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The Scope of the Proposed IP Enforcement Directive: Torn between the Desire to Harmonise Remedies and the Need to Combat Piracy

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Two Aims for One Directive: Combat or Harmonise?

On January 30, 2003, the European Commission proposed a Directive on measures and procedures to ensure the enforcement of intellectual property rights (the "proposed Directive").[1] Quite ambivalent, the proposed Directive seems to proceed from two aims: (1) the need to combat counterfeiting and piracy, and (2) the desire to harmonise national civil procedures and remedies for infringements of intellectual property rights ("IPRs"). The Commission proffers harmonisation as a means of combating piracy.[2] The authors submit, however, that irrespective of the proposed Directive's stated ends, its chief effect will be increased harmonisation of intellectual property remedies.

As its title[3] suggests and legal basis[4] requires, the proposed Directive is to be adopted under the "co-decision" procedure.[5] On first reading, the Committee on Legal Affairs and the Internal Market within the European Parliament, under the aegis of Ms Janelly Fourtou, tabled on December 2, 2003, a report with 52 amendments ("the Fourtou Report"). The Fourtou Report contains the opinion delivered on October 2, 2003 by the Committee on Industry, External Trade, Research and Energy within the European Parliament ("the Fuster Opinion").[6]

Combating counterfeiting and piracy

Overall, the Commission's primary goal is apparently to combat counterfeiting and piracy,[7] more specifically to take action against industrial, large-scale smuggling perpetrated by criminal organisations,[8] as distinct from domestic, small-scale snatching. The proposed Directive follows up the Commission's (self-proclaimed "ambitious") Action Plan of November 30, 2000[9] and the wide-ranging consultation held by the Commission in early 1999 on the basis of its Green Paper of October 15, 1998 on "Combating Counterfeiting and Piracy in the Single Market".[10] While this proposed Directive essentially concerns the civil weaponry for the combat, the Action Plan contemplated more forceful criminal and administrative measures as well, such as extending Europol's powers or setting up mechanisms of operational co-operation among supervisory authorities. Such virile measures, however, might be emasculated by institutional constraints as they overstep the supranational First Pillar to get bogged down into the intergovernmental Third Pillar.

At great lengths, the Commission depicts how counterfeiting and piracy ravage modern economy and society.[11] Combating this criminal "scourge" surely makes a worthy policy goal, but how does the instrument of a harmonising directive contribute to it? As its core justification, the Commission maintains that "this phenomenon [counterfeiting and piracy] takes particular advantage of the national disparities in the means of enforcing intellectual property rights".[12] Let us not delude ourselves: counterfeiters and pirates do not systematically exploit comparative advantages across national legislation, so increased harmonisation will hardly affect the international map of counterfeiting. The rate of piracy is more a function of the weakness of local resources effectively available to rightholders and competent authorities. Only if the Directive strengthens those resources will it contribute to the fight against counterfeiting and piracy.[13]

Harmonising national civil procedures and remedies

Whether constricted by its legal basis or spurred by a more ambitious desire, the Commission faithfully recites its internal market "harmonisation mantra". A Directive on the enforcement of IPRs is heralded as a "logical extension"[14] because "till now, the action taken by the Community in the field of intellectual property has focused mainly on the harmonisation of national substantive law or the creation of a unitary right at Community level".[15] To enhance the enforcement of

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1 COM (2003) 46 final—2003/0024 (COD), available at *http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0046en01.pdf* (pdf) and *http://europa.eu.int/eur-lex/pri/en/lip/latest/doc/2003/com2003_0046en01.doc* (word).

2 See the Explanatory Memorandum at p.3.

3 "Proposal for a Directive of the European Parliament and of the Council . . . ".

4 Art.95 of the EC Treaty.

5 Where the European Parliament and the Council each read and discuss the proposal twice in succession then reach an agreement as to the final text before it can be adopted into law. See Art.251 of the EC Treaty.

6 C5-0055/2003 and A5-0468/2003 final, PE 322.534.

7 See below for a definition of these terms.

8 See the Explanatory Memorandum at pp.3 and 11–12.

9 COM (2000) 789 final.

10 COM (98) 569 final.

11 See the Explanatory Memorandum at pp.8–12.

12 See the Explanatory Memorandum at p.3.

13 See also W. Cornish, J. Drexl, R. Hilty and A. Kur, "Procedures and Remedies for Enforcing IPRs: The European Commission's Proposed Directive" [2003] E.I.P.R. 447 at 448, jeeringly dismissing the Commission's (legal) "Softland" tales.

14 See the Explanatory Memorandum at p.6.

15 See the Explanatory Memorandum at p.4.

IPRs within the Community, the Directive seeks to create a level playing field by extending to all Member States the best practices of one another. Hence the Directive is intended to complement, on the inside, the Council Regulation 1383/2003 of July 22, 2003 concerning customs action at the Community's external borders,[16] which is to replace Regulation 3295/94 (as amended) with effect from July 1, 2004.

Such harmonisation of national civil procedures and remedies should spare no infringers, no matter their criminal innocence and civil carefulness. Indeed, to infringe an exclusive right of property, whether tangible or intellectual, there need not be *mens rea* (criminal law) or even negligence (tort law). Thus any attempt to set wilful and/or fraudulent, or severe infringers apart from negligent, innocent or harmless ones—subjecting only the former to harmonised civil sanctions—"would introduce an awkward division", as rightly, if perhaps reluctantly, acknowledged by eminent academics led by Professor William R. Cornish.[17]

The tension between the two aims

Although combating counterfeiting and piracy, and harmonising national civil procedures and remedies may converge at some point, these are two distinct aims for one single directive. The tension between the two aims tears Arts 1 and 2 of the proposed Directive apart. Article 1 and even the title ("on measures and procedures to ensure the enforcement of intellectual property rights") spotlight the instrumental end of harmonisation for all IPRs. This, however, should not overshadow the ultimate end of combating counterfeiting and piracy.

