EU Directive on measures and procedures to ensure the enforcement of intellectual property rights

The Council Political Agreement should be adopted in first reading.
Intellectual property is the foundation of human creativity and innovation.

Author's rights are indeed needed to reward creativity and innovation, and as any right, they need to be carefully balanced with the wider needs of society, for example there is a reason why copyrights and patents are only given for a limited amount of time.

Balancing, not shifting the rights of authors, inventors, users and consumers is indeed vital for the economic sustainability of creative processes.

The directive avoids to clarify the rights it seeks to protect and it still refuses to set clear conditions on **when** its measures can be applied, whereas its measures are clearly defined: They are investigative methods belonging to criminal procedure.

When investigating a murder, there are clearly defined conditions on if and how investigative measures can be taken against any suspect. Only for infringements on "Intellectual Property", the directive now drops all those conditions, allowing the application of these investigative methods against anyone without any of the safeguards we have for criminal procedures.

In Europe, over 5% of the GDP is generated through creative works. Millions of citizens directly depend upon intellectual property protection for their livelihood. Many more benefit from its contributions.

If it is the political will to introduce such totalitarian measures to the European market, it still remains to be explained why these measures should only be applied to infringements of "Intellectual Property Rights" and not with infringements against the foundations for the other 95% of the GDP?

In addition, there are reasons why infringements in immaterial monopoly rights are not punishable under laws of material goods. To give three examples, copyright infringement is not punishable by laws against theft, patent infringement is **not** a criminal offense and possessing stolen physical goods is a criminal offense while mere possessing of goods which infringe on copyright is not.

Yet widespread counterfeiting and piracy put European consumers and creators at risk. These activities steal jobs and tax revenues from economies. They hamper the growth of legitimate online services and threaten the well-being of consumers.

There are a lot of activities which do exactly that. Still, prosecutors have to respect the criminal procedure law when investigating against these actions. Is there a certain reason why investigation against counterfeiting should be allowed to use a much more relaxed set of rules as for the prosecution of serial killers, drug barons and child abusers? Is there a certain reason why the same reduced conditions are enough to search the dwellings of teenagers?

The EU has been considering acting since 1998, when the Commission first released its Green Paper on the problem of counterfeiting and piracy in the EU. In 2000, the European Parliament agreed unanimously that strong action was needed.

> However, this mandate for action was weakened by the widening the scope of the Directive to cover **all** infringements of all intellectual property rights. Depending on the member state, this can even include business secrets and confidential information, but the text does not give any guidance if they are definitely included or not. This is especially interesting from the viewpoint of the media which could suffer from the ability to report about leaked information then, making unapproved reports about companies a offense which is punishable using seizures which can be used to take away any evidence for the reports. This is a very dangerous combination.

The proposed Directive is an opportunity to give meaning to this commitment and ensure that creativity is fostered throughout the enlarged Community's 25 Member States.

> Without a Second Reading, representatives from the 10 new accession states will not have an opportunity to take part in the creation of the Directive. This will reduce their practical commitment to a strong implementation and exclude them from a debate that will have a large impact on their national laws. It will not encourage a sense of European solidarity amongst accession state citizens to see this type of legislation deliberately rushed through to prevent them from having any influence on its form. Nor would a rushed Directive seemingly targeted directly at the accession states provide a properly European welcome to these new members.

Now is the time for the European Parliament to act by adopting the Council Political Agreement in first reading.

> In the codecision process, as it was designed, the parliament did not give up it's legislative power to a set of trilogy meetings. Doing so would undermine the legitimation of the European Parliament, widen the disconnect with the people and would increase the sadly already existing notion in constitutiency that not even the European Parliament is a democratic institution.

The Council Political Agreement should not be further weakened.

> The Agreement has indeed already gone a long way towards a better balance of effective measures to protect right holders while also ensuring protection for EU citizens. This has not "weakened" the draft Directive, but made it more likely to be supported by the EU's citizens. The Parliament should make sure they amend the Directive in the same spirit to ensure support from right holders **and** citizens.

The Council Political Agreement is not as far-reaching as the Legal Affairs Committee might have hoped. While it reflects some best practices and remedies already existing remedies from the Member States, the Agreement is less effective in some areas than existing rules in the Member States.

> Intellectual property is a complex and carefully evolved area of law in each Member State. Different remedies exist in different states quite deliberately, to ensure effective protection of the rights of citizens as well as right holders and to best fit each state's wider legal framework.

