



March 31, 2011

**Public consultation on Directive 2004/48/EC
on the Enforcement of Intellectual Property Rights**

The European Coordination of Independent Producers (CEPI - ID 59052572261-62) represents the interests of approximately 8000 independent film and television producers in Europe, equivalent to 95% of the entire European audiovisual production industry and over 16000 hours of new programming each year to broadcasters in Europe, ranging from single documentaries and special event programming, to game shows, light entertainment and high-cost drama serials.

The Federation of European Film Directors (FERA – ID 29280842236-21), is an international, non-profit federation of 37 national associations of film and television directors, across 30 European countries. Founded in Venice, Italy, in 1980, FERA has responded to the many changes in the audiovisual industry over the last thirty years always with the focus on how to maximize the creative, social and commercial potential of the growing audiovisual industry, art and culture.

The International Federation of Film Distributors Associations (FIAD) gathers the national organisations of film distribution companies. Film distributors are the intermediates between film producers and cinema exhibitors and cover the entire range of companies: small and medium-sized companies specialized in art house films as well as larger companies specialized in mainstream films. FIAD's members operate in 16 European countries where they achieve from 90% to 100% of the theatrical market.

The International Federation of Film Producers Associations (FIAPF) is a trade organisation dedicated to the defence and promotion of the legal, economic and creative interests of film and audiovisual producers throughout the world. FIAPF's members are 26 national producers' organisations from 23 countries across the globe from Europe, Asia, Pacific, North America, and Latin America.

The members of the International Video Federation (IVF - ID 7013477846-25) - are businesses active in all segments of the film and audiovisual content sector in Europe. Their activities include production of films and audiovisual content as well as distribution thereof on digital media and in online channels.

We welcome the opportunity offered by this public consultation to contribute to the reflections on a topic which our members consider crucial, i.e. promoting a sustainable European content production and distribution industry by ensuring respect for and enforcement of intellectual property rights ("IPRs").

Introduction

The national implementation of Directive 2004/48/EC (the "Directive") has only recently been completed. However, technological development accelerates at an almost exponential speed. We therefore welcome the Commission's reflections as expressed in the two reports which form the basis of the public consultation¹. The Directive contains a number of important tools which aim to address the serious problem of copyright infringement online. In our view, it is crucial that the provisions of the Directive are transposed and applied in letter and spirit at Member State level. As clearly identified by the Commission in its application report, this is an area with room for improvement in order to ensure a more effective means of not only redressing civil wrongs in the digital environment, but also preventing them.

The Commission can play an important role in resolving a number of difficulties arising from national implementation of the Directive. In this regard, we encourage the Commission to consider infringement proceedings against Member States whose national laws are inconsistent with the terms of the Directive. The Commission can also promote important clarifications of certain provisions in the Directive.

In its assessment of the functioning of the Directive, the Commission's primary goal should be to ensure that enforcement problems related to the Internet are adequately addressed. The Internet represents an unprecedented opportunity for intellectual property owners and other stakeholders, including consumers. We believe that one part of addressing illegal use of copyright content on the Internet is through the continued development of legal alternatives, and many of our members are pursuing the offer of cinematographic and audiovisual works online, either directly to end-users or working in cooperation with service

¹ Report on the enforcement of intellectual property rights (COM(2010) 779) and Analysis of the application of Directive 2004/48/EC on the enforcement of intellectual property rights in the Member States (SEC(2010) 1589).

providers or content aggregators deploying different business models (e.g. time-limited viewing, streaming or digital delivery of permanent copies). However, these new business models can only flourish in a digital environment which respects the rule of law and provides a level-playing field. As a result, civil enforcement of IPRs remains a critical tool for right holders in parallel with the possibility for public prosecutors to initiate criminal proceedings in appropriate circumstances.

We emphasize the importance of ensuring that the entire body of EU law which is relevant to the enforcement of IPRs on the Internet - notably the Copyright, E-Commerce, and Data Protection Directives as well as general principles of EU law and treaty provisions – is consistent and coherent. We set out below our reflections on selected issues of particular relevance to our members and their enforcement activities.

