



Europe

## JOINT REPLY TO THE COMMISSION'S CONSULTATION ON THE APPLICATION OF DIRECTIVE 2004/48/EC ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

### INTRODUCTION

Our pan-European organisations, Cable Europe, ECTA, ETNO, EuroISPA and GSMA Europe represent the European electronic communications industry that is comprised of both national and pan-European fixed and mobile telecoms operators, Internet Services Providers (ISPs) and cable companies. The European electronic communications industry plays a crucial part in connecting European citizens and businesses to information, news, entertainment and cultural content.

We welcome the opportunity to provide comments in relation to the Report from the Commission on the application of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights (thereafter IPRED). As a preliminary consideration, we highlight our interest in discussions relating to the importance of copyright for an innovative Europe, the need for copyright to reflect the dynamics of the Single Market and the potentiality of the digital economy. In this context, we underline the essential role played by Internet intermediaries in building consumers' trust in the digital environment and developing the Information Society services of the future.

### ANY REVISION WOULD BE PREMATURE

First and foremost, we consider that the IPRED as it stands offers a well-balanced and functioning framework to address digital piracy. Therefore, we regret that the European Commission seems pre-disposed to revise the IPRED despite a lack of evidence of the necessity for such a revision. **We believe that it is premature to review the Directive at this stage due to the limited experience with its implementation and the lack of evidence justifying any revision** (in some Member States the IPRED was implemented only very recently). Indeed as reported by the Commission, *"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"*. Moreover, both the evaluation report and staff working document report that the Directive provides efficient provisions to support rightsholders in enforcing their rights. Hence, as the Commission itself points out several times, additional evidence is needed to fully assess the need for revision.

### HARMONISATION IS KEY TO EFFECTIVE ENFORCEMENT IN THE SINGLE MARKET

The EU is facing the challenge of adapting the Single Market to the digital age. This can only be achieved if a single framework is efficiently implemented across the EU. The Commission should refrain from drawing the conclusion that the IPRED is not sufficient to achieve this goal before it has been properly implemented. **Prematurely introducing stricter enforcement through increasingly restrictive technical measures in a fast changing digital environment would inevitably result in a chilling**

**effect on innovation, undermining consumers' confidence in digital products and causing unintended negative consequences on the freedom of communications and Internet openness.**

### **THE ROLE OF INJUNCTIVE RELIEF**

Articles 9 and 11 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 widely used across the EU. In this regard we recall the Commission 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, as the Commission acknowledges in the evaluation report, the injunctive relief mechanisms contributed positively to addressing this issue through a judicial intervention. **In light of the late transposition and different interpretation of these articles across Member States, the effectiveness of injunctive relief cannot be efficiently assessed. Therefore, we call on the Commission to ensure a proper, harmonised implementation of the IPRED provisions across the EU before making any proposal regarding the suitability of a revision.**

### **TECHNICAL MEASURES WILL NOT BE EFFECTIVE IN FIGHTING DIGITAL PIRACY AND ARE DISPROPORTIONATE**

The implementation of technical filters in ISPs' networks and servers for communications generated by users, irrespective of whether they are alleged infringers or not, is contrary to the principles of the E-Commerce Directive, providing that a general monitoring obligation cannot be imposed on ISPs in relation to the content transmitted over their operated networks. Moreover, such technical filters would be complex and very costly. Yet the effectiveness of such measures in combating piracy is doubtful because such measures are likely to be circumvented or quickly become obsolete in this fast moving digital world. Technical measures such as site filtering/blocking have detrimental effects on consumers and online businesses - for example, access to legitimate sites or content may be blocked in the process. **Therefore, we strongly believe that filtering measures are contrary to the provisions of the E-Commerce Directive and that the technical complexity and cost, together with the potential harm to consumers and businesses, are disproportionate to the likely success of any filter.** In this regard, the Commission has failed to provide a proper cost-benefit analysis of the effectiveness of the solutions advocated to solve the problem and the detrimental effects that they would bring about to fundamental rights of communications and consumer trust.

### **INCOMPATIBILITY WITH THE E-COMMERCE DIRECTIVE**

The IPRED, in article 2.3a, makes it clear that it "*shall not affect*" the provisions in the E-Commerce Directive, in particular those relating to the liability regime of intermediaries (Articles 12 to 14) and the non-general monitoring obligation (Article 15). The latter in particular has implications that are much broader than the mere liability issue (as suggested by the analysis of the Commission in the evaluation report), notably with regard to freedom of expression (as also mentioned in Recital 9 of the E-Commerce Directive). Indeed, any injunction on an ISP to ensure that a given IPR infringing act is taking place through its service, even for a single piece of content, effectively amounts to a general obligation to monitor and filter "every single" communication carried through a network or hosted in a server. **We urge the Commission to abandon its extreme interpretation of IPRED that an intermediary - because of its supposed position of control, while not itself committing or condoning the alleged infringement - may be ordered to implement unspecified, disproportionate and possibly repressive technical measure in a blanket fashion against its customers simply because it is not the infringing party.**

## **INFRINGEMENT OF FUNDAMENTAL RIGHTS AND EUROPEAN PRINCIPLES**

Technical measures involve processing personal data in a manner which contradicts data protection laws or the freedom of communications when ISPs are obliged to monitor users' transmissions. **We have serious concerns that any change to the IPRED - e.g. introducing technical measures to combat piracy online - would be incompatible with fundamental laws of privacy around data protection and freedom of communications which are essential for innovation and growth in the digital market<sup>1</sup>.** We strongly believe that the balance between fundamental rights at stake (property rights, privacy of communications, freedom of expression, etc.) needs to be decided on a case-by-case basis by a judge. Any other cooperative mechanism, voluntary or not, should be carefully assessed in the light of proportionality, necessity and transparency principles, within a legitimate framework and in the presence of consumer-friendly legal offers in the market.