> Nobody is suggesting that existing remedies should be **weakened** by the Directive in Member States. Indeed, Article 2.1 of the Political Agreement begins by stating that "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..."

It creates a bare minimum in terms of meaningful legislation that should not be further weakened.

> This sentence is extremely misleading. Indeed the search, seizure and bank account orders are known in the UK and Ireland already, BUT: For example the search orders are not actually search warrants with usual procedures and autorities as one might think. They have to knock on your doors, but you have to let them in. Otherwise you are in breach of the court order and therefore in contempt of court. That's why the courts in the UK and Ireland are careful about issuing the orders because they know they are drastic and open to abuse. The problem with the Directive is that these checks and conditions imposed in the UK and Ireland are not even mentioned. According to national transpositon, not even the police needs to be used, but rather private cops hired by themselves. At least that's the way in England with Anton Pillar orders.

It is, however, an important first step toward eliminating counterfeiting and piracy in the EU.

> Be honest: There have been lots of highly effective predecessor steps. What the directive actually does is set one of the most extreme legislative steps in the history of the common European market. The field where this compromise actually lowers a minimum of conditions which are commonly accepted throughout the EU, is the field of fundamental procedural rights like Art 6 EMRK.
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> For the directive to harmonize and not de-harmonize, replacing the term "Intellectual Property Rights" with clear list of rights would be needed.
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> Georg Jakob wrote in his Paper “Deharmonisation thru the Enforcement-Directive”:
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> > If you bring together three lawyers from across Europe, it soon becomes clear that it will prove very difficult to get a definition of either Intellectual or Industrial Property they will all **agree** on, especially when it comes to the question of which areas of law should actually be included.
> > Even the **concept** of a property right is **vastly different** in the English common law and European continental law. And although the term Intellectual Property seems to be marketed heavily by some interest groups, hardly any of the national legal systems actually use it. Where the term has **actually survived**, it seems to be for **historic** reasons.
> > One of Germany's most distinguished experts has gone so far as to call the term Intellectual Property an **aberration of legal theory, drawn from the junkyard of legal history, which only serves to obscure the facts** - it is quite rare that legal scholars find such strong words.

It brings the EU closer to achieving the Lisbon goal of making Europe the world’s leading knowledge-based economy.

> As patents are included in the scope of the current proposal, there is a huge danger that it will bring Europe further away from this goal than where it was when this goal was set. With the patent system, there can be no guarantee that one are not infringing by the fact that you are creating independently without copying anything. There are no safeguards against causing severe damage to european's fast-moving SME.

It would be better for many small compainies to play safe and not take this risk of patent infringement altogether by not providing innovative products or services altogether, but this is not in-line with the Lisbon goals.

Ultimately, its adoption will send an important signal to countries outside the EU about the EU's commitment to creativity and innovation.

As long as there are different levels of IP protection inside and outside the EU, companies in member states can be at disadvantage for cross-border competition.

No one will go to jail as a result of the proposed Directive.

No one will go to jail as a result of the proposed Directive. But houses will be searched, all kinds of equipment will be seized, bank accounts will be frozen and ISPs will have to give previously confidential information to rightholders.

Anybody's homes, anybody's equipement, anybody's bank account, anybody's confidential information - from Teenagers to SMEs and maybe, hey, if we're lucky we might also have some counterfeiters among them!

The Political Agreement adopted by the Council does not establish criminal penalties. It is a purely civil instrument.

As a purely civil instrument it does not balance enough between the two interests in the civil aspect that is trying to regulate. In fact it is building up a big set of powers for measures for parties which claim intellectual property while the party which is blamed for something is in duty to serve that totally. There is an obvious raise of the claiming party into a state that makes it nearly equivalent to the powers of a public prosecutor, which is a known part of the criminal law. Such public powers in the hands of private persons are highly doubtfull. On one side, the pure claim would be enough for obtaining anything from the other party, including unlimited insight into any sort of business secrets for serving the request. On the other side, the defending party has nearly no legal powers to deny such measures to finally take place. There is further no levelling, so the defending party is subject of a screening in a civil law to a degree as it is not even possible in current criminal law. The measure itselves is much some sort of a punishment, even if the defendant was truely not guilty all the time. The risk for the claiming party is minimal, and nearly no entry barrier has been specified.

No one will be going to jail on the basis of this text – despite what some have said. The criminal penalties initially contemplated by both the Parliament and the Commission have now been abandoned.

