Unit D.3 – DG Enforcement of Intellectual Property Rights
Internal Market and Services DG,
European Commission, SPA2
B-1049 Brussels, Belgium

Email: markt-iprconsultation@ec.europa.eu

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ISPA CONTRIBUTION REGARDING THE CONSULTATION ON THE COMMISSION REPORT ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

ISPA (Internet Service Providers Austria; Identification Number: 56028372438-43) is pleased that the Commission has issued this consultation on the Commission Report of the application of Directive 2004/48/EC on the enforcement of intellectual property rights.

First and foremost, ISPA considers that the Directive as it stands offers a well-balanced and functioning framework to address digital piracy. We also think that strengthening enforcement through ever increasing restrictive technical measures would result in chilling effects for innovation, the undermining of consumers' confidence in digital products and unintended negative consequences for freedom of communications online.

Regarding any possibilities of injunctions - if so decided by national courts - against ISPs, hereinafter especially focused on access providers, we firmly believe that ISPs should not be subject to injunctions. Right holders should direct their enforcement measures against individual infringers. ISPA also rejects any claims that impose a general duty onto ISPs to monitor the traffic of their clients.

If injunctions are however issued against ISPs, such injunctions should be required to comply with strict formal and substantial requirements and need to be issued via a competent (Austrian) court. Any requests for information, aiming to identify infringers, should, besides other requirements, indispensably require the consent of a judge.

We are concerned that any additional burden on ISPs will create barriers to the deployment of better infrastructures and the development of online services for the benefit of the European economy. Furthermore, ISPA considers that ISPs should under no circumstances be charged with a monitoring and enforcement role. The fundamental Rights of information, privacy and communication will be severely undermined should ISPs, in effect, become prosecutors in the name of the business interests of others.

address: 1090 wien, währingerstraße 3/18 • austria • europe
phone: +43-1-4095576 • fax: +43-1-409557621 • mail: office@ispa.at • web: http://www.ispa.at • zvr:551223675
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II. General issues

1. There is no need for a revision of the existing system

ISPA regrets that the European Commission intends to revise the IPRED without sufficient evidence of the necessity of this revision. Indeed as reported by the Commission, '*the 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'.*

As mentioned above, ISPA believes that the Directive creates a balanced and functioning framework for the enforcement of Intellectual Property Rights, providing law enforcement authorities with the required legal powers to address problems of piracy. Nonetheless, the late and inadequate transposition of the Directive in some Member States causes legal uncertainties for both ISPs and rightsholders. We would therefore strongly encourage the Commission to first focus on the need for a harmonised transposition of the Directive by Member States.

ISPA firmly opposes any tendencies to expand the scope of the IPRED to intellectual property law, such as the law of unfair competition or trademark law. Instead, ISPA urges the Commission to concentrate on the harmonisation of these fields of law before extending the scope of the IPRED to cover their enforcement.

ISPA considers the current scope of the Directive to be far-reaching enough; there is no need to further extend its scope. Uncertainties concerning the interpretation of the Directive should however not lead to the introduction of additional duties or obligations for ISPs.

Furthermore, ISPA calls on the European Commission to assist creative industries in the shift towards more sustainable business models by moving its regulatory focus away from enforcement, restrictions and sanctions towards measures that promote the establishment of innovative services. In this context, ISPA urges the Commission to promote research on how the different national copyright systems (e.g. through transnational licensing systems) could be improved and harmonized. Only such an improved European copyright regime would guarantee that European entrepreneurs are 'fit' to perform well on the European and indeed global digital markets.

The development of legal markets promoting and supporting digital content will constitute one element of success in addressing online copyright infringements to the benefit of the creative industries, consumers and all stakeholders of the online environment.

2. No 'general monitoring obligation' should be introduced

ISPA is concerned that a substantial modification of the liability regime provided for in Directive 2000/31/EC (hereafter ECD) is advocated in the evaluation report to the IPRED. We remind the Commission that the principles laid down in the ECD are the cornerstones of the development of the ICT industry in the EU. Therefore, they should be preserved and

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respected in any other legislation. The provisions in question provide a secure and predictable legal base for our industries to connect European citizens to the Internet and other electronic communication platforms. Any interference with this delicate balance will bring with it an increase of burdens for legitimate commerce, creating a negative impact on innovation, distorting competition and undermining consumers' fundamental rights to privacy and free flow of information.

