

European Commission
Internal Market and Services DG,
Unit D.3 – Fight against counterfeiting and piracy

via e-mail
markt-iprenforcement@ec.europa.eu

Vienna, 29th March 2013

ISPA CONTRIBUTION ON THE PUBLIC CONSULTATION ON THE EFFICIENCY OF PROCEEDINGS AND ACCESSIBILITY OF MEASURES

Dear Sir / Madam,

ISPA - Internet Service Providers Austria (Identification Number: 56028372438-43) is pleased that the Commission has issued this consultation on the efficiency of proceedings and accessibility of measures for civil enforcement of intellectual property rights.

ISPA is the Austrian association of internet service providers representing approximately 200 ISPs. ISPA is the major voice of the Austrian internet industry. We would like to use this opportunity of this consultation to address some general concerns of our members.

ISPA emphasizes that the existing framework for the enforcement of intellectual property rights is sound and efficient. The focus should therefore not lie on a revision of the Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED), but instead on an effective implementation of the existing provisions.

1. Internet intermediaries must not be obligated to traffic monitoring

First and foremost, ISPA is of the opinion that the Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) in its current form offers a well-balanced and functioning framework to address online IPR infringements. ISPA would like to express clearly that internet intermediaries must under no circumstances be tasked with a monitoring obligation of users' communications and must not play a civil enforcement role outside any judicial framework. Fundamental Rights of information, privacy and communication, as well as innovation in the digital economy, would be severely at risk if internet intermediaries were required to censor the internet outside judicial safeguards at the advantage of vested interests on a self-regulatory basis.

2. Sustainable and comprehensible copyright solutions are fundamental for the further development of the internet

ISPA acknowledges the need to enforce intellectual property rights (IPR) in order to remunerate right holders and to fight infringing activities that happen at a clearly commercial scale.

ISPA firmly believes that a sustainable solution for the use of IPR lies within a legal framework that accepts current users' practises (e.g. sharing of protected material on social media platforms), an extended scope of the personal legal ability to reproduce ("Privatkopie") as well as increased public awareness on the value and use of IPR as an economic and cultural asset.

Any future legal framework will need to prevent that large proportions of internet users will be deemed to consume protected material on an illegal or legally unclear basis. Any uncertainty on the side of the users will prevent them from maximising their benefit of the internet.

ISPA therefore calls on the Commission to support the development of a copyright regime whose cornerstones are not only simple and comprehensible for all users but are also the same across all EU Member States. Instead of a highly complex system of exceptions for private reproduction ISPA calls for a new approach under which all acts by the user in his/her private capacity should be deemed permissible, unless these acts fall under an exhaustive and comprehensible list of explicitly forbidden acts.

For Europe's citizens to fully appreciate the value of IPR, this will require the development of innovative and attractive content services online (e.g. through a one-stop-shop licensing system for audiovisual content as well as a system of pan-European licences), at affordable prices and based on new business models, able to meet consumers' expectations and needs.

ISPA therefore calls on the Commission to continue this positive focus on new measures that promote the establishment of innovative services that will effectively allow the value of copyright to be realised and constitute new sources of revenues for creators. A new reality for business models requires that European policy makers work with the internet establishment to promote, rather than restrict, new developments, especially given the delicate balance it takes to best nurture both the creative industry and those who help to disseminate their work. Intensifying the enforcement measures, restrictions and sanctions already in place would run counter to the sorts of environments that promote innovation and optimal circulation of business and consumer communication activities across the many platforms used today.

3. A revision of the IPRED is not necessary

ISPA is convinced that a revision of the IPRED is not necessary. ISPA would like to recall that the late and inadequate transposition of the IPRED in some Member States is causing legal uncertainties for both internet intermediaries and rightsholders. As confirmed by the European Commission, in its 2010 Report on the application of the IPRED:

“due to late transposition of the Directive in many Member States [...], experience in applying the Directive is limited [...]. Therefore, the Commission has not been able to conduct a critical economic analysis of the impact that the Directive has had on innovation and on development of the information society, as provided for in Article 18 of the Directive”.

An objective and grounded economic quantification of the impact of digital piracy on the market is an indispensable prerequisite to ensure that piracy is fought without unnecessary cost and risk for the wider internet ecosystem. The Commission has not provided so far any neutral, comprehensive study assessing the magnitude of the problem across the EU, as provided for in Article 18 of the Directive.

ISPA therefore urges the Commission to first focus on proper implementation of the Directive’s provisions across the EU and on the effective assessment of the application of its provisions, before considering any revision.

