



EUROPEAN COMMISSION
Directorate General Internal Market and Services

INTELLECTUAL PROPERTY
Fight against counterfeiting and piracy

SYNTHESIS OF THE COMMENTS ON THE

COMMISSION REPORT ON THE APPLICATION OF

DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND

THE COUNCIL OF 29 APRIL 2004 ON THE ENFORCEMENT OF

INTELLECTUAL PROPERTY RIGHTS

(COM/2010/779 final)

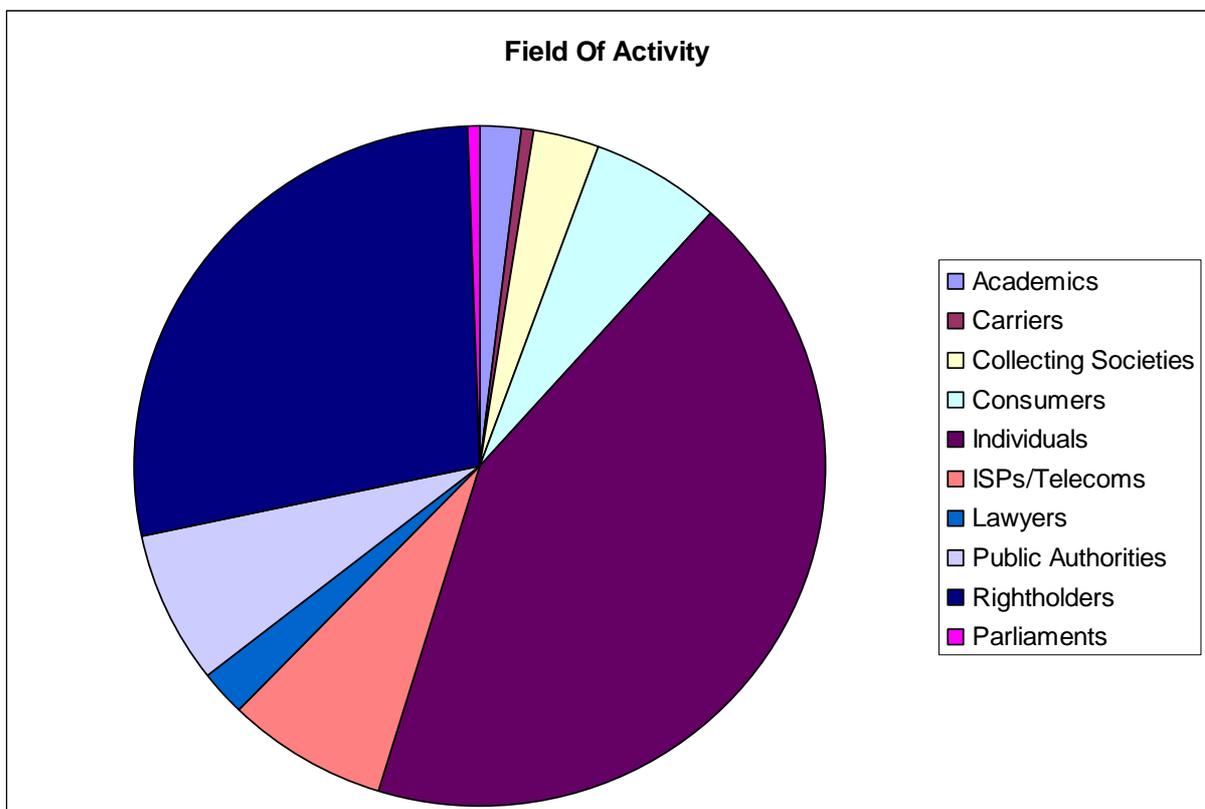
July 2011

1. INTRODUCTION

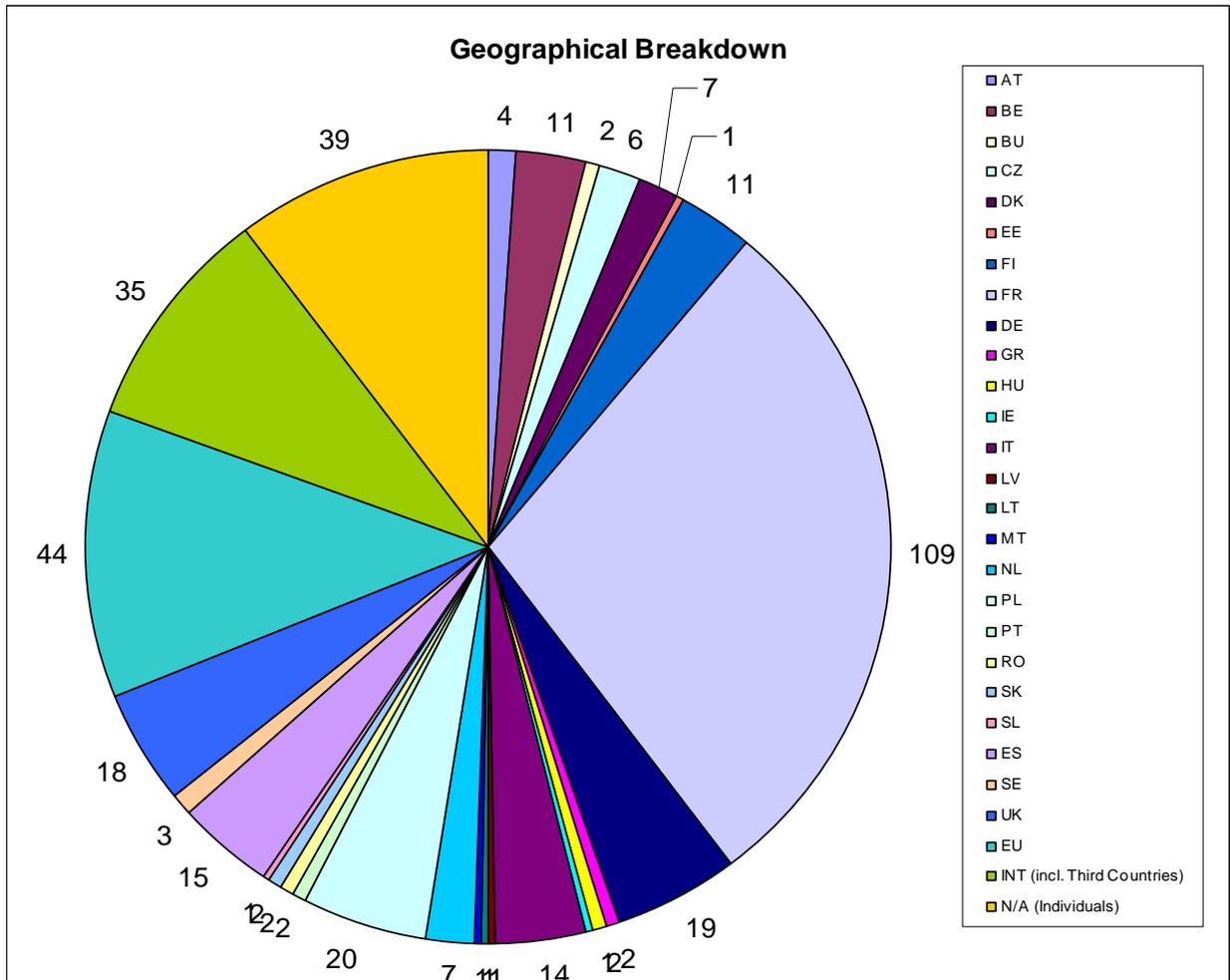
On 22 December 2010, the Commission adopted its "Report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights" (COM(2010)779 final), mandated by Article 18(1) of Directive 2004/48/EC. The Report was accompanied by a Commission Staff Working Paper containing an article-by-article analysis of the application of the Directive in the Member States (SEC(2010)1589).

