



Introduction

The European Commission launched a public consultation on the Intellectual Property Rights Enforcement Directive (IPRED) on 30 November 2012.

IPRED is in force since 2004 and requires all Member States to apply remedies and penalties against those engaged in “commercial” infringements of intellectual property law. This is the Directive which is partly responsible for the heavy-handed injunctions that are being imposed by some courts (there is some confusion between the injunctions foreseen in IPRED and those in the Copyright in the Information Society Directive).

IPRED also foresees access to consumer data. The fact that the safeguards in the Directive are widely ignored by Member States (and this failure is being ignored by the Commission), has led to breaches of the rights of citizens across the EU, most notably in the UK and Germany.

The European Commission is now assessing flaws and efficiency of the application of this Directive and has therefore launched this consultation.

This answering guide has been prepared in order to make the task of responding to the questionnaire easier for citizens.

Consultation

Access to the consultation can be obtained from the following link:

http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm

The first step is to register, by providing your name and e-mail address. This can be done via the following URL – <http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=IPRREGFORM>. Please note that it can take some time before the registration is processed.

There are also reports of slowness and time-outs at weekends and of Gmail filtering registration details as “spam”.

Responding to the questionnaire – Identification

The first stage of the consultation is a series of questions about you – as the respondent. Citizens have the opportunity to respond either as a “citizen” or a “citizen with intellectual property rights”. It is almost impossible for a citizen not to hold (even if they do not use) intellectual property rights as almost any creative activity (such as making photos and texts available online) generates IP rights. If you want to have the opportunity to answer more questions if you are a “citizen with intellectual property rights” than a “citizen”, it is advisable to choose this option.

Similarly, if you happen to have trademark or patent rights, you will get a further set of questions. Questions 1,2, 4, 8 and 13 are all identification questions. As with each section of the questionnaire, not all questions are immediately visible. Other questions appear, depending on the answers you give.

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EUROPA > European Commission > Your Voice > IPM

[6] http://ec.europa.eu/internal_market/iprenforcement/conferences_en.htm
[7] hyperlink
[8] These were enumerated in the Statement by the Commission concerning article 2 of Directive 2004/48/EC (2005/295EC), and consisted of copyright, rights related to copyright, sui generis right of a database maker, rights of design rights, patent rights, including rights derived from supplementary protection certificates, geographical indications, utility model rights, plant variety rights, and trade names, in so far as these are protected as exclusive pr

Background information

This survey is addressed to public and private stakeholders who are affected by IPR enforcement issues. You are first asked to provide basic background information about you as a respondent.

1. Name of the respondent: * (compulsory) (between 1 and 200 characters; count: 23)

European Digital Rights

2. Identity of the respondent: * (compulsory)

CITIZEN

MEMBER STATE

UNDERTAKING

JUDGE

OTHER

CITIZEN HOLDING INTELLECTUAL PROPERTY RIGHT(S)

OTHER PUBLIC ORGANISATION

UNDERTAKING HOLDING INTELLECTUAL PROPERTY RIGHT(S)

ASSOCIATION

5. Country of establishment: * (compulsory)

BE - Belgique / Belgie

European Digital Rights
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Tel: +32 2 274 25 70
E-Mail: brussels@edri.org, <http://www.edri.org>


Responding to the questionnaire – IPRs held

The remainder of the questions (16-35) on the first page of the questionnaire covers the types of IPRs that are held by you. Please remember that not all questions are visible, so do not worry if the numbering is confusing.


Question 16 in the English-language version does not make it clear that it refers to the growth/performance of the entity responding to the question.


Regarding question 31, the response “crucial” gives the opportunity to explain that a high quality system – rather than the current system, is essential. The current system, with its disjointed injunctions regime and the “wild west” access to personal data in some EU countries, that willfully ignores the safeguards in the 2004 Directive, is damaging to the legitimacy of the entire legal framework.

EUROPA > European Commission > Your Voice > IPM Home page

 29. What is the substitution rate between original goods and counterfeited/pirated goods in your sector according to your estimation? How do you measure this rate?
(optional) (between 1 and 2000 characters; count: 3)


0%

 30.
How do infringements of your intellectual property rights impact your investment in research, development and innovation (eg. estimated loss in investments/amount of investments not undertaken)?
(optional) (between 1 and 2000 characters; count: 0)

 31. What is the relevance of the quality of civil enforcement system for intellectual property rights for your research, development and innovation investments? (optional)

None Low Medium High Crucial

N/A

 35. Please explain: (optional) (maximum 1000 characters; count: 0)

Efficiency and effectiveness of civil proceedings in cases concerning infringements of intellectual property rights

This section is based primarily on the experience of the respondent. Please note that if you have been the subject of either a “warning” letter or more coercive tactics from the music/film industry, then you need to choose “yes” in response to the first question. This will give you the opportunity to access questions 2-4/5, which are important for the Commission to be able to hear the views of the subjects of such tactics, rather than just the view of industry. The Commission does not define “alternative dispute resolution” in the questionnaire, so it has to be assumed that “alternative dispute resolution” means any alternative to court decisions.

Responding “no” to question 6 permits the respondent to explain, in response to article 8 that the types of coercive approaches used in some European countries (see <http://en.wikipedia.org/wiki/ACS:Law>) are not an appropriate response in a society based on the rule of law.

In response to question 24, respondents that hold IPRs are able to explain reasons for refraining from litigation. In EDRI's case, for example, we will explain that our Creative Commons licensing is as flexible as possible and infringements are of little or no financial importance to us.

