



EUROPEAN COMMISSION
Directorate General Internal Market and Services
INTELLECTUAL PROPERTY
Fight against counterfeiting and piracy

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Note to the File

Public Hearing on Directive 2004/48/EC and the challenges posed by the digital environment, Brussels, 07.06.2011

The hearing was moderated by **Ms. Margot Froehlinger**, Director, Directorate for Intellectual Property from DG Internal Market and Services. It was opened with a key note speech by **Mr. Jonathan Faull**, Director General of the DG Internal Market and Services of the European Commission and welcome remarks to the Economic and Social Committee premises by **Mr. Bryan Cassidy**, President of the INT Section in the EESC.

The hearing commenced with a detailed presentation by **Ms. Corinna Ullrich**, Deputy Head of Unit, outlining the first results of the consultation to Directive 2004/48/EC on the enforcement of intellectual property rights (hereinafter referred to as "IPRED"). Almost 400 responses had been received and the Commission was currently analysing them with a view to drawing conclusions and providing summaries.

Following the presentation, stakeholders were given the floor to comment on these results of the public consultation.

Bits of Freedom considered that there was a dangerous trend towards the privatisation of IPR enforcement, noting that self-regulation and intermediaries' enhanced role circumvented democratic control and stakeholder scrutiny. It sees the European Commission as a driver in proposing more liability for intermediaries. It also stated that private companies should not be given censorship tasks or be encouraged to restrict fundamental rights of Internet users, on what is essentially a public space, the internet. It referred to the recent report of UN Special Rapporteur La Rue and called on the Commission to change its approach.

Business Software Alliance (BSA) stressed that a balance was needed between piracy and allowing innovation. It was concerned about the remedies against infringers, and especially repeat infringers. It suggested the introduction of damages compensating the full loss of the rightholder (including lawyers' fees, court fees etc) as it considers that the current system encourages piracy. BSA considers that measures such as suspension or termination of access to Internet (based on proper evidence, through an established procedure and in respect of fundamental rights). Blocking should be the last resort, and an appropriate process would need to be guaranteed.

Cable Europe expressed understanding for the rightholders' interests but stressed that IPRED is sufficient and that only guidelines from the Commission for correct implementation, and in particular the scope and legality of injunctions were needed. They do not oppose providing right holders with information, to the extent that they are in possession of this information, and the request and disclosure of that information is being made in accordance with national privacy laws, including any court orders that are required. Filtering systems do not work well and are disproportionate. Clarification of the circumstances in which injunctions can be granted is needed. This should limit the tendencies of national courts to establish or extend monitoring obligations for intermediaries. Injunctions should also be clarified in the sense that the burden of costs resulting from the injunctions should be borne by the rightholders. Moreover, they should be the last resort; measures against the uploading infringer should first be exhausted. Legal alternatives are seen as the primary way to fight piracy.

British Telecom (BT) stated that it is too soon to make conclusions whether the IPRED is sufficient and that it is too soon to revise it, since major right holders have not yet made any use of the existing measures. Disclosure orders have been abused by unscrupulous individuals. Any review should be evidenced based and should seek consensus. The UK's Digital Economy Act (DEA) was criticized as not being evidence-based.

EAEA (European Arts and Entertainment Alliance) on the contrary, stated that they consider the IPRED useful and balanced, but overtaken by the fast development of the internet. The situation in the entertainment industry is worsening and their return on investment for producers is becoming increasingly uncertain, due to, *inter alia*, the effects of piracy. This in turn affects negotiations on remunerations as well as job opportunities for workers in the entertainment sector. Internet service providers should be more closely involved. Measures should primarily be directed towards those acting on a commercial scale. As for damages, it was stressed that the benefits of the infringer must in any case be retained and that the sanctions imposed must be proportionate to the benefits of the infringer.

EcoGermany (German member association of EuroISPA) stressed that the IPRED is fit for the internet environment and that no further repressive measures are needed. There is a need to better harmonise the implementation before considering further steps. In Germany, the right of information is being heavily used by the rightholders. Following one court order, as many as 5000 IP addresses are being asked to be disclosed. 300 000 IP addresses are being disclosed by internet service providers (ISPs) each month which makes the current IPRED a success. Enforcement is sufficient and should go alongside the development of legal offers.

European Competitive Telecom Association (ECTA) considers that it is not the right time to review the IPRED. The focus should be, instead, on the implementation of the current Directive. The ISPs should neither be given the role of "internet police" nor be asked to take decisions on whether content is legal or not.