As it is the ultimate target, one might expect to find "counterfeiting" and "piracy" defined somewhere in the text, but oddly enough, the proposed Directive remains silent on this matter. To find such definitions, one must turn to Regulation 1383/2003 concerning customs action. Article 2.1 of this Regulation broadly defines "counterfeiting" as the unauthorised use of an essentially identical trade mark, and "piracy" as the unauthorised copying of subject-matter that is protected by copyright or related rights, or (un)registered design rights.[18] Equally infringing, yet not labelled as "counterfeiting" and "piracy", is the unauthorised use of a patent, a plant variety, a designation of origin, or the like.

The Regulation's definitions clearly contradict the proposed Directive's title and Art.1 in so far as counterfeiting and piracy do not encompass all IPRs, excluding in particular—yet not only—patents. Incidentally, it is worth noting that "piracy" in the Regulation covers *any unauthorised copying*, whether or not it is deliberate and/or fraudulent, commercially purported or significantly harmful.[19]

In the absence of an express definition for "counterfeiting" and "piracy" in the Directive, some could be tempted to equate or approximate those terms with the proviso in Art.2.1 *in fine*, which restricts infringements under the Directive to those "committed for commercial purposes or [causing] significant harm to the right holder" (the "proviso"). This legal stew by the Commission will be criticised below—the authors will go as far as to plainly advise the "co-decisional cooks" (the European Parliament and the Council) to get rid of it.

In fact, this incongruous proviso may not even outlive its passing through the European Parliament, thanks to the Fourtou Report. Amendment 13 of that Report sets about deleting the proviso, relying on the understanding that the proposed measures "should ideally apply to any infringement" of IPRs. Furthermore, Amendment 13 pertinently, if inelegantly, proposes that "Member States shall ensure in this connection that the judicial authorities take due account of the specific characteristics of each individual case in choosing penalties and the modalities thereof", to which Recital 10, as amended by the Fourtou Report, adds: "taking account in particular of the intentional or unintentional character of the infringement". It is submitted that advantage could be taken of such leeway to further distinguish independent creators from copiers.

Yet Amendment 13 of the Fourtou Report will have to triumph over its antitheses in the Fuster Opinion. Amendment 6 of that Opinion, not content with the proviso in Art.2.1, would graft on to it a second proviso: "provided that the infringement in question constitutes an act of counterfeiting". The Fuster Opinion's Amendment 7 embarks on defining such an act of counterfeiting as a "deliberate and fraudulent" infringement only. And Amendment 8 of that Opinion considers creating a rebuttable presumption of "commercial purposes" based on possession of quantities or varieties of counterfeit goods.

In the light of the foregoing, it is submitted that the Fuster Opinion, with its combating piracy logic, is neither pertinent nor functional. It is not pertinent because counterfeiting and piracy are better tackled by criminal and administrative measures; these should be strengthened as a matter of urgent policy but should not encroach on auxiliary civil enforcement. It is not functional because it would artificially (and awkwardly) divide up civil measures into harmonised sanctions for counterfeiting infringements as opposed to national remedies for, say, "less serious" infringements.

The Fourtou Report, with its harmonising logic, appears more functional, not only because it encompasses all infringements (although, should it exclude patents from its scope,[20] all infringements to *certain*

16 Council Regulation 1383/2003 of July 22, 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights [2003] O.J. L196/7–14.

17 W. Cornish *et al.*, n.13 above, at 447.

18 It is piquant to compare this definition of piracy with that in Art.101(a) of the United Nations Convention on the Law of the Sea, signed at Montego Bay on December 10, 1982 ("any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State . . . "). In the territorial sea of intellectual property, even simple fishermen are boldly branded as "pirates".

19 Compare with the "proviso" of Art.2.1 and Amendment 7 of the Fuster Opinion, below.

20 See below.

IPRs only) but also because it allows for differentiated regimes of mitigated measures for independent patent infringers.

Political compromises or, more pompously, dialectics do not necessarily make good law. If an IP Enforcement Directive is going to be adopted at all, it should exclusively follow the harmonising logic reflected in the Fourtou Report. Indeed, the authors trust that the proposed Directive's harmonising benefits will outweigh its costs in terms of disruption for national systems.

The academics led by Professor Cornish are thinking further forward; the present authors wholeheartedly subscribe to their conclusive stance that Community action is needed most towards "establishing a common system of adjudication, and elaborating a unitary catalogue of procedural interventions, sanctions and remedies for the infringement of Community rights".[21] This common system of adjudication should preferably centralise litigation at specialised, efficacious fora. Supposedly (and hopefully), these Community rights will one day include copyright.

Moving from the ideal to the actual, one will deliberately overlook what the proposed Directive says it aims to do and rather look at what it effectively does: harmonise.[22]

Harmonisation: TRIPs-plus or TRIPs-minus?

The proposed Directive proclaims to perform a "TRIPs-plus" harmonisation.[23] Indeed, its harmonised remedies offered against breaches of IPRs represent a breakthrough that outstrips TRIPs in many—though not all—respects. Those remedies cannot be analysed here, but in a nutshell:

— Compared with current national practice, the most notable effort arguably consists in the elective double-licence-fee damages in Art.17 (or even pre-established damages, were Amendment 38 of the Fourtou Report followed). It should nevertheless be borne in mind that, while Art.17 makes more damages available, it does *not* make damages more available—quite the contrary (unless the Fourtou Report is followed). Provisional measures aimed at securing evidence, enjoining infringers, or freezing assets are provided for in Arts 8, 10 and 11 but call for further specification. Controversially beyond current national practice, but necessarily so, Art.21 offers much-debatable legal protection to technical devices.

