

Public consultation by the European Commission

on the protection and enforcement of intellectual property rights in third countries

EUROKINEMA's contribution

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EUROKINEMA represents audiovisual producers at a European level.

As from the start of the development of the high-speed internet, our sector has focused on piracy of copyrighted contents and related problems and phenomena. Indeed, the loss of incomes generated by the illegal consumption of films is extremely high¹.

In order to fight against these trends, the audiovisual field is not defenseless and the European legislation has provided some legal and technical tools such as the 2001/29 Copyright Directive², the 2004/48 Enforcement of intellectual property right Directive³, the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 1215/2012 dated 12 December 2012 and 10th January 2015⁴.

However, the digital world is moving rapidly and adjustments **are now absolutely needed**.

I. The current legal basis to go to court in case of copyright infringement

a) Article 8⁵ of the 2001 Copyright Directive and article 11 of the 2004 Enforcement of Copyright Directive⁶ :

Both articles are aimed at protecting the rightsholders against infringement of the copyright and intellectual property rights including through injunctions against intermediaries. The text

¹ See in [EUIPO report "Online copyright infringement in the EU: Music, Films and TV \(2017-2018\) Trends and Drivers" \(November 2019\)](#), page 7: "The average internet user in the EU accessed pirated content 9.7 times per month in 2018, ranging from almost 26 times per month in Latvia to less than 4 times per months in Finland."

² [Directive 2001/29/EC](#) of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

³ [DIRECTIVE 2004/48/EC](#) of 29 April 2004 on the enforcement of intellectual property rights

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=en>

⁵ 2001 Copyright directive | Article 8 - Sanctions and remedies

"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 for shall be **effective, proportionate and dissuasive**.

2. Each Member State shall take the measures necessary to ensure that rightholders 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 and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against **intermediaries** whose services are used by a third party to infringe a copyright or related right."

⁶ 2004 – Enforcement directive | Article 11 - **Injunctions**

"Member States shall ensure that, where a judicial decision is taken finding an infringement of an intellectual property right, the judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance. Member States shall also ensure that rightholders are in a position to apply for an injunction against **intermediaries** whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC."

provides that the sanctions ordered by the courts ought to be **effective, proportionate, and dissuasive**.

Of course, the remedies ordered must abide by the principle of **proportionality**⁷ and the limitations of article 14 and 15 of the 2000/31 e-commerce Directive⁸ (limited liability of intermediaries and no general obligation to monitor). We have now a quite clear view of the CJEU's opinion on the implementation of these notions.

b) **Recognition and enforcement of EU court decisions inside the EU.**

When a national court ruling needs to be recognized and enforced in another country inside the EU, the exequatur proceedings are abrogated by the "Brussels I Regulation"⁹. From now on, a court ruling will be fully enforceable in all the EU member states.

The audiovisual sector has coped with these instruments for years since most of the intermediaries (notably the internet access providers) are based inside the EU, or have subsidiaries in the EU whose responsibility could sometimes be engaged, notably in the implementation of article 8.3 of the 2001 Copyright Directive¹⁰ (such as for instance search engines, with however a trend to revert more and more back to the mother company based outside the EU).

II. **A technological revolution is however in process that will render meaningless the existing recognition and enforcement tools, if not enforced properly through international private law**

1) Up to now, the intermediaries through which the court obtained the sanctions and remedies under notably article 8.3 of the 2001 Copyright directive were the **internet providers** as the

⁷ Article 52.1 of the Charter of Fundamental rights: **Scope and interpretation of rights and principles**

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of **proportionality**, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

⁸ **E-commerce directive:**

▪ **Article 14 : Hosting (e-commerce directive)**

« 1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

▪ **Article 15 : No general obligation to monitor**

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements. »

⁹ [Regulation \(EU\) No 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Called "Brussels I Regulation")

¹⁰ 2001 Copyright directive – Article 8.3:

"3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."

legal entities capable to solve the piracy disturbances. Indeed, the Internet providers are the services that **resolve the domain names through their local “DNS servers”**. However, a revolution in the resolution of domain names is in process. This revolution will **change the legal entities to which we must address our request** to remedy the infringements of copyright or intellectual property observed. These new legal entities are the **web browsers or the operating systems**¹¹ whose mother companies are massively domiciled outside the EU – mainly in the USA or in Asia.

Unfortunately, the recognition of an EU court decision by a non-EU court is complex, costly, and lengthy (which is contradictory with the necessity of swiftness in the digital world).

The acceptance by a State of the binding force of a foreign court rule depends on the sole decision of the said State. Only the jurisdictions of this State have the power to compel an intermediary situated in its territory.

- 2) If we specifically focus here on the USA, there are no international exequatur rules for the moment. If one wants to enter such process, there are two steps: the recognition of the foreign judgment and its enforcement¹². The proceedings are extremely long (can go up to 7 years¹³) and is not adapted to the digital environment.

The current international rules being ineffective to quickly solve the court order’s enforcement in a rapid digital world, **new solutions should be sought at an EU level** toward notably the USA and the Asian countries.

We do not seek here for extra-territorial application of EU law in other countries. As far as the digital matters are concerned, it must be noticed that US law does not have a provision such as article 8.3 of the Copyright Directive whereby intermediaries can be compelled to take measures in case infringement of copyright. There is therefore a clear risk that the EU court decision be considered as “Repugnant to US Public Policy”. But a solution could be sought through a **local implementation of the court rules (and not transnational)**. To be more specific, **an EU court decision condemning a non-EU company for online infringement of copyright could be only recognized and enforced on the territory of the Court ruling requesting exequatur (i.e. within the EU)**.

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If the Digital Services Act is an attempt to strengthen the responsibility of intermediaries, another side of the coin should be studied i.e, **how long will it take to have the EU and national court decision implemented inside Europe by the digital intermediaries settled outside the EU ?**

We believe it is time that the international private law and the recognition and enforcement of court rules be adapted to the needs of the digital world.

¹¹ The web browsers such as Firefox (Mozilla) and Chrome (Google) have developed an option called « DNS over HTTPS » that encrypts the internet providers’ DNS requests made by the web users. These web browsers have a huge market share (70% in France for instance). Recently, the operating systems (Windows 10 for instance) have developed such an option as well. The web servers of these companies become the receivers of the users’ requests. The internet providers are thus deprived of the possibility to monetize the internet traffics.

¹² To obtain the recognition and the enforcement of a foreign court ruling, the US judge verifies:

- If the foreign court has jurisdiction
- the regularity of the foreign proceedings
- the fairness of the foreign court
- the governing law
- the compliance with the public order in the USA
- the absence of fraud in law.

¹³ One example: De Fontbrune v. Alan Wofsy – September 12th 2019 – [Case 5:13-cv-05957-EJD](#) – Northern District Court of California, San Jose Division.