Combating piracy – undermining privacy?

The harmonization of IP enforcement in Europe

Paper presented at the
ECPR 2007 (Helsinki) Workshop 26 on 'Privacy and Information: Modes of Regulation'

Helsinki, Finland: 7 - 12 May 2007

Thomas R. Eimer
FernUniversität Hagen
Dep. of Political Regulation and Governance
Universitätsstraße 41
D – 58084 Hagen

phone: +49 (0) 2331 / 987 – 21116
fax: +49 (0) 2331 / 987 – 4845
E-mail: thomas.eimer@fernuni-hagen.de
http://www.fernuni-hagen.de/POLAD/
Introduction

The deployment of internet based distribution channels has led to an increasing online availability of textual, visual or aural content, and software (Drossou et al. 2006). Traditional modes of remunerating authors and right holders (e.g. publishers) by levy systems are challenged by new models of distribution and payment procedures enabled by digital rights management (DRM) or technological protection measures (TPM). Based on personal data processing, the new business models are inclined to interfere with citizens’ privacy (Cohen 2002; Nuss 2006: 100; Brown 2006: 16f). Even more controversially, effective download pricing requires the rigorous prosecution of illegal copying activities. Therefore, users’ internet protocol addresses would have to become accessible to right holders in order to identify alleged infringers. Such a transfer of data would obviously compromise all internet users’ privacy and contravene the European data protection policy (1995/46/EC, Art. 2).

In 2001, the EU member states have committed themselves to protecting digitalised oeuvres against an unauthorised duplication or modification, thereby encouraging the deployment of self-regulatory mechanisms like DRM or TPM (2001/29/EC, hereafter EUCD). Addressing the right holders’ access to internet user data in vague terms, the 2004 Intellectual Property Rights Enforcement Directive (2004/48/EC, hereafter IPRED1) may be interpreted as a first but futile attempt to resolve the intrinsic tension of piracy prevention and privacy protection at a European scale (Jakob 2004). As regards current legislative efforts, it is disputable whether the European Commission’s proposal for a Directive on Criminal Measures aimed at ensuring the Enforcement of Intellectual Property Rights (COM 2006/168, hereafter IPRED2) will lead to a reconciliation of interests or at least pave the way for a harmonised approach within the European Union.

On an empirical level, the persisting vagueness and partial inconsistency in the intellectual property enforcement and privacy protection policies conflict with the widespread assumption of an undisputed legal development in favour of a unidirectional protection of intangibles (May 2002; 2004). In theoretic terms, the rather disharmonising effects of past and present legislation in this policy field cast the emergence of a European “supra-national system of governance” (Kohler-Koch 2005: 5) or “EU federalism” (Kelemen 2003) into doubt. Moreover, the empirical findings are opposed to expectations that “post-regulatory state gov-

---

1 The paper summarizes initial findings of an ongoing research project recently funded by the Fritz Thyssen Foundation. Empirical evidence has been obtained by internet-based enquiries, document analysis, personal talks during the WIPO SPLT Open Forum from March 1 to 3, 2006, and 33 interviews in Geneva, Brussels, and Strasbourg. I am deeply indebted to Susanne Lütz (Fernuniversität Hagen) for helpful comments and suggestions.
ernance” for the internet (Christou/Simpson 2006: 45) supported by public-private partnerships (Green Cowles 2003: 108) and deliberative politics will supersede the tension between supra-nationalism and intergouvernementalism within the European Union (Neyer 2006).

In a view to explain the ambiguousness of the European Union’s regulative efforts, I will firstly dwell on the conflict between piracy prevention and privacy protection by portraying the different stakeholders’ perspectives. Secondly, I will show that the contention between market integration and privacy considerations is interwoven with a conflict between the European Commission’s aspirations for a deeper harmonisation and member states’ ambitions to preserve their national prerogatives. In the third section, I will demonstrate that the institutional processing of the conflict is unlikely to provide for a coherent and consistent solution. I will conclude my presentation by discussing its implications for European integration theory.

1 Stakeholders’ perspectives

At the latest from the 1990s, the European content industries and their federations are at the forefront of a steady campaign to enforce intellectual property rights, esp. copyright, in the digital environment. The International Confederation of Music Publishers (ICMP) notoriously claims that its members suffer from existential losses due to peer to peer (p2p) file-sharing and individual copying of CDs. Although the ICMP statistics are considered to be exaggerated by independent observers (The Australian 2006) and publishers usually keep licensing expenditures secret (Grassmuck 2006: 2), it seems comprehensible that the music industry sustains serious damages by the unlicensed dissemination of its products. The ICMP’s demands are twofold: Firstly, it opines that the circumvention of DRM protection measures shall be prosecuted in order to prevent consumers from what it perceives as illegitimate copying. Secondly, internet users shall be compelled to contractually agree that their internet service providers transmit personal data to the right holders. In this case, the content industry and/or its legal representatives would be able to identify alleged infringers and warn the ISP to exclude them from their services. At the same time, the content industry could initiate proceedings if deemed appropriate (ICMP/CIEM 2005). According to the ICMP, criminal prosecutions shall be undertaken by joint investigation teams consisting of judicial authorities and right holders’ representatives.

