



A publication series of the  
European Audiovisual Observatory

# Copyright enforcement online: policies and mechanisms

IRIS *Plus* 2015-3



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL  
EUROPEAN AUDIOVISUAL OBSERVATORY  
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

**IRIS Plus 2015-3**

**Copyright enforcement online: policies and mechanisms**

European Audiovisual Observatory, Strasbourg, 2015

ISSN 2079-1062

**Director of publication** – Susanne Nikoltchev, Executive Director

**Editorial supervision** – Maja Cappello, Head of Department for Legal Information

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**Cover layout** – P O I N T I L L É S, Hoenheim, France

**Please quote this publication as**

Cabrera Blázquez F., Cappello M., Grece C., Valais, S., *Copyright enforcement online: policies and mechanisms*, IRIS Plus, European Audiovisual Observatory, Strasbourg, 2015

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## Foreword

Pirates, as such, are somehow surrounded by a romantic allure: the Latin “pirate” was a “sailor, corsair, sea robber” and stems from the Greek “peirates”, who were “those who attack”. The root of the Greek word (-per) gives the meaning of “to try, risk”, from which the Latin “peritus”, i.e. “experienced”,<sup>1</sup> which reinforces the idea that there is something heroic in there. But the meaning started to change as soon as a connection was established with the value of the goods that were part of the robbery: pirates were not Robin Hood, they were basically thieves, just maybe smarter than average.

As Jack Sparrow would say, pirates take what they can ... and give nothing back.<sup>2</sup> The problem with thieves is that their activities benefit nobody but themselves, while hurting other people’s legitimate businesses. In the case of the production and circulation of creative works, it can also have a fatal impact on cultural diversity. It is therefore fundamental for rightsholders to ensure that piracy does not leave them with empty pockets.

The meaning of “one who takes another's work without permission” was first recorded in 1701, just a few years before the Statute of Anne was adopted in 1710, equipping Great Britain with the first act providing for copyright regulated by the government and courts, rather than by private parties.<sup>3</sup> The roots of copyright protection therefore go a long way back in history, which also explains the constant search for tools able to ensure that the protection of copyright is effectively enforced.

This need for enforcement appears even more necessary in the online environment, where the action of “taking another’s work without permission” is particularly easy and often not perceived as an infringement of any law: on “pirate websites” everything is available for free and looks legal – many would say. Similarly, the wide availability of professional looking websites giving access to entire archives of protected works, often with logos of payment intermediaries and offering even subscriptions to their offers, not to speak about the advertisements they show, makes the enforcement activity not only complex, but also very debated.

It is not within the remit of this report to provide an answer to the questions that have been raised as to the economic impact of piracy on creative industries, but it aims at guiding our readers across the wide literature that exists in this field. The debate is particularly heated when it comes to the balancing of the fundamental right to copyright protection with other fundamental rights, such as freedom of expression, which shows that there is plenty of food for thought for policymakers.

The ambition of this report is to give a digest of what has happened so far in the field of copyright enforcement online. After having set the scene, providing the main trends of the audiovisual market and a discussion of facts and figures around piracy so as to contextualise the

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<sup>1</sup> Entry “Pirate” in the Online etymology dictionary, <http://www.etymonline.com/index.php?term=pirate>.

<sup>2</sup> From the film series “Pirates of the Caribbean” (Walt Disney Pictures), see [http://pirates.wikia.com/wiki/Take\\_what\\_you\\_can,\\_give\\_nothing\\_back](http://pirates.wikia.com/wiki/Take_what_you_can,_give_nothing_back).

<sup>3</sup> See <http://www.copyrighthistory.com/anne.html>.



topic (chapter 1), it digs into the legal framework at international and EU level (chapter 2), before moving over to exploring the most innovative national models of copyright online enforcement tools adopted by public bodies (chapter 3) and by self-regulatory initiatives (chapter 4). A selection of relevant case-law both at EU and national level is provided (chapter 5) before rounding up with an outlook of the state of play of the decision-making process (chapter 6).

It has been stated that “in Internet years, eight years is an information generation”.<sup>4</sup> When reporting about such a technologically driven issue as the fight against copyright infringement online, this becomes particularly evident. Considering that the Observatory started to write on this topic fifteen years ago,<sup>5</sup> the following list of Observatory legal publications concerning piracy shows how much water has gone under the bridge:

- IRIS *Plus* 2000-4, “MP3: Fair or Unfair Use?”
- IRIS *Plus* 2002-2, “Movies Online: Balancing Copyrights and Fair Use”
- IRIS *Plus* 2007-1, “Digital Rights Management Systems (DRMs): Recent Developments in Europe”
- IRIS *Plus* 2008-3, “User-Generated Content Services and Copyright”
- IRIS *Plus* 2009-2, “Filtering the Internet for Copyrighted Content in Europe”
- IRIS *Plus* 2012-1, “Answers to Internet Piracy”
- IRIS *Plus* 2014-4, “The Influence of New Technologies on Copyright”.

A special thanks goes to Ismail Rabie, who has preciously assisted us with bibliographical research.

Strasbourg, December 2015

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<sup>4</sup> OCLC, Gauder B. (ed), “A Long View—In Internet Time”, *Perceptions of Libraries, 2010: Context and Community*, [http://www.oclc.org/content/dam/oclc/reports/2010perceptions/2010perceptions\\_all\\_singlepage.pdf](http://www.oclc.org/content/dam/oclc/reports/2010perceptions/2010perceptions_all_singlepage.pdf).

<sup>5</sup> Cabrera Blázquez F.J., Nikoltchev S., “MP3: Fair or Unfair Use?”, IRIS *Plus* 2000-4, <http://www.obs.coe.int/documents/205595/264569/IRIS+plus+2000en4LA.pdf>; Cabrera Blázquez F.J., Nikoltchev S., “Movies Online: Balancing Copyrights and Fair Use”, IRIS *Plus* 2002-2, <http://www.obs.coe.int/documents/205595/264573/IRIS+plus+2002en2LA.pdf>; Cabrera Blázquez F.J., “Digital Rights Management Systems (DRMs): Recent Developments in Europe”, IRIS *Plus* 2007-1, <http://www.obs.coe.int/documents/205595/264583/IRIS+plus+2007en1LA.pdf>; Cabrera Blázquez F.J., “User-Generated Content Services and Copyright”, IRIS *Plus* 2008-3, <http://www.obs.coe.int/documents/205595/264585/IRIS+plus+2008en3LA.pdf>; Angelopoulos C., “Filtering the Internet for Copyrighted Content in Europe”, IRIS *Plus* 2009-2, <http://www.obs.coe.int/documents/205595/264587/IRIS+plus+2009en2LA.pdf>; Nikoltchev S. (ed.), “Answers to Internet Piracy”, IRIS *Plus* 2012-1, [http://www.obs.coe.int/documents/205595/264635/Iris\\_plus\\_2012-1\\_EN\\_FullText.pdf](http://www.obs.coe.int/documents/205595/264635/Iris_plus_2012-1_EN_FullText.pdf); Nikoltchev S. (ed.), “The Influence of New Technologies on Copyright”, IRIS *Plus* 2014-4, <http://www.obs.coe.int/documents/205595/264635/IRIS%2B2014-4+EN+complet.pdf/030edfc9-dbe1-4cae-b0ef-043814fc1ab0>.



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# 1. Setting the scene

Intellectual property matters for the competitiveness of the European audiovisual sector. It creates wealth and jobs. According to a joint report by European Patent Office<sup>6</sup> and the Office for Harmonization in the Internal Market,<sup>7</sup> about 39% of the total economic activity in the EU (worth some EUR 4.7 trillion annually) is generated by IPR-intensive industries, and approximately 26% of all employment in the EU (56 million jobs) is provided directly by these industries, while a further 9% of jobs in the EU stems indirectly from IPR-intensive industries.<sup>8</sup>

As part of the IPR industries, Europe's cultural and creative sectors make a substantial contribution to economic growth, employment, innovation and social cohesion in Europe. According to the European Commission,<sup>9</sup> they represent around 4.5 % of the European gross domestic product and account for some 3.8 % of the EU workforce (8.5 million people). They contribute to innovation, skills development and urban regeneration, and they have a positive impact on tourism and information, and communication technology.

The audiovisual sector, as much as the rest of the cultural and creative industries, relies heavily on copyright law in order to protect its creative work and financial investments. But in the age of digital reproduction, enforcing copyright has become increasingly difficult for the sector. Moreover, the public awareness of the importance of copyright is at a low ebb, and millions of people around the globe download and share illegally their favourite films and series without remorse. This state of affairs occurs in a period of profound change for the cultural and creative industries.

This chapter presents 1) an overview of the EU audiovisual market, 2) an analysis of the impact of copyright infringement on the EU audiovisual industry and 3) a discussion on the importance of public awareness of copyright in the fight against piracy.

## 1.1. The EU audiovisual market in the digital era

### 1.1.1. Trends on the paid entertainment market

Physical video distribution revenues (retail and rental of DVDs and Blu-ray discs) are on a sharp downward trend as digital video distribution is replacing the physical one. Physical video distribution

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<sup>6</sup> <https://www.epo.org/index.html>.

<sup>7</sup> <https://oami.europa.eu/ohimportal/en/>.

<sup>8</sup> European Patent Office and Office for Harmonization in the Internal Market, "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union", Industry-Level Analysis Report, September 2013, [http://ec.europa.eu/internal\\_market/intellectual-property/studies/index\\_en.htm](http://ec.europa.eu/internal_market/intellectual-property/studies/index_en.htm).

<sup>9</sup> European Commission, "The EU explained: Culture and audiovisual", 2014, [http://europa.eu/pol/pdf/flipbook/en/culture\\_audiovisual\\_en.pdf](http://europa.eu/pol/pdf/flipbook/en/culture_audiovisual_en.pdf).



revenues shrunk from EUR 8.7 billion in 2009 to EUR 6.2 billion in 2013 for 17 countries<sup>10</sup> of the EU according to data from the market analysis company IHS,<sup>11</sup> a loss value of EUR 2.5 billion in the five-year period or a decrease by almost 30%. In the same period, digital video (OTT and TV VoD<sup>12</sup>) increased from EUR 461 million in 2009 to EUR 1.8 billion in 2013, an increase of 291% and a value gain of EUR 1.34 billion. The digital uptake and value gain does not cover the physical losses, as the total home entertainment market (physical video and digital video revenues) in these 17 EU countries passed from EUR 9.16 billion in 2009 to EUR 8 billion, a total revenue loss of EUR 1.16 billion or a decrease of 12.7%. For now, the shift to digital video distribution therefore means a loss in revenues to rightsholders and creators in the paid entertainment market.

The abovementioned figures show a clear transitional phase for the European audiovisual market. The Internet has introduced new competitors in a once closed and regulated market, shifting market forces and establishing a new paradigm. European players, confronted with increased competition from international players, have to adapt to this new setting. The Internet, by challenging existing business models and market structures, creates new ones. These new markets are characterised at their beginning by phases of strong growth.

### 1.1.2. Rise in on-demand services in Europe

The growth relay for audiovisual services lies in the on-demand audiovisual service market. Digging deeper, data from IHS published in the IVF Yearbook 2014<sup>13</sup> of the International Video Federation makes the distinction between OTT VoD (“Digital Video” in IHS terminology) and TV VoD (on-demand services on managed networks, as those operated by pay-TV services, and therefore, mostly established in the country where the services are provided and operated by national players).

In order to understand the dynamics at play in the on-demand audiovisual service market, it is necessary to take a closer look at these figures and their evolution in the past five years. Consumer spend on on-demand video (digital and TV VoD) had a value of EUR 443.8 million in 2009 in the 14 EU countries<sup>14</sup> in which IHS tracked consumer spend. The important point to note, is that consumer spend on TV VoD represented in 2009 78% of the total spend on VoD services. The situation has been reversed completely just five years later. In 2013, total consumer spend on VoD services amounted to EUR 1.7 billion, up by 282% compared to 2009. Consumer spend on OTT video, that is to say video distributed through the open Internet and not controlled on a managed network by often national pay-TV players, represented 60% of total consumer spend.

In only five years, market forces shifted from the dominance of TV VoD, that is to say mostly national pay-TV operators and commercial broadcasters, toward OTT players who distribute their

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<sup>10</sup> Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom.

<sup>11</sup> See Yearbook 2014 of the European Audiovisual Observatory, [http://www.obs.coe.int/en/shop/yearbook/-/asset\\_publisher/ip2j/content/yearbook-2014](http://www.obs.coe.int/en/shop/yearbook/-/asset_publisher/ip2j/content/yearbook-2014).

<sup>12</sup> TV VoD as defined by IHS: TV VOD includes TV series and movies only (excludes sport, live events and adult content), provided by pay TV services on VOD basis via a walled garden (excludes subscription VOD)

<sup>13</sup> IVF – Yearbook 2014, [http://www.ivf-video.org/new/public/media/EU\\_Overview\\_2014.pdf](http://www.ivf-video.org/new/public/media/EU_Overview_2014.pdf).

<sup>14</sup> Belgium, Denmark, Germany, Finland, France, Hungary, Ireland, Italy, Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom.



content on the Internet, subject to less regulation when operating from outside of the EU. This shift shows how the Internet altered the market equilibrium from national competition (national TV VoD service operators) to an international “Over-the-Top” competition with new entrants.

Another main trend which emerged during the past two years, notably with the entry of Netflix in 14 countries<sup>15</sup> of the European Union, is the emergence of Subscription Video-on-demand services (SVoD). In 2013, according to IVF and IHS data, OTT SVoD services represented consumer spending of EUR 520.9 million, up by 147.5% compared to 2012, making SVoD services the most important and fastest growing business model among OTT on-demand video services. However, it is important to note that four markets (the United Kingdom, Finland, Norway and Sweden) make up three quarters of the total consumer spending on SVoD in 2013. SVoD services, allowing subscribers to consume in exchange for a flat fee (often around EUR 8 to 10 per month) all the content available in the catalogue, are found to be appealing to consumers. This appeal of SVoD services can be seen in the rapid up-take of SVoD services in the United Kingdom (the value of the UK SVoD market increased from GBP 28 million in 2009 to GBP 437 million in 2014 and is expected to grow to over GBP 1 billion by 2019<sup>16</sup>), bearing in mind that the United Kingdom is one of the most advanced markets in the EU concerning digital entertainment. With the development of SVoD services, these “new” digital services start to appeal also to older generations and not only early adopters.<sup>17</sup>

As offers develop in other EU countries, driven in most of the countries by the entry of Netflix and the reaction of national players to its entry, SVoD services and market value will experience a steep uptake in Western Europe, and to a less comparable extent in Central and Eastern Europe. Estimates by IHS Technology predict that the number of subscribers to Netflix will increase from 3 million in 2013 in Western Europe to 21 million in 2019, and 19.9 million for the EU in 2019.<sup>18</sup> The arrival of Netflix in the European market has acted as a catalyst for other players, and as has been stated:

*SVOD has developed even faster than we expected in our last edition a year ago. Some of this growth was spurred by Netflix’s aim to establish operations in 200 countries by end-2016. Not only has the launch of Netflix boosted each market, but the anticipation of its launch has galvanized local players into action – creating a whirlwind of promotional activity.<sup>19</sup>*

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<sup>15</sup> At the date of this publication Netflix operates its SVoD services in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

<sup>16</sup> Digital TV Europe, “UK SVoD market to pass £1 billion by 2019”, 23 March 2015, <http://www.digitaltveurope.net/342182/uk-svod-market-to-pass-1-billion-by-2019/>.

<sup>17</sup> In the United Kingdom, 38% of 35-45 year olds used SVoD services in 2014 up by +7 points, and the use of SVoD services by 35% of the 45-54 age old group experienced the most dramatic increase compared to 2013, +15 points. See Warc, “Older viewers turn to SVOD”, 25 May 2015, [http://www.warc.com/Content/News/N34804\\_Older\\_viewers\\_turn\\_to\\_SVOD.content?PUB=Warc%20News&CID=N34804&ID=665db27c-3a9e-4a73-aeb4-7bbd0e41dead&q=&qr=](http://www.warc.com/Content/News/N34804_Older_viewers_turn_to_SVOD.content?PUB=Warc%20News&CID=N34804&ID=665db27c-3a9e-4a73-aeb4-7bbd0e41dead&q=&qr=).

<sup>18</sup> Briel R., “Western Europe Netflix Subscribers will more than double by 2019, according to IHS Technology”, IHS, published in Broadband TV News, 9 June 2015, <http://www.broadbandtvnews.com/2015/06/09/netflix-subscribers-to-more-than-double-in-western-europe/>.

<sup>19</sup> Murray S., “OTT TV and video revenues to rocket to \$51 billion”, BroadbandTV News, 15<sup>th</sup> June 2015, available at: <http://www.broadbandtvnews.com/2015/06/15/ott-tv-and-video-revenues-to-rocket-to-51-billion/>.



### 1.1.3. Trends on the advertising market

According to Warc,<sup>20</sup> TV advertising in the EU 28 increased with a compound annual growth rate (CAGR) of +1.3% between 2009-2013. At the same period, Internet advertising increased with CAGR of +15%. Internet advertising, offering more possibilities to target consumers more precisely by using “big data”,<sup>21</sup> allowing for more interactivity and therefore engagement with the consumer, has become more appealing to advertisers, even if questions about the efficiency and effectiveness remain. Other facts explaining the rapid rise of Internet advertising are:

- The strong increase in mobile devices (smartphones,<sup>22</sup> tablets<sup>23</sup>) equipment in the EU population and the correlated increase in mobile advertising;
- The rise of online video advertising as a branding and storytelling medium for advertisers, allowed by higher broadband speeds on the fixed and mobile Internet and an increase in equipment in connected devices (mobile devices, Smart TVs, HDMI dongles<sup>24</sup>, game consoles, media players ...) used to watch online video content.<sup>25</sup> Online video advertising spend increased by 45.1% from 2012 to 2013 in 17 EU countries,<sup>26</sup> from EUR 714 million in 2012 to EUR 1.03 billion in 2013;<sup>27</sup>
- The expected growth in ad spending in social networks from USD 3.68 billion in 2014 in Western Europe to USD 6.85 billion in 2017<sup>28</sup> (and from USD 520 million in 2014 in Central and Eastern Europe to USD 790 million in 2017);
- The increased importance of real-time bidding and programmatic<sup>29</sup> buying and selling of advertisements (the use of data-driven software to buy and sell advertising inventory in an automated way)<sup>30</sup>.

<sup>20</sup> <http://www.warc.com/>.

<sup>21</sup> See Nikoltchev S. (Ed.), “New Forms of Commercial Communications in a Converged Audiovisual Sector”, IRIS *Special*, European Audiovisual Observatory, Strasbourg, 2014, [http://www.obs.coe.int/shop/irisspecial/-/asset\\_publisher/A0cy/content/iris-special-2014-new-forms-of-commercial-communications](http://www.obs.coe.int/shop/irisspecial/-/asset_publisher/A0cy/content/iris-special-2014-new-forms-of-commercial-communications).

<sup>22</sup> In Western Europe, mobile phone Internet User penetration is estimated at 48.2% of the population in 2014 and is expected to rise to 66% of the total population by 2017. See eMarketer, “Nearly Half of Western Europeans Will Use Mobile Web This Year”, 7 January 2014, <http://www.emarketer.com/Article/Nearly-Half-of-Western-Europeans-Will-Use-Mobile-Web-This-Year/1010510>.

<sup>23</sup> In EU-5 (France, Germany, Italy, Spain, UK), tablets are expected to have penetrated 31.3% of the population in 2014 and 44.1% in 2018, “The UK Leads the EU-5 in Tablet Adoption”, eMarketer 5 May 2014, <http://www.emarketer.com/Article/UK-Leads-EU-5-Tablet-Adoption/1010810>.

<sup>24</sup> Small devices that plug into other equipment to add functionality, e.g. Internet content streaming devices.

<sup>25</sup> eMarketer estimated mobile Internet ad spending in Western Europe at USD 3.58 billion in 2013, up by 259% compared to 2012, and forecasts mobile ad spending to reach USD 15.18 billion in 2017, an increase by +324% compared to 2013. For more information see eMarketer, “Smart TVs make slow progress in the UK”, 24 March 2015, <http://www.emarketer.com/Article/Smart-TVs-Make-Slow-Progress-UK/1012256>.

<sup>26</sup> EU countries included in the study (by order of importance for online video ad spend): United Kingdom, Germany, France, Italy, Netherlands, Sweden, Poland, Spain, Finland, Austria, Czech Republic, Denmark, Ireland, Greece, Slovenia, Hungary, Romania.

<sup>27</sup> IAB, “IAB Adex Benchmark report 2013”, <http://iab.org.pl/wp-content/uploads/2014/07/IAB-Europe-AdEx-Benchmark-2013-slides-PUBLIC.pdf>.

<sup>28</sup> eMarketer, “Social Network Ad Spending to Hit \$23.68 Billion Worldwide in 2015”, 15 April 2015, <http://www.emarketer.com/Article/Social-Network-Ad-Spending-Hit-2368-Billion-Worldwide-2015/1012357#>.

<sup>29</sup> Kihn M., “What is this thing called “Programmatic”, 11 December 2014, <http://blogs.gartner.com/martin-kihn/thing-called-programmatic/>.

<sup>30</sup> According to Magna Global, programmatic advertising transactions will make up 59% of online advertising transactions in the United Kingdom in 2017, 56% in France, 60% in the Netherlands, 33% in Germany and 31% in Spain, Italy and Greece. See “MAGNA GLOBAL Ad Forecasts: Programmatic Buying Reaching a Tipping Point”, <http://www.businesswire.com/news/home/20131014005599/en/MAGNA-GLOBAL-Ad-Forecasts-Programmatic-Buying-Reaching>.



These major changes in the advertising ecosystem and the shift towards the digital space where tech companies such as Google, Facebook and Amazon dominate,<sup>31</sup> will lead to a situation where TV will only make up 27% of total advertising in Western Europe in 2017,<sup>32</sup> according to findings by IHS. As traditional television viewing declines<sup>33</sup> and online video viewing increases, ad budgets will migrate towards the digital online landscape.

## 1.2. The impact of copyright infringement on the European audiovisual industry

Some fifteen years ago, the public enemy number one for the cultural industries (in this case, the music industry) was called Napster. Since then, lots of water has passed under the bridge, and (paraphrasing Sun Tzu) the cultural industries have seen many of their enemies' bodies floating by. However, Internet piracy is like the Lernaean Hydra: each time the industry cuts off one of the monster's heads, many other grow elsewhere. Subsequent peer-to-peer distribution systems learned from Napster's foes and adapted their software so that the indexing of available files would not be available in central servers anymore.<sup>34</sup>

The cultural industries, unable to cut that Hydra's head off, then shifted their focus from suing the distributors of peer-to-peer software to chasing the millions of users who actually were making illegal copies of copyrighted works. Moreover, they placed their trust in technological protection systems and reviewed in some cases their legislation on copyright in order to adapt it to the digital age.

But technology being much faster than the law, new forms of unauthorised access to copyrighted material appeared one after the other, posing new threats to the cultural industries as well as new legal challenges. For example, according to NPD Group's data, 27 million people in the United States used a mobile application to download free music in the past year, "much of it believed to be unauthorized".<sup>35</sup> They estimate that 21 million people use peer-to-peer sites to download music. Also, video stream ripper software is used widely to rip online audio and video streams from Spotify or YouTube to the users' computers.<sup>36</sup> Cyberlockers allow wide unauthorised

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<sup>31</sup> In the United Kingdom for example, Google has a 40.5% market share of the online advertising market in 2014 with digital ad revenues of GBP 2.93 billion and Facebook 7.9% at GBP 576.1 million. See eMarketer, "Google and Facebook to Account for Half of UK Digital Ad Spend in 2015", 4 December 2014, <http://www.emarketer.com/Article/Google-Facebook-Account-Half-of-UK-Digital-Ad-Spend-2015/1011651>.

<sup>32</sup> IHS, "Online Video Advertising Revenue Doubles in Three Years, Says IHS and Vidiro", 12 May 2015, <http://press.ihs.com/press-release/technology/online-video-advertising-revenue-doubles-three-years-says-ihs-and-vidiro>.

<sup>33</sup> IHS found that in 2014 the global average linear TV viewing time declined by 7 minutes per person per day.

<sup>34</sup> Napster contributory infringement was easy to prove before the courts because it maintained a log of the information concerning files made available for sharing, and users had to be logged on to the Napster system in order to transfer files.

<sup>35</sup> Ulloa N., "Are Most Illegal Downloads Happening on Mobile Applications?", Digital Music News, 25 March 2014, <http://www.digitalmusicnews.com/2014/03/25/mobilepiracy/>.

