



Cable Europe

## **Cable Europe comments on the Commission's Report on the Application of Directive 2004/48/EC on the enforcement of intellectual property rights**

ID number: 03152551883-31

31 March 2011

Cable Europe welcomes the Commission's consultation on its report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED).

We believe that copyright should be the cornerstone of the dynamics of a true EU-wide Digital Single Market and a vibrant European digital economy.

The IPRED harmonises the means available to rights holders for fighting infringement of IPR. Cable Europe and its members recognise the need for right holders to have a proper instrument for enforcing their rights and understand the urgency of finding an answer to the piracy problem. However, we are of opinion that the IPRED Directive provides sufficient statutory enforcement measures for rights holders and does not need to be revised. Furthermore, Cable Europe believes that compelling, affordable legal alternatives remain the primary answer to piracy, not statutory measures, and therefore addressing piracy through amendments to IPRED is not the right approach. Indeed, "enforcement" measures are likely to alienate customers and in any event need very careful consideration, taking into account (among other things) compliance with privacy law and costs.

Cable Europe strongly considers that the focus of any initiatives taken by the Commission should be directed towards correct implementation of the IPRED at national level as well as encouraging and incentivising innovation in new content services.

It would be premature to review at this stage the IPRED as we have limited experience with the Directive and there is a lack of evidence that a revision is needed (in some Member States IPRED still needs to be implemented). The Commission's report stands clear on that point when mentioning that it is the reason why it has not been able to conduct a critical economic analysis of the impact the Directive has had on innovation and on development of the information society, while in our view a lack of impact assessment cannot lead to a credible revision of the Directive.

The IPRED Report seems to suggest that clarifications are needed on several points. From a cable operator point of view, we certainly do not have a great experience with this Directive but we would like to comment on certain points.

## **1. Right of information**

Cable Europe is concerned by the fact that, as mentioned in the Evaluation Report, some Member States provide the right of information outside of judicial proceedings contrary to the provisions of article 8. Also, this article is essentially used by right holders towards ISPs to obtain IP addresses and establish that the infringer has acted on a commercial scale or even, in some Member States, for all types of infringements. We certainly are not opposed to providing this kind of information when cable operators are in possession of the information being requested, and the request and disclosure of that information is being made in accordance with national privacy laws, including any court orders that are required. Our members would stand fierce against any general obligation of providing any information that would oblige them to go against fundamental rights and community or national legislations. IP addresses are personal data protected by Data Protection Directive (95/46/EC) and the only allowed exceptions for their processing outside of the privacy rules are for national security reasons or the prosecution of serious criminal offences as stated by the e-Privacy Directive (2002/58/EC) and the Data Retention Directive (2006/24/EC). The disclosure of Internet users' identities by ISPs to right holders do not fall within those exceptions and should therefore continue to be clearly prohibited outside the context of judicial proceedings. We refer here to the Promusicae case (C-275/06) which ruled that Member States must not only interpret their national law in a manner consistent with Community law, but must also make sure that they do not rely on an interpretation of them which would conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality. A right balance between the right to privacy and the right to information cannot be made in a unilateral manner by regulation but should only be decided on a case-by-case basis by a judge.

## **2. Injunctions against intermediaries**

There are serious concerns that any changes to IPRED -- e.g. granting injunctive relief against intermediaries irrespective of any liability, introducing technical measures to combat piracy -- would be incompatible with fundamental laws around data protection and freedom of communications under the e-Commerce Directive (2000/31/EC) which is essential for innovation and growth in the digital market. For example, technical measures could involve processing personal data in a manner which contradicts data protection laws, or could jeopardise e-Commerce exemptions provisions as a result of requiring ISPs to monitor transmissions.

Although the e-Commerce (art. 12.3, 13.2 and 14.3), Copyright (art. 8.3) and Enforcement Directive (art. 11) do not seem to contradict each other, the question arises how the reconciliation between these 3 Directives should be clarified in practice, essentially because courts differ in the range of measures they impose and in the way they react to requests for injunctions. Uncertainty surrounding the possibility to issue injunctions is of great importance as such injunctions could conflict with the prohibition on imposing a general obligation to monitor as set out in art. 15 of the e-Commerce Directive, the data protection rules, the fundamental rights of consumers and art.5 e-Privacy Directive and could greatly undermine

innovation and incentives for investment in new business models as well as being very costly for ISPs to implement.

In the Belgian Sabam vs Tiscali/Scarlet case (29 June 2007), the judge considered that the possibility to issue injunctions against an intermediary was in no way restricted by the e-Commerce Directive because the prohibition on general monitoring obligations is listed in section 4 of the e-Commerce Directive dealing with 'liability' of intermediary service providers, while injunctions only concern the termination of infringements, and do not deal with liability at all. Scarlet was ordered to adopt a system called Audible Magic to filter illegal file-sharing. Audible Magic did not work, was considered as having a non proportional effect and the order was overturned in 2008. In its judgment of 28 January 2010, the Brussels Court of Appeal has referred questions to the ECJ to know if the e-Commerce Directive prohibits an injunction of filtering P2P communications because it would be a general obligation to monitor and if not, whether the Belgian court can impose such an injunction on Scarlet. At the hearing held by the ECJ on 13<sup>th</sup> January 2011, Advocate-General Pedro Cruz Villalón asked the Commission to take position on the proportionality of filtering measure and the Commission expressed some doubt that the conditions for such measure were proportionate. Furthermore, Judge Rapporteur, Jiri Malenovsky, claimed that Member States and ISPs gave very concrete and worrying arguments to explain why filtering were inefficient, disproportionate and too costly.

