

collective management societies and by collective bargaining agreements also varies among the Member States. All in all, there are substantial differences in regulatory approaches across the EU and substantial differences across sectors of creative industry. These different approaches are likely to become more evident as multi-territorial exploitation by on-line service providers becomes more frequent.

Further details are presented in Annex M.

3.6. Enforcement

The shift to digital technologies has allowed creators and other economic actors in the value chain to find new ways to market their products but has at the same time opened the door to new forms of infringements, in particular commercial-scale infringements aiming at generating profit. Concerns have been raised as to whether some of the provisions of the current legal framework (IPRED and Article 8 of the Infosoc Directive) strike the correct balance for the enforcement of copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet in particular in an online cross-border context; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights. More generally, effectiveness and efficiency of IPR enforcement may be improved while underpinning its legitimacy in the wider context of the copyright reform.¹⁴⁸

3.6.1. Rules on gathering of evidence and identification of infringers are divergent and not adapted to the digital environment

Articles 6, 7 (gathering and preserving evidence) and 8 (right of information) of IPRED offer tools to right holders to access information, evidence etc. in order to effectively protect their IPRs in civil court procedures. However, these tools are not always adapted to deal with infringements of copyright occurring on the internet, in particular to identify or keep evidence of infringements in case of services which propose tools allowing the dissemination of infringing content and which make profit out of these activities.

First, problems stem from the fact that these provisions have been implemented differently across Member States, which first leads to different levels of enforcement of copyright and second makes it difficult to apply cross-border measures, in particular the cross-border collection of evidence. Divergences relate for example to the condition imposed to use the right of information, in particular whether it is possible to use this tool as a preliminary measure or only in the context of an already existing proceeding, or the use of a “commercial scale” criteria to be able to access this tool (see Annex N for further details). Because of the differences in the transposition of Articles 6 and 7 of IPRED into national law by Member States, a court could be faced with a measure requested by a foreign court which is not known in its own state, and could then be reluctant to execute it. In the IP field, some national courts have already refused to execute a measure aiming at preserving evidence requested by a court from another Member State. The finding of the Consultation on the civil enforcement of IPR is that only very few respondents indicated that they had obtained a court order decision to request an intermediary established in another Member State to provide information on the identity of the infringer.

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Communication from the Commission on content in the Digital Single Market, COM (2012) 789.

Second, further difficulties arise when these tools are used in the online environment. The fact that almost all responses to the Consultation on the civil enforcement of IPR concerning problems of identification of infringers related to infringements occurring on the internet highlights this.¹⁴⁹ The main problem in this area relates to the articulation between the rules on the identification of infringers and the protection of personal data/ privacy (half of those who reported in that Consultation that they were denied access to information reported that the refusal was based on personal data protection and privacy). IfIPRED stipulates, in recitals (2) and (15) as well as in Article 8(3)(e), that its provisions are without prejudice to the protection of personal data, neither IPRED, nor other pieces of EU legislation contain specific provisions on the retention and disclosure of personal data to copyright holders for the purposes of IPR civil enforcement.¹⁵⁰ (see Annex N for further details). It was reported, in particular in the Consultation on the civil enforcement of IPR, that the articulation between the different rules is often not provided in the Member States legislations which is likely to affect the effectiveness of measures implementing Articles 6, 7 and 8 while at the same time raising concerns in terms of protection of personal data. Problems of effectiveness of the rules are linked to the period of retention of data, the possibility for internet service providers (and their willingness) to legally disclose alleged infringer's identities or the accuracy of the data disclosed. The problem is particularly salient for infringers operating anonymously, changing IP addresses rapidly and channelling the revenues they get from their activity through empty shell companies. At the same times, cases of overzealous enforcement of copyright allowed by the use of the tools provided for by IPRED were reported (see Annex N for further details).