Since it cannot reasonably be argued that the IPRED takes precedence over the e-Commerce Directive or that copyright prevails over the freedom of communications, privacy or e-Commerce, ISPA calls on the Commission to avoid any interpretations that would jeopardize the limited liability regime of ISPs. Any attempt to change the balance between those two pieces of legislation would run counter to the intention of the European legislator of creating an efficient and competitive ICT market while providing the tools for helping to address illegal activities online. Indeed, the prohibition in Article 15 of the ECD on imposing general monitoring obligations on ISPs, as well as the conditional exemption liability regime in Articles 12 to 14 were justified by the desire of the legislator to preserve the fundamental right to freedom of expression and to prevent censorships. Recital 9 of the e-Commerce Directive specifically stresses the importance of safeguarding freedom of expression when providing information society services.

> *The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.*

Therefore, we can conclude that the principle laid down in Article 15 is a general one, not confined to the ECD, but also rooted into the Council of Europe's Convention for the protection of human rights and fundamental freedoms[1]. As such, this principle should be observed in other legislation, particularly if adopted after the ECD. The IPRED is then bound to respect the no general monitoring obligation and its provisions should be read in conjunction with the rule it sets out.

3. Technical measures are ineffective and disproportionate

Bearing in mind the abovementioned, ISPA is concerned about the interpretation provided in the IPRED evaluation report of the injunctions' regime with regard to the implementation of mass-filtering obligations on an ISP network. We believe that this interpretation is too far-reaching.

ISPA recalls that the deployment of such filtering measures aimed at preventing copyright infringement in peer-to-peer communications would inevitably involve the monitoring of all the traffic passing through the network of an ISP. The filtering device will, indeed, identify, by

[1] http://conventions.coe.int/treaty/en/treaties/html/005.htm.

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reference to predetermined data placed in the system, all files which should be blocked in order to prevent a copyright infringement.

Such filtering measures clearly imply a widespread surveillance of all users' communications be they alleged infringers or not. In other words, it will implement a general monitoring obligation. Such an injunction can be compared to a requirement that a postal or telephone service provider to monitor every email sent or every phone call made, regardless who the senders/recipients of the mail or the participants in the communication are. This would entail not only an infringement of the principles in the ECD, but also of the ECHR, while doing little to help addressing digital piracy.

Furthermore, ISPA is concerned that the adoption of filtering technologies, while ineffective, will bring with it serious threats to privacy, innovation and creativity. Due to the inherent resilient nature of the Internet, these measures are inaccurate and easy to circumvent. In addition, the implementation of these techniques has proven to be disproportionally costly for ISPs and is becoming rapidly obsolete in a fast-moving technological world. The increased costs of such technology would contribute to reinforce the digital divide, as they would ultimately be borne by consumers – including the huge majority of users who do not infringe copyright. For these reasons, ISPA is convinced that there is no effective and proportionate way to apply ubiquitous content filtering measures to prevent online copyright infringements.

The repressive approach suggested by the Commission would risk producing the opposite effect in the digital environment, i.e. instead of helping to prevent IPR infringement, it will speed up the process of the anonymisation of communications online, and thereby neutralise the IPRED approach. An example has been recently reported in Sweden where hosting provider Bahnhof, in reaction to IPRED's national implementation, invited its users to use encryption to avoid the imposition of filtering measures. As Bahnhof warned, '*since the service will encrypt user traffic, not even Bahnhof will know what their customers are doing online. If the ISP does not know about their activities, then there is not much to log. Nothing to log means there's nothing useful to hand over to authorities and anti-piracy companies'*[2]

Further invasive filtering and blocking measures are restricted by the Charter of Fundamental Rights of the European Union that reads: '*everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*.' Besides, the Commission has committed itself to strictly limiting such measures to fight child sexual abuse images as recently expressed by Commissioner Malmström. Indeed, she acknowledged that

> '*the Internet is a powerful tool, and we should be extremely cautious in regulating it. But again, the Commission's proposal is about child abuse images, no more no less. The Commission has absolutely no plans to propose blocking of other types of content - and I would personally very strongly oppose any such idea.'*[3]

[2] http://www.boingboing.net/2011/01/27/swedish-isp-will-ano.html.