The ICMP propositions are largely supported by the Motion Pictures Association (MPA), the European E-Learning Industry Group (ELIG), the European Newspaper Publish-
ers’ Association (ENPA), and, in a more moderate tone, by the International Video Foundation (IVF) and the European Publishers Council (EPC). The International Federation of the Phonographic Industry (IFPI) denies any privacy intrusion by DRM or TPM (IFPI 2005: 3) and claims that “the view that IP addresses are personal data remains open to question” (IFPI 2005: 8). Furthermore, the European Association for the Protection of Encrypted Works and Services (AEPOC) requires that the circumvention of DRM shall be regarded as a criminal offence. Although all content providers consider the deployment of DRM and TPM as an essential tool increasing\(^2\), minor differences remain between those who propagate a phasing out of the current levy systems in favour of direct licensing schemes (IVF, MPA), and those who stipulate that levies should be maintained in order to compensate right holders for analogue copies (ELIG, IFPI). Content provider associations have jointly initiated the Creative Media Business Alliance (CMBA), which claims that internet user data stored by the ISP according to the Data Retention directive (2006/24/EC) shall be made available to right holders, enabling them to detect intellectual property rights infringements.

Most content provider associations pursue a dual strategy. At the national level, they demand for a rigorous implementation of IPRED1 and initiate large-scale awareness raising campaigns (e.g. TV and movie spots, advocacy events etc.). In the Eastern European countries, they are supported by U.S. based think tanks like the Progress & Freedom Foundation, which holds seminars on intellectual property issues. At the EU level, content industry federations strive for a broader scope of IPRED2. Generally, European lawyers’ associations support the content providers’ perspective, although both the influential Chartered Institute of Patent Attorneys (CIPA) and the Association Internationale pour la Protection de la Propriété Intellectuelle (AIPPI) share some reservations about the application of criminal law in the case of patent infringements. Unlike the content industries’ federations, lawyers’ associations usually refrain from vociferous lobbying tactics. They rather try to frame their recommendations in disguise of judicial expertise.

The European federations are backed by transatlantic organisations like the Transatlantic Business Dialogue (TABD) or the International Chamber of Commerce (ICC), the latter claiming that “policies for data protection may also have the unintended consequence of hampering efforts to enforce intellectual property rights” (ICC 2006: 60). Additionally, large U.S. entertainment companies and federations like Time Warner, Inc., Walt Disney Company, the

\(^2\) Recently, one of the four global music publishers (EMI) as announced that it will refrain from employing DRM for music titles sold by Apple’s distribution channel iTunes. As yet, EMI’s decision has not led to similar offers from its competitors. Steve Jobs, the CEO of Apple, has declared that he will continue to encourage the deployment of TPM for video content (The Register 2007).
Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA) have founded the Coalition for Online Accountability. The U.S. alliance stands up for the legal protection of DRM/TPM and a facilitated data transfer from ISP to right holders. Furthermore, it demands an increased cooperation between judicial authorities and industry representatives to prosecute alleged infringers. Whereas the American Chamber of Commerce to the EU (AmCham) overtly disseminates its position papers in favour of similar propositions, U.S. governmental authorities like the U.S. Patent and Trademark Office (USPTO) try to influence members of the European parliament in a more subtle way, e.g. by advisory letters.\(^3\)

Compared to the camp of anti-piracy protagonists, the supporters of privacy rights seem rather heterogeneous. One might make a rough distinction between those organisations, which are more generally concerned about the implications of strengthened intellectual property enforcement, and other groups clamouring for rather particular modifications. Among the first cluster, IP Justice had been very active in lobbying against IPRED1. Together with Free/Open Source Software (FOSS) and other organisations, it had launched the CODE campaign, criticising the legal protection of DRM/TPM, the broad subpoena powers “that would permit intellectual property holders to easily obtain the names and addresses of individuals they consider to be infringers” (IP Justice 2003: 7), and the mandatory application of criminal law proceedings envisioned in the first draft of the directive. Although IPRED2 includes most of the provisions which had to be withdrawn during the discussions about IPRED1, IP Justice is not engaged on the current debate due to a lack of funding\(^4\). Nevertheless, some other civil liberty groups like European Digital Rights (EDRI) and CP Tech have kept the flag flying. But although both organisations have agreed to a closer cooperation (Communications Daily 2006), they suffer from a multiplicity of regulative fields and political levels they have to monitor in order to pursue their ambitions.\(^5\) As regards their lobbying activities around IPRED2, EDRI and CP Tech get support from U.S. based organisations like the American Civil Liberties Union (ACLU) or the Electronic Frontier Foundation (EFF), which has recently opened an office in Brussels.


\(^4\) Email to the author.

\(^5\) CP Tech has focussed the activities of the World Intellectual Property Organisation (WIPO), and EDRI covers a plethora of privacy-relevant issues in the EU ranging from biometrics to the transferability of financial and passenger data to the US administration.
Especially EFF is very experienced in the field of DRM. In the U.S., the organisation has forced Sony-BMG into a settlement, after its DRM had turned out to operate as “malware” destroying the CD drive in case of its removal (Grassmuck 2006: 4). EFF’s critiques on privacy-invasive effects of DRM are echoed by consumer associations. The European Consumer Law Group (ECLG) complains that the combination of technological barriers to access with legal restrictions endorsed in the end-user licence agreements (EULA) prevent consumers from using legal exceptions to copyright. Additionally, users had to pay twice, because they were charged with levies on hardware components (CDs, CD burners, etc.) and direct costs imposed by DRM based licensing schemes. Finally, the ECLG criticises that content protected by DRM is not usable by other than the preinstalled hardware (ECLG 2005). More closely related to privacy concerns, the European Consumers’ Organisation (BEUC) is afraid that DRM are used to spy out users’ convictions and preferences. Concerning IPRED2, BEUC stands up against what it perceives as a disproportionate criminalisation of file-sharers downloading music or movies without any commercial purposes. At least, only governmental authorities should be entitled to prosecution: “The privatization of criminal procedures strikes at the very heart of the independence of the judicial power” (BEUC 2005: 4).