— Compared with the TRIPs Agreement, fully "TRIPs-plus" measures include Arts 11, 12, and 19 on, respectively, asset-freezing injunctions, market recall and publicity. Article 17.2 on recovery of profits contains a TRIPs-plus rebuttable presumption that the infringer's gross income, as proven by the rightholder, is to be deemed net income. Moreover, Art.9, unlike the optional Art.47 of TRIPs, makes the provision of a right of information obligatory for national legislators. And Art.15, unlike Art.44 of TRIPs, also makes obligatory for national legislators the provision of permanent injunctions that are available irrespective of the infringer's good faith. However, the proposed Directive is, at times, "TRIPs-minus" in two opposite ways: silence[24] and specification.[25]

Nevertheless, the *scope* of the proposed Directive is insidiously "TRIPs-minus" (unless the Fourtou Report is followed). TRIPs' civil remedies must be made available against *any* acts of infringement of the intellectual property rights it covers[26] (unlike TRIPs' criminal penalties, which are to be applied "at least" in cases of

21 W. Cornish *et al.*, n.13 above, at 449.

22 The proposed Directive is structured as follows:
Chapter I: Objective and scope (Arts 1 and 2);
Chapter II: Measures and procedures (Arts 3 to 19):
- Section 1: General provisions (Arts 3 to 6);
- Section 2: Evidence (Arts 7 and 8);
- Section 3: Right of information (Art 9);
- Section 4: Provisional and precautionary measures (Arts 10 and 11);
- Section 5: Measures resulting from a decision on the merits of the case (Arts 12 to 16);
- Section 6: Damages and legal costs (Arts 17 and 18); and
- Section 7: Publicity measures (Art 19);

Chapter III: Criminal law provisions (Art 20);
Chapter IV: Technical measures (Arts 21 and 22);
Chapter V: Administrative cooperation (Arts 23 and 24); and
Chapter VI: Final provisions (Arts 25 to 27).

23 See Commission Press Release IP/03/144 and Explanatory Memorandum at p.12 *et seq.*

24 Certain provisions of TRIPs, in whole or in part, are not found in the proposed Directive and are candidates for indirect effect. Whole provisions include: Art.43.2 TRIPs on a court's authority, in the case of access denial by one party, to make preliminary and final determinations on the basis of the information presented; and Art.45.2 TRIPs on statutory, pre-established damages (even without the infringer's actual or constructive knowledge of the infringement), which would, however, lose its interest were Art.17 to adopt its offspring, Amendment 38 of the Fourtou Report. Unfortunately, Arts 43.2 and 45.2 TRIPs are not self-sufficient, hence unsuited for (in)direct effect. Parts of provisions that are suited for indirect effect include Art.50.3 TRIPs on provisional measures (in a broad sense) in so far as it provides that an "equivalent assurance sufficient to protect the defendant and to prevent abuse" may suffice as an alternative for a "security". Amendments 27, 30 and 33 of the Fourtou Report support a TRIPs-like interpretation.

25 The proposed Directive adds here and there to TRIPs specifications that make a remedy less easily available to rightholders (which, of course, is not wrong for that sole reason). In these cases, there is arguably no indirect effect possible, as TRIPs-consistent interpretation would run *contra legem*. For example, unlike Art.45.2 TRIPs, Art.17 of the proposed Directive subjects a recovery of profits to the infringer's actual or constructive knowledge of the infringement. Also, Arts 8.3 and 10.3 of the proposed Directive, respectively on evidence-protection measures and provisional measures, disconcertingly differ from Art.50.6 TRIPs by providing for *ex officio* (thus without request by the defendant) revocation of the measure should no substantive proceedings be instituted by the applicant (thus not by anyone) within 31 days of a determined starting point; this *terminus a quo* comes as early as, under Art.8.3, the seizure (thus before the sending, receipt or filing of the expert's report) and even, under Art.10.3, the day on which the rightholder became aware of the facts on which the measure is based. Amendments 27 and 30 of the Fourtou Report come round to reason by repeating the time period in Art.50.6 TRIPs (determined by the court or, failing this, 20 working days or 31 calendar days) and by setting, in the silence of TRIPs, the starting point of the period at the date of notifying the defendant of the measure. Upon expiry of the period, the Fourtou Report still mandates *ex officio* nullity for seizures (unlike TRIPs), but, for injunctions, now subjects revocation to the defendant calling for it (like TRIPs).

26 See Art.41.1 TRIPs.

wilful trade mark counterfeiting or copyright piracy on a commercial scale[27]). Yet the sanctions of the proposed Directive are, as has been seen, subject to the unsettling proviso in Art.2.1 *in fine*, a limitation in scope that revolves around criteria of "commercial purposes" or "significant harm". This limitation will be criticised below, but here is the thrust of the critique:

— The *raison d'être* of this limitation may reflect laudable morals and sound criminal policy, but it is not correct intellectual property law.

— The effect of this limitation is to grade infringing acts into three classes, subject to an arsenal of sliding-scale sanctions: (1) criminal artillery and civil weaponry against "serious" infringing acts (unless Amendment 43 of the Fourtou Report, which repeals Art.20 on criminal law provisions, is followed[28]); (2) civil weaponry against "commercially-purported" and/or "significantly harmful" acts; and (3) outright leniency towards benign (albeit infringing) ones.

— The "commercial purposes" wording is unclear and excessively draws from industrial property as distinct from literary and artistic property.

— The "significant harm" wording, even if merely alternative, is unclear and erroneously draws from unfair competition as distinct from intellectual property.

— The nature of this limitation is substantive and violates the *Ubi ius, ibi remedium* adage: "Where there is a right, there is a remedy".

— This limitation threatens to make a breach *in* IPRs and their exclusive ethos.

The Scope of the Proposed Directive: A Breach *in* Intellectual Property?

If the measures make up the legal, fertile Ganges of the proposed Directive, its scope, rather, conjures up political storm-lashed Himalayas. Here the authors will not journey through the valley of law, but will attack the steep path to the peak of politics. They will explore the scope of the proposed Directive in four stages: (1) what the Directive is without prejudice to; (2) the rights it encompasses; (3) the infringements it embraces, being restrained in Art.2.1 by a deceitful proviso that threatens to make a breach *in* intellectual property; and (4) what could be done outside the Directive's scope. The conclusion will advocate the deletion of the deceitful proviso and, alternatively, will submit an interpretation for it.

The ambit of the "without prejudice" specification

Article 2 sets out the scope of the proposed Directive. First and foremost, the Directive is *without prejudice* to (almost) anything under the sun, in particular: (1) the means that are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders[29]; (2) the particular provisions on the enforcement of rights contained in Community legislation concerning copyright, and notably those found in Directive 2001/29[30]; (3) the Community provisions governing the substantive law on intellectual property, Directive 95/46, Directive 1999/93 and Directive 2000/31[31]; (4) Member States' international obligations and notably the TRIPs Agreement[32]; as well as (5) a seemingly endless list encompassing freedom of expression, free movement of information, the protection of personal data, including on the internet,[33] judicial co-operation, jurisdiction, the recognition and enforcement of decisions in civil and commercial matters, applicable law,[34] the rules of competition[35] and fundamental rights as recognised in particular by the Charter of Fundamental Rights of the European Union.[36] Further added to this list by Amendment 15 of the Fourtou Report are the Community provisions regarding the reverse engineering of products for interoperability, in particular Directive 91/250.

