IFPI Input to the Public Consultation on the Commission Communication on a comprehensive approach on personal data protection in the European Union

15th January 2011

Introduction

IFPI welcomes the opportunity to submit written comments on the Commission Communication of 4 November 2010 on a comprehensive approach on personal data protection in the European Union (“the Communication”).

We would like to use the opportunity to recall the importance of a balanced application of data protection rules for an effective exercise of EU intellectual property rights. For the music sector, it is crucially important that data protection rules should not provide a shield for illegal activities in the online environment. This principle should be reflected in the legislative proposal to tabled by the Commission in 2011.

IFPI represents the recording industry worldwide with over 1,400 members in 66 countries and 45 national affiliated industry associations, including throughout the EEA. IFPI’s mission is to promote the value of recorded music, safeguard the rights of record producers and expand the commercial uses of recorded music in all markets where its members operate. As part of its role in protecting the rights of its members, IFPI investigates infringements of copyright that occur on the Internet, for the purpose of preparing criminal complaints and taking other legal steps.

The music industry has invested massively in the development of the online music market. Today, over 13 million tracks have been licensed to over 400 unique legal music services online, and more than a quarter of record companies’ global revenues (29% in 2010) now come from digital sales.

However, the growth of the online market is severely hindered by the massive illegal use of music online. When attempting to defend the rights of record producers against piracy, IFPI has been faced with difficulties arising from the interpretation and application of the data protection rules by some courts and Data Protection Authorities. At present, the ability to obtain an effective remedy against copyright infringements is severely limited in several EU jurisdictions, and there are 27 versions of the “balance” to be struck between the fundamental rights at stake. This situation calls for clarification at EU level.

This paper identifies the practical difficulties encountered by copyright holders, and explains why effective enforcement is necessary as well as why the current situation falls short of the balance required by EU law.

1 COM(2010) 609 final

2 The International Federation of the Phonographic Industry
The paper concludes that whatever proposals will be tabled in 2011, they ought to strike a fair balance between several of the fundamental rights protected under the EU Charter of Fundamental Rights: the right to the protection of personal data (Article 8 of the Charter) on the one hand, and the right to property, including the protection of intellectual property (Article 17(2) of the Charter) and the right to an effective remedy (Article 47) on the other. Ultimately, right holders must not be deprived of effective remedies to protect their rights.

I. DATA PROTECTION RULES IN THE CONTEXT OF IPR ENFORCEMENT ONLINE

The development of the online music market. Over the last 10 years, the music industry has transformed itself radically and has invested heavily in new online services. Music companies and other rights holders continue in their efforts to create more and more diverse legal offer in cooperation with online distributors (from online media companies, to device manufactures, mobile operators and ISPs). Record companies have licensed over 13 million tracks to over 400 unique legal music services worldwide, of which more than 275 are based in the EU (see http://www.pro-music.org/Content/GetMusicOnline/stores-Europe.php). In 2009, for the first time ever, more than a quarter of the recorded industry’s global revenues (27%) come from digital channels. However, the online music market is far from reaching its full potential because of the widespread illegal use of music online.

Massive illegal use of content online. The legitimate business online is deluged by unauthorised free content. A large part of the illegal use of music online comes from unauthorised “peer-to-peer” file-sharing services, where internet users make available to the public large numbers of music files without authorisation, and without any payment to right holders. Today, around 95 per cent of music downloads worldwide are illegally made from unlicensed services. A groundbreaking study by Tera Consultants for trade unions in Europe concluded that in 2008 alone, the main creative industries in Europe lost more than 185,000 jobs and over €10 billion in revenue due to piracy, and that the cost of not tackling piracy is projected to be more than 1.2 million in lost jobs and over €240 billion in lost retail revenue by 2015.

The widespread availability and use of unauthorised free content amounts to open disregard of the law. Illegal use of music via file-sharing networks is a clear violation of copyright rules, in particular the right of making available to the public recognised by the 1996 WIPO WCT and WPPT Treaties and included in Article 3 of the EU Copyright Directive, and this has been recognised regularly in court cases in the different Member States.

Education and deterrence actions. In addition to developing the legal offer, the music industry has done extensive education campaigns. However, these efforts are insufficient to overcome the lure of illegal free offer. Thus, the industry has also sought redress and future deterrence by means of legal actions. Since 2003, the industry has taken more than 100,000 civil and criminal legal actions against individual illegal high volume file-sharers in 22 countries.

Data protection in the context of enforcement. The protection of intellectual property rights against online infringers does ultimately—just as in the offline world—require the identification of a potential defendant. However, at present, access to legal remedies and their effectiveness varies quite significantly between the different EU Member States. This has much to do with the divergent interpretation and application in the Member States of certain key principles relating to personal data.

Problems concern for instance:
- data processing (e.g., circumstances in which IP addresses, which identify devices, are nonetheless treated as personal data and the rules for lawful processing in such cases);
- conditions and circumstances in which personal data stored by third parties (e.g., the identity of subscribers using a device with a given IP address), such as ISPs, may be disclosed to right holders for the purpose of bringing civil proceedings;
- the existence of specific procedures between ISPs, right holders and data protection authorities relating to the processing of data and potential disclosure of subscribers’ identity in specific cases;
- the obligation for parties such as Internet service providers to retain the data which is necessary for right holders to bring legal proceedings.