<sup>36</sup> Lindvall H., "YouTube and Spotify ripping: why won't they act?", The Guardian, 19 June 2013, <http://www.theguardian.com/media/media-blog/2013/jun/19/youtube-spotify-ripping-apps-mp3s>.



distribution of copyrighted content with a certain degree of anonymity. Summarising, this fast developing environment makes much harder the parsing of what is illegal today.<sup>37</sup>

### 1.2.1. The war on figures

1.5 million illegal downloads in eight hours. According to TorrentFreak, this is the new piracy record set by the season 5 finale of the Game of Thrones TV series.<sup>38</sup> The reasons for this record are to be found, first of all, in the HBO series' worldwide success, but also to the ease in which users can access copyrighted content for free. But what matters most: ease of access or the fact that the user gets content for free? Some argue that piracy is almost always a service problem and not a pricing problem.<sup>39</sup>

As has been detected through an empirical study<sup>40</sup> there are six major business models that are substantially based on copyright infringements, namely:

- Live TV Gateways: links to streams of live free-to-air and pay TV, in exchange for advertising or donations, with centrally hosted content;
- Peer-to-peer communities: download of content for free, mostly dependent on advertisements and donation funding;
- Subscription communities: content to download via peer-to-peer or distributed servers in exchange for a subscription fee, but less dependent on advertising;
- Music transactions: download from the site's own servers, with card processor logos on payment page;
- Rewarded freemiums: basic access to centrally located content is for free, but users providing content are rewarded financially;
- Embedded streaming: users can embed content on their own sites where other users can stream it; the upload of content is rewarded.

According to a report issued by the Digital Citizens Alliance,<sup>41</sup> ad-supported businesses based on copyright infringement enjoy low barriers to entry: obtaining copyrighted content and setting up a site can be achieved with minimal technical expertise or cost, and can then be repeated to avoid detection and policing, especially among the largest segments of sites. Moreover, attracting a user base requires little effort or investment, as millions of users are hungry for free content. As a result,

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<sup>37</sup> Crupnick R., "4 Brutal Realities of Modern-Day Piracy...", Digital Music News, 22 January 2015, <http://www.digitalmusicnews.com/2015/01/22/4-brutal-realities-modern-day-piracy/>.

<sup>38</sup> Van der Sar E., "Game of Thrones season finale breaks piracy records", 15 June 2015, <https://torrentfreak.com/game-of-thrones-season-finale-breaks-piracy-record-150615/>.

<sup>39</sup> See Tufnell N., "Interview: Gabe Newell", The Cambridge Student, 15 October 2015, <http://www.tcs.cam.ac.uk/interviews/0012301-interview-gabe-newell.html>.

<sup>40</sup> BAE Systems Detica for PRS for Music and Google, "The six business models for copyright infringement. A data-driven study of websites considered to be infringing copyright", A Google & PRS for Music commissioned report, June 2012, <http://www.prsformusic.com/aboutus/policyandresearch/researchandconomics/Documents/TheSixBusinessModelsofCopyrightInfringement.pdf>.

<sup>41</sup> Digital Citizens Alliance, "Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business A Report on the Profitability of Ad-Supported Content Theft", February 2014, <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>.



such businesses' infringing activity hurts the content creators' businesses, and undermines the credibility of the entire digital advertising ecosystem. Advertisement served on offending sites, often alongside offensive ads and links to malware, threatens the value of legitimate brands. As a result of all this, ad-supported businesses based on copyright infringement are highly profitable:

Figure 1 - Profitability analysis of ad-supported businesses based on copyright infringement

Segment	Ad Revenue	Margin
<b>BitTorrent and Other P2P Portals</b>		
Small	2,079,334 USD	85.9%
Medium	3,227,159 USD	84.5%
Large	23,181,252 USD	94.1%
<b>Linking Sites</b>		
Small	3,690,915 USD	79.9%
Medium	8,351,446 USD	89.8%
Large	4,498,344 USD	87.5%
<b>Video Streaming Hosts</b>		
Small	529,480 USD	79.9%
Medium	1,681,477 USD	
Large	4,661,535 USD	
<b>Direct Download (DDL) Host Sites</b>		
Small	401,087 USD	
Medium	1,281,344 USD	
Large	3,084,123 USD	
Q3 Aggregate Ad Revenue, Margin for Ad-Supported Sites		

Source: "Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business  
A Report on the Profitability of Ad-Supported Content Theft", Digital Citizens Alliance, February 2014.

A particular problem faced by rightsholders nowadays is posed by the so-called "cyberlockers". These are online services that provide storage space for digital files on dedicated servers.

According to a NetNames Report<sup>42</sup> they are "intentionally architected to support the massive distribution of files among strangers on a worldwide and unrestricted scale, while carefully limiting

<sup>42</sup> NetNames, "Behind the cyberlocker door: A report on how shadowy cyberlocker businesses use credit card companies to make millions", a report for Digital Citizens Alliance, 2014,

<https://media.gractions.com/314A5A5A9ABBBC5E3BD824CF47C46EF4B9D3A76/7843c97d-fd81-4597-a5d9-b1f5866b0833.pdf>.



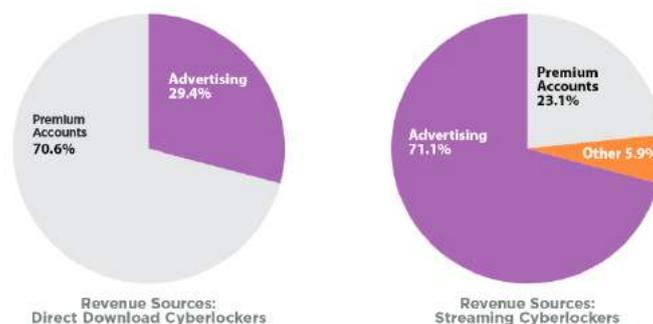
their own knowledge of which files are being distributed. The link to a user's file stored on a cyberlocker can be posted to any location for any user to access: cyberlockers generally place no limits on who can download or stream a file". According to this report, the client is not the person who uploads files. Actually people who post popular files are often paid by the cyberlocker through affiliate programmes that reward users when their uploaded content is accessed. Instead, their real clients are the people downloading or streaming the content.

Cyberlockers' business is selling advertising around these visitors, and/or offering them subscription services. In that sense, cyberlockers differ from other cloud storage services on their business model, since those cloud services are not designed to incentivise their use for copyright infringement, and their business model is not based on attracting customers who will pay to download illegal files.

Another difference between regular cloud storage providers and cyberlockers is the latter's lax copyright enforcement policies. The report quotes an example of one cyberlocker that, despite receiving over eight million notifications from rightsholders, it terminated the accounts of only 43 users – and most of whom for reasons other than infringement. But the most important difference between legitimate cloud storage services and cyberlockers is that the overwhelming bulk of files found on cyberlockers are illegal.

The NetNames report states that "immense levels of profit are possible for sites that facilitate and encourage infringement by providing centralized hosting for content theft". The costs incurred in securing stable hosting and, in some cases, paying affiliates in order to attract visitors "pale in comparison to the enormous revenues that can be gathered through the collection of subscription fees through payment processors and advertising dollars". The overall, total annual revenue, across the thirty cyberlockers researched in the report equated to USD 96.2 million or USD 3.2 million per site.

Figure 2 - Cyberlockers' revenue sources



Source: "Behind the cyberlocker door: A report on how shadowy cyberlocker businesses use credit card companies to make millions", A NetNames Report for Digital Citizens Alliance, 2014.

The report also states that cyberlockers are aided and enhanced by intermediaries that deliver access to advertising, facilitate the acceptance of online payments, and provide the tools and means to serve infringing content to users. Every cyberlocker that offered paid premium accounts to users provided the ability to pay for those subscriptions by using Visa or MasterCard, with only one exception. Only a single cyberlocker accepted PayPal. The report concludes that corrective action by any of these intermediaries could make a direct impact on cyberlockers' activities.



These figures provide only a fraction of the figures that have been quoted in the various studies that have been commissioned over the past years by rightsholders, public bodies and by civil society. The reason why there is no universal truth as to the worth (*rectius* weight) of piracy on the cultural industry is very likely to be found in the simple reason that we are here referring to an illegal activity. As such, it cannot be subject to any regular data collection deriving from declarations from the industry, as is normally the case for legal activities. It is instead dependent on empirical surveys and on a very specific investigation activity by specialised bodies.

The European Observatory on Infringements of Intellectual Property Rights<sup>43</sup> has carried out several studies on the costs of intellectual property infringements<sup>44</sup> in various sectors, focusing on “key results such as lost sales, revenue and employment, as well as on knock-on effects on other industries and on government revenue”, and is currently conducting, with the European Commission’s Joint Research Centre,<sup>45</sup> a study on infringements in the music, film and e-book industries, in order to “look at copyright from an empirical economics perspective and aims to fill major holes in the empirical evidence gap and thereby contribute to a more constructive debate”.

While awaiting the results of this study, there is already a huge variety of studies available, with a significant divergence of opinions. Being creative industries highly dependent on copyright protection for the remuneration of their activities, piracy is considered as one of the most important direct reasons for their losses.<sup>46</sup> On the other hand, there are also studies that provide a different picture, stating that evidence does not support claims about overall patterns of revenue reduction due to individual copyright infringement.<sup>47</sup>

To get an idea of the variety of conclusions on this very heated topic, it is worth considering the following statements:<sup>48</sup>

- Piracy reduces how long albums spend on the pop charts (University of Connecticut<sup>49</sup>)...  
...but albums that get pirated the most don't see a corresponding dent in sales (Hitotsubashi University<sup>50</sup>).
- Pirates actually spend more money on legal downloads than non-pirates (University of Amsterdam<sup>51</sup>)...

<sup>43</sup> The European Observatory on Infringements of Intellectual Property Rights was created as part of the Commission's Internal Market and Services Directorate-General in April 2009 under the name of the European Observatory on Counterfeiting and Piracy. The Office for Harmonization in the Internal Market (OHIM - <https://oami.europa.eu/ohimportal/en/home>), as the EU's principal agency devoted exclusively to IP matters. It began co-operating closely with the Observatory under a Memorandum of Understanding signed in April 2011.

<sup>44</sup> The studies conducted by the Observatory concern for the moment the counterfeit of goods (Cosmetics and personal care sector, Clothing, footwear and accessories sector, Sports goods sector, and, to come, Luggage and handbags, Watches and jewellery, Medicines, Tobacco, Alcoholic beverages, Games and toys, Computers and automotive parts). See <https://oami.europa.eu/ohimportal/en/web/observatory/quantification-of-ipr-infringement>.

<sup>45</sup> See <https://ec.europa.eu/irc/en/research-topic/digital-economy#>.

<sup>46</sup> See e.g. RIAA, Piracy Impact Studies, [https://www.riaa.com/keystatistics.php?content\\_selector=research-report-journal-academic](https://www.riaa.com/keystatistics.php?content_selector=research-report-journal-academic).

<sup>47</sup> Bart Cammaerts B., Mansell R., Meng B., “Copyright & Creation - A Case for Promoting Inclusive Online Sharing”, LSE Media Policy Project, September 2013, <http://www.lse.ac.uk/media@lse/documents/MPP/LSE-MPP-Policy-Brief-9-Copyright-and-Creation.pdf>.

<sup>48</sup> See Collier K., “Inside the confusing, contradictory world of Internet piracy studies”, <http://www.dailydot.com/politics/piracy-studies-contradictory-paid-for/>.

<sup>49</sup> Bhattacharjee S., Gopal R.D., Lertwachara K., Marsden J.R., Telang R., “The Effect of Digital Sharing Technologies on Music Markets: A Survival Analysis of Albums on Ranking Charts”, Management Science, 2007, <http://pubsonline.informs.org/doi/abs/10.1287/mnsc.1070.0699>.

<sup>50</sup> Tatsuo T., “Does file sharing reduce music CD sales?: A case of Japan” IIR Working Paper, 2004, <http://econpapers.repec.org/paper/hitirwps/05-08.htm>.



...but piracy means fewer CD sales. (University of Texas at Dallas<sup>52</sup>).

- Among college students who pirate lots of music, every five downloads is equivalent to about one lost sale (University of Pennsylvania<sup>53</sup>)...

...but pirates spend way more money on legal downloads than non-pirates. (Columbia University<sup>54</sup>).

- Apple loses money when college students pirate more music, because they purchase fewer legal iTunes downloads (Chinese University of Hong Kong<sup>55</sup>)...

...but Apple gains money when college students pirate more music, because they purchase more iPods. (That same study).

If any conclusion can be drawn from this “war on figures”, it is that we are facing a complex phenomenon where many social and cultural aspects are at stake which are certainly of great relevance for policy makers. However, what is relevant for the purposes of copyright enforcement is the ascertainment of a violation no matter how big the loss has been for the creative industries and for rightsholders, without prejudice to the fact that no content is created for free, and that the investments made by the creative industries deserve a return.

But apart from the parallel business models driven by professional pirates as described above, the aspect which makes online infringements so common, is also an issue of awareness, as will be described in the following section.

## 1.2.2. Public awareness of copyright

If one were to accept the *dictum* that piracy is almost always a service problem and not a pricing problem, solving this conundrum should be an easy proposition. There are already certain signs that an improvement of existing legal offers may have a positive impact on piracy figures. For example, in Norway, a countrywide survey in December 2014 showed that just 4% of Norwegians under 30 years still used illegal file-sharing platforms to get hold of music, and less than 1% of people under 30 years said that file-sharing was their main source of obtaining music.<sup>56</sup> This is a complete reversal of the situation in 2009, as this graph shows:

<sup>51</sup> Poort J. and Leenheer J. (eds), “File sharing 2012, Downloading from illegal sources in the Netherlands”, IViR, 2012, <http://www.ivir.nl/publicaties/download/174>.

<sup>52</sup> Liebowitz, S.J., “Research Note: Testing File-Sharing’s Impact on Music Album Sales in Cities”, Management Science, 2008, <https://www.utd.edu/~liebowit/cities6f.pdf>.

<sup>53</sup> Rob R. and Waldfogel J., “Piracy on the High C’s: Music Downloading, Sales Displacement, and Social Welfare in a Sample of College Students”, <http://www.nber.org/papers/w10874.pdf>.

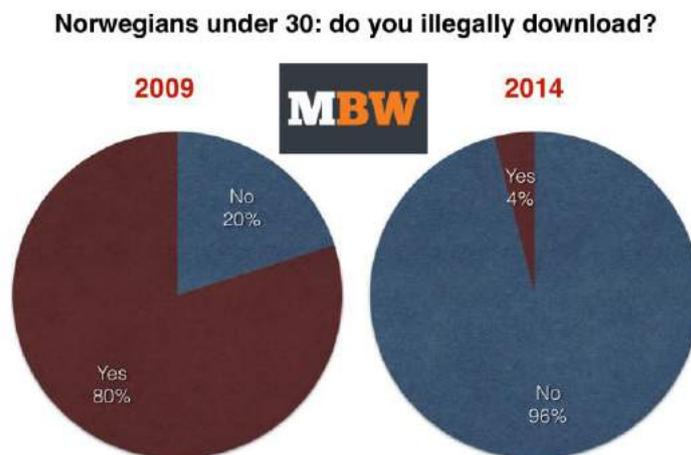
<sup>54</sup> Karaganis, “Where do Music Collections Come From?”, American Assembly, Columbia University, 2012, <http://piracy.americanassembly.org/where-do-music-collections-come-from/>.

<sup>55</sup> Cheuk Leung T., “Should the Music Industry Sue Its Own Customers? Impacts of Music Piracy and Policy Suggestions”, Chinese University of Hong Kong, 2002, <http://faculty.washington.edu/bajari/metricsp10/ipod.pdf>.

<sup>56</sup> According to IFPI Norge MD Marte Thorsby, “We are now offering services that are both better and more user-friendly than illegal platforms... In [the past] five years, we have virtually eliminated illegal file sharing in the music industry.” See Ingham T., “Music piracy has been ‘virtually eliminated’ in Norway”, Music Business Worldwide, 26 January 2015, <http://www.musicbusinessworldwide.com/piracy-virtually-eliminated-norway/>.

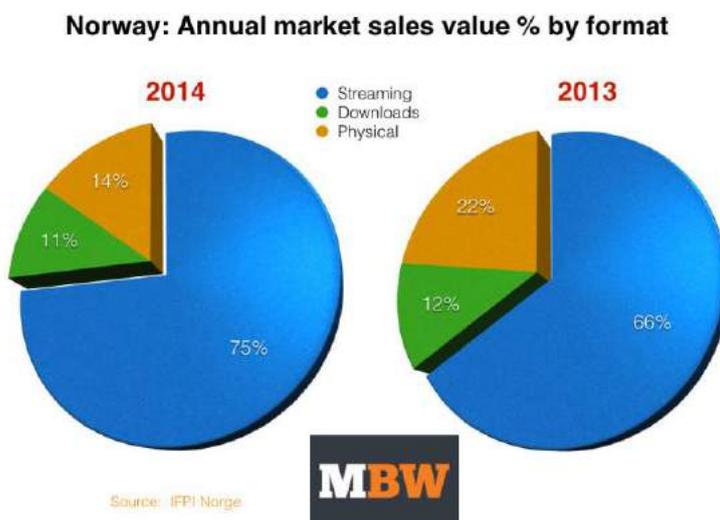


Figure 3 - Percentage of people reporting having downloaded or accessed copyright-protected content illegally over the last 12 months.



Source IFPI Norge/GramArt Surveys

Figure 4 - Percentage of annual market sales value by format in Norway



Source: IFPI Norge

Source: IFPI Norge

The success of SVoD services such as Netflix could have a similar effect on the audiovisual sector, even if for many reasons, making a comprehensive catalogue of audiovisual works available online is considerably more complex than licensing music for online services. Also, what seems to work in Norway may not work in other countries. The users' attitude towards intellectual property rights has to be understood first in order to analyse to what extent a solution to piracy can be found. Only then one can define, in a "carrot and stick" approach, what is the right mix between an improvement of existing legal offers, raising awareness in favour of intellectual property rights and enforcement of such rights.



According to a study made by the Office for Harmonization in the Internal Market,<sup>57</sup> European citizens are largely favourable to intellectual property rights, are convinced that it is an important pillar of the economic and social organisation of their country, and are supportive of associated regulations as well as their enforcement. However, the study also shows that even if only a tenth of Europeans openly admit to having engaged in IP infringing behaviours over the last 12 months, more than a third of them tolerate these same behaviours when considered subjectively. According to the study, these two attitudes are not mutually exclusive. A large majority of EU citizens display strong support for intellectual property and yet consider that at a personal level, breaking these rules may be justified to cope with the consequences of limited purchasing power or to protest against an economic model driven by a market economy and premium brands.

A demographic analysis of the study's results yield interesting conclusions: illegally accessing copyrighted material is more popular among the younger generations. Also, gender and education level play a role: male and more educated people are more prone to illegally accessing copyrighted content. Also differences exist between member states and according to the date of their accession to the European Union.

*Table 1 - Percentage of people reporting having downloaded or accessed copyright-protected content illegally over the last 12 months.*

Age groups	Percentage
15 to 24 years	26%
25 to 34 years	17%
35 to 44 years	9%
45 to 54 years	5%
over 55 years	below 3%

*Source: "European citizens and intellectual property: perception, awareness and behaviour", Office for Harmonization in the Internal Market, November 2013.*

*Table 2 - Percentage of people reporting having downloaded or accessed copyright-protected content illegally over the last 12 months (according to gender)*

Age groups	Men	Women
15 to 24 years	31%	21%
All	13%	6%

*Source: "European citizens and intellectual property: perception, awareness and behaviour", Office for Harmonization in the Internal Market, November 2013.*

<sup>57</sup> "European citizens and intellectual property: perception, awareness and behaviour", Office for Harmonization in the Internal Market, November 2013,

[https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/25-11-2013/european\\_public\\_opinion\\_study\\_web.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf).



*Table 3 - Percentage of people reporting having downloaded or accessed copyright-protected content illegally over the last 12 month (according to education level)*

Age groups	Percentage
finished their studies before the age of 15	3%
finished their studies between 16 and 19 years old	6%
finished their studies after 20 years old	10%
citizens still studying	27%

*Source: "European citizens and intellectual property: perception, awareness and behaviour", Office for Harmonization in the Internal Market, November 2013.*

*Table 4 - Percentage of people reporting having downloaded or accessed copyright-protected content illegally over the last 12 month (according to EU Member State)*

Member States, which joined the EU after 2004	13%
15 other Member States	4%

*Source: "European citizens and intellectual property: perception, awareness and behaviour", Office for Harmonization in the Internal Market, November 2013.*

Another important finding of the study is that the understanding of intellectual property and related notions by Europeans is far from being consistent and reveals important gaps between self-evaluated/'subjective' understanding and verified/'objective' understanding. Three quarters of Europeans say they understand the term "intellectual property" and related terms such as patents, copyrights, trademarks etc. However, the objective knowledge indicators paint a different perspective – with only 13% of Europeans demonstrating a good knowledge of what is behind the term IP and 51% displaying moderate knowledge and 37% poor knowledge.

Also, if counterfeiting is condemned on an ethical level, and judged to have very negative consequences on a macro-economic level, it can be seen more favourably when it is presented from an individual perspective and in the light of personal benefit. There is also a perception that intellectual property mainly serves the interests of elites and tends to demonstrate the lack of understanding, or disagreement with the idea of the value that it brings to European citizens at large. These perceptions are again more or less prominent depending on respondents' age, occupation and country of residence.

With regard to the influence that the existence and awareness of legal offers might have on illegal downloading activities, 80% of Europeans agree with the statement "whenever there is an affordable legal option I prefer to access/download/stream content through authorised platforms and not do it illegally", a figure this time strictly identical amongst citizens from 15 to 24-year-olds.

The question therefore is: what is an "affordable legal option"? Whereas the first part of the concept, "affordable", is subjective and therefore difficult to measure, "legal option" is easily identifiable. In France, the *Haute Autorité pour la diffusion des œuvres et la protection des droits sur*



internet (HADOPI)<sup>58</sup> hosts a website<sup>59</sup> that lists Internet services providing legal offers for music, VoD, eBooks, video games, photos and crowdfunding. This website also offers Internet users the possibility of reporting copyrighted works that are not available on any legal service. After six months of operating this website, the HADOPI issued a report<sup>60</sup> concerning the numbers of works unavailable online. On 1 August 2015, 772 works had been reported by users as not being available online: however, 200 of the works reported (26%) were actually available on legal sites; 152 of the works reported (20%) were declared unavailable after feedback received from the rightsholders; 420 of the works reported (54%) were in the process of consultation with rightsholders identified by the HADOPI. The reasons put forward by rightsholders not to publish certain works online were the cost of digitisation as well as the cost of adapting them for each online platform. In any event, the HADOPI remarks that for those users engaging in illicit downloading the price of legal options is more important than their availability online. That is, “affordable” seems to come before “legal offer”.

Of course, those engaging in illicit downloading can be subject to lawsuits, and the next chapters of this publication describe the legal framework of copyright enforcement in the EU. However, given the potential number of infringers and the difficulties in identifying them, in recent years, different proposals have been made proposing alternative solutions to copyright enforcement, such as to extend the private copying exception to copyright infringement on the Internet.<sup>61</sup> The proponents of these solutions (e.g. *licence globale* in France, *Kulturflatrate* in Germany) submit that a levy paid by Internet users in addition to their Internet access flat-rate can result in adequate remuneration for rightsholders and solve (at least in part) the problem of Internet piracy. For example, a recent large-scale empirical study of Alternative Compensation Systems (ACS)<sup>62</sup> conducted by a multidisciplinary research group at the Institute for Information Law (IViR), University of Amsterdam, suggests that:

- Consumers are dissatisfied with the currently available legal access channels, and consequently, different forms of ACS are supported by the majority of the Dutch population;
- An ACS, if implemented, would provide extra revenues to music and audio-visual rights holders as compared to the status quo;
- It is possible to include lay people in highly complex copyright policy decisions.

From a legal point of view, the main criticism made against such solutions is that they might be contrary to international copyright treaties and take away from rightsholders their exclusive right

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<sup>58</sup> The HADOPI is an independent public authority, the creation of which was the result of extensive discussions about creation in a digital world. The missions with which it is vested are set out in the Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet. <http://www.hadopi.fr/en/high-authority/high-authority-overview-and-missions>. For more details see paragraph 3.3.1.

<sup>59</sup> See <http://offrelegale.fr/>.

<sup>60</sup> Hadopi, Rapport intermédiaire sur le signalement des oeuvres introuvables, [http://blog.offrelegale.fr/wp-content/uploads/2015/09/prez\\_signalement\\_20150914.pdf](http://blog.offrelegale.fr/wp-content/uploads/2015/09/prez_signalement_20150914.pdf).