Motion Picture Association (MPA) welcomes the review of the IPRED. The focus should be on the websites which facilitate copyright infringements, make profits on the back of the right holders and often do not even pay any taxes. However, there is also a need to involve all intermediaries. MPA believes there is also a need to take legal action to ensure a level playing field. It is necessary to clarify that the internet is not a rules-free zone immune from values and the rule of law. If IPRED is reopened, it should establish a

general obligation for Member States to take legislative, administrative and other steps to reduce IP infringement on the Internet – irrespective of the technology being used.

Yahoo! described the complications regarding the recent decision in Italy (PFA case) and reported that disproportionate injunctions are being imposed by the courts on online intermediaries. Such injunctions are very damaging for online intermediaries, even if they are not, *per se*, liable.

European Digital Rights stressed that ISPs should neither be forced nor permitted to undertake private enforcement and that no policy should attempt to create new restrictions on the internet. Campaigns aimed at educating consumers are not considered very useful as long as existing problems are “educating” them to believe that the copyright regime is not credible. For example: (i) services as Spotify are not available throughout the EU; (ii) pricing of legal offers does not take account of reduced distribution costs, compared to the offline world, and (iii) payment systems are not sufficiently developed. Statistics from the IFPI Digital Music Report 2010 indicating that there were extremely few legal offers as late as 2003 suggest that "piracy" acted as a driving force to encourage the music industry to come up with legal offers in the online world.

FIAD/FIAPF/IVF (International Federation of Film Distributors Associations; International Federation of Film Producers’ Associations and International Video Federation) stated the national implementation of the IPRED has just been completed and it is obvious that there is room for improvement of national implementation. The ability of courts to seize the domain names was highlighted. They also stressed that it must be ensured that national data protection regimes do not render the use of the right of information impossible. In order to make legal offer attractive, a viable investment model must be offered that is able to attract sufficient investment to film production and distribution.

FIMI (Federazione Industria Musicale Italiana) pointed out that there is still a problem with the implementation of the IPRED in Italy. Data protection laws must not frustrate the application of Article 8(3) of the Directive 2001/29/EC.

BEUC (European Consumers Organisation) highlighted that the national consumer associations are of the opinion that the Commission failed to provide sufficient evidence that there is a need to revise the IPRED. BEUC considered that the Commission has so far not taken into account the findings of a number of studies regarding the overall economic impact of file-sharing. It pointed out that strict enforcement measures do not necessarily aid artists, e.g. in France, the HADOPI law has not resulted in an increase of the revenue for artists. In the recent SABAM/Scarlet case, the opinion of the Advocate General was very explicit. Furthermore, ISPs should not be put in a position to be the judge of infringements, and legal offers must be further developed. BEUC referred to the study by the Norwegian collecting society according to which the emergence of legal offers has resulted in a significant decrease of file-sharing.

IFPI (International Federation of the Phonographic Industry) stressed that it is necessary to open the IPRED and that all forms of illegal behaviour must be addressed, as otherwise there would be a shift to other forms. Even in markets with sufficient legal offer, the levels of piracy are still substantial. Hence, legal offer helps to correct the situation, but are not the sole solution. IFPI has tried voluntary cooperation with ISPs,

but since it did not work, they suggest legislating on the matter. IFPI suggests adopting effective measures for site blocking and tackling all forms of piracy.

IIPTC (International Intellectual Property & Technology Consulting) stated that in order to get an injunction against an intermediary, one often has to prove liability of the intermediary itself. However, these injunctions should be available irrespective of the intermediary's liability since there are unnecessary incentives for right holders to try to attribute third parties' activities to the intermediary. Due to data protection, rightholders are sometimes prevented from collecting evidence of infringements on-line; therefore, the right of information and data protection rules must be reconciled. As for damages, 10 Member States have in place predetermined damages for trademark or copyright infringements: this constitutes best practice that should be adopted EU-wide.

Librius (boek.be) emphasized that good legal offer is the basis of the digital economy. Raising consumer awareness is also necessary. Enforcement measures should be aimed at hosters and uploaders, but not at downloaders. Librius' cooperation with ISPs in Notice-and-take-down (NTD) procedures is good. It however faces problems with the identification of infringers. Librius also raised the question why ISPs are able to block SPAM via deep packet inspection (DPI) but seem to be unable or unwilling to do so for infringing content.

OFCOM (Regulator and competition authority for communications industries in the UK) stressed that a mix of measures (consumer education, NTD, judicial and administrative measures and self-regulation) working in a complementary manner are the best solution to the problem. More research to inform policy discussions is needed, and there is a value in sharing experiences between public authorities from different Member States: the Commission can play an important role in facilitating such discussion. The question of legislation – or the prospect of it - being used by industry as an excuse to delay commercial solutions should also be borne in mind.