3.6.2. Rules on provisional measures and definitive injunctions tend to be ineffective against copyright infringements in the on-line environment

The main problem relates to the extent to which it is possible to involve intermediaries not only to help identify infringers as examined above but also in putting an end to infringements of copyright on the internet. Enforcement of copyright can in the first place be directed towards the actual perpetrator of the infringement himself, but this is often difficult given the ubiquitous nature of infringements on the internet and the possibility for infringers to operate in an anonymous way as described above. For cases where direct action against the perpetrator of the infringement is not possible or very difficult, involving intermediaries can be a solution to put an end to the infringement. This is the reason why EU law provides rules on injunctions against intermediaries (Articles 9 and 11 of Directive 2004/48/EC and Article 8 of the Infosoc Directive). However, these rules appear to be ineffective to deal with infringements of copyright over the internet, which is particularly problematic in cases of commercial-scale infringements giving rise to revenues.¹⁵¹

The problem seems to stem from the fact that there is no harmonised understanding of the types of intermediaries covered, of the types of injunctions that be ordered against intermediaries, in what circumstances they may be issued, under which conditions and within

¹⁴⁹ Of 136 responses received on problems relating to the identification of infringers, only around 3% did not relate to infringements on the internet. See http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm

¹⁵⁰ This situation was reflected in the consultation on the civil enforcement of IPR: 68% of 146 respondents declared having faced problems in the identification of (alleged) infringers of their IPR. However, the consultation does not allow saying whether these problems were all related to data protection or had other reasons.

¹⁵¹ The Consultation on the civil enforcement of IPR seems to reflect this: Very few stakeholders took a stand on the issue of injunctions imposed on intermediaries (28 respondents stated clearly that they obtained a preliminary injunction and 25 indicated that they obtained a permanent injunction). Other respondents indicated that preliminary injunctions were not granted due to an exemption of the intermediary from liability, difficulties in proving the intermediary's knowledge or involvement in the infringing activity or lack of sufficient merit of the claim.

Draft to be finalised in light of responses to the public consultation

which delays. There is in particular a need to clarify how to articulate the possibility to impose injunctions on intermediaries given the prohibition for Member States to impose a general monitoring obligation on internet service providers which is also part of the EU acquis.¹⁵² The lack of clarity concerning the extent to which intermediaries can be involved does not only affect the effectiveness of the protection of IPR but is also likely to raise concerns in terms of protection of fundamental rights, for example the freedom to conduct a business or the freedom of expression (see Annex N for further details).

There is therefore a need on the one hand to clarify the extent to which intermediaries can be involved to help putting an end to copyright infringements on the internet, while on the other hand ensuring that other EU legal provisions including fundamental rights are duly taken into account.

3.6.3. Insufficient relief to copyright holders for infringements to their rights

Compensation to the right holder for the prejudice suffered as a result of infringements of copyright is generally low and has little deterrent impact. More particularly on the internet, it is difficult to prove the exact scope of the infringing use and therefore the actual damages that have occurred. Right holders claim that in many instances damages are set at levels that are neither dissuasive nor even compensate the right holder's actual losses (and legal expenses).¹⁵³ This problem has also been acknowledged by some Member States, e. g. France recognised the difficulty for judges to assess the level of damages and recommended increasing the use of experts to improve the level of indemnification (see Annex N for further details).

Also, in spite of Article 14 of Directive 2004/48/EC, in practice, copyright holders are rarely reimbursed all legal costs and other expenses they incur to protect their copyright through litigation. This, together with the low levels of damages awarded, may inhibit copyright holders' possibilities and readiness to institute proceedings, even in cases of infringements with a commercial purpose involving significant levels of profits for the infringer. As the Consultation on the civil enforcement of IPR showed, right holders might refrain from litigation if they held the court proceeding lengthy, costly and do not expect to get properly compensated.¹⁵⁴

3.7. How would the problem evolve, without EU action? [to be finalised in light of responses to the public consultation]

A range of outcomes can be envisaged in the event that the EU does not act, depending on the specific issue. In some cases, likely developments, especially long term, are extremely uncertain.

