



To Lisbon or to prison?

Jonas Maebe
FFII

IPRED2: criminalisation of intellectual
property infringements
(COD 2005/0127)



IPRED2: General overview

IP infringer = criminal

- Criminalise all **intentional IPR infringements** on a **commercial scale**
- Justification: organised crime, terrorism, public health/safety

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**THINK OF THE
IP HOLDERS**

All IPRs

- Directive applies to **all** kinds of “intellectual property”
 - Patents
 - Copyright
 - Trademarks
 - Sui generis rights of database makers
 - ...

Not all IPRs are equal

- Patent infringement: regular business practice
- Trademark confusion
- EC: *the economic impact of the “sui generis” right on database production is unproven*
- Plant variety rights: cross-pollination
- ...

Infringements differ



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“... serious threat to national economies and governments.”

“... increasingly linked to organised crime.”

“... lucrative activities in the same way as other large-scale criminal activities such as drug trafficking.”



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- Intentional: in criminal law, may mean “consciously, not accidentally” (“*I wrote this patent-infringing program accidentally while sleeping.*”)

Commercial scale

- Some proposed definitions: “direct or indirect economic advantage”
- May even apply to private persons (advantage: paying less for a product)
- Needed condition: **intent** to earn a **profit**



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- Allow governments to start investigation without a prior report
- Regulate also abetting, aiding, facilitating, ...
- No provisions against abuse (but is TRIPs requirement!)

Think of the IP holders?

- Many negative effects for companies in IP-intensive sectors
- Not many active industry proponents
- Max Planck Institute for IP: *“risk that ... freedom of market actors to engage in business is curtailed beyond proportion”*

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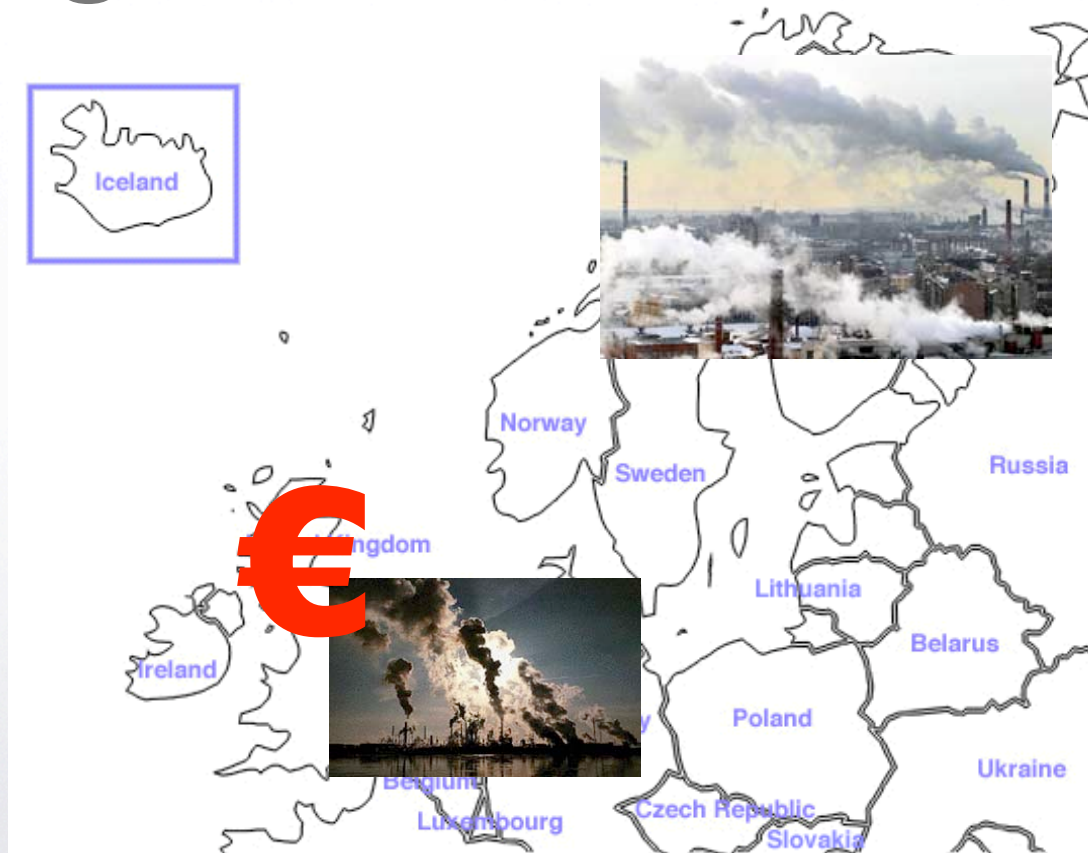
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NOT EXACTLY

