



Response to the European Union consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights (IPR)

European Film Agency Directors (EFADs)

ID: 430805515370-85

April 2016

About EFADs

The Association of the European Film Agency Directors (EFADs) brings together the Directors of European Film Agencies from 31 countries in Europe (EU28, Iceland, Norway and Switzerland). EFADs represent government, or government associated bodies, in charge of national funding for the audiovisual sector and/or the regulation of film. EFADs members also have the responsibility to advise on all aspects of national and European audiovisual policies.

Altogether, EFADs members distribute around 3 billion Euros every year to the film sector in Europe¹ with a view to foster the creation, production, promotion, distribution and exhibition of high quality and diverse European audio-visual and cinematographic works. By doing so, they do not only contribute to the creation of economic value but they also play a major role in ensuring European cultural diversity that forges a common European conscience and identity.

Executive Summary

EFADs welcome the opportunity to contribute to the European Commission's consultation on the Intellectual Property Rights Enforcement Directive (IPRED). EFADs is however an association and therefore we do not have direct experience of the enforcement of intellectual property rights. Moreover, the experience of the implementation of IPRED will vary widely across different Member States. We are therefore unable to answer in the form of the questionnaire.

Instead, in this paper we make some general observations and recommendations to address the issue of copyright infringement in Europe. These recommendations cover the

¹ See footnote 1 of the Cinema Communication: "EUR 2.1. billion of support is provided annually by European film funds" (<http://www.obs.coe.int/about/oea/pr/fundingreport2011.html>). Several EFADs members are also responsible for distributing tax incentives. According to a study into the economic and cultural impact of territorial conditions in film support schemes, a further, estimated EUR 1 billion is provided by Member States through film tax incentives. (http://ec.europa.eu/avpolicy/info_centre/library/studies/index_en.htm#territorialisation)

enforcement framework in its entirety, focusing on the liability exemption, duty of care, transparency online, the balance of rights, simplified cross-border enforcement, injunctions and liability, voluntary agreements and collaborations, film education and media literacy.

General Observations

From the EFADs perspective, copyright infringement represents a significant threat to the sustainability of the independent film industries and to consumers. Infringement has a negative impact on innovation, investment, circulation and access to legal offers, and cultural diversity.

Copyright infringement has grown exponentially over the last ten years. The digital age has facilitated the illegal distribution of content leading to the rapid growth of illegal, highly organised and profit-driven platforms. These platforms host or facilitate the distribution of illegal content, setting up commercial scale structures making a profit out of advertisements, paid subscriptions and donations among other things. They often do not respect other legal requirements, have links to organised crime, and pose serious risks to consumers.

EU citizens are regularly accessing illegal content online, particularly young people. A recent study published by the European Intellectual Property Office (EUIPO) in April 2016 reported that:

A quarter of EU citizens aged between 15 and 24 admit to intentionally using illegal sources to access online content in the past 12 months... Most say they do this because it is free, or cheaper than accessing content from legal sources. *Films and series* were the most accessed types of content from illegal sources, followed by music and games... The second most important reason to use illegal sources indicated by 38% of young people who do so is that they do not see anything wrong in doing it as it is for their personal use.²

It is therefore crucial that the policies of the European Union are fit for purpose and allow the effective enforcement of rights by right holders in the face of rapidly changing technologies and consumer behaviour.

The EFADs believe that there are a number of significant challenges to the overall enforcement regime for copyright in the EU which need to be addressed. IPRED and the E-Commerce Directive represent very important planks of the Commission's policies for the enforcement of rights. Nonetheless, it must be recognised that there have been significant developments in technology since the Directives were adopted in 2004 and 2000 respectively. We encourage the Commission to look at how these Directives can be brought into the digital age. The Commission should also support voluntary agreements and collaborations which can complement the legislative framework.

Effective enforcement is about ensuring a fair balance among all the market operators involved – right holders, creators, and Internet services – whilst providing the legal security necessary for the development of innovative private initiatives.