With the adoption, the Commission launched a public consultation on the Report, with a view to informing the Commission's decisions on any possible future measure and to feed the related impact assessment work. The deadline for the public consultation expired on 31 March 2011.

A total of 380 contributions were received by the services of DG Internal Market and Services (hereunder DG MARKT) from a broad range of relevant associations and organisations, parties and professions. The largest share of replies was submitted by individual citizens (most of them internet users resident in France) who focused their comments on the issues related to the digital environment. Responses were furthermore received from rightholders (including trade and business associations and anti-counterfeiting/piracy organisations), consumer organisations (in particular internet user organisations), internet service providers, telecommunication operators, academics, carriers, collecting societies and public authorities. Among these public authorities, there were 20 Member States' governments that provided replies. Also the Committee on Legal Affairs of the European Parliament, the German Bundestag and the European Data Protection Supervisor commented on the Report. The responses are available on the website of DG MARKT, except for those for which confidential treatment was explicitly requested.



There was a wide geographical coverage in terms of responses received, with respondents originating from 25 EU Member States, and only Cyprus and Luxembourg not being represented in the replies. A significant number of responses were also submitted by European and international bodies and associations. Finally, there were 54 replies from citizens who did not provide any information on their Member State of residence.



DG MARKT would like to thank the interested parties who responded to this consultation for the level of detail and for the thoroughness of their contributions. This report seeks to provide a summary of the main comments received by DG MARKT. It does not provide detailed statistical data, but rather seeks to present a qualitative assessment of the contributions received. In particular, DG MARKT not only takes into account the number of respondents expressing concurring views but also their degree of representativity.

2. REACTIONS ON THE ISSUES RAISED IN THE COMMISSION REPORT

2.1. The IPR Enforcement Directive and the Digital Environment

The issue as to whether the current IPR Enforcement Directive is fit to encounter the challenges posed by the digital environment triggered responses from more than 70% of the stakeholders with very different points of view. These came from rightholders and collecting societies on the one hand and ISPs, telecommunication operators and – to a large extent – individual citizens on the other.

Rightholders and collecting societies almost unanimously criticized the shortcomings of the current legal regime as transposed into national law especially in terms of how it frames the role of intermediaries as well as its perceived failure to stem the increase in online copyright infringements, whereas ISPs, telecommunication operators and individual citizens consistently stressed that there was no need for changing the current Directive. Some ISPs stated that there were not enough statistics to prove that internet causes serious problems in terms of counterfeiting.

However, a clear majority of stakeholders who advocated a change of the current legal regime requested that such change should be **in accordance with the already existing legal framework at EU-level**, especially to ensure coherence with the provisions and definitions of the E-Commerce Directive. This point was specifically addressed also by certain Member States, such as DK, MT and PT.

In particular, citizens expressed anxiety that a revision of the current Enforcement Directive would lead to stricter rules which would interfere with net neutrality and the freedom of speech. As for the Member States, only two (DE, HU) saw the current regime as sufficient and suited to combat online IPR infringement. The majority (BG, CZ, DK, ES, FI, FR, IR, IT, LI, LV, MT, NL, PL, RO, SK) considered the Directive (at least partly) inapt to solve IPR problems of the digital age. Due to a lack of sufficient statistical data and case-law on the matter, three of them (BE, PT, UK) deemed it too early to respond to the question.

The Legal Affairs Committee of the European Parliament called on the Commission to address aspects of and challenges posed by the internet to the enforcement of IPR with particular care and asked it to put forward for consultation specific questions concerning these issues. The German Bundestag emphasized that future provisions regarding the digital environment should take into account the interests of all stakeholders. The interests of the rightholders would have to be balanced with those of the ISPs as well as those of the consumers regarding their privacy.

Those respondents in favour of amending the current Directive specifically stressed the following issues:

(1) Need for rules on the role of intermediaries

The majority of rightholders and collecting societies demanded a greater involvement of internet service providers and other intermediaries, identifying them as key actors in combating IPR infringements in the digital world. While most of the rightholders were calling for a closer cooperation with intermediaries, only a few of them actively advocated the implementation of filtering / monitoring technologies

or a duty of care principle (e.g. for intermediaries that actively use, present, organise or modify third parties' content for commercial purposes).

As for the separate issue of the liability of intermediaries, the vast majority of the stakeholders in favour of amending the IPR Enforcement Directive emphasized the need to keep the current liability-regime established by the E-Commerce Directive. Only a few (mostly rightholders) demanded for a stricter liability regime and a reform of the safe-harbour principles. A problem that was identified with regard to online-piracy as well as the sale of counterfeit goods on internet-platforms was the issue of anonymity of users and the perceived lack of verification, by ISPs, of information provided by subscribers/customers, both of which were claimed to facilitate infringements these customers and thus hinder enforcement.

(2) Need for stricter rules on copyright infringement and file-sharing

The overwhelming majority of rightholders and a number of collecting societies called for stricter rules on online copyright-infringement and peer-to-peer file-sharing, claiming that the current Directive does not provide effective and expeditious measures to tackle online-piracy and that this deficiency in the legal framework was jeopardizing investment and innovation. Rightholders claimed that a range of measures should be adopted to address online-piracy as a whole (instead of limiting measures to specific forms of infringement). The Committee on Legal Affairs of the European Parliament noted that it should be examined whether specific IPR-infringements (e.g. copyright) in the online world require particular measures since the infringement normally does not involve a tangible good. An issue that was raised by several rightholders and a few MS, in particular FI and NL, was the need for improved cross-border enforcement.