Consumer groups’ concerns are shared by the most prominent FOSS organisations. The Free Software Foundation (FSF) Europe is vehemently opposed to the criminal prosecution aimed at the dissemination of programs enabling the circumvention of DRM. R. Stallman, the founder and front man of the FSF, translates DRM as “digital restriction management”. The FSF does not only combat DRM in the political sphere, but tries to stem their use by legal restrictions in its new licence (GPL v.3), which will probably be applied to a bulk of open source software. FSF Europe launches into IPRED2 in order to shorten right holders’ influence on the prosecution of IP infringements. Moreover, FSF is afraid that judicial uncertainties which are anything but seldom in intellectual property conflicts may deter both consumers and developers from exercising their legal rights. Therefore, both the FSF and the more moderate Foundation for a Free Information Infrastructure (FFII) clamour for clearer definitions in IPRED2. According to them, only mere piracy and counterfeiting activities should be addressed. Unlike the FSF, the FFII has established a second line of defence: If the general application of criminal law cannot be halted, at least patents shall be excluded from the scope of the directive. The resistance of both FOSS organisations against IPRED2 is supposed to have a deep impact on the discussions for two reasons. Firstly, they dispose about comparatively high financial resources because of their relatedness to the small and medium-
sized businesses. Secondly, they are organised both at the European and the national level, which provides them with a multiplicity of access points.

The same holds true for the second cluster of more particularised criticisms, represented by the Internet Services Providers Association (EuroISPA), the European Telecommunication Networks Organisation (ETNO), and influential firms like Nokia or the Spanish Telefonica S.A. The aforementioned organisations and firms are not primarily worried about the impact of IPRED1/IPRED2 on privacy issues. Rather, they are afraid of increased costs due to the storage and pre-packing of personal data, which would be a precondition for the prosecution of their clients by right holders and/or judicial authorities. The ambiguity of IPRED1, to what extent ISP have to cooperate with right holders, is severely criticised: “In line with the provisions of the IPR Enforcement Directive [IPRED1, T.R.E.], ISPs should not be expected to act as ‘judge and jury’, and should not be expected to act without the necessary legal certainty that they will not be liable for the incursion on another party’s rights” (EuroISPA 2006: 3). As regards IPRED2, Telecom Italia S.A. argues that at least all ISP in the EU member states should be equally charged with obligations in order to prevent market distortions. While such an outcome seems rather improbable, ISP as well as telecommunication firms are supposed to withstand the ongoing criminalisation of IP infringements. Even if the Data Retention directive will be implemented (which is anything but sure because of Ireland’s proceedings for annulment before the ECJ, Council of the EU 12519/06), ISP will oppose to bear the costs of data pre-packaging for the right holders’ needs.

Most remarkably is the resistance of parts of the Information Technology (IT) industry against IPRED2. Whereas the Business Software Alliance (BSA) promotes a rigorous approach towards private users’ intellectual property infringements, the European Information, Communications and Consumer Electronics Industry Technology Association (EICTA) prefers the maintenance of civil law proceedings and opposes the criminalisation of consumers. Even Microsoft, whose hard-nose lobbying tactics are well-known from its engagement with the European software patent debate (Müller 2006: 56), claims that “insufficient care has been exercised in the proposal [IPRED2, T.R.E.] to impose criminal sanctions for patent infringement Europe-wide, which is unwarranted due to the complexity of patents” (Microsoft 2006).

To sum up, if privacy considerations were only brought forward by civil liberty organisations, their criticisms would be thrust aside by the immense lobbying resources of European content industry federations, U.S. entertainment industry organisations, and the ostensibly “neutral” expertise of intellectual property lawyers’ associations. But the intrinsic
relationship of privacy concerns with broader consumer and developer interests as well as its compatibility with a more general repudiation of strengthened intellectual property enforcement leads to a broad coalition against the finalisation of privacy-invasive regulations in the EU. Given the partial resistance of the ICT branch to certain aspects of the proposed regulations, proponents of privacy issues are able to counterbalance the content industries’ attempts to acquire full information about allegedly infringing citizens’ behaviour.

2 Market integration and national prerogatives

When the European Court of Justice (ECJ) affirmed the EU-wide exhaustion principle\(^6\) for intangibles in the late 1970s (Littoz-Monnet 2006: 443; Pardo 2003: 136ff), the European Commission became aware that media content fell in the realm of the common market. First attempts to harmonise intellectual property regulation in the 1980s shipwrecked because of the cleavage between the continental European “droit d’auteur” tradition, which emphasises unalienable authors’ rights as well as common welfare considerations, and the Anglo-Saxon approach focusing on economic rights and trade-related aspects (Drahos 1996: 25ff). In the early 1990s, the European Commission campaigned for the extension of the continental European levy system to the EU level, inciting EU-wide mandatory fees on hardware components (disks, video players etc.) in order to remunerate authors, composers, and their publishers. Due to the resistance of Great Britain, Ireland, Luxemburg and the Netherlands, these plans were abandoned (Littoz-Monnet 2006: 440ff).

At the same time, the EU had committed itself to international treaties at the World Trade Organisation (WTO) and the World Intellectual Property Organisation (WIPO), which made it imperative to reach at least a minimum common level of intellectual property harmonisation. In consequence, the EUCD, which implements the obligations of the World Copyright Treaty (WCT), is characterised by least common denominator regulations preserving the EU member states legal approaches (Pardo 2003: 136ff). In respect of the legal protection of DRM/TPM, the formulation of copyright exemptions, and the prosecution of infringements, EUCD has spurred a variety of national legislations (Westerkamp 2007; CEIPI 2004), which are far from the envisaged goal of deeper harmonisation. Nevertheless, its im-

---

\(^6\) The exhaustion principle (first sale doctrine) prescribes that once a product has been sold, the vendor has no right to preclude its resale in a given economic area. Since the 1960s, the EJC regularly assumes an EU-wide exhaustion in order to safeguard the free movement of goods within the Union (Keeling 2003: 75ff).
plementation has led to serious privacy invasions in numerous member states (Guibault et al. 2007: 15).

