



CONSULTATION ON THE COMMISSION'S REPORT ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

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GENERAL CONSIDERATIONS

EuroISPA welcomes the opportunity to provide comments on the Commission's Report on the application of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights (thereafter "IPRED").

First and foremost, EuroISPA considers that the IPRED as it stands offers a well-balanced and functioning framework to address online IPR infringements. As a general consideration, we believe that the imposition of filtering and monitoring obligations on Internet intermediaries would not only result in chilling innovation and much needed investment in network infrastructure deployment, but will also undermine consumers' confidence in the digital environment and cause unintended negative consequences on freedom of communications and the Internet openness as a whole.

EuroISPA maintains that Internet intermediaries must under no circumstances be tasked with a monitoring obligation of users' communications and play a public enforcement role which is not part of our business nature. **Fundamental Rights of information, privacy and communication, as well as innovation in the digital economy, would be severely at risk if Internet intermediaries were required to censor the Internet at the advantage of vested interests.**

Finally, we notice that the evaluation report, read in light of the repressive approach recently promoted by DG Internal Market in the Dialogue on illegal up-downloading, on the Observatory on Counterfeiting and Piracy (from where the Internet industry has been excluded) and in the context of the digital chapter negotiations within ACTA, is inconsistent with some of the goals of the Digital Agenda to make the Internet more secure, to increase consumers' trust and to defend privacy of communications online.

NEED FOR A HARMONISED FRAMEWORK, NOT A REVISION

EuroISPA regrets that the European Commission seems pre-disclosed to revise the IPRED without sufficient evidence of the necessity for such a revision. Indeed as reported by the Commission in its report:

"due to late transposition of the Directive in many Member States [...], experience in applying the Directive is limited [...].Therefore, the Commission has not been able to conduct a critical economic analysis of the impact that the Directive has had on innovation and on development of the information society, as provided for in Article 18 of the Directive".

In the application report, the main argument suggesting a review of the Directive is based on the idea that back in 2004 the IPRED was not meant to address the challenges raised by the development of the Internet. This justification is incorrect considering that, when the Directive was drafted, problems related to exchange of material under copyright in P2P networks were already known. EuroISPA believes the IPRED provides law enforcement authorities with the required legal powers to address

online IPR infringements and sets the legal conditions they must adhere to when exercising those powers.

We recall that the late and inadequate transposition of the IPRED in some Member States is causing legal uncertainties for both Internet intermediaries and rightsholders. **We would therefore urge the Commission to first focus on the needed, harmonised implementation of the Directive's provisions across the EU and on the effective assessment of the application of its provisions, before considering any possible revision.**

NEED FOR AN ECONOMIC ASSESSMENT OF THE PROBLEM

In order to understand if a revision is needed, an economic quantification of the problem is required. **The Commission has so far failed to provide any neutral, comprehensive study assessing the magnitude of the problem across the EU, as provided for in Article 18 of the Directive.** The only studies used as basis for further IPR initiatives are those commissioned by vested interests and discussed in the context of the Observatory on Counterfeiting and Piracy, from which the Internet industry has been excluded. All these studies failed to assess whether, on the one hand, the Internet is disruptive of traditional business models for reasons unrelated to IPR infringements and, on the other hand, whether it is creating a new meritocratic, cost-effective marketplace and patterns in the consumption and distribution of entertainment products.

We therefore call on the Commission to start a wide-ranging study across all 27 Member States to understand if digital piracy is a problem in itself or if it is rather the symptom of an inefficient market structure and, in this case, assess how such a structure could be changed in a way to favor the transition of traditional content business model to the digital age.

THE “NO GENERAL MONITORING OBLIGATION” IS A EUROPEAN VALUE

EuroISPA is deeply concerned that a substantial modification of the liability regime provided for in the Directive 2000/31/EC (hereafter “ECD”) is advocated in the evaluation report of the IPRED. The principles laid down in the ECD (articles 12 to 15) are the cornerstones of the development of the digital economy in the EU, and must be preserved and respected in any other legislation. The provisions in question provide a secure and predictable legal base for the growth of the digital economy and the benefits derived from that growth. Any direct or indirect change to this regime will not only bring with it an increase in burdens for legitimate commerce, having an adverse impact on innovation and distorting competition, but will also undermine consumers' fundamental rights to privacy and free flow of information.

