31 March 2011

Internal Market and Services DG
Unit D.3 - Enforcement of Intellectual Property Rights
European Commission
SPA2, B-1049 Brussels, Belgium

RE: EUROPEAN COMMISSION CONSULTATION ON THE COMMISSION REPORT ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

The Internet Society respectfully submits its comments for the European Commission *Consultation on the Commission Report on the enforcement of Intellectual Property Rights*[1].

Introduction and scope of comments

The Internet Society commends the Directorate General for the Internal Market and Services of the European Commission for inviting public comment regarding the Report from the Commission to the European Parliament, the Council, the European and Economic and Social Committee and the Committee of the Regions regarding 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*[2].

The Internet Society's mission is to promote the open development, evolution, and use of the Internet for the benefit of all people throughout the world. With respect to online Intellectual Property Rights ("IPR") issues, the Internet Society is involved in discussions on issues concerning enforcement and Internet intermediaries in various forums, including the World Intellectual Property Organization ("WIPO") and Organisation for Economic Co-operation and Development ("OECD").[3]

As our focus is the Internet, we have limited our comments to issues concerning enforcement of IPR on the Internet. We have further limited the scope of our

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[1] http://ec.europa.eu/internal_market/consultations/2011/intellectual_property_rights_en.htm
[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0779:EN:NOT
[3] See also http://www.isoc.org/internet/issues/property_rights.shtml

comments in this submission by excluding IPR issues associated with domain names and the sale of counterfeit goods.

Although the Report is principally reflective as it "… provides the first assessment of the implementation and impact of Directive 2004/48/EC …", our comments on the issues raised by the Report are intended to be forward-looking.

Further, in keeping with the tenor of the objective of the Report, we have generally limited our comments to matters of general principle. We would welcome the opportunity to provide more specific input as the European Commission's review of the Directive progresses.

A consistent legal framework

IPR protected content crosses borders, legally and illegally. Long-term effective enforcement will likely require a consistent or at least interoperable international framework. Accordingly, it is important that the European Commission's review also be outward looking.

Further, we encourage the European Commission to conduct the reviews of Directive 2004/48/EC and *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* together, mindful of the Commission's statement regarding the importance of the Open Internet:

> *The Commission attaches high importance to preserving the open and neutral character of the Internet, taking full account of the will of the co- legislators now to enshrine net neutrality as a policy objective and regulatory principle to be promoted by national regulatory authorities, alongside the strengthening of related transparency requirements and the creation of safeguard powers for national regulatory authorities to prevent the degradation of services and the hindering or slowing down of traffic over public networks…[4]*

IPR infringement outside the European Union

The Report states that the European Commission is addressing IPR infringement outside the European Union "… in different ways, for instance by including ambitious chapters on intellectual property rights in bilateral trade agreements and through participation in international initiatives, such as the ongoing negotiation of the ACTA agreement".

We take this opportunity to refer the European Commission to our statement dated 14 February 2011 regarding the Anti-Counterfeiting Trade Agreement ("ACTA") (www.isoc.org/internet/issues/docs/acta-statement_20110214.pdf).[5]   We   believe

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[4] http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/568
[5] The Internet Society statement on ACTA is also available in French and Spanish via http://www.isoc.org/internet/issues/acta.shtml.

that further and more inclusive discussions are needed before proceeding with binding international agreements on the enforcement of IPR. However, if ACTA should proceed, we urge the European Commission to adopt mechanisms for active, timely and direct multistakeholder participation in the local implementation of its terms. We also call upon the European Commission to advocate for meaningful all stakeholder participation in the administration and implementation of the agreement.

The Internet Society has considerable experience participating in, and facilitating, multistakeholder Internet policy dialogue in such forums as the UN Internet Governance Forum, OECD and the World Summit on Information Society follow-up process.[6] We would be pleased to assist the European Commission in this regard.

The scope of the Directive

We agree that it would be useful to clearly articulate the IPRs covered by the Directive to provide greater legal certainty within the European Union.

The concept of intermediaries and the workability of injunctions

We note that the Report proposes that the European Commission could explore how to involve intermediaries more closely in combating IPR infringement because current measures are not considered to be powerful enough for effective enforcement.

This issue should not be considered in isolation, especially with respect to Internet intermediaries. Initial questions to be examined include: the scope of IPR on the Internet; motives behind infringement; how IPR is infringed; objectives of enforcement; how the Internet functions and develops; how different enforcement policies might operate in practice, and the potential impact they may have; the individual and society costs and benefits of enforcement. As much as possible, this analysis should include the results of verified quantitative and qualitative research.

Also, the term "intermediary" is largely unconfined in the Directive. It would be useful at this point in the implementation of the Directive to closely examine the roles of intermediaries (offline and online) before attempting to ascribe any additional enforcement responsibility. Further, we encourage the European Commission to develop a working definition for Internet intermediaries that is consistent and interoperable with definitions being developed in other forums such as the OECD and WIPO. Consistent terminology would greatly facilitate the interoperability of legal frameworks.