With regard to the cross-border availability of content, trends vary by sector. Publishers may continue to grant multi-territorial licences for e-books, while some e-books retailers are likely to continue into the longer term to fragment the market for commercial reasons unrelated to copyright. In the music sector, the explosion of legal services means that consumers in all EU Member States have access to a wide range of services at national level. Restrictions by platforms and/or rights holders may limit cross-border access, but cross-border portability of

¹⁵² Article 15 of Directive 2000/31/EC.

¹⁵³ For example, during the IPRED Consultation, Austrian association 'Film and Music' indicated that damage claims are rarely deterrent in cases of structurally infringing sites since the profits are very substantial and the abilities to hide assets due to the aforementioned problem of being able to do business anonymously.

¹⁵⁴ 51% of the respondents have indicated that they would refrain from litigation because of such reasons.

8.18. ANNEX N: ENFORCEMENT

With the internet, behaviours concerning the consumption of copyrighted content (in particular music but increasingly films and books as well) has changed dramatically. Until the spread of the internet, music consumption took place either through broadcast/TV or the purchase of phonograms. The number of producers of broadcasts and phonograms was fairly limited and the production of high quality counterfeits relatively expensive. Therefore, infringement levels were comparatively low and the enforcement of copyright was reasonably straightforward.

The internet has changed the situation in many respects:

- New possibilities of music consumption have opened up: internet radio, file (e.g. mp3) download on various devices, web streaming.
- All these new modes of consumption are, physically, not limited by distance or borders.
- Marginal costs of producing copyright infringing digital copies of the identical quality as the original are almost zero.
- The same holds for transaction costs (publicising websites/P2P download possibilities etc., dissemination of copies), arguably only financial transactions still represent a certain cost factor.
- Internet facilitates to a certain extent anonymity of its users.

Pirated material can literally be sent by everybody from everywhere to anybody anywhere. Moreover, infringements of copyrighted content online have become so frequent that they are no longer considered by consumers as illegal or even if illegal, as causing economic harm. At the same time, given that technology allows for almost perfect copies at low cost, piracy has become an even more profitable business.

1. Current EU and national legal frameworks

The current EU regulatory framework already provides for tools which can in principle be used to tackle online copyright infringement. The Directive on the enforcement of IPR (Directive 2004/48/EC, "IPRED") and Article 8 of the Infosoc Directive make provision for civil remedies in case of infringement of copyright. These provisions encompass in particular evidence-gathering powers for judicial authorities, powers to force offenders and any other party commercially involved in an infringement to provide information on the origin and distribution network of the infringing goods, provisional and precautionary measures (including against intermediaries whose services are used to infringe a copyright), permanent injunctions, powers to force offenders to pay damages. Directive 2000/31/EC on the electronic commerce is also relevant in the context of the enforcement of copyright. Article 14 of this Directive, as interpreted by the European Court of Justice, provides that, for a hosting service provider to avoid being held liable for illegal content (including content infringing copyright), it should expeditiously act on adequately substantiated and sufficiently detailed notices⁴⁰¹. At the same time its Article 15 prohibits Member States from imposing on intermediaries a general obligation to monitor content that they transmit or host.

⁴⁰¹ "Acting" takes the form of removing or disabling access to the illegal content by a "hosting provider".

Draft to be finalised in light of responses to the public consultation

Beside these harmonisation instruments, the EU has also launched in 2009 a European Observatory on infringements of IPR. This has, included in its tasks, the need to identify trends in on-line copyright infringement in order to provide evidence on the need for adjustments to enforcement policy in this field. It has recently undertaken a first survey⁴⁰² for this purpose that will be repeated on a bi-annual basis.