[3] http://www.meldpunt-kinderporno.nl/files/Biblio/Speech-Malmstrom-Combating-sexual-abuse06_05_2010.pdf, 6.

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4. ISPs should not be subject of injunctions

ISPA is of the opinion that ISPs must not be subject to injunctions. Any legal measures should be directed against the individual infringers. Thus ISPs should not be forced to execute extra-judicial orders, while not being in the position themselves, to be faced with fair and transparent procedures nor being able to provide, such fair and transparent procedures to its customers.

ISPA strongly objects to the ongoing trend to delegate enforcement from national courts to ISPs which, as a consequence, would be forced to carry out extra-judicial tasks. Any measure should be directed against the infringer and not against ISPs, which are not in the position to effectively solve the problems of rights violation. In addition, this procedure is neither fair nor transparent, as no courts are involved at this stage. ISPs furthermore cannot be expected to bear the costs caused by law enforcement.

Right holders in Austria are currently litigating against an Austrian ISP, as the (access) provider refused to follow the injunction issued against them and to block their customers from accessing a number of sites providing streams or links to streaming sites. While this dispute is still being examined at the level of first instance, discussion among legal scholars and practitioners has shown that filtering measures are generally regarded as ineffective, as they can be easily circumvented and pose a disproportionate burden for ISPs.

5. The EU should focus to develop sustainable solutions

ISPA believes that rightsholders and rightsowners should be able to benefit from the exploitation of their work. However, we firmly believe that a sustainable solution to IPR infringement lies in better public awareness on the use of copyrighted works and on the public perception of the value of intellectual property as an economic and cultural asset. Currently the offer proposed by the content industry in the market is not sufficient to attract the attention of consumers due to high prices and limited choice. The Commission has correctly identified this problem in its report when stating that:

> *'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.'*[4]

ISPA therefore strongly suggests that the development of innovative content services online, at affordable prices and based on new business models, meeting consumers' expectations and needs, is the most effective way to limit digital piracy.

On one hand, the plurality of authors, performers and publishers, each having an ownership interest in a given work, undermines the ability of entrepreneurs to develop new business models suitable for e-commerce. This is exacerbated by the fragmentation of the rights themselves, including the right to make digital copies, performance, streaming and broadcast rights and database rights. When this is considered together with the plethora of notionally

[4] COM (2010) 779 final, 3.1.

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separate works that may be associated, the multiple licenses that an entrepreneur with a new business model has to deal with becomes clear.

On the other hand, the information society is constantly growing to meet increasing consumer expectations regarding commercial online services. We believe that the digitalisation of the offer, far from being a barrier to culture and artistic creation, is rather a tremendous opportunity in terms of audience, scope, supply and equal access. Overall, consumers want access to a wide range of audiovisual offer, immediately and in multi-modal ways. With the constant development of online services, consumers ask for the same rights in the online world as in the offline world. Therefore, ISPA believes that it is time for a new approach and a debate on how to make copyright legitimate again in the eyes of consumers. Those new technologies enable rightholders to create more and better services, so that consumers have the option of downloading lawfully, in the safest, most user-friendly format possible.

6. Raising damages will not help to fight privacy

Although acknowledging authors' and performers' right to fair remuneration for their works, ISPA strongly rejects any suggestions of increasing the amount of damages awarded in cases of copyright infringements.

Such an increase in damages will not only be used to threaten ISPs and consumers, but will have a very little effect to remedy the current situation, where the lack of innovative business models has driven law-abiding citizens to commit copyright infringements, as has been very accurately described in the Commission's report[5].

