



EUROPEAN COMMISSION
Directorate General Internal Market and Services
KNOWLEDGE-BASED ECONOMY
Enforcement of Intellectual Property Rights

Ares S: markt.d.3(2011)406175

Synthesis Report
on the Stakeholders' Dialogue on Illegal Up- and Downloading
2009 - 2010

March 2011

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1. INTRODUCTION

Over the last twelve months stakeholders, under the auspices of the Internal Market and Services DG, have jointly explored a series of topics related to the illegal up- and downloading of works protected by copyright.

Upon completion of this exploratory round, stakeholders agreed to consolidate the results of the Dialogue in a public synthesis report. This synthesis should draw upon the presentations and discussions during the meetings and the summary records prepared after each meeting. It should take stock of the work done over the last year, list the achievements and serve as a basis for possible further joint work to address copyright infringement online.

2. THE STAKEHOLDERS' DIALOGUE ON ILLEGAL UP- AND DOWNLOADING

2.1. Objective and scope

Stakeholders' Dialogues are a working method to bring together a representative group of stakeholders to discuss concrete problems in the field of IPR enforcement and explore possible ways of voluntary cooperation in compliance with the existing legal framework. Such Dialogues seek to improve the mutual understanding by participants of their respective positions, to identify areas of common interests and to promote collaborative approaches by developing possible joint, practical and workable solutions. The ultimate aim is to exchange information, benchmark and, if possible, reach collaborative voluntary agreements where appropriate that focus on concrete problems in a quickly evolving technological environment. The Internal Market and Services Directorate-General of the European Commission acts as a facilitator of these Dialogues by providing administrative and logistic support.

The Stakeholders' Dialogue on Illegal Up- and Downloading has focused on illegal file sharing. The phenomenon itself, its impact on both the creative and entertainment industries and the telecommunications industry (telco's and ISPs) and society as well as the possible remedies are all often rather controversial. This Stakeholders' Dialogues aimed to promote a high-standard IP culture, which is regarded as a vital cornerstone of the modern knowledge-based society, while striking a fair balance with other interests at stake, in particular those of Internet users. Therefore, this Dialogue has been of an exploratory nature. In first instance, it aimed to facilitate dialogue and foster mutual understanding between the different types of stakeholders involved. At this stage, it is not clear whether this can result in industry- and EU-wide voluntary cooperation in a limited number of areas.

2.2. Working Method

In the Summer of 2009, stakeholders agreed to meet and explore their willingness to engage in a Dialogue on illegal up- and downloading. Despite some scepticism concerning the need, scope and possible outcome of such a Dialogue, stakeholders showed a general readiness to participate.

Stakeholders agreed to successively tackle a range of issues over a period of one year. A number of plenary meetings were scheduled, each dedicated to a specific topic, at which

stakeholders would present their views on the basis of substantiated arguments and discuss them amongst each other with an open and constructive attitude.

The aim was to progressively build a climate of confidence, mutual respect and understanding which would serve as the cornerstone for further collaboration.

2.3. Topics covered

The following topics have been covered:

Educational measures and awareness raising	11 September 2009
Legal offers	9 October 2009
Information sharing	3 February 2010
Current legal framework	3 March 2010
Sanctions and other legal actions	14 April 2010
Technical measures	2 June 2010
Economic implications	1 July 2010

2.4. The participants

It was necessary to set-up a functional and manageable group of participants, covering the main interests affected by illegal up- and downloading. This was done by inviting a mix of pan-European representative associations complemented by a few individual companies. It has been the intention to work with a group of representative and highly experienced players. In view of the need to keep this group at a workable size, it was impossible to invite every individual company that wished to take part.

Rightholders were represented at sector level by IPFI (music), MPA (Film), ISFE and BSA (games and software), FEP and ENPA (books and newspapers), EBU and ACT (broadcasters) and SROC (sports). Authors and performing artists were represented by GESAC and AEPO-ARTIS.

The telecommunications sector was represented at sector level by ETNO, EuroISPA, ECTA and CableEurope. Individual telecom operators, like BT, Orange, Telefonica, Telecom Italia, Fastweb, Liberty Global and Virgin Media, participated as well.¹

The consumer association BEUC has been invited, but did not want to participate in the Dialogue in the proposed format. UNI-Europa represented trade union interests. Several other companies and organisations participated on an ad-hoc basis in some meetings.²

The Italian and UK National Regulatory Authorities AGCOM and OFCOM participated in some meetings as observer.

¹ It should be noted that several participating ISP's have interests in content as well.

² Calypso, Blue Rubicon, Libreka!, Deezer, Universal Music, Tele2, FindAnyFilm, PRS, Warner Music, Vivendi, SCPP, BPI, Promusicae, FIMI, Constantin Film and Vedecis.