But granting wide powers for minor reasons in the directive means nearly the same to the affected parties. In many sectors there is a hard fight for market shares because consumers have a many choices, and so we are seeing a permanent competition with lots of dynamics which is in fact enjoyable. Due to the fact that the competitors are in heavy pressure to outdo their opponents in the market, if there is a chance to only give one opponent a small kick to tumble back then it will tried. A legal way to bind an opponent for days, weeks or even months, will surely be taken if possible - endangering SME, leaving Europe without it's foundation for meeting the Lisbon goals.

As conceived by the Council, the Directive will not impose harsh criminal sanctions on individuals. It does not provide for any of the criminal remedies available under the US Digital Millennium Copyright Act (DMCA).

> Of course, e.g. Author's Rights Laws include administrative as well as criminal measures, procedures and sanctions in most member states, as e.g. also the violation of property rights on material goods is protected by criminal law. But in either case those measures can be applied only if the respective conditions of criminal law and criminal procedure are respected.
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> Criminal sanctions have been dropped from the proposal, but the **measures** it contains still belong to criminal procedure. "purely civil" isn't the right term to descibe this.
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> One example of these measures are the measures of Article 9 which, without careful amendment, can introduce the same problems which the DMCA subpoena provisions cause in the US.

The Directive's measures do not apply without restriction.

> It is quite questionable if an entry level requirement for applying measures from that law has substantial height. Step rules for increasing severity of applied measures don't exist really. In other words, fullfilling the entry level on a claim opens anything so that in practice any company or individual can be made a target for those measures.

Consistent with the Legal Affairs Committee's Report and the TRIPs Agreement, the Council proposal permits effective action against any acts of infringement of IPRs. This does not mean that the Directive's measures now apply without restriction, however. Instead, under the Council Agreement, certain Articles of the Directive (Articles 7(2), 9 and 10(1)(a)) only apply where the conduct involved is on a "commercial scale".

> This should apply to the entire Directive. In terms of existing laws there is a fundamental split between commercial law and private law. If there is further need for regulating this for private law as well then a totally separate Directive should serve that. This would avoid lots of confusion in application and unbalanced design for the later law practice.

This approach provides for the limits that some have demanded and excludes acts done by end consumers acting in good faith.

> The Electronic Frontier Foundation(EFF) disagrees:
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> The key to the directive is the definition of **"commercial scale."** Several of the more extreme new remedies are only available for commercial-scale infringement. However, this is largely undermined by the definition in new recital 13a of the directive, which states, **"The acts which are committed on a commercial scale are those carried out for direct or indirect economic or commercial advantage."**
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> Although it goes on to say, **"This would normally exclude acts done by end consumers acting in good faith,"** the meaning of **"indirect economic advantage"** is unclear and the directive is not limited to intentional infringements. Therefore, there is concern that rights-holders will be able to use the new tougher penalties against consumers who accidentally or unknowingly infringe, including those who commit minor infringements without any commercial purpose or impact.

The Directive provides a "right of information" that is balanced, limited and that fully and appropriately respects individual privacy. Some have suggested that the "right of information" (Article 9) could lead to abuse and potentially intrude on individual privacy. This is not true. Article 9 includes several safeguards against abuse. First, the Council Agreement limits this right to conduct occurring on a "commercial scale".

> Again, "commercial scale" is unclear (has to be defined), see the EFF comment above.

Second, requests for information must be "justified and proportionate". Most importantly, only a judicial authority can order that information be provided.

> The term "juridical authority" must be strengthened to require that an independent judge or court of law makes an order. Otherwise, there is no safeguard against the problems of the US situation, where orders are issued under the DMCA by a court clerk.

Finally, use of the measure must not prejudice rules on confidential information, on treatment of personal data, and on the right against self-incrimination. And as with all measures in the Directive, the right of information is subject to the general requirement in Article 3 that measures be fair and proportionate.

> Anything potentially interferring with human and civil rights my only be done if it is "fair and proportionate". It is common knowledge that laws and of course Directives which laws will be based on have to specify clearly **how** "fairness and proportionality" shall be achieved, thereby providing guidance and control for judicial authorities.

Given these many safeguards, ISPs can be assured that they will not be flooded with numerous and potentially unfair requests for information. And individuals can be confident their privacy will be respected.

> Since these safeguards, are as described above, are unclear, the opposite is true.