<sup>61</sup> For further information on this topic see e.g. Cabrera Blázquez F.J., “Private Copying Levies at the Crossroads”, in Nikoltchev S. (Ed.), *Who Pays for Private Copying?*, IRIS Plus 2011-4, European Audiovisual Observatory, Strasbourg 2011, [http://www.obs.coe.int/documents/205595/264635/Iris\\_plus\\_2011-4\\_EN\\_FullText.pdf](http://www.obs.coe.int/documents/205595/264635/Iris_plus_2011-4_EN_FullText.pdf).

<sup>62</sup> Quintais J.P., “IViR Survey Shows Public Support for Legalizing Digital Content Sharing through Alternative Compensation System”, *Kluwer Copyright Blog*, 1 July 2015, <http://kluwercopyrightblog.com/2015/07/01/ivir-survey-shows-public-support-for-legalizing-digital-content-sharing-through-alternative-compensation-system/>.



to determine the use of their intellectual property. From a practical point of view, the main criticism is that it cannot be proven in advance that with the introduction of an ACS, the law-abiding people that now buy their CDs and DVDs or use online services like Spotify or Netflix might switch to sharing files or use free streaming services since it now would be legal and they would pay the levy anyway.





## 2. International and European legal framework

### 2.1. Relevant international provisions on copyright enforcement

According to the World Intellectual Property Organisation (WIPO), “the protection of copyright and related rights contributes to the promotion, enriching and disseminating of national cultural heritage and, as such, it forms an essential part of the development process of countries”.<sup>63</sup> Every production in the literary, scientific and artistic domain, whatever the mode or form of expression, is subject matter of copyright protection, as long as it is an original intellectual creation of the author. Practically all national copyright laws provide for the protection of literary works, musical works, artistic works and motion pictures (cinematographic works). Owners of copyright are conferred by law “exclusive rights” of an economic character to authorise others to use the protected work, as well as “moral rights” on their original intellectual creation.

Protecting intellectual property rights (IPR) is not only important for promoting culture and diversity, but it is also important at an economic level, especially to remunerate authors and creators and allow them to derive a legitimate profit from their creation.<sup>64</sup> Through copyright and related rights, authors and creators can benefit from the commercial value of their work and obtain a fair return on their investment. At a macroeconomic level, IPR protection has also an important role to play as it contributes to developing employment and improving competitiveness at a country level.

However, providing for exclusive rights at a legislative level is not enough, as countries also need to ensure that the rights granted are respected and, if they are not, that they can be enforced against infringers in practice. An effective intellectual property (IP) system therefore needs to be accompanied by appropriate remedies and an efficient judicial system in the framework of which infringements can be prosecuted and adjudicated. This can be achieved through the adoption of high standards for the enforcement of copyright and related rights at international level, together with the setting up of appropriate rightsholders’ organisations for collection and distribution of fees.

The advent of digital technology that makes it possible to transmit and make perfect copies of any copyright-protected work in digital form, as well as the increasing importance of goods and services protected by IPRs in international trade, and in the worldwide economy, have contributed to the evolution of international enforcement standards in the past 20 years. The following sections aim at describing those standards and provisions applicable at international level in relation to the enforcement of copyright and related rights in the online environment.

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<sup>63</sup> See WIPO Intellectual Property Handbook: Policy, Law and Use, <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf>.

<sup>64</sup> See chapter 1 of this publication.



## 2.1.1. From the WIPO Conventions to the Internet Treaties

### 2.1.1.1. Laying the foundation of minimum standards of enforcement in the Berne Convention

The Berne and Rome Conventions<sup>65</sup> already established in the 19th century some minimum rights that parties to the conventions must grant to beneficiaries. However, these conventions do not contain extensive provisions in relation to the enforcement of rights, apart from the general obligation for contracting parties to offer adequate means for the enforcement of rights under their national laws. Both conventions are based on the principle of “national treatment”, expanding the territorial application of the regulatory framework to nationals of the contracting parties of the convention (Article 5(1) of the Berne Convention).<sup>66</sup> In addition, Article 5(2) of the Berne Convention provides that the enjoyment and the exercise of the rights protected

*“(…) shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed”.*

The other provisions related to IP enforcement contained in the WIPO Conventions refer to the possibility of the seizure of infringing copies of a work in any signatory country where the work enjoys protection<sup>67</sup> or to the requirement for signatory countries to adopt certain appropriate enforcement measures.<sup>68</sup>

Eight countries<sup>69</sup> acceded to the Berne Convention in 1886. Today, 168 countries from around the world<sup>70</sup> are parties to the Convention and have to implement the minimum standards of copyright protection it provides for (92 countries have signed and implemented the Rome Convention). It is worthwhile mentioning another convention, the Universal Copyright Convention (UCC),<sup>71</sup> which was adopted in 1952 under the aegis of UNESCO with a view to extend international copyright protection universally, for those states which disagreed with aspects of the Berne Convention but still wished to participate in some form of multilateral copyright protection.<sup>72</sup> Contrary to the Berne Convention, which prohibits formal requirements that affect the “exercise and

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<sup>65</sup> WIPO, Rome Convention for the protection of Performers, Producers of Phonograms and Broadcasting Organisations, 26 October 1961, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=289757](http://www.wipo.int/treaties/en/text.jsp?file_id=289757).

<sup>66</sup> WIPO, Berne Convention for the protection of Literary and Artistic Works, 9 September 1886, as revised in 1971, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698).

<sup>67</sup> See Article 16(1) and (2) of the Berne Convention.

<sup>68</sup> See for example Article 36(1) of the Berne Convention.

<sup>69</sup> Belgium, France, Germany, Italy, Spain, Switzerland, Tunisia and the United Kingdom.

<sup>70</sup> For more details, see: [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=15](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15).

<sup>71</sup> Universal Copyright Convention, with Appendix Declaration relating to Articles XVII and Resolution concerning Article XI 1952, [http://portal.unesco.org/en/ev.php-URL\\_ID=15381&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15381&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>72</sup> These states included developing countries as well as the United States and most of Latin America. The former considered that the strong copyright protections parties to the Berne Convention overly benefited Western, developed, copyright-exporting nations, whereas the latter two were already members of the Buenos Aires Convention on Literary and Artistic Copyright, a Pan-American copyright convention that was weaker than the Berne Convention. The Berne Convention signatory countries also became parties to the UCC, so that their copyrights would exist in non-Berne convention states. In 1973, the Soviet Union joined the UCC. The United States finally adhered to the Berne Convention on 1 March 1989, to the WPPT on 20 May 2002 and to the WCT on 5 June 2009. The Russian Federation adhered to the Berne Convention on 13 March 1995 and to the WCT and WPPT on 5 February 2009.



enjoyment” of copyright,<sup>73</sup> under the UCC, any formality in a national law can be satisfied by the use of a notice of copyright in the form and position specified in the UCC.<sup>74</sup>

### 2.1.1.2. Adapting standards to digital technologies through the Internet Treaties

In 1996, two additional treaties were adopted within the framework of the WIPO, with a view to update and supplement the Berne and Rome Conventions and adequately respond to the questions raised by the development of technologies and the new forms of dissemination of works via the Internet. The WIPO Copyright Treaty (WCT)<sup>75</sup> and the WIPO Performance and Phonogram Treaty (WPPT)<sup>76</sup> - commonly referred to as the “Internet Treaties” - which entered into force in 2002, do not provide for a real extension of the scope of protection, but mainly clarify the application of the existing norms and their adaptation to the new digital online environment.

As regards the exercise and the enforcement of copyright and related rights, the Internet Treaties have introduced new obligations for the protection of technological measures and rights management information (TPMs/DRMs). In particular, parties to the conventions shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers or producers of phonograms in connection with the exercise of their rights and that restrict acts, in respect of their works, performances or phonograms, which are not authorised.

93 countries<sup>77</sup> have adhered to the WCT (94 to the WPPT), 49 of which did so between 1996 and 1997. The WCT and WPPT are in force in most of these countries. All the principles and values promoted in the WCT and WPPT were later confirmed through the adoption, in 2012, of the Beijing Treaty on Audiovisual Performances (BTAP),<sup>78</sup> which has been signed to the date by 77 countries but, is not yet in force.

### 2.1.2. The major milestone of the TRIPS agreement

At the beginning of the second half of the 20<sup>th</sup> century, in view of the emergence of new players on the global scene such as China, IP issues entered into the field of trade negotiations. The issue of an effective international protection of IPRs was introduced as part of the Uruguay Round of the GATT<sup>79</sup> negotiations in the framework of the World Trade Organisation (WTO), as a response to the rising surge of pirated and counterfeit goods distorting international trade flows. When the WTO Agreement was concluded in Marrakesh in 1994, the Agreement on Trade-Related aspects of

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<sup>73</sup> The works of an author who is a national or domiciliary of a country that is a party to the treaty or works first published in a contracting country or published within 30 days of first publication in a Berne Convention country can claim protection.

<sup>74</sup> A UCC notice should consist of the symbol © (C in a circle) accompanied by the year of first publication and the name of the copyright proprietor.

<sup>75</sup> WIPO Copyright Treaty, 20 December 1996, <http://www.wipo.int/wipolex/en/details.jsp?id=12740>.

<sup>76</sup> WIPO Performance and Phonograms Treaty, 20 December 1996, <http://www.wipo.int/wipolex/en/details.jsp?id=12743>.

<sup>77</sup> See [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=16](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=16).

<sup>78</sup> WIPO, Beijing Treaty on Audiovisual Performances, 24 June 2012, <http://www.wipo.int/wipolex/en/details.jsp?id=12213>.

<sup>79</sup> General Agreement on Tariffs and Trade, 30 October 1947, [https://www.wto.org/english/docs\\_e/legal\\_e/06-gatt.pdf](https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf).



Intellectual Property Rights (TRIPS),<sup>80</sup> with its main objective being IPRs protection and IPRs enforcement,<sup>81</sup> became an integral part of the Treaty. According to Article 8(2) TRIPS:

*Appropriate measures may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.*

With the TRIPS, not only the geographical scope of mandatory IPR protection<sup>82</sup> increased on a global level, but the standards of such protection were elevated to a much higher level than what had been prescribed so far and new obligations were imposed. In particular, the National Treatment principle was endorsed by Article 3 of the TRIPS and Part III includes a list of detailed obligations that WTO member states must comply with in relation to enforcement rules, civil and administrative procedures, provisional measures, border measures and criminal proceedings, as follows:

- Enforcement procedures must be efficient and shall not be unnecessarily costly or complicated; judicial review of administrative decisions must be granted; sanctions in civil and administrative proceedings must include, in addition to permanent injunctions and damages, also other remedies such as disposal of infringing goods outside the channels of commerce, without compensation being paid to the infringer;
- Preliminary measures must be available for the purpose of preventing infringements or securing evidence; in urgent cases, this must be possible without the other party being heard;
- Criminal procedures and penalties must be available in cases of copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, and where appropriate the seizure, and destruction of the infringing goods.<sup>83</sup>

One of the most important novelties of the TRIPS with regard to IPR enforcement lies in the ability of contracting parties to subject alleged violations of the TRIPS to the WTO Dispute Settlement procedure.<sup>84</sup> This procedure allows for cross-retaliation (i.e. certain privileges can be suspended vis-à-vis the infringing parties in areas other than the one in which the infringement occurred) if a party does not abide by the terms of a binding dispute settlement. In practice, this often increases the pressure on the infringing state's legislature, to bring its national law in line with the WTO TRIPS standards.

The TRIPS had to be implemented in developed countries by 2000, whereas less developed countries had until 2013 to implement it - with the possibility to ask for a further extension.<sup>85</sup> More than 20 years after its adoption, the assessment of the TRIPS is somewhat mixed. From the rightsholders' point of view, the TRIPS has been beneficial to raise the standards of substantive law

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<sup>80</sup> TRIPS is Annex 1 C to the WTO Agreement, 15 April 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf).

<sup>81</sup> See Article 7 TRIPS.

<sup>82</sup> 161 countries are currently members of the TRIPS, [http://www.wipo.int/wipolex/en/other\\_treaties/parties.jsp?treaty\\_id=231&group\\_id=22](http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22).

<sup>83</sup> See Article 61 TRIPS.

<sup>84</sup> See Part IV (Articles 63 and 64) TRIPS.

<sup>85</sup> See Part IV TRIPS.



in a major number of countries, even though more protection should be granted to make enforcement more efficient and deterrent. From growing parts of the civil society in industrial countries, it is argued that overly strong protection encumbers contemporary forms of creativity and information exchange.<sup>86</sup>

### 2.1.3. The Council of Europe Convention on Cybercrime

Within the framework of the Council of Europe, the Convention on Cybercrime,<sup>87</sup> also known as the Budapest Convention, was adopted in November 2001 and entered into force in July 2004. As of September 2015, 47 countries had ratified the convention. The non-Council of Europe states which signed and ratified the Convention include Australia, Canada, Japan, the United States and South Africa. The Budapest Convention is the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security. Its main objective is to pursue a common criminal policy aimed at the protection of society against cybercrime, especially by adopting appropriate legislation and fostering international co-operation.

Article 10 (1) and (2) of the Convention provide that each party to the convention shall adopt legislative and other measures to establish as criminal offences under its domestic law the infringement of copyright and related rights, as defined under the law of that party, pursuant to the obligations it has undertaken under the Berne and Rome Conventions, the TRIPS and the WIPO Treaty. The Convention excludes any moral rights conferred by such conventions and limits its scope to copyright and related rights offences committed wilfully on a commercial scale and by means of a computer system. In addition, Article 10(3) authorises parties to the convention to reserve the right not to impose criminal liability in certain limited circumstances, provided that other effective remedies are available and that such reservation does not derogate from the Party's international obligations set forth in the same international instruments.

Since it entered into force, major countries like Brazil and India have declined to adopt the Convention on the grounds that they did not participate in its drafting, while Russia was opposed to the Convention on grounds of national sovereignty.

### 2.1.4. Post TRIPS developments in the field of copyright enforcement

In view of the increasing difficulties encountered at ministerial level to obtain some significant improvements in IP enforcement issues in international fora, the USA and the EU progressively opted for addressing them at bilateral level, through the negotiations of "Free Trade Agreements" (FTAs) and Economic Partnership Agreements (EPAs)<sup>88</sup> with some East-Asian and Eastern European

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<sup>86</sup> See The Washington Declaration on Intellectual Property and the Public Interest, <http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf>.

<sup>87</sup> Convention on Cybercrime, Budapest, 23.11.2001, <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>.

<sup>88</sup> For further information regarding bilateral trade relations of the EU, see <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations>.



States. In these bilateral agreements, the parties subscribe to a high level of IP protection through the approximation of their legislation and practice, in exchange for certain trade advantages.<sup>89</sup>

Furthermore, a multinational treaty, the Anti-Counterfeiting Trade Agreement (ACTA) was negotiated from 2008 between several countries<sup>90</sup>. It was aimed at setting international standards for IP enforcement, targeting counterfeit goods and copyright infringements on the Internet and achieving a more effective international enforcement. The ACTA addresses border measures, civil sanctions and criminal sanctions and goes beyond the existing *acquis* under the TRIPS, particularly by enhancing the level of sanctions applicable in cases of copyright and related right infringement on a commercial scale.

The ACTA was signed by the EU on 26 January 2012 in Tokyo and had to be signed and ratified by all EU member states as it intervened in an area of shared competences with national authorities, such as criminal enforcement. After the signing of the Agreement by the EU and its member states,<sup>91</sup> ACTA still had to be notified to the European Parliament to formally initiate its consent procedure before the adoption of the final decision by the Council of the European Union and to start its ratification process at national level. However, after months of intense debates among civil society and NGOs about the potential threat on citizen's liberties and fundamental rights, such as privacy, freedom of expression and data protection, the European Parliament finally rejected ACTA on 4 July 2012 by a large majority of votes<sup>92</sup> - which means that neither the EU nor its individual member states can join the agreement.

### 2.1.5. Copyright enforcement and human rights

Concern has developed in the last decade among civil society and in the political sphere at international level on the relation between copyright enforcement on the one hand, and the fundamental rights of alleged infringers, such as the protection of personal data and privacy, and freedom of expression, on the other. It is worthwhile remembering in this regard that fundamental and human rights form the classical foundations on which copyright has developed at international level. Thus, according to Article 27(2) of the Universal Declaration of Human Rights (UDHR)<sup>93</sup>, everyone has a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

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<sup>89</sup> Kur A., Dreier T., "European intellectual property law, Text, cases & materials", Edward Elgar, USA, 2013.

<sup>90</sup> The ACTA has been signed by the EU, Japan, Australia, Canada, Mexico, Morocco, New Zealand, Singapore, South Korea and the United States. It is set to enter into force after having been ratified by six countries. Japan is the only state so far that has ratified the agreement.

<sup>91</sup> 22 Member States actually signed the ACTA in Tokyo on 26 January 2012: Austria, Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the UK.

<sup>92</sup> European Parliament legislative resolution of 4 July 2012 on the draft Council decision on the conclusion of the Anticounterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America (12195/2011 – C7-0027/2012 – 2011/0167(NLE)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0287+0+DOC+XML+V0//EN>.

<sup>93</sup> The Universal Declaration of Human Rights (1948), <http://www.un.org/en/documents/udhr/>.



This provision was adopted almost verbatim in the International Covenant on Economic, Social and Cultural Rights<sup>94</sup> (ICESCR), through its Article 15(1). Furthermore, at the Council of Europe level, although the European Convention on Human Rights (ECHR)<sup>95</sup> does not have a specific provision on copyright, it codifies the principle of freedom of expression and communication in Article 10(1), while Article 10(2) provides restrictions on the protection of rights of others, which – as is generally admitted – includes the rights of creators. Furthermore, even if intellectual property is not explicitly mentioned, the European Court of Human Rights (ECtHR) has expressly recognised that the exploitation right is also protected by Article 1 of Protocol 1 of the Convention which protects property. The only reservation which is being made to this right relates to the right of a state to enforce laws which are deemed necessary to control the use of property in accordance with, *inter alia*, the general interest.<sup>96</sup>

## 2.2. The EU legal framework against online IPR infringement

At the EU level, the directives related to the harmonisation of copyright and related rights in the information society and to IPR enforcement constitute useful tools to combat copyright infringements, both offline and online. These rules are complemented by specific provisions determining the venue before which IP-related proceedings can be brought. However, specific questions arise at the moment of enforcing copyright in the online environment, which involve other sets of legislation such as the provisions related to electronic commerce in the internal market and on data protection.

### 2.2.1. Copyright infringement under EU law

#### 2.2.1.1. General obligation under the InfoSoc Directive

The InfoSoc Directive<sup>97</sup> has achieved the most ambitious harmonisation in this field at EU level. It aims to reflect technological developments and to transpose into EU law the main international obligations arising from the WCT and WPPT. The InfoSoc Directive harmonises several essential rights (reproduction right, distribution right, right of communication to the public of works and right of making available to the public) of authors and rightsholders (performers, phonogram producers, film producers and broadcasting organisations), as well as the limitations and exceptions to these rights.

As far as enforcement is concerned, the InfoSoc Directive only contains some basic provisions, which oblige member states to provide adequate legal protection against the

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<sup>94</sup> International Covenant on Economic, Social and Cultural Rights (1966), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

<sup>95</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, European Convention on Human Rights, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>96</sup> Derclaye E. Research Handbook on the Future of EU Copyright, Edward Elgar, Cheltenham, 2009.

<sup>97</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32001L0029>.



circumvention of technological measures and against the “manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services”, which enable or facilitate the circumvention of technological measures (Article 6).

### 2.2.1.2. Civil remedies through the Enforcement Directive

Whereas the previous directives related to IPR mostly contained a mere standard reference, to the extent that member states shall provide appropriate remedies in respect of the infringement of rights, it is only in 2004 through the Enforcement Directive<sup>98</sup> that the EU created a level playing field for the enforcement of IPR in different EU countries, by harmonising enforcement measures across the EU. The Enforcement Directive requires all EU countries to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy. It sets out as a general principle that these measures shall be fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays (Article 3). It also aims to establish a general framework for the exchange of information between the responsible national authorities. The Enforcement Directive is characterised by:

- A “one-size-fits-all” solution: The Directive has a transversal approach and covers infringements of all IPRs<sup>99</sup> (both copyright and industrial property), which under European law have been harmonised within the EU;
- A scope limited to infringements carried out for commercial purposes, i.e. to those acts carried out for direct or indirect economic or commercial advantage – this would normally exclude the acts carried out by end-users acting in good faith, according to the Directive;
- A minimum harmonisation based on the “best practice” approach: member states may apply other appropriate sanctions in cases where IPRs have been infringed, provided that they are more favourable to the rightsholder;
- Limited to civil law measures: The Directive incorporates civil law measures of the TRIPS into the EU legal framework. It goes beyond the minimum provisions laid down in the TRIPS as it also covers, for example, damages, corrective measures and evidence;
- The persons entitled to seek application of the measures are not only the rightsholders, but also the persons who have direct interest and legal standing as permitted by the applicable law, such as collective management organisations representing their collective and individual interests.

More specifically, the Directive’s provisions encompass:

- Evidence-gathering powers for judicial authorities (Article 6) and preservation of evidence (Article 7);

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<sup>98</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0048R%2801%29>.

<sup>99</sup> For more details, see the Statement by the Commission concerning Article 2 of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32005C0295>.



- Right of information of the infringed person against third parties, such as powers to force offenders and any other party commercially involved in an infringement to provide information on the origin of the infringing goods and of the distribution networks (Article 8);
- Provisional and precautionary measures such as interlocutory injunctions or seizures of suspect goods (Article 9);
- Corrective measures including recall and definitive removal of the infringing goods from channels of commerce (Article 10);
- Permanent injunctions (Article 11);
- Alternative measures, i.e. pecuniary payment in case of unintentional and non-negligent infringement (Article 12);
- Powers to force offenders to pay damages (Article 13);
- Measures related to legal costs (Article 14) and to the publication of judicial decisions (Article 15).

The transposition of the Enforcement Directive was due in all member states by 29 April 2006. Although the Directive did not entail important changes in national legislation, the implementation process took a long time. Still, some difficulties in the implementation remained in certain member states, as shown in the evaluation of the practical application and effect of the directive carried out by the Commission in 2010<sup>100</sup>. The report in fact concluded that, despite an overall improvement of enforcement procedures, the sheer volume and financial value of IPR infringements were alarming and the directive was in some respects out of steps with the digital age and insufficient for combating online infringements.

Among the reasons put forward by the Commission are the divergent interpretations and application in practice of certain provisions of the Directive by the member states and by national courts. In particular, the Commission stressed that some of the measures that are to be taken against intermediaries, such as the right of information, provisional and precautionary measures or injunctions, cannot be implemented in practice due to the level of evidence required by national courts, which is generally rather high. Furthermore, uncertainties remain over the concept of “intermediaries” and the broad interpretation which is made in certain member states, as well as the specific measures to which they are subject by contributing to or facilitating an infringement regardless of their liability.

Another important limitation of the Directive to combat online infringement lies in the question of the right balance between the right of information and privacy laws. Thus, the right of information obliges the infringer or another person to provide to the rightsholder information on the origin and distribution network of the infringing goods. The main challenge regarding this right is the need to respect privacy laws and the protection of personal data. The Commission found that in some member states, the right of information seems to be granted very restrictively, mainly due to

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<sup>100</sup> See the Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 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, 22 December 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0779:FIN:EN:PDF> and accompanying Commission Staff Working Document “Analysis of the application of Directive 2004/48/EC in the Member States”, SEC(2010) 1589 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2010:1589:FIN:EN:PDF>.



national laws on the protection and retention of personal data. In addition, the 2010 report outlined that damages awarded in IPR cases remain comparatively low and do not appear to effectively dissuade potential infringers from engaging in illegal activities. Based on these conclusions, the Commission considered that several issues and clarifications (including the relationship of the Enforcement Directive with other Directives) were required in order to adapt its provisions to the challenging dimension to enforcing IPR in the current Internet and digital context.

### 2.2.1.3. Lack of harmonization of criminal sanctions at EU level

Although the Enforcement Directive does not deal with criminal sanctions, it states in Recital 28 that

*in addition to the civil and administrative measures, procedures and remedies provided under this Directive, criminal sanctions also constitute, in appropriate cases, a means of ensuring the enforcement of intellectual property rights.*

As a matter of fact, most national IP laws in the EU provide for criminal sanctions for IPR infringement in addition to civil remedies. Despite the fact that the EU (and its member states) is bound by the TRIPS since 1 January 1995,<sup>101</sup> there is no harmonisation of criminal law and procedures within the EU, and so the relationship between the commercial framework of IPR and the criminal enforcement of its standards remains unsettled.