3. RESULTS AND POSITIONS OF STAKEHOLDERS

3.1. Educational measures and awareness raising

All stakeholders consider awareness raising an essential element of a comprehensive strategy to increase the use of online legal content. Consequently, rightholders and telecom operators have in place different specific awareness campaigns which bring positive effects at Member State level, targeting parents and children, teachers and pupils, media and governments. Different strategies are used to convey messages concerning the implications of illegal up- and downloading. It is still very difficult to assess precisely the impact of such public awareness campaigns and to find out what works best in given circumstances.

ISPs consider that a prerequisite for successful campaigns is to define positive messages for the promotion of legal content. Sharing of experience and exchange of best practices would seem to be of interest. In their view, a balanced and proportionate approach to the allocation of costs should be taken, particularly with regard to stakeholders which are not liable for infringements carried out over their networks and do not benefit from them.

Whilst rightholders agree on the need to continue with awareness campaigns, and even to step up efforts, they consider that this is not in itself sufficient to change consumer behaviour significantly and that therefore deterrent measures (sanctions) are needed in addition for repeated acts of infringement when warnings have no effect. Rightholders consider that ISPs bear a specific responsibility to address infringement because they operate the networks used by the infringers.

3.2. Legal offers

Different categories of market players presented a wide variety of legal offers currently existing on the market and shared their experiences with consumers responses and obstacles to overcome in order for new services to be rolled out across the EU in a commercially viable way.

From the discussions, it appeared that in order to provide an alternative to piracy, it is crucial to propose to consumers the products where, when and how they want (demand driven). Beyond the sheer number of lawful services, issues determining success include the quality of the service in terms of variety and completeness, availability on multiple platforms, ease of use and supply model, including the price and the mode of payment. Rightholders consider that legal offers alone are not likely to reduce piracy. They regard piracy as one of the main disincentives to the further development and expansion of legal offers. However, it seemed that without improved availability and promotion of attractive legal offers the fight against online piracy will be much more difficult. Rightholders stressed the number and attractiveness of legal offers which are already available.

ISPs perceive the currently available legal offer as insufficient, particularly in terms of conditions and diversity. ISPs consider the wider availability of legal offer at fair conditions the main tool for substantially reducing piracy. ISPs indicated that they still experience substantial difficulties in rolling out new attractive services. They urged the different categories of rightholders involved to jointly move things forward, in particularly with regard to revenues along the value chain and rights clearance, particularly in cross-border situations.

3.3. Information sharing between rightholders and ISPs

Rightholders monitor the sharing of their protected works via the Internet. They collect IP addresses involved in the actual exchanges of files over the Internet and store them together with a date/time stamp. This information can then be linked to a specific ISP in a Member State and remitted to that ISP by the rightholder concerned. This provides a basis on which that ISP may take possible steps within the applicable legal framework, such as, for example, forwarding notices to the relevant subscribers. So far, such measures have only taken place during trials.

Rightholders stressed the important deterrent effect of notices, which, in addition to a warning about the alleged infringement, could also contain references to available legal offers and general information about the risks and detrimental effects of piracy. There was general agreement on the educational potential of notices.

However, ISPs explained that the sending of notices is not error free and requires human intervention to reliably complete the matching of subscriber identification data with an IP address. Consequently, there will be important financial implications, which cause concerns to ISP, particularly with regard to their allocation. ISPs strongly feel that they should not become involved in disputes between rightholders and alleged infringers. The protection of the fundamental right of privacy is also relevant. In particular, ISPs are also very concerned about the data protection aspects of the information sharing and the sending of notices. They seek further clarification in order to enhance legal security, particularly in view of differences between Member States. In most jurisdictions, disclosure of data on subscribers by an ISP to rightholders requires a court order.

3.4. Current legal framework

Stakeholders discussed in great detail the legal framework currently in force in Member States and shared experiences on legal parameters which need to be borne in mind if ISPs and rightholders wish to cooperate in the enforcement of IPR.

Rightholders highlighted the difference in provisions on the protection of personal data and privacy between the different Member States. They also referred to the difficulties to exercise the right of information in civil procedures due to national data protection rules. Rightholders further explained that their ability to take legal action against infringers is restricted by the limited capacity of the national court systems. Therefore, in their view, alternative ways to ensure compliance have to be put in place.

ISPs perceive the current legal framework as sufficient to protect the different rights and interests. They pointed out that the relevant national laws have only been recently changed in some Member States in order to comply with the IPR Enforcement Directive and that it takes time for national courts to apply these new rules in a consistent manner. ISPs stressed the importance of data protection and privacy laws and the fundamental rights of users.