Questions 66 to 76 deal with issues related to “fast-track” procedures. In all relevant questions in this section, the key points that need to be stressed are:

- Privatised policing and enforcement (as in Ireland) is not appropriate in a society based on the rule of law
- Independent courts are the only acceptable means of establishing guilt

The final question in this section allows a general response. Issues that need to be addressed are that the injunctions regime needs to be in one instrument and needs, especially in the online environment, for Member State courts to take full account of the relevant European Court of Justice case law - Scarlet/Sabam and Netlog/Sabam in particular. Personal data must not be shared with the litigant except in full respect of the safeguards provided for in Directive 2004/48/EC.

Right of information

The explanation in the introduction to this section “explains” that “Currently, one of the key obstacles for parties seeking to enforce their intellectual property rights is the difficulty in obtaining information allowing identification of infringers who offer infringing goods/services via the services of an intermediary”.

It fails to mention – or solicit comments/feedback on the fact that there is widespread abuse, in the UK and Germany in particular, of current systems for access to personal data (see <http://en.wikipedia.org/wiki/ACS:Law> and <http://www.eco.de/2011/pressemeldungen/300-000-adressen-pro-monat-erfolgreicher-kampf-gegen-illegale-downloads.html>).

It is the responsibility of the European Commission to take legal action against any Member State that fails to enforce an EU Directive. In the UK and German examples, there is an unequivocal breach of the safeguards provided for in 2004 Directive. We suggest using question 1 in this section to raise this issue and demand that the Commission take action against every country that has failed to protect fundamental rights safeguards.

[1] For the purposes of this survey, an intermediary should be understood as indicated in Directive 2004/48/EC, i.e. as a natural or legal person whose services are being used by a third party to infringe an intellectual property right.

1. How do you identify infringers/alleged infringers of your IPRs? (optional) (between 1 and 1000 characters; count: 466)

There are several examples, Germany being the most notable, of Member States enforcing measures which run contrary to the safeguards provided for in Directive 2004/48/EC. Identification of alleged infringers should only be permitted in line with the European Charter and all of the conditions provided for in the the Directive. We call on the Commission to identify all Member States that are failing to respect the safeguards and to launch infringement proceedings.

2. Do you face problems identifying infringers/alleged infringers of your IPRs? (optional)

YES NO N/A

4. Has it been possible for you to obtain information allowing identification of infringers/alleged infringers directly from an intermediary? (optional)

YES NO N/A

8. Has it been possible for you to obtain a court order obliging an intermediary to disclose the identity of the infringer/alleged infringer? (optional)

YES NO N/A

12. Has it been possible for you to obtain a court order obliging an intermediary to disclose the identity of the infringer/alleged infringer of your IPRs in case where the intermediary and/or the infringer/alleged infringer of your IPRs were incorporated, or resident in a Member State other than the one in which you operate? (optional)

N/A

Mechanisms to inform about the alleged infringement and to impede access to goods and services allegedly infringing IPRs

This section appears to be inquiring about the possibility of informal arrangements that would allow rightsholders to ask technical intermediaries (such as payment providers, domain name registries...) to take action against alleged infringers. Such actions, outside the rule of law, are clearly unacceptable. The answer to question 1 must therefore be “no”.

The explanation can cover issues such as the need to rely on courts to implement the law, jurisdiction issues (if an intermediary implements the law, whose law does it impose, etc). A possible response could be:

It is wholly inappropriate for technical intermediaries to take arbitrary actions against their customers on the basis of simple allegations. The scale of the legal uncertainty that this would create needs to be understood. Any e-commerce company or online entity of any sort relies directly on a domain name registry, domain name registrar and hosting provider. It may also rely indirectly on payment providers, search engines and possibly an advertising network in order to function. Many of these will not be based in their jurisdiction.

Aside from undermining the rule of law, ad hoc enforcement measures by intermediaries would mean that such online entities would have to self-censor/self-police their networks on the basis of the law of their own jurisdiction, but on the basis of guesses about the interpretation of the laws in the relevant jurisdictions where the chain of intermediaries listed above may be based.

Question 7 refers to notifications, presumably via the technical intermediary, to the alleged infringer. As we have already seen, this approach fails in relation to online filesharing, it appears clear that the answer to this question should be “no”.

Question 20 appears to suggest that intermediaries should take punitive actions on the basis of accusations. In a society based on the rule of law, such privatised enforcement is clearly unacceptable.

Question 23 uses the emotionally loaded word “notorious” (although the French text is more neutral). In any event, the question is whether previous convictions or allegations result in a situation where an intermediary should assume guilt on the part of an alleged infringer. The answer is obviously “no”.

Corrective measures

This section covers injunctions and other “corrective measures”.

Question 1 is a factual, based on the respondent's experience.

Question 7 is essentially asking if courts should be directed to respond in a particular way. This seems to undermine the independence and flexibility of courts and is therefore not a good idea.

Questions 9, 11 and 12 and 21 are not relevant to digital rights.

Damages

In a digital environment, the question of damages is a very complex one and possibly outdated in the context of the Internet. When we consider that three different studies in three European countries found that large-scale downloaders also spend the most on digital content, how can a realistic “damage” to the rightsholders be calculated?

The final question asks if the “damages” should be based on something other than the damage caused to the rightsholder. Insofar as “damages” are supposed to compensate for “damage”, this seems to be a counter-intuitive question.