La Quadrature du Net said that copyright is facing a legitimacy crisis. Modification of film and music is used by today's younger generation as a way of expression. More sharing on the internet should be promoted. Moreover, people who are engaged in file sharing are the ones who subsequently buy the works, as in particular a recent HADOPI study shows. File-sharing is likewise not for free, it has related costs, e.g. purchasing a computer and a subscription for internet access. Acts that are not enforced in the offline-world such as reading or lending must not be enforced in the digital field either. Considering exceptions to the scope of the Directive is key, i.e. excluding individuals who share without any intention of making profits.

SIAE Legale (Società Italiana degli Autori ed Editori) explained that, in Italy, following a judgment of the Tribunale di Roma, intermediaries no longer have any interest in seeking cooperative agreement. They also stressed that Article 8 of IPRED (right of information) should be used as a provisional measure, and the notion of "commercial scale" should be replaced by that of "commercial purpose". Damages are low and do not compensate for the rightholders' real prejudice.

Università degli Studi Roma Tre stated that problems arise due to divergent interpretations between the Member States of the e-commerce Directive, the Data Protection Directive and the Copyright Directive. This lack of legal certainty for consumers, rightholders and others has been created by EU law and therefore has to be resolved at EU level. Privacy laws and the right to freedom of expression increasingly

allow IP infringers to hide. However, Art. 54 of the Charter of Fundamental Rights requires that the different rights affected be reconciled. Lengthy and cumbersome legal procedures hinder IPR enforcement – enforcement should therefore be given to national administrative authorities. The Commission should also consider the implications of cloud computing.

SROC (Sports Rights Owners Coalition) stressed the need for effective redress. Time is of the essence when it comes to enforcement, as the sport content's value is mainly in the live broadcast. Court orders or NTDs are too lengthy; instead intermediaries should be more strongly involved and search engines should have more responsibilities. There is room for improving the IPRED. SROC members were able to find solutions in certain countries, for example in France with Daily Motion.

VRIJSCHIRFT stated that the business models are rather out-dated as they are often unable to exploit the benefits of the digital environment. However, the development of new business models is strongly impeded by legal uncertainty. Following recent case law – e.g. against a painter using a Louis Vuitton handbag on the picture of a Darfur refugee or alleging that using the word "torrent" in the domain name were considered as proof of "illegal use" – IPR law is being interpreted in an excessive manner to the detriment of artists. A revision of IPRED would be welcomed.

Younison Europe commented on collective rights management. Criminalising consumers is not in the interest of the artists. Rather, enforcement should lead free-riders to legal offers and the EU should break any barriers to the Internal Market for consumers.

European Publishers' Council stated that illegal offers have a competitive advantage over legal offers. They commented on the interaction between data protection, e-commerce and copyright and stated that it needs to be reviewed.

FEP (Federation of European Publishers) made remarks on the presumption of copyright and suggested to extend it to exclusive licensees. They also commented on the issue of data protection and asked for clarification that injunctions should not depend on the liability of an intermediary. Generally, intermediaries - such as search engines - should be more involved and education/awareness should be increased. They also expressed their support to the work of the European Observatory on Counterfeiting and Piracy on data gathering.

IMPALA (Independent Music Companies Association) considered that a review of IPRED is a good idea, and welcomed Commissioner Barnier's approach in the IPR Strategy to increase the awareness of the value of IPR as an enabling tool. The current situation is paradoxical - the consumption of music is higher than ever but revenues are lower than ever due to massive infringements which must cease in order to allow new business models to develop. There should be more effective deterrents and ISPs must have a duty of care. A package approach which includes remedies and other measures is needed. For example, there must be fair competition between big companies on the one hand and smaller ones on the other, to ensure a level playing field and diversity. Finally, in order to promote the online sale of music, VAT for music-sales should also be reduced as in the US.

Telecom Italia/ETNO considers it premature to review IPRED. Any revision should be done on the basis of solid figures. It was also suggested to widen the scope of the

Observatory on Counterfeiting and Piracy and include new stakeholders. The commercial scale requirement should be maintained. Article 8 of IPRED should be maintained as it is. The Courts are the best place to assess infringements. Cases currently pending before the CJEU should be taken into account by the Commission before coming forward with any proposal.

Transatlantic Consumer Dialogue stated that if copyright is violated by thousands of citizens, this indicates that the problem is not the citizens, but rather the copyright system. Blaming downloading is an easy scapegoat to justify anachronistic business models. The Commission would have failed to create a digital single market. There is no real, acceptable legal offer and rightholders have concentrated on lobbying against attempts to bring down prices. Evidence like the Hargreaves report, the reports by the LSE (media policy brief) and by the Dutch Government would show that the fight against piracy is futile. If there is a conflict between human rights and other rights, human rights have to always prevail.