(3) Need for a level playing field for legal digital content

Rightholders, while acknowledging that the supply of licit offers is a key factor in combating online-piracy, claimed that such services cannot be developed as long as IPRs are not sufficiently protected in the online world. In particular broadcasting rightholders rejected the idea that the current lack of licit offer was the main cause of digital piracy, arguing that most of their content was consumed illegally despite existing and easily accessible legal alternatives.

Contributors opposing changes to the current legal regime brought forward in particular the following the arguments:

(1) Lack of sufficient data for evaluation

A significant number of stakeholders, in particular ISPs, telecommunication operators and certain Member States (BE, DE, PT, UK), took the view that due to the limited experience with the implementation of the Directive as well as the lack of statistical data and evidence, it is too early to review and amend the Directive at this stage. Especially ISPs argued that a premature introduction of stricter enforcement rules would have a chilling effect on innovation and undermine consumers' confidence in digital products.

A number of individual contributors, furthermore, took the view that there was no evidence that file sharing has any overall detrimental effect. On the contrary, in the view of these respondents piracy would even have the potential to boost sales.

(2) Increase in legal uncertainty

In particular ISPs and other online intermediaries emphasized that any potential revision or reopening of the IPR Enforcement Directive would jeopardize the existing balance between the interests of rightholders, users and intermediaries and create legal uncertainties. They claimed that the relationship between enforcement provisions against infringements on the one hand and the limited liability regime and the prohibition of general monitoring obligations enshrined in the E-Commerce Directive on the other would risk to become unclear.

This view was to some extent shared by a number of Member States (DE, HU, MT, PT, RO) who argued that no new liability regime and no new definitions in the IPR Enforcement Directive were needed and that establishing more precise legal requirements for the enforcement of IPR would cause uncertainty for the actors involved. One Member State (SK) furthermore stressed that with legislation regularly lagging behind the technical developments and awareness of the population being low, the focus should be on the prevention, not on repression.

(3) Shortcomings of current licit offer

Many stakeholders who opposed amending the current IPR Enforcement Directive, including ISPs, telecommunication operators and a majority of individual contributors, viewed the lack of available and attractive licit offer as one of the main causes for online piracy. They considered that increasing such service offers would constitute a feasible alternative to imposing more detailed enforcement measures. It was suggested that an appropriate role for the Commission might be to look at ways of encouraging discussions regarding pan-European licensing of content and market-driven private agreements related to development and implementation of technological solutions, such as those that exist today to protect premium content from unauthorized use, copying and distribution.

Also one Member State opposing any legislative changes in this area (HU) highlighted that one of the biggest online music stores ceased to provide its services at the end of March 2011 on its territory. As a result, there would hardly be any licit content available online to compete with illegal file sharing. This phenomenon would also show that the fight against copyright piracy does not necessarily only call for stronger IP enforcement but also new business models in the copyright industry with a sound legal framework on collective rights' management.

(4) Safeguarding the freedom (and free exchange) of information

The overwhelming majority of individual citizens, consumer protection organisations and academics strongly argued against any further (over)regulation of IPR infringements, especially in the context of the online world. Filtering of content and monitoring traffic on the internet were perceived as threats to fundamental rights (freedom of speech, right to privacy) or even censorship and therefore clearly rejected. Amendments to the current Directive were viewed by individuals as aimed

at limiting citizens' basic freedoms. In their contributions, most individual citizens called for removing copyright protection against file-sharing, arguing that the free exchange of information (including current copyright-protected material) would help spread culture as well as increase creativity without having detrimental effect on industry and society as a whole; such free exchange should therefore be supported rather than considered as infringing copyright law.

2.2. Scope of the IPR Enforcement Directive

On the issue of clarifying and/or modifying the scope of the Directive, views were less divergent, but almost two thirds of respondents did not comment on the matter.

Amongst those who did comment on the scope, almost 80% expressed their support for the idea of **generally clarifying the scope** of the Directive, including the majority of Member States that took a position on this question (BG, CZ, DK, FR, IR, IT, LV, MT, PL, PT, RO, SK, UK) as well as the majority of rightholders and consumer organisations.

Regarding the potential introduction of a **pre-defined list of IPRs** covered by the IP Enforcement Directive, most stakeholders generally in favour of clarifying the scope advocated the introduction of a non-exhaustive list into the annex of the text. Such a list would not interfere with other rights protected only by certain national jurisdictions and would increase legal certainty. A definitive / exhaustive list in the normative part of the Directive was unanimously opposed by those who took a view on the issue. Some stakeholders stressed that the wording of Article 1 of the Directive should be harmonised with the provisions of the TRIPs Agreement and the Paris Convention.

Roughly two thirds of the stakeholders that commented on the issue said that the scope should **not only be clarified but also extended**, with almost half of them arguing that all the mentioned rights and issues (especially trade secrets and other acts often covered by national unfair competition rather than IP law) should be covered. Others advocated a more limited revision of the scope by focusing on specific rights / issues; in this respect, an extension to trade secrets and parasitic copying was most often demanded. Stakeholders in favour of extending the scope were mostly rightholders and, on the Member States' side, BG, CZ, FR, IT and PT.

However, the majority of Member States that commented on the issue (BE, DE, DK, ES, FI, HU, IE, MT, LT, PL, RO, SK) **opposed extending the scope** of the Directive, considering that such an extension was not warranted and that the 'nature' of acts of unfair competition were different from IPR infringements. This view was supported by academics as well as a few Government-related trade and business associations (predominantly from Germany and Austria).

Some stakeholders specifically opposed the extension of the scope to certain matters such as domain names. Approximately 10% of the contributors (in particular consumer protection organisations, ISPs and telecommunication operators) demanded a distinction within the scope between the counterfeiting of physical goods and online IPR infringements (mostly copyright infringements). Amongst the Member States, UK stressed the importance that different IPR should be treated differently by the Directive (as e.g. copyright infringements were different from patent infringements) and that no blanket solutions should be applied.

2.3. The concept of intermediaries and the workability of injunctions

About 60% of respondents took a position on the issues related to intermediaries and injunctions. Almost all ISPs/telecommunication operators and carriers expressed an opinion on the issue, and also a large majority of rightholders, collecting societies and consumer organisations reacted on this point.

Many ISPs stressed that before deciding on a review of the Directive, the Commission should ensure a proper implementation of the IPRED provisions across the EU. All ISPs and telecommunication operators refused to assume a stronger role in the area of enforcement which they considered to be a task for the public authorities. They furthermore considered that any measure jeopardizing the limited liability regime of ISPs would run against the intention of the European legislator to create an efficient and competitive ICT market. The majority of them took the view that if more clarity on how to apply the rules on injunctions was necessary, this should be achieved through Commission guidance. Only a few ISPs preferred clearer rules in that area in order to increase legal certainty. Carriers asked to distinguish between internet intermediaries and intermediaries in the offline world.