Thus, on its face, the Directive only tackles procedural matters: it helps enforce substantive rights, but does not affect them. And regarding procedural matters, the Directive is "anything-plus" and "nothing-minus" for rightholders. The "without prejudice" clauses should be borne in mind throughout the following discussion.

Secondly, Art.2.1 determines the rights and the infringements to which the measures provided for by the Directive shall apply.

The rights concerned: what about moral rights and "purely" national patents, if not all patents?

The *rights* concerned are those "deriving from Community and European law on the protection of intellectual property, as set out in the Annex". The Annex—deleted by the Fourtou Report—lists 21 legal instruments, comprising the *acquis communautaire* in the field as well as the European Patent Convention ("EPC"). Thus the verb "deriving" must be construed very broadly: it encompasses not only Community Regulations or European Conventions, but also national legislation as harmonised by Community Directives. Supposedly, the seven copyright directives enacted so far represent a sufficient derivation, in particular the Copyright Directive 2001/29, whose scope extends beyond the much-hyped information society to the most old-fashioned environments. Even so, this appears to leave out certain rights, such as authors' moral rights or inventors'

27 See Art.61 TRIPs.

28 See below.

29 Art.2.1 of the proposed Directive.

30 Art.2.2 of the proposed Directive.

31 Art.2.3(a) of the proposed Directive. The Fuster Opinion proposes, perhaps superfluously but cautiously, to make it clear that intermediary service providers whose role is limited to the activities specified in Arts 12 to 14 of Directive 2000/31 shall not be considered infringers, or participants in an infringement.

32 Art.2.3(b) of the proposed Directive.

33 See Recital 2.

34 See Recital 11.

35 See Recital 12.

36 See Recital 30.

"purely" national patents (which have not been granted by the European Patent Office[37]).

Indeed, whether steeped in their economic creed or cramped in their limited powers, the WTO and the European Union have not (yet?) tackled, much less accorded, moral rights. If the enforcement of moral rights is not looked down on as an utter futility, the authors suggest minimising this loophole by inserting a cross-reference to all rights guaranteed by multilateral treaties to which all EU Member States are contracting parties; those instruments include the Berne Convention, whose Art.6*bis* provides for two moral rights.[38] As for "purely" national patents, the best bet might be to infer *a fortiori* from the proposed Directive's overtures to unfair competition (or passing off). Pursuant to its Recital 13, the proposed Directive "does not affect the possibility, on the part of those Member States which so wish, to extend, for internal purposes, the provisions of this Directive to include acts involving unfair competition or similar activities". Whether deliberately or unwittingly, Member States could take advantage of such leeway to include "purely" national patents and moral rights within their implementing legislation.

However, the Fourtou Report (albeit only in Recital 13, not in Arts 1 or 2) and the Fuster Opinion agree to exclude patents, even European or, soon, Community ones, from the proposed Directive's scope. The Fourtou Report's justification is terse, relying on the "special nature" of patents. The Report's Explanatory Statement is hardly more loquacious:

> "On the matter of patents the rapporteur proposes to exclude 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".

Just as anxious to respect patents' specific nature, the authors advocate differentiated regimes of mitigated sanctions for independent patent infringers (notably for the criminal aspect, if any, and damages), instead of plainly excluding patents from the Directive's scope.

The infringements concerned: the venomous proviso in Art.2.1 (a restriction to commercial purposes and/or significant harm)

Article 2.1's venom is tucked away in its tail, a proviso restricting the *infringements* concerned to the effect that the provisions adopted by the Member States in order to comply with the Directive shall apply "when the infringement is committed for commercial purposes or causes significant harm to the right holder" ("the proviso"). Before analysing the proviso, it is important to recall that the Fourtou Report rightly means to delete it, while the Fuster Opinion intends to strengthen it.[39]

Raison d'être and effect of the proviso: confusion between criminal policy and civil law?

The proviso is bizarre, and even more so is the virtual silence surrounding it in the Recitals and the Explanatory Memorandum. With a laconic Recital 10 ("This protection is essential against infringements carried out on [*sic*] for commercial purposes or which cause significant harm to the right holder, apart from minor and isolated infringements")—which Amendment 3 of the Fourtou Report means to delete—the best available explanation for that crucial clause comes from a humble press release: "Since it is particularly important to act decisively against the 'big' offenders, the proposed Directive concentrates on infringements carried out for commercial purposes or which cause significant harm to right holders."[40] The official *raison d'être* seems to focus on offenders rather than the rights they infringe, and their calibre rather than their infringing acts. In essence, the proposed Directive conspicuously targets "big" bad boys.

At this point, let us recall that the Commission's political will appears primarily to combat counterfeiting and piracy, more specifically to take action against industrial, large-scale smuggling perpetrated by criminal organisations, as distinct from domestic, small-scale snatching.[41] The Explanatory Memorandum contains an interesting statement that clearly shows the proviso's political posture: "Combating the phenomenon [counterfeiting and piracy] is thus of vital importance for the Community *especially* when these illegal activities are carried out for commercial purposes or cause significant harm to the right holder".[42] Few would challenge the justness of the word "especially", but this adverb did not find its way into the final proposal. While such focus on "big offenders" may reflect laudable morals and sound criminal policy, it is not correct intellectual property law.

Back to the proviso, Art.2.1 *in fine* sets out two *alternative* criteria, thus imposing a one-step test on the rightholder—unless the authors' reverse interpretation of a two-step exception is followed.[43] The first criterion, "commercial purpose", turns on the objective nature of an infringer's activity, more than subjective intent. Alternatively, the second criterion, "significant harm", regards a rightholder's objective loss or damage resulting from an infringer's activity. By comparison, Art.61 TRIPs refers to a "commercial scale" threshold—with respect to criminal penalties only.[44] In the proposed Directive, the woolly "commercial scale" seems to be split up into commercial quality and significant quantity—with regard to all remedies, civil and criminal. Furthermore, Art.20 of the proposed Directive as to criminal sanctions requires that the infringement be "serious", *i.e.* intentional and committed for commercial purposes.[45]

37 As regards European patents, Art.64.3 EPC states that "any infringement of a European patent shall be dealt with by national law". This explicit empowerment as to patent-restricted acts shall presumably not hinder the required "derivation" from European law.

