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Directorate General Internal Market and Services

INTELLECTUAL PROPERTY
Fight against counterfeiting and piracy

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REPORT ON COMMISSION/PRESIDENCY CONFERENCE OF 26 APRIL 2012 ON THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: THE REVIEW OF DIRECTIVE 2004/48/EC

This conference, organised in Brussels by the European Commission (DG Internal Market and Services) in association with the Danish EU Presidency, aimed to provide further stakeholder input on the review of Directive 2004/48/EC on the enforcement of intellectual property rights, thus following up on the Commission's Intellectual Property Rights (IPR) Strategy of May 2011 and a first public hearing of June 2011.

A webcast of the conference (in DE, EN, ES, FR, IT and NL) is available online at: http://ec.europa.eu/internal_market/iprenforcement/conferences_en.htm. A short video drawing out views of key participants is also on this site.

The programme of the conference and the list of attendees are at annex to the report.

(N.B. While every effort is made to be as accurate as possible with this summary report, it does not in any way replace the verbatim proceedings of the conference, which should thus be considered the only complete record of the event.)

OPENING SESSION

Pierre Delsaux (European Commission) opened the Conference on behalf of the Commission and the Danish EU Presidency. He recalled that the main reason for the event was to extend the public consultations on the possible revision of the 2004 directive, and he warmly encouraged involvement in the discussions both by participants present in the room and those following online. The scope of the debate was to discuss an existing directive on civil enforcement of IPR within the EU, and to explore whether it should be revised to support economic growth in Europe. Conversely, the scope was not to debate agreements on IPR enforcement at international level (e.g. ACTA). He thus urged participants not to mix debates.

Jesper Kongstad (Danish Presidency) likewise welcomed participants to the conference, and stressed the importance of IPR enforcement, and of this conference, to the Danish Presidency. He considered it of great importance, in a time of economic crisis, that the focus be brought to areas like IPR enforcement, so as to give businesses - and SMEs in particular - the best possible conditions for growth and creativity. From a Danish national perspective, he stressed that enforcement is the key to ensure an efficient IPR system.

Klaus-Heiner Lehne MEP, in his capacity as Chair of the Committee on Legal Affairs in the European Parliament, delivered the keynote opening speech to the conference. Mr Lehne's principal message to the conference was that rational discussion based on facts - rather than ideology - is what is needed above all when discussing IPR enforcement. Facts have to be conveyed to the public, he affirmed, so that misunderstandings and misinformation can be addressed. For that reason, he was convinced that this conference would provide facts and valuable insights as to how policy-makers could improve the EU's IPR system.

He argued that what is needed is an IPR-system which is fit to address the challenges posed by the internet, and which ensures a fair balance between the legitimate interests of all stakeholders, whether they be right holders and collecting societies on the one hand, or citizens, consumers and internet service providers on the other. This must take account of the reality that file-sharing of copyright-protected content is still very popular throughout the Union. In this context, citizens are concerned that stricter rules could be detrimental to fundamental rights such as freedom of speech. Notwithstanding this, the fact that operators of websites make profit on the backs of those who are creative - by soliciting copyright infringements by individuals - was not acceptable, according to Mr Lehne. One of the most difficult questions is therefore whether the current system is capable to deal with online copyright infringements. Any measures to enforce IP-rights should always be necessary and proportionate, he considered. "But one thing is clear: the internet should not be the 'Wild West'. There can be no real freedom without rules." In parallel with the enforcement challenge, he considered that easy access to a broad range of legal online content in all Member States was essential.

Mr Lehne also suggested that it would be important to improve intellectual property protection for SMEs trying to enforce their rights, and he looked forward to the outcome of the conference in this respect.

Mr Lehne believed that, overall, the Enforcement Directive had established a well-balanced IPR-system within the EU. He suggested that the current system was not obsolete in the face of developments in the online sector. Rather, where necessary, changes could be made. These should ensure a coherent approach to IP-protection in the EU with due regard being paid to the existing *acquis* and the digital environment while not forgetting the real world. He concluded by informing the conference that the revision of the directive would be looked at by his Committee in a holistic way along with other relevant Commission initiatives, notably the upcoming proposal on collective rights management.