Still, the European Commission intended at various occasions to intervene in this field, first through an earlier draft of the proposal for the Enforcement Directive in 2003,<sup>102</sup> which included criminal sanctions, but was later omitted. Then, in July 2005, a harmonising Directive on criminal measures was proposed,<sup>103</sup> which introduced criminal measures against all intentional IPR infringements on a commercial scale (or aiding, abetting or inciting the infringements) and qualified these infringements as criminal offences, in accordance with the provisions of the TRIPS. However, the proposal was halted by the European Parliament due, among other reasons, to concerns regarding the legal basis of the proposal<sup>104</sup> and was officially withdrawn by the European Commission on September 2010.<sup>105</sup> The harmonisation within EU law of criminal enforcement of IPRs remained though on the political agenda of the Commission, which later pursued such efforts

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<sup>101</sup> For further details on the TRIPS Agreement Chapter 2, paragraph 2.1.2. of this publication.

<sup>102</sup> For an earlier proposal of the Enforcement Directive, see COM (2003) 46 final, <http://eur-lex.europa.eu/procedure/EN/180910>.

<sup>103</sup> Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2005) 276 final, 12 July 2005, <http://db.eurocrim.org/db/en/doc/474.pdf>, and, subsequently, Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM(2006) 168 final, 26 April 2006, <http://eur-lex.europa.eu/procedure/EN/193131>, and <http://db.eurocrim.org/db/en/doc/741.pdf>

<sup>104</sup> The first instrument was proposed under the First Pillar, where the Commission has the exclusive right of initiative in legislative matters. The second instrument was proposed under the Third Pillar and so the member states shared the right of initiative with the Commission. However the Court of Justice gave judgment two months later in C-176/03 *Commission v. Council and Parliament* (Environment Framework Decision Case), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l16015>, whereby it concluded as a general rule that neither criminal law nor the rules of criminal procedure fall within the Community's competence. For further details on the proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights, see Geiger C. (Ed.), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research*, October 2012, Elgar E. Publishing.

<sup>105</sup> OJ C252/7 of 18 September 2010, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:252:0007:0011:EN:PDF>.



externally through the ACTA Agreement. However, as earlier explained,<sup>106</sup> such attempts were blocked at the European Parliament level.

#### 2.2.1.4. Jurisdiction and applicable law

Jurisdiction in civil litigation over intellectual property matters, as well as the laws applying with regard to non-contractual matters involving intellectual property, are regulated by the Brussels I Regulation,<sup>107</sup> as replaced by the “Recast” Regulation,<sup>108</sup> and by the Rome II Regulation.<sup>109</sup>

Regarding the applicable jurisdiction, the general rule is that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”. (Article 2 Brussels I Regulation (now Article 4 of Brussels I Recast) and that, in matters relating to tort, delict or quasi-delict, one may be alternatively sued “(...) in the courts for the place where the harmful event occurred or may occur.” (Article 5(3) Brussels I / Article 7(2) Brussels I Recast).

However, locating such “place” in practice is not always an easy task when it comes to online copyright infringement, that can hardly be considered as occurring in a specific place that can be defined according to a territoriality criterion and which may result in “delocalised” damages. The Court of Justice of the European Union (CJEU) has struggled with the interpretation of this article, adopting a number of different criteria, the most recent one to the date of this publication being clarified through the *Hejduk* ruling in January 2015.<sup>110</sup>

As for the applicable law, the Rome II Regulation provides for a special regime for non-contractual obligations related to intellectual property law, whereby the law of the country for which the protection is sought (*lex loci protectionis* or *lex protectionis*) shall apply. (Recital 26 and Article 8(1) Rome II).<sup>111</sup> However, in practice, the application of the *lex protectionis* is being challenged in the online environment when content is spread over the Internet, as infringement occurs, or may occur, simultaneously in all the countries where the content is technically accessible and must be adjudicated under the different laws applying in each of these countries.<sup>112</sup> Such situations might lead to parallel litigation being conducted in a multitude of countries, and to the application of many different national laws, leading in the end to an obstruction of justice.

It is legitimate then to consider that if the special regime of Rome II does not provide a response, the general regime applicable to torts and delicts would apply.<sup>113</sup> According to this regime,

<sup>106</sup> See paragraph 2.1.4. of this publication.

<sup>107</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition of judgments in civil and commercial matters (“Brussels I”), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001R0044>.

<sup>108</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast regulation), <http://www.wipo.int/edocs/lexdocs/laws/en/eu/eu194en.pdf>.

<sup>109</sup> Regulation No. 864/2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations, (“Rome II”), (2007) OJ L199/40, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l1602>.

<sup>110</sup> For further details, see the *Hejduk* Case in chapter 5 of this publication.

<sup>111</sup> The scope of the rules determining the law applicable to non-contractual obligations is defined in Article 15 Rome II. The law determined by those rules applies to “the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them”, as well as to the limitations and exceptions from liability (Article 15(1) (a), (b)) – covering therefore the violation of the right as such as the remedies.

<sup>112</sup> See *Lagardère* Case, in chapter 5 of this publication.

<sup>113</sup> Savin A. and Trzaskowski J. (Ed.), *Research Handbook on EU Internet Law*, (2014), E. Elgar Publishing, p. 207.



the law of the country in which the damage occurs applies, regardless of the countries in which indirect consequences of the event occur (Article 4(1) Rome II), and whether or not that law is the law of a contracting party (Article 3 Rome II). Still, some questions remain unsettled, as for example in relation to the determination of such country (is it the country where the economic impact of a multi-territorial infringement is concentrated?) or in relation to the derogations allowed within the general regime.<sup>114</sup>

In spite of the absence of specific rules addressing multi-state or ubiquitous copyright infringements in Europe, in practice judgments prohibiting or otherwise regulating conduct on the Internet generally entail global effects, even where they only aim at the national territory. For example when someone is ordered to shut down a website as a result of alleged copyright infringement, such a measure affects traffic from all the countries where the website can be accessed (and not only the country where the judgment was issued). Nevertheless, judgments in such cases are usually based on the application of domestic law alone. And often, with regard to damages, courts frequently do not confine their decisions to computing the losses suffered in a single territory; however, they hardly ever examine the issue under the laws of all the countries where infringements have taken place. In the absence of any satisfactory solution, the development of a solid and transparent framework of rules at global level for adjudication of disputes relating to ubiquitous infringement is often considered as necessary.

## 2.2.2. The limits of EU rules to tackle online copyright infringement

### 2.2.2.1. The liability exemption regime of ISPs under the E-Commerce Directive

The E-Commerce Directive (or ECD)<sup>115</sup> provides for a technologically neutral framework for the cross-border provision of online services in the EU through a special liability regime for certain types of online intermediaries, aimed at striking a balance between the several interests at stake.<sup>116</sup>

Namely, it sets forth exemptions from liability for information society service providers (ISPs) when they host or transmit illegal content that has been provided by a third party. ISPs can, under certain conditions, benefit from these exemptions when they provide one of the so-called intermediary services set out in Article 12 to 14 of the Directive. In particular, ISPs that act as mere conduits (transmitting data by providing an internet access), cache content (automatically making temporary copies of web data) or host content (storing content provided by the user of an online service) may not be held liable for illegal content, provided that they do not have *actual knowledge* of such content and (in the case of hosts) are not *aware* of facts or circumstances from which the illegal content is apparent. In all cases except caching, if the ISP is to be exempted from liability, it is further required, upon obtaining such knowledge or awareness, to act *expeditiously* to remove or

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<sup>114</sup> Such as where the parties have a common habitual residence (Article 4(2) Rome II); where the tort is manifestly more connected with a country other than the country specified by Article 4(1) or 4(2) (Article 4(3) Rome II); where the parties choose “with reasonable certainty” to apply a different law (Article 14 Rome II).

<sup>115</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32000L0031>.

<sup>116</sup> See Recitals 41 and 46 ECD.



disable access to the content.<sup>117</sup> Moreover, Article 15 ECD prohibits member states from imposing on ISPs neither a general obligation to monitor content that they transmit or host, nor a general obligation actively to seek facts or circumstances indicating illegal activity.<sup>118</sup>

Despite this special liability exemption regime, member states can require ISPs to apply a “duty of care”, as follows:

*[t]his Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities. (Recital 48 ECD)*

Furthermore, the E-Commerce Directive encourages the drawing up of codes of conduct<sup>119</sup> at EU level and voluntary agreements among the industry, as well as so-called “notice and take-down” (NTD) procedures<sup>120</sup> so that ISPs can act expeditiously to remove or disable access to illegal content. This designation (also referred to as “Notice and action”) usually covers the procedure according to which an intermediary takes down or prevents access to information or activity following a notice of infringement. Blocking may become the only solution when take-down is not possible because the illegal activity or information is stored in a different country from the one where the servers of the ISPs are located.

Other directives also set the basis for an active role of ISPs towards the objective of a better enforcement of copyright online. This is so for example in the case of the Enforcement Directive, which provides that member states shall ensure that rightsholders are in a position to apply for an injunction against ISPs whose services are being used by a third party to infringe IPRs (Articles 9 and 11) and which encourage the development of self-regulatory codes of conduct in this field (Article 17). Fundamental rights are also relevant when it comes to the implementation of NTD procedures. It is worthwhile noting in this regard that in the EU, a “three strikes” solution provided by law, leading to blocking access to the Internet for repeat offenders was expressly rejected by the Commission in the debate on the “Telecom Package” 2009 – the EU regulatory framework for electronic communications.<sup>121</sup>

Although a number of voluntary codes, NTD and blocking legislative procedures have developed in some member states,<sup>122</sup> these procedures are still heavily fragmented in the EU, which may create legal uncertainties for intermediaries. Furthermore, as outlined in the public consultation held by the Commission in 2010 on the implementation of the E-Commerce Directive and the future

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<sup>117</sup> Torremans P. (Ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property*, EE Elgar Publishing.

<sup>118</sup> Article 15(1) ECD.

<sup>119</sup> Article 16 ECD.

<sup>120</sup> Recital 40, Article 21(2) ECD.

<sup>121</sup> Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009L0140>.

<sup>122</sup> See further details on national legal framework in chapter 3 of this publication.



of e-commerce,<sup>123</sup> many questions remain unsettled as to the implementation of these procedures in practice, such as for example:

- The notion of “actual knowledge” and the form of the “notice”: what is the level of details required to lead to actual knowledge of the ISP without placing an unreasonable burden on the notice provider;
- NTD or “Notice and *stay down*”: where would a single notice lead to actual knowledge of all potential future infringements that are similar to the notified infringement?
- The notion of “disabling access”: while “removing” under Article 14 ECD is usually interpreted as “permanently taking down” or “deleting” content, the notion of “disabling access” gives rise to discrepancies. Thus for example, some hosting service providers use geo-software to impede access exclusively to users with an IP address from a country where the content in question is considered illegal;
- The notion of “expeditiously”: within which timeframe should the ISP take down or block illegal information once they have obtained actual knowledge of it, so as to benefit from the liability exemption regime?
- Which degree of proportionality of NTD requests shall be guaranteed?

In practice a multitude of often very different procedures exists and it is not easy either for ISPs or for victims of illegal content to determine which one applies and in what way.

Another question outlined by the Commission in its review of the implementation of the E-Commerce Directive,<sup>124</sup> where the need for further clarification was identified, relates to the definition of intermediary activities in Articles 12 to 14 ECD.

More specifically, Recital 42 ECD reserves the liability exemption regime to those ISPs whose activity is limited to a “*mere technical, automatic and passive nature*”. However, new business models and services have appeared since the adoption of the E-Commerce Directive, such as cloud-based services storing and/or processing data or linking services. The main question is to what extent these new services that have not been explicitly mentioned in the Directive (and for which there is some diverging case-law at national level) are intermediary activities in the sense of Article 12 to 14 ECD<sup>125</sup> and can therefore benefit, in principle, from a liability exemption.<sup>126</sup>

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<sup>123</sup> [http://ec.europa.eu/internal\\_market/consultations/2010/e-commerce\\_en.htm](http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm); see also Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC), [http://ec.europa.eu/internal\\_market/consultations/docs/2010/e-commerce/summary\\_report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf).

<sup>124</sup> See the Commission Staff Working Document, Online services, including e-commerce, in the Single Market, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services, SEC(2011) 1641 final, 11 January 2012, [http://ec.europa.eu/internal\\_market/e-commerce/docs/communication2012/SEC2011\\_1641\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf).

<sup>125</sup> The recitals of the E-Commerce Directive provide some guidance for determining whether certain services can benefit from a liability exemption. First, recital 42 mentions that an activity should be “of a mere technical, automatic and passive nature”. Second, recital 43 mentions that an intermediary should be “in no way involved with the information transmitted”. Lastly, recital 44 states that an intermediary “cannot deliberately collaborate with one of the recipients of its service in order to undertake illegal acts”.

<sup>126</sup> For example, there are divergent interpretations by national court in relation to video-sharing or file sharing sites, online-selling platforms or social networks. For further example on national case law, see chapter 5 of this publication.



### 2.2.2.2. Copyright enforcement versus data protection

Both IPR protection and the right to privacy are fundamental rights protected under the European Charter of Fundamental Rights (CFR), which was accorded binding legal value in 2009 with the entry into force of the Lisbon Treaty.<sup>127</sup> In particular, Article 7 CFR provides for the right of everyone to respect for his or her private life, home and communications; in addition, Article 8 CFR provides for the right to the protection of personal data and that such data be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law (Article 8(2) CFR). On the other hand, Article 17 CFR guarantees the right of everyone to property, the only reservation to this right being the possibility for the member states to regulate by law in so far as is necessary for the general interest. More remarkably, Article 17 paragraph 2 CFR expressly states that “intellectual property rights shall be protected”. Based on these provisions, it is up to the national legislator to strike a fair balance between all fundamental rights involved, as established by the CJEU in 2008.<sup>128</sup>

The protection of personal data, as IPR enforcement, has been harmonised at EU level. This harmonisation has been done mainly through the Data Protection Directive,<sup>129</sup> soon to be replaced by the General Data Protection Regulation (GDPR).<sup>130</sup> According to this Directive, personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. In addition, the e-Privacy Directive,<sup>131</sup> as amended by the Citizen’s Rights Directive,<sup>132</sup> aims *inter alia* at giving citizens control over the information stored on or retrieved from users’ terminal equipment and devices connected to the internet.

Any national legislation must comply with these directives, as well as with the InfoSoc and Enforcement Directives. However, in many aspects these directives are in conflict with each other as far as copyright enforcement online is concerned. It is so, for example, in relation to the right of information provided under Article 8 of the Enforcement Directive, which grants to rightsholders a right to claim, before the competent judicial authority, the information from the ISP about the identity of a person (potential commercial-scale infringer or website) which is behind a dynamic IP address that was attributed by the ISP in an automated process. This right of information is a prerequisite for the rightsholder to enforce his/her rights.<sup>133</sup> However, the exercise of this right raises many questions in practice in some member states due to restrictive implementations of the

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<sup>127</sup> Article 6(1) of the EU Treaty makes reference to the Charter and sets forth that it is of equal legal value. Article 118 of the Lisbon Treaty also places particular emphasis on intellectual property.

<sup>128</sup> See chapter 5 of this publication.

<sup>129</sup> European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:114012>.

<sup>130</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) - Preparation of a general approach, <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>.

<sup>131</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32002L0058>.

<sup>132</sup> Directive 2009/136/EC of the European Parliament and the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF>.

<sup>133</sup> Article 8(1)(c) Enforcement Directive.



EU Directives on the protection of private data into national law and to diverging interpretation by national courts (e.g. proof of protectability of subject matter, of ownership of exclusive rights and of infringement; requirement of prior notice given by the IPR holder to the ISP, etc.).

### 2.2.3. EU IPR enforcement policy in third countries

IP enforcement also forms part of the trade policy of the EU with third countries, through bilateral trade agreements it has concluded, which include comprehensive chapters on IPR. These bilateral tools are aimed at offering similar levels of IPR protection to that existing in the EU, while taking into account the level of development of the country concerned.<sup>134</sup>

In relation with certain partner countries, the EU has also engaged in regular meetings, on-going dialogues and working groups to address certain specific IP issues, mainly related to the question of enforcement of IPR.<sup>135</sup> In addition, the EU, as a number of other international organisations,<sup>136</sup> provides important resources for intellectual property through the technical assistance programmes<sup>137</sup> which are intended to help third countries to improve their IPR systems. This cooperation includes the assistance in the preparation of draft laws on the protection and enforcement of IPR, the exchange of information, awareness-raising campaigns and support for the establishment or strengthening of IPR domestic offices and agencies. The intervention of the EU at international level is part of a global strategy,<sup>138</sup> which analyses the principal changes in the international IP environment aimed at meeting current challenges appropriately.

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<sup>134</sup> EU Trade relations world wide – a map [http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc\\_149622.jpg](http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149622.jpg).

<sup>135</sup> EU dialogues with priority countries on intellectual property issues, [http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_151009.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151009.pdf).

<sup>136</sup> For example, WIPO, EPO, World Bank, UNDP, UNCTAD, WHO, WCO.

<sup>137</sup> EU technical assistance programmes in the field of intellectual property, [http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150990.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150990.pdf).

<sup>138</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Trade, growth and intellectual property – Strategy for the protection and enforcement of intellectual property rights in third countries, SWD(2014) 204 final, COM(2014) 389 final, of 1 July 2014, [http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152643.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152643.pdf).



## 3. National legal framework

### 3.1. Different legal traditions and systems

Despite approximation of legislation across international agreements and harmonisation processes at EU level, the dichotomy “copyright vs droit d’auteur” still remains one of the main pillars when it comes to the regulatory framework concerning copyright and neighbouring rights. As has been stated:

*Under the civilian approach (...) the author is front and centre stage. Later exploiters and users of the work – performers, recorders, broadcasters and cablecasters – are secondary players and stand in the wings. (...)*

*The common law tradition views copyright more pragmatically. Copyright is there to help propel works into the market. It is overtly an instrument of commerce rather than of culture, a tool of the media entrepreneur rather than of the author.<sup>139</sup>*

Speaking about copyright law, if a line can be drawn to separate common law countries, such as the UK, the US or Canada, from civil law countries, such as France, Italy or Spain, this would not necessarily stay the same when considering national enforcement systems. The countries mentioned, while sharing common concepts when defining authors’ rights, have set up different systems when it comes to their protection, and this is the case in many other countries as well.

### 3.2. Different approaches to online copyright enforcement

The variety of approaches in setting up enforcement systems for handling copyright infringements online affects several aspects, among which:

- the subjects being addressed,
- the type of infringement and procedure,
- the range and the target of the adopted measures.

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<sup>139</sup> Vaver D., “The Copyright Mixture in a Mixed Legal System: Fit for Human Consumption?”, *Electronic Journal of Comparative Law*, vol 5.2, May 2001, <http://www.ejcl.org/52/art52-3.html>.



### 3.2.1. The addressed subjects

Services carried over electronic communications networks involve a plurality of actors, each of them with a different set of responsibilities according to the applicable regulatory frameworks.

From the point of view of substantive copyright law, the responsibility chain would already start with the individuals up- and downloading illegal content. However, in the online environment, where the issue of awareness of the existence of a copyright violation is particularly relevant, due to the coexistence of a mix of legal and illegal options, individual users are not necessarily fully conscious about actually infringing the law. This is the reason why the so-called “graduated response”<sup>140</sup> has been chosen in some European countries that have opted for targeting individual subscribers.

A second group of actors are the internet service providers (ISPs) as defined by the E-Commerce directive,<sup>141</sup> who could be asked, in the case of hosting providers, to take down the illegal content, and in the case of access providers, to block the access to entire websites that make illegal content available. These subjects benefit from an exemption of responsibility as long as they do not have actual knowledge of the illegal activity, and, should they obtain such knowledge, as long as they act expeditiously to remove or disable access to the illegal content. Since this is the only harmonised area as to the involvement of ISPs in enforcement actions, most member states are equipped with judicial or administrative procedures to order removal or site blocking in case of ascertained copyright infringement.

The main enforcement tools for the cases described above are “notice and take-down” (NTD) procedures, based on the DMCA<sup>142</sup> or on national procedures of EU member states, targeting primary infringement (up- and downloading) and the secondary liability of intermediaries such as hosting providers.

A third approach to enforcement would consider more relevant to target those who benefit from copyright infringement activities. In such cases voluntary “follow the money”<sup>143</sup> initiatives target advertisers and financial intermediaries who are actually monetising the content that is infringing copyright law. This tool is used in many EU countries, despite the lack of harmonisation in this field and hence the existence of diverging approaches. The current debate on the regulatory fitness (REFIT)<sup>144</sup> of the relevant EU directives will among others also look at this aspect.

The other side of the coin is made up of the subjects who are eligible for seeking protection in the case of copyright infringement. Apart from the actions that can be brought by individual right

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<sup>140</sup> “‘Graduated response’ schemes generally require that the ISP take some action against users suspected of infringing copyright, ranging from issuing warnings, to collating allegations made against subscribers and reporting to copyright owners, to suspension and eventual termination of service”. See Suzor N. and Fitzgerald B., “The legitimacy of graduated response schemes in copyright law”, UNSW Law Journal, 2011, Volume 34, no. 1, [http://www.unswlawjournal.unsw.edu.au/sites/default/files/1\\_suzor\\_2011.pdf](http://www.unswlawjournal.unsw.edu.au/sites/default/files/1_suzor_2011.pdf).

<sup>141</sup> For further details see paragraph 2.2.2.

<sup>142</sup> Digital Millennium Copyright Act of 1998, implementing WIPO Copyright and Performances and Phonograms Treaties in the USA, <http://copyright.gov/title17/92appb.pdf>. See B. Child, “Hollywood: piracy sites must shut within 24 hours”, The Guardian, 1 May 2015, <http://www.theguardian.com/film/2015/may/01/hollywood-torrent-piracy-sites-must-shut-within-24-hours>.

<sup>143</sup> See Manara C., “Attacking the Money Supply to Fight Against Online Illegal Content?”, September 2012, [http://faculty-research.edhec.com/medias/fichier/edhec-position-paper-attacking-the-money-supply\\_1350462532740.pdf](http://faculty-research.edhec.com/medias/fichier/edhec-position-paper-attacking-the-money-supply_1350462532740.pdf) and more extensively Chapter 4 of the present publication.

<sup>144</sup> For an overview of the scope of the 2015 REFIT exercise of the European Commission, see the complete toolkit at [http://ec.europa.eu/smart-regulation/better-regulation/key-docs\\_en.htm](http://ec.europa.eu/smart-regulation/better-regulation/key-docs_en.htm). For further details see paragraph 6.1.3.



owners, a certain role is foreseen also for collective management organisations, which are entitled to act on behalf of their members.

### 3.2.2. The type of infringements and procedures

As mentioned, common law and civil law traditions differ from each other specifically on where they put their focus, i.e. economic vs moral rights. The two approaches mirror also different views on the economic relevance of the infringement. Whereas under the Anglo-Saxon “fair use doctrine”<sup>145</sup> profit is one of the criteria that has to be considered in order to determine whether there has been a copyright violation, the InfoSoc Directive enumerates the possible exceptions and limitations to copyright protection. In the latter case, profit is not mentioned as a discriminatory element when evaluating the subsistence of an infringement.

Once the lack of a legitimate use of copyright-protected works, and thus an infringement of copyright has been established, the type of applicable procedure depends entirely on each national legal system.

Several websites offer NTD procedures, according to which copyright holders send a request (the “Notice”) to the concerned website host with a request to remove (the “Takedown”) the content infringing their protected rights.<sup>146</sup>

The existence and employment of NTD does not pre-empt the use of enforcement remedies offered by public bodies. The European picture is very scattered, and includes administrative procedures, with governmental bodies, as in Spain, or independent authorities, as in France, or regulators, as in Italy, and in certain cases specific investigations units,<sup>147</sup> as in the UK,<sup>148</sup> and judiciary procedures, which are everywhere foreseen.

<sup>145</sup> The fair use doctrine is enshrined in § 107 of the US Copyright Law, <http://copyright.gov/title17/circ92.pdf>

“Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”

<sup>146</sup> For an overview of NTD procedures worldwide, see Michels L., “Enforcing Online Copyright Protections Abroad: Understanding Foreign Takedown Notice Requirements”, 2013, <http://theipexporter.com/2013/03/25/enforcing-online-copyright-protections-abroad-understanding-foreign-takedown-notice-requirements/> and, by the same author, “Enforcing Online Copyright Protections Abroad: Part II – South and East Asia”, 2014, <http://theipexporter.com/2014/08/25/enforcing-online-copyright-protections-abroad-part-ii-south-and-east-asia/>; “Enforcing Online Copyright Protection Abroad: Part III – South America”, 2014, <http://theipexporter.com/2014/10/13/enforcing-online-copyright-protection-abroad-part-iii-south-america/>; “Part IV: Enforcing Online Copyright Protection Abroad: North and Central America”, 2014, <http://theipexporter.com/2014/12/06/part-iv-enforcing-online-copyright-protection-abroad-north-and-central-america/>.