This EU framework has created high European legal standards to enforce copyright. All Member States have implemented IPRED as well as Article 8 of the Infosoc Directive and provided for civil remedies in case of infringement of copyright. Some Member States have also implemented other measures than those foreseen in IPRED to encourage better compliance with copyright law (for example administrative procedures in France with the HADOPI law⁴⁰³, in Spain with the Ley Sinde⁴⁰⁴, or in Italy with the regulation on online copyright enforcement⁴⁰⁵). At Member States level, the legal framework regarding the liability of hosting service providers (Article 14 of the e-commerce Directive referred to above) has created an incentive for the development of “notice-and action” procedures that are used to enforce copyright on the internet. However, as concluded by the Commission in IPRED’s application report⁴⁰⁶, despite an overall improvement of enforcement procedures the volume of infringements has not decreased because of the unprecedented increase in opportunities to infringe IPR offered by the internet⁴⁰⁷. The report concludes that the Directive on its own is not necessarily fit for purpose anymore because it was not designed with this challenge in mind. As a consequence, some measures will remain ineffective while others could give rise to growing concerns regarding the respect of fundamental rights.

⁴⁰² The European Citizens and Intellectual Property: Perception, Awareness and Behaviour, <https://oami.europa.eu/ohimportal/en/web/observatory/observatory-publications>

⁴⁰³ Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet http://www.legifrance.gouv.fr/affichTexte.do?sessionId=C06CF191ECA64835E58B417557BF3F08.tp&djo01v_2?cidTexte=JORFTEXT000020735432&dateTexte=

⁴⁰⁴ Ley 2/2011, de 4 de marzo, de Economía Sostenible, <http://www.boe.es/buscar/act.php?id=BOE-A-2011-4117&p=20131023&tn=0>

⁴⁰⁵ Regolamento in materia di tutela del diritto d’autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, N° 70 <http://www.agcom.it/Default.aspx?DocID=12229>

⁴⁰⁶ Report from the Commission on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights, COM(2010)779 final (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0779:EN:NOT>)

⁴⁰⁷ It is extremely difficult to estimate the exact scale of the problem, the quantity of illegal downloads and the economic impact on rightholders. Nevertheless, a study carried out by RAND in 2012 gives an overview of studies evaluating the impact of piracy on different industries, based on surveys or figures provided for by the industry itself. For example, in the software industry, a 2010 Business Software Alliance study reported an estimated global software piracy rate of 43% for 2009, expressed in terms of units of pirated software installed relative to total units of software installed. In the movie industry, a LEK Consulting study (Motion Picture Association of America, 2006) found that Motion Picture Association member companies lost \$6.1 billion in revenues due to piracy in 2005. \$1.4 billion to illegal copying, and \$2.3 billion came from online UUPC. Finally, in the music industry, the International Federation of Phonographic Industry reported a global average piracy rate of 38% in 2006 as a share of total sales (Siwek, 2007, p. 20). At the EU-27 level, a 2010 Tera Consultants study estimated Euro 5.3 billion lost revenues in the audiovisual sectors and Euro 4.5 billion in the software industry. Report “Measuring IPR infringements in the internal market Development of a new approach to estimating the impact of infringements on sales”, RAND, 2012.

http://ec.europa.eu/internal_market/iprenforcement/docs/ipr_infringement-report_en.pdf

This was for example the case for a “description” in the case C-175/06, Tedesco, that was refused to be performed by the British authorities on the ground that such measure were not in keeping with national practices.

2. Problems identified in the current legal framework

2.1. Rules on gathering of evidence and identification of infringers are divergent and not adapted to the digital environment

Articles 6, 7 (gathering and preserving evidence) and 8 (right of information) of IPRED offer tools to right holders to access information, evidence etc. in order to effectively protect their IPRs in civil court procedures. However, these tools are not always adapted to deal with infringements of copyright occurring on the internet, in particular to identify or keep evidence of infringements in case of services which propose tools allowing the dissemination of infringing content and which make profit out of these activities. Two particular sets of problems have been identified in relation to these tools.