Most rightholders and all collecting societies that took a position on the issue called for a stronger involvement of intermediaries and for clearer rules regarding the conditions under which injunctions may be granted. However, a small minority of rightholders was concerned that in particular (offline-world) carriers would become subject to excessive inspection duties if additional measures were taken.

A majority of Member States (BE, BG, CZ, DK, ES, FI, FR, IE, IT, LV, PL, PT and UK) considered that it was necessary to clarify the role of intermediaries in the process. This need was in particular acknowledged in the area of the internet where anonymity makes it more difficult to take appropriate measures against such infringements. One (DK) stressed, however, that any such changes should be reasonable and balanced in relation to the intermediaries' possibilities of carrying out their businesses. Another Member State (FI) called for more attention to be paid to the issue of enforcement and injunctions in cross-border situations. Seven Member States (NL, DE, HU, LT, MT, SK and RO) did not see the need for any changes. One (NL) questioned whether there was sufficient evidence for concluding that the role of intermediaries needed to be reinforced. The Legal Affairs Committee of the European Parliament took the view that an analysis of both the E-Commerce Directive and the Copyright-Directive (Directive 2001/29/EC) could prove useful for further assessment concerning online intermediaries.

Consumer organisations were in general opposed to any modification of the Directive concerning the role of intermediaries and injunctions. Those that considered a modification useful pleaded in favour of restricting the conditions for granting injunctions that were considered as potentially very harmful in particular for SMEs.

(1) Distinction between liability and injunctions

Almost all ISPs/telecom operators considered that any attempt, by the European Commission, to change the current balance between the IPR Enforcement Directive and the rules of the e-Commerce Directive, including its definitions, would risk jeopardizing the limited liability regime of ISPs and therefore the efficiency and competitiveness of the European ICT market. They also considered that additional rules could be incompatible with laws on other fundamental rights such as data protection and freedom

of communications and the e-Commerce Directive (2000/31/EC) which would be essential for innovation and growth in the digital market.

Most rightholders and four Member States (ES, FR, IE, PT), however, stressed in their responses that the distinction between liability and injunctions should be further clarified. In their view, it would be helpful to make clear that interlocutory and permanent injunctions against third-party intermediaries do not depend on the intermediary's liability. Some of them however also suggested that such injunctions should be limited to a certain period of time and had to be proportionate to their intended goals in order to avoid overly severe consequences (e.g. blocking a production line for several days). One Member State (BE) stressed that that it would be advisable to wait for the decisions in the cases currently pending before the Court of Justice of the EU. Some rightholders, furthermore, suggested clarifying to what extent a right holder who has obtained an interlocutory injunction should be liable where injury is caused by the provisional measures (strict objective liability or fault-based).

One Member State (DE) explicitly opposed any clarification that injunctions are not dependent on the liability of the intermediary. According to that Member State, injunctions cannot be issued deliberately but must depend on some kind of responsibility (which does not necessarily have to equal to the concept of liability under tort law). A clarification could be misinterpreted that injunctions could be issued just on the basis of an infringement without any other preconditions fulfilled.

Another Member States (SK) emphasized the need to strike a balance between the commercial interests and protection of the user rights and freedoms on the internet (including the principle of presumption of innocence, the right to privacy, to a prior fair and impartial procedure and to effective judicial review).

Some of the small minority of rightholders that opposed a modification of the Directive stressed that intermediaries providing mere conduit or hosting services should not be made responsible for illegal content. In particular, they opposed the idea that such intermediaries should be held responsible for online opinion forums to the extent that there could be no obligation to constantly review such forums for repetitions of already removed entries or other unlawful texts, or censoring each entry before its placement. This would also potentially conflict with the freedom of the press.

(2) Definition of the term 'intermediary'

Carriers requested that a distinction should be made between intermediaries in the online world on the one hand, and those in the offline world on the other. Also one Member State (DE) opposed the imposition of monitoring/examining-obligations on shippers and other offline intermediaries as such obligations would disproportionately affect their business. That Member State believed it should only be possible to issue injunctions against such intermediaries if they had actual knowledge of an infringement or were shown to be negligent in their checking obligations despite specific hints of such infringement.

Some rightholders requested that a definition of the term 'intermediary' be introduced into the Directive. In particular some of the collecting societies, furthermore, called for a clarification that internet sales platforms and websites that structurally and systematically operate a service that facilitates and induces copyright infringements while generating

revenue for example through advertising are not covered by the liability privilege of the E-Commerce Directive.

Some of the responding ISPs however stressed that any attempt to define the term 'intermediary' in an online environment for purposes of the IPR Enforcement Directive would quickly turn obsolete in view of the speed of technical development on the internet. Many of those Member States that were in favour of modifying the Directive (BG, ES, FI, IE, LV, PL, PT, UK) considered that a common definition of intermediaries could be useful, also in order to allow defining more precisely the obligations of different types of intermediaries. One of these Member States (ES) stressed that such definitions should cover P2P, search engines and social networks, but should remain open in order to encompass any future ISPs that might have responsibility to act against infringements. Other Member States (NL, SK) stated that they were not aware of any difficulties concerning this issue and that the definition and interpretation of the concept of intermediaries should be left to the courts (PL, LT, RO).

Some rightholders furthermore, suggested that it should also be possible to take action against advertisers and credit card companies that cooperate with platforms where copyright infringements take place systematically and/or on a large scale.

(3) Scope of injunctions

Most of the ISPs/telecommunication operators stressed that intermediaries are not the infringers and that they are typically not in a position to make qualitative judgments as to the legality of certain content. These ISPs therefore considered that injunctions should remain limited to the elimination of a concrete and actual infringement, and not apply in view of possible future infringements. Filtering and/or monitoring obligations were strongly opposed by almost all ISPs and telecommunication operators. They claimed this would be incompatible with the prohibition, in the E-Commerce Directive, of general monitoring obligations, extremely costly, easy to circumvent and would have negative effects on the overall performance of the networks. Some ISPs took, furthermore, the view that interlocutory (provisional) injunctions used as an enforcement remedy, are particularly damaging for startups, taking into account their lower evidence requirements. As the costs of a subsequent court case would often be too high for startups, the interlocutory injunction would often be a definitive judgment, terminating the startup's market entry.

The idea that ISPs would need to monitor content and prevent infringements in the future was also strongly opposed by responding citizens as it would lead to increased operating costs for ISPs. These additional costs would be passed on to consumers and could reduce access to broadband, which is recognised as an essential service, for all consumers. Some of the respondents also stressed that filtering technologies are, by design, unable to distinguish between authorised and unauthorised copyright protected content, public domain works or content freely distributed by the author.

Also three Member States (DE, IE and NL) considered filtering and general monitoring obligations as problematic. DE also opposed, in particular, the idea of internet-bans for end-users.

