invalid, the ISP could be subject to counter claims.

The Directive will introduce new administrative burdens which will hamper innovation, because all uses of computer networks will be subject to authorisation and monitoring. Thus increasing costs and holding back the development of the information society.

### **Less competition, less choice**

The proposal will stifle competition and the development of legitimate markets by preventing the reverse engineering of software components in order to produce interoperable products currently permitted under the software Directive<sup>3</sup> e.g. printer and game accessories. It would become more difficult for new, innovative SMEs to sell software and accessories independently of console and printer vendors.

It would also seriously undermine the growing use of Free Software (sometimes called Open Source or Libre Software) such as GNU/Linux, which the Information Society Initiative of the European Commission says *"may be a unique opportunity for the European software industry - somehow this may be a proverbial 'second and last chance'"*. The result will be less choice and competition and an increase in the monopoly position of the dominant players.

### **Alienates the citizens of the information society**

The amendments proposed by the Council extend the scope of the Directive to include any infringement of copyright by anyone, including small-scale, unintentional, non-commercial activities which do not harm the rightholder (Article 2) and seek criminal sanctions for all these infringements (Article 20).

The approach of the Council in their recent amendments creates a highly unbalanced situation and would be detrimental to the information society, in particular the Lisbon Strategy. It would affect hundreds of thousands of Internet users and create legal uncertainty for millions more. It will alienate large portions of the on-line world, young people in particular, from European politics and institutions.

### **Learning from the U.S. DMCA**

The Digital Millennium Copyright Act (DCMA) is the U.S. equivalent of the proposed European copyright framework. After five years in force, there is evidence it has been used to stifle scientific research and free expression; undermine competition, reverse engineering and technological innovation and has had a negative impact on fair use and non-infringing use<sup>4</sup>. Legislators concerned at the unintended and far reaching effects are introducing new legislation to redress the balance.

We therefore request that you use your influence on this important issue affecting the information society to seek further discussion or to recommend the attached amendments.

Yours sincerely

Teresa Hackett  
On behalf of IFSO

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<sup>3</sup> Council Directive 91/250/EEC OJ L122, 17/05/1991

<sup>4</sup> Unintended Consequences: Five Years under the DMCA  
[www.eff.org/IP/DMCA/unintended\\_consequences.php](http://www.eff.org/IP/DMCA/unintended_consequences.php)

**IFSO urges the Council, under the Irish Presidency, to adopt the following amendments:**

Article 2 paragraph 1

<b>Council text</b> st16289[1].en03.PA 19.12.2003	<b>IFSO amendment</b>
<p>Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures and procedures provided for by this Directive shall apply to any infringement of the following intellectual property rights: copyright, rights related to copyright, sui generis rights of a database manufacturer and of the creator of the topographies of a semiconductor product, trademarks, patents, including supplementary protection certificates, geographical indications, including indications of origin, designs, utility models and plant variety rights, to the extent that protection of these rights is provided for by Community law or by the national law of the Member State concerned. In this respect, Member States shall ensure that the judicial authorities take due account of the specific characteristics of each case, including the intentional or unintentional character of the infringement, when determining the applicable sanctions or other measures.</p>	<p>Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for right holders, the measures provided for by this Directive shall apply to infringements of the following intellectual property rights: copyright, rights related to copyright, sui generis rights of a database manufacturer and of the creator of the topographies of a semiconductor product, trademarks, designs, utility models and plant variety rights, to the extent that protection of these rights is provided for by Community law or by the national law of the Member State concerned and from the provisions adopted by the Member States in order to comply with those acts <b>when the infringement is committed for commercial purposes or causes significant harm to the right holder.</b></p> <p><i>Based on European Commission proposal 31.1.2003</i></p>

*Justification*

Maintain the objective of the original Commission proposal which was to combat organised crime and was aimed at infringements carried out for commercial purposes and which significantly harmed the rightholder. It was not intended to criminalise all infringements irrespective of their nature or character.

Article 2 paragraph 3

<b>Council text</b> st16289[1].en03.PA 19.12.2003	<b>IFSO amendment</b>
This Directive shall not affect:  (a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive.  (b) Member States' international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement").	This Directive shall not affect:  (a) the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC in general, and the provisions of Articles 12 to 15 in particular of that Directive.  (b) Member States' international obligations and notably the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement").  (c) <b>Community provisions regarding the reverse engineering of products for interoperability, Directive 91/250/EC in particular the provisions of Articles 5 and 6.</b>  (d) <b>Community provisions regarding the protection of patents.</b>

*Justification*

The provisions of the software directive with regard to reverse engineering should be maintained (European Parliament report A5-0468/2003 Amendment 15).

Patents must be excluded because of their special nature and to prevent the directive from mixing competitive product development with counterfeiting and piracy.

See also European Parliament report A5-0468/2003 Amendment 5 to Recital 13:  
*"...while excluding patents and certain activities which do not involve intellectual property in the strict sense."*

Article 20

<b>Council text</b> st16289[1].en03.PA 19.12.2003	<b>IFSO amendment</b>
Without prejudice to the civil and/or administrative measures provided for under this Directive, Member States shall adopt the necessary measures to ensure that at least every infringement of an intellectual property right of a serious and intentional nature is liable to penal sanctions.	Without prejudice to the civil and administrative measures and procedures laid down by this Directive, <b>Member States shall apply appropriate sanctions in cases where intellectual property rights of a serious and intentional nature have been infringed.</b>

*Justification*

The effect of this provision is to criminalise all infringements, even those of a trivial and unintentional nature and which do not harm the interests of the rightholder.

Furthermore, a First Pillar co-decision procedure is the incorrect legal base for the introduction of criminal sanctions (European Parliament report A5-0468/2003 Amendment 43).