The principle laid down in article 15 (“no general monitoring obligation”)¹ is a general principle, rooted into the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms² and now in the Charter of Fundamental Rights of the European Union³. As such, this principle should be observed in legislations other than the ECD and the IPRED provisions can only be read in that light. Indeed, article 2(3)(a) of the IPRED, read in conjunctions with its Recital 15⁴, makes it clear that it should not affect:

¹ Article 15(1) of the ECD: *Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*

² <http://conventions.coe.int/treaty/en/treaties/html/005.htm>

³ http://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁴ Recital 15 of the IPRED: *This Directive should not affect [...] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market.*

“the Community provisions governing the substantive law on intellectual property, Directive 95/46/EC, Directive 1999/93/EC or Directive 2000/31/EC, in general, and Articles 12 to 15 of Directive 2000/31/EC in particular”.

The general monitoring obligation has implications that are much broader than the mere liability issue (as suggested by the analysis of the Commission in the evaluation report) and notably with regard to freedom of expression and the protection of personal data. In essence, general monitoring obligations, by making Internet intermediaries the “police” of the Internet, will create liability where there was none before.

EuroISPA therefore calls on the Commission to avoid any action that would directly or indirectly jeopardize the limited liability regime of Internet intermediaries set out in the ECD through the application of other legislation, such as the IPRED or national tort law (e.g. through far-reaching injunctions against intermediaries). Any attempt to change the principles enshrined in the E-Commerce Directive would run against the intention of the European legislator to create an efficient and competitive digital single market where the development of an innovative legal offer could help to address illegal activities online.

INJUNCTIONS AND TECHNICAL MEASURES

Articles 9 and 11⁵ of the IPRED introduced injunctions within the majority of Member States. These mechanisms, relatively unknown to many Member States in 2004, proved to be efficient for rightsholders in the enforcement of their rights, especially with regard to commercial infringement, and are largely in use across the EU. In this regard we would like to underline that, at the time of the adoption of the Directive back in 2004, the problem of IPR infringements through P2P networks, for instance, was already well known and the injunction relief mechanisms, as the Commission acknowledges in the evaluation report, contributed positively in addressing this issue through a judicial intervention.

EuroISPA recalls that any injunction on an Internet intermediary to ensure that a given IPR infringing act is taking place through its services, even for a single piece of content, effectively amounts to a general obligation to monitor and filter all the data hosted on, or passing through its services. This type of filtering measure was requested by Sabam in the *Scarlet Extended* case⁶, currently pending before the Court of Justice of the European Union (ECJ). It clearly implies a widespread surveillance of all users’ communications irrespective of whether they are alleged infringers or not. This injunction can be compared to a requirement for a postal or telephone service provider to monitor every mail sent or every phone call made, regardless of the senders/recipients of the mail or the participants in the communication. This approach has been supported and promoted by the Commission in a hearing on the Scarlet case held in January 2011 before the ECJ and creates a serious precedent which amounts to an infringement of the fundamental freedom of expression under the European Convention and the Charter of Fundamental Rights and would constitute a disproportionate measure with no effectiveness in combating digital piracy.

In addition, the implementation of these techniques has proven to be disproportionately costly for Internet intermediaries and rapidly obsolete in a fast moving technological world. The increased costs would add to the digital divide as these costs would ultimately be borne by consumers – including the overwhelming majority of users who do not infringe IPR at all. Such costs also shift limited resources away from Internet intermediaries’ ability to invest in innovative services and infrastructures. The bottom line is that there is no effective and proportionate way to apply ubiquitous content filtering or monitoring measures to prevent online IPR infringements.

⁵ Article 9 on Provisional and Precautionary Measures and article 11 on Injunctions.

⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:113:0020:0020:EN:PDF>

DATA PROTECTION LAWS ARE NOT AN OBSTACLE TO IPR ENFORCEMENT

EuroISPA is concerned that the evaluation report of the Commission found that privacy and data protection laws were obstacles to an effective IPR enforcement in the EU. We remind the Commission that this position raises serious proportionality concerns and conflicts with the provisions in article 3(2) of the IPRED. We would also like to point out that in the Promusicae case⁷ the ECJ stated that Member States were not obliged to require Internet intermediaries to communicate personal details in the context of civil proceedings. Furthermore, according to a study carried out by the Commission regarding the relationship between IPR Enforcement and Data Protection legislation in a number of Member States⁸, in specific circumstances IP addresses are considered personal data, which means that they may only be processed in a limited number of circumstances, for specific purposes and that consent is required to process them for other purposes, such as online copyright enforcement.