WORKING SESSION 1: ENFORCEMENT CHALLENGES FACING SMES AND CREATORS

- Moderator: Professor Robin Jacob, University of London
- Jesper Kongstad, Director General of the Danish Patent and Trademark Office
- John Mitchell, Chair of the SME Innovation Alliance, UK
- Dominick Luquer, General Secretary of the International Federation of Actors
- Johannes Studinger, Head of UNI Global Union

Professor Jacob opened this working session by stating that, in his view, the 2004 directive had been one of the EU's most successful intellectual property directives. For example, the possibility to obtain court orders for evidence and rules concerning levels of

damages had previously been very fragmented indeed. That being said, the system of enforcement can still differ markedly from one Member State to another, and a certain number of refinements are possible. He noted that the issues to be considered are different for different IP rights. Trademarks, patents and copyrights are different in nature (with most public attention currently tending to be focused on copyright). One of the enforcement problems to be looked into (for copyright) is the question to know how far courts should go to grant injunctions. Another aspect that could be further harmonised is how to calculate a pecuniary remedy. In this respect, damage (e.g. lost profits) suffered by the IPR owner is not the same thing as the amount of money the infringer has made. The current directive rather muddles the two up. A further subject that could be envisaged is access to court, though it is not certain that this directive is the appropriate vehicle, since it would involve intruding deeply into national procedural rules. Another interesting question is how to apply enforcement measures when the right holder is a non-practicing entity (so-called 'patent troll'). In the US, following eBay, the courts can withhold an injunction where what the IPR owner really wants is just money rather than to protect his business. Overall, in Professor Jacob's view, the debate should ideally take place with real options on the table for discussion (i.e. drafts for textual improvements to the directive).

John Mitchell (SME Innovation Alliance) welcomed anything that would improve IPR enforcement for SMEs. The enforcement measures in the directive are by and large sufficient, however if SMEs cannot get to court to make use of these measures, they remain a dead letter. Better access to courts is thus a fundamental need for SMEs. Focusing his remarks principally on patents, he considered that enforcement systems are currently failing SMEs, for example as regards issues related to the financing of litigation. Likewise, SMEs take on unacceptable litigation risk due to the "loser pays" principle. Meanwhile, the proposed unitary patent, while being a tremendous benefit for big firms (notably pharmaceutical and chemical companies), would not necessarily benefit SMEs. They want direct protection of their innovation; but without reward for their innovations, there will be no economic recovery.

Professor Jacob commented that a lot of these problems were not caused or could be cured by the directive. Nevertheless, the financing of litigation is indeed a difficult area, including for example the question of whether lawyers can have a direct interest in the outcome of the litigation (contingency fee systems), an issue that is considered very differently by Member States. Some say it is contrary to professional ethics for a lawyer to work on any sort of contingency basis.

Dominick Luquer (FIA) stated that the directive was a step in the right direction, and has sent a strong signal that enforcement is important. If it is reopened, it could however be further improved and clarified in various respects. By contrast with 2004, online piracy has become ubiquitous, and is increasingly decentralised outside the Union. As a result of piracy, the various income sources of audio visual performers like actors have been significantly reduced. Clarification is needed as to the role of entities such as search engines, and their inclusion in the notion of intermediaries. Clarification is also needed as to what activities may disqualify these services providers from benefiting from the liability exemptions under the eCommerce directive. Adjustments could also be introduced in respect of provisional measures the cost of which might be enormous, of injunctions against intermediaries, rules for lodging of securities in different Member States, data protection issues in the context of the right of information for evidence

gathering (under judicial oversight), and setting appropriate levels of damages against infringers. A provision on awareness-raising should also be added to the directive.

Professor Jacob added that indeed, if the infringer cannot be caught, measures addressed to intermediaries whose services the infringer uses should be available even though they are not themselves infringers.

Jesper Kongstad (Danish Patent and Trademark Office) outlined the experience within Denmark of combatting counterfeiting. Denmark has for example established a network of Enforcement Agencies. He shared the view that the directive has been very successful across the EU. He wondered whether it was necessary to revise the directive, but showed openness to listening to the views of stakeholders in this respect. If the directive is to be amended, the areas Denmark would like to be reviewed are the calculation of damages (to make sure that unjust enrichment of the infringer should be taken into account) and the publication of court decisions. As regards the broader intellectual property context, he saw the unitary patent as essential because it will provide for one jurisdiction, and saw this as an important benefit for SMEs.

