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Policy Department C
Citizens' Rights and Constitutional Affairs

THE IMPLEMENTATION OF THE RIGHT OF INFORMATION AND CIVIL MEASURES, IN PARTICULAR INJUNCTIONS: BEST AND WORSE NATIONAL PRACTICES FROM THE RIGHTSHOLDERS' POINT OF VIEW

Workshop on the state of implementation of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights in the Member States
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THE ENFORCEMENT DIRECTIVE (2004/48/EC)
THE IMPLEMENTATION OF THE RIGHT OF INFORMATION

This paper is written to supplement and complete an oral presentation made in the European Parliament before the Legal Affairs Committee on 26 June 2008 on the same topic. It sets out in more detail the issues which were raised in the context of the presentation and describes the recording industry's experience notably with regard to the implementation and application of a very central provision in the Enforcement Directive, namely Article 8 on the right of information.

Executive Summary

Article 8 of the Enforcement Directive provides right holders and their representatives with a possibility to obtain information related to an infringement of an intellectual property right from the infringer or from other parties who possess such information. Internet Service Providers are such 'other parties' as they know the identity of those whose computers are being used to infringe copyright on the Internet. The right of information is particularly important in cases of Internet piracy, including Peer to Peer piracy, as the right holders can find the identity of the infringers only via the ISPs. A properly implemented and applied right of information allows rightholders to address and possibly take civil action against those who are infringing their rights. The absence of a proper right of information means the road to civil remedies against Internet piracy is virtually blocked. As a result, right holders have no other option but to file criminal complaints.

Unfortunately, the right of information provision has been considerably weakened in some Member States. There are even cases of its non-application due to perceived conflicts with data protection law. The recent Telefonica – Promusicae judgement of the European Court of Justice confirms that EU data protection law does not stand in the way of the application of the right of information in intellectual property cases. This important judgement also underlines the need to establish a fair balance between various fundamental rights, including privacy, right to property and the right

to an effective remedy. Nevertheless, the practice in the various Member States is patchy and this lack of uniformity and consistency throughout the EU hampers enforcement against Internet piracy. Clarification at EU-level is urgently needed to ensure that the right balance between rightholders' and privacy interests is struck and that the right to information is effectively applied throughout the Internal Market. The European Parliament has an important role to play in striking the right balance during the upcoming review of the Enforcement Directive.

The challenges facing the creative sectors today

The increasing penetration of Internet broadband and the availability of ever faster connections bring about exciting possibilities for the making available of creative content online, but it has also given rise to a number of challenges when it comes to protecting content from illegal distribution. In the online world one music file can be shared an unlimited number of times without any loss of quality, and this has led to a massive problem with online piracy of copyright protected content.

The music industry estimates that only 1 in 20 downloaded music files originate from a legal content service and in the UK alone approximately 6 million users exchange files illegally via illegal Peer to Peer ('P2P') file-sharing programs. Other creative sectors are also experiencing problems with piracy and today these sectors struggle more than ever to enforce their rights in the online environment.

The relevant EU harmonisation directives

Two EU harmonisation directives constitute an important framework for protection and enforcement of copyright in the online environment: the 'Enforcement Directive' of 2004 and the 'Copyright Directive' of 2001.

The recording industry relies on strong copyright for the protection and exploitation of its investment in recorded music. In this context Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society ("the Copyright Directive") is of great importance. It adapted copyright to the developments of digital technology

and introduced essential provisions for the online environment such as the right of making available and the protection of technological measures.

In 2004 the European Parliament in co-decision with the Council of the European Union adopted the Directive on the Enforcement of Intellectual Property Rights ("the Enforcement Directive"). This Directive harmonises certain aspects of civil enforcement of intellectual property rights, including copyright. The aim was to ensure that rights could be effectively enforced throughout the Internal Market, and the Directive recognises that "without effective means of enforcing intellectual property rights, innovation and creativity are discouraged and investment diminished" (recital 3).

From the point of view of right holders it should be noted that the Enforcement Directive did not necessarily lead to an increased level of protection if one takes most of the existing national legal systems in the EU into account. Its strength was rather the harmonising approach and the acknowledgment of the need to provide for proper tools to enforce intellectual property rights. The Directive is an example of minimum harmonisation as it allows the Member States to adopt stronger measures (see Article 2(1)). The first Commission draft also suggested harmonising certain aspects of criminal enforcement, but this part of the Directive did not find sufficient support in the European Parliament.

How does the Enforcement Directive fit into the context of massive on-line piracy?

The Enforcement Directive is an important instrument for rightholders both in the physical and in the online environment. It is therefore very important to ensure proper implementation and application of this Directive in all 27 Member States. The Commission has a responsibility to monitor the situation and take action where there are specific problems.

As the Commission is preparing an evaluation of the implementation and application of this Directive, the Parliament has an important role to play in making sure that the application report properly highlights and clarifies issues which hamper proper enforcement of intellectual property rights so that investment in creativity can once again flourish.