38 But the right to object to derogatory treatment is subject to showing a prejudice.

39 See above.

40 Commission press release IP/03/144.

41 See the Explanatory Memorandum at pp.3 and 11–12, and the Framework, above.

42 At p.3 (*emphasis added*).

43 See the Conclusion, below.

44 "This expression corresponds to what have been referred to as "professional infringers", writes D. Gervais, in *The TRIPS Agreement: Drafting History and Analysis* (1998), p.234, fn.28.

45 See above.

Thus the proposed Directive grades infringing acts in three classes, subject to an arsenal of sliding-scale sanctions: (1) criminal artillery and civil weaponry against "serious" infringing acts (unless Art.20 is repealed by following Amendment 43 of the Fourtou Report, thereby establishing the prevalence of the harmonising logic (of national civil procedures and remedies) over the combating logic (against counterfeiting and piracy)[46]); (2) civil weaponry against "commercially-purported" and/or "significantly harmful" acts; and (3) outright leniency towards benign (albeit infringing) ones.

The concept of "commercial purposes": confusion between industrial property and literary and artistic property?

The concept of "commercial purposes" is not novel in industrial property, conjuring up, *e.g.*, the exceptions to patent[47] and design[48] laws or, perhaps overstepping the mark, the scope of trade marks.[49] And it is not original in literary and artistic property either, evoking, *e.g.* the exceptions to copyright[50] and database[51] laws.

First, these legal precedents may shed light on evidentiary issues. The procedural exception in the proposed Directive seems to shift the burden of proof (of an infringer's commercial purposes) on to rightholders. True, rights of occupation (trade marks) may fit in this scheme, but this would be in stark contrast with the substantive exceptions to rights of creation (patent, design, copyright or database right), for which it is up to would-be users to show their non-commercial purposes. It is therefore submitted that the onus of proof (of fully non-commercial purposes) should lie with an alleged infringer, just as when a substantive exception is invoked.

In addition, those legal precedents may assist in interpreting "commercial purposes" under the proposed Directive. Let us assume that commercial character means nothing more than an economic advantage. Such an economic advantage for the user may arguably include any consideration received from a contractor. Furthermore, could it extend to avoiding any economic loss, *e.g.* saving licence fees (except, of course, where the user owes such avoidance of loss to statutory exceptions or statutory licences)? This extension would be

46 See above.

47 In line with the ill-fated Community Patent Convention (see its Art.27 (a)), many a national patent law currently provides for an exception for acts done privately and for non-commercial purposes (see *e.g.* Belgian Patent Act, Art.28.1(a) and UK Patents Act 1977, s.60(5)(a)); and probably so will the ever-forthcoming Community Patent Regulation. In logical terms, the conjunction "and" assumes that non-commercial is something else than private; and private, something else than non-commercial.

48 Likewise, the new Community Design Regulation lays down a limitation for acts done privately and for non-commercial purposes (Art.20(1)(a) Regulation 6/2002); this has not been interpreted by the European Court of Justice as yet. In the Benelux, however, "industrial and commercial purposes" even define the scope of the exclusive right (see Art.14.1 of the Uniform Benelux Design Law). This reflects a market ethos akin to that of trade marks.

49 Trade marks are industrial, too, yet in a different league: they do not reward creation, but record occupation. While patents and designs have their source upstream from the market-place, trade marks spring up, grow and live, and sometimes decline and die, on and for the market-place. On that planet "Market", where trade marks creatures thrive, the oxygen is composed of commercial purposes. Accordingly, both the TRIPs Agreement and the Community Trade Mark Regulation lay down the scope of this exclusive right as "using [the trade mark] in the course of trade" (see *e.g.* Art.16 TRIPs and Art.9.1 Regulation 40/94)—implicitly "as a trade mark" as regards the origin function (indication of a sole trade source), not necessarily so as regards the advertising function (capitalisation on goodwill). The "course of trade" has not been defined yet by the European Court of Justice; the Benelux Court of Justice once clarified it as covering any use that "takes place—for purposes other than exclusively scientific—within an enterprise, a profession or any other activity that is not exercised within the private domain and the object of which is to draw an economic advantage" (BCJ, *Tanderil* case, July 9, 1984, *Jur.*, 1984, p.1; physicians could thus freely prescribe branded medicines). First, note that non-private activities for non-economic *objectives* fell within the course of trade as soon as they had an economic *object*. In more logical terms, "within trade" means non-private and economically advantageous; equivalently, "out of trade" means private *or* not economically advantageous. Thus here, in apparent contrast to patent, design and copyright, anything private is not within the course of trade. It is unclear, however, whether commerce can be equated with trade thus defined, or solely means an economic advantage. It is therefore submitted that the further requirement of non-privacy on top of an economic advantage reflects trade marks' market ethos and should not be extended to rights of creation. With patent, design (and copyright), a commercial purpose means arguably nothing more than an economic advantage.

50 Among the 20 facultative exceptions and limitations to copyright allowed by Art.5 of Copyright Directive 2001/29, no less than six contain a reference to commerciality. The first three restrict the right of reproduction only; these are Art.5.2(b) on private use; Art.5.2(c) on public libraries and Art.5.2(e) on social institutions. The last three curtail both rights of reproduction and communication to the public; these are Art.5.3(a) on teaching and scientific research, Art.5.3(b) on the disabled and Art.5.3(j) on the sale of artistic works. In those six exceptions, the adjective "commercial" (or "non-commercial") qualifies the nouns "ends", "advantage", "purpose", "purposes", "nature" and "uses". One might think that, while "advantage", "nature" and "uses" relate to the object of an activity, "ends" and "purposes" pertain to the ultimate objective of an activity. Such is not the case as regards "purpose(s)", as the particularly instructive Recital 42 of the Copyright Directive 2001/29 makes clear: "When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect." As for the neither direct nor indirect commercial ends of private use by a natural person under Art.5.2(b), these are likewise to be determined by the use of each copy made privately. Obviously, the ultimate non-commercial character of private life is irrelevant. Similarly to Art.5.2(b), national copyright laws often permit private (impliedly neither directly nor indirectly commercial) copying of *lawfully acquired original* copies (and normally not *further* copying of *lawfully made* copies) by way of an exception (or a statutory licence where this is offset by levies on blank media and recording equipment).

