

Copyright Piracy - why Brussels should walk the plank.

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Piracy costs **\$12-15 Billion** a year to the US copyright industry alone, it accounts for **5-7%** of the value of world trade and causes an estimated **100,000** job losses per annum in Europe according to the latest figures published by the International Chamber of Commerce.

Why then has Brussels failed to introduced tough measures in its proposed Copyright Directive to address this epidemic ? Have none of the Eurocrats been home lately and asked their kids where they got that copy of *Tomb Raider* ? on their home pc. Almost one in every two will get a shock, since the software piracy rate has reached a staggering 46%.

What about that new *Spice Girls* CD ? The piracy rate in the audio-visual industry is 25% and rising rapidly with the introduction of the latest double-deck CD players. Could this be the reason that the music industry's trade body, the International Federation of the Phonographic Industry (Ifpi) has been on the warpath in Brussels of late ?

The provision in the directive which is most under attack for failing to address this issue - and there have been over 300 objections to this particular draft - is contained in Article 5, which exempts private individuals from the need to obtain copyright permission to make *private* copies (ie. for non-commercial purposes) of any copyright material. Member States in the EU have the *option* of implementing this exemption into their national law since it is, what the directive calls, a *non-mandatory exception*.

Most Member States (including the UK) *do* allow private copying under their present laws. However, 11 of those Member States (*not* including the UK) do not allow private copying *for free* but instead impose a legal licence and levy system on blank CDs, tapes and cassettes to gather 'notional royalties' in an otherwise unpolicable area. At least this source of revenue, which is not insignificant (France collected 120 Million ECU - about £78 million - in 1995 and Germany, about £49 Million in the same year) helps to compensate musicians, software owners and other copyright holders for the loss of revenue they suffer by not outlawing private copying.

Should not the proposed copyright directive consider practical measures such as this levy system, in order to safeguard at least the copyright holders' right of remuneration - ie. the right to be paid for the number of copies made of their work - whether or not private copying is permitted (as it is in the case in countries applying the private copying exemption) or even where it is outlawed, since in neither situation can the extent of copying be readily policed ?

In addition, should not the directive also include provisions for the imposition of a levy on 'double-deck' equipment, the purpose of which is specifically to enable and facilitate copying ? Several Member States (not the UK) already impose such a levy on photocopiers and facsimile machines.

Both these measures would make copyright owners - and bodies such as the Ifpi - a little happier, but what is the manufacturers' defence to such propositions. The European Association of Consumer Electronic Manufacturers (Eacem) is naturally not in favour of any measure which would increase the price of equipment to consumers. Others on this side of the argument contend that copyright owners should protect their own works by technological means (eg. encryption, scrambling, digital watermarking and tattooing, access control monitoring) and not by draconian copyright legislation.

For those in Europe who are currently arguing this latter approach, they will be more than a little shocked to discover the stringent anti-piracy legislation which has just recently passed through Congress.

The US' *No Electronic Theft Act* imposes strict penalties (including prison) on copyright pirates even if the parties involved do not profit by sharing, bartering or exchanging unauthorised copies of software or other material on the internet. The two specific offences which it introduces are:

- ?? *wilfully making or possessing 2 or more illegal copies of software, music or film* (this carries a maximum jail sentence of 3 years) and
- ?? *knowingly possessing pirated material* (this carries a maximum jail sentence of 1 year).

It would not be true to say that the European Commission is doing nothing in the attempt to combat piracy. In its recent Green Paper entitled *Combating Counterfeiting and Piracy* (Oct 98) it proposes to improve the existing 1994 EU Regulation (which prohibits the entry or release of counterfeit goods into EU territory for free circulation, export or re-export) by

- assessing the economic impact of such counterfeit and pirated goods in the EU
- reviewing existing legislation and identifying problems and improvements which can be made in the fight against piracy
- examining the need for EU action.

The recent fight against piracy is not merely confined to the proposed EU copyright directive, nor is it just in relation to copyright material; it is being fought on the Internet and consequently, in the courts world wide, especially in relation to some new forms of internet piracy of trade marks and other intellectual property rights.

There have been numerous cases against '*Cybersquatting*' - which is the registration of an Internet domain name comprising or incorporating the name, trade mark, brand or logo of a well-known organisation without its consent and with a view to selling that domain name to the organisation concerned.

Of the famous successful cases in the UK, BT, Virgin, Ladbrokes, Sainsbury's and Marks & Spencers all won an action against a company called One in a Million Ltd which had registered all their respective names as Internet domain names with .com at the end (eg. BT.com). The court ordered One in a Million to assign the domain names to the respective companies.

Would-be cybersquatters are now registering hyphenated, misspelled or derived names in an attempt to avoid prosecution as was seen in the recent cases against **www.Altavista.com** (the original domain name of *www.Altavista.com* having been bought by Compaq for \$3.35Million the same year !). Amazon.com was also subject to this form of piracy when **www.Amazom.com** was registered; as was *www.Viagra.com* when an imaginative pirate registered the domain name www.wwwViagra.com - by adding the addition 'www' he tried to evade prosecution for trade mark theft from Pfizer pharmaceutical company which owns the name.

Namestuffing and meta-tagging are also innovative new forms of IPR piracy. Websites are found by 'search engines' by the text on the web pages and by meta-tags, which are hidden (ie. invisible to the human eye) key words in HTML (software code) on the website - which describe the content of the pages. For example, if a car dealer has a website selling cars, the website is likely to have meta-tags with all the relevant words that any prospective buyer might type-in when looking for a car in general or the specific type of car which the car dealer sells in particular - eg. *car, auto, automobile, vehicle, Rover, Land Rover, Discovery, Freelander, County*

Namestuffing or meta-tagging becomes piracy when a website uses the trade marks, names or logos of famous or competing companies to achieve a higher profile or 'hit' rate. For example, in the above illustration (which is *not* an actual case) the car dealer may put in meta-tags of *BMW, Jaguar, Porsche, Ferrari* to attract the prospective purchasers of those cars too.

One of the successful cases in this form of piracy was Playboy Enterprises against Calvin Designer Label, where the Calvin website used the trade marks *Playboy* and *Playmate* as meta-tags without Playboy enterprises permission.

'Framing' relies on hypertext links (ie. encoded text which appears in a different colour and underlined on a website and which, when 'clicked', automatically accesses the other web pages or websites which it has been coded to find). If these links are used to display the copyright information from another website without that website owner's permission, this is *'framing'* - and its piracy.

This type of piracy was the subject of a court action last year, when The Shetland News website used hypertext links to headlines and stories in the website of its rival, The Shetland Times without its permission and without acknowledging that The Shetland Times website was the source (and copyright owner) of the material. The Shetland Times was granted an interdict (the Scottish equivalent of an injunction) to stop The Shetland News pirating its material. The case was subsequently settled out of court on the basis that if The Shetland News used its rival's material it would acknowledge the copyright of The Shetland Times and next to each headline insert a hypertext link back to The Shetland Times website.

Back in Brussels, the European Commission and the European Parliament have to agree (by June this year - is the suggested deadline), which of the many amendments proposed, will be implemented into the Copyright directive or, to use its proper name: *Directive on the **harmonisation** of certain aspects of copyright and related rights in the Information Society*. However, many will agree that 'harmony' is not the word that springs to mind for those who have been involved in this battle to date.

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