

Report on the application of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

Statement by EUROCOPYA

EUROCOPYA

EUROCOPYA is the European organization of cinema and television producers' collecting societies in charge of private copy rights management (blank media & equipment levies). Our statutory members are the companies representing producers from Austria, Belgium, Denmark, France, Germany, the Netherlands, Poland, Portugal, Spain, Sweden and Switzerland. Our Associated members are the societies representing producers from United Kingdom, Hungary, Czech Republic, Canada, Slovak Republic and Australia. <http://www.eurocopya.org>

I. Introduction:

On 22nd December 2010, the Commission publishes a report (COM(2010)0779 final) on the application of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights and gives opportunity to interested parties to address their observations till 31st March 2011.

EUROCOPYA welcomes the report and the Commission staff working document (SEC(2010)1589 final), who constitute a source of information and an adequate basis to rethink the 2004 directive.

The report notes that it has become apparent that the directive was not designed with the challenge posed by the Internet to the enforcement of IPR in mind.

"The multi-purpose nature of the Internet makes it easy to commit a wide variety of infringements of intellectual property rights. (...). Search engines often enable fraudsters to attract Internet users to their unlawful offers available for sale or download. File-sharing of copyright-protected content has become ubiquitous (...) and has led many law-abiding citizens to commit massive infringements of copyright and related rights in the form of illegal up-loading and disseminating protected content. Many online sites are either hosting or facilitating the online distribution of protected works without the consent of the right holders. In this context, the limitations of the existing legal framework may need to be clearly assessed"¹.

¹ Report, point 3.1 (page 5)

"Internet platforms such as online market places or search engines can also play an important role in reducing the number of the infringements, in particular through preventive measures and 'notice and take-down' policies".(see Report, point 3.3)

"Internet service providers are also key to the way the online environment works. They provide access to the Internet and interconnect the underlying networks, host websites and servers. As intermediaries between all users of the Internet and the rightholders, they are often placed in a compromising position by unlawful acts committed by their customers. For this reason, EU law already contains specific provisions limiting the liability of Internet service providers whose services are used to infringe intellectual property rights".(Report, point 3.3)

"The Directive leaves it to Member States to determine when and how an injunction can be issued against an intermediary. For this to work efficiently, it could be useful to clarify that injunctions should not depend on the liability of the intermediary. Furthermore, the findings reported in the Staff Working Paper that accompanies this Report indicate that the currently available legislative and non-legislative instruments are not powerful enough to combat online infringements of intellectual property rights effectively. Given intermediaries' favourable position to contribute to the prevention and termination of online infringements, the Commission could explore how to involve them more closely".(Report, point 3.3)

"In some Member States the right of information provided for in the Directive seems to be granted very restrictively, mainly due to national laws on the protection and retention of personal data. This issue could deserve special attention. National laws must also allow the courts to apply EU law on enforcement of intellectual property rights. According to the Court of Justice of the European Union a fair balance must be struck between the various rights at stake (such as the right to data protection and the right to property, which includes intellectual property rights) given that both data protection/privacy and the protection of intellectual property are recognised as fundamental rights by the Charter of Fundamental Rights of the European Union" (Report, point 3.3)

"The European legal framework on the protection of personal data on the one hand and enforcement of intellectual property rights on the other is neutral, in that there is no rule implying that the right to privacy should generally take precedence over the right to property or vice versa. (...) Further evaluations could be needed on the extent to which Member States' laws and the way they are applied are consistent with these requirements" (Report, point 3.4).

- II. The report and the staff working document point out a number of important issues that EUROCOPYA wishes to comment, especially regarding the digital environment and the need to improve the ways to address infringements online.

The goal of the Commission's programme should be to ensure that enforcement problems related to the Internet are adequately addressed. In this regard, the Commission has to consider opening a dialogue with Member States, whose national laws are inconsistent with the terms of the directive.

EUROCOPYA recalls the importance of ensuring that the 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.

EUROCOPYA 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 intellectual property infringements online, particularly with respect to copyright, Member States may need to adopt a range of measures to address Internet infringement 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 Enforcement Directive and the E-Commerce Directive, in particular Article 15. 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 than being aimed at specific titles. Courts should also be empowered to order the seizure of the tools/means 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.