Many rightholders asked for clarification as to whether, under the current rules, Member States can impose an urgency requirement for the granting of preliminary injunctions. Some of them and a number of collecting societies furthermore suggested allowing not

only for injunctions to stop ongoing infringements, but also as a preventive measure with a view to possible future infringements, such as the obligation to use filters (i.e. not only Notice and Take-down, but Notice and Stay-down). Some of the rightholders suggested that the Commission should clarify that injunctions need not necessarily to be title- or brand-specific but could, in appropriate cases, refer to the right holder's entire portfolio/repertoire. Several ISPs, however, stressed that it was an essential requirement that injunctive measures must exhaustively and precisely list the material that are to be taken down. Some rightholders, furthermore, suggested that the Commission should clarify the scope of permanent injunctions by, for example, adding an annex containing a non-exhaustive list of proactive and preventive measures to the Directive to guide courts on the scope of injunctions available to prevent repeat infringements.

Those Member States that were in favour of reinforcing the role of intermediaries proposed different mechanisms in order to engage their co-operation, including filtering of content, giving the rightholders the possibility to remove illegal content or requesting that such removal be done by the intermediaries. One Member State (BE) suggested clarifying that the dual possibility of granting both interlocutory injunctions and permanent injunctions (following a judicial decision finding an infringement of an intellectual property right) against intermediaries is also applicable to copyright and related rights infringements.

(4) Notice and takedown procedures (NTD)

A number of rightholders and collecting societies called for European rules on NTD procedures. Academics proposed to improve the current NTD procedures, in particular by providing for a mechanism that would allow for a digital identification of protected content, and thus prevent a repetition of the infringement once the content has been taken down.

While many ISPs agreed that a court should be able to order a hosting provider to take down specific material for which the illegal nature and the location is clearly identified, they opposed any measure that would require an online intermediary to actively search its systems as infringing the prohibition to impose general monitoring. Some ISPs furthermore took the view that the notion of 'actual knowledge' should refer to human knowledge and not 'computer knowledge'. Others stressed that some rightholders demand internet companies to adopt filtering mechanisms for their brands although these rightholders do not use the existing notification systems.

2.4. The right of information and privacy laws

Half of all respondents took a position on whether the current rules on the relationship between the right of information under the IPR Enforcement Directive and rules on data protection and privacy are appropriate and sufficiently clear. Whereas more than half of the rightholders and collecting societies and almost half of the consumer organisations expressed an opinion on the issue, only a quarter of the ISPs and telecommunication operators did so.

A slight majority, mainly composed of rightholders and collecting societies, considered that the interaction between the current sets of rules requires clarification whereas all ISPs/telecommunication operators and all consumer organisations opposed any such change, referring to the citizens' rights to privacy and the principle of proportionality. This was stressed in particular for non-commercial file-sharing. It was also stressed that

any reinforcement of the contribution of intermediaries to the fight against file sharing would have to remain compliant with the right to a presumption of innocence, the right to a fair trial, the right to privacy and the right to the confidentiality of communications. Several rightholders stressed the importance of guaranteeing citizens' right to privacy but most of them emphasized that this right should not be absolute. Many of them took the view that, under the current rules, users can hide behind anonymity in the online world, thus rendering it impossible for rightholders to enforce their rights. Some of them furthermore stressed the need to distinguish between personal data relating to the family life of persons and those relating to the professional life of companies.

A considerable number of contributions on this point were made by citizens. The vast majority of these pleaded against censorship on the internet and called for free speech. These respondents feared that the protection of IP would lead to invading citizens' privacy. Some were concerned about the fact that current technologies can actually monitor citizens' behaviour on the social networks or on the internet in general.

Consumer organisations contested the assumption of the Commission Report that giving systematic precedence to the right to data protection over that of information should be seen as problematic. It was stressed that no proof had been provided that such a practice affects negatively the economies of the countries in question. One such respondent contested the legal validity of the EU Charter of Fundamental Rights; the UN Convention on Human Rights however, while mentioning privacy, made no specific reference to IP.

Those Member States that took a position on this question were almost evenly split. While almost half of them (BE, BG, FR, HU, IE, IT, PL, ES and UK) considered that the relationship between the right of information and data protection rules currently poses a problem at least in the online world, the other half (CZ, DK, FI, DE, LV, LT, MT, PT, RO and SK) took the view that there was no need to change the status quo. One MS (HU), although of the opinion that clarification was needed, considered that the question should not be dealt with in the context of the IPR Enforcement Directive but should be left to a more horizontal policy. Also the European Data Protection Supervisor (EDPS) saw no need for a modification of the Directive but considered that guidance on certain issues (limits to the allowed monitoring of internet usage and on how to ensure a balanced approach to transferring information (subscriber details) in the context of court proceedings) should be provided by way of an interpretative Commission Communication. The EDPS also stressed that any monitoring measures by rightholders involving data processing should be subject to a prior check/supervision from data protection authorities.

Specific issues raised in the contributions under this point can be summarised as follows:

(1) Data retention

Many of the rightholders stressed that data often are not retained long enough by internet service providers to allow rightholders to obtain the information they need to enforce their rights. They proposed to introduce an obligation into the Enforcement Directive to store data at least on a temporary basis. Several of these respondents suggested that, alternatively, the storage of data upon request (quick freeze) could be considered. One of the MS (ES) proposed to require that ISPs retain data for a period of 24 months and to

allow for protective measures requiring the ISP to retain them for the entire duration of court procedures.

Some telecommunication operators stressed that the European Data Retention Directive (Directive 2006/24/EC) and the Data Protection Directives (Directives 95/46/EC and 2002/58/EC) were quite specific in their balancing of principles and exceptions related to data retention for specific purposes and the protection (use and deletion) of data. Any considerations regarding retention of data for the purpose of disclosing information related to IPR infringements should respect these fundamental principles while also securing the proportionality of any new obligations related to data retention placed on intermediaries on the internet. One respondent indicated that experience in Germany so far had shown that seven days were long enough for rights holders to exercise their right to information.

Replies from individual citizens were clearly opposed to any right to store private data or provide them to third parties.

(2) Role of the courts

Those internet service providers and telecommunication operators that took a position on this issue considered that Member States' courts were able to handle it appropriately under the current rules. Also a number of Member States (CZ, MT, PT and RO) reported that they had not experienced any problems with the handling by their courts.