Article 8 of the Enforcement Directive – right of information

The remaining part of this paper will focus on Article 8 of the Enforcement Directive. This provision has given rise to a number of questions and clarification is sorely needed to ensure its proper application throughout the EU.

Article 8 of the Enforcement Directive is an example of a provision which, correctly implemented and applied, could have had a very large potential in ensuring proper civil enforcement, notably in the online environment. As a matter of fact, without a right to information some online infringers would in effect be immune to any form of civil action to bring an end to their illegal activities. This is in particular the case for infringements via so-called P2P networks, which account for 80-90 % of the music industry's piracy problems in the online environment. As a result, the only other viable option for rightholders to stop such illegal activity would be to file criminal complaints. Considering the sheer number of illegal music up-loaders, this would not be practical.

Article 8 basically provides rightholders and their representatives with a possibility to obtain information related to an infringement of an intellectual property right from the infringer or from other parties who posses such information (see Annex I). An example of such a third party could be an Internet Service Provider whose services have been used to infringe copyright. To obtain this information the right holder must address a "justified and proportionate request" to the "competent judicial authorities" – usually a court. The authority in question will assess whether the requirements are fulfilled and, provided this is the case, order the relevant information to be disclosed to the rightholder. The requirement of a justified and proportionate request, assessed by a competent authority, provides the necessary safeguard against any possible abuse of this right of information.

The possibility to obtain this information from intermediaries, if and when their services have been used to infringe intellectual property rights, is very important for copyright holders. Unfortunately it is also this part of the provision that has given rise to certain questions as to its possible limitations.

To understand the importance of that provision it is necessary to understand how certain online infringements take place. The only information available to the right holders about online infringers is the IP-address, which is a sort of on-line identification number. The number yields no information whatsoever about the person (age, sex, physical address, etc.) to whom this number has been allocated. In order to identify the infringer, for example an up-loader of illegal tracks on a P2P network, the right holder will need to approach the Internet Service Provider, normally by request via a court. The right holder will provide the relevant IP-address and present evidence of the infringement. The right holder will also provide evidence of the time interval in which the infringement was committed. This, in turn, allows the Internet service provider to identify the subscriber and only if that information can be communicated to the right holder will the latter be able to pursue the infringer to bring an end to the infringement and/or claim damages.

The process described above shows that right holders would often be left without civil remedies in the online world if they are not able to obtain name and address information from the service provider. There is no doubt that Article 8 intends to cover such situations, but issues have arisen in some Member States as to whether disclosure of the relevant information could run counter to data protection law.

Article 8 in the light of data protection law – the ECJ "Telefonica – Promusicae" decision (C-275/06)

The question whether a civil right to information involving disclosure of names and addresses of clearly identified infringers could be contrary to data protection law has been addressed by the European Court of Justice ("the ECJ") in the so-called "Promusicae" case. This case was referred to the ECJ for a preliminary ruling by Spanish Court in a case concerning infringements carried out online via a P2P file sharing network. The Spanish court asked whether Member States are obliged to provide for rules on a right to information in civil cases under the specific circumstances characterising the case.

In order to answer this question, the ECJ had to consider relevant EU Directives in the field of intellectual property, notably the Enforcement Directive (2004/48), and Directives regarding the protection of data, in particular the so-called e-Privacy Directive (2002/58). The Court also had to

consider how to balance the fundamental right to privacy against the fundamental right to protection of property and the right to an effective remedy.

First, the ECJ confirmed that the e-Privacy Directive (2002/58) does not preclude Member States from providing for an obligation to disclose data in the context of civil proceedings (recital 54). This statement is important as rightholders are regularly confronted with the argument that data protection rules stand in the way of disclosure or of ISP cooperation in general. According to the ECJ this is clearly not the case.

Second, the ECJ held that neither the relevant EU Directives in the field of intellectual property nor the WTO TRIPs agreement actually oblige Member States to provide for rules on disclosure. However, neither do they prevent them from doing so. Having stressed that this legislation is meant to ensure, especially in the information society, effective protection of intellectual property, in particular copyright, the ECJ concluded that Member States needed to reconcile the different fundamental rights at stake in this case, i.e. the right to protection of property, the right to an effective remedy and the right to protection of personal data.

The ECJ provides some general guidelines in its judgement, which make clear that a fair balance must be struck between these fundamental rights and that one right cannot be given supremacy to the detriment of the other. Data protection rules are increasingly being presented by ISPs and national data protection authorities as "more important" than IP-rights. However, it follows from the ECJ's guidelines that such an interpretation is incorrect and would undermine the requirement of a fair balance between the various fundamental rights.

Examples from Member States

Apart from Sweden and Luxembourg, all EU Member states have implemented the Enforcement Directive. There are examples of incorrect implementation of (certain elements of) the Enforcement Directive, as is the case with virtually any EU directive. The greatest problem for the recording industry, however, when it comes to Internet piracy lies in the way some Member States apply – or abstain from applying – the right to information. This is specifically the case for online information from intermediaries.