First, the provisions foreseen in IPRED have been *implemented differently* across Member States, which first leads to different levels of enforcement of copyright and second makes it difficult to apply cross-border measures, in particular the cross-border collection of evidence.

Some Member States provide for provisional measures to obtain and preserve evidence, while others consider the preservation of evidence as a distinct procedure. Other divergences relate to the condition to use the right of information, in particular whether it is possible to use this tool as a preliminary measure or only in the context of an already existing proceeding. The possibility to use the tool as a *preliminary measure* is particularly important in the context of infringements of copyright on the internet where the identification of the infringer is often extremely difficult and necessary to start a proceeding. Other divergences across Member States relate to the *condition of "commercial scale"* in order to use the right of information or other tools relating to the gathering of evidence. The notion of "commercial scale" (which was not defined in IPRED but explained in a recital) varies across Member States where it can be understood as a quantitative or as a qualitative (profit making aim) requirement. The condition of commercial scale to be able to use identification tools (right of information) is not imposed in an uniform way across Member States. Some Member States do not impose this condition at all, other impose this condition only for the activity of the third party who is required to divulge the identity of the infringer, others impose this condition for the activity of the infringer itself.

These divergences not only create disparities in the level of protection of copyright, they also lead to problems for the cross-border enforcement. Because of the differences in the transposition of Articles 6 and 7 of IPRED into national law by Member States, a court could be faced with a measure requested by a foreign court which is not known in its own state, and could then be reluctant to execute it. In the IP field, some national courts have already refused to execute a measure aiming at preserving evidence requested by a court from another Member State. The finding of the Consultation on the civil enforcement of IPR is that only very few respondents indicated that they had obtained a court order decision to request an intermediary established in another Member State to provide information on the identity of the infringer.

Second, *further difficulties* arise when these tools are used in the *online environment*. The fact that almost all responses to the Consultation on the civil enforcement of IPR concerning problems of identification of infringers related to infringements occurring on the internet highlights this⁴⁰⁸. The main problem in this area relates to the articulation between the rules

⁴⁰⁸ Of 136 responses received on problems relating to the identification of infringers, only around 3% did not relate to infringements on the internet. See http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm

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on the identification of infringers and the protection of personal data/ privacy (half of those who reported in that Consultation that they were denied access to information reported that the refusal was based on personal data protection and privacy).

IPRED stipulates, in recitals (2) and (15) as well as in Article 8(3)(e), that its provisions are without prejudice to the protection of personal data. At the same time, neither IPRED, nor other pieces of EU legislation contain specific provisions on the retention and disclosure of personal data to copyright holders for the purposes of IPR civil enforcement.⁴⁰⁹ The European Court of Justice has clarified that the Union's *acquis* does not preclude Member States from imposing an obligation to disclose to private entities or persons personal data of citizens in order to enable them to bring civil proceedings for copyright infringements against these citizens, but nor does it require those Member States to lay down such an obligation⁴¹⁰. The CJEU has also clarified that rules concerning the retention of data for civil enforcement of IPR purposes do not fall within the scope of Directive 2006/24 on the retention of data. The articulation between rules on gathering of evidence and identification of infringers and rules on protection of personal data is therefore left to the Member States (provided that they strike a fair balance between the various fundamental rights protected by the European Union's legal order). However, it was reported, in particular in the Consultation on the civil enforcement of IPR, that the articulation between the different rules is often not provided in the Member States legislations which is likely to affect the effectiveness of measures implementing Articles 6, 7 and 8 while at the same time raising concerns in terms of protection of personal data. This conflict has, for example, been acknowledged by the Austrian Supreme Court in the decision 'LSG vs Tele 2': "*As no explicit provision exists which requires the storing of traffic data to disclose identities and information to prosecute copyright infringers, the current right to information is worthless as the data which would be required are not entitled to be stored in the first place*"⁴¹¹.