Many ISPs and telecommunication operators stressed the importance of a judicial decision in order to ensure that the right balance is struck between data protection and the right of information in Art. 8. Internet access providers should not be put into a position, where they have to judge whether the information request of Rights owners is justified and proportionate. Some referred to a frequent practice of certain rightholders of using personal information obtained from ISPs to address warning cease and desist letters with fines and requesting payment for the alleged damage. In case the addressed alleged infringer returns the signed declaration to cease and desist and does pay the demanded damage a further judicial proceeding would not take place. Furthermore, one indicated that any such court decision should only be issued if the rights holder had presented sufficient evidence that an infringement had been committed from the IP-address in question.

Two Member States (FI and SK) and the EDPS also stressed the need for an ex ante court order or, alternatively, an administrative order (IE). One of these Member States (SK) furthermore took the view that a right of information against ISPs would have to be strictly limited to infringements committed on a commercial scale. The EDPS considered that the commercial scale criterion should be maintained (while possibly clarified) as well as the requirement for the disclosure to be "in the context of proceedings" and the need for the information request to be "justified and proportionate".

(3) False and incomplete information

Several rightholders considered that the Commission should explore the need for sanctions for the supply of false or incomplete information. Some took the view that ISPs should be obliged to suspend their services to customers that turn out to have delivered false identity details. That same view was also supported by one of the MS (IE).

Some of these respondents also suggested to put in place economic sanctions, proportionate to the scale of the infringement, for failure to comply with relevant judicial orders and a prohibition for the infringer to warn his suppliers about the ongoing procedures.

(4) Scope of the right of information

In particular consumer organisations stressed that ISPs should disclose any personal information only to enforcement authorities and not directly to rightholders.

One Member State (FR) highlighted that it should be clarified that the right of information is not limited to a party of the judicial proceedings whereas another (HU) opposed that idea. The plaintiff should ensure that third parties are (or become) parties to the litigation.

Some rightholders took the view that it would be useful to clarify that the list of information or documents to be provided, contained in Article 8, is purely indicative. One of the Member States (PL) also stressed the need to clarify the conditions under which information can be considered to be "under the control" of the opposing party.

Another Member State (HU) stressed that information to be provided should be limited to those data that are indispensable to enforce the claims, i.e. name and contact details of the alleged infringer.

A number of rightholders mentioned as a specific problem that intermediaries do not disclose information regarding the number of infringing items and the revenues made with them by a specific seller. Some of them suggested, furthermore, extending the right of information also to administrative proceedings, as e.g. customs procedures.

(5) Provisional measures

Many responses from rightholders and two Member States (FR and ES) highlighted that it should be possible to invoke the right of information as a provisional measure before the decision on the merits and even before a case on the merits has been launched, in order to allow identifying the future defendant and calculating the damages to be requested. Two other Member States (LV, PT) however, considered that this was already clear from the current rules of the Directive.

On contrast, some respondents, including one MS (BE), stressed that the provision of information is by nature irreversible and can cause damage to the alleged infringer if provided prematurely. Germany indicated that, in its jurisdiction, the right of information can be exercised in preliminary proceedings only in cases of 'obvious infringements'. An infringement would be considered obvious if it was clear enough to all but exclude the possibility of a wrong decision and thereby an unjustified burden for the respondent.

2.5. Damages

Roughly 40% of the overall respondents took a position on the issue of damages. Half of them (mostly from the side of rightholders) felt that the provisions on damages needed improvement as they held that damages awarded are often not dissuasive. Moreover, they complained that the considerable differences and inconsistencies in the implementation and interpretation of the Enforcement Directive across the Member States would make

damages claims uncertain and costly in some jurisdictions. The other half of respondents (mostly consumer organisations, telecommunication operators and individual contributors) considered that the current regime of Article 13 of the Directive should not be changed. They claimed that a higher level of damages would encourage rightholders to sue individual (small-time) copyright infringers, or pursue technical intermediaries whose services are deemed to “facilitate” infringements. Additionally, these respondents claimed that higher damages would mean higher litigation costs and would therefore have a chilling effect on innovation and the sharing of culture.

As for the Member States, only a few (ES, FR, IR, IT, LV, RO) advocated a revision of the current damages regime. The majority of Member States (BE, BG, CZ, DK, DE, HU, FI, LT, MT, NL, PL, SK, UK) felt that the current Article 13 lays down sufficient guarantee for rightholders to be adequately compensated for the damages suffered and that it would be up to the courts under national law to respond accordingly.

The **specific issues raised** can be grouped as follows:

(1) Compensation

Consumer organisations, telecommunication operators and individual citizens demanded that damages should only be awarded in cases of for-profit infringements and be based on concrete data regarding the material loss suffered by the right holder.

The majority of rightholders pointed out that damages currently awarded by courts would not succeed in adequately deterring infringers. They therefore insisted that the Directive should include measures to enable rightowners to recover the full extent of their loss, including attorney’s fees, expert costs and all costs incurred in establishing that an infringement had been committed (such as identifying the infringer, investigating his activities, obtaining evidence (including test purchases), applying for seizure and, where appropriate, destroying the counterfeited goods and taking legal action against the infringer). The inability to recuperate such costs would often discourage rightholders from pursuing legal action, particularly small and medium sized businesses (SMEs). Also two MS (DK and HU) remarked that, due to the fact that the level of damages are relatively low, parties often prefer to settle disputes out of court.

In this respect, rightholders suggested guidelines for the calculation of damages they considered would be particularly useful in copyright cases, for example where a website was making available copies of films that were still in theatrical release. Additionally, they claimed that courts were facing severe difficulties in calculating the level of damages due to the difficulties in interpreting the existing legal framework and that the evidence requirements rightholders must meet to substantiate damages claims were generally too high.

(2) Infringer's profits

There was almost unanimous consent amongst responding rightholders that in order to have an adequately compensatory and deterrent effect, damages awards should be such that, at a minimum, infringers are deprived of any of the economic benefits deriving from their infringement, on the basis of the principles governing unjust enrichment. To this end, it was occasionally argued that there should be a legal

presumption that the damage suffered by the rightholder is at least equal to the profits made by the infringer.

(3) Lump sum damages

Due to the fact that the financial gains from piracy can be very substantial and also difficult to establish, a majority of rightholders advocated a modification of the rules on pre-established or multiple damages (lump-sum damages), to provide for an alternative to any lost profit that, in many cases, would almost be impossible to prove. In this respect, a predetermined calculation method should set a figure sufficiently high to compensate the right holder for his likely damage and to act as a deterrent. One Member State (DE) opposed an introduction of a general entitlement to lump-sums in the form of multiple licensing-fees.

(4) Punitive Damages

An issue that faced heavy opposition from the vast majority of respondents was the possible introduction of punitive damages. Individual contributors as well as consumer organisation and lawyers/academics clearly opposed the concept of punitive damages, claiming that under European legal tradition damages are awarded to compensate and not to punish the infringer. But also within the group of rightholders, the majority was reluctant towards the idea of introducing any such concept. Finally, there was a unanimous consent amongst Member States that no punitive damages must be introduced.