Existing intellectual property rights and exceptions are unaffected by the Directive. The EU has a long-established and well-balanced framework of intellectual property legislation which includes the 1991 Software Directive and the 2001 Copyright Directive. The proposed Enforcement Directive respects this framework, as it should. Article 2 of the proposed Directive states unequivocally that the Directive does not affect existing Community legislation on intellectual property, including the Software and Copyright Directives. Because the proposed Directive does not change the substantive IP rules, conduct that did not infringe an intellectual property right before the adoption of the proposed Directive will not infringe one after the Directive's adoption. The proposed Directive does not create new or different rights, nor does it alter the exceptions to these rights. Instead, the proposed Directive simply defines workable tools needed to enforce existing rights, as the EU is required to do by the WTO TRIPs Agreement.

> The last sentence suggests that the EU has signed TRIPS and some member states have not and this Directive is needed therefore, but Member States are already signatories to the TRIPs agreement, and so must implement its provisions with or without this Directive. Even distingushed academics in the field of IP law could not find an answer to the question why the EU has to impose these Super-TRIPS requirements on member states and these academics believe it has been a wise decision in the past to leave questions of legal procedure to member states (principle of subsidiarity).

The Directive does not require that Internet Service Providers 'police' their networks, nor does it subject ISPs to new or greater liability for illegal activity occurring on their networks.
Some have suggested that the Directive will impose undue burdens on Internet service providers (ISPs), to the detriment of the Information Society. The rules relating to the liability of ISPs for illegal content carried on their networks are established in Articles 12-15 of the 2000 "E-Commerce Directive". These rules are fair and workable and reflect a balance among many competing interests. They have worked well in practice. The proposed Directive respects those rules – as it should. Article 2(3)(a) of the proposed Directive expressly states that the Directive shall not affect the E-Commerce Directive and, more particularly, shall not affect Articles 12-15 of the E-Commerce Directive. This means that the existing rules on ISP liability will not change. And it means that ISPs will not be required to monitor or "police" their networks. There are many other safeguards for ISPs (and others) in the proposed Directive. For example, with regard to the right of information, requests for information must be justified and proportionate. Other measures in the Directive are similarly limited. These limitations ensure that ISPs will not be faced with limitless requests for injunctions, demands for information or seizure of their equipment.

> Again, these "safeguards" have to be considered insufficient, as they are purely rethoric without any significant meaning or guidance for judicial authorities. Also, if there is some sort of "Police" neccesary in the online world, then there is the question if this power can work without the internet service providers. Any expert can quickly answer this question with "no". This police must be in posession of big monitoring skills, insights in any major data stream and the ability to track any data back up until the last network node before the investigation target, the individual. That would require total observation without any sort of guaranteed privacy.

The Directive is good for consumers and respects their legitimate expectations.
Some have suggested that this Directive is bad for consumers. First and foremost, we must remember that it is counterfeiting and piracy that are bad for consumers. It is consumers who are the real victims of counterfeiters. They buy products that they believe to be genuine, only to discover that they have been misled. In the most extreme instances, consumers can be physically harmed by counterfeit products.

> Criminal subjects, such as large scale pirates and counterfeiters, will be hit by the criminal law already. Only non criminal subjects will get hit specifically by an extra civil law. Customers can even be harmed by genuine products. Of course the customer may not be misled about if he is buying a brand product or a alternative product. Competition is the most important aspect for the customer to have a useful market on this side of the trade, otherwise the only supplyer of replacement parts can dictate price, qualitiy and contract conditions at his will.

It is also important to note that the Directive itself includes safeguards for consumers and preserves their legitimate expectations. For example pursuant to Article 3, the application of the Directive's measures must be proportionate in all instances. Article 2 make clear that the private copying exception as established in the EU Copyright Directive remains unaffected.

> The private copying exception is an **optional** exception not implemented in some states such as the UK. Since most counterfeited products are cheaper than originals, every consumer who unintentionally happen to have a counterfeited product has an "economic advantage". Since this is considered "commercial scale" by the Directive, any consumer could fall victim to the investigative measures. Is this proportionate?

The Directive fully respects EU data privacy laws.
The EU is committed to protecting individual privacy. The proposed Directive respects this commitment. Over and again, its measures require that privacy be fully respected. For example, any order made under Article 9 (the right of information) must not prejudice provisions on the treatment of personal data. A judicial authority must be involved, further ensuring that privacy is respected. Other provisions are similarly limited. We must recall, however, that privacy should be a shield rather than a sword. Those who are committing illegal acts must not be allowed to cloak themselves behind spurious claims to privacy.