7. The terms '*online service provider*' and '*commercial scale*' need to be clarified

The scope of the term 'online service provider' is unclear. The Austrian legal system generally follows the distinction between Access Providers and Content Service Providers. ISPA therefore asks for a clear definition of which services should be seen as 'online service providers' and which services would fall within this category.

As the discussion with Austrian stakeholders has shown, uncertainty exists regarding the term of 'commercial scale'. ISPA therefore calls upon the commission to clearly state that the term of 'commercial scale' aims at fighting violations of intellectual property rights such as the import and sale of counterfeit products on a commercial (large) scale. By contrast, the upload of a single file through a peer-to-peer network (for example the recording of a newly released movie) should not be regarded as a 'commercial' activity, despite the potential damage caused by this act.

[5] SEC (2010) 1589 final, 3.1.

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II. Issues concerning the implementation of the IPRED in Austria

8. Strict rules regarding the form and content of injunctions should be an indispensable precondition for any injunctions against ISPs

In the light of the current day-to-day ‘Injunction-SPAM’ [‘Abmahn-SPAM’], describing the hundreds of emails per day which a medium-sized Austrian ISP will receive, ISPA calls for reforms of the current injunction practice in Austria. Although the majority of these SPAM-emails originate from outside Austria, ISPs under the current legal regime are required to examine them to avoid legal consequences. ISPA wants to point out that most of their members are micro- and medium size organisations and therefore are faced with special problems concerning complex legal implications.

ISPA believes that ISPs should not be seen as addressees of injunctions, as ISPs, due to the lack of a true contradictory procedure, which allows both parties to provide evidence and arguments in court on the merits of an IPR-dispute.

If the Austrian jurisprudence however decides that ISPs should be addressees of such injunctions, there will be a need for a very transparent procedure with very strict requirements as to their form and their content.

The centre of such a reform should be the indispensable requirement for any requests by the claimant for injunctions to be issued via a competent Austrian court. Only a measure, reviewed and issued by a court might guarantee the necessary transparency and fairness. At the same time, this would not only remove an undue burden and risks from ISPs, but also help to make the enforcement of intellectual property laws more effective in Austria.

In addition to the requirement for any request by the claimant for injunctions to be issued via a competent Austrian court, the issues of additional formal and substantial requirements, as well as the issue of the burden of costs needs to be discussed. Only by addressing all these issues, can fair and transparent procedures which don’t impose undue cost burdens on ISPs be established.

9. Injunctions bear severe financial risks for ISPs and thus have to be issued via competent courts

ISPA is of the opinion that the current way in which injunctions - if they prove to be successful - are directed against ISPs in Austria can be regarded as a form of liability. Such injunctions, due to the lack of sufficient requirements, such as the requirement that a prior request of the claimant have to be issued via a competent Austrian court, or the appliance of a contradictory procedure, constitute a very severe (financial) risk for any ISP.

Against this background ISPA points out that the current injunction regime in Austria effectively violates the (Safe Harbour Doctrine) principles as laid out in the ECD and the Austrian eCommerce Act and thus poses and undue burden upon Austrian ISPs.

ISPA calls for the introduction of a requirement that all injunctions have to be issued via competent courts. Decisions following an injunction should clearly define the scope of the

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injunctions while sticking to the principle that no general monitoring obligations should be posed upon ISPs, as outlined in the ECD.

ISPA is of the opinion that it is misleading to focus mainly on the intermediaries who are not in the position to have any information about an infringing act by a third party (e.g. content provider). Thus, it doesn't seem to be sensible to suggest the introductions of even more legal acts against intermediaries. In most cases, the intermediary has no chance to verify any infringement in terms of offering substantial information on the merits (IPR). Furthermore it must be guaranteed that any procedures against an intermediary are only possible by way of contradictory procedure.

10. Requests for information have to be issued by independent judges

Austrian practitioners, ISPs and right holders are confronted with the situation that in respect to requests for information concerning 'dynamic IP-addresses' severe differences exist between the views of civil and criminal courts.