² EUIPO. April 2016. "Intellectual Property and Youth – Scoreboard 2016" [*emphasis added*]

Recommendations

a) Hosting/promoting and referencing illegal content

EFADs believe that the E-Commerce Directive offers a liability exemption in Articles 12-14 which is ambiguous and subject to abuse by copyright infringers. EFADs encourage the Commission to explore how to implement the liability exemption more effectively. This could, for example, be achieved through an interpretative communication, revision of the Copyright Directive and/or IPRED.

The problem lies in its misuse by online intermediaries involved in the distribution of copyright protected content who deny responsibility for the transmission of illegal content. The liability exemption should be limited to providers that are only passively hosting and transmitting information and not to platforms active in content distribution. Where platforms act to directly and voluntarily address the public (for example by distributing copyright related content) they should not be considered neutral technical providers and should not benefit from the liability exemption.

The exemption needs to be adapted to ensure a fairer treatment of online service providers. One area we encourage the Commission to look at is a better definition of “intermediary”. This should describe the types of activities which exclude an intermediary from utilising the liability exemption. For example, when an intermediary acts anonymously they should not be able to invoke the exemption. The definition should also be broad enough to cover search providers, ad networks and payment providers. Moreover, the injunction rule should apply to information service providers “who host information provided by recipients of their service” (Recital 48 - E-Commerce Directive) and who “are best placed to bring infringing activities to an end” (Recital 59 - 2001 Copyright Directive). We encourage the Commission to look at the CJEU’s decisions on LSG and Telekabel.

b) Duty of Care

Intermediaries are essential in the battle against piracy. Their services are often used for illegal activities and therefore they have a responsibility to prevent such activities. Nevertheless, mere technical intermediaries often refuse to take significant and pro-active measures to tackle commercial-scale infringement out of fear that they will become liable. The only option left to rights holders is to go through lengthy and costly court procedures to obtain an injunction. For mere technical intermediaries, their role should be properly defined and a “duty of care” should be introduced that comprises a minimum set of commitments to prevent infringements of copyright:

- Use of tools such as digital recognition and finger printing of works to identify copyright protected works.
- Notice and stay down procedures so that infringed content is identified, removed, does not reappear in another guise (file renamed, multiple accounts) and is not posted by another user. There is already clarification on “stay down” in the CJEU’s decisions on L’Oreal v. eBay and Kino.to which could be codified if legislative action is pursued. There should also be rapid, machine-to-machine mechanisms available via the platform so that content providers can notify the platform. It is also essential that there are short response times once an intermediary has been notified. These procedures should be limited to removing links or illegal content.
- Delisting and website-blocking of structurally infringing sites. Search engines in

particular enable easy access and high visibility to operators distributing illegal content. Search engines should set up structures that de-rank sites subject to multiple justified notifications. There should be a reflection at EU level on how to address the role and functioning of search engines in respect to fighting piracy.

- Suspension/termination of domains and customer accounts making illegal content available.
- In all cases, identification of systematic infringers upon request by a “notice giver”. This would be possible if we eliminate the immunity that anonymity provides to infringers by extrapolating from the offline world the principle of “know your customer” through an information obligation targeting users. The said obligation must be the least intrusive possible and in compliance with the personal data protection rules.

These obligations are essential if piracy is to be tackled online effectively. If a platform attempts to avoid these obligations then they should be prevented from using the liability exemption.

c) Transparency Online

Effective enforcement and consumer protection is dependent upon transparency. Unfortunately this is not the case online with many illegal online platforms hiding behind several layers of anonymity. These illegal platforms provide false or no information on their websites and in contracts agreed with intermediaries. This allows them to engage in all kinds of harmful activities whilst avoiding law enforcement and regulations. For example, these platforms will often distribute malware, show inappropriate content and advertising which can be easily viewed by minors, and engage in copyright infringement.