The unclear effects of recent and previous legislations notwithstanding, the European Commission expressed its deep concerns about the unaccomplished harmonisation. Already in 2000, it announced further initiatives to combat piracy and counterfeiting activities, which were perceived as a threat to the stimulation of innovativeness (COM 2000/789 final). Despite some warnings from DG Information Society (National Journal's Technology Daily 2002), the Commission proposed IPRED1. In its original draft, the directive endorsed an all-encompassing protection of DRM, an obligation of ISP to deliver personal data to the right holders, and a compulsory application of criminal law procedures to all infringements (COM 2003/46 final). But the proposals were watered down during the negotiations, and the final outcome was far from the Commission’s desired harmonisation. In 2005, the Commission proposed IPRED2, a reuptake of the aforementioned stipulations, although most member states had not even initiated the implementation of IPRED1 (Managing Intellectual Property 2006). Critical voices within the Commission itself referred to the privacy invasive implications of the proposed measures (EC 10092/05/DE WP 104), but they were brushed aside. The Commission justified its haste by the threat of free harbours for pirates within the European Union, which would stifle the community’s innovativeness and competitiveness (SEC 2005/848: 12). Furthermore, the Commission explained that the EU could not urge third countries to impose high standards in intellectual property protection, if it did not accomplish these goals within its own common market (Council of the EU 11245/05 ADD 1).

Despite the intermittent warnings of data and consumer protection groups within its own administration, the European Commission seems indefatigable in its ambitions to impose higher standards in intellectual property enforcement. Its zealousness may be spurred by the long-term intention to replace the continental European levy systems by individual licensing schemes, which are the only viable alternative to accomplish a common market in digital content after the Anglo-Saxon repudiation of the continental European model. But a direct attack on the national levy systems has proved to meet fierce resistance by national collecting societies, governments and the European Parliament (EUobserver 2006; EUobserver 2006a). Thus, the Commission is eager to strengthen intellectual property enforcement (esp. DRM) in order to create a legal environment, in which individual licensing schemes can be defended as a rational alternative to the parallel existence of levies and DRM based payment procedures. In order to avoid strong resistance, it tries to package these regulations with other measures aimed at combating counterfeiting.
Given the broad scope of the Commission’s proposals, most EU member states adopt an ambivalent attitude. In respect of mere counterfeiting activities and product piracy, the southern countries take a tough stance to protect intellectual property. Italian, French and Spanish industries sustain serious losses due to the reproduction of trademarked fashion goods and perfumes (Gucci, Versace, Ferrari, Lancôme etc.; cf. CEIPI 2004: 48ff). Therefore, these countries have even tried to strengthen the Commission’s draft on IRPED1 (Council of the EU 11107/03) and push for the adoption of IPRED2 (Council of the EU 13103/06 in connection with 6466/06). More generally, the stronger exporting economies within the EU are interested in combating intellectual property infringements on a world scale (The Hollywood Reporter 2003). Most particularly, the German government stresses the interconnection of European measures and worldwide activities to protect intellectual property. In the first term of 2007, anti-piracy initiatives are one of the focal points both of the German EU presidency and at the G8 summit in Heiligendamm. In order to find a common strategy with the U.S. and to avoid increasing prosecution costs, the most powerful EU member states are prepared to establish private-public partnerships to take action against product plagiarisms e.g. from Asian countries (Council of the EU 10131/06).

Despite most western EU member states’ commitment to fight piracy, the European Commission’s broader ambitions are attacked from various angles. In particular, Ireland’s and the United Kingdom’s criticisms strike at the heart of a substantial harmonisation by rejecting the mandatory application of criminal law proceedings in intellectual property infringements (Council of the EU 11107/03 ADD1; 13103/06 in connection with 6466/06). The Anglo-Saxon legal tradition already provides for comparably rigorous standards in intellectual property law. Private copies of printed material, for example, are explicitly allowed in nearly all European states but the UK. Nevertheless, the Common Law tradition tackles private copyright infringements by civil law procedures focussing on financial harms sustained by the right holders (Westerkamp 2007: 268ff; 440ff). Furthermore, the civil law procedures in the Common Law tradition entail numerous provisions, which are reserved to criminal procedures in the continental European systems (e.g. provisions for gathering evidence like the Anton Piller order etc., cf. Hartz 2005: 378; Kierkegaard 2005: 494). As right holders are sufficiently vested with legal instruments to defend themselves against a commercial exploitation of their protected works, an additional criminalisation is deemed inappropriate by the Irish and British Government. From their perspective, a root and branch restructuring of their legal systems

Most documents relating to the Council negotiations on IPRED1/IPRED2 are blanked. Therefore, the assignment of delegations to comments is only possible by comparing the blanked files with the few available full text documents.
would unnecessarily complicate the established compensation for loss asserted by judicial oversight.

The delegation of the Netherlands argues in the same vain. A quotation from the former Dutch minister of justice, Mr. Donner, touches the sore spot: “[European Commissioner] Frattini mentioned copying a Ferrari, but shouldn’t Ferrari solve that itself?” (cf. Volkskrant 2006) According to the British as well as to the Dutch perspective, only right holders themselves should be responsible for initiating legal procedures if considered worthwhile. Moreover, prosecution authorities should not be hold responsible for deciding the threshold of commercial harm in infringement cases. In the above quoted article, Mr. Donner continues: “We have limited means, and the question is whether we want to spend them on this” (ibid).