In any case, we consider that the starting point must always be enforcement by appropriately qualified independent authorities – targeting the source and the infringers. Further, civil contraventions of the law should not be conflated with

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[6] For more information see - http://www.isoc.org/pubpolpillar/community

criminal contraventions. Injunctions against third parties, whether they be Internet intermediaries or others, should be a choice of last resort, only where the harm truly justifies such intervention. A distinction should also be drawn between intermediaries that are merely acting as a conduit for data without knowledge of its contents, and other types of intermediaries who may play an active role in disseminating illegal content.

Technical measures

We strongly urge against the use of technical measures as an enforcement tool, particularly at the network level, as such widespread use of such measures may threaten the stability, encumber development, and restrain access to the global Internet. In any event, the effectiveness of such measures against "hardcore" infringers is likely to be limited.

Guidelines

Noting that:

- online IPR infringement is considered to be: a significant issue in Europe; a source of direct and indirect economic loss in Europe; and detrimental to the development of European content such as film, television, music and eBooks:

- the Internet is one of the tools used to infringe IPR;

- the Internet has inspired and will continue to inspire new business models for content distribution.

Recognising the importance of developing a European legal framework that ensures an appropriate balance between the need to foster an innovative European Union digital market and the need to protect IPR online;

We offer the following suggested guiding principles:

⇒ Effective enforcement of IPR online requires a multi-pronged approach:

- o robust and holistic examination of the motives behind infringement and shortcomings in traditional means of enforcement;

    In this regard, the European Observatory on Combating Counterfeiting and Piracy should be encouraged to pursue the exploratory work it launched in 2010.

- o readily accessible and understandable information about what activity is legal and what is illegal (within and outside the European Union);

- o general and specific education;

- o viable legal alternatives that are well known and easily to use;

- o fair and proportionate enforcement measures; and

- o international consistency and cooperation.

  > In this regard, the European Observatory on Combating Counterfeiting and Piracy could facilitate a multi-stakeholder network of contact points of relevant actors, such as WIPO, the Internet technical community, etc. to facilitate exchange of best practices, etc.

⇒ Enforcement measures should target behaviour not technology: they should be technologically neutral.

⇒ Internet intermediaries should not become de facto law enforcement agents: they should not be required to determine when conduct is illegal and due process must be maintained.

⇒ Laws should not be used to freeze existing business models: they should nurture innovation and creativity.

⇒ Explore a stepped enforcement procedure with an educative element that ensures:

- o methods used for detection of infringement and identification of infringers are reliable, accurate and carried out in a privacy-respecting manner

- o stringent data protection rules and security

- o the procedure

  - is linguistically, socially, culturally and economically appropriate;
  - does not unreasonable interfere with the business or activities of third parties;
  - does not diminish innovation and development of the Internet, Internet technologies and the spread of Internet access;
  - is applied to proven, not suspected, infringement.

- o any sanctions are proportionate, fair, appropriate, and are applied with due process by an independent suitably qualified third party.

⇒ Before considering implementation of any enforcement procedure, closely examine:

- o the financial and other costs, including indirect costs, to Internet intermediaries and other parties;
- o the impact on the Internet and Internet technologies.

Going forward

We encourage the European Commission to continue its engagement with all relevant stakeholders throughout its review of *Directive 2004/48/EC*, particularly at the point where amendments are being considered. In this regard, the Internet Society, a member of the Internet technical community, offers to provide its expertise to this process.

We also encourage the European Commission to carefully consider the impact the revised Directive may have outside the European Union, and further, how interoperable it is internationally.

Additional information

The Internet Society recently produced a discussion document entitled *Perspectives on Policy Responses to Online Copyright Infringement – An Evolving Policy Landscape*. This document considers aspects of a number of emerging Internet-focused copyright enforcement measures – graduated response; traffic shaping; blocking; content identification and filtering; domain name system (DNS) manipulation. A copy of this document will be available in early April 2011 via http://isoc.org/wp/newsletter/?p=3530.

About the Internet Society

The Internet Society is an independent non-profit organisation, founded in 1992 to provide leadership in Internet related standards, education and policy. It is a principles-based organisation, dedicated to ensuring the open development, evolution and use of the Internet for the benefit of people throughout the world.

The Internet Society is the organisational home of the Internet Architecture Board ("IAB") and the Internet Engineering Task Force ("IETF") - an open consensus-based group responsible for defining Internet protocols and standards.

The Internet Society is accredited with Consultative Status with the United Nations Economic and Social Council and Observer Status with WIPO. It has formal and strong working relationships with other UN organisations such as UNESCO, UNECA and the ITU, as well as governmental and inter-governmental organisations, for example, the OECD, CITEL and APEC.

The Internet Society has more than 100 organisational members, more than 40,000 individual members and over 80 chapters around the world. To better serve the regional Internet community, the Internet Society has created regional bureaus in Africa, Latin America, Asia, North America and Europe. Further, the Internet Society

has established a Next Generation Leaders Programme to nurture future Internet leaders to address the critical technology, policy, business, and education challenges that lie ahead.

This global and diverse community continues to deploy efforts in a wide range of areas, working to enhance their contribution to the development of Internet-related public policy solutions around the world. Through its sponsored events, developing-country training workshops, tutorials, public policy, and regional and local chapters, the Internet Society serves the needs of the growing global Internet community.

For more information see www.InternetSociety.org