Johannes Studinger (UNI-MEI Global Union) stressed that, for trade unions and guilds, the directive can be equated to a sort of "labour inspection directive" for creators. He would welcome a reopening of the directive, if it had the objective of strengthening the level of intellectual property protection. In this respect, he endorsed all of FIA's specific comments on possible changes. While the internet has often been seen as a threat, it is in fact a tremendous opportunity to reach ever larger audiences, and also an opportunity for citizens to access content. Like SMEs, creators take great risks to bring their ideas to screen. Thus, enforcement of the rights of creators is essential. Like SMEs, most producers are small. When works get pirated, there is no return on investment, and thus no incentive for further investment. "Passive enrichment" should also be taken into account: thus intermediaries such as credit cards companies should be considered relevant actors in the context of this directive. Intermediaries should be partners in the enforcement challenge, and not be forced into a position of having to "police" the internet. Finally, the speed of procedures leading to interlocutory injunctions should be addressed.

General Discussion

Professor Jacob thanked the panellists for their important contributions and opened the discussion in which a wide range of issues was raised. They are summarised as follows:

Abuse

Online question from a **citizen**: "The directive allows defendants to claim compensation for harm suffered due to unfounded claims. If abuse is proved, should the consequence for that go beyond this possibility? Would that mean 'punitive damage', something which otherwise is ruled out? What should be the consequence of abuse?" The moderator commented that this issue could be considered by the Commission, i.e. whether a specific provision on abuse is needed, or whether it should be left to national courts.

EuroISPA argued that the directive should provide stronger mechanisms to address and dissuade abuse. There is currently an enormous volume of (typically machine-generated) unfounded complaints against ISPs, which judges would throw out if ever they ever got to court. Moreover, ISPs do not necessarily have the technical/legal competence to check

the legitimacy of complaints. The problem of unfounded complaints arises both for copyright and trade marks, and basically leads to significant and wholly unnecessary costs for ISPs.

SACG considered it important to clarify that abuse by right holders is not rampant, and recalled that mechanisms against such abuse exist under the directive. The reason that right holders take actions against distributors or intermediaries (notably in the trade mark and design fields) is because of the limited scope of the right of information provisions in Article 8 of the directive, and the way these provisions are being interpreted.

Damages

Online question from a **citizen**: "should the directive include a method for calculating the appropriate level of damages to be awarded?" Noting that most IPR cases seek injunctions to stop the infringement, and not damages (because of the modest scale of awards), Professor Jacob considered that the directive could be improved in this respect of damages, to spell out in a harmonised manner how damages to the right holder should be calculated on the one hand, and how profits by the infringer should be calculated on the other. He thus undertook to draft some ideas on this issue for the Commission, and invited contributions to be sent to him by interested parties on the issue [rjacob@ucl.ac.uk]. **SACG** agreed that damages often do not compensate litigation costs of the successful plaintiff (especially as it is extremely difficult to show loss of sales), but cautioned against too much detail or prescription in the text. **SME Innovation Alliance** considered that maximum damages, as applied in the UK, are a barrier to innovation.

BEUC argued that if punitive damages were ever to be allowed (and the US does not create a happy precedent in this regard), then they should also be provided for in the EU's consumer protection legislation. Returning to the issue of damages in the afternoon, **BEUC** did not see a role for the Union in this directive in setting levels of damages in the Member States. **CI** considered that, for a range of reasons linked to the wider IPR enforcement debate, now was not the right time to reopen this directive. The unintended consequences of increasing damages must be considered before any decisions are taken, as this could chill innovation. A complex and holistic study on the economic impact of counterfeiting would be a first pre-requisite for any review.

Legal offer of licensed content on the internet

CI called for more extensive and competitive legal offers (notably through appropriate collective licencing schemes), and generally warned against a "more sticks and fewer carrots" scenario for IPR enforcement. **ETNO** stated that many of its members have recently launched e-books services, and agreed that efforts should be focused more on expanding legal offer rather than on strengthening enforcement rules. **GESAC** reported that more than 300 legal services are now offering music in Europe; notwithstanding this, users are often not prepared to pay the price of these services. Expanding legal offer should not however be an alternative to a more efficient and reliable enforcement system (a point echoed by **FIA**).

Other comments

BEUC considered that funding of litigation (picking up on the issue raised by Mr Mitchell) is also a relevant matter for consumers, and not just right holders, and saw no reason for which “no win, no fee” arrangements (i.e. contingency fees) should be allowed for right holders when it is always refused for consumers. On data protection rules (in particular as regards internet IP addresses), there is already a delicate balance in EU law, and this should not be modified through a revision of this directive.

EuroISPA, which is currently neutral as regards whether the directive should be reopened at this time, argued that it is important to avoid imposing costs on Internet Service Providers (ISPs) when creating enforcement measures. A good model to follow is the UK Norwich Pharmacal Order, in which a court order to an ISP to identify a customer to a right holder plaintiff includes an order to the right holder to pay the ISP's costs in so doing.