ENPA (European Newspaper Publishers Association) stressed that newspaper publishers have not asked for the re-opening of the IPRED, however the implementation of the Directive should be improved. As court cases since 2004 (e.g. Copiepresse in BE, Infopaq in DK) have proven, enforcement measures are complex, costly and timely. Damages should be improved. It is necessary to tackle both offline and online infringements, and cooperation with ISPs is supported. However, the right balance must be maintained between interests of the rightholders and digital freedom of press. Judicial authorities are best placed to balance the various interests.

The afternoon session was devoted to a free discussion.

APM (German Anti-Counterfeiting Association) stressed that infringements on the internet are increasing and all forms of online infringements should be tackled, P2P but also streaming. Besides this, there is still an issue of hard goods piracy by sale over the internet. The new phenomenon of sending counterfeit goods in small consignments was highlighted (it increased by 170% in Germany between 2009-2010). It was also stressed that intermediaries have to play a greater role in the enforcement of intellectual property rights, without there being any link with liability.

The **Transatlantic Consumer Dialogue** took the view that current figures showed that the system is working, not failing. The Hargreaves report would show that the 300 years old copyright is obstructing innovation (growing problems in the area of medical research and with emerging business models) and creating problems for third countries (free trade agreements). A report on media piracy in emerging economies (Brazil, Libya) has shown that prices for legal offer in these countries are even higher than in the EU, because of a lack of competition. Also, basing any revision of IPRED on substitution costs would be too simple. The Commission announced that the studies that will be used as a basis for the impact assessment will be published with it.

EURATEX (European Apparel and Textile Confederation) stressed that the concept of copyright is different in the different Member States which would render protection difficult. National judges often consider copying a design as a "trend" and do not consider such infringements sufficiently important. The lack of knowledge of national authorities (judges, police) is a growing problem when it comes to enforcement. Also

destruction costs in customs procedures would be an issue. The costs of litigation are too high for SMEs (99% of their members have less than 15 employees). Perhaps a mediation system at EU level (similar to the WIPO one) would be an option.

The **Austrian Chamber of Labour** highlighted consumer aspects including the right to a fair trial and presumption of innocence. They also strongly oppose Deep Packet Inspection. It is inadequate to target ISPs in the enforcement of intellectual property rights since ISPs should not act as judge and jury. A clear distinction is needed between commercial scale and private downloading.

La Quadrature du Net gave their view that the rightholders' request for ISP cooperation is reflected in ACTA, the Commission's IPR strategy and the G8 Conclusions. They are concerned about this apparent intention to "privatise" enforcement. Such privatisation would lead to cases like taking down the parodies around a scene of "Der Untergang" from YouTube. Furthermore, a risk of accidents (like in the case of HADOPI/TMG) would be created that harm privacy. Any measures would have to look at the scope of the infringement, whether it would be committed in the context of private use and for non-commercial purposes.

Telefonica Italia requested clarification of what the Commission meant by "going after the source". It was explained that it means not going after the individual consumers. The company stressed that deep packet inspection is not the same as the management of traffic.

Internet Society stressed that further research on possible future consequences, intended and unintended, of any possible measure would be needed. This would have to be done in the context of the impact assessment.

VRIJSCHIRFT took the view that sanctioning infringements where profits are made at the expense of the rightholder would be an issue for tort law rather than for IPRED or IP law in general.

Librius (boek.be) stressed that they were not seeking liability for ISPs, only their cooperation. They stressed that if spam can be filtered, probably something can be done in terms of the infringements of intellectual property rights. Separately, it also discussed the differences between spam and filtering.

EcoGermany stressed that email blocking is contained in the contract with the email provider. Any kind of cooperation from the ISP will require a court order.

MIH group stressed that it was pointed out that more than 50% of all responses came from private individuals. MIH wanted to know what the content of these responses was and whether the Commission will give due respect to these responses when deciding whether to continue its work on the revision of the IPRED or not. The Commission explained that the content of the citizens' responses was mainly against any censorship on the internet, against policing the internet and supportive of free speech.

Yahoo! recalled the purpose of the limited liability regime, which was to protect the economic interests of intermediaries and the rights of users. For online intermediaries, legal liability *per se* is not key, but rather the effect of injunctions on their business. Therefore, reassurances from rightholders that injunctions need not be linked to liability are of no comfort if these injunctions cause economic damage and oblige them to take

decisions on the legality of content, which would damage the fundamental rights of Internet users.

European Digital Rights took the view that the Directive on unfair commercial terms would prohibit ISPs from using contractual clauses to allow them to unilaterally terminate a contract in case of allegations of IPR infringements. As far as spam filtering was concerned, this is practically and technically very different from content filtering. For example, the level of awareness would be different, as receivers of spam – contrary to people downloading content without authorisation – would and do complain to the ISP.