When it comes to IPR enforcement online, this lack of transparency is problematic. Online intermediaries are required to put in place procedures to validate the identity of their counterparties but this provision is not implemented. Article 8 of the IPRED on the right to information is therefore made ineffective because the information a rights holder requests from an intermediary on an illegal platform operator is often falsified. Right holders will often go through lengthy and costly court proceedings to obtain this information, only to end up with information they cannot use. As already mentioned, intermediaries should be subject to a “know your customer” obligation.

Better implementation of Article 5 of the E-Commerce Directive would also go some way to creating more transparency online. Article 5 outlines general information an operator of a service has to provide to recipients of the service and competent authorities. This includes a name, geographical address, where the service is registered to trade, and the email address of the operator. This is clearly not enforced and EFADs encourage the Commission to impose sanctions on those who fail to comply.

d) The Balance of Rights

Article 8 on the right to information in IPRED is weakened further by different interpretations of the balance between the right to property and the protection of personal data in the member states. National courts have interpreted this balance differently which has often denied right holders important information for pursuing illegal platforms. At the same time, compliance with data protection rules is necessary to ensure trust online.

Therefore the Commission should consider clarifying the balance which could be based on the CJEU Promusicae and Kino.to case law.

e) Simplified Cross-Border Enforcement

In Article 3 of IPRED, member states are required to provide “measures, procedures and remedies” which are not “unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.” Unfortunately, the cross-border nature of enforcement online and uneven implementation of the enforcement framework in the member states has meant it has become complicated, costly and time consuming to enforce rights. Different implementation and legal systems means enforcement must be adapted to each member state. We would encourage the Commission to implement the framework more effectively to reduce this burden.

f) Injunctions and Liability

Liability should not be a prerequisite for an injunction. If this were the case, Article 11 would become ineffective because the liability exemption is unclear and often circumvented by illegal online platforms. Moreover, recent CJEU case law regarding Kino.to, Sabam v. Scarlet and L’Oreal v. eBay has concluded already that this should not be a requirement.

g) Voluntary Agreements and Collaborations

In addition to any legislative steps, EFADs encourage the Commission to support voluntary agreements and collaborations to tackle online infringement. Cooperation between rights holders and platforms should be supported at EU level to ensure the introduction of “rapid and reliable procedures for removing and disabling access to illegal information”. EFADs also strongly support the Commission’s plans on the Follow the Money initiative which covers online payment providers and advertisers.

Finally, EFADs encourage member states to improve the efficiency of their cooperation. IPR infringement in the digital world usually has a cross-border nature and affects multiple member states. Cooperation is therefore essential and this could be fostered at EU and international level, for example through exchanges of information and coordination. This will also help to avoid regulatory distortions in the area of IPR enforcement in order to prevent illegal platforms locating in Member States that have less stringent enforcement regimes.

h) Film Education and Media Literacy

EFADs encourage the development of education campaigns to ensure that young people and other EU citizens are fully aware of how copyright can protect their own creativity, and to discourage them from downloading and uploading illegal content. It is important that EU citizens recognise the value of copyright protected content and are able to distinguish between legal and illegal content.

This is a necessary foundation to a broader campaign to promote film education and media literacy. Film plays a crucial role in the development of human identities, cultural affiliation and understanding. They are an integral part of the effort to build a safe but innovative digital environment which empowers European citizens through critical engagement with audiovisual content.

Film education and media literacy are at the heart of cultural and educational policy making in the 21st Century. Schools and colleges, in many EU countries, have access to copyright exemption arrangements which allow rights holders to make their content available for the benefit of education. Moreover, new film education methods and partnerships are being developed which emphasise the importance of film as a tool for reflection and critical understanding. We encourage a debate at EU level to examine how to establish an environment in which film and other moving image can become central to the curriculum.

We are available for further information

Samuel Young
Secretary General
European Film Agency Directors Aisbl
ID: 430805515370-85
Samuel.young@efads.eu
Tel. +32 2 231 12 99