<sup>147</sup> A conference organised by OHIM, Eurojust and Europol on “Infringements of Intellectual Property Rights on the Internet”, Alicante, 2014, explored specifically the various investigative activities, carried out both by public bodies and by private subjects, [https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/Knowledge-building-events/Infringements%20of%20Intellectual%20Property%20Rights%20on%20the%20Internet\\_en.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/Knowledge-building-events/Infringements%20of%20Intellectual%20Property%20Rights%20on%20the%20Internet_en.pdf).

<sup>148</sup> It is worth mentioning is the partnership between The Police Intellectual Property Crime Unit (PIPCU) of the City of London Police and the UK advertising industry and rightholders called “Operation Creative and the Infringing Website List (IWL)”, <http://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx>. This unit is financed by the Intellectual Property Office (UK) and reports very good results, <https://www.gov.uk/government/news/overall-fall-in->



The institutional framework is subject to national sovereign choices and no binding indication is given at EU level as to how to set up national procedures, apart from the general principles discernible from the Enforcement Directive as to the need of being fair, equitable, not unnecessarily complicated or costly nor within unreasonable time-limits or unwarranted delays. There is therefore a certain variety in terms of duration, measures and costs.<sup>149</sup>

### 3.2.3. The type of measures imposed

As for the procedures, the various measures applied at national level also present a certain variety. Within the need of being “effective, proportionate and dissuasive”, according to the Enforcement directive, member states are free to choose the most appropriate remedies for cases of copyright infringement according to their national systems.

Apart from preliminary injunctions or interim measures which may be shaped by the courts according to the features of each single case, when national bodies adopt sanctions in this specific field, this can be done with an educational or punitive purpose. Depending on the national qualification of the infringement, sanctions can be of administrative or criminal nature, without prejudice to civil remedies in case of compensation.

However, what makes online infringements so peculiar is mainly the type of actor being addressed. In the case of measures targeting individual subscribers, as might be the case of France and the UK, a graduated response<sup>150</sup> – notably a sequence of letters – aims at combining an initial educational warning with the need of applying sanctions in case of repeated infringements.

Where ISPs are involved, the type of measure<sup>151</sup> depends on their activities. In the case of hosting providers which exercise control over the content they host on their servers, they could be asked to selectively remove the illegal content, without impacting on the entire website where the concerned content is shown. Differently, a request to block access to a website disseminating illegal content would be addressed to mere conduit providers, i.e. the carriers of content over electronic communication networks, who could possibly access the content only through deep packet inspection (DPI).<sup>152</sup>

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[reported-intellectual-property-crime](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461792/ip-crime-report-2014-15.pdf), as also highlighted in the latest IP Crime report 2014/15, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/461792/ip-crime-report-2014-15.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461792/ip-crime-report-2014-15.pdf).

<sup>149</sup> For a recent overview on selected countries, see BOP Consulting with DotEcon for IPO (Intellectual Property Office), “International Comparison of Approaches to Online Copyright Infringement: Final Report”, 2015/40, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/404429/International Comparison of Approaches to Online Copyright Infringement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404429/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf).

<sup>150</sup> Giblin R., “Evaluating Graduated Response”, Columbia Journal of Law and Arts, 2014, <http://lawandarts.org/wp-content/uploads/sites/4/2014/01/JLA-37.2-Evaluating-Graduated-Response.pdf>, provides an overview of legislative and private arrangements in selected countries (respectively France, UK, New Zealand, Taiwan, South Korea and Ireland, USA) and their functioning. The same countries, but with a specific attentions to technological issues, are considered by Elton S., “A Survey of Graduated Response Programs to Combat Online Piracy”, Journal of the Music and Entertainment Industry Educators Association, vol. 14, No. 1, 2014, [http://www.meiea.org/Journal/Vol.14/Elton-MEIEA\\_Journal\\_vol\\_14\\_no\\_1\\_2014-p89.pdf](http://www.meiea.org/Journal/Vol.14/Elton-MEIEA_Journal_vol_14_no_1_2014-p89.pdf).

<sup>151</sup> These measures imposed as sanctions do not replace technical measures voluntarily put in place by the ISPs themselves, such as decisions to throttle internet speed. See Smith G., “Verizon Copyright Alert System Would Throttle Internet Speeds Of Repeat Online Pirates”, Huffington Post, 11 January 2013, [http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy\\_n\\_2459133.html](http://www.huffingtonpost.com/2013/01/11/verizon-copyright-alerts-piracy_n_2459133.html).

<sup>152</sup> “Deep packet inspection (DPI) is normally referred to as a technology that allows packet-inspecting devices, such as firewalls and IPS, to deeply analyse packet contents, including information from all seven layers of the OSI model”. In these terms Ramsos A., “Deep Packet



Considering the issue of lack of awareness witnessed by various surveys, some countries, such as France, Italy and the UK, have started to invest also on positive measures aimed to promote and incentivise the consumption of legal content and thus gradually invert the trend of illegal consumption. This seems to be particularly effective in the case of platforms allowing streaming consumption instead of downloading.<sup>153</sup>

### 3.3. National examples

Due to the variety of legislative traditions that underpin the different national enforcement systems for copyright violations online, any attempt to provide a one-size-fits-all model would not be meaningful. Already in 2012, the European Commission stressed the existence of as many different national legal systems as the number of member states,<sup>154</sup> and since then no further harmonisation initiative has been put in place.

The Enforcement Directive mainly focuses on judicial systems, which certainly remain the main pillar of copyright enforcement at domestic level, and has safeguarded a minimum level of guarantees and tools Europe wide. Judicial protection is in fact ensured in all member states and does not offer specific matters for discussion, apart from those highly complex issues concerning the applicable law and competent jurisdiction in the context of unlawful use on the Internet, that demanded courts to become frontrunners in “enforcing” enforcement.<sup>155</sup> Besides the courts, some countries have started to explore additional ways of ensuring copyright protection by involving administrative bodies. The long duration and significant costs of court procedures are among the reasons why the more immediate needs for copyright protection in the online environment have translated into setting-up new ways of intervention.

The following sections focus on systems that have appeared and are particularly innovative in terms of involving administrative bodies in the fight against online infringement. It identifies the main features of systems adopted in France, Italy, Spain and the UK. It should be noted that even though these systems are treated in one chapter, no real coherence can be found among the various models. The combinations of tools are very diverse: graduated response (France and the UK), independent regulators (Italy and the UK), involvement of the judiciary under certain circumstances (France, Spain and the UK), actions against end-users (France and the UK), actions against websites (Spain and Italy), explicit mention of notice and takedown procedures (Spain and Italy), and the list could continue. All of these models were subjected to strong debates with civil society and did see the involvement of the constitutional courts, in the case of France, Italy and Spain, and of the High Court of Justice in the UK.

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Inspection Technologies”, [http://www.infosectoday.com/Articles/Deep\\_Packet\\_Inspection\\_Technologies.htm](http://www.infosectoday.com/Articles/Deep_Packet_Inspection_Technologies.htm), in Tipton H. F. and Krause M. (eds), *Information Security Management Handbook*, Sixth Edition, Volume 3, New York: Auerbach Publications, 2009.

<sup>153</sup> The high rate of illegal downloading in the UK (Gayleand D. and Siddique H., “Game of Thrones pirate downloads: Britain leads the world”, *The Guardian*, 13 April 2015, <http://www.theguardian.com/tv-and-radio/2015/apr/13/game-of-thrones-pirate-downloads-britain-leads-the-world>) contrasts with the opposite trends in Norway thanks to streaming consumption (Cook J., “Norway has figured out how to solve the problem of music piracy”, *Business Insider*, 27 January 2015, <http://www.businessinsider.com.au/norway-music-piracy-statistics-2015-1>).

<sup>154</sup> European Commission, “A coherent framework for building trust in the Digital Single Market for e-commerce and online services”, COM(2011) 942 final, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52011DC0942>. For more details see paragraph 6.1.2.

<sup>155</sup> See paragraphs 2.2.1.4. and 5.5.



### 3.3.1. France

After a long and heated debate, the first law “to encourage the distribution and the protection of creative works on the Internet”, known as HADOPI 1, was adopted in June 2009<sup>156</sup> limited to the parts of the text which had not been declared unconstitutional.<sup>157</sup> The aim was to establish action against the illegal download of copyrighted works, and at the same time to encourage legal consumption. The law also created a specific administrative authority for the distribution and protection of creative works on the Internet, the HADOPI (Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet), charged to monitor online activities of individual subscribers. In the case of infringements, the Authority could send warnings, with the means of a graduated approach, in order to persuade individual infringers to refrain from illegal activities.

Following a new decision of the Constitutional Council,<sup>158</sup> the HADOPI 2, “on the criminal protection of protected literary and artistic works on the Internet” was adopted in October 2009,<sup>159</sup> and implied that after two warnings and subsequent reoccurrence of illegal downloading, disconnection from the Internet could be imposed by court order.

The system became operational in October 2010 and has since then reported on a significant amount of warnings.<sup>160</sup> Despite the high figures, discussions are still ongoing in France as to possible further amendments to the law, even though no formal initiative has been taken so far.<sup>161</sup> Two policy reports appeared in 2013 with concrete proposals as to a change in the approach: the “rapport Imbert-Quaretta”<sup>162</sup> adopted by Hadopi's Rights Protection Commission in February and the “rapport Lescure”<sup>163</sup> adopted by the Government's special advisor in these matters in May. It is worth mentioning what HADOPI itself sees as shortcomings of its own activity:

*There is no single solution to unlawful streaming and direct downloading, but a set of several coherent and complementary measures that are both effective and compatible with fundamental freedoms. These measures take into account the limitations of existing legal tools and of public policies that promote the participation of intermediaries in preventing and putting a stop to infringement.*

*Therefore, the options under consideration involve giving more responsibility to content and referencing sites, and also enlisting the cooperation of all the intermediaries in the streaming*

<sup>156</sup> Law no. 2009-669 of 12 June 2009 “favorisant la diffusion et la protection de la création sur internet”, [http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=944EF82A71586BA1A3D5ED8FF4550372.tpdila17v\\_2?cidTexte=JORFTEXT000020735432&categorieLien=cid](http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=944EF82A71586BA1A3D5ED8FF4550372.tpdila17v_2?cidTexte=JORFTEXT000020735432&categorieLien=cid).

<sup>157</sup> Decision of the Constitutional Council no. 2009-580 DC of 10 June 2009, [http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=944EF82A71586BA1A3D5ED8FF4550372.tpdila17v\\_2?cidTexte=JORFTEXT000020735682&categorieLien=cid](http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=944EF82A71586BA1A3D5ED8FF4550372.tpdila17v_2?cidTexte=JORFTEXT000020735682&categorieLien=cid).

<sup>158</sup> Decision of the Constitutional Council no. 2009-590 DC of 22 October 2009, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208113&categorieLien=cid>.

<sup>159</sup> Law no. 2009-1311 of 28 October 2009 “relative à la protection pénale de la propriété littéraire et artistique sur internet”, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208046&categorieLien=id>.

<sup>160</sup> The last figures given by HADOPI, dating June 2015, report about almost 5 million first warnings since the start of activities, <http://www.hadopi.fr/sites/default/files/ChiffresRGjuin15.pdf>.

<sup>161</sup> For a quick overview on the current debate in France, see Rees M., “L'avant-projet de loi pour surarmer la Hadopi”, Next Inpact, 11 June 2015, <http://www.nextinpact.com/news/95357-lavant-projet-loi-pour-surarmer-hadopi.htm>.

<sup>162</sup> Imbert-Quaretta M., “Report on the prevention of unlawful streaming and direct downloading”, February 2013, [http://hadopi.fr/sites/default/files/page/pdf/Rapportstreaming\\_eng.pdf](http://hadopi.fr/sites/default/files/page/pdf/Rapportstreaming_eng.pdf).

<sup>163</sup> Lescure P., “Contribution aux politiques culturelles à l'ère numérique”, May 2013, [http://www.culturecommunication.gouv.fr/var/culture/storage/culture\\_mag/rapport\\_lescur/index.htm](http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescur/index.htm).



*and direct download ecosystem. With this in mind, self-regulation under the supervision of the public authorities is being encouraged, rather than the development of new and restrictive mechanisms.*<sup>164</sup>

In concrete response to the needs emerging from these two reports and as a follow-up on a specific request of the Government, a second “rapport Imbert-Quaretta”<sup>165</sup> suggested four specific tools: 1) agreements with advertiser and payment intermediaries online, 2) public information on websites responsible for massive infringements, 3) a stay-down injunction for certain pirated works, 4) a long term follow-up on judicial decisions concerning massive violations.

In March 2015 the Government announced its new action plan.<sup>166</sup> The plan was to address measures to decrease the financing of sites specialising in infringing copyright on works distributed on the Internet; to monitor the effectiveness of all the sanctions, including blocking, imposed on technical intermediaries; to impact on video-sharing platforms which, in addition to hosting, also distribute and “editorialise” some content.

### 3.3.2. Italy

Partly inspired by the French solution, the Italian fight against online piracy also involves an administrative body, namely the communications authority, AGCOM (Autorità per le garanzie nelle comunicazioni), but with a different procedural approach.

In 1997 AGCOM was set up as the regulator for the entire communications sector and in 2000 gained competences with regard to copyright,<sup>167</sup> when the general Copyright law was amended so as to entrust, with the new Article 182-bis, both AGCOM and the collective management organisation SIAE with specific monitoring powers. When in 2003 the E-Commerce Directive was transposed in Italy,<sup>168</sup> the implementing decree stated that the judiciary or the administrative authority having monitoring powers could require, also by means of expedited procedures, that service providers terminate or prevent an infringement in order to immediately remove or disable access to illegal information. In 2010, when the AVMS directive<sup>169</sup> was implemented,<sup>170</sup> AGCOM was also charged with specific regulatory powers in this domain.

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<sup>164</sup> From the Conclusion of the Imbert-Quaretta Report, cit.

<sup>165</sup> Imbert-Quaretta M., “Outils opérationnels de prévention et de lutte contre la contrefaçon en ligne”, May 2014, <http://www.culturecommunication.gouv.fr/Ressources/Rapports/Outils-operationnels-de-prevention-et-de-lutte-contre-la-contrefacon-en-ligne>.

<sup>166</sup> French Ministry of Culture, press release of 11 March 2015, “Stratégie du Gouvernement concernant la lutte contre le piratage des œuvres sur internet”, <http://www.culturecommunication.gouv.fr/Presse/Communiqués-de-presse/Lutte-contre-le-piratage>. See Blocman A., “Piracy on the Internet - Government action plan”, IRIS 2015-4/9, European Audiovisual Observatory, 2008, <http://merlin.obs.coe.int/iris/2015/4/article9.en.html>.

<sup>167</sup> Law 22 April 1941, no. 633, “Protezione del diritto d'autore e di altri diritti connessi al suo esercizio”, as amended by Law 18 August 2000, no. 248, “Nuove norme di tutela del diritto di autore”. The consolidated text, which includes the new Article 182-bis, is available at <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1941-04-22:633!vig=>.

<sup>168</sup> Legislative decree 9 April 2003, no. 70, “Attuazione della direttiva 2000/31/CE relativa a taluni aspetti giuridici dei servizi della società dell'informazione nel mercato interno, con particolare riferimento al commercio elettronico”, <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-04-09:70!vig=>.

<sup>169</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007L0065>.



Before exercising its regulatory competence, and considering the debate that followed the French laws on copyright enforcement, AGCOM decided to launch an extensive public consultation, which in the end took over three years.<sup>171</sup> Taking into account the comments given by stakeholders during the consultations and by the European Commission following the notification of the draft regulation<sup>172</sup> under the Transparency Directive,<sup>173</sup> the final text was adopted in December 2013.<sup>174</sup>

In order to encourage the development and protection of digital works, the Regulation sets up a specific Committee composed of representatives from industry, consumers and public bodies competent in copyright matters, with the aim of fostering the adoption of self-regulatory codes for NTD procedures<sup>175</sup> and “follow-the-money” initiatives.

The Regulation also lays down a complaint-based procedure for requesting AGCOM to ensure copyright enforcement, distinguishing between an ordinary and an expedited procedure, lasting 35 and 12 days respectively. Should an infringement be ascertained on websites hosted by providers based in Italy, AGCOM may order Italian hosting providers to remove the illegal content from their servers. In the case of servers located outside Italy, AGCOM may order Italian mere conduit providers to block access to entire websites should there be cases of massive violations. In case of non-compliance with the order, AGCOM may impose a pecuniary sanction up to EUR 250,000. All decisions taken by AGCOM are accessible in full on a dedicated website<sup>176</sup> and may be challenged before a court.

As in France, Italy has seen a strong debate around the constitutional legitimacy of its administrative enforcement procedures. Following a challenge made by various consumers’ associations against the Regulation, on 25 June 2014 the Administrative court (TAR) of Rome suspended the procedure and asked for a preliminary ruling of the Constitutional Court.<sup>177</sup> On 20 October 2015 the Court declared the question inadmissible, because of lack of clarity.<sup>178</sup>

<sup>170</sup> Legislative decree 15 March 2010, no. 44, “Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive” <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2010;44>.

<sup>171</sup> The three public consultations preceded the final adoption of AGCOM’s regulation on copyright enforcement are the following:

Resolution no. n. 668/10/CONS del 17 dicembre 2010, “Consultazione pubblica su Lineamenti di provvedimento concernente l'esercizio delle competenze dell’Autorità nell’attività di tutela del diritto d’autore sulle reti di comunicazione elettronica”, <http://www.agcom.it/documents/10179/539483/Delibera+668-10-CONS/b3be2cb8-0e63-4cbd-a79e-5daf2b25f927?version=1.0>;

Resolution no. 398/11/CONS of 6 July 2011, “Consultazione pubblica sullo schema di regolamento in materia di tutela del diritto d’autore sulle reti di comunicazione elettronica”, <http://www.agcom.it/documents/10179/539629/Delibera+398-11-CONS/197741f1-1f3a-48dd-870f-b84cbe854ffb?version=1.0>;

Resolution no. 452/13/CONS of 25 July 2013, “Consultazione pubblica sullo schema di 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/documents/10179/540089/Delibera+452-13-CONS/0c05ccfa-8c02-4cd2-a66b-0bc528c4364c?version=1.0>.

<sup>172</sup> TRIS database, Notification no. 2013/496/I, <http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2013&num=496>.

<sup>173</sup> Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31998L0034>.

<sup>174</sup> Resolution no. 680/13/CONS of 12 December 2013, “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/documents/10179/540163/Delibera+680-13-CONS/2fb37939-620c-410d-a23f-2150d505b103?version=1.1>. See Pellicanò F., “AGCOM Adopts a Regulation on Copyright Protection”, IRIS 2014-3/31, European Audiovisual Observatory, 2014, <http://merlin.obs.coe.int/article.php?id=14571>.

<sup>175</sup> Stakeholders have been invited to notify their NTD procedures to AGCOM and are made public, <https://ddaonline.it/elenco.html>.

<sup>176</sup> All decisions adopted by AGCOM are made public in full, <https://ddaonline.it/interventi.html>.

<sup>177</sup> Order of the Tribunale amministrativo regionale (TAR) del Lazio, no. 10016/14 of 25 June 2014, <https://www.giustizia-amministrativa.it/cdsintra/cdsintra/AmministrazionePortale/DocumentViewer/index.html?ddocname=JBZTMYIK7PMPDCLVJOU7KSJTXQ&>



### 3.3.3. Spain

The so-called Ley Sinde was adopted in March 2011<sup>179</sup> to provide Spain with an effective tool against the increasing rates of copyright infringement online, setting up a specific Intellectual Property Commission (Comisión de Propiedad Intelectual) under the Directorate General of Intellectual Property of the Ministry of Culture and Sport. The Commission operates in two sections, one responsible for mediation and arbitration activities, the latter empowered to oblige ISPs to block access to websites that offer access to protected content without holding the necessary rights.

The regulation on its functioning was adopted the following December<sup>180</sup> and provides for a complaint-based procedure<sup>181</sup> similar to the Italian system. Should the Commission find the requests filed by the rightsholders well founded, the infringers are invited to remove the illegal content within 48 hours, unless they prefer to present briefs as to their justifications. The final decision of the Commission must be ratified by a court order if it implies site-blocking activities.

As in France and Italy, the debate as to a possible collision with constitutionally protected rights led to a judicial decision in May 2013.<sup>182</sup> Apart from a specific provision concerning the presumption of violation in case of spontaneous removal of content, which was declared unconstitutional, the regulation was considered to be in line with the Spanish constitution.

Following the judgment of the Court and considering the still-high level of online infringements in Spain,<sup>183</sup> the powers of the Intellectual Property Commission were further developed in November 2014 by the so-called Ley Lassalle,<sup>184</sup> which provided for fines up to EUR 600,000, and also included in its scope information society intermediaries who act as facilitators for copyright infringement online.

In March 2015,<sup>185</sup> the Parliament approved a bill presented by the Government in October 2013<sup>186</sup> to reform the criminal code also with regard to copyright violations online. In parallel with

g= . See Frosio G., “AGCOM Regulation Challenged before the Italian Constitutional Court: an Update”, The Center for Internet Society, Stanford Law School, 3 February 2015, <http://cyberlaw.stanford.edu/blog/2015/02/agcom-regulation-challenged-italian-constitutional-court-update>.

<sup>178</sup> Judgment of the Constitutional Court, no. 247/2015, of 20 October 2015,

[http://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2015&numero=247&tipoView=P&usg=AFQjCNFSims41E\\_aJqv7uKhEEMsjuEhUlg](http://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2015&numero=247&tipoView=P&usg=AFQjCNFSims41E_aJqv7uKhEEMsjuEhUlg).

<sup>179</sup> Law no. 2/2011 of 4 March 2011, “de Economía Sostenible”, <http://www.boe.es/buscar/act.php?id=BOE-A-2011-4117>.

<sup>180</sup> Royal decree no. 1889/2011 of 30 December 2011, “por el que se regula el funcionamiento de la Comisión de Propiedad Intelectual”, [http://www.mecd.gob.es/legislacionconvenio/legislacion/real\\_decreto\\_1889\\_2011.pdf](http://www.mecd.gob.es/legislacionconvenio/legislacion/real_decreto_1889_2011.pdf).

<sup>181</sup> The latest figures published by the Commission show a satisfactory outcome of the activities. See Spanish Ministry of Culture, press release of 24 July 2015, “El 98% de las webs requeridas por la Sección Segunda de la Comisión de Propiedad Intelectual han retirado los contenidos ilegales de Internet”, <http://www.mecd.gob.es/prensa-mecd/en/actualidad/2015/07/20150724-balance.html>. For the functioning of the Commission, see <http://www.mecd.gob.es/cultura-mecd/en/areas-cultura/propiedadintelectual/informacion-general/gestion-en-el-ministerio/comision-de-propiedad-intelectual.html>.

<sup>182</sup> Decision of 31 May 2013 of the Sala Tercera del Tribunal Supremo, [http://noticias.juridicas.com/base\\_datos/Privado/509757-sentencia-de-31-de-mayo-de-2013-anula-inciso-del-art-20-2-del-rd-1889-2011.html](http://noticias.juridicas.com/base_datos/Privado/509757-sentencia-de-31-de-mayo-de-2013-anula-inciso-del-art-20-2-del-rd-1889-2011.html).

<sup>183</sup> Cantor-Navas J., “84% of Content Consumed in Spain is Pirated”, Billboard, 10 April 2014, <http://www.billboard.com/biz/articles/news/global/6049208/84-of-content-consumed-in-spain-is-pirated>.

<sup>184</sup> Law no. 21/2014, of 4 November 2014, “por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil”, <https://www.boe.es/boe/dias/2014/11/05/pdfs/BOE-A-2014-11404.pdf>. See Hernández P., “Key Aspects of the New Reform of the Spanish Copyright Act”, Kluwer Copyright Blog, 10 November 2014, <http://kluwercopyrightblog.com/2014/11/10/key-aspects-of-the-new-reform-of-the-spanish-copyright-act/>.

<sup>185</sup> Organic law no. 1/2015 of 30 March 2015, “por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal”, [http://www.congreso.es/constitucion/ficheros/leyes\\_esp/lo\\_001\\_2015.pdf](http://www.congreso.es/constitucion/ficheros/leyes_esp/lo_001_2015.pdf).



the reform of the Law of intellectual property, the new provisions of the amended Criminal code introduce the notion of “direct or indirect profit” for copyright infringements online, setting out a checklist of indicators for the qualification of facilitators of online infringements, who are now put on the same level as direct infringers.<sup>187</sup>

### 3.3.4. The UK

The Digital Economy Act 2010 (DEA)<sup>188</sup> amended the Communication Act 2003,<sup>189</sup> and introduced specific duties for the British regulator in the communications sector, OFCOM, in the field of copyright protection. OFCOM has to adopt a code for the purpose of regulating the initial obligations of ISPs to send notifications and provide copyright owners with copyright infringement lists. The draft code was subject to a public consultation first in 2010<sup>190</sup> and then, again, in a slightly revised version, in 2012,<sup>191</sup> but no final decision has yet been taken.