Criminal courts in Austria argue that the identity of a person using a 'dynamic IP-address' has to be revealed by the ISP in response to a simple request by a public prosecutor according to Art 103 par 4 of the Austrian Telecommunications Act (TKG 2003). Austrian civil courts on the contrary follow a recent ruling by the Austrian Supreme Court in respect to a civil law case (*LSG v Tele2*, 4 Ob 41/09x) which clearly stated that, as a consequence of the fact that the ISP has to process traffic-data to reveal the identity of a user holding a specific IP-address at a certain point of time, such requests require the consent of a judge. As a consequence requests for information concerning 'dynamic' IP-addresses are dealt with differently by criminal and civil courts.

This discrepancy, together with an extensive interpretation of the term of 'immediate/concrete danger' ('konkrete Gefahrensituation', Art 53 par 3a SPG), which is applied by law enforcement agencies to cover a wide range of situations (exceeding 48hrs), has led to ongoing legal uncertainty.

ISPA therefore calls for a general requirement of the consent of a judge for any requests for information by law enforcement or judicial authorities. At the same time ISPA stresses that there is an existing Supreme Court´s decision which has to be followed so that the current practice and arguments of courts and the police, requiring IPSs to differentiate between the views of the criminal and civil department the Supreme Court, is not acceptable and has to be brought in line with the recent Supreme Court decision in criminal law matters.

The Commission should therefore elaborate on the relationship between so called 'static' and 'dynamic' addresses and state that any request of information concerning a 'dynamic' IP-address requires the processing of traffic data and therefore needs to be issued by a judge and under no circumstance by an authority subject to any administrative directives (e.g. a public prosecutor).

ISPA strongly objects against the recent attempts by Austrian law makers to use political pressure related to the implementation of the Data Retention Directive as pretence to introduce new legal grounds for the requests for information which have never been openly discussed and which significantly broaden the competences of law enforcing bodies while at

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the same time removing or lowering the requirements (consent of a judge, minimum level of penalty, etc.) and civil rights safeguards (right of the subject of a request for information to be informed about such a request).

III. Conclusion

'Copyright should be about promoting cultural dynamism, not preserving or promoting vested business interest.[...] Copyright is complicated and complex, reflecting the successive waves of technological development in the media of creative expression from printing through to digital technology, and the business responses to those different media.'

Francis Gurry, WIPO Director General in Geneva, February 24, 2011

In general, ISPA remains convinced that the development of new appealing business models, which are currently lacking in the market, by content providers is the most effective way to combat online piracy. In addition, we consider that the IPRED already created a balanced and functioning framework for the enforcement of those Intellectual Property Rights and believe there is no need to revise the Directive. Instead, we call on the Commission to monitor the implementation of the IPRED across Europe and 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 before undertaking any review.

ISPA is therefore open for discussion about reasonable and sustainable solutions that respect the fundamental Rights of information, privacy and communication and do not delay the development of innovative services that can benefit consumers and contribute to the European economic growth.

Again, ISPA stresses that ISPs should not be subject to injunctions as any legal measures should be directed against the direct infringer. Thus ISPs should not be forced to execute extra-judicial orders, while not being in the position themselves, to be faced with fair and transparent procedures nor being able to provide, such fair and transparent procedures to its customers. At the same time, ISPs cannot be expected to bear the costs caused by law enforcement.

In cases where ISPs are found to be subject to injunctions, any such injunction have to be issued via a competent Austrian court, so as not to impose an undue burden onto ISPs. Any requests for information have to be issued by a judge on a comprehensible legal basis. The current situation in Austria where requests for user data are treated differently under civil and under criminal law needs to be simplified and aligned to the current practise under Austrian civil law to safeguard freedom of information and user privacy.

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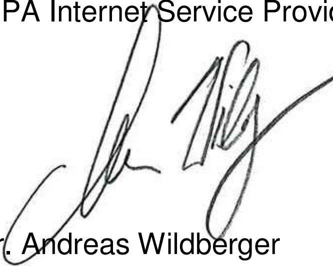
For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

<u>About ISPA:</u> ISPA is the Austrian association of Internet Service Providers (Identification Number: 56028372438-43), representing approximately 200 ISPs. ISPA is a 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.

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