51 Database Directive 96/9 subjects the bundle of database copyrights (Art.6.2(b)) and the database extraction right (yet not the database re-utilisation right) (Art.9(b)) to exceptions for (the sole) purpose(s) of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved. It also exempts the reproduction (Art.6.2(a)) or the extraction (Art.9(a)) (yet again not the re-utilisation) for private purposes of (the structure/the contents of) a non-electronic database; these private copying exceptions are more restrictive than that in the Copyright Directive (see Art.5.2(b), above) as they do not cover electronic media.

particularly crucial as regards literary and artistic property, in view of infringing peer-to-peer networks.

Let us then assume that the purpose of drawing such an economic advantage refers to the object of an activity, regardless of its ultimate objective. Indeed, Recital 42 of Copyright Directive 2001/29, in interpreting Art.5.3(a), tips the scale in favour of the former (and restrictive exceptions): it considers the non-commercial nature of the activity as such, irrespective of the ultimate educational and scientific research purposes (as reflected in the organisational structure and the means of funding of the establishment concerned). Clearly, such a commercial activity may be competing or non-competing. Furthermore, the purpose need not be exclusively, directly, and regularly commercial; a dual, indirect or one-off commercial purpose is probably enough. Arguably, the proviso should then bite any natural or legal person somehow using protected subject-matter to draw an economic advantage, be it dual, indirect, or one-off. The issue sparks heated debates: may private activities of natural persons and internal activities of legal persons, such as professional organisations or even not-for-profit entities, be commercial? It is submitted that they are as soon as they give rise to an external consideration downstream—or even, perhaps, as soon as they allow an avoidance of economic loss other than under statutory exceptions or licences?

Let us now assume that "commercial purpose" at least covers everything but strictly private use or copying ("strictly" in the sense of "without external consideration or other economic advantage, be it dual, indirect or one-off"). As for industrial property, this would mean, in practice, little more than all uses not exempted.[52] But, as for literary and artistic property, this would leave out not only exempted private copying of lawfully acquired original copies but also *further* copying of lawfully made copies as well as unlawful copying—and this would moreover leave out private copying of electronic databases. Thus the wording "commercial purpose" falls short of covering all infringements to copyright and database right. More generally, it totally neglects the differences in ethos between industrial property and literary and artistic property, as well as between rights of occupation and rights of creation. At its most dramatic, it fetters copyright in a trade mark straitjacket.

What is more, all this seems to be the Commission's downright intent. In a FAQ memo, the Commission flaunts a "cool", youthful attitude: "The proposed Directive would not introduce tougher sanctions against individuals downloading the odd track for non-commercial purposes . . . It is not aimed at allowing the prosecution of large numbers of individuals using peer to peer networks for casual file swapping"[53] —where "casual" is set up as a term of art. (Observe that such visionary open-mindedness—or decadent laxness, depending on your position—does not extend to intermediaries, such as ISPs: these may be enjoined provisionally[54] and on the merits.[55]) In practice, however, the vast majority of individuals using peer-to-peer networks such as *KaZaA (Lite)*, *Gro(c)kster* or *eMule* would not be sued anyway (at least in Europe). Thus, ultimately, the whole "commercial purposes" thing turns out to be a political sedative of a declaratory nature. It is hoped that this limitation will not shelter activities that are not otherwise "significantly harmful".

The concept of "significant harm": confusion between unfair competition and intellectual property?

When it comes to "significant harm", the authors are well aware that this alternative criterion is provided as a safety net against "serial" non-commercial infringers. Even so, it is technically out of place in intellectual property law. This trespasser's incompatibility can be revealed in contrast with the "substantial taking" (reproduction or extraction) requirement for copyright or database right to be infringed. Whereas a "substantial taking" affects the protected work or database *in rem*, a "significant harm" afflicts the rightholder *in personam*. While "substantial taking" is suited to fully fledged property rights, be they "intellectual", "significant harm" is tailored to torts, such as unfair competition. Indeed, a major point in invoking IPRs is precisely to eschew debates on the harm caused by the taking (except for compensation on the merits).

Granted, this peremptory indictment of trespass may be slightly qualified. Scraping up bits and pieces, the concept of harm does appear in intellectual property law, *e.g.* trade marks[56] and copyright[57]—but "significant" harm never does. Again, legal precedents may, at least, clarify evidentiary issues. Assuming that the three-

52 Depending on the scope of other exceptions, *e.g.* that for experimental use.

53 Commission Press Release MEMO/03/20 (*emphasis in the original*).

54 Art.10.1 of the proposed Directive.

55 Art.15.2 of the proposed Directive.

56 Art 9.1(c) Community Trade Mark Regulation 40/94 protects reputed trade marks against dilution only "where use of the [second] sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark" (similar goods or services are (not "may be") covered as well as different ones: see the ECJ *Davidoff/Durffee* judgment, C–292/00, January 9, 2003, clarified by the ECJ *Adidas/Fitnessworld* judgment, C–408/01, October 23, 2003). Note that detriment (stain) only comes as an alternative to the taking of an unfair advantage (misappropriation); the latter may be found more readily. The relevant detriment bears on the trade mark's distinctive essence or reputed goodwill. Both of these notions actually seem to fall in between intellectual property and unfair competition. A trade mark's distinctive essence precisely constitutes what can be directly infringed by confusingly similar (or identical) signs; so any detriment to it represents a more "secondary" than "primary" infringement of intellectual property. A trade mark's reputed goodwill is only a servant of the proprietor's trading, not a business in itself; so any detriment to it is a more "indirect" than "direct" unfair trade practice. Whatever the percentages of heredity, this CTMR provision on dilution is a hybrid of intellectual property and unfair competition.