Digital Environment

While the Directive (and related provisions in the Copyright Directive) provides important tools intended to address IPR infringements on the Internet, these measures fall short of achieving the desired goal because they fail appropriately to address the crucial role of intermediaries in online copyright infringements. In addition, the relevant provisions in EU Directives are not always correctly implemented in all Member States. Thus, certain elements may benefit from clarification and/or improvement in order to more suitably address copyright infringements online.

We consider that it would be helpful to establish a general obligation on Member States to take legislative, administrative and other steps (for example facilitating voluntary agreements) to reduce all forms of IPR infringement on the Internet. Such steps should include measures related to prevention, inducement, and facilitation of mass forms of infringement. This includes dealing with source piracy as well. Given the nature of IPR infringements online, particularly with respect to copyright, Member States may need to adopt a range of measures to address Internet infringements and ensure that measures are not limited to addressing specific forms of infringement, e.g. unauthorized streaming.

Any specific rules relating to ISP liability in the Directive should clarify the relationship between the Directive and the E-Commerce Directive, in particular Article 15 (an issue which is currently before the Court of Justice of the European Union). An overly broad interpretation of Article 15 of the E-Commerce Directive hampers effective enforcement of IPRs online. National courts must be in a position to order meaningful relief not only to bring to an end to or reduce ongoing infringements, but also to prevent them. In this context, courts should be able to grant blocking, filtering and other forms of injunctive relief that covers entire repertoires rather being aimed at specific titles. Courts should also be empowered to order the seizure of the tools of infringement such as domain names. As per the Enforcement, E-Commerce and Copyright Directives, such relief should be available irrespective of the intermediary's liability for the underlying infringement. This is not about attributing liability to “intermediaries” but rather recognition of the fact that they are best placed to prevent the infringement or the continuation thereof.

As a general matter, online service providers whose services are directly (or even indirectly) “used in infringing activities” have an obligation to prevent such infringements, for example

through the use of filtering technologies. Such obligations may be imposed upon service providers by the courts by means of injunctions regardless of liability for the underlying infringements. Mere notice and takedown procedures are insufficient to address infringements that are taking place on a massive scale. In cases where the site in question structurally and systematically operates a service that facilitates and induces copyright infringement while generating revenue for example through advertising, that site will not qualify for the liability privileges set forth in Articles 12-14 of the E-Commerce Directive. This principle is clear from both decisions by the Court of Justice of the European Union and the majority of national case law. However, there are some decisions at national level which have addressed this matter in an incorrect manner. As a result, it would be helpful to clarify that such sites are not only subject to injunction orders requiring them to filter out infringing content, but that they may also be subject to criminal and/or civil liability.

Right of Information and Evidence

While Articles 8(1) and 8(2) of the Directive already apply to online service providers, it would be useful to clarify that ISPs, regardless of their liability, are subject to orders to disclose information relating to individual subscribers regardless of whether the end user is infringing on a commercial scale. It should be left to the national authorities' and/or the judge's discretion to determine whether or not the alleged infringement warrants disclosure based on the immediate facts before it and general principles of law, including in particular proportionality, as well as applicable data protection rules. Moreover, it should be confirmed that the commercial scale requirement in Article 8(1)(c) relates to the service provider (i.e., "any other person") and not the infringer or the infringement itself. This could be accomplished by clarifying that so-called double commercial scale tests are inconsistent with the Directive or by deleting the reference to "commercial scale" or by other means.

In some Member States, the relationship between the right of information and data protection/data retention rules is unclear and in other Member States, data protection rules prevent disclosure. National rules should not prevent the possibility of the disclosure either due to an outright ban on disclosure in civil IPR cases or because data retention rules eliminate proper compliance with any order. It may well be that in certain cases courts will refuse to issue such orders based on the specific facts before them but the opportunity to present a "justified and proportionate request" must be available.

Sanctions for non-compliance or insufficient compliance (for example provision of incomplete or inaccurate data) with such orders are necessary to ensure that national implementations of Article 8 function in practice.

The priority in respect of evidence is to ensure that relevant evidence, required to prove the elements of the IPR infringement or resulting compensation, is available to right holders and can be put before the court in support of the civil action.