Certainly, neither the Dutch nor the British positions are directly aimed at preventing privacy invasions. However, the focus on infringements inciting commercial losses to right holders provides for a natural barrier to excessive investigations against everyday consumers. These barriers would be broken down, if EU members were obliged to initiate criminal proceedings. Most notably the Dutch parliament opines “that violations of intellectual property cannot be treated as such a serious violation (...) that the harmonised deployment of criminal law measures must be considered essential in the battle against these violations.”8 Furthermore, both Houses of the States-General affirm in their letter to the European Commission that they perceive IPRED2 as a violation of the principles of subsidiarity and proportionality.

Other member states’ reservations are more directly focussed on privacy-invasive aspects. Denmark for example opposes the prosecution of consumers utilising devices for the circumvention of DRM/TPM (Council of the EU 5862/04), and Sweden is ambitious to enhance defendants’ rights in case of alleged infringements (Council of the EU 5832/04). Actually, the Danish implementation of the EUCD does not prohibit the circumvention of DRM in case of copyright exemptions, and the Swedish law entails remedies for consumers if right holders abuse DRM to prevent the legitimate utilisation of digitalised works (Westerkamp 2007: 95ff). Belgium, Austria, Italy, Germany9, Luxembourg, Spain, and Portugal repudiate the right holders’ access to personal data stored by ISP, unless a judicial court has ordered its delivery (Council of the EU 12055/03 ADD 1).

---

8 See letter from Y.E.M.A. Timmerman-Buck (President of the Senate of the States-General) and F.W. Weisglas (President of the House of Representatives of the States-General) to F. Frattini (European Commissioner for Justice, Freedom and Security). The Hague, 3 July, 2006.

9 The German federal government’s position in the Council does not prevent the Second Chamber („Bundesrat“) from challenging the obligatory judicial order during the ongoing implementation of IPRED1 (heise 2006).
After 2004, the situation in the Council of the EU has complicated by the Eastern European states’ general unwillingness to upgrade the enforcement provisions (Council of the EU 13103/06 in connection with 6466/06). As yet, the implementation of existing directives in most Eastern European countries seems partially incomplete (Westerkamp 2007: 148ff), and intellectual property infringement rates in copyrighted content and software are twice or even three times as high as in the old member states of the EU (CEIPI 2004: 86ff; Andrés 2006). Hungary, Poland, Latvia, Lithuania are mentioned in the annual watch list of the United States Trade Representative because of their patchy copyright enforcement mechanisms (USTR 2006). Although most Eastern European countries have adhered to the continental European intellectual property regime since the 1920s (Pardo 2003: 113f), the economic situation and the lack of differentiated pricing mechanisms for protected media and software within the common market almost necessitate their contempt for intellectual property enforcement (Cosovanu 2006). In consequence, they try to avoid the imposition of even more restricting regulations. Their resistance against a substantial harmonisation is certainly not primarily inspired by privacy considerations. Nevertheless, their refusal to penalize copyright infringements hampers the European Commission’s ambitions.

To conclude, the Commission’s unidirectional preference for measures aimed at strengthened intellectual property enforcement is not shared by many EU member states for various reasons. Although at least the Western European countries agree with the Commission to fight counterfeiting activities in respect of trademarked tangibles (fashion, perfumes etc.), the Council is obviously split in its opinion on copyright and especially patent infringements. Many member states are reluctant to follow the Commissions vision of an all-encompassing penalisation even on a non-commercial scale. Their scepticism is not necessarily linked to privacy considerations, although some member states are not willing to impose rigorous surveillance mechanisms in the interest of right holders. Rather, a considerable number of EU member states refuse IPRED2 because of its incompatibility with legal traditions, subsidiarity concerns or due to a general repudiation of strengthened enforcement measures in this policy field.

10 Among the western European states, only Italy and Greece are accused of neglecting intellectual property enforcement measures (USTR 2006).
3 Institutional leeway and its restrictions

In respect of the common market, the European Commission is deemed to be the undisputed agenda-setter in the decision-making process (Tsebelis/Garrett 2001: 358). Under the first pillar, the Commission has a monopoly on initiating legislative measures. In addition to its formal competencies, the Commission disposes of sufficient means to organise considerable support from economic actors (Bouwen 2002: 379ff; Schmidt 2004: 985f). The first draft of IPRED1 had been intimately discussed between the working level of the Commission and the Business Software Alliance (Managing Intellectual Property 2002). Such informal meetings enable the Commission to get a deeper understanding of industry’s needs. In most cases, the Commission does not simply endorse a single federation’s propositions, although this may happen occasionally (Interview 016). Rather, various stakeholders’ positions are put into perspective in such a way that proposals for directives at least fulfil the requirement of technical feasibility (Beyers 2004: 218).

Whereas informal meetings are inclined to enhance the Commission’s “output-legitimacy” (Schmidt 2004: 984), official working groups and consultations are conducive to its “input-legitimacy” by organising societal support. As regards the regulation of DRM, the Commission had established a High Level Group on Digital Rights Management in 2004. Its participants had been rigorously selected, as almost only hardware manufactures and content providers had been invited to join the working group (High Level Group 2004). Although consumers’ interests had been recognised by the participation of BEUC, their demands had been clearly underrepresented. Furthermore, BEUC is said to be rather weak in Brussels (Interview 020), which might relate to its financial dependence on the Commission’s subsidies. So it comes at no surprise that the High Level Group supported the long-term phasing out of continental European levy schemes in favour of DRM based licensing schemes. Privacy concerns were not even mentioned (High Level Group 2004).