In addition, the study carried out by RAND¹ and concluded in 2012 that the studies commissioned by the industry presented a number of critical issues, especially regarding the methodology consisting of applying a so-called “*substation rate*” which multiplies the total number of infringements by the number of lost sales per infringement. A more recent study by *Aguiar/Martens* showed that illegal downloads

¹ *Hoorens et al*, Measuring IPR infringements in the internal market, Rand Cooperation, 2012
http://www.rand.org/pubs/technical_reports/TR1279.html.

do not negatively impact the sales of digital legal content.² We therefore call on the Commission to start a wide-ranging study across all 27 Member States to understand if digital piracy is a problem in itself or if it is rather the symptom of an inefficient market structure. In the latter case, it should be assessed how such a structure could be changed in a way to favour the transition of traditional content business model to the digital age.

4. The intermediary liability exemption is vital for innovation and growth on the internet

ISPA is deeply concerned that a revision of the IPRED could substantially modify the liability regime provided for in the Directive 2000/31/EC (the e-Commerce Directive). The principles laid down in the e-Commerce Directive (articles 12 to 15) are the cornerstones of the development of the digital economy in the EU, and must be preserved and respected in any other legislation. The provisions in question provide a secure and predictable legal base for the growth of the digital economy. Any direct or indirect change to this regime will not only lead to an increase in burdens for legitimate commerce, having an adverse impact on innovation and distorting competition, but will also undermine consumers' fundamental rights to privacy and free flow of information.

In this regard ISPA would like to underline that, at the time of the adoption of the Directive back in 2004, the problem of IPR infringements through P2P networks, for instance, was already well known and the injunction relief mechanisms, as the Commission acknowledges in the evaluation report, contributed positively in addressing this issue through a judicial intervention.

5. Fundamental rights of users and ISPs have to be respected

ISPA has serious concerns that any change to the current IPRED regime- e.g. introducing specific rules on the Digital environment - would be incompatible with fundamental right to the protection of personal data and freedom of communications which are essential for innovation and growth in the digital market.

ISPA therefore strongly believe that the balance between fundamental rights at stake (property rights, privacy of communications, freedom of expression, etc.) needs to be decided on a case-by-case basis by a judge. The Court of Justice of the European Union confirmed in its rulings in the cases Scarlet Extended and Sabam v. Netlog that the introduction of enforcement measures should be proportionate and respectful of industry's freedom to conduct a business activity as laid down in article 16 of the EU Charter of Fundamental Rights. Moreover, any injunctions must be proportionate to

² *Luis Aguiar/Bertin Martens*, Digital Music Consumption on the Internet: Evidence from Clickstream Data, 16, 2013, <http://ftp.jrc.es/EURdoc/JRC79605.pdf>.

the intermediary's ability to take action and should apply to actual infringements, properly substantiated.

6. "Stay-down" obligations would require general monitoring by ISPs

Where an online intermediary has taken action to disable access to illegal content, it cannot prevent the same content from being re-uploaded by the content owner or someone else. Obliging hosting providers to take pro-active measures with regard to content already taken down, albeit by court order or third party notification, will effectively amount to imposing a general monitoring obligation, which is not allowed under the e-Commerce Directive.

ISPA therefore calls on the Commission to avoid any action that would directly or indirectly jeopardize the limited liability regime of internet intermediaries set out in the e-Commerce Directive through the revision of the IPRED.

7. Due legal process and judicial oversight are indispensable

Due legal process and judicial oversight remains a prerequisite for the sustainable development of the digital single market. ISPA underlines, that Member States will need to strike the balance between the involved diverging fundamental rights spheres of rightsholders, ISPs and their users.

ISPA in this context would like to express that data retained for the purpose of fighting terrorism and serious crimes must not be used to prosecute non-commercial alleged copyright infringer. ISPA however encourages the Commission in this respect to pursue a "follow the money" approach. Instead of focusing solely on the ISPs to release the identity of the alleged infringer, coalitions with advertising networks, banks and payment processors should aim to identify the source of the infringing material and to eliminate the financing of infringing websites.

In conclusion, ISPA is of the opinion that the focus of any initiative undertaken by the Commission on the protection of IPRs should be directed towards encouraging the creation of innovative, affordable content services, based on business models which are able to embrace the internet revolution. ISPA is deeply convinced that this would be a much more effective strategy for enforcing IPRs than increasingly repressive legislation which will inevitably produce the opposite result and will only serve to maintain those barriers to trade that are the real obstacle to the creation of a truly European Digital Single Market but also discourage users from maximising their use of the internet.

ISPA would like to reiterate that it is very thankful for this opportunity to contribute. For further information or any questions please do not hesitate to contact us.

Sincerely,
ISPA Internet Service Providers Austria



Dr. Maximilian Schubert
General Secretary

About ISPA: ISPA is the Austrian association of internet Service Providers (Identification Number: 56028372438-43), representing approximately 200 ISPs. ISPA is the major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.