(5) Joint liability of company-managers/directors

The majority of contributors opposed the idea of generally extending liability to the management of an infringing company. Only a few rightholders felt that joint and several liability of directors of relevant companies should be considered, with some suggesting to consider spousal attachment to cases (as in tax evasion cases where the transfer of assets to spouses has been a proven channel to circumvent fiscal requirements).

2.6. Corrective Measures

Roughly 20% of the overall contributing stakeholders commented on the Directive's provisions on corrective measures. While the issue raised significant concerns amongst rightholders, individual contributors hardly commented at all. As for Member States, some (BG, DK, FR, HU, IR, IT, LV, PT) asked to clarify certain terms and/or conditions regarding the Directive's current provisions. Others either felt that there was no need for any clarifications or amendments (CZ, DE, ES, LT, MT, PL, SK, RO), considered that due to the principle of subsidiarity this topic should not be dealt with at an EU level (NL), or did not comment at all on the matter (BE, FI, UK).

The issues that were **raised** in the different contributions were largely similar and can be summarised as follows:

(1) Clarification of the difference between the terms 'recall' and 'definitive removal'

The clear majority of contributors that took a position on this issue demanded a clarification of the terms 'recall' and 'definitive removal' as well as precision as to the difference between them, with rightholders criticising that the terms were interpreted differently across Member States.

(2) Clarification of cost bearing

Rightholders strongly advocated clearer rules on the issue of bearing the costs for the destruction of infringing goods, claiming that they would often have to pay without being able to recover these costs from the infringer. This would often deter, or even prevent, individual companies, particularly SMEs, from taking (legal) action. A few proposed that the alleged infringer who does not agree with the destruction of the goods should provide a warranty for the payment of the storage and destruction. Where costs could not be imposed on the infringer (either because he is unknown or insolvent), rightholders claim that they should be borne by intermediaries as they had easier access to the infringers' funds or had otherwise profited from the illicit trade. Intermediaries on the other hand (both online intermediaries/ISPs and shippers/ carriers) pointed out that they should never be burdened with costs for destroying goods since they did not have any links to the actual infringement. In case of counterfeit goods which pose a threat to public safety or health and whose destruction is therefore in the public interest, a number of stakeholders (including various Member States such as IT, LV, MT or PL) considered it justified that the costs should be borne by the State where they could not be recovered from the infringer. Finally, there was a broad agreement amongst the stakeholders that courts should be entitled to impose the costs of destruction on the unsuccessful party (with some requesting a definition of the term 'unsuccessful party').

(3) Relation between corrective and provisional measures

When confronted with the relation between corrective and provisional measures, most of the stakeholders, including a number of Member States such as BG, DE, HU, LV, MT, PL, RO and SK saw no need for any kind of clarification within the Directive. Only IT suggested that the Directive could make it clear that provisional measures can also include temporary removal from the market.

(4) Extension of the recall order to retailers on an ex-parte basis

Rightholders suggested that the court order stipulating the recall of the infringing goods from channels of commerce could, on an ex-parte basis, be extended to retailers (who are identified in the data provided by the infringer). Another proposal was to deal more generally with the situation that the infringing goods are not in the infringer's possession any more.

3. OTHER ISSUES

3.1. Evidence

Evidence-related matters did not raise major concerns for the vast majority of stakeholders, with only about 20% commenting on the issue. Contributors consisted mostly of rightholders. Only one contributor for the group of the ISPs/telecommunication operators commented on this issue stressing that the determination of what evidence is reasonably available and sufficient should always be left to the judicial authority, and not to the responsibility of intermediaries. On the side of the Member States, a substantial number (BE, BG, IR, LV, MT, NL, PO, PT, RO, UK) saw a need for amendments regarding certain evidence-related issues; only a few (CZ, DE, HU, LI, SK) did not consider any changes to the current legal regime necessary.

Amongst those who sent in comments, the **issues and topics raised** were similar and can be grouped and summarised in the following way:

(1) Facilitation of the collection of evidence, difficulties with cross-border evidence

The clear majority of contributors (in particular rightholders) supported the idea of facilitating the collection of evidence, especially by empowering the courts to accept any proof of infringement, including simple witness statements and allowing the use of samples as evidence. While the introduction of provisions on screenshots as a form of evidence received significant support, also by a number of Member States (BG, IR, LV, PL and PT), the idea of searching/seizing personal computers raised more controversy amongst the stakeholders. Some stressed that such search/seizure could already be ordered under current national law (BG, DE, LI), whereas others pointed out that personal computers could not be specifically linked to being 'predominantly' used for infringement-purposes. Mostly rightholders as well as a few Member States (IR, LV, PL, PT and RO) considered explicit regulation on searching/seizing personal computers necessary. Finally, a number of stakeholders asked for further harmonisation of cross-border collection of evidence which according to their practical experience remains difficult.

(2) Protection of confidential information

A substantial number of rightholders demanded clarification and/or guidance on the requirements of disclosing and/or protecting confidential information (e.g. banking, financial or commercial documents). Only a few Member States specifically addressed the issue by stating that they already provide for procedural guarantees regarding confidential information in their respective civil procedure laws, mostly through the involvement of courts and judges (BE, DE). NL specifically warned that the rightholders' interest in collecting evidence needed to be balanced with the risk of "fishing expeditions" aimed at obtaining internal company information. A few stakeholders also suggested inserting a definition as to what kind of information should be covered by the term 'confidential information'.

(3) Witness' identity protection

The issue of protecting the identity of witnesses came up in several contributions, predominantly again from rightholders, claiming that without clear (mandatory) provisions on witness protection it would be very difficult for rightholders to collect

evidence, given that witnesses are often in danger of facing severe consequences and thus can be reluctant to testify. Article 7(5) of the Enforcement Directive allows such protection but – with the exception of Ireland – has not been implemented by Member States.

(4) Pre-litigation evidence, ex-parte search orders

A number of contributions (coming almost exclusively from rightholders) requested a stronger focus on pre-litigation procedures (especially ex-parte granted search orders such as the UK Anton Piller orders or Mareva injunctions or the French / Belgian saisie-contrefaçon proceedings), to allow for a more efficient collection of evidence. Concerns were raised on this matter both by academics as well as by consumer protection organisations who demanded clarification as to whether or not the conditions under which ex-parte proceedings are granted (e.g. necessity, likelihood of irreparable harm or demonstrable risk of evidence destruction) are mandatory. They also requested that safeguards be developed to prevent abuse on the part of rightholders and to ensure due process.

(5) Definition of the term "under the control" in Article 6 of the Directive

The vast majority of stakeholders commenting on evidence-related matters, including rightholders, ISPs as well as certain Member States (BG, IR, MT), mentioned the need to clarify the term "under the control". The majority of Member States addressing the issue (CZ, DE, HU, LI, RO, SK), however, did not see any need for a definition and/or further clarification.