Main advocate: EC

- Preamble: emotional arguments (organised crime, terrorists), no reasoned studies
- Dutch Minister: *Frattini mentioned copying a Ferrari, but shouldn't Ferrari solve that itself?*
- Massive opposition from industry until patents taken out

Legal basis: ECJ C-176/03



Competence extension?

- Here:
 - No arguments about trade distortion
 - Only lays down “at least maximum fine of €X or Y years in prison”
 - Proposal even increases fragmentation



Law scholars

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“clearly goes beyond the scope of the ruling in *Commission v Council*”

“Framework Decision did not go nearly as far as this proposed Directive”

“difficult to see how litigation will be avoided if the proposal is pursued in its present form”

“We are extremely concerned by the broad, all-encompassing nature of this provision”

Law scholars

“clearly goes beyond the scope of the ruling in *Commission v Council*”

“we question whether an across-the-board criminalisation of commercial scale IP infringements throughout the EU is actually in the public interest and whether it serves justice effectively.”

“We are extremely concerned by the broad, all-encompassing nature of this provision”

Political process

The previous episode

- IPRED I: harsh civil sanctions/means
 - Anton Piller orders: private agents can search premises
 - Mareva injunctions: freeze/confiscate assets for 30 days **before** hearing accused party

Parliament: ITRE

- Advisory Committee
- Result (Hammerstein report):
 - Scope limited to copyright piracy and trademark counterfeiting
 - Privatisation of criminal investigation removed
 - No investigations without prior complaint

Parliament: ITRE (2)

- But:
 - Definition of counterfeiting includes regular business conflicts
 - Copyright piracy not defined at all
 - Some specific penalties still included (contrary to ECJ judgement)

Parliament: LIBE

- Advisory Committee
- Strange draft report (Wieland)
 - Less attention for civil liberties than ITRE
 - Removes “intentional” condition
 - Criminalises “facilitating”
- Vote: ± 11 December

Parliament: JURI

- Responsible Committee
- Bad draft report (Zingaretti)
 - Wide scope, keeps state initiative, worsens privatising investigations, no abuse prevention, remains ECJ incompatible
- Amendment tabling deadline: 4 December
- Amendments discussion: ± 20 December

Industry

- General consensus (except big pharma?) that patents should be excluded
- Few signs of who is actively supporting this directive
- Very silent overall after Commission indicated that taking out patents is ok

What have we done

- <http://action.ffii.org/ipred2>
 - General analysis and amendment proposals
 - Analysis of available tabled amendments
 - Research into civil conflicts wrongfully criminalised by the proposal



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- Commercial scale: ITRE + “loss rights holder”
- Private agents: ITRE ok
- Police initiative: ITRE ok
- Infringements: must be 1:1 unmodified copying
- Provisions against abuse: to be added

Conclusion

- All fixes lead to implementation of TRIPs
- “*Max Planck Institute*” and “*Law Society of England and Wales*” extremely critical (many amendments based on their texts)
- Main reason for directive seems competence extension
- Rejection?



Information, analysis, mailing list

<http://action.ffii.org/ipred2>