Compared to the selective participation arrangements in Working Groups, the Commission risks more open resistance when it launches public consultations. As opponents cannot be excluded from responding to the Commission’s questionnaires, their positions may gain larger publicity at low cost. Nevertheless, the Commission may exercise its influence by encouraging supportive voices to participate in order to legitimise its ambitions (Eimer 2006). Furthermore, the decision if and how the consultation shall be resumed in a final report depends on the Commission’s will. If the outcome is deemed controversial (e.g. the Consultation on “Copyright levies in a converging world” in 2006), the Commission is unlikely to
weaken its position by an unfavourable presentation of stakeholders’ petitions. Given theCommission’s discretion about a consultation’s further employment, this instrument works to
its advantage irrespective of the outcome. In the worst case, the Commission is enabled to
anticipate further resistance, and in the best case, it may present the results as a bottom-up
support for its own legislative initiatives.

Despite the Commission’s competencies and capacities in the agenda-setting, the
adoption of its proposals depends on the co-legislators’ consent. The Council’s ambiguous-
ness has been already described in the previous section, and within the European Parliament,
there is a clear party difference at least between the smaller political groups. Most members
of the Alliance of Liberals and Democrats for Europe (ALDE) strongly support an increased
application of civil and/or criminal law provisions to tackle with intellectual property rights
infringements, which may partially be explained by professional relationships with the legal
community (Interview 017) or conjugal relatedness with leaders of the content industry (Cap-
tal 2005). The Group of the Greens/European Free Alliance (Greens/EFA) and the Confederal
Group of the European United Left - Nordic Green Left (GUL/NGL), however, prioritise pri-
vacy concerns which are brought forward by civil liberty organisations. Furthermore, there is
a close relationship between the Free/Open Source organisations and the Greens/EFA in the
EP.

The position of European People's Party (Christian Democrats) and European Democ-
rats (EPP-ED) is more ambiguous. Although conservative MEP generally approve of
strengthened intellectual property rights, the opposition of internet service providers, tele-
communication firms and small and medium enterprises is partially taken into account. The
Socialist Group (PSE) seems even more heterogeneous. Whereas social democrats especially
from Germany subscribe to the position that strong intellectual property rights foster innova-
tiveness and competitiveness, more leftist socialists from the Mediterranean countries adhere
to the “freedom of knowledge” approach propagated by the Free Software Foundation (Inter-
view 023).

Apart from the party difference, there is a second cleavage between the different
Committees in the EP. The Industry, Research and Energy (ITRE) Committee is inclined to
avoid increased risks of litigation for small and medium enterprises and academic institutions.
Therefore, its members oppose a mandatory penalisation of infringements. Though rather un-
assertive, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) remains scepti-
cal about the privacy-invasive effects of the Commission’s proposals. The amendments pro-
posed in both committees cannot be neglected by JURI (Legal Affairs), the committee in charge, although its majority is committed to stronger enforcement measures. If JURI simply overruled all amendments made by LIBE and ITRE, the proposal would encounter numerous objections in the final plenary vote.

Due to the twofold split in the EP, an outright rejection of the Commission’s proposals is impossible, because the opponents lack of a majority. Even if opposing MEP succeeded in altering the substance of the proposed directives, the Commission could repudiate these amendments, and a unanimous vote in the Council would be necessary to overcome the Commission’s refusal (Art. 251 TEU). Furthermore, the mandatory introduction of criminal law procedures proposed in the directives would enhance the European Parliament’s competencies in a domain which is generally reserved to national governments or at least to Council decisions for the time being (Thomson/Hosli 2006: 414). The institutional self-interest encourages the EP’s consent to at least some minimum standards of penalisation. Nevertheless, a wholehearted welcome of criminal law procedures for non-commercial infringements is quite improbable because of the resistance of Green and leftist MEP and the opposition in the LIBE and ITRE committees.

In respect of IPRED1, the Commission stood to profit from a “window of opportunity”, as both the Council and the EP anticipated the effects of the accession of the Eastern European countries. At that time, the European Parliament had even adopted a “Declaration on the Fight against Piracy and Counterfeiting in the Enlarged EU” (Billboard 2003). Although the first draft of IPRED1 implied judicial uncertainties, if it fell under the first (common market) or the third pillar (Police and Judicial Co-operation in Criminal Matters), the Commission did not hesitate to assume the first in order to employ the “community method”, i.e. the co-legislation procedure of the EP and the Council. From the Commission’s point of view, accepting the EP as co-legislator was a less dangerous strategy than a framework decision under the third pillar, under which a unanimous vote of the Council would have been required.

The assigned IPRED1 rapporteur in the EP was very supportive of stronger enforcement measures. In a first working document, she even criticised that the Commission’s draft proposal was not ambitious enough to endorse civil actions against private copying activities (PE 329.425: 3). Although most members of ALDE backed her position, harsh protests from the civil society arose and members of the Greens/EFA were on the verge of extending the discussions. But on the eve of the Eastern European states’ accession to the EU, the rappor-
teur as well as Commission officials and the Permanent Representatives Committee (Council) engaged in an accelerated trialogue. The candidate countries had already expressed their astonishment to the high priority of intellectual property harmonisation (The Independent 2003), and the Estonian observers had declared that they disapproved of mandatory criminal sanctions for intellectual property infringements (Council of the EU 5863/04). Despite many objections, most member states in the Council were eager to find a common solution to address the perceived threat of increased counterfeiting and piracy in an enlarged union. Thus, the wording of the Commission’s draft was corrected in order to make it acceptable to the critics both within the EP and the Council. The decision to apply of criminal law procedures was left to the national level in order to overcome the Anglo-Saxon countries’ objections. Private users “acting in good faith” were excluded from the scope of the directive, and a judicial order was prescribed as a precondition for the transmission of user data to right holders. The compromise stole the opponents’ thunder and was acceptable for a majority in the EP. In the Council, the overarching anti-piracy considerations made it possible for most member states to accept the directive. Nevertheless, Belgium, Italy, and Austria abstained in the final vote (Council of the EU 8285/04).