EDRi suggested that enforcing a legal framework that is not considered credible would be "like teaching a pig to dance: it annoys the pig, and it's a waste of time". This is because EU IPR legislation (in respect of the exceptions and limitations regime, cross border licensing, and collective rights management) is not considered legitimate in the eyes of many citizens. Above all, the internet should stay an open space. For intermediaries, the question is whose law will apply, and who guards the guards? If intermediaries (mostly US) have to police the internet, the US Digital Millennium Copyright Act law (DMCA) will be applied in Europe, giving rise to anti-competitive concerns. **MPA** did not share this concern, suggesting that since copyright is territorial, the law applicable is the one of the jurisdiction where protection is sought.

ETNO noted with satisfaction that the Commission retains an open mind as regards a revision of the directive; ETNO considered that a revision is unnecessary, and also premature, given the lack of precise data. As regards the cost of litigation, and any possible deletion of the commercial scale notion, ETNO sees the commercial scale clause as a very useful way of limiting the proliferation of litigation.

MPA stated that it does not take action against individual consumers, but rather against websites that make money out of piracy. MPA expressed support for a review of the Directive, clarifying that while it wants help from intermediaries, it does not want them to be forced to become net policemen. In any event, further clarity could potentially be brought to the directive on these issues. There is a need to address inconsistencies across Member States, as protection is often sought in favourable jurisdictions or (in the plaintiff's interest) according to a Member State's domestic implementation arrangements.

IFPI noted that piracy is moving to outside Europe. New measures against new forms of piracy are thus needed (e.g. regarding cyber loggers, streaming, peer to peer, cloud services and mobile services) and regardless of where the infringements actually take place. Differences and inconsistencies across Member States should be addressed in a revision of the directive: notably as regards the speed of acquisition of an injunction; the lack of mutual recognition of judicial decisions; fragmentation as regards judicial application of the directive's remedies from one Member State to another; differing cost structures for equivalent cases depending on the Member State; the need to lodge a prohibitive bank guarantee when an interlocutory injunction is requested; differing levels of evidence requirements (catalogue wide injunctions versus an injunction for each title);

and finally differing levels of damages (which are sometimes so negligible that they are not typically requested). **MPA** voiced a similar view on this final point.

FEP endorsed the positions expressed by other right holder stakeholders, and stated that book publishers increasingly face piracy. Publishers have made efforts to make books available online at an early stage, and apply pan-European licencing. However, by contrast with other sectors, the directive does not confer on publishers the presumption of ownership rights (Article 5), and this leads to significant problems in most Member States regarding the right of action on the part of book publishers.

An online question, from Andrej Savin of the **Copenhagen Business School**, addressed interlocutory injunctions in Art. 9 (2) and (7) (bank freezing orders and search orders), and asked whether these provisions not be put in line with what is more common in civil law states. The moderator stressed that both provisions are extremely powerful weapons in the fight against counterfeiting, and have worked well in the UK, not least because of the speed with which infringing activities can be stopped by a judge (e.g. within hours). **CNAC** agreed with the moderator, noting that they were very good tools in Italy also, even if they are very sparingly granted by judges.

DPDHL drew attention to the big variety of customs systems, and the challenge of how to reduce the amount of IPR infringing goods entering the EU. Customs solutions need to be improved and modernised. Data sharing is necessary, but the right of customer privacy takes primacy as regards the opening of parcels.

CNAC considered that the directive should be revised and improved as regards deterrents (notably on evidence gathering and a reduction of the costs incurred by the winning party) and predictability. In this latter respect, there is a need for training for specialised judges and prosecutors for IPR enforcement. Use should be made of alternative measures, as provided for in Article 12 of the directive.

APM would support the inclusion in the directive of the possibility of repertoire action (i.e. non-title specific). The directive should also include, to the extent possible, a provision for fast-track small claims by SMEs. This call was strongly supported by the SME Innovation Alliance.

EGMA suggested that the directive should be revised, notably because of remaining disparities across the EU regarding IPR enforcement measures.

In response to a question from the moderator, **BEUC** (supported by **EuroISPA**, **ETNO**, **FIA** and **IFPI**) would not support a compulsory levy/tax on consumers' ISP accounts as an alternative to the standard route of right holders seeking redress through IPR enforcement remedies.

Alongside closing remarks by the panellists, who each reiterated the points of key relevance to them or their specific constituency, Professor Jacob closed the first working session, asking for a show of hands amongst the participants as to whether a revision of the directive should be proposed by the Commission. Of those stakeholders who raised their hands, he concluded that a slim majority supported such a revision.