The problems are as follows:

- (a) Right holders complain that the retention of data, which is necessary to have access to the identity of infringers on the internet, can either be impossible for copyright civil enforcement purposes or too short to be useful in the framework of civil proceedings.
- (b) In cases of copyright infringements committed via the internet, internet service providers may often not be in a position to disclose alleged infringers' identities and contact details to right holders, even in the context of judicial proceedings, because of the lack of legal basis at EU and national level to disclose personal data;
- (c) Moreover, even if intermediaries are willing to provide contact details of their clients following a Court order, the accuracy of these data is sometimes questionable. Many websites tend to operate anonymously, i.e. they register fake 'WHOIS' data and operate their business through empty shell companies. The problem is often compounded by the fact that some intermediaries offer services facilitating anonymous registration of domain names or allowing the actual IP addresses of the infringing websites to be hidden and generally provide services such as hosting

⁴⁰⁹ This situation was reflected in the consultation on the civil enforcement of IPR: 68% of 146 respondents declared having faced problems in the identification of (alleged) infringers of their IPR. However, the consultation does not allow saying whether these problems were all related to data protection or had other reasons.

⁴¹⁰ C-275/06, *Promusicae* (2008) and C-557/07, *LSG v/ Tele 2* (2009).

⁴¹¹ Decision of the Austrian Supreme Court of 13 November 2007.

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without ensuring that contact details are accurate and/or up to date. Right holders therefore complain that they do not have access to more data in case of infringements. The problems are particularly salient for infringers operating anonymously, changing Ip addresses rapidly and channelling the revenues they get from their activity through empty shell companies.

- (d) The lack of clarity concerning the articulation between enforcement of IPR and protection of personal data is not only likely to affect the effectiveness of provisions on the identification of infringers, but it can also raise concerns in terms of protection of fundamental rights of individuals to privacy and data protection (as enshrined under Article 7 of the Charter of Fundamental rights of the European Union and Article 8 ECHR, under Article 8 of the Charter of Fundamental rights of the European Union, and under Article 16 TFUE). It was reported that in some instances right holders collect and process data, e.g. by monitoring of IP addresses involved into file sharing or even streaming practices, using technical means that might not respect quality standards that guarantee the correctness of the data. They sometimes use the data collected through the execution of a Court order to “offer” out-of-court settlements to individuals without having the intention to launch a procedure. As a consequence, individuals might be exposed to possibly overzealous enforcement of IPR by the respective right holders.

2.2. Rules on provisional measures and definitive injunctions tend to be ineffective against copyright infringements in the on-line environment

The main problem relates to the extent to which it is possible to involve intermediaries not only to help identify infringers as examined above but also in putting an end to infringements of copyright on the internet. Enforcement of copyright can in the first place be directed towards the actual perpetrator of the infringement himself, but this is often difficult given the ubiquitous nature of infringements on the internet and the possibility for infringers to operate in an anonymous way as described above. For cases where direct action against the perpetrator of the infringement is not possible or very difficult, involving intermediaries can be a solution to put an end to the infringement. This is the reason why EU law provides rules on injunctions against intermediaries (Articles 9 and 11 of Directive 2004/48/EC and Article 8 of the Infosoc Directive). However, these rules appear to be ineffective to deal with infringements of copyright over the internet, which is particularly problematic in cases of commercial scale infringements giving rise to revenues.⁴¹²

The problem seems to stem from the fact that there is no harmonised understanding of the types of intermediaries covered, of the types of injunctions that be ordered against intermediaries, in what circumstances they may be issued, under which conditions and within which delays. For example, often courts appear to focus exclusively on internet service providers (ISPs) as intermediaries on the internet. Some Member States' courts have linked the question of granting an injunction against an ISP to the establishment of some kind of responsibility of the intermediary which makes the granting of preliminary injunctions

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The Consultation on the civil enforcement of IPR seems to reflect this: Very few stakeholders took a stand on the issue of injunctions imposed on intermediaries (28 respondents stated clearly that they obtained a preliminary injunction and 25 indicated that they obtained a permanent injunction). Other respondents indicated that preliminary injunctions were not granted due to an exemption of the intermediary from liability, difficulties in proving the intermediary's knowledge or involvement in the infringing activity or lack of sufficient merit of the claim.