WORKING ON SUSTAINABLE SOLUTIONS

EuroISPA firmly believes that a sustainable solution to IPR infringement lies in a better public awareness on the value and use of IPR as an economic and cultural asset. **For Europe's citizens to fully appreciate the value of IPR, this will require the development of innovative and attractive content services online, at affordable prices and based on new business models, able to meet consumers' expectations and needs. This is a much more effective strategy for enforcing copyright than a heavy-handed legislation.**

The digital economy, far from being a barrier to culture and artistic creation, is rather a tremendous opportunity in terms of audience, scope, supply and equal access. Indeed, there is an always increasing demand from consumers to get access to wide range of digital services and content online. Technology enables rightsholders to create more and better services based on business models adapted to the digital age, so that consumers have the option of downloading lawfully, in the safest, most user-friendly format possible. Hence, the political answer should not be in another set of measures to enforce copyright online, but on how to make copyright work in the digital environment.

As WIPO Director General, Francis Gurry, recently stressed:

*“any future copyright policy would have to strike a balance between the availability of cultural works to consumers at affordable prices while assuring a dignified economic existence for creators and performers. [...] rather than resist it, we need to accept the inevitability of technological change and to seek an intelligent engagement with it” [...] “there is, in any case, no other choice – either the copyright system adapts to the natural advantage that has evolved or it will perish”.*⁹

EuroISPA also believes that voluntary agreements between Internet intermediaries and rightsholders for the enforcement of IPR risk not being an appropriate instrument to address digital piracy. Voluntary agreements undeniably shift the enforcement power from courts to Internet intermediaries, depriving alleged infringers and consumers of due process and a fair trial.

⁷ <http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?where=&lang=en&num=79919870C19060275&doc=T&ouvert=T&seance=ARRET>

⁸ http://ec.europa.eu/internal_market/iprenforcement/docs/study-online-enforcement_en.pdf

⁹ Conference hosted by the Australia's Faculty of Law of the Queensland University of Technology on the future of copyright: http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html

CONCLUSIONS

“Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interest.[...] Copyright is complicated and complex, reflecting the successive waves of technological development in the media of creative expression from printing through to digital technology, and the business responses to those different media.”

Francis Gurry, WIPO Director General in Geneva, February 24, 2011

EuroISPA remains convinced that the development of new business models by content providers adapted to the digital age is the only, effective way to combat digital piracy. We consider that the IPRED already provides a balanced and functioning framework for the enforcement of Intellectual Property Rights and believe there is no need to revise it. Instead, EuroISPA calls on the European Commission to support the creative industries and the digital economy by shifting its commitment from increased enforcement measures to the promotion of innovative services which would effectively value copyright while providing new sources of revenues for artists.

EuroISPA is the world's largest association of Internet Services Providers (ISPs) representing the interests of more than 1800 ISPs across the EU and the EFTA countries. EuroISPA is a major voice of the Internet industry on information society subjects such as cybercrime, data protection, e-commerce regulation, EU telecommunications law and safe use of the Internet (www.euroispa.org). Contact: Andrea D'Incecco, Head of Policy (+32 2 503.22.65/ andrea@euroispa.org).

ANNEX

EXAMPLES OF RELEVANT NATIONAL COURT CASES

FAPAV vs. Telecom Italia

In 2009 FAPAV (an association of audio-video producers and distributors) sued Telecom Italia, the most important Italian Internet Service Provider, under section 156 of the Copyright Law and section 700 of Civil Procedure Law. FAPAV claimed loads of copyright violations committed by Telecom Italia's end users through Internet access to "pirate" web sites which allowed downloading of copyrighted contents. The claimant sought injunctive relief under which: 1) ordering Telecom Italia, pursuant to section 17, 2nd par., lett. a) of the Electronic Commerce law (namely Legislative Decree n. 70/2003, implementing section 15, 2nd paragraph of Directive 2000/31/CE) to communicate to competent authorities all data necessary for preventing violations of copyrights; 2) ordering Telecom Italia to prevent access by its users to the specific pirate web sites; 3) ordering Telecom Italia to inform all its clients not to commit further copyright violations. Telecom Italia rejected all charges, assuming inter alia that, as a "mere carrier", it was not responsible for end users' violations nor was obliged to monitor its customers Internet traffic. The court rejected most of the requests of FAPAV. The only responsibility of Telecom Italia was the obligation to inform the competent authorities of alleged illegal activities upon notification by FAPAV (article 17§3 of the Electronic Commerce Law) and without infringing privacy of users. In addition, the court considered that Telecom Italia was contractually bound to deliver the Internet service without interruption and that it could not cut the service for its subscribers without a prior decision from the competent authorities.

