

Public consultation on the European Commission report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights

SAA Contribution
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The Society of Audiovisual Authors (SAA) is the association of European collective management societies representing audiovisual authors' rights. Through its 24 members in 17 countries, SAA represents over 118 000 film and television European screenwriters and directors.

SAA's main objectives are:

- To defend and strengthen the economic and moral rights of audiovisual authors (screenwriters and directors);
- To secure fair remuneration for audiovisual authors for every use of their works;
- To develop, promote and facilitate the management of rights by member societies.

SAA welcomes the public consultation on the application of the 2004 Directive on the enforcement of intellectual property rights (IPR), based on the European Commission report published on 22 December 2010. SAA contribution will focus on general problems which have arisen from the implementation of the Directive in relation to the digital environment and will concentrate on the challenges of the online infringements which were not taken into account at the drafting and adoption stages of the Directive.

The executive summary of the European Commission report assesses that the internet offers an unprecedented increase in opportunities to infringe IPR and that the 2004 Directive was not designed with this challenge in mind. It is therefore necessary to proceed to the revision of the Directive in order to adapt it to the new digital and online environment where most protected works are now exploited.

SAA would like to take this opportunity to welcome the creation of the European Observatory on Counterfeiting and Piracy in 2009 to serve as the central resource for gathering, monitoring and reporting information and data related to IPR infringement and as a platform for representatives from national authorities and stakeholders to exchange ideas and expertise on best practices, to develop joint enforcement strategies and to make recommendations to policy-makers. SAA looks forward to the publication of a report on the work delivered so far and to the European Commission's proposals to adjust the Observatory's means in line with the important challenges it is facing.

In this context, SAA is of the opinion that clarifications to the 2004 Directive are needed to avoid ambiguities and adapt the Directive to the new challenges posed in particular by today's digital environment. SAA's contribution will therefore focus on the role of intermediaries and the balance between the right of information and privacy law.

I. INTERMEDIARIES' CONTRIBUTION TO THE PREVENTION AND TERMINATION OF ONLINE INFRINGEMENTS

The Commission's report highlights that uncertainties remain over intermediaries and the specific measures to which they are subject by contributing to or facilitating an infringement.

It further indicates that "the currently available legislative and non-legislative instruments are not powerful enough to combat online infringements of IPR 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".

According to SAA, there are two main ways to involve intermediaries more closely: through enhanced notification procedure and through legislation which requests them to send warnings to alleged infringers.

1. Notification procedure

SAA would like to draw the attention of the Commission to the need to further develop the notification procedure to intermediaries, as indicated in SAA's contribution to the public consultation on Directive 2000/31/EC on electronic commerce¹. Today, contrary to the US notice and take down procedure, the procedures for the notification of illegal content to intermediaries only help establish that the providers have actual knowledge of the illegal content as part of the conditions to engage their liability. It does not usually lead to an automatic take down of the illegal content despite such intermediaries, in certain cases, being in the best position to stop or to prevent an infringement.

It is therefore essential to develop the notification procedure into:

- True notice and take down procedure for illegal content,
- Notice and stay down, to avoid the reappearance of the said illegal content on the same service,
- Notice and keep off, to avoid illegal content based on the same protected work to appear on the service.

The introduction of such procedures would be facilitated by filtering technologies developed by platforms and implemented at the stage where users upload content onto their servers. This filtering technology would be based on databases of works which have been registered, with a view to identifying and blocking illegal content. In this context, cooperation between rights holders and providers is key to developing such databases of protected content and should therefore be encouraged.

2. Unauthorised internet file sharing of protected works

In an effort to reduced illicit file-sharing of protected works, several EU Member States have passed legislation to require intermediaries such as internet access providers to send letters to their customers suspected of unauthorised sharing of protected works. The warnings are initiated by rightsholders who track protected works on file-sharing networks and send

¹ http://www.saa-authors.eu/dbfiles/mfile/1500/1537/SAA_Contribution_E_Commerce_Directive_5.11.2010.pdf

allegations of infringement to Internet service providers who then are required to forward them to the appropriate subscriber.

This approach to dealing with infringements reduces both the need for police involvement in simple file-sharing cases and the subsequent load on the courts. It therefore represents a serious alternative to court procedures to stop and prevent further infringements. In addition, it alerts and educates people to the value of IPR and the impact of IPR infringements as well as contributing to consumer awareness of the need to respect IPR.

Taking into account the high level of illicit file-sharing of protected works, these legislations represent an effective tool to enforce IPR protection online.

SAA encourages the Commission to examine the possibility of integrating such an approach in the future revised Directive, which would duly take into account personal data protection.

As an example, the French 2009 Creation and Internet law created a government agency called HADOPI (High Authority for Transmission of Creative Works and Copyright Protection on the Internet) as an intermediary between the rightsholders who collect IP addresses of alleged IPR infringers and internet service providers (ISPs). It is the ISPs who send warnings to their customers without needing to transmit personal data of alleged infringers to rightsholders.

II. THE FAIR BALANCE BETWEEN THE RIGHT OF INFORMATION AND PRIVACY LAW

As mentioned in the Commission's report, national laws must allow the courts to apply EU laws on IPR enforcement. According to the Court of Justice of the European Union² 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 IPR) given that both are recognised as fundamental rights by the Charter of Fundamental Rights of the European Union.

However, Spanish legislation on data protection impedes rightsholders from obtaining information necessary to prosecute online IPR infringers. This is due to the restrictive national implementation of EU Directives on personal data protection. The adoption on 15 February 2011 of the law on Sustainable Economy might improve the situation in the future as it creates an Intellectual Property Commission which is dependent to the Ministry of Culture. This Commission will be entitled to ask internet service providers, after previous judicial authorisation, to communicate private data necessary to identify the alleged infringer.

In addition, the limited scope of the right to information to acts carried out on a commercial scale (article 8 of the Directive) prevents the full exercise of the right to information in all infringing situations.

The Commission should take the opportunity of the revision of the Directive to guarantee an effective balance between IPR and the data protection right, in order to allow the provision on the right of information to effectively protect right holders.

² Judgment of 29 January 2008 in the case C-275/06 *Productores de Música de España (Promusicae) v. Telefónica de España SAU*.