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against intermediaries very difficult⁴¹³. There is a need to clarify how to articulate the possibility to impose injunctions on intermediaries given the prohibition for Member States to impose a general monitoring obligation on internet service providers which is also part of the EU acquis.⁴¹⁴ It was also reported in the framework of the Consultation on the civil enforcement of IPR, that there are other burdensome requirements in some Member States that can constitute a disincentive for right holders to bring an action; for example, in Finland, a case against the primary infringer/operator of a site as well as high guarantee sums in court were required before an injunction would be enforced. Furthermore, right holders complained that injunctions against intermediaries in some Member States have an ineffective scope, insofar as they only enjoin the intermediary from allowing exactly the same infringement to happen (i.e. a continuation of the specific infringement by the same infringer), whereas in practice it is quite possible that the same infringer may engage in future infringements of the right owner's title/product and this is particularly challenging for the protection of copyrighted works on-line. There are also doubts about the possibility to deliver injunctions on a catalogue-wide or only on a title-specific basis, which is very relevant when dealing with websites infringing copyright for a commercial purpose. It is not clear either whether ex parte injunctions which are foreseen in IPRED are possible when the recipient of the injunction is an intermediary. Finally, the possibility to request injunctions against intermediaries established in different Member States or to consolidate several actions in one jurisdiction is also very limited. According to the Consultation on the civil enforcement of IPR, many right holders indicated that they had obtained neither a preliminary nor a permanent injunction imposed on an intermediary providing services necessary to access the infringing services/goods when the intermediary or the person infringing/allegedly infringing his IPRs were incorporated in a Member State other than the one in which the right holder operated. Some of the respondents stressed that such legal actions – if possible according to the national legislation – are usually pursued in the country, where the intermediary is located. Moreover, the Consultation on the civil enforcement of IPR, despite acknowledging the general increase in the number of cross-border IPR infringements, revealed that the majority of stakeholders did not launch proceedings concerning such infringements that occurred in another Member State or in several Member States⁴¹⁵.

The lack of clarity concerning the extent to which intermediaries can be involved does not only affect the effectiveness of the protection of IPR but is also likely to raise concerns in terms of protection of fundamental rights. It can for example not be excluded that an injunction against an intermediary would constitute a restriction to the freedom to conduct a business of the intermediary, in which case any such limitation would have to be provided by law in accordance with Article 52 of the Charter of Fundamental Rights⁴¹⁶. Such an injunction

⁴¹³ In the Consultation on the civil enforcement of IPR, France, whose legislation includes within the notion of intermediaries those whose services are used by an infringer in the framework of its IPR infringing activity, called for a clarification in IPRED that injunctions are available independent of any liability of the intermediary.

⁴¹⁴ Article 15 of Directive 2000/31/EC.

⁴¹⁵ For this reason, some of the respondents to Consultations on the civil enforcement of IPR called for an initiative at EU level, which would facilitate cross-border measures (i. e. against intermediaries), consolidation of claims and automatic enforcement of specific injunctions/judicial decisions issued in one Member State throughout the European Union (either directly or in expedited court procedure).