On behalf of the Commission, Hunton and Williams studied online copyright enforcement and data protection in selected Member States (Austria, Belgium, France, Germany, The Netherlands, Poland, Spain, Sweden and the United Kingdom). The final reports reveal a divergent situation throughout the EU with regard to the relation between IPR enforcement and data protection and privacy laws. However, ISPs pointed out that one conclusion of the study is that ISPs could not store IP addresses (which are for the most part considered to be personal data) “for the specific purpose of online copyright

enforcement". The reports are available via the website of the Internal Market and Services DG.³

3.5. Sanctions and other legal actions

Rightholders reiterated the need for new ways to enforce IPR online in order to be able to counter massive infringement of rights. They are also very worried by the fact that, under the current legal regimes of certain Member States, it is often impossible for rightholders to obtain information concerning the identity of infringers for the purpose of civil proceedings, which forces them to rely on criminal instead of civil procedures. Such infringers are not always individual subscribers but often carry out commercial services.

Rightholders also highlighted the important and harmful role of web sites facilitating easy access to infringing material. In some Member States, courts have imposed filtering obligations on infringing sites and injunctions against ISPs. Indeed, injunctive relief sought via ISPs is becoming more prominent.

Rightholders feel that there is room for voluntary actions by ISPs in cases of continued repeat infringements. Some rightholders maintained that a system of warnings followed by a full set of deterrent measures should be applied throughout the EU.

ISPs stressed that sanctions should remain the prerogative of the courts. Only due legal process can ensure a proportionate legal response. Legal sanctions have to be distinguished from voluntary actions. ISPs favour constructive solutions based on a wider availability of legal offer at fair conditions rather than an increase in deterrent measures, which in their view increase overall costs and are likely to provoke resistance from users.

3.6. Technical measures

Stakeholders discussed what is technically and legally possible to identify and prevent illegal up- and downloading.

Rightholders emphasize that ISPs have the capability to exercise significant control over the traffic generated by their subscribers without endangering access to essential "core" services. In their view, tests under operational conditions clearly show that it is technically possible to identify, detect and block protected works illegally circulating over the Internet, even without any impact on privacy and data protection.

ISPs have not seen the same results, as it is in their view impossible to detect the legal status of a work shared among users. They do not favour technical measures and consider them contrary to principles laid down in the EU Acquis. Moreover, they think they could be ineffective and disproportionate, penalise the rollout of legal offers, able to cause "collateral damage" and are likely to hamper technological development and innovation on the Internet, which will be to the detriment of society as a whole. In consideration of the different network architectures adopted by ISPs, technical measures raise concerns about their standardization. ISPs are also very concerned about the direct impact of technical measures applied by an individual operator on competition between ISPs. The issue as to the cost of implementing measures, which may be substantial according to ISPs, was also left unresolved.

³ http://ec.europa.eu/internal_market/iprenforcement/documents_en.htm

3.7. Economic implications

An inventory of studies related to online enforcement has been compiled by the Internal Market and Services DG. It has proven to be difficult to make an overall assessment about the available data and economic analysis due to the different methodologies used and the resulting different and often conflicting figures and conclusions. The EU Observatory on Counterfeiting and Piracy, in close cooperation with interested stakeholders, will be entrusted to establish a reliable, recognized methodology and to collect and analyze data on a sound basis in the future.

Rightholders maintain that, despite the difference of opinion on the ultimate facts and figures, the studies seem to demonstrate that the overall impact of illegal up- and downloading on creative industries is negative and that a proportion of illegal uses ends up in lost sales for rightholders. Rightholders also point to the loss of tax revenues, the profits made by sites involved in illegal downloading with advertising and the lack of revenues re-invested in the value chain of the creative industries and grass-root sports.

ISPs stressed the need to align the economic and cultural incentives for all stakeholders in order to allow the development of a large market of entertainment and cultural products.

4. CONCLUSIONS AND FOLLOW-UP

Over the last twelve months, the Stakeholders' Dialogue on Illegal Up- and Downloading has developed into an interesting platform for consultation and exchange of information, between stakeholders concerned by online piracy and related issues. The current Dialogue has effectively facilitated the exchange of views between the different stakeholders, on the basis of substantiated arguments and extensive and detailed informal discussions.

All stakeholders have approached the Dialogue with a positive attitude and have dedicated a significant amount of effort to it. Consequently, this has resulted in a much better mutual understanding of each others' position and technical, legal and commercial constraints, as well as in enhanced trust and confidence amongst the participants. As such, this could be considered to be a substantial achievement.

A great deal of information and material has been collected which can provide a basis for further discussions.

Although stakeholders consider that the joint work on the topics identified at the beginning of the Dialogue has resulted in a better understanding of the issues at stake and the mutual concerns by each participant, they nevertheless realize that fundamental differences of opinion remain on most of the topics. Most participants would seem to be willing, within certain parameters, to continue to work together on a limited number of areas.