NOTE

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL INTERNAL POLICIES OF THE UNION

Policy Department C
Citizens' Rights and Constitutional Affairs

PERSONAL DATA PROTECTION PROBLEMS RAISED BY THE IMPLEMENTATION OF THE RIGHT OF INFORMATION IN THE FRAMEWORK OF DIRECTIVE 2004/48/EC

Workshop on the state of implementation of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights in the Member States
26 June 2008

LEGAL AFFAIRS

SEPTEMBER 2008
PE 408.303

EN

PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPÉEN PARLAMENTO EUROPEO EIROPAS PARLAMENTS
EUROPOS PARLAMENTAS EURÓPAI PARLAMENT IL-PARLAMENT EWROPEW EUROPEES PARLEMENT
PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU EURÓPSKY PARLAMENT
EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROPAPARLAMENTET

Directorate-General Internal Policies
Policy Department C
Citizens' Rights and Constitutional Affairs

PERSONAL DATA PROTECTION PROBLEMS RAISED BY THE IMPLEMENTATION OF THE RIGHT OF INFORMATION IN THE FRAMEWORK OF DIRECTIVE 2004/48/EC

SPEAKING NOTE

PE 408.303 **EN**

This note was requested by The European Parliament's committee on Legal Affairs.

This paper is published in the following languages: EN.

Author: **Georg Apenes, Data Inspectorate (Datatilsynet), Norway**

Manuscript completed in July 2008

Copies can be obtained through:
Ms Roberta Panizza
Tel: +32 2 2831433
Fax: +32 2 2832365
E-mail: roberta.panizza@europarl.europa.eu

Informations on DG Ipol publications:
http://www.ipolnet.ep.parl.union.eu/ipolnet/cms

Brussels, European Parliament

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Personal data protection problems raised by the implementation of the right of information in the framework of Directive 2004/48/EC

In 1842, Charles Dickens went on a lecturing tour to the United States. He was very popular on the other side of the Atlantic, and his books were sold in really big numbers. The American publishers made quite a bit of money off his work. Partly because wide-scale circulation and sale was made possible through production of cheap copies, but also because the publishers didn't pay Dickens a cent: They did not have to; it was the age before international copyright laws and agreements. In one case, though, his biographer admits, he received 25 dollars for sending one publisher an early proof-set so that he could beat his competitors to it.

Some thirty years later, Henrik Ibsen, living in Germany and receiving generous acclamations by German critics as well as audiences, received next to nothing from the theatres performing his works.
Then, little by little, international instruments with the purpose of protecting the authors were developed.
For more than a century the Bern-convention and additional declarations on intellectual property, seem to have worked well in many parts of the world.

However, with the development of new media to be used in the creation, reproduction and even manipulation of works of art, we have witnessed a sort of 'privatization' of the media. Dickens and Ibsen could, to a great extent, register the names and addresses of those who used their work without their explicit permission. They could not sue them all, but they could support the legal and professional efforts made in their homeland to develop proper instruments for the prevention of illegal use – home as well as abroad.

When I started my present position as Director of the Norwegian DPA in the early 90-ies, I could not imagine the negative consequences for the protection of intellectual property made possible by the new technologies. Not only for literature and music, but also for films, games, patterns of design and figurative arts such as prints and

lithography. What has proved to be even more challenging is that accusations can be made against registered users, who would never dream of stealing, but never the less, become suspects due to other users actions involving their equipment. An example of this is a father being accused for the illegal downloading carried out by his son.

The Dickenses sand Ibsens of today are well organized and they also have means to enable the proper authorities to keep the Net under constant surveillance, looking for certain predefined and identifiable behaviour.

The trouble is, that in Norway, as in most other liberal democracies, we like to point to the police when somebody claims something criminal is going on. We insist that when the private sphere, for quite acceptable reasons, has to be invaded, we should have been proactive and developed the necessary, legal tools for such operations and these tools would be reserved for the State – represented by the police.

The problem is, of course, that the police – who has access to the identities behind the ISP- addresses, does not give priority to this work. I hate to say so, but this is today the fact: The police give all kinds of reasons, and I admit that the challenge is overwhelming if all thieves – small and big – should be subject to a police-hunt.

Even when the representatives of the copyright-holders argue that prosecuting a few – preferably bigger – thieves may serve as an example and be valuable for educational purposes, the necessary priority is not given to this work.

If we compare the situation with the equivalent of the hunt for production and distribution of child-pornography, we register that the willingness to use human as well as administrative resources are far greater for the last category.

My personal explanation for this is lack of symmetry is as follows;

Child pornography is disgusting and represents moral, ethical as well as esthetical questions, which 99.9 percent of Norwegians can and will understand.

Intellectual property is often seen as a question of money – read: ‘greed’ from persons and the firms involved, who do not seem to suffer. They have abundance – and want more. Usually it is quite a challenge for these citizens to convince their surroundings of the moral justification of their legal actions.

The thieves are mostly youngsters who may not understand the full consequences of what they are doing for fun or due to a lack of means.

And, thirdly: These thieves are many and they will have the right to vote in the next election, they should therefore be befriended and courted – not punished!

A serious and well respected law firm in Oslo, representing some major copyright-holders, approached my office some time ago with an application for a license to collect the IP-addresses of individuals they had reasons to suspect were downloading, sharing or illegally copying film- and/or music-files. It was accepted that this, in itself, would involve collecting sensitive data, which according to Norwegian law, can only be carried out with a permit from the DPA. It was agreed that as a private organization they would not be allowed access to the identities behind the IP.
The firm was, given a one-year licence to collect the indicative data. The accepted solution was to collect information on the character and extent of the abuse of files for educational and informational purposes.
The license holder is obliged to delete all data connected to Net-subscribers beyond suspicion when it is decided that a specific case, should be reported to the police for further investigation.
After some discussion the licence holder and the Norwegian DPA has agreed that, as a matter of principle - no connection -between the watchdog and the individuals under suspicion - by mail or e-mail - should be possible through the intermediation of the ISPs.

We have, however, accepted that the ISP can find the proper address behind the IPs and then send a letter to the registered user stating that somebody may have been using their Internet equipment to down- or up-loading items protected as intellectual property, thus breaching Norwegian penal law.

We have decided to regard these kinds of activities as an educational supplement to other endeavours of information through advertising media; radio, TV spots etc. We have, however, in our deliberations with the mentioned law firm stressed that what may be communicated to the selected users should not include a legal conclusion – merely suggestions of the probability that one or some of the users of a specific terminal, may have come too close to a check-point.
Furthermore, it is our position that these undertakings represent a legal possibility for the ISP – not a legal obligation.