(6) Professional privilege

Almost 25% of the stakeholders who contributed (predominantly rightholders and lawyers) specifically addressed the need for introducing provisions on professional privilege into the Directive in order to safeguard the confidentiality of communication between parties and their legal advisers (IP attorneys, especially patent attorneys, both in private practice as well as in-house). They stressed that that privilege should be connected to membership of a particular profession and not relate solely to the client/legal adviser relationship or to a particular procedure before a particular court. According to these stakeholders, national legislation on this point seems to vary considerably and therefore raises the need for harmonisation at EU level.

3.2. Commercial scale

About 20% of respondents took a specific position on the commercial scale requirement in the Directive, mostly rightholders and citizens. Also about half of the internet service providers/telecom operators and some collecting societies expressed an opinion on this point.

A majority of those Member States that replied on the issue (BG, CZ, DE, HU, LT, LV, RO, SK) did not consider a modification of the current rules as useful, and only some (ES, IT and PL) saw an added value in such a modification. These latter Member States were either in favour of removing the requirement from the Directive (ES, PL) or of a broader concept of 'for the purposes of direct or indirect profit', since the term 'commercial' could be interpreted as being limited to business activities (IT).

Those respondents that opposed the idea of introducing a definition into the Directive referred to the existing recital which would provide for a sufficient degree of clarity. Those consumer organisations and citizens that took a view on this point were, however, in general in favour of a definition, with the aim of restricting the current broad interpretation in some Member States and limiting it to wilful, large scale IPR infringements carried out by entities acting for financial gain (and excluding P2P file-sharing). This idea was supported by a minority of the internet service providers/telecom operators that took a position on the issue while the majority of them was opposed against any change of the current provisions.

The majority of rightholders and collecting societies were in favour of deleting the requirement entirely: others requested to clarify that it only relates to the intermediary but not to the infringer or to broaden it by covering any economic activity or all activities aimed at direct or indirect profit, without being necessarily commercial.

3.3. Secondary use

Less than 7% of respondents took a position on the question whether secondary use should be dealt with in the Directive, almost exclusively coming from the sides of the Member States and the rightholders. A clear majority of them opposed the idea.

Even most of those Member States that were open to (DK, MT, HU) or in favour of any such rule (BG, IT) specified that any secondary use would have to be subject to the requirements that the injured party does not wish to apply for assignment of the goods and that there is no danger of the products re-entering the market.

Those Member States that opposed the idea (DE, FR, IE, LT, LV, NL and RO) mostly argued that the spread of infringing goods would contradict the idea of IPR protection, create the danger that such goods re-enter the market, and might pose risks to consumers' health and safety.

Also the few rightholders that showed openness to the idea stressed that it should be specified that secondary use should only be allowed where: (1) the rightholder agrees, (2) there is no risk that the goods will re-enter the market, and (3) there is a specific interest in an alternative use.

3.4. Additional issues raised by correspondents

About half of the respondents raised additional issues that had not been specifically mentioned in the Commission Report or the Commission Staff Working document.

These issues ranged from general calls to refrain from all regulation on the internet, complaints that the Staff Working Document was only available in English and about the allegedly biased tone of the documents, to specific proposals for additional measures.

Such proposals were e.g.:

- to harmonize the question of jurisdiction, in particular with a view to infringements committed via websites located outside the EU territory, on the basis of the judgment of the Court of Justice of the EU in the case C-585/08 ('Alpenhof'). In that judgement, the Court established certain criteria, such as the international nature of the professional activity, the use of a language or a currency other than the language or currency generally used in the Member State in which the professional is established,

use of a top-level domain name other than that of the Member State in which the professional is established). Some of the respondents that put this proposal forward considered that this should perhaps rather be done in the context of the E-Commerce Directive (for all illegal content) than in the IPR Enforcement Directive (which would only concern content infringing IPR);

- to introduce a presumption of legality for all uploaded content;
- to reform collective management for online commercial distribution and continue work on maximizing licensing efficiency for commercial users by aggregating the rights involved in the online dissemination of creative content (rights of reproduction, performance right). A “one-stop shop” was considered to provide commercial users with an easy way to clear all the rights attached to copyrighted content. The Commission was asked to make sure that the licenses for online dissemination do not entail stringent financial conditions on commercial users, especially if they are small businesses;
- to finalize the creation of freely accessible and comprehensive online databases containing information on rights and owners for all creative works (“ARROW” project);
- to examine the impact of the legal protection of technical protection measures on innovation, cultural creativity and the other actors on the Internet, in particular on innovative creators of free IT tools and on the existing monopolies of the IT industry (evaluation of the Copyright Directive 2001/29/EC);
- to review the rules on exceptions of that same Directive, and in particular private copying exceptions and rules applying to user generated content;
- to extend the presumption of ownership to holders of exclusive licenses or to assignees of copyright owners, and to clarify in general whether the Enforcement Directive covers only exclusive licensees or all licensees;
- to introduce rules giving the artist the right to manage his/her own work without using collective societies;
- to shorten terms of protection;
- to introduce a single global license for media consumption that, against payment of a fixed amount, would entitle users to freely consume music, movies, documentaries and TV content;
- to clarify that goods in transit are counterfeits that can be subject to seizures;
- to establish a black-list of companies infringing IP rights of European companies, with the aim of triggering automatic actions (as e.g. the exclusion by EU customs, from importing into the EU and the exclusion from participating in any public tender in the EU) while avoiding any systemic effect;
- to make the Office for Harmonisation in the Internal Market (OHIM) accept Priority Certificates in the same way that national authorities do;

- to introduce measures against abuse of patents by patent trolls that tax startups and small and medium sized enterprises, thus leading to excessive transaction costs and consumer prices;
- to prevent authorisation for patenting software as such patents would hamper creative activity in the field of software design;
- to designate one competent EU court and one court per Member State competent in first instance for infringement cases regarding EU plant breeders' rights in order to create more expertise in the field of such rights within courts, and one competent court per Member State for infringement cases regarding national plant breeders' rights;
- to broker a Memorandum of understanding on online pharmacies;
- to mandate a firstbuy or objection procedure for internet intermediaries that use keywords in paid advertising referencing or in sales listings;
- to revise accounting standards in order to allow for a proper valuation of intellectual assets;
- to await the outcome of the study currently being prepared, in the context of the European Observatory on Counterfeiting and Piracy, on a common methodology for assessing data on counterfeiting and piracy before considering moves to clarify or revise the Directive;
- to increase awareness-raising measures, in particular those specially targeted at young people;
- to come forward with a new proposal on criminal measures.