Since 2004, the situation has become even more diffuse. After the accession of Eastern European countries, the complexity of interests in the Council has dramatically increased (see previous section). Both among societal actors and in the EP, intellectual property issues have become more contentious. Especially the discussion and final rejection of the Commission’s proposal for a directive on computer-implemented inventions (COM 2002/92) has led to an increased attention of many stakeholders and MEP. As regards IPRED2, the Commission initially presumed that it partially fell under the third pillar. Consequently, it proposed a directive entailing the application of criminal law sanctions in general terms, and a framework decision prescribing the penalties as well as mandatory prosecution by judicial authorities (SEC 2005/848). By dividing IPRED2 in two parts, the more general decision to introduce criminal law measures would have been subject to the co-decision procedure, whereas the concretisations – which had been more likely to become scandalized by critical NGO – would have been discussed behind the closed doors of the Council. But a judgement of the ECJ in a completely different case (C-176/03) cast the strategy into doubt. On 13 September 2005, the ECJ confirmed that the European Community was entitled to adopt criminal law measures for the fulfilment of community goals laid down in the treaties. But the ECJ further pronounced that

11 Letter from Peter Gunning, Chairman of COREPER 1 to Guiseppe Gargani, Chairman JURI (EP), on February 16, 2004, made available by IP Justice.
the decision thereon fell under the first pillar of the treaties and had to be taken by co-decision procedures. When it became clear to the Commission that many members of the Council working group on substantive criminal law would not easily find common ground (Council of the EU 8319/06), it used the judgement as pretext to drop the framework decision and to recast IPRED2 in a single directive.

The Commission’s U-turn means that the EP is confronted with the same conflicts which had been impossible to overcome at the discussions on IPRED1. Still, there is a stalemate between supporters and opponents, with ALDE at the apex of those claiming for rigorous enforcement standards and Greens/EVA as well as GUL/NGL defending users’ privacy rights. The involved committee’s perspectives (JURI, LIBE, and ITRE) have not changed either. But unlike the situation at IPRED1, the rapporteur of IPRED2 is more compromise oriented and there is no need for speeding up the decision-making process due to the accession calendar. Thus, it comes at no surprise that the most extreme amendments both from ALDE and Greens have been rejected within the committees’ polls. The plenum of the EP will have to vote on a compromise draft. For the time being, patents are excluded from the directive and the involvement of internet service providers will be determined at the national level. As yet, it remains unclear, if private users’ shall be subjected to criminal prosecution in case of infringement. After harsh discussions in the committees, JURI has decided to address infringers “on a commercial scale”. The wording leaves it open to national authorities, if they only prosecute mere counterfeiting activities or if they consider potentially infringing users’ behaviour as harmful enough to provide right holders with the access to user data. In the compromise draft of the EP, the balance between anti-piracy measures and privacy concerns in IPRED2 will largely be left at the European member states’ discretion.

As regards the Council, the employment of the co-decision procedure has made it nearly impossible to reject IPRED2, because a unanimous vote would therefore be necessary. Given most member states’ commitment to combat counterfeiting activities, such an outcome seems very improbable. Nevertheless, the described conflict between the Anglo-Saxon and the continental European legal tradition is nearly impossible to bridge. Moreover, the Eastern European member states’ interests are not supposed to enhance a compromise. In January 2006, the European justice and home ministers had almost abandoned the negotiations. Finally, it was decided to shift the negotiations from the Council working group of substantive criminal law to the Article 36 Committee, i.e. a working group specialised in the field of police and judicial cooperation (Council of the EU 11856/06; 13103/06 in connection with 6466/06). As yet, the Committee’s recommendations have not been published, but it seems
quite probable that the results will not exceed the level of harmonisation which has been reached in the EP compromise. But even if the Committee achieved a more substantial agreement, the Council would have to overcome the compromise amendments of the EP by qualified majority voting. Given the accession of Romania and Bulgaria in January 2007, it is far from clear if such an attempt would be undertaken.

To conclude, the institutional processing of both IPRED1 and IPRED2 is firstly characterised by the European Commission’s disposal of considerable formal and informal means to push for its desired regulations in intellectual property enforcement. The Commission has not only the competency to initiate legislative acts but also the capacity to act as a “political entrepreneur” (Broscheid/Coen 2003: 170) and to organise societal support, e.g. from business federations. This makes it difficult for the co-legislators to reject its proposals, even if a considerable number of opponents are inclined to refrain from harmonisation efforts. Furthermore, both the Council and the EP find themselves in a “joint decision-trap” (Scharpf 1988; 2006), although for different reasons. MEP are interested in advancing their competencies in the domain of the “third pillar” and feel pressurised from societal actors to become involved in the process. Therefore, the Commission’s proposals serve as an offer they cannot refuse. Nevertheless, due to the opposing perspectives on the on the substance of intellectual property enforcement measures, the various political groups and committees are inclined to agree upon a lowest common denominator harmonisation. The members of the Council, however, are quite aware that legislative efforts at a national scale are useless against most intellectual property infringements. But the diverging legal traditions and varying economic interests prove hard to reconcile. In consequence, a framework of facultative measures seems to provide for a “local optimum” (Scharpf 1988: 271) acceptable to all EU member states. In a synopsis of the EP and the Council negotiations, the bottom line is far from the Commission’s envisaged goal of an in-depth harmonisation.

**Conclusion**

As yet, a substantial harmonisation of intellectual property enforcement in the EU seems beyond reach. Even worse, the more or less optional measures endorsed in the past and present directives may be used by right holders’ organisations to achieve acceptance for strengthened enforcement regulations at the national level. Depending on the relative strength of countervailing forces in each country, the balance between the prevention of piracy and the protection
of privacy will be determined at the national level, which will inevitably lead to a regulative patchwork. Given the economic disinterest of Eastern European governments to prevent online piracy, free harbours for illegal copies will further exist, and skilled users everywhere in the EU will not be prevented from downloading unlicensed oeuvres. To make a long story short, the Western European everyday consumers’ privacy is put at risk, but digital piracy will prevail.