> It as a very dangerous direction to neglect rights like that to privacy in favour of "fighting illegal actions". We have to remember that we are not only talking about privacy, as e.g. the provisions of Art 6 EMRK are much more affected by this Directive. One of the main reaons, why these human rights have been designed, was to protect innocent citizens from unjust investigations.

The Directive is good for SMEs and mindful of EU competition laws.
Some have suggested that this Directive will stifle competition in the EU and/or make the EU an unattractive forum for SMEs. To the contrary, strong rules on enforcement will enhance competition.

> The Austrian Chamber of Commerce submitted a statement criticising the conditions on which the investigative measures of the Directive can be applied as weak and undefined, saying that the Directive was open to abuse and therefore potentially damaging, in particular to SMEs. This statement has been submitted in May 2003, but the problems pointed out by the Chamber of Commerce still have not been fixed.
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> In addition, it will be particularly problematic to ensure that SMEs do not get involved unwittingly in patent disputes with large right holders. As the rapporteur said in the Legal Affairs Committee report on the Directive, *"the question of patent protection is such a complex and delicate issue that it deserves a specific text, perhaps following adoption of the text on the Community patent."*

The Directive itself contains safeguards to ensure that SMEs are not prejudiced by its application. As a general rule, Article 3 instructs Member States to apply the Directive in a manner that avoids the creation of barriers to legitimate trade. The measures themselves also include safeguards against abuse. For example, the Directive's rules on civil ex parte (surprise) searches (Article 8) requires that judicial authorities have the ability to obtain from right holders an adequate security or equivalent assurance; this ensures that where a search is wrongly conducted, the defendant can be compensated for any resulting prejudice. Other Articles contain similar safeguards.

> The problem is that big enterprises like e.g. Microsoft or Vivendi-Universal can afford these securities more easily than the average european SME or any Free Software Project. This is another example on how this Directive is, by its design, bound to help big players against small competitors. This design problem isn't something which can be repaired without completely redrafting the text.

Finally, it is important to recall that this Directive is based on the best practices in the Member States. We are unaware of any evidence that suggests that these tools have been misused against SMEs or that they have stifled competition in any way.

> Those "Member States" must be the UK and Ireland. In the UK, these orders have become subject to ***severe criticism*** and therefore their ***application*** has, by negative experience, been ***extremely limited***. These limits are **not** part of this directive, so the **grown experiance** of these Member States with these measures is **not included**.

Indeed, the evidence is to the contrary: weak IP protection undermines competition.

> Could any pointer be given to the evidence referred to in the above line?
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> The opposite is true, at least for patents: A stronger patent system causes less competition, because patents, by their very nature, are economy-wise anti-competitive instruments(except for the competition on getting higher numbers of patents per company and country, bit this does not need enforcement). The same could be the case for overly strong protection in other areas. For example, big trademark holders like Microsoft enforce their trade marks against competition from smaller companies to forbid selling of competitive products, e.g. see http://www.lin---s.com/. In addition, copyright charges without presenting any proof have been invoked by SCO, a company which got a big money infusion from Microsoft just before starting a fight against Linux itself, a very competitive Operating System against Microsoft's Windows.

The Directive supports interoperability and open source software models.
The proposed Directive will not undermine the ongoing development of open source software in the EU. First it does not affect the 1991 Software Directive.

Thus the acts of reverse engineering to achieve interoperability that have been permitted under the Software Directive for over a decade will continue to be permitted.

> But since the level of conditions for applying the measures of the directive is extremly low, "reverse engineering" combined with a suspected additional infringement will likely equal "reasonable available evidence", letting the suspect fall victim to searches, seizures and the like being kept up for at least a month. More than likely enough to help big players like Microsoft, which, for example, are in anti-trust for using their dominant position alreay, to shut down small, innovative competitors.
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> Another example: SCO claims that a competing software (Linux) is using code infringing their copyrights without giving clear proof that they indeed have a case. Abusing the law for such cases must be prevented.

Indeed, any conduct permitted by the Software Directive will still be permitted after the adoption of the Enforcement Directive.

> There is another Directive, the Directive on computer-implemented inventions, which is, still in progress. Because it is, no assessment can be made on the issues related to this directive: Patents are sensible to interoperability and by having patents in the scope of the IPR Directive, without provisions for interoperability related to patents, depending on the final outcome of the Directive on computer-implemented inventions (if the final

version has only insufficient interoperability privileges), this compromise will hurt inter perability even at the patent level and would extend any negative outcome of the adopt on or not-adoption if the directive on computer-implemented inventions.