The DEA was challenged by two ISPs before the High Court of Justice, claiming a breach of EU privacy and telecom directives. In its judgement of April 2011,<sup>192</sup> the Court rejected the claim on all grounds, except for the aspects concerning the allocation of costs for the enforcement activities to be carried out by ISPs.<sup>193</sup> Following this ruling, OFCOM launched an additional public consultation on the separate code on the sharing of costs of copyright enforcement,<sup>194</sup> but has not yet taken a final decision in this case either.

Once the new procedures are in place, rightsholders may notify the ISPs about the IP addresses used for copyright infringements by transmitting to them a Copyright Infringement Report (CIR). ISPs will then notify their users about the receipt of a CIR up to three times: the first letter will be followed by a second letter, in case of repeat violations in six months, and by a third letter should a new violation occur during the following month. After the third “strike”, the user will be placed in a

<sup>186</sup> Proyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, registered at the Congress of Deputies on 4 October 2013, [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF).

<sup>187</sup> Article 151 of Law, replacing Article 270 of the Spanish Criminal Code, provides for imprisonment from 6 months to 4 years not only in case of direct placement of illegal works on the internet, but also for those who facilitate the access to, or the localisation of such content, in an active and non-neutral way, excluding merely technical activities (such as search engines, as explained in the explanatory memorandum to the law), with the purpose of obtaining a direct or indirect profit.

<sup>188</sup> Digital Economy Act 2010, <http://www.legislation.gov.uk/ukpga/2010/24/contents>.

<sup>189</sup> Communications Act 2003, <http://www.legislation.gov.uk/ukpga/2003/21/contents>.

<sup>190</sup> OFCOM, “Online Infringement of Copyright and the Digital Economy Act 2010. Draft Initial Obligations Code”, May 2010, <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/summary/condoc.pdf>.

<sup>191</sup> OFCOM, “Online Infringement of Copyright and the Digital Economy Act 2010”, June 2012, <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf>.

<sup>192</sup> Royal High Court of Justice, Judgment of 20 April 2011, British Telecommunications Plc & Anor, R (on the application of) v The Secretary of State for Business, Innovation and Skill, <http://www.bailii.org/ew/cases/EWHC/Admin/2011/1021.html>.

<sup>193</sup> The issue of costs has recently also been at the centre of the debate in Ireland, following the judgment of 17 June 2015 of the Irish High Court in the case Sony Music Entertainment (Irl) Ltd & ors -v- UPC Communications Irl Ltd, <http://www.courts.ie/Judgments.nsf/0/84D0803D3BC9AE1C80257E5100477A3D>. The Court ordered the ISP to set up a graduated response system and to bear its costs. See Markey C. and Byrne J., “ISPs face the cost of implementing a graduated response system to deal with copyright infringers”, LK Shields, July 2015, <http://www.lexology.com/library/detail.aspx?g=65ac59fa-83f7-4a03-b767-bc0dd38ce9db>.

<sup>194</sup> OFCOM, “Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012, June 2012, <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf>.



Copyright Infringement List (CIL), which can be sent to copyright owners upon request, without prejudice to the right of appeal and request for mediation.

While awaiting the entry into force of the graduated response mechanism,<sup>195</sup> ordinary judicial procedures are operational.

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<sup>195</sup> Barron A., “ ‘Graduated response’ à l’Anglaise: online copyright infringement and the Digital Economy Act 2010”, LSE Research Online, Hart Publishing, 2011, [http://eprints.lse.ac.uk/41708/1/Graduated\\_response\\_%C3%A0\\_l%E2%80%99Anglaise\\_%28lsero%29.pdf](http://eprints.lse.ac.uk/41708/1/Graduated_response_%C3%A0_l%E2%80%99Anglaise_%28lsero%29.pdf).





## 4. Self-regulatory initiatives from the industry

The initiatives set up by the industry can be distinguished in two main groups:

- Economy driven initiatives, such as the “follow the money” approach;
- Non-financial approaches, as NTD procedures and awareness campaigns.

Both tools are complementary to publicly driven systems,<sup>196</sup> and have proven to have a significant impact on the fight against online piracy.<sup>197</sup>

### 4.1. Economy driven initiatives: “follow the money”

Considering the economic relevance of copyright for creative industries,<sup>198</sup> one of the most explored tools is the so-called “follow the money”. This approach aims at draining the illegal websites of their economic sources; by capturing in a voluntary enforcement net all relevant intermediaries that play a role in generating economic revenues from illegal activities.

There are two main actors who are drivers of the financial flow deriving from piracy: the advertisers and the providers of payment services.<sup>199</sup> Each of them can be addressed under the “follow-the-money” approach.<sup>200</sup>

<sup>196</sup> These private enforcement systems are not immune from critics, see EDRI, “Human Rights and privatized law enforcement”, February 2014, [https://edri.org/wp-content/uploads/2014/02/EDRI\\_HumanRights\\_and\\_PrivLaw\\_web.pdf](https://edri.org/wp-content/uploads/2014/02/EDRI_HumanRights_and_PrivLaw_web.pdf), and are not to be considered as a replacement of publicly driven remedies.

<sup>197</sup> International Chamber of Commerce and BASCAP, “Roles and Responsibilities of Intermediaries”, March 2015, <http://www.iccwbo.org/Advocacy-Codes-and-Rules/BASCAP/International-engagement-and-Advocacy/Roles-and-Responsibilities-of-Intermediaries/>.

<sup>198</sup> WIPO, Advisory Committee on Enforcement, “Copyright enforcement in the digital age: empirical economic Evidence and conclusions”, August 2015, [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_10/wipo\\_ace\\_10\\_20.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_10/wipo_ace_10_20.pdf). Without entering the debate on the effects of piracy on creative industries, see also Schermer B. W. and Falot N., “ ‘Because it's free’ The damage to the Dutch film industry as a result of downloading from illegal sources”, Considerati, June 2014, [http://www.considerati.com/wp-content/uploads/2014/09/Because\\_its\\_free-June-20141.pdf](http://www.considerati.com/wp-content/uploads/2014/09/Because_its_free-June-20141.pdf) and Barbière C., “Piracy, the quiet killer of the EU’s cultural industries”, euractiv.com, 16 October 2014, <http://www.euractiv.com/sections/languages-culture/piracy-quiet-killer-eus-cultural-industries-309242>.

<sup>199</sup> For an overview of the activities of 30 of the most popular Cyberlocker sites (sites that store files for downloading or streaming), and the role of online payment and advertisers, see NetNames, “Behind the cyberlocker door: A Report on How Shadowy Cyberlocker Businesses Use Credit Card Companies to Make Millions”, A report commissioned by Digital Citizens Alliance, 2014, <https://media.gractions.com/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/7843c97d-fd81-4597-a5d9-b1f5866b0833.pdf>. See also Digital Citizens Alliance, “Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business A Report on the Profitability of Ad-Supported Content Theft”, February 2014,

<http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf>.

<sup>200</sup> International Chamber of Commerce and BASCAP, “Roles and Responsibilities of Intermediaries”, March 2015, <http://www.iccwbo.org/Advocacy-Codes-and-Rules/BASCAP/International-engagement-and-Advocacy/Roles-and-Responsibilities-of-Intermediaries/>.



As already mentioned,<sup>201</sup> the relevance of advertising revenues for websites is steadily increasing,<sup>202</sup> and the role of advertisers in blocking the monetary flow to websites offering illegal content is very important. Basically conceived in the US,<sup>203</sup> the “follow the money” approach is being referred to more and more also in Europe. The European Commission has expressly recommended it in its Action plan on copyright enforcement adopted in 2014,<sup>204</sup> stating that:

*The Commission will facilitate the development of further voluntary Memoranda of Understanding to reduce the profits of commercial scale IP infringements in the online environment, following Stakeholder Dialogues involving advertising service providers, payment services and shippers.*

The UK has been a European pioneer in the implementation of “follow the money” initiatives.<sup>205</sup> A pilot project called Infringing Website List (IWL) was launched in 2013 and is the result of a joint public-private initiative: the creative industry bodies provide the initial list of infringing sites, which is then “evidenced and verified” by the City of London Police's Police Intellectual Property Crime Unit (PIPCU), which provides a list of undesirables for advertisers to avoid.<sup>206</sup>

A similar, but for the moment a purely industry-driven initiative, is the Memorandum signed in Italy by IAB Italy, FPM and FAPAV in June 2014.<sup>207</sup> “Follow the money” is also explicitly mentioned in the AGCOM Regulation on copyright enforcement as one of the approaches to be discussed within the multi-stakeholder Committee established by the same Regulation.<sup>208</sup>

The new Spanish Law on intellectual property of November 2014 mentions the possibility of requesting the cooperation of financial intermediaries and advertisers as a means of reducing copyright infringements online.<sup>209</sup> A Code between rightsholders and advertisers on the model of the

<sup>201</sup> See paragraph 1.1.3. of this publication.

<sup>202</sup> PwC for IAB, “IAB internet advertising revenue report. 2014 full year results”, April 2015, [http://www.iab.net/media/file/IAB\\_Internet\\_Advertising\\_Revenue\\_FY\\_2014.pdf](http://www.iab.net/media/file/IAB_Internet_Advertising_Revenue_FY_2014.pdf); report 2015 not yet available, see press release “U.S. Internet Ad Revenues Reach Historic \$13.3 Billion in Q1 2015, Representing 16% Increase Over Q1 2014 Landmark Numbers, June 2015, <http://www.iab.net/about-the-iab/recent-press-releases/press-release-archive/press-release/pr-061115#sthash.SBSQ8P4I.dpuf>.

<sup>203</sup> As an example of concrete actions, see USC's Annenberg Innovation Lab, “Online Advertising Transparency Report”, 2013, <http://www.annenberglab.com/projects/ad-piracy-report-0>. “Follow the money” is not mentioned in Google's “Transparency report”, <http://www.google.com/transparencypolicy/> or in Google's Adword policy when addressing copyright, <https://support.google.com/adwordspolicy/answer/6008942?vid=1-635795876259526720-185309259&rd=1> and [https://support.google.com/adwordspolicy/answer/6018015?hl=en&ref\\_topic=1626336&vid=1-635795876259526720-185309259](https://support.google.com/adwordspolicy/answer/6018015?hl=en&ref_topic=1626336&vid=1-635795876259526720-185309259).

<sup>204</sup> European Commission, “Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan”, COM(2014) 392 final, July 2014. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0392&from=EN>. This tool was also welcomed by the Council, see “Conclusions on IPR enforcement”, 4-5 December 2014, <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015321%202014%20INIT>.

<sup>205</sup> Weatherley M., “‘Follow the Money’: Financial options to assist in the battle against Online IP piracy”, June 2014, <http://www.olswang.com/media/48204227/follow-the-money-financial-options-to-assist-in-the-battle-against-online-ip-piracy.pdf>.

<sup>206</sup> Dredge S., “Forget suing filesharers: in 2014, anti-piracy efforts follow the money”, April 2014, <http://www.theguardian.com/technology/2014/apr/02/infringing-websites-list-anti-piracy>.

<sup>207</sup> IFPI, “IAB Italy, FPM and FAPAV united in preventing advertising on pirate websites a grey market that is worth \$227 million USD”, June 2014, <http://www.ifpi.org/news/00-FIMI-announcement>. Bottà G., “Italia, un tridente per soffocare la pirateria”, Punto Informativo, June 2014, <http://punto-informativo.it/4068237/Pi/News/italia-un-tridente-soffocare-pirateria.aspx>.

<sup>208</sup> Resolution no. 680/13/CONS of 12 December 2013, “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/documents/10179/540163/Delibera+680-13-CONS/2fb37939-620c-410d-a23f-2150d505b103?version=1.1>.

<sup>209</sup> Law no. 21/2014, of 4 November 2014, “por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil”, <https://www.boe.es/boe/dias/2014/11/05/pdfs/BOE-A-2014-11404.pdf>. See Andrevia M., “Derecho de propiedad intelectual:



British pilot project is being discussed between the Coalition of Creators and Content Industries (Coalición de Creadores e Industrias de Contenido) and Spanish Advertisers' Association (Asociación Española de Anunciantes).<sup>210</sup>

A "follow the money" Charter was signed among French advertisers in March 2015<sup>211</sup> and inserted in the Government's action plan on the fight against piracy.<sup>212</sup>

## 4.2. Non-financial approaches

### 4.2.1. Notice and takedown procedures

A field where the industry has been very active is the establishment of voluntary procedures for the handling of requests to remove content on the Internet. These are known as "notice and take down"<sup>213</sup> procedures under the DMCA (Digital Millennium Copyright Act) and as "notice and action"<sup>214</sup> procedures under the EU framework. According to the DMCA, the expeditious removal (the "Takedown") of content protected by copyright upon receipt of a notification (the "Notice") exempts the ISPs from any liability with regard to the copyright violation. This procedure is employed by all US-based websites and is considered to be a quick and economical remedy against copyright violations:

*A service provider shall not be liable (...) for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider (...) upon notification of*

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modificación de la Ley de Propiedad Intelectual en virtud de la Ley 21/2014, de 4 de Noviembre (publicada en el B.O.E. el 5 de Noviembre de 2014), Marimón Abogados Revista Jurídica, December 2014, <http://marimon-abogados.com/wp-content/uploads/2014/12/revista-jur%C3%ADdica-diciembre-20142.pdf>.

<sup>210</sup> Despite being announced as already signed in 2013 (IIPi, 2014 Special 301 Report on Copyright protection and enforcement, <http://www.iipa.com/rbc/2014/2014SPEC301SPAIN.PDF>), in 2014 preliminary discussions were still ongoing, (ADEPI, Los creadores proponen al sector de la publicidad colaboración y autorregulación, <http://adepi.net/2014/04/29/la-coalicion-de-creadores-propone-al-sector-de-la-publicidad-colaboracion-y-autorregulacion-para-reducir-la-presencia-de-marcas-y-anunciantes-en-las-paginas-web-de-pirateria/>).

<sup>211</sup> "Charte des bonnes pratiques dans la publicité pour le respect du droit d'auteur et des droits voisins", March 2015, <http://www.culturecommunication.gouv.fr/Actualites/Dossiers/Charte-des-bonnes-pratiques-dans-la-publicite-pour-le-respect-du-droit-d-auteur-et-des-droits-voisins>. Poussiélgue G., "Internet : Le gouvernement frappe les sites pirates au portefeuille", Les Echos, March 2015, <http://www.lesechos.fr/tech-medias/medias/0204247549379-internet-le-gouvernement-frappe-les-sites-pirates-au-portefeuille-1104635.php>.

<sup>212</sup> "Plan d'action du Gouvernement pour la lutte contre le piratage". Ministry of Culture and communication. March 2015, [www.culturecommunication.gouv.fr/content/download/112808/1295260/version/1/file/20150323\\_MCC-signature-charte-publicite.pdf](http://www.culturecommunication.gouv.fr/content/download/112808/1295260/version/1/file/20150323_MCC-signature-charte-publicite.pdf).

<sup>213</sup> The so-called Notice and Takedown procedure is foreseen by the Digital Millennium Copyright Act of 1998, <http://www.copyright.gov/title17/92chap5.html#512>, which addresses the take down of copyright infringing content from a website following a sworn statement of the content owner.

<sup>214</sup> European Commission, "A coherent framework for building trust in the Digital Single Market for e-commerce and online services and online services", COM(2011) 942 final, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52011DC0942>. In this Communication, a specific proposal was made to set up a horizontal European framework for notice and action procedures. In view of the growing volume of statutory and case-law in the Member States, and the public consultation "on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy" launched in September 2015 contained various questions on the procedures employed by the respondents, [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=10932](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=10932). For further details see paragraph 6.1.2.



*claimed infringement (...) responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.*<sup>215</sup>

At EU level, NTD procedures can be referred to by the regulatory framework or be used in application of self-regulatory initiatives. A Memorandum of Understanding was signed in 2011 for the fight against the sale of counterfeit goods over the Internet also by using NTD procedure.<sup>216</sup> However, this has not yet been followed by similar European-wide initiatives with regard to digital content protected by copyright. There are therefore no common guidelines as to how to set up such procedures, but the underlying principle remains the same. The presentation of a notice creates a situation of knowledge for the service provider, who may decide to act or not to act, in the case of a purely self-regulatory regime followed by European-based websites, notwithstanding that this behaviour contributes to the definition of the fulfilment of the duties of care as foreseen by the E-Commerce Directive. On the other hand, if the notice is followed by a public order, whether it is judicial or administrative, the situation is different, and action must be taken.

Strictly connected to NTD procedures based on the DMCA is YouTube's Content ID,<sup>217</sup> which provides rightsholders with an automated, scalable system enabling them to identify YouTube videos that include content they own. Content ID can be used by rightsholders who own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community. Rightsholders provide YouTube with reference files (audio, visual, or audiovisual) and metadata that describe the content and which territories they own it in. These files are then used by YouTube to scan uploaded videos for matching content. When a match is found, YouTube applies the rightsholders preferred policy: to monetise, track, or block the video in question. Content ID also performs a "legacy scan" to identify matching videos uploaded before the reference. A full legacy scan may take a number of months to complete; recent uploads and popular videos are scanned first.

As an example of a semi co-regulated NTD procedure, it is worth mentioning the recently signed Portuguese Memorandum of Understanding on the protection of copyright in the digital environment.<sup>218</sup> The agreement was signed by public and private entities, public agencies of surveillance and protection of consumers, particularly the representative body of the operators of electronic communications, representatives of rightsholders, the associations of advertisers and of advertising agencies, consumer protection associations and the entity responsible for the management, registration and maintenance of domains under the .pt Top Level Domain (TLD). The memorandum sets out a procedure for the blocking of websites that may be violating copyright law. This procedure includes the signatories notifying the anti-piracy organisation MAPINET (Movimento Cívico Anti Pirataria na Internet) of websites allegedly violating copyright law, which may then forward a complaint to the ministry's General Inspection of Cultural Activities (IGAC). IGAC may then request ISPs to block access to these websites. The basic criterion for the blocking of the websites is

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<sup>215</sup> Section 512 of the DMCA.

<sup>216</sup> Memorandum of Understanding for the fight against the sale of counterfeit goods over the internet, 4 May 2011, [http://ec.europa.eu/internal\\_market/iprenforcement/docs/memorandum\\_04052011\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf).

<sup>217</sup> See YouTube "Using Content ID",

[https://support.google.com/youtube/answer/3244015?hl=en&ref\\_topic=4515467&vid=1-635799113680735986-2037337187](https://support.google.com/youtube/answer/3244015?hl=en&ref_topic=4515467&vid=1-635799113680735986-2037337187).

<sup>218</sup> Press release of the Portuguese government, 30 July 2015, "Acordo de autorregulação protege direitos de autor em ambiente digital".



that they contain either at least 500 copyrighted items or that 2/3 of their content is copyrighted.<sup>219</sup> Moreover, in order to encourage the legal use of copyrighted content, a portal will be launched which will make available a dynamic list of websites offering music, videogames, books, audiovisual works and sport events in a legal way.<sup>220</sup>

#### 4.2.2. Positive measures: legal offer and creating awareness

Considering the relevance in the public debate of issues related with the availability of affordable options of legal consumption and the need for educational campaigns as to the economic value of copyrighted works, more and more countries report about positive measures to accompany enforcement programmes.

Noteworthy is the Voluntary Copyright Alert Programme (VCAP) launched in the UK in September 2013 as a response from the industry to the difficulties in implementing the Digital Economy Act, with the support of the government.<sup>221</sup> The VCAP is co-managed and co-funded by ISPs and content creators and foresees a subscriber alerts programme which informs them that unlawful file sharing may have taken place on their connection and offers at the same time advice on where to find legal content.

The programme was incorporated in the wider initiative Creative Content launched in July 2014,<sup>222</sup> which includes an awareness campaign led by content creators and part-funded by government, that aims to create wider appreciation of the value and benefits of entertainment content and copyright. Educational campaigns on the existence of legal content are also promoted in France by HADOPI and in Italy by the industry.<sup>223</sup>

Another proposal put on the table is that of the British collecting society Performing Rights Society (PRS) for Music, the so-called “Traffic Lights”.<sup>224</sup> This proposal aims at providing a visual indication to users (approaching an unlicensed site) that the site is facilitating copyright theft, as well as other unfair or unsafe trading practices. The traffic light - a green tick or red cross - would appear next to a link to the site in question. The traffic light can be applied wherever the site is based, not just for those based in the UK. The proposed framework would count the number of ignored “notice and takedown” requests that apply to a site, and use that “score” to decide when a sanction should

<sup>219</sup> Caçador F., “A pirataria online tem os dias contados em Portugal? Acordo facilita bloqueio de sites pelos operadores”, [http://tek.sapo.pt/noticias/internet/artigo/a\\_pirataria\\_online\\_tem\\_os\\_dias\\_contados\\_em\\_portugal\\_acordo\\_facilita\\_bloqueio\\_de\\_-43609kkc.html](http://tek.sapo.pt/noticias/internet/artigo/a_pirataria_online_tem_os_dias_contados_em_portugal_acordo_facilita_bloqueio_de_-43609kkc.html).

<sup>220</sup> Portuguese government, press release of 17 August 2015, “Memorando de entendimento regula proteção de direitos de autor em ambiente digital”, <http://portugaldigital.pt/noticias/?id=38>.

<sup>221</sup> See the statement made in the House of Commons by the Under-secretary of state for culture, media and sport on 13 February 2014, <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140213/halltext/140213h0001.htm#14021365000001>.

<sup>222</sup> UK Government, press release of 19 July 2014, “New education programme launched to combat online piracy”, <https://www.gov.uk/government/news/new-education-programme-launched-to-combat-online-piracy>.

<sup>223</sup> The HADOPI has started to label websites offering legal content, <http://www.offrelegale.fr/>; similar industry driven initiatives are behind “The content map” in the UK (<http://www.thecontentmap.com/>) and “Mappa dei contenuti” in Italy (<http://www.mappadeicontenuti.it/>). See also paragraph 1.2.2.

<sup>224</sup> See PRS for Music, “Traffic Lights: Creating a distinction between legal and illegal content online”, <http://www.prsformusic.com/aboutus/press/latestpressreleases/pages/trafficlightscreatingadistinctionbetweenlegalandillegalcontentonline.aspx>.



be applied. This system would require the creation of a central and independent “authority body”, which can then take a full view of the behaviour of a site.



## 5. Case law

National courts of law have difficulties in finding legal solutions to questions related to copyright infringement in the online environment, which involve new technologies and services. These courts often provide contradictory solutions depending on the country of their jurisdiction. At European level, the Court of Justice of the European Union (CJEU) has in recent years provided clarification of many different issues in this field, notably:

- The contours of the right of communication to the public on the Internet;
- The application of exceptions and limitations of copyright in the online environment;
- The right to privacy of alleged infringers;
- The secondary liability of service providers for the acts committed by individual infringers;
- Jurisdiction and laws applicable to the infringing act.

This chapter summarises the most significant judgments issued by the CJEU concerning these legal issues, while taking into account jurisprudential developments at national level.

### 5.1. The right of communication to the public on the Internet

The Internet and digital technologies have made possible new forms of communicating audiovisual works to the public in many ways. The ease of digital reproduction and transmission online allows individual people to share digitised content with virtually the whole world. However, the fact that this is an easy thing to do does not exempt uploaders from asking rightsholders for permission first. If this permission is not obtained, the making available of the copyrighted work at hand is *prima facie* illegal. But as usual, the devil is in the detail. As already mentioned,<sup>225</sup> new services are usually tailored in such a way as to profit from legal loopholes and legal uncertainty. In such cases, courts at national and EU level have to decide upon their legality.<sup>226</sup>

#### 5.1.1. Internet streaming of TV broadcasts

There are many ways of tailoring a streaming service in order to take advantage of somebody else's copyrighted content. The easiest way is to retransmit the broadcast signal of a TV channel, but this infringes the broadcasters' right of communication to the public. This issue was clarified by the CJEU

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<sup>225</sup> See paragraph 1.2.1. of this publication.

<sup>226</sup> For a description of the concept of public communication in traditional broadcasting see Guibault L. and Quintais J.P., "Copyright, technology and the exploitation of audiovisual works in the EU", in Nikoltchev S. (Ed.), *The Influence of New Technologies on Copyright, IRIS Plus 2014-4*, European Audiovisual Observatory, Strasbourg, 2014, <http://www.obs.coe.int/documents/205595/264635/IRIS%2B2014-4+EN+complet.pdf/030edfc9-dbe1-4cae-b0ef-043814fc1ab0>.



in *ITV-Broadcasting*.<sup>227</sup> The CJEU ruled that the right of communication to the public covers retransmission of works included in a terrestrial television broadcast:

- where the retransmission is made by an organisation other than the original broadcaster,
- by means of an Internet stream made available to the subscribers of that other organisation, who may receive that retransmission by logging on to its server,
- even though those subscribers are within the area of reception of that terrestrial television broadcast and may lawfully receive the broadcast on a television receiver.