In several Member States, there is a distinction drawn between a search order and a seizure order and in many cases it is easier to obtain a search order than a seizure order. In some Member States, civil search orders are not available. Moreover, the costs related to such procedures are sometimes prohibitive and sanctions for non-compliance are not sufficiently

deterrent. National provisions on Presumptions (Article 5) and Sampling (Article 6) are often inadequate.

It would therefore be useful to ensure disclosure of evidence in all IPR infringement cases. Moreover, search and seizure orders must be available in all Member States in practice in a simple, cost-effective and expeditious manner. In order to ensure meaningful compliance with related court orders, national laws must include deterrent sanctions for any failure to comply with such orders.

Finally, the Commission should encourage Member States to strengthen national provisions on sampling and presumptions. While sampling and presumptions are traditionally important tools in civil enforcement actions, their relevance has taken on new meaning in complex litigation involving websites that are structurally facilitating copyright infringement.

Intermediaries

Injunctive relief is one of the most important civil litigation tools designed to cease infringing conduct or the facilitation thereof as soon as possible while balancing the interests (fundamental rights) of all the parties concerned. As mentioned above, intermediaries should be involved to a much greater extent in the prevention and/or termination of IPR infringements.

In this connection, we wish to draw the Commission's attention to a number of issues arising in connection with attempts to obtain injunctive relief against intermediaries. This possibility is severely hampered in several Member States because of failure to implement specifically the relevant provisions of the Copyright and the Enforcement Directives. In some cases, Member States have relied on general civil law rules but this often causes problems for the courts where in particular the intermediary is not necessarily liable for the underlying infringements.

Commercial Scale

Several Member States have defined '*commercial scale*' either in law or by jurisprudence. In so doing, most Member States have recognised that certain activities even if undertaken without a pure profit motive can cause considerable damage (for example the first seeding of a file containing a copy of an unauthorised camcord of a film still in the cinemas). Moreover, other activities such as making available unauthorised copies of premium content online in order to gain access to more unauthorised content have also been recognised as '*commercial scale*' activities. Any website that carries advertising is considered to be operating on a '*commercial scale*'.

As noted above, there is a need to clarify that Article 8 of the Directive does not establish a double '*commercial scale*' requirement.

Damages

As a general matter, the practice of awarding damages in civil IPR cases serves two equally important purposes:

- Compensation: damage awards should put the right holder in the position he would have been in had the infringement not taken place; and
- Deterrence: damage awards should serve to discourage both repeat and would-be infringers.

As currently dealt with in EU legislation with regard to copyright matters, these goals are not achieved. National courts face significant difficulty in calculating and awarding compensation comprehensively. Outside of lost profits, right holders may not in practical terms be compensated for other negative economic consequences resulting from an infringement. Moreover, damages for non-economic harm are often unavailable. In the majority of cases, the costs of investigating, taking legal action against, and rectifying an infringement are not compensated in full. All too often, infringers may retain some of their profits, or otherwise have an economic incentive to engage and/or continue to engage in infringement of IPRs.

In copyright cases, right holders face significant difficulty in proving damages where for example a website is making available without authorization copies of films that are still in theatrical release. Such illegal files are disseminated on a massive scale in an unprotected format. It will not always be possible to determine how many times a given copyright work was downloaded without authorization, re-uploaded without authorization, etc. As a result, strong measures aimed at ensuring that right holders are able to recover the totality of the losses sustained as a result of an infringement are required. Member States should therefore ensure that all elements of direct, indirect and consequential economic consequences to the right holder that result from an infringement are compensated, regardless of whether the infringement has taken place on a commercial scale. In addition, Member States should provide that lump-sum damages, reflecting all negative economic consequences that the right holder has suffered are available at the judge's discretion at least as an alternative to any lost profits that can be proved. Finally, Member States should provide that a "predetermined" calculation method for determining lump-sum damages, reflecting a reasonable approximation of all negative economic consequences that the right holder is likely to have suffered, is available as an alternative to other means of determining damages.

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We remain available for further information where necessary.

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