57 A hint of prejudice can be found in the three-step test enshrined in Art.13 of the TRIPs Agreement (drawing from Art.9.2 of the Berne Convention): "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice legitimate interests of the right holder." Those TRIPs and Berne tests border the enactment (*in abstracto*) of limitations and exceptions to copyright (not other

step tests for copyright exceptions are more relevant than a hybrid provision on trade mark dilution, it is submitted that the burden of proof (of the absence of any significant harm) should lie with the alleged infringer.

The next conundrum asks what "significant" signifies (and how it is to be assessed: quantitatively and/or qualitatively?). No comparable adjective appears in trade mark law (with "detriment"). The adverb "unreasonably", which qualifies "prejudice" in copyright law, throws little light on "significant": "unreasonably" pertains more to value judgments, "significant" more so to reality ones. On its face, the adjective "significant" seems to be less demanding than "substantial" (in relation to taking[58]). The Fuster Report indeed proposes to delete "significant" on the ground that "attempting to quantify the harm done may give rise to differing interpretations and at the same time impair the holder's rights". Were "significant" here to stay, it is submitted that it should be construed as nothing more than a *de minimis* yardstick: only "minor and isolated"[59] infringements should be spared.

Speaking of a *de minimis* threshold, one might be tempted to import interpretations from competition law, in particular the ECJ *Delimitis* case on beer supply agreements.[60] This temptation should be resisted as the context is altogether different. While competition law does not prohibit a minor agreement until it makes "a significant contribution to the sealing-off effect brought about by the totality of those agreements" on a relevant market, intellectual property law forbids any breach of a pre-existing private right. Yet because the proposed Directive itself yields to this temptation, some might argue that an IPR infringement causes no "significant harm" under Art.2.1 unless and until it makes a significant contribution to the harmful effect brought about by the totality of those infringements on the rightholder's interests. Again, this is particularly crucial as regards peer-to-peer networks infringing copyright. For the sake of completeness, note that the term *de minimis* also appears in Art.60 TRIPs to exclude from TRIPs customs provisions goods of a non-commercial nature contained in travellers' personal luggage.[61]

Back to the initial confusion between tort and property, to underscore it is more than intellectual quibbling. For property—while meaning exclusivity and *erga omnes* opposability to abstract lawyers—procures to concrete dealers a much needed feeling: commercial safety. Property over an asset allows its transferability and licensability. Property enables contracts.[62] Conversely, unfair competition claims do not protect an asset *in rem* but hold against the defendant only. Such claims make proceedings possible, not contracts. Therefore this confusion and uncertainty severely undermines the economic value of IPRs as assignable and licensable property assets, unlike one-off unfair competition claims.

The nature of the proviso: Confusion between substance and procedure?

The IPRs' exclusive ethos

These suggested interpretations of "commercial purposes" and "significant harm" strive for consistence with the ethos of exclusivity that still presides over intellectual property rights. Indeed, whether you see IPRs as (inviolable and sacred) natural property or as (amiable) utilitarian, policy-driven incentive monopolies[63] with a personalist rewarding touch, or even as (grudgingly tolerable) artificial enclosures in the Great Plains of Free Competition and Free Speech, those rights are legally granted as exclusive. Such exclusivity means that, in principle, all the prerogatives on an IPR's subject-matter vest in its owner (or co-owners) only; accordingly, the slightest use of the protected subject-matter by a third party requires the owner's (or co-owners') authorisation. In more daunting terms, the essence of intellectual property is zero tolerance.

However, public policy grounds demand that these exclusive rights be balanced against legitimate interests of competitors and users and, where appropriate, step aside in their favour. The balance can first be struck by limiting the existence of IPRs "enclosures" in matter, time and space.[64] It can also be achieved by curtailing the reach of existing "enclosures" or by granting righteous passers-by substantive "safe-conducts" through those enclosures.[65]

IPRs). Furthermore, Art.5.5 of Copyright Directive 2001/29 subjects, perhaps inadvertently, the application (*in concreto*) of thus enacted exceptions to a similar three-step test; with its requirement of "significant harm", the proposed IP Enforcement Directive seems to follow a parallel path from the mountain of the abstract (enactment) to the jungle of the concrete (application).

58 See above.

59 See Recital 10, above.

60 See ECJ, Case C-234/89, *Sergio Delimitis v Henninger Bräu AG*, February 28, 1991, especially at point 27: "The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context . . . ".

61 See also Art.3.2 of Council Regulation 1383/2003 concerning customs action.

62 This idea is far from new. In the Napoleonic Code 1804, Book II ("On the assets and various modifications of property") and Book III ("On various ways of acquiring property"—including contracts) clearly manifest that articulation.

63 These are mostly legal monopolies, though patents, registered designs and the like are more likely to confer economic monopolies on product or process markets.

64 (1) Overly precious or, conversely, trite material may be excluded from an IPR's subject-matter; (2) an IPR is secured for a limited period of time; even a trade mark, though calling for perpetuity, is at its root temporary, being subject to expiry (it must be renewed) and revocation (it must be used as such); (3) an IPR is granted for a limited territory.

65 (1) Circulation down the distribution chain of goods first marketed with an IPR owner's consent may be freed by an exhaustion rule; (2) inherently deserving uses of an IPR's subject-matter may be permitted under a statutory exception, to be strictly interpreted; (3) unmanageable uses of an IPR's subject-matter may be allowed by way of a statutory licence, against upstream equitable remuneration; (4) uses deemed desirable on the facts may be authorised against fair compensation through an *ad hoc* compulsory licence; (5) under exceptional circumstances, abusive exercises of an IPR may be curbed by courts applying civil law (the "abuse of right" doctrine, akin to a judicial exception on the facts) or competition law (the "abuse of a dominant position" (see Art.82 of the EC Treaty, possibly backed by Art.8.2 TRIPs), akin to a judicial compulsory licence on the facts). A future right of access for users or, at least, a

Violation of the "Ubi ius, ibi remedium" adage

Among those substantive "self-conducts", however, there is no such thing as a stand-alone exception for non-commercial purposes or absence of significant harm, or both. Either term may be specified as a *necessary* condition for the grant of a "safe-conduct" (*e.g.* an exception for purposes of illustration for teaching or scientific research,[66] not to mention private use or copying[67]). Yet not so as a *sufficient* condition; the non-commercial purposes and/or lack of significant harm come as *additional* requirements that delimit the scope of a distinct provision. Save the above counterbalancing devices, an IPR's owner is thus entitled to oppose any third party taking advantage of the protected subject-matter, no matter that such advantage is "non-commercial", "casual", "minor", "isolated" or that it does not cause any correlative loss or damage to the owner.