Improvement of the right of information (Article 8)

Enforcement Directive provides Member States with innovative ways that can facilitate the protection of intellectual property rights. This is the right of information and the injunctions. However, it is clear from the various reports that the two substantive provisions have not been implemented properly or were poorly implemented in some Member States. The report of the European Commission and the staff working paper already provide substantial guidance on how these two key provisions could be strengthened in Member States. In this case, this is less about creating new provisions than about making existing arrangements truly effective.

The directive established a right of information which enables the judicial authorities to better identify the counterfeiting and piracy networks. This principle aims to get the presentation of any documents or information held by the defendant or any person who was found in possession of counterfeit products. This provision is particularly important and is a key measure to facilitate the enforcement of intellectual property.

The right of information aims at determining the origin and counterfeiting networks. Consequently, the procedure of right of information must be clearly distinguished from the rules of evidence. There is a need to clarify that the right of information may be involved before the infringement was established by the judicial authorities.

In some Member States the right of information provided for in the Directive seems to be granted very restrictively, mainly due to existing national laws on the protection and retention of personal data. This tends to prevail over the right to property (which includes intellectual property rights), which makes it difficult to exercise the right of information regarding online piracy. Reconciling the rights to data protection and the right to property is a critical issue since over protection of personal data can lead to weakening the means granted by the

Directive 2004, including the right of information. This provision should be clarified so it does not put obstacles to the right of information. The Commission should in practical terms explain how to ensure in practice the "balance" between protection of personal data and intellectual property protection, as these principles are part of the Acquis communautaire and are substantive issues.

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.

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.

Injunctions

The Commission Staff Working Document (CSWD) recalls (point 2.5 - 1.1) that for most stakeholders, due to the length of the judicial proceedings involving infringements of intellectual property rights and the costs of the proceedings which are rarely reflected in the damages awarded in the main proceedings, injunctions are the main enforcement remedy. However, injunctions are not operational since the concept of liability of intermediaries is subject to varying interpretations by the courts and the Member States which tend to limit the exercise of the injunctions.

Therefore, it should be convenient to clarify how the injunctions need to be addressed. There is a need to ensure that rapid injunctions should be available whenever an IP infringement is ongoing or imminent irrespective of the degree of urgency, that the possibility of requesting the seizure of the movable and immovable property of an alleged infringer should be available in all IPR infringements cases and that the possibility to seize tools of the infringement including domain names is provided by the directive.

EUROCOPYA believes that part of the problem could be addressed via inaudita parte injunctions, and to that extent this possibility should be stressed in the amendment of the directive. In some EU Member States, judges are not prone to this type of injunctions, which in most of the cases are the only issue left to prevent infractions in advance. And sometimes ex post.

In some countries, injunctions against intermediaries (which may not be legally responsible for the underlying infringements) are not available. Therefore, the injunction should be granted irrespective of the intermediary's liability. Articles 9 and 11 should be amended to confirm that the intermediary's liability is not a precondition to an injunction being issued against him.

Clarification of directive on protection of personal data should also allow for better exercise of the injunctions laid down in Article 11 of the Directive.

Damages and legal costs (article 13 and 14)

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).

Civil penalties imposed are often of minor importance in comparison to the profits made by infringers. The costs of investigating, taking legal action against and rectifying an infringement are often not compensated in full.

Strong measures aimed at ensuring that rightholders are able to recover the totality of the losses sustained as a result of an infringement. It has to be clarified that all elements of direct, indirect and consequential economic consequences to the rightholder that result from an infringement are compensated, regardless of whether the infringement has taken place on a commercial scale and provide measures that enable rightholders to recover their actual costs of investigating, taking legal action against, and rectifying an IPR infringement. All costs reasonably incurred by the rightholder in investigating, taking successful civil action against and rectifying an infringement should be compensated in full by the infringer. Measures to ensure that infringers do not retain any economic benefit from their infringing activities should be added.

EUROCOPYA is also in favor of introducing an alternative to the actual (and in its wider concept) damages system, via the so called statutory damages. It will be a powerful tool for many SMEs which do not have the resources to afford the legal and related costs that the actual damages proceeding requires.