WORKING SESSION 2: CHALLENGES POSED IN THE ONLINE ENVIRONMENT

- Moderator: Benoît Tabaka, Secretary General, Conseil National du Numérique
- Simon Darlow, Deputy Chairman, Performing Rights Society for Music
- Philippe Lacoste, Vice President, UNIFAB
- Carsten Hess, Head of Corporate Representation, Deutsche Post DHL
- Kostas Rossoglou, Senior Legal Officer, BEUC

Benoît Tabaka opened the 2nd working session by noting how important he considered this multi stakeholder dialogue to be. The information society, and the digital economy, has heralded a revolution for the economy and for citizens and consumers over the past ten years. Just one example of these new business models is the development of digital music, the first form of content to become the subject of widespread availability on the internet. This has now moved to other forms of cultural content, most recently digital books. Infringements over the internet, which have of course also developed, have the capacity to damage all actors in the net economy, right holders, ISPs and consumers. The challenge is to fight this phenomenon, while at the same time respecting both internal market rules and fundamental rights. Regarding intermediaries, there is an important debate underway. What role, if any, is there for non-infringing online intermediaries like ISPs, search engines and hosting services, but also what role for offline non-infringing intermediaries, such as payment services, advertisement brokers and postal operators? Is there a risk of over-focusing on intermediaries, to the exclusion of the real infringers? Is there a risk of over-focusing on online piracy, to the exclusion of other forms of online IPR infringements? Is there a role for multi-stakeholder agreements rather than just hard law? How to avoid legal uncertainty, but also not hinder innovation? Since the internet is watching, both in a literal and metaphorical sense, Mr Tabaka strongly invited virtual inputs to this working session, in addition to inputs from within the room.

Simon Darlow (PRS for Music) shared his personal experience over many years as a music composer, and as a beneficiary of musical royalties, which have allowed him to make a living from this career. Internet technology, which has heralded the need for the music industry both to evolve and to seek out new markets, has also allowed the development of illegal business models which live off the various and diverse forms of proceeds stemming from their infringing activities. Enforcement laws must therefore remain up to date with the digital age. PRS for Music is developing a red/green "traffic light" system, which highlights the status of a particular site in a search engine (i.e. whether it is licit or unlicensed). Such a system would allow consumers, a majority of whom prefer to buy legal, to know what type of site they are engaging with. Above all, consumer awareness-raising is the key challenge that should be prioritised.

Philippe Lacoste (UNIFAB) firmly believed that the internet is a tool that has brought huge added value to companies, consumers and society generally. Notwithstanding these benefits, IPR infringements are a challenge that companies struggle to address, because of the frequently extra-territorial nature of these infringements. One way to do so is via the various categories of intermediaries of illicit transactions. Even if these intermediaries are by and large unwitting facilitators of these IPR infringements, they do sometimes nonetheless benefit from commissions (e.g. payment facilitators), and so cannot consider themselves as completely innocent bystanders. Therefore, some form of "obligation to help in a proactive manner" could usefully be put on intermediaries, but not going so far as imposing a results-based obligation (via a transfer of liability). That

being said, we should not rush to one-size-fits-all solutions to address all the complex challenges posed in the online environment. In this respect, right holders must also play their part. Thus, they must also be proactive on the internet (e.g. by providing services), as "nature does not like a void". Finally, companies must do more to communicate with consumers on IPR and the positive role it plays in the economy.

Carsten Hess (DPDHL) welcomed the revolution that e-Commerce has brought to his industry, but argued against a policy approach that would involve "shooting the postman", by transferring liability to logistics companies. Considering that all actors in the supply chain are sitting in the same boat, he insisted that his company does not want to increase revenue on the back of IPR infringements. By way of illustration, DPDHL will only work with reliable shippers, and uses sophisticated track and trace technologies for its customers. Where there is a doubt about the authenticity of a package to be transported, customs authorities are consulted. However, ever better and, above all, real time collaboration with right holders is essential, since in addition to not having the right to open parcels without the appropriate authorisations, logistics companies do not in any event have the technical expertise to identify all infringements. Another challenge, rooted in Asia, concerns lax controls by the customs authorities of the exporting state, who leave the responsibility for detection to transporters. Mr Hess called for an integrated EU policy approach, also involving better customs enforcement tools.

Kostas Rossoglou (BEUC) did not support any early reopening of the directive. The lesson from IPR debates at international level over the past year is that there is a lack of public support for strengthening substantive law in general and enforcement in particular. To do so would only risk further eroding overall support for