The empirical findings suggest that the interaction of national governments, societal actors, European Commission officials and MEP does not necessarily lead to an “institutionalisation of supranational governance” (Stone Sweet 2005: 54). Rather, the decision-making process may be at least partially explained by neo-realistic assumptions (Collard-Wexler 2006; Arts/van Tatenhove 2004: 339f). The economic importance of technology and digitalised content incites a “techno-nationalism” (Gilpin 2001: 108), by which all EU member states pursue policies subordinated to their trade- and industry-related ambitions. Potentially disharmonising effects are partially counterbalanced by the ECJ, but the impact of its jurisdiction seems constricted to advance “negative integration” approaches (Stone Sweet 2005: 42ff). The Court’s sentences may enlarge the competences of community institutions in respect of its interpretation of common market requirements, as it has become visible by the extension of the exhaustion principle on digital content and the general approval of criminal law harmonisation measures. However, a “positive integration” (e.g. a balance of intellectual property enforcement and citizens’ privacy) is unlikely to be achieved against the EU member states’ will. Hence, the “European problem-solving gap” (Scharpf 2006: 855f) seems to widen with the further development of the common market. The accession of Eastern European countries has rather enforced these problems, because the definition of common values and interests has become even more difficult in an enlarged Union (Schmitter 2005: 266ff).

At least in the field of intellectual property enforcement, the involvement of societal actors does not provide for a deeper integration. Instead of a deliberative discourse (Neyer 2006), esp. the Commission’s understanding of non-governmental input is characterised by tactical considerations (Dür/Bièvre 2007: 80). At best, the Commission’s inclusion of societal actors may be described as “government with some people” (Schmidt 2004: 985), as it has become clear in its composition of the DRM working group. Furthermore, the pressure from societal actors – irrespective of their preferences – constrains the European Parliament’s possibility to reject a Commission’s proposal. Due to re-election purposes, MEP cannot afford to ignore societal demands (Michalowitz 2004). At least some members or political groups will consider it worthwhile to pick up some pressure groups’ interests. In consequence, the EP is
inclined to lose its already weak veto power, and it finds itself in a “compulsory negotiating system” (Scharpf 2006: 848) with the Commission and the Council. While a compromise is almost necessitated, lowest common denominator decisions with optional harmonisation measures are more likely to result. In the case of intellectual property enforcement, inconsistent regulations will follow and rather lead to a less harmonised common market.

Finally, the conception of private-public partnerships expressed by the intellectual property right holders raises some normative questions about the desirability of a blurred distinction between “government” and “society”, as it is partially proclaimed in the European governance literature (Christou/Simpson 2006; Green Cowles 2003). Only if one subscribes to the perspective of the content industry, an increased co-operation between judicial authorities and right holders will be considered as “good governance”. For those who are inclined to uphold some privacy reservations, the assumed Pareto-optimality (i.e. lower prosecution costs for the governments and more effective results for the right holders) would only be validated for privileged economic interests (Moe 2005).

In sum, the empirical findings in the field of intellectual property enforcement confirm that national interests still play a pivotal role in the EU decision-making process. Neither the jurisdiction of the ECJ nor the Commission’s formal competencies and informal capacities may incite regulations against the member states’ will. Furthermore, the involvement of societal actors does not necessarily enhance the harmonisation process, and it is far from sure if such an influence would be acceptable in terms of democratic legitimacy. In consequence, the proclamation of a supranational governance of the common market seems premature and neglects the impact of power relations between member states, EU institutions and societal actors (Arts/van Tatenhove 2004). When combined with the analysis of non-governmental organisations, neo-realistic and intergouvernemental approaches to the EU policy making still offer a more promising perspective.
References


95/46/EC: Directive of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.


BEUC (2005): Criminal measures for enforcement of intellectual property rights. BEUC position paper.


COM 2000/789 final: Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Follow-up to the green paper on combating counterfeiting and piracy in the single market.


Council of the EU 10131/06: EU – US action strategy for the enforcement of intellectual property rights.

Council of the EU 11107/03: Addendum to outcome of proceedings: Proposal for a directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights.

Council of the EU 11245/05 ADD 1: Document de travail de la Commission. Annexe à la proposition de décision Cadre du Conseil visant le renforcement du cadre pénal pour la répression des atteintes à la propriété intellectuel.

Council of the EU 11856/06: Note from the Presidency to Art. 36 Committee.

Council of the EU 12055/03 ADD 1: Addendum to outcome of proceedings of Working Party on Intellectual Property.

Council of the EU 12519/06: Case before the Court of Justice. Case C-301/06 (Ireland versus Council of the European Union and the European Parliament) Proceedings for annulment of directive 2006/24/EC of the European Parliament and of the Council of March 15, 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communications networks and amending directive 2002/58/EC.

Council of the EU 13103/06: 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.


Council of the EU 6466/06: Procedural consequences of the judgement of the Court of Justice in Case C-176/03.

Council of the EU 8285/04: Addendum to “I/A” Item note from General Secretariat of the Council to Permanent Representatives Committee (Part I/Council).

Council of the EU 8319/06: Outcome of proceedings of Working Party on Substantive Criminal Law.


Interview 017: Member of the European Parliament. Strasbourg, October 25, 2006.


Interview 023: Member of the European Parliament. Strasbourg, October 24, 2006.


Microsoft (2006): Response of Microsoft to the Commission consultation on the future of the internal market.


SEC 2005/848: Proposal for a European Parliament and Council directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and Proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences.