⁴¹⁶ Following the ECtHR case law in this respect, this requirement implies not only that a domestic law exists as such but also imposes a certain requirement as to the quality of the law at stake, which would have to "be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [...] Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the

Draft to be finalised in light of responses to the public consultation

could also result in a restriction of access to content and as such, may be considered as a restriction on the freedom of expression and such a limitation would have to be provided by law in accordance with Article 52 of the Charter of Fundamental rights as well. It follows that an injunction with a broad scope or that lacks clarity as concerns its exact scope and specificity in terms of measures that would have to be implemented would raise serious concerns as to the requirement that any limitation of a Charter right would have to be provided by law. Moreover, the burden and cost of the implementation of the injunction imposed on an intermediary can also be problematic. In the *Scarlet case*⁴¹⁷, the CJEU considered an injunction requiring an ISP to install a filtering system applying to all electronic communications passing via its services, which applies indiscriminately to all its customers as a preventive measure, exclusively at its expense and for an unlimited period would result in an infringement of the freedom of the ISP concerned to conduct its business and would be contrary to the conditions laid down in Article 3(1) of IPRED.

There is therefore a need on the one hand to clarify the extent to which intermediaries can be involved to help putting an end to copyright infringements on the internet, while on the other hand ensuring that the fundamental rights are duly taken into account.

2.3. Insufficient relief to copyright holders for infringements to their rights

Compensation to the right holder for the prejudice suffered as a result of infringements of copyright is generally low and has little deterrent impact. More particularly on the internet, it is difficult to prove the exact scope of the infringing use and therefore the actual damages that have occurred. Right holders claim that in many instances damages are set at levels that are neither dissuasive nor even compensate the right holder's actual losses (and legal expenses).⁴¹⁸ This problem has also been acknowledged by some Member States, e. g. France recognised the difficulty for judges to assess the level of damages and recommended increasing the use of experts to improve the level of indemnification.

The reasons for the low levels of damages awarded are not only the difficulties in determining the pecuniary value of intellectual property, but also the lack of clarity of the rules contained in Directive 2004/48/EC, the freedom of the courts to apply the Directive's criteria and the considerable differences in the national transposition results. As it turned out from the responses to the Consultation on the civil enforcement of IPR, in some of the Member States courts do not award the profit generated by the infringer (unjust enrichment).⁴¹⁹ This is possibly one of the reasons why right holders claim that damages awarded are low in many instances. Responses also indicated that damage claims and recovery of profit claims are rarely effective due to the lack of adequate disclosure obligations in most Member States as well as a lack of "know your customer" regulations applicable to service providers.

Convention. In matters affecting fundamental rights it would be contrary to the rule of law [...] for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise" (ECtHR, Glas Nadezhda Eood & Elenkov v. Bulgaria, application no. 14134/02, 11 October 2007, para 45-46).

⁴¹⁷ Case C-70/10 *Scarlet* extended (2011)

⁴¹⁸ For example, during the IPRED Consultation, one contribution indicated that damage claims are rarely deterrent in cases of structurally infringing sites since the profits are very substantial and the abilities to hide assets due to the aforementioned problem of being able to do business anonymously.

⁴¹⁹ Only 46 out of 62 respondents have indicated that unjust enrichment is taken into account by national courts. (s. 4.7 of Synthesis of responses "Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures" dated July 2013)

Draft to be finalised in light of responses to the public consultation

Also, in spite of Article 14 of Directive 2004/48/EC, in practice, copyright holders are rarely reimbursed all legal costs and other expenses they incur to protect their copyright through litigation. This, together with the low levels of damages awarded, may inhibit copyright holders' possibilities and readiness to institute proceedings, even in cases of infringements with a commercial purpose involving significant levels of profits for the infringer. As the Consultation on the civil enforcement of IPR showed, right holders might refrain from litigation if they held the court proceeding lengthy, costly and do not expect to get properly compensated.⁴²⁰

The challenges to be addressed are therefore a lack of efficiency of existing civil enforcement systems in the online environment, difficulties in setting a proper balance between protection of IPR and protection of other fundamental rights and a sub-optimal functioning of the single market for copyrighted content.

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51% of the respondents have indicated that they would refrain from litigation because of such reasons.