## **QUANTIFYING THE ECONOMIC IMPACT OF DIGITAL PIRACY**

In order to understand whether or not a revision of the IPRED is needed, an economic quantification of the problem is required. **We highlight the fact that the Commission has failed to provide any objective, comprehensive study assessing the magnitude of the problem across the EU.** The only studies used as a basis for further 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 seem to provide erroneous statistics and fail to assess whether, on the one hand, the Internet is disruptive towards traditional business models for reasons unrelated to IPR infringements and, on the other hand, whether it is creating a new meritocratic, cost-efficient marketplace and patterns in the consumption and distribution of entertainment products. Additionally, effectiveness and legality of various national initiatives still need to be assessed and issues that have arisen in this context should be taken carefully into consideration by the Commission. In this context, we draw the Commission's attention to a recent study by the Hadopi<sup>2</sup>, where the authority points out that the first and biggest barriers to legal downloading are the high, uncompetitive price of legal offers currently available and the lack of diversity in offers.

## **CONCLUSIONS**

Finally, we consider that the focus of any initiative undertaken by the Commission on the protection of IPRs should be directed towards encouraging the creation of innovative, affordable content services, based on business models which are able to embrace the Internet revolution. This is a much more effective strategy for enforcing IPRs than increasingly repressive legislation which will inevitably produce the opposite result and will only serve to maintain those barriers to trade that are the real obstacle to the creation of a truly European Digital Single Market.

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<sup>1</sup> London School of Economics, "Creative Destruction and Copyright Protection - Regulatory Responses to File-sharing" (March 2011): <http://dl.dropbox.com/u/43063/lsempbrief1creativedestructionandcopyrightprotection-110321065027-phpapp01.pdf>

<sup>2</sup> Hadopi study (23 January 2011), Slide 70 : <http://www.hadopi.fr/download/hadopiT0.pdf>

The contributors to this joint statement are:



**Cable Europe** ([www.cable-europe.eu](http://www.cable-europe.eu)), the European Cable Communications Association, is based in Brussels and groups all the leading European cable TV operators and their national trade associations throughout Europe. The aim of Cable Europe is to promote and defend the industry's policies and business interests at European and international level. The European cable TV industry provides digital TV, broadband Internet and telephony services to more than 70 million customers. Contact: Gilone d'Udekem, Director Regulatory Affairs (+3225562101/[gilone.dudekem@cable-europe.eu](mailto:gilone.dudekem@cable-europe.eu))



**ECTA** (the European Competitive Telecommunications Association - [www.ectaportal.com](http://www.ectaportal.com)) is the pan-European pro-competitive trade association that represents more than 100 of the leading challenger telecoms operators across Europe. For over a decade, ECTA has been supporting the regulatory and commercial interests of telecoms operators, ISPs & equipment manufacturers in pursuit of a fair regulatory environment that allows all electronic communications providers to compete on level terms. Our members have been the leading innovators in Internet services, broadband, business communications, entertainment and mobile. Contact: Vicky Hanley-Emilsson (+32 2 227 11 79/[vhanley-emilsson@ectaportal.com](mailto:vhanley-emilsson@ectaportal.com))



**ETNO** (the European Telecommunications Network Operators' Association - [www.etno.eu](http://www.etno.eu)) is the voice of the European telecommunications network operators with over a decade of experience in shaping EU telecoms policy. The association represents 41 companies located in 35 European countries. They account for an aggregate annual turnover of more than 250 billion Euros and employ over one million people across Europe. Contact: Caroline Greer, Regulatory Affairs Manager (+322227 10 83 / [greer@etno.be](mailto:greer@etno.be))



**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](http://www.euroispa.org)). Contact: Andrea D'Incecco, Head of Policy (+32 2 503.22.65/ [andrea@euroispa.org](mailto:andrea@euroispa.org))



**GSMA** represents the interests of the worldwide mobile communications industry. Spanning 219 countries, the GSMA unites nearly 800 of the world's mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organisations. The GSMA is focused on innovating, incubating and creating new opportunities for its membership, all with the end goal of driving the growth of the mobile communications industry. In the European Union the GSMA represents over 100 operators providing more than 600 million subscriber connections across the region. For more information on GSMA, please visit: Mobile World Live, the new online portal for the mobile communications industry, at [www.mobileworldlive.com](http://www.mobileworldlive.com), GSMA corporate website at [www.gsmworld.com](http://www.gsmworld.com), GSMA Europe [www.gsmeurope.org](http://www.gsmeurope.org). Contact: Martin Whitehead, Director, GSMA Europe (+32 2 792 05 50/ [MWhitehead@gsm.org](mailto:MWhitehead@gsm.org))