An excessively wide interpretation of data protection rules has permitted illegal operators to hide behind privacy while engaging in IPR infringement and in some cases has deprived right holders of judicial remedies altogether. This was not the purpose of the data protection legislation, which as recognised in the Promusicae case, discussed below, should be neutral as regards the needs and objectives of effective copyright enforcement.

DG Markt and the EU Observatory on Counterfeiting and Piracy are currently examining the extent to which the conditions for IPR enforcement vary between the Member States, also as a result of divergences in interpretation of data protection rules. Similarly, the Study on Online Copyright Enforcement and Data Protection in Selected Member States found that “whereas there is no direct legal conflict as such between the European legal framework for data protection and online copyright enforcement, the ECJ decisions leave open several important questions, such as how to apply the proportionality principle in practice, and how to strike a fair balance between the various rights involved. These issues seem to be left to the Member States, and there is little or no harmonisation of them at EU level.”

II. LEGAL PRINCIPLES: BALANCING OF RIGHTS AND THE RIGHT TO AN EFFECTIVE REMEDY

IFPI strongly supports all efforts to uphold the rule of law in the online environment. For our part, this includes compliance with all the applicable data processing legislation when gathering evidence for use in court proceedings, as well as working with regulators, such as for example Hadopi and CNIL in France, to implement non-litigious means of achieving notice, warning and deterrence against acts of copyright infringement.

In parallel to the protection of intellectual property rights in international law, European directives and national laws provide right holders with exclusive rights in relation to their works, and set out specific remedies and procedures which should be available to enforce those rights. In particular, the Copyright Directive 2001/29/EC, Article 8, provides that:

“(1) Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided shall be effective, proportionate and dissuasive.
(2) Each Member State shall take the measures necessary to ensure that right holders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction...” (emphasis added)

This article reflects the EU’s international obligations under the WTO TRIPS Agreement, in particular, Article 41(1)-(2) which establishes a clear requirement that effective action must be available to redress infringements of intellectual property rights. These standards of

3 Kuner, Ch., Burton, C., Hladjk J., Proust O., Study on Online Copyright Enforcement and Data Protection in Selected Member States, for DG Market, November 2009, “the Hunton & Williams Study”.
4 “(1) Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against abuse.
(2) Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” (emphasis added)
enforcement are general and there is no distinction between infringements online or offline as far as the need for enforcement and effective remedies is concerned.

This is consistent with the EU Charter of Fundamental Rights which recognises as fundamental rights the right to property, including the protection of intellectual property (Article 17(2) of the Charter) and the right for everyone to have an effective remedy (Article 47). Moreover, the Charter provides, as a general principle of statutory interpretation, that "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein" (Article 54).

The relationship between the enforcement standards implemented in the IPR Enforcement Directive 2004/48/EC, and the data protection legislation, was examined by the European Court of Justice ("ECJ") in the Promusicae case. The case raised the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.

Regarding the ePrivacy Directive 2002/58/EC, eCommerce Directive 2000/31/EC, as well as the Copyright and IPR Enforcement Directives mentioned above, the ECJ held that these directives:

"...leave the Member States with the necessary discretion to define transposition measures which may be adapted to the various situations possible (...). That being so, the Member States must, when transposing the directives mentioned above, take care to reply on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (citations)" (emphasis added)

III. Conclusion

The Promusicae judgment underlined the important principle that the interpretation of EU legislation must strike a fair balance between the fundamental rights at stake, including the right to property (and intellectual property), and the right to an effective remedy.

However, as we pointed out above, as a result of the divergent interpretation of data protection rules and of the balance between the different fundamental rights in the Member States, right holders have inconsistent legal remedies to protect their rights and are even deprived from effective remedies altogether in some cases.

We do not believe that the existing data protection rules, in particular the 1995 Framework Directive, need to be changed as such to address this problem. As highlighted by the Hunton & Williams study cited above, there is no direct conflict as such between the European legal framework for data protection and online copyright enforcement. However, the existing legislation and the ECJ decisions leave open several important questions which need to be addressed. In particular, clarification is needed on some of the principles in the data protection legislation, including in the specific legislation such as the 2002/58/EC ePrivacy Directive, and the 2006/24/EC Data Retention Directive, to avoid application and interpretations which would lead to right holders being deprives from some fundamental right to property and to an effective remedy through the operation of DP law.

Fundamentally, data protection rules should not provide a legal shield for illegal activities in the online environment, just as they do not do so in the offline world. Any legislative

5 Case C-275/06, Promusicae v Telefónica de España, [2008] ECR I-271 ("Promusicae").
6 Promusicae, at para. 65.
proposals resulting from this consultation should take into account the necessary balance of rights and the need for rights holders to defend their intellectual property rights. We look forward to continuing the dialogue with the Commission and the opportunity to comment on more concrete proposals.