And in the recent EMI vs UPC case (11 October 2010), the judge recalled the liberty of Member States to set 'conditions and modalities relating to injunctions' as said in recital 59 of the Copyright Directive. Nothing in the Directive requires a Court to implement, in the absence of national law, injunctive relief in a certain way.

Cable Europe agrees with rights holders that piracy is a serious issue but filtering systems do not appear to us as being a valid solution:

- We believe that filtering is contrary to the mere conduit principle and the no general obligation to monitor enshrined in the e-Commerce Directive.
- Filtering mechanisms are extremely costly. The question has to be raised how these mechanisms will be financed. Cable Europe strongly argues that if any such mechanisms were to be introduced, then rights holders as the sole beneficiaries should bear all costs. It would be counterproductive and could breach the European Policy on Broadband and broader availability of innovative products and services if ISPs were required to bear some of the costs which would inevitably be passed down to customers.
- Filtering can be bypassed through circumvention methods such as encryption or use of proxy servers, and would lead to a technological "arms race", rendering the substantial investment in such systems redundant in a very short space of time.
- Filtering methods could impact ISPs' networks and therefore detrimentally affect consumers and businesses alike, e.g. by slowing down broadband speeds.
- Some filtering methods could result also in the blocking of legitimate content – e.g. some applications and sites have both legitimate and illegitimate uses - and would therefore be against fundamental rights of businesses and consumers and in practice are likely to alienate customers and encourage circumvention rather than lead to a change in behaviour.

- The potential cost and technical implications outlined above could impede innovation in the broadband market and, in turn, penalize or dis-incentivise the development of legal alternative offers of content services.
- Filtering requires intermediaries to intercept and spy on the consumers' services which is against art.5 of the e-Privacy Directive (2002/58/EC), fundamental rights or with the other general principles of Community law, such as the principle of proportionality.
- Last but not least, current filtering mechanisms have not at all been proved efficient or effective.

Given all of the above, we believe that such filtering methods would be a grossly disproportionate measure for addressing actions, such as copyright infringement, which have an economic impact on certain parties, and simply impractical in relation to most other activities (for example defamation claims). Filtering is requested when law enforcement's deficit comes rather than from lack of investment in training to improve technical understanding and understanding of the Internet in general. Imposing general monitoring or filtering obligations on ISPs via legal proceedings and changes in the IPRED could have the wrong consequences of raising legal uncertainty and disproportionate actions. Technical measures can be technically complex and potentially very costly, yet their effectiveness in combating piracy is doubtful in this fast moving digital world. Therefore, the technical complexity, cost, potential harm to consumers and businesses seem disproportionate to the likely success of any measures.

Instead, we believe the answer to controlling online behaviours is the introduction of new commercial models that transcend old territorial restrictions and give consumers the flexibility and access to legal content that they demand.

**Therefore, contrary to what the Commission's Report on IPRED suggests, we would welcome additional implementation guidance from the Commission not through a modification to the IPRED, but through other non legislative means available. This should strengthen the liability limitations against tendencies of national courts (and demands from rights holders in particular) to establish or extend monitoring obligations for intermediaries. The Commission should therefore restrict and clarify the circumstances in which injunctions can be granted and the scope of those injunctions given the high level of costs and the impact on fundamental rights of consumers, plus the likelihood that compliance with such injunctions would very likely put the intermediary in breach of EU and national privacy laws including those relating to unlawful interception. Clarification is sought from the Commission that these injunctions should only be allowed when it is proportional to the goal sought, in line with privacy rules and all other legal actions against the user who uploaded the unlawful content have been exhausted so that the injunction against the mere conduit service provider is used as a last resort mechanism. The burden of costs should also be on the one requesting the injunction as the sole beneficiaries of such measures. Any other interpretation would need to be detailed evidenced with economic data as would in our view be clearly damaging to the ICT growth and business innovation.**

### 3. Codes of conduct

A targeted and proportional approach is needed to deal with counterfeiting, which can have serious implications for the health and safety for consumers, and on the other hand for non-commercial online copyright infringement, which does not constitute the same quality of harm. We must avoid a situation developing where we are running awareness campaigns to improve the perception of intellectual property, particularly in the digital environment, while at the same time proposing harsher sanctions and surveillance which, logically, can only serve to have the opposite impact.

We believe that the best way to protect copyright is the development of innovative legal offers that respond to consumers' demand. Cooperation between stakeholders may be possible, however only within recognised framework, not beyond of it, and in the presence of consumer-friendly legal offers. Effectiveness and legality of various national initiatives still need to be assessed. The French HADOPI law has not yet proved itself and the UK Digital Economy Act is under judicial review on the grounds that it is incompatible notably with the e-Commerce and the e-Privacy Directives and the disproportionate effect of certain provisions on subscribers. We would therefore strongly urge the Commission to take into careful consideration the issues that have arisen from these various national initiatives in determining its course of action.

**Therefore, the focus of any initiatives taken by the Commission should be directed towards encouraging and incentivising innovation in new content services that transcend old territorial licensing restrictions and give consumers the flexibility and access to legal content that they demand.**

About Cable Europe: Cable Europe is the trade association that groups all leading broadband cable operators and their national associations throughout Europe. The European cable industry provides digital TV, broadband Internet and telephony services to more than 70 million customers.

Cable Europe 201109