Now, whether you agree with this preventative capacity or not, the role of civil procedure and remedies is to make it effective—it is not to upset the balance of substantive interests by forging apocryphal "safe-conducts". Undoubtedly, third-party fundamental rights (*e.g.* privacy[68]) and due process requirements may call for certain procedural balances to be struck, but those counteracts should be valid for themselves and remain scrupulously unrelated to intellectual property policy. The law's credibility thus demands that procedures and remedies be effective and only procedurally, not substantially, balanced. As a rule, there ought to be a strict parallelism between substantive rights and procedures that enforce them. A thousand-year-old adage encapsulates that principle: *ubi ius, ibi remedium*. This is, of course, not to say that everything is for the best in the best of all possible worlds (with or without IPRs). But a directive on enforcement is without a doubt *lex non conveniens* to deal with complex issues of substantive law.

Is the proposed Directive "IPRs-minus"?[69]

Strategic breaches *in* IPRs and their exclusive ethos would therefore be threatened—and age-old legal wisdom flouted—if a claim for remedies against an IPR infringement came to imply a demonstration of the adverse party's infectious greed or megalomaniac evil. Admittedly, the proposed Directive is only procedural in scope, and is, in any event, without prejudice to anything substantive. But the proposed Directive's scope suggests that "non-commercial", "casual", "minor", "isolated" infringing is fair and harmless. In a socio-psychological sense at least, it might thus be regarded as an underhandedly "IPRs-minus" device.

Arguably, the proposed Directive's scope conveys the message that, among those hastily branded as free-riding "pirates" by rightholding monopolistic dreadnoughts or cartelistic squadrons, many may be singled out as innocuous fishermen or even valiant corsairs, who do commit illegal acts, but with a noble heart. Yet, if (solely or jointly) dominant rightholders are committing abuses—which is not sheer fantasy or acute paranoia—the proper legal device to crack down on them is to enforce the rules of competition, not to disarm IPRs.

future allowance of non-commercial peer-to-peer file sharing against a compensating levy would equally be overriding public policy.

66 See *e.g.* Art.5.3(a) of Directive 2001/29, in conjunction with Art.5.5.

67 See above.

68 Think of the *Doorstep* order, a softened version of the *Anton Piller*.

69 This daring neologism echoes the trendy "TRIPs-plus" and "TRIPs-minus" expressions.

Outside the scope of the Directive: full-scale harmonisation?

As was ascertained above, the proposed Directive does not cover all conceivable rights and infringements. Outside its scope, rightholders fall back on national remedies. But one might not be forced to meekly accept this relative inadequacy. For, after all, Art.2.1 with its deceitful proviso only affects the scope of the proposed Directive; beyond this, it does not necessarily have a "reflex", opposite effect. So national legislators may not be precluded from achieving full-scale harmonisation of their own motion, going further than their formal implementation duties to offer remedies *all* infringements of *all* rights. This bold approach would altogether defuse the proviso, as well as a possible exclusion of patents.

It is yet unclear whether national legislators will follow a "commutative" (enacting an umbrella law on procedures and remedies for all IPRs) or "distributive" (interspersing amendments in each IPR law) method of implementation. The commutative method would help gently write off the proviso.

Conclusion: Delete the Proviso, Circumvent it (through Full-scale Harmonisation), or Restrict its Interpretation (as a Two-step Procedural Exception)?

In essence, this is the Commission's new four-step recipe for legal stew:

(1) blend literary and artistic property with industrial property into an amalgam of intellectual property rights;

(2) mix unfair competition with this IPRs amalgam to obtain substantive forcemeat;

(3) stuff this substantive forcemeat into civil procedure;

(4) water this civil law fricassee down in criminal policy stock; and serve boiling.

While the chef's intentions may be good, this stew is bound to cause indigestion. Thus what is unpalatable in the proposed IP Enforcement Directive is not the six-course menu as a whole, but essentially the stew served as a hors-d'oeuvre: Chapter I on Objective and Scope, especially the "commercial purposes" or "significant harm" proviso in Art.2.1.

Indeed, the proposed Directive, as its title announces, concerns "measures and procedures to ensure the enforcement of intellectual property rights":

(1) "measures and procedures" means procedural, not substantive, law; (2) "enforcement" (by the right-holder) means mostly civil procedure, not criminal policy (even combating counterfeiting and piracy); (3) "intellectual" means both "industrial" and "literary and artistic"; and (4) "property rights" means exclusive rights, assignable and licensable, not one-off unfair competition claims.

Now, take the proviso: (1) "commercial purposes" or "significant harm" relate to substance, not procedure; (2) both come out of the meiosis of the "commercial scale" threshold in criminal policy (if you see scale as significance); (3) "commercial purposes" is suited to industrial property, not literary or artistic property; and (4) "significant harm", albeit a mere alternative, is tailored to torts such as unfair competition, not exclusive rights.

Therefore the "commercial purposes" or "significant harm" proviso, which might well fit in instruments effectively combating counterfeiting and piracy, makes up a quite incongruous hors-d'oeuvre in this proposed harmonising IP Enforcement Directive.

To put it plainly, the proviso should be deleted —which the Fourtou Report rightly proposes. If, despite all opposition, the co-decisional cooks (the European Parliament and the Council) cling to this concoction, the meal may still be salvaged by (1) circumvention through full-scale harmonisation or (2) restrictive interpretation as a two-step procedural exception.

First and foremost, national legislators, whether deliberately or unwittingly, may sweep aside the proviso through offering remedies for *all* infringements of *all* intellectual property rights. Failing this, national judges faced with the implemented proviso should treat it as an awkward procedural exception for non-commercial purposes *and* absence of significant harm. The heated proviso would then boil down to a slightly more palatable cumulative two-step test to be proven by the alleged infringer and to be construed restrictively.