



# Position Paper

## **Cable Europe position on the European Commission's evaluation and modernisation of the legal framework for the enforcement of intellectual property rights**

Cable Europe welcomes the Commission's public consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights (IPRs).

The Commission's survey aims to assess the functioning of Directive 2004/48/EC on the enforcement of intellectual property rights (IPRED) in the online environment, with a view to identify the possible need for adapting its provisions and to propose corrective measures. It also seeks views about the use and impact of so-called 'follow the money' initiatives in the area of IPR enforcement as emphasized in its Communication of 9 December 2015 on the modernisation of the European copyright framework.

Cable Europe supports the Commission's aim to improve the legal framework of IPRs in order to allow innovative services and products to create growth and jobs in Europe. The IPRED Directive provides sufficient statutory enforcement measures for rights holders and the focus of any Commission's actions should be on 1) the correct implementation of its provisions at national level and on 2) the encouragement of innovative and attractive content services for consumers. Rather than a legislative review, we would welcome guidance from the Commission on the implementation of the current rules, for example, by translating into clear guidelines the different CJEU rulings on the balance of the different rights and interests at stake.

In addition, we think that all stakeholders should understand that the complexities of IPR protection cannot be resolved by a single entity in the value chain and that any enforcement measures entail costs and risks which have to be shared.

Below, you will find general comments on our views on the functioning of the IPRED Directive which reiterate our response to the 2013 consultation. Cable Europe has decided to submit such a paper to the Commission as it considered difficult, as a European association, to respond to the detailed questions of the consultation document, as many of them are of an operational nature.

### **Right of Information**

There are different regimes and procedures across the Member States on the implementation of the right of information. This causes legal uncertainty and unnecessary costs for both rights holders and our members.



Article 8 of the IPRED is often used by rights holders towards ISPs to obtain names and addresses of individuals and establish that the infringer has acted on a commercial scale or even, in some Member States, for all types of infringements. We are not opposed to providing this type of information when cable operators are in possession of the requested information, and the request and disclosure of that information is made in accordance with national privacy laws, including any court orders. Our members would stand fierce against any general obligation to provide any information that would require them to override EU fundamental rights as well as community or national legislations. Names and addresses are personal data protected by the Data Protection Directive (95/46/EC) as well as the newly adopted general data protection regulation and should only be disclosed to third parties in the context of judicial proceedings as per article 8 of Directive 2004/48/EC. We recall that in *Promusicae (C-275/06)*, the CJEU ruled that Member States must not only interpret their national law in a manner consistent with Community law, but must also ensure that they do not rely on an interpretation of national rules which would conflict with 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 should not be decided unilaterally by law-makers but should only be struck on a case-by-case basis by a judge.

In addition, we believe that any request, by national courts, to disclose information to rights holders, according to the above-mentioned safeguards, should be paired with an enforceable remuneration claim by the ISP. Should the Commission decide to review the directive, a revised text should specify that rights holders should remunerate ISPs for information provided under article 8° and that unpaid claims should be enforceable by the national court making such request. In order to make national transposition easy, we advocate the use of national catalogues specifying the amount of remuneration due in case of requests for information.

## **Injunctions against intermediaries**

We have serious concerns that any changes to IPRED could be incompatible with fundamental laws on data protection, freedom of communications and with the e-Commerce Directive (2000/31/EC) whose liability provisions provide a sound and predictable legal framework for intermediaries. The principles of the e-Commerce Directive, fundamental to our business model, are well-functioning and should remain unchanged.

Although the e-Commerce (art. 12.3, 13.2 and 14.3), Copyright (art. 8.3) and Enforcement (art. 11) directives do not seem to contradict each other, the question arises of how to reconcile these three directives 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 key as injunctions may conflict with the “no general monitoring obligation” of article



15 of the e-Commerce Directive, the data protection framework, EU fundamental rights and with article 5 of the e-Privacy Directive (on confidentiality of communications). Such uncertainty could greatly undermine innovation and incentives for investment in new business models as well as be very costly for ISPs.

In *Sabam vs Tiscali/Scarlet (C-70/10)*, the CJEU ruled that a national court requiring an ISP to install a filtering system to prevent the illegal downloading of copyright material does not comply with EU law, as it does not comply with “the prohibition on imposing a general monitoring obligation” on ISPs and does not “strike a fair balance” between the rights and freedoms at issue. The court also clarified that requiring ISPs to install a “complicated, costly, permanent computer at its own expense” for the purpose of monitoring copyright infringements would be a “serious infringement of the freedom of the ISP concerned to conduct its business”. In *SABAM vs NETLOG (C-360/10)*, the CJEU confirmed that general filtering systems installed for the prevention of copyright infringements are disproportionate.

Cable Europe shares rights holders’ concerns over piracy but (and in line with the CJEU’s rulings) considers that filtering systems, are not a valid solution on the following grounds.

- **Intermediaries Status.** Filtering is contrary to the mere conduit principle and the “no-general monitoring obligation” of the e-Commerce Directive.
- **Cost.** Filtering is extremely costly. If any such mechanisms were to be introduced, rights holders, as the beneficiaries, should bear all costs, including the costs of litigation proceedings. A different approach hinders broadband innovation and the development of legal alternative offers of content services.
- **Circumvention.** Filtering can be bypassed by encryption or the use of proxy servers, which can lead to a technological “arms race”, rendering the substantial investment in such systems redundant in a very short space of time.
- **ISPs quality of service.** Filtering could impact ISPs’ networks and therefore detrimentally affect consumers and businesses, e.g. by slowing down broadband speeds.
- **Fundamental Rights.** Filtering requires intermediaries to intercept and to monitor consumers’ behaviour. This goes against article 5 of the e-Privacy Directive, fundamental rights and other general principles of Community law, such as the principle of proportionality.
- **Unwanted blocking.** Some filtering methods could result in the blocking of legitimate content. This would also be against the fundamental rights of businesses and consumers.

## Damages

In our opinion, the measures and remedies provided for in the directive are not applied homogeneously across the Member States. In Poland, the rights holder may seek the payment of damages in the form of payment of a lump sum corresponding to twice the amount of the



appropriate fee from the persons (individual and ISPs) who infringed the author's economic rights, even if this infringement was not culpable. The Polish Supreme Court has sent request for a preliminary ruling to the CJEU (C-367/15) on the interpretation of article 13 of the directive having regard to its recital 26, according to which a judicial authority which must decide on damages should take into account the factors listed in article 13(1)(a), and only as an alternative, in certain cases, may set the damages as a lump sum, taking into consideration the elements listed in article 13(1)(b). A ruling from the CJEU is pending and we hope will clarify the interpretation of this provision.



### **About Cable Europe**

Cable Europe is the trade association that connects leading broadband cable TV operators and their national trade associations throughout the European Union. The regulatory and public policy activities of Cable Europe aim to promote and defend the industry's policies and business interests at European and international level. The European cable industry provides high speed broadband internet, TV services, and telephony into the home of 64.5 million customers the European Union.

*This paper represents the views of the full members of Cable Europe, and not necessarily those of our associate members, partners or affiliates.*



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