Therefore, it is extremely important to remove patents from the scope of this direcive.

Moreover, enforcement of IPRs is good for OSS developers just as it is for commercial software developers.

Just to prevent a possible misconception to readers of the above sentence: Open Source Software developers can be commerical software developers, e.g. Sun's OpenOffice is developed under an Open Source License and sold commercially *at the same time*.

Yes, OSS developers can benefit from this Directive, but as an **individual** developer, it's unlikely that he can risk the securities which need to be provided for seizures of commercial companies and pay the **legal expenses**.

Obligations regarding the use of open source software are established in the respective OS licenses and grounded upon IPRs.

Copyright, to be specific. Existing European Union Directives made already for good protection of copyright, but as seen in the US, an imbalanced copyright system can have bad effects: For example, for much too long, SCO has been able to make unproven claims about Linux while SCO had to stop these claims in Europe in quite short time.

The ability to enforce these IPRs is a critical element in maintaining the open source system.

Whoever was in danger of beeing sued for open source licenses looked for a solution quite quickly and avoiding the lawsuit. The whole thing is reliable. This works already. IPRs are a two-sided sword, not striking the right balance will have detrimental effects.

Failure to achieve a minimal harmonisation of IPR enforcement rules in an enlarged EU will expose software developers – both commercial and open source – to situations in which they are unable to enforce their respective rights.

No Open Source Software developer has suggested that the strong enforcement provisions in this directive is necessary in any way to maintain the open source system. However, many open source developers and distributors are worried that the Directive would open them up to action under these provisions for complex and contested arguments over intellectual property. This will especially be the case if the Parliament does not stand firm on the amendments it made during the first reading of the Software Patent Directive.

Ending up in a situation with fear of huge legal fees for unintentional patent infringement as well as using and selling and using Open Source software in good faith would discourage development activities and competition, and as a result, stifle innovation.

There is no longer a concern that the Directive's remedies will be applied unjustly in patent disputes.

Despite initial opposition by the Legal Affairs Committee, who had sought to exclude these from the scope of the Directive, the Council text applies to patent infringements. The Legal Affairs Committee properly believed that certain of the Directive's measures (double damages and strong criminal sanctions) should not apply to patent infringements. This concern has been mitigated by the elimination of double damages and criminal sanctions from the Directive. Patent litigation tends to focus on questions about the validity of the relevant patent, and not necessarily on counterfeiting matters. In these circumstances, strong criminal sanctions and double damage remedies are less appropriate. Patent litigation is almost exclusively conducted between competing commercial organisations involved in the same area of trade. Patent litigation tends to focus on questions about the validity of the relevant patent, and not necessarily on counterfeiting matters. In these circumstances, strong criminal sanctions and double damage remedies are less appropriate. Given that these remedies have been eliminated from the Directive, however, there is no longer a concern that they will be unjustly applied in patent disputes.

> The remaining measures and damages do not fit the patent system because patents be violated without ever knowing until someone recognizes a speicfic abstract design principle that is granted in form of a patent. The reason for this is that the patent system suffers greatly of the problem of independent creation which copyright and trademark law do not introduce. Even limiting this to intentional infringement is troublesome. Just to demonstrate the level of complexity(from an FFII draft):
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> - intentional BUT: sanctions shouldn't discourage people from reading patent applications.
> - breadth of monopoly (how far it goes beyond an individual creation)
> - likelyness of the validity of the claims (whether the defendant can point to some new prior art)
> - how old the claims are
> - for how long and how visibly the right-holder's enforcement policy has been publicised- (e.g. submarine patents don't deserve strong enforcement at the expense of the public), - whether a non-discriminatory licensing policy has been published
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> Complexity was the main reason why patents have been left out in the official JURI report! In the final report the report on this directive), you can find these words:
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> *On the matter of patents the rapporteur proposes excluding them from the directive's scope, since the European Patent Convention is the sole text in force at present and the question of patent protection is such a* ***complex and delicate issue*** *that it deserves a specific text, perhaps following adoption of the text on the Community patent.*
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> The rapporteur herself said that there is a complex and delicate issue and removing the double damages and criminal sanctions does **not** make the *complex and delicate issue* go away.
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> To give a colorful parable to demonstrate the issue:
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> *Let's make a law which introduces torture and the death penalty.*
> *But we do not want children to be subject to those measures.*
> *But instead of exluding anybody under a certain age from the scope of that law, we take the death penalty out.*
> *This won't save 3-year-olds from torture, would it?*