Techland and Peppermint

In 2006-2007, Techland (a computer game company) and Peppermint (a phonogram company) challenged several ISPs claiming, pursuant to Section 156 and 156-bis of the Copyright Law: (i) an order to operators for barring Internet access to copyright contents; and (ii) to discover the user personal data whose IP address had violated the copyrights. ISPs argued that claimants had violated privacy law by intercepting Internet data traffic and, moreover, they could not be responsible for users' violations according to the electronic commerce regime. The court first granted the claims filed by Techland and Peppermint, ordering the ISPs to disclose users' personal data upon a wide interpretation of Section 156-bis of the Copyright Law. A narrower interpretation of the law was then provided by the Italian Appeal court in 2007, after that the national Data Protection Authority pointed out that the Internet data interception made by the claimants and the disclosure of users' personal data seriously violated privacy law. Indeed, according to the authority, the European and national legislations on data protection do not oblige to disclose personal data for copyright purposes, unless such disclosure is necessary to prevent criminal offences (thus trying to find a right balance between personal data protection and copyright enforcement). A similar conclusion was then reached by the Advocate General to the European Court of Justice in the proceeding C-275/06 concerning *Promusicae /Teléfonoica*. The Italian court therefore reversed the first instance interim case and ruled that Section 156-bis of the Copyright Law cannot be applied by civil courts to disclose users' personal data for copyright enforcement.

***Christian Dior vs. eBay*¹⁰**

In 2008, the Paris Commercial Court in *Parfums Christian Dior and Others vs. eBay* (upheld by the Paris Court of Appeal on 3 September 2010) ordered eBay, subject to a heavy fine per day, to prevent eBay sellers from using the brand names Dior, Kenzo, Givenchy and Guerlain in relation to

¹⁰ The following judgment was not taken pursuant to IPRED but we believe it is a valid example of national courts utilising national tort laws in a way that runs counter to IPRED's incorporation of the principle against general monitoring obligations (i.e., article 2(3) of IPRED which references to article 15 of the ECD).

perfumes and cosmetics products in listings and advertisements on eBay platforms accessible to the French public. In other words, eBay was obliged to install filters, in fact any measure, to detect and ban the selling of perfumes or cosmetics products under these brands – no distinction being made with regard to authentic and second-hand items. This is similar to an injunction in the case Lancaster vs. Kijiji (Frankfurt Am Main Higher Regional Court, 2008), where the injunction prohibited the service provider from granting third parties the opportunity to publicise offers for sale for perfumes of 11 different brands, including Lancaster, Davidoff, and Calvin Klein.

These examples illustrate how an injunction pronounced against a service provider may *de facto* amount to a general monitoring obligation. It should be kept in mind that every newly uploaded piece of content will have to be checked against the terms of an injunction. There are currently insufficient safeguards against injunctions imposing upon service providers an unattainable standard of “effective” filters, regardless of the technological realities or commercial reasonableness. Moreover, if the injunctive relief is available in one case, it may be available for all other rights owners - the accumulation of injunctions over time will lead to a general monitoring obligation and potentially cripple the resources of Internet intermediaries, thus jeopardizing their ability to provide innovative services that are critical to the continued growth of the digital economy. Indeed, in Lancome vs. eBay (2006), the Munich District Court recognized this danger of exposing the service provider to “a limitless flood” of claims.

Media CAT Ltd v Adams & Ors

In 2011, ACS Law, a law firm acting on behalf of Media Cat, took a number of users to court. This was based on the company harvesting IP addresses of users associated with the downloading of copyrighted material. Letters were sent to the alleged infringers asking for compensation to be paid or they would be taken to court. After thousands of letters were sent, ACS Law took a number of users to court. Due to the poor quality of the evidence brought by ACS Law, who tried to withdraw from proceedings but unsuccessfully, the case was thrown out and the judge severely criticized the approach and methods used by the law firm and its client, Media Cat.

Stokke vs. eBay

The different approaches national courts take is illustrated in the case concerning STOKKE, a manufacturer of the Tripp Trapp children chair, and eBay (German Supreme Court, 22 July 2010, I ZR 139/08). The Court of Appeal held that it was not unreasonable for an online platform to manually review all listings where the STOKKE brands were included and identify from the picture whether an original Tripp Trapp chair was offered or something else. The Supreme Court overturned these findings, conscious of the risk of imposing unreasonable burdens on the service provider which would prevent it from carrying out its business model and also of the cumulative effect when the standards of this ruling are applied in other cases. The Supreme Court was cognizant of the technological limitations service providers face, e.g. that object recognition cannot be done in an automated fashion. It was also careful to ensure the proportionality of any obligation on service providers, e.g. regarding the relation of the average number of offers which contained the STOKKE brands and the number of cases of violation. Finally, the Supreme Court did not see why the service provider should bear the burden of policing the rights owner’s brand, in particular when eBay’s VeRO program provide rights owners with powerful search and reporting capabilities – indeed, granting rights owners with better protection than they find in the offline world. The Court concluded that it did not see why the service provider should take on a review of trademark infringements in the rights owner’s place.