The CJEU's ruling was neither influenced by the fact that the retransmission was funded by advertising and is therefore of a profit-making nature, nor by the fact that it was made by an organisation which was acting in direct competition with the original broadcaster. Moreover, this case concerned the transmission of works included in a terrestrial broadcast and the making available of those works over the Internet. Since each of those two transmissions must be authorised individually and separately by the authors concerned as both are made under specific technical conditions (using a different means of transmission for the protected works, and each is intended for a public) the CJEU found a violation of copyright. The Court did not even consider it necessary to examine the requirement that there must be a new public. Following the CJEU judgment, the UK High Court ruled, by an Order of 7 October 2013,<sup>228</sup> that the defendant was infringing the right of communication to the public of the claimants, except in the case of broadcasts by ITV, Channel 4 and Channel 5, according to the cable re-transmission defence set in section 73 of the UK Copyright, Designs and Patents Act (CDPA). Section 73 provides that copyright in a qualifying service is not infringed where it is received and immediately re-transmitted via cable. For the defence to apply, the broadcast must be re-transmitted only to users situated in the region where the original broadcasts were made. However, here the UK High Court declared that it is not possible to interpret this defence "so as to be compatible with" Article 5(3)(o) of the InfoSoc Directive.<sup>229</sup>

The CJEU has also further considered the contours of the right of communication to the public in the more recent case of *C More Entertainment*.<sup>230</sup> The case concerned the provision, on an Internet site, of links enabling Internet users to access, on the site of a broadcasting organisation, live broadcasts of ice hockey matches, without having to pay the fee required by that organisation for that access. The Swedish Supreme Court decided to refer the following question to the CJEU for a preliminary ruling: "May the Member States give wider protection to the exclusive right of authors by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(2) of [Directive 2001/29 'InfoSoc Directive']?". According to the CJEU, live streaming does not meet the criteria for on-demand transmission and is not an act harmonised by the InfoSoc

<sup>227</sup> CJEU Case C-607/11, *ITV Broadcasting Ltd. and others v. TV Catch up Ltd.*, 7 March 2013,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d57a38640b82f74e72a9c1f0959f3c46fc.e34KaxiLc3eQc40LaxgMbN4ObNeLe0?text=&docid=134604&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=236553>.

<sup>228</sup> *ITV and Others v TVCatchup Limited* Order, 7 October 2013, High Court, Chancery Division,

<http://presscentre.itvstatic.com/presscentre/sites/presscentre/files/TVCatchup.pdf>.

<sup>229</sup> See <http://www.legislation.gov.uk/ukpga/1988/48/section/73>. For commentary on this case see, e.g., Abbotts G., "A catch for TVCatchup – limits of the cable defence", <http://www.simkins.com/news/acatchfortvcatchupgma2013/> and Swimer N., Edwards S., "Is this the beginning of the end for TVCatchUp and section 73 CDPA?", <http://www.reedsmith.com/Is-this-the-beginning-of-the-end-for-TVCatchUp-and-section-73-CDPA-10-11-2013/>.

<sup>230</sup> CJEU Case C-279/13, *C More Entertainment AB v Linus Sandberg*, 26 March 2015,

<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30ddebe044ea1ae14caea663f8b6a854f386.e34KaxiLc3qMb40Rch0SaxuPc3j0?text=&docid=163250&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=106979>.



Directive. Since the InfoSoc Directive does not prescribe full harmonisation, the CJEU concluded that member states could extend the definition of “communication to the public” to give wider protection to authors and broadcasters. Consequently, there is nothing that precludes member states from legislating in order to bring the provision of links to paywall-protected live streaming within the scope of national legislation.

This issue was also recently dealt with by the US Supreme Court, which ruled on 25 June 2014 that online television service Aereo violated the US Copyright Act by allowing its subscribers to watch television programmes over the Internet without obtaining consent from the programmes’ copyright owners.<sup>231</sup> According to the US Supreme Court, although a definition of “the public” is not to be found in the US Copyright Act, it suggests nevertheless that “the public” consists of a large group of people outside of a family and friends. It further explained that “the public” need not be situated together, spatially or temporally.

A different matter is whether the user watching illegally streamed content is doing something illegal. The user does not communicate to the public (the uploader does) and the reproduction of the streamed content in the user’s device could be considered as a temporary act of reproduction according to the exception to the reproduction right included in Article 5(1) of the InfoSoc Directive. In order to clarify this matter, the Dutch Supreme Court recently referred<sup>232</sup> to the CJEU the following questions (case still pending):

1. Must Article 5 of the Copyright Directive (Directive 2001/29/EC) be interpreted to mean that there is no “lawful use” within the meaning of the first paragraph at b of that provision, if a temporary reproduction is made by an end user during the streaming of a copyright-protected work from a website of a third party on which this copyright-protected work is offered without the consent of the rightholder(s)?
2. If the answer to this question is in the negative, is making a temporary reproduction by an end user during the streaming of a copyright-protected work from a website of a third party on which this copyright-protected work is offered without the consent of the rightholder(s) in breach of a the “three-step test” referred to in Article 5(5) of the Copyright Directive (Directive 2001/29/EC)?

### 5.1.2. Hyperlinking

The CJEU in *Svensson*<sup>233</sup> put an end to the uncertainty surrounding a very thorny question: is the provision of hyperlinks to copyrighted content that is freely available elsewhere a form of communication of the public?<sup>234</sup> The case concerned the operator of a website that provides lists of

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<sup>231</sup> Judgment of the US Supreme Court, *American Broadcasting Cos., Inc., et al. v. Aereo, Inc., Fka Bambooblabs, Inc.*, 25 June 2014, [http://www.supremecourt.gov/opinions/13pdf/13-461\\_1537.pdf](http://www.supremecourt.gov/opinions/13pdf/13-461_1537.pdf).

<sup>232</sup> *Rechtbank Midden-Nederland*, ECLI:NL:RBMNE:2015:7192, 30 September 2015, <http://deemlink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2015:7192>. See also Boyd J., “New CJEU reference on linking and streaming of unlawful content”, <http://ifro.org/content/new-cjeu-reference-linking-and-streaming-unlawful-content>.

<sup>233</sup> CJEU Case C-466/12, *Svensson v. Retriever Sverige AB*, 13 February 2014, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=34059>.

<sup>234</sup> The judgment in *Svensson* has met with criticism, see e.g. ALAI’s opinion of 17 September 2014, <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>.



clickable Internet links to articles published by other websites. The applicants had written articles that were published in a Swedish newspaper and were freely available on that newspaper's website. The defendant's website included hyperlinks redirecting users to the said articles. The applicants requested compensation for the harm they consider to have suffered as a result of the inclusion of their articles on the defendant's website. According to the applicants in the main proceedings, if a client clicks on one of those links, it is not apparent to him that he has been redirected to another site in order to access the work in which he is interested. By contrast, according to the defendant, it is clear to the client that, when he clicks on one of those links, he is redirected to another site.

On 13 February 2014, the CJEU ruled that Article 3(1) of the InfoSoc Directive must be interpreted as meaning that the provision on a website of clickable links to works freely available on another website does not constitute an 'act of communication to the public', as referred to in that provision. The said article also precludes a member state from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.

The CJEU considered that the provision of hyperlinks to protected works must be considered to be an act of communication to the public according to Article 3(1) of the InfoSoc Directive. However, the decisive factor in determining whether the authorisation of the copyright holders was required for a communication to the public by making the article available to its clients through hyperlinks was whether the communication was to a 'new' public.<sup>235</sup> According to the CJEU, "where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorised the initial communication." In such a case, there is no 'new' public and authorisation of the copyright holders is not required for a communication to the public. However, the CJEU stated that if the hyperlinks were to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public. This was not taken into account by the copyright holders when they authorised the initial communication, and accordingly the holders' authorisation is required for such a communication to the public.<sup>236</sup>

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<sup>235</sup> This criterion was outlined a.o. in the *SGAE v Rafael Hoteles SA* case, "when the author authorises the broadcast of his work, he considers only direct users, that is, the owners of reception equipment who, either personally or within their own private or family circles, receive the programme [...] if reception is for a larger audience, possibly for profit, a new section of the receiving public hears or sees the work and the communication of the programme via a loudspeaker or analogous instrument no longer constitutes simple reception of the programme itself but is an independent act through which the broadcast work is communicated to a new public [...] such public reception falls within the scope of the author's exclusive authorisation right". See CJEU Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA*, 7 December 2006,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=66355&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=27024>. Here the CJEU mentioned the WIPO Guide to the Berne Convention, an interpretative document drawn up by the WIPO which, without being legally binding, nevertheless assists in interpreting that Convention. The WIPO Guide is available at

[http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo\\_pub\\_615.pdf](http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf).

<sup>236</sup> The CJEU had already applied the concept of "new public" in the *Airfield* case concerning the application of the SatCab Directive. The CJEU stated that the authorisation of any communication of the protected works to the public by satellite "must be obtained in particular by a person who triggers such a communication or who intervenes when it is carried out, so that, by means of that communication, he makes the protected works accessible to a new public, that is to say, a public which was not taken into account by the authors of the



*Svensson* concerns hyperlinking to freely available content. But what happens when the links point to illegal content? The CJEU dealt already with this issue in the above-mentioned *C More Entertainment*. More recently, the cited referral of the Dutch Supreme Court also asked the CJEU about the legality of hyperlinks to unlawful content.

### 5.1.3. Embedding

The *Bestwater*<sup>237</sup> case also dealt with a difficult question: does “embedding, within one’s own website, of another person’s work made available to the public on a third-party website”, constitute communication to the public “even where that other person’s work is not thereby communicated to a new public and the communication of the work does not use a specific technical means, which differs from that used of the original communication”?

Following its judgment in *Svensson*, the CJEU issued an order<sup>238</sup> stating that embedding, as long as the same technical means are used for the communication, does not constitute a communication to the public where the communication does not reach a new public. Embedding content, which was previously made available online legally, does not constitute a communication to the public and therefore requires no previous authorisation by the rightsholders.

The plaintiff company argued before the German courts that the video was uploaded to YouTube “without its consent,” but the German courts did not rule on this point and therefore the question referred to the CJEU did not address the situation where a video is uploaded without permission.

Following this CJEU order, on 9 July 2015 the *Bundesgerichtshof* (German Federal Supreme Court - BGH) decided that copyright is not infringed by a website operator who uses ‘framing’ to embed, in its own website, copyright-protected content that has been made accessible to the public on a third-party website with the copyright-holder’s consent.<sup>239</sup>

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protected works within the framework of an authorisation given to another person”. See CJEU Joined Cases C-431/09 and C-432/09, *Airfield and Canal Digitaal v. Sabam and Airfield NV v Agicoa Belgium BVBA*, 13 October 2011,

<http://curia.europa.eu/juris/document/document.jsf?docid=111226&doclang=EN>.

<sup>237</sup> CJEU Case C-348/13, *BestWater International GmbH v. Mebes*, 21 October 2014,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=159023&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=177> (available only in French and German).

<sup>238</sup> According to Article 99 of the Court’s rules of procedure, the Court can issue an order “[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt”.

<sup>239</sup> Judgment of the Federal Supreme Court of 9 July 2015 - I ZR 46/12 - Die Realität II. See press release of the BGH, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2015&Sort=3&nr=71618&pos=4&anz=119>. See also Raab T., BGH rules that framing of lawfully uploaded content does not infringe copyright, IRIS 2015-9/9, <http://merlin.obs.coe.int/iris/2015/9/article9.en.html>.



## 5.2. Exceptions to copyright

Copyright law is based on exclusivity of rights tempered by exceptions and limitations. However, member states are not free to introduce any type of exception or limitation. First of all, Article 5 of the InfoSoc Directive introduced an exhaustive, optional list of exceptions to the reproduction, communication to the public and distribution rights. And according to Article 5(5) of the same directive, member states may provide for exceptions or limitations only “in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder”. Furthermore, in *Infopaq*<sup>240</sup> the CJEU ruled that “the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly”.

The private copying exception<sup>241</sup> introduced by Article 5(2)(b) of the InfoSoc Directive is probably the most frequently invoked as a defence in cases of copyright infringement. Most member states have some form of private copying exception in their national legislation coupled with a compensation scheme for rightsholders (in most cases, a levy on blank media). While users may invoke a private copying exception for cases in which the source from which a reproduction for private use is made is lawful, it has been discussed whether this is also possible for cases in which the source is unlawful. This issue was clarified by the CJEU in the *ACI Adam and Others v. Stichting de ThuisKopie and Stichting Onderhandeligen ThuisKopie vergoeding* case.<sup>242</sup> In its judgment of 10 April 2014, the CJEU ruled that EU law, and in particular Article 5(2)(b) of the InfoSoc Directive must be interpreted as precluding national legislation “which does not distinguish the situation in which the source from which a reproduction for private use is made is lawful from that in which that source is unlawful”.<sup>243</sup> The CJEU explained that if the member states had the option of adopting legislation that also allowed reproductions for private use to be made from an unlawful source, the result of that would clearly be detrimental to the proper functioning of the internal market. Also following Recital 22 of the InfoSoc Directive, the CJEU stated that the objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.<sup>244</sup>

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<sup>240</sup> CJEU Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, 16 July 2009,

<http://curia.europa.eu/juris/document/document.jsf?docid=72482&doclang=en>. This judgment makes reference to Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72, and Case C-36/05 *Commission v Spain* [2006] ECR I-10313, paragraph 31).

<sup>241</sup> For more information about the private copying exception in the EU see Cabrera Blázquez F.J., “Private Copying Levies at the Crossroads”, in Nikoltchev S. (ed.), *Who pays for private copying*, IRIS plus 2011-4, European Audiovisual Observatory, Strasbourg, 2011, [http://www.obs.coe.int/documents/205595/264635/Iris\\_plus\\_2011-4\\_EN\\_FullText.pdf](http://www.obs.coe.int/documents/205595/264635/Iris_plus_2011-4_EN_FullText.pdf).

<sup>242</sup> CJEU Case C-435/12, *ACI Adam BV and Others v. Stichting de ThuisKopie*, 10 April 2014,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=150786&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=286178>.

<sup>243</sup> In this case the CJEU also ruled that the Enforcement Directive 2004/48/EC must be interpreted “as not applying to proceedings in which those liable for payment of the fair compensation bring an action before the referring court for a ruling against the body responsible for collecting that remuneration and distributing it to copyright holders, which defends that action”.

<sup>244</sup> Following this CJEU judgment, the Dutch Minister of Justice ordered a report from *Stichting ThuisKopie* calculating a new levy based only on private copying from a legal source. This organisation offered its advice on 7 October 2014, suggesting lowering the fees by 30%. The advice further suggested adding e-readers to the list of copying devices. On 28 October 2014, following the proposals made in the *Stichting ThuisKopie* report, the Dutch Minister of Justice issued a decision which extended the Dutch private copying levy system for another three years and lowered the levy by 30%. See Decision of 28 October 2014,

<https://zoek.officielebekendmakingen.nl/dossier/29838/stb-2014-410.html>.



The private copying exception is also invoked by services providing Internet-based video recorders. These services allow users to record television programmes on servers run by the service provider, which are then downloadable by the user at a time of his choice.

In Germany, the *Bundesgerichtshof* (Federal Supreme Court - BGH) decided<sup>245</sup> that such services infringed the television broadcasters' right of communication to the public, as enshrined in Article 87(1)(1) of the *Urheberrechtsgesetz* (Copyright Act - UrhG). In a previous decision, the BGH had instructed<sup>246</sup> the Appeal Court (OLG Dresden) to examine in detail who actually carried out the recording. Only if the recording process was automated could it be attributed to the customer and therefore be considered as a lawful recording for private use. As this was the case, the OLG Dresden decided<sup>247</sup> that the resulting copy was to be considered a private copy and did not infringe the broadcasters' right of reproduction. However, as the service was retransmitting the broadcast programmes to the "personal video recorders" of several users, it infringed the broadcaster's right of communication to the public. A different question however is whether according to Article 87(5) UrhG broadcasters are obliged to conclude a cable retransmission agreement with the Internet-based video recorder service. According to the BGH, the Appeal Court had omitted to check whether the conditions for filing such an objection had been met.

### 5.3. The identity of the infringers

Detecting copyright infringement on the Internet is one thing, but determining who the actual infringer may be is quite another one. Every Internet user holds an IP address, and in principle, only his or her ISP can identify him or her. So here two rights collide: on the one hand, rightsholders need to identify the infringer in order to enforce his/her copyrights, and on the other hand, end-users have a right to the protection of their private data. In *Promusicae*,<sup>248</sup> the CJEU ruled that, according to EU law, when transposing the E-Commerce Directive, the InfoSoc Directive, the enforcement Directive, and the Privacy Directive, the member states have to rely on an interpretation of those directives which allows the striking a fair balance between the various fundamental rights protected by the Community legal order. In this case, the national court had essentially asked whether EU law, in particular the abovementioned Directives, must be interpreted as requiring member states to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings.

The CJEU made clear that those directives do not require the member states to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. Nevertheless, the Court of Justice found that the Privacy Directive does not preclude the possibility for the Member States to lay down an obligation to disclose personal

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<sup>245</sup> Judgment of the German Supreme Court of 11 April 2013 (I ZR 152/11) - *Internet-Videorecorder II* ("*Shift.TV*"),

<http://www.telemedicus.info/urteile/Urheberrecht/Online-Videorecorder/1398-BGH-Az-I-ZR-15211-Internet-Videorecorder-II.html>.

<sup>246</sup> Judgment of the German Supreme Court of 22 April 2009 (Az. I ZR 216/06), <http://www.telemedicus.info/urteile/Urheberrecht/Online-Videorecorder/802-BGH-Az-I-ZR-21606-shift.tv.html>.

<sup>247</sup> Judgment of the OLG Dresden (14 U 801/07), 12 July 2011, <http://www.recht-hat.de/urteile/urheberrecht-urteile/olg-dresden-14-u-80107-urteil-vom-12-07-2011-rtl-gegen-save-tv/>.

<sup>248</sup> CJEU Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 29 January 2008,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=70107&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=275722>.



data in the context of civil proceedings. The CJEU added that, when implementing the measures transposing those directives, “the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality”.

The principles stated in the *Promusicae* case (“striking a fair balance between the various fundamental rights” and “interpretation of directives not in conflict with fundamental rights or with other general principles of Community law”) are mentioned by the CJEU in various judgments. In the *Bonnier Audio*<sup>249</sup> case, for example, the CJEU also had to balance competing rights. The question referred to the CJEU was whether Directive 2006/24/EC precludes the application of a national provision which permits an ISP in civil proceedings, in order to identify a particular subscriber, to be ordered to give rightsholders information on the subscriber to whom the ISP provided a specific IP address which was used in the infringement.

The CJEU ruled that this was not the case, since the national legislation at stake did not fall within the material scope of Directive 2006/24/EC.<sup>250</sup> Furthermore, the CJEU ruled that the Privacy Directive and the Enforcement Directive must be interpreted as not precluding national legislation that enables the national court seized of an application for an order for disclosure of personal data to weigh the conflicting interests involved, on the basis of the facts of each case and taking due account of the requirements of the principle of proportionality.

## 5.4. Secondary liability of Internet service providers

In its 2011 Staff Working Document “Online services, including e-commerce, in the Single Market”,<sup>251</sup> the European Commission highlighted the fact that, despite the frequent literal transposition of Articles 12-14 of the E-Commerce Directive and the fact that some member states had provided for specific liability exemptions for information location services (search engine services) and hyperlinking services, divergent national case law had emerged in regard to the application of liability exemptions to “new services”, location tool services and hyperlinking services.<sup>252</sup>

*L’Oreal v. eBay*<sup>253</sup> is the earliest case in which the CJEU pronounced itself on injunctions against intermediaries. The CJEU stated that the third sentence of Article 11 of the Enforcement

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<sup>249</sup> CJEU Case C-461/10, *Bonnier Audio v. Perfect Communication Sweden AB*, 19 April 2012,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=121743&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=280219>.

<sup>250</sup> The CJEU also ruled that it is irrelevant to the main proceedings that the member state concerned had not yet transposed Directive 2006/24/EC, despite the period for doing so having expired.

<sup>251</sup> See paragraph 2.2.2.1. of this publication.

<sup>252</sup> Austria, Hungary, Spain and Portugal have adopted specific liability exemptions for search engines according to which a company can benefit if it meets the conditions that hosting service providers are required to meet in order to secure a liability exemption. Similarly, Austria, Spain and Portugal have adopted liability exemptions for hyperlinks applying the same conditions as the Directive's liability exemption for hosting activities. Where specific exemptions from liability for search engine services and hyperlinking services have not been explicitly included in national legislation, these services have either been classified as mere conduit services, caching services or hosting services, or courts have excluded them from the scope of any exemption. See the Commission Staff Working Document, p. 26-27.

<sup>253</sup> CJEU Case C-324/09, *L’Oréal SA v. International AG*, 12 July 2011,



Directive “must be interpreted as requiring the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, and dissuasive and must not create barriers to legitimate trade”.

As mentioned in Chapter 2, the E-Commerce Directive introduced limitations on the liability of intermediary service providers concerning activities of mere conduit, caching and hosting. Whereas a general monitoring obligation is prohibited by Article 15 of the same directive, specific injunctions against ISPs are in principle allowed. Therefore, in recent years rightsholders have asked national courts of the EU member states to issue filtering and/or blocking injunctions against ISPs hosting and providing access to copyrighted content offered by individual users without the corresponding authorisation.

The CJEU in some ground breaking cases has made a clear distinction between filtering measures, which are used to detect copyright infringements but require some form of pre-emptive monitoring of networks, and blocking measures, which basically impede access to copyrighted material.<sup>254</sup> The CJEU has in two cases spoken up clearly against filtering measures. In the *Scarlett Extended v SABAM* case<sup>255</sup> the CJEU declared illegal an injunction made against an ISP requiring it to install a system for filtering capable of identifying on that provider’s network the movement of electronic files containing copyrighted works with a view to blocking the sharing of infringing files among users. In this case, the filtering measure was very broad, applying indiscriminately to all customers’ electronic communications passing via its services, in particular those involving the use of peer-to-peer software. This preventive measure was exclusively at the ISP’s expense and set for an unlimited period. Here the CJEU applied not only relevant directives (the e-Commerce Directive, the InfoSoc Directive, the Enforcement Directive, the Data Protection Directive 95/46/EC, the Privacy Directive 2002/58/EC), but it construed them in the light of the requirements stemming from the protection of the applicable fundamental rights. In *SABAM v Netlog*,<sup>256</sup> which concerned a hosting service provider, the CJEU came to the same conclusion.

In *UPC Telekabel Wien*,<sup>257</sup> the CJEU had to answer the question whether it is permissible to order an ISP to block its subscribers’ access to a website on which copyright protected films are made available to the public without authorisation of the rightsholders. Initially, the *Handelsgericht Wien* prohibited UPC Telekabel from providing its customers with access to the infringing website. This prohibition was to be carried out, in particular, by blocking that site’s domain name and current

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=107261&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=285834>.

<sup>254</sup> See Angelopoulos C., “Are blocking injunctions against ISPs allowed in Europe? Copyright enforcement in the post-Telekabel EU legal landscape”, *Journal of Intellectual Property Law & Practice*, 2014, Vol. 9, No. 10, <http://jiplp.oxfordjournals.org/content/9/10/812>.

<sup>255</sup> CJEU Case C-70/10, *Scarlet Extended SA v. SABAM*, 24 November 2011,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=277277>.

<sup>256</sup> CJEU Case C-360/10, *SABAM v. Netlog NV*, 16 February 2012,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=279896>.

<sup>257</sup> CJEU Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH*, 27 March 2014,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=149924&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=35766>.



IP address, and any other IP address of that site of which UPC Telekabel might be aware. As an appeal court, the *Oberlandesgericht Wien* partially reversed the order of the court of first instance and held that Article 81(1a) of the Austrian Copyright Act must be interpreted in the light of Article 8(3) of the InfoSoc Directive. UPC Telekabel had to be regarded solely as an intermediary, and that UPC Telekabel could only be required, in the form of an obligation to achieve a particular result, to forbid its customers access to the website at issue, but that it had to remain free to decide the means to be used (so-called *Erfolgsverbot*). UPC Telekabel appealed to the *Oberster Gerichtshof* (Austrian Supreme Court), which decided to stay the proceedings and to refer a set of questions to the Court of Justice for a preliminary ruling.

The CJEU ruled that the fundamental rights recognised by EU law must be interpreted as not precluding a court injunction prohibiting an internet service provider from allowing its customers access to a website placing protected subject-matter online without the agreement of the rightsholders. This includes when that injunction does not specify the measures which that access provider must take, and when that access provider can avoid incurring coercive penalties for breach of that injunction by showing that it has taken all reasonable measures, provided that:

1. the measures taken do not unnecessarily deprive Internet users of the possibility of lawfully accessing the information available and
2. those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging Internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right, that being a matter for the national authorities and courts to establish.

## 5.5. Jurisdiction and law applicable to transfrontier dissemination of copyrighted works

Which jurisdiction should a rightsholder apply to in the case of an infringement online? If the upload normally occurs in one place, the download can happen in many different countries. And which law should be applied by the relevant court? Where did the damage take place? These are questions that, given the complex nature of international private law,<sup>258</sup> the CJEU has been called on in different occasions to clarify.

### 5.5.1. Jurisdiction

In *Pinckney*<sup>259</sup> the plaintiff claimed to be the author of 12 songs which were recorded by the group Aubrey Small on a vinyl record. The record was then, without his consent, reproduced on compact discs by an Austrian company named Mediatech, which were subsequently sold by companies in the

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<sup>258</sup> See paragraph 2.2.1.4. of this publication.

<sup>259</sup> CJEU Case C-170/12, *Peter Pinckney v. KDG Mediatech AG*, 3 October 2013,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=142613&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=274905>.



United Kingdom on their website. He sued Mediatech before the Regional Court of Toulouse, where Mediatech questioned the jurisdiction of the court. After an appeal from the Court of Appeals of Toulouse, the case came before the Court of Cassation, which requested a preliminary ruling with regard to the jurisdiction of the French courts.

According to the CJEU, “as regards the alleged infringement of a copyright, jurisdiction to hear an action in tort, delict or quasi-delict is already established in favour of the court seized if the Member State in which that court is situated protects the copyrights relied on by the plaintiff and that the harmful event alleged may occur within the jurisdiction of the court seized”. With regard to the circumstances of the case, “that likelihood arises, in particular, from the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an internet site accessible within the jurisdiction of the court seized”.

Following this reasoning, the CJEU ruled that “in the event of alleged infringement of copyrights protected by the Member State of the court seized, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible from the jurisdiction of the court seized.” As in the cases already mentioned, the jurisdiction of the court seized only extends to the damage caused in the member state of the court seized. This was explained by the CJEU in the following way: “If that court also had jurisdiction to adjudicate on the damage caused in other Member States, it would substitute itself for the courts of those States even though, in principle, in the light of Article 5(3) of the Regulation and the principle of territoriality, the latter have jurisdiction to determine, first, the damage caused in their respective Member States and are best placed to ascertain whether the copyrights protected by the Member State concerned have been infringed and, second, to determine the nature of the harm caused”.

In *Hejduk v. EnergieAgentur*,<sup>260</sup> the CJEU had to consider the question of whether under EU Regulation No. 44/2001 the Austrian court has jurisdiction to hear an action for damages for copyright infringement “resulting from the placing of protected photographs online on a website accessible in its jurisdiction”.

First, the Court held that the acts liable to constitute copyright infringement “may be localised only at the place where EnergieAgentur has its seat, since it is where the company took and carried out the decision to place the photographs online”. In this case, the CJEU applied its jurisprudence in the above-mentioned *Pinckney* Case, and held that “the occurrence of damage and/or the likelihood of its occurrence arise from the accessibility in the Member State of the referring court” and that “courts of other Member States in principle retain jurisdiction, in the light of Article 5(3) of Regulation No 44/2001 and the principle of territoriality, to rule on the damage to copyright or rights related to copyright caused in their respective Member States, given that they are best placed, first, to ascertain whether those rights guaranteed by the Member State concerned have in fact been infringed and, secondly, to determine the nature of the damage caused”.

Regarding matters of jurisdiction related to contracts, the CJEU ruled in *Falco*<sup>261</sup> that the place where that obligation has or should be performed is to be determined in accordance with the

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<sup>260</sup> CJEU Case C-441/13, *Pez Hejduk v EnergieAgentur.NRW GmbH*, 22 January 2015,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=161611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=174137>.

<sup>261</sup> CJEU Case C-533/07, *Falco Privatstiftung v. Weller-Lindhorst*, 23 April 2009,



law governing that obligation according to the conflict rules of the court before which the proceedings have been brought, as the Court has already held with regard to Article 5(1) of the Brussels Convention.<sup>262</sup>

## 5.5.2. Applicable law

The *Lagardère*<sup>263</sup> case concerned the exploitation by satellite of phonograms and the collection of royalties on behalf of performers and producers of the said phonograms. The CJEU had to decide whether the SatCab Directive<sup>264</sup> precluded the fee for phonogram use being governed not only by the law of the member state in whose territory the broadcasting company is established but also by the legislation of the member state in which, for technical reasons, the terrestrial transmitter broadcasting to the first State is located. The issue at stake was the use of a transmitter at Felsberg (Germany) by a subsidiary of Lagardère to broadcast to the French territory. These broadcasts could, for technical reasons, also be received in German territory, but only in a limited area, and were not the subject of commercial exploitation in Germany. Lagardère paid in France a royalty to the performers and producers of the phonograms which was collected by the French collecting society SPRE, as well as an annual flat-rate royalty in Germany for broadcasting the same phonograms to the German collecting society GVL. In order to avoid double payment of the royalty for phonogram use, an agreement concluded between Europe 1 (radio belonging to Lagardère) and SPRE, provided that the amount of the royalty payable by Europe 1 to performers and producers would be decreased by the amount paid to GVL. After the agreement authorising that deduction was not renewed, SPRE commenced proceedings against Europe 1 before the French courts. In its preliminary ruling, the CJEU concluded that a broadcast of the kind at issue in this case did not constitute a communication by satellite to the public within the meaning of Article 1(2)(a) of the SatCab Directive, and as a result the Directive did not preclude the fee for phonogram use being governed by the legislation of the two member states involved.

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=77990&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=273127>.

<sup>262</sup> See, respectively, with regard to the concept of ‘obligation’ referred to in Article 5(1) of the Brussels Convention, De Bloos, paragraph 13; Case 266/85 Shenavai [1987] ECR 239, paragraph 9; Case C-288/92 Custom Made Commercial [1994] ECR I-2913, paragraph 23; Case C-420/97 Leathertex [1999] ECR I-6747, paragraph 31; and Case C-256/00 Besix [2002] ECR I-1699, paragraph 44, and with regard to the place of performance of that obligation within the meaning of Article 5(1) of the Brussels Convention, Industrie Tessili Italiana Como, paragraph 13; Custom Made Commercial, paragraph 26; Case C-440/97 GIE Groupe Concorde and Others [1999] ECR I-6307, paragraph 32; Leathertex, paragraph 33, and Besix, paragraphs 33 and 36.

<sup>263</sup> CJEU Case C-192/04, *Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*, 14 July 2006, <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=lst&docid=60584&occ=first&dir=&cid=488130>. For a full description of the judgment see Rossini M., “Court of Justice of the European Communities: Judgment in *Lagardère Active Broadcast V. SPRE & GVL*”, IRIS 2005-7:Extra, European Audiovisual Observatory, Strasbourg, 2005, <http://merlin.obs.coe.int/iris/2005/7/article110.en.html>.

<sup>264</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0083>.



## 6. State of play of the decision-making process

### 6.1. Tackling illegal content online more effectively

Combating IPR online infringement is at the crossroad of various current policy priorities in the EU calendar, starting with the Action Plan on the enforcement of IPR, the review of EU copyright rules and the Digital Single Market Strategy for Europe. However, it is also related to some extent to other directives which are currently under review by the European Commission, such as the Audiovisual Media Services Directive,<sup>265</sup> the SatCab Directive,<sup>266</sup> and EU telecoms rules.<sup>267</sup> Other current initiatives, such as the public consultation on the needs for Internet speed and quality beyond 2020,<sup>268</sup> or on the standards for the Digital Single Market,<sup>269</sup> may also have an impact on IPR enforcement online: such as the definition of intermediaries; the scope of the limited liability regime provided under the E-Commerce Directive for certain intermediaries; the need for Europe-wide “Notice and Action” (N&A) procedures; the design of such systems; and finally if there is a need for a “duty of care” for certain online intermediaries.

This chapter will present the main initiatives announced by the Commission in relation to IP enforcement, namely the revision of the Enforcement Directive, the development of an EU legal framework for N&A procedures and of a new “follow the money” EU approach to tackle IP online infringement.

#### 6.1.1. The civil enforcement of intellectual property rights under review

Since its national implementation in the member states in 2006, the Enforcement Directive has been subject to a first evaluation in 2011, and to several consultation processes<sup>270</sup> and public hearings,<sup>271</sup>

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<sup>265</sup> Public consultation on Directive 2010/13/EU on Audiovisual Media Services (AVMSD) – A media framework for the 21<sup>st</sup> century, from 6 July to 30 September 2015, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-directive-201013eu-audiovisual-media-services-avmsd-media-framework-21st>.

<sup>266</sup> Consultation on the review of the EU Satellite and Cable Directive, from 24 August to 16 November 2015, <https://ec.europa.eu/digital-agenda/en/news/consultation-review-eu-satellite-and-cable-directive>.

<sup>267</sup> Public consultation on the evaluation and the review of the regulatory framework for electronic communications networks and services, from 11 September to 7 December 2015, <https://ec.europa.eu/digital-agenda/en/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications>.

<sup>268</sup> Public Consultation on the Needs for Internet Speed and Quality Beyond 2020, from 11 September to 7 December 2015, <http://ec.europa.eu/digital-agenda/en/news/public-consultation-needs-internet-speed-and-quality-beyond-2020>.

<sup>269</sup> Public consultation on Standards for the Digital Single Market, from 23 September to 16 December 2015, <https://ec.europa.eu/digital-agenda/en/news/have-your-say-standards-help-achieve-digital-single-market>.

<sup>270</sup> For more details, see Synthesis of the comments on the Commission report 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, July 2011, [http://ec.europa.eu/internal\\_market/consultations/docs/2011/intellectual\\_property\\_rights/summary\\_report\\_replies\\_consultation\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2011/intellectual_property_rights/summary_report_replies_consultation_en.pdf) or Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures



in order to adapt it to IP enforcement in the digital age.<sup>272</sup> In May 2011, the European Commission announced<sup>273</sup> that it was working on a review of this Directive, *inter alia* identifying ways to create a framework that would allow more effective combating of IPR infringement via the Internet. The revision aimed at improving the framework for civil law proceedings, was initially announced for 2012, but was postponed many times. The improvement of EU rules on civil law proceedings was also raised in the context of the public consultation on the review of EU copyright rules<sup>274</sup> carried out in 2013. On this occasion, the Commission asked stakeholders whether some of the provisions of the Enforcement Directive are still fit to ensure a proper respect for copyright in the digital age. It also questioned how best to guarantee a fair balance between copyright enforcement on the Internet and the protection of fundamental rights. Emphasis was given on the need for stronger enforcement measures in case of infringement of copyright committed on a commercial scale, and on the clarification of the role of intermediaries in the IP infrastructure, with due respect for the private life and data protection for end-users.

The modernisation of the Enforcement Directive is now officially back on the agenda of the Commission through the Digital Single Market's strategy, as one of the priorities announced in the Communication "A Digital Single Market Strategy for Europe", where the Commission reaffirms that:

*(...) An effective and balanced civil enforcement system against commercial scale infringements of copyright is central to investment in innovation and job creation. In addition the rules applicable to activities of online intermediaries in relation to copyright protected works require clarification, given in particular the growing involvement of these intermediaries in content distribution.*<sup>275</sup>

The Commission announces its intention to clarify the rules on the activities of intermediaries in relation to copyright-protected content before the end of 2015 and to make proposals in 2016 to modernise IPR enforcement in relation to commercial-scale infringements (the "follow the money" approach).

## 6.1.2. Towards an EU framework for Notice and Action procedures

The European Commission has already announced on many occasions its intention to set up a horizontal European framework for N&A procedures, in order to enhance legal certainty for all

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survey on civil enforcement of intellectual property rights, from 30 November 2012 to 30 March 2013, [http://ec.europa.eu/internal\\_market/consultations/docs/2012/intellectual-property-rights/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2012/intellectual-property-rights/consultation-document_en.pdf).

<sup>271</sup> Public hearing on the application of Directive 2004/48/EC in a digital environment, 7 June 2011; [http://ec.europa.eu/internal\\_market/iprenforcement/docs/conference20110607/hearing-report\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/conference20110607/hearing-report_en.pdf) and conference on the enforcement of intellectual property rights, 26 April 2012, [http://ec.europa.eu/internal\\_market/iprenforcement/conferences\\_en.htm](http://ec.europa.eu/internal_market/iprenforcement/conferences_en.htm).

<sup>272</sup> For further details, see chapter 2 of this publication.

<sup>273</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM(2011) 287 final, 24 May 2011, available at: [http://ec.europa.eu/internal\\_market/copyright/docs/ipr\\_strategy/COM\\_2011\\_287\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf).

<sup>274</sup> Public consultation on the review of EU copyright rules, from 5 December 2013 to 5 March 2014, [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/consultation-document\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf)

<sup>275</sup> See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A Digital Single Market Strategy for Europe, COM(2015) 192 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1433409601658&uri=CELEX:52015DC0192>.



parties involved. It already did so in response to a public consultation on E-commerce in 2010<sup>276</sup> and included it again in its 2012 Communication,<sup>277</sup> as part of the priorities of the strategy for building trust in the Digital Single Market - notably by combating abuse and resolving disputes more effectively through more efficient mechanisms. As a follow-up to this initiative, the Commission carried out, over the summer of 2012, a further consultation on procedures for notifying and acting on illegal content hosted by online intermediaries.<sup>278</sup> This was aimed at increasing the level of legal certainty and growth in (cross-border) online services, combating illegality on the Internet and ensuring transparency, effectiveness, proportionality and fundamental rights compliance of these procedures. In April 2013, the Commission issued a Staff Working Document<sup>279</sup> where it announced that it was working on an impact assessment on N&A procedures and, in May 2013, the Commissioner for Internal Market and Services anticipated that it would propose new legislation on N&A procedures.<sup>280</sup> Indeed, a first draft proposal circulated for the Commission's inter-service consultation in July 2013, but it was never published.

Among the initiatives put forward in the 2015 Communication on "A Digital Single Market Strategy for Europe", the Commission confirms that it will analyse the need for new measures to tackle illegal content on the Internet, "such as rigorous procedures for removing illegal content while avoiding the take down of legal content", and whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems. To this end, the Commission commits to undertake a comprehensive assessment on the role of platforms. As part of this process, a new consultation was launched on 24 September 2015 on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy.<sup>281</sup> The Commission has already announced that it will address the tackling of illegal content online and the liability of online intermediaries as one of the four strategic themes of the digital economy, taking into account the important technological, legal and political developments that have taken place in the past five years. The ambiguous role of ISPs enshrined in the E-Commerce Directive and the need for them to exercise greater responsibility and due diligence in the way they manage their networks and systems through a duty of care is also emphasised in the consultation document. More specifically, the Commission enquires about the need to update the current definitions and categories of services offered - conduit/ caching / hosting -, "having in mind the growing involvement in content distribution by some online intermediaries, e.g. video sharing website", with a view to have a more homogeneous interpretation across Europe.

As regards N&A procedures, the Commission consults stakeholders about the need to differentiate among categories of illegal content – e.g. illegal offers or promotion of goods or services, content facilitating phishing, pharming or hacking, infringement of IPRs, infringement of consumer protection rules and of safety and security requirements, racist and xenophobic,

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<sup>276</sup> For more details on the results of this consultation, see chapter 2 of this publication.

<sup>277</sup> Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions "A coherent framework for building trust in the Digital Single Market for e-commerce and online services, 11 January 2012, [http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC\\_1&format=PDF](http://eur-lex.europa.eu/resource.html?uri=cellar:87375c7c-1bd0-445d-b251-60599af8c73b.0009.03/DOC_1&format=PDF).

<sup>278</sup> For more details on the 2010 and 2012 consultations, see chapter 2 of this publication.

<sup>279</sup> Commission Staff Working Document, "E-commerce Action Plan 2012-2015, State of play 2013, SWD(2013) 153 final, 23 April 2013, [http://ec.europa.eu/internal\\_market/e-commerce/docs/communications/130423\\_report-ecommerce-action-plan\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/communications/130423_report-ecommerce-action-plan_en.pdf).

<sup>280</sup> See speech given on 28 May 2013 to the Conference, "the EU Digital Single Market: From rhetoric to reality", by Michel Barnier, the Commissioner for the Internal Market and Services, [http://europa.eu/rapid/press-release\\_SPEECH-13-476\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-13-476_en.htm?locale=en).

<sup>281</sup> EC consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 24 September 2015, <https://ec.europa.eu/eusurvey/runner/Platforms/>.



homophobic, hate speech, child abuse content, terrorism-related content, defamation, etc.. The possibility for content providers to be given the opportunity to give their views to the hosting service provider on the alleged illegality of the content is also being raised, as well as the need that actions taken by these services remain effective over time (“take down and stay down principle”).

The consultation ran until the end of December 2015. This is the first step in the Commission’s examination of the issues around platforms – although not in relation to N&A procedures. It is expected that the outcome of this consultation will feed into a comprehensive assessment on the role of platforms and intermediaries planned for the first part of 2016.

### 6.1.3. New EU strategy focused on the “follow the money” approach

As part of the global strategy of the European Commission towards the creation of a Single Market for intellectual property rights,<sup>282</sup> the Commission announced that it would explore to what extent the sale of counterfeit goods over the Internet can be reduced through voluntary measures involving the stakeholders most concerned by this phenomenon, i.e. rightsholders and Internet platforms. In line with this, the European Commission adopted in July 2014 a Communication,<sup>283</sup> setting down a ten-point action plan to be implemented by the Commission in partnership with the Office for Harmonization in the Internal Market (OHIM), which since June 2012<sup>284</sup> houses the European Observatory on Infringement of Intellectual Property Rights. The objective of the Commission is to reach a renewed consensus on how intellectual property rights are exercised, by involving all relevant stakeholders. The Communication builds upon the consensus that IP enforcement policy ought to be focused on the fight against commercial-scale IP infringing activity, which is considered as the most harmful by the Commission. It aims to propose new enforcement policy tools, such as so-called “follow the money” approach seeking to deprive commercial scale infringers of the revenue flows that draw them into such activities. To this end, the Commission relies on stakeholders’ dialogue towards agreements between rightsholders and the business partners that source, promote, distribute and sell their products to meet the dual goals of rapid detection and interruption of commercial scale IP-infringing activities in a preventive approach.<sup>285</sup>

The Commission has already been working towards this objective through the development of Memoranda of Understanding (MoU) that establish the principles that signatories can apply in bilateral contractual agreements. The first dialogue, on limiting the sale of counterfeit items via online platforms, resulted in a MoU in 2011.<sup>286</sup> An evaluation report in April 2013 concluded that it

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<sup>282</sup> See above-mentioned Communication, A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM(2011) 287 final, 24 May 2011.

<sup>283</sup> Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, “Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan”, 1 July 2014, COM(2014) 392 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0392>.

<sup>284</sup> Regulation (EU) No 386/2012 of 19 April 2012 entrusts OHIM with various tasks aimed at facilitating and supporting the activities of national authorities, the private sector and EU institutions in the fight against IPR infringements. These tasks do not extend to participation in individual operations or investigations carried out by national authorities, nor to matters related to criminal and police cooperation, [http://ec.europa.eu/internal\\_market/iprenforcement/docs/observatory/20120419-ohim-regulation\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/observatory/20120419-ohim-regulation_en.pdf)

<sup>285</sup> The 2014 Action Plan includes a number of other activities such as the protection and enforcement of IPR in third countries and the development of deeper cooperation between customs authorities in the EU and in third countries with respect to trade of IP infringing goods. These actions were foreseen together with the promotion of awareness-raising campaigns targeting consumers and producers on the wider consequences of IPR infringement.

<sup>286</sup> See paragraph 4.2 of this publication.



could be usefully extended to include new parties.<sup>287</sup> Based on this, the Commission established new Stakeholders Dialogues in 2014 and 2015, comprising advertising services providers, payment services and shippers, with the objective of achieving further Memoranda of Understanding to help keep IP-infringing products off the Internet. In parallel, the European Observatory on Infringement of Intellectual Property Rights carried out a comparative analysis on existing collaborative practices between rightsholders and business partners established in member states and third countries. To facilitate the development of further MoU to reduce the profits of commercial-scale IP infringements in the online environment forms part of the Action Plan of the European Commission, as set forth in the 2014 Communication.

In the wake of this Communication, the Commission set up, in September 2014, an Expert Group on the enforcement of intellectual property rights,<sup>288</sup> with the aim to strengthen cooperation between the Commission and the authorities in EU countries that are responsible for overseeing the IPR enforcement. The group's mandate is to provide the Commission with advice and expertise in relation to the preparation and implementation of policy initiatives, and to facilitate the exchange of regulatory experience and good practice between EU countries. Among other themes, the group provides a platform of exchange on best practices based on the "follow the money" approach across Europe. Furthermore, the European Parliament also supported, in a Resolution of 9 June 2015,<sup>289</sup> an approach based on due diligence involving all key actors and operators throughout the supply chain (rightsholders, producers, intermediaries, internet service providers, online sales platforms, end users and public authorities) in the fight against IPR infringement. The Parliament stressed the importance of sector-based agreements and good practice guides in this field. It called on operators in the industry to exchange information about platforms which provide access to infringing content, and to take coordinated and proportionate measures, such as notice and takedown, to reduce the income generated from such content and platforms. The Parliament recalled that such approaches must comply with the principles of the E-Commerce Directive and fundamental rights and that the non-judicial blocking of websites shall be excluded.

In practice though, many questions remain open as to the exact scope of the "follow the money" approach. Should the EU implement an expansion of the US model, where US companies like Visa, MasterCard, PayPal and Google would intervene to remove services from companies around the world that are accused of breaching copyright? Or should the EU prefer a rule-of-law based approach, whereby European courts could apply orders requiring payment or advertising services to withdraw payments on a case-by-case basis? Which approach would be more effective in an ever-changing digital environment?

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<sup>287</sup> Report from the Commission to the European Parliament and the Council of 18 April 2013 on the functioning of the Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0209&from=EN>.

<sup>288</sup> Commission Decision of 16 September 2014 on setting up a group of experts on the enforcement of intellectual property rights, COM(2014) 6449 final, [http://ec.europa.eu/internal\\_market/iprenforcement/docs/expert-group/setting-up-expert-group\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/expert-group/setting-up-expert-group_en.pdf).

<sup>289</sup> European Parliament resolution of 9 June 2015 on "Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan" (2014/2151), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0220&language=EN>; see also the Report of the Committee on Legal Affairs on "Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan", Rapporteur Pavel Svoboda, A8-0169/2015, 18 May 2015, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0169+0+DOC+PDF+V0//EN>.



On 9 December 2015, the European Commission has announced in its Communication “Towards a modern, more European copyright framework”<sup>290</sup> that it will “take immediate action to engage, with all parties concerned, in setting up and applying ‘follow-the-money’ mechanisms, based on a self-regulatory approach”. According to the Communication, the ‘follow-the-money’ approach seems to be a particularly promising method that can deprive those engaging in commercial infringements of the revenue streams emanating from their illegal activities, and therefore act as a deterrent. The Commission aims to reach an agreement by spring 2016 and states that codes of conduct at EU level could be supported by legislation in order to ensure their full effectiveness. The Commission has also announced that it will “will assess options and consider by autumn 2016 the need to amend the legal framework focussing on commercial-scale infringements, inter alia to clarify, as appropriate, the rules for identifying infringers, the application of provisional and precautionary measures and injunctions and their cross-border effect, the calculation and allocation of damages and legal costs”.

#### 6.1.4. Final remarks

At this time of a deep transitional phase for the EU audiovisual sector, characterised by the decline of old models, the rise of new online services, and of new competition patterns for traditional players, creative content remains more than ever at the heart of the digital market. Digital technologies and services increase the possibilities to disseminate creative content around the world. However, they have also increased the possibilities to copy and distribute copyright-protected works illegally.

There is a general consensus that authors and creators, who are at the heart of the creative process, should receive remuneration for their work. However, the enforcement of copyright online meets many practical obstacles and raises many concrete questions. Different approaches are being tested at international, European and national level: “Follow the money” approaches, “notice and action” procedures, or the improvement of civil enforcement procedures are only some of the directions that are being explored. National courts and the CJEU are also playing a pathfinder role in interpreting the laws in light of new technologies and services. These approaches are not self-executive though, and need to arise jointly with awareness-raising tools among the public. Of course, there will always be people that are aware but nevertheless do not care. However, a lot can be done to ensure that the majority opts for legal content.

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<sup>290</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Towards a modern, more European copyright framework”, 9 December 2015, COM(2015) 626 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A626%3AFIN>.