Examples of problematic application:

In Greece, IP addresses are considered personal data and it is unclear if those addresses can be collected (other than by the competent authorities). Disclosure of the personal data behind the IP address is possible only in criminal cases involving serious crimes and copyright infringement is not considered a serious crime. This means not only that right holders have no possibility to obtain the necessary data to start a civil infringement proceeding in cases of, for example, P2P Internet piracy, but there is not even an alternative via criminal proceedings.

Rightholders contemplating legal action against Internet pirates in Italy face difficulties in identifying infringers due to restrictions imposed by the Privacy Code. Rightholders may not obtain from Internet Service Providers (ISPs) the identity of an infringing end-user through a civil procedure. Such information may only be secured through the police or the courts in criminal actions, which is time consuming and cumbersome. Moreover, in September 2007, the Data Protection Authority (Garante) issued regulations prohibiting ISPs from disclosing information about their subscribers for civil or administrative purposes. If this issue is not solved, civil enforcement against online piracy in Italy is likely to become totally impossible and right holders will be forced to resort to criminal proceedings.

In Spain, the implementation of the right of information granted in Article 8 of the Enforcement Directive is subject to a double commercial scale requirement applying to both the services provided by the ISPs as well as to the infringements committed by the user. The Spanish formulation thereby misses a fundamental principle of this Directive, which is that the commercial scale requirement should only apply to the services provided by the ISPs and not to the infringements committed by the user. The Enforcement Directive does not foresee commercial scale requirement with respect to the on-line infringement as such. Therefore, the Spanish law incorrectly narrows down the scope of application of the right of information.

The inevitable consequence of the lack of a possibility to exercise the right to information in civil proceedings is that rightholders have no other option than to apply for criminal measures against Internet piracy, including against illegal P2P. Civil remedies should be available. This is foreseen in the relevant EU Directives and the WTO TRIPS Agreement. Considering the sheer number

of Internet piracy cases, it cannot have been the intention of the legislator to limit any action against on-line piracy to criminal prosecution, which would put a very heavy burden on law enforcement authorities and the judiciary. However, without a proper right of information, civil action is not possible. Member States where this is the case should be strongly encouraged to review their laws, regulations and/or court practice.

Examples of good application:

In **Denmark**, the authorities will make an assessment on a case-by-case basis. If there is a justified and proportionate request, the disclosure order will be granted. A procedure like this represents the right balance between privacy protection interests and the interest of rightholders to protect their intellectual property.

IP addresses are considered personal data in **Ireland**, but they can be collected as per the decision of the High Court of Dublin in the EMI v. Eircom case (8 July 2005). Disclosure of the personal data behind the IP number is possible with a court order.

In the **United Kingdom** protection of personal data is governed by the Data Protection Act 1998. Rightholders are allowed to collect IP addresses and ISPs can be ordered by a court to disclose personal data including in civil infringement cases. Even voluntary disclosure is, if certain requirements are met, possible under Section 35 of the Data Protection Act.

Others:

Sweden is in the course of implementing the Enforcement Directive and the Government has announced that it will implement the right of information whilst taking into account the Telefonica - Promusicae decision.

Even though the implementation of the right of information is correct in **Austria**, data protection rules, in particular as applied in civil cases, make obtaining personal data extremely burdensome in practice. In the meantime, an Austrian court has, as in the Spanish Telefonica case, submitted questions to the ECJ (C-557/07 LSG - Gesellschaft)

ISP Cooperation – the French example

The Enforcement Directive, as implemented into national legislation, may not provide all the tools necessary to rapidly and effectively address mass scale on-line infringements. Therefore, the adoption of additional mechanisms to supplement the traditional enforcement tools is needed. Such additional mechanisms should, in particular, involve more cooperation from Internet Service Providers ('ISP'). ISPs are in a key position to assist right holders and authorities in addressing these problems. An example of a solution which adopts a cooperative approach is the recently adopted French Agreement, also referred to as the Elysee Agreement. This agreement between the creative sector, ISPs and the French Government includes educative measures and foresees informative warnings in case of breach of copyright, eventually followed by a possibility of suspension of access to the Internet for a specified period of time in case of repeat infringement. Similar initiatives are needed at EU and at national level with the involvement of all relevant stakeholders so as to create a balanced level playing field across the EU.

Conclusion

The existing situation of inconsistent application of Article 8 of the Enforcement Directive and the blocking effect of data protection rules in certain Member States in civil infringement cases is unsatisfactory and cannot have been the intention of the European legislator. The ever growing level of Internet piracy and ongoing problems for right holders to take effective action to protect their copyright in the on-line environment show that clarification is urgently needed. While data protection is an important tissue, so are the right to the protection of property and the right to an effective remedy. In this respect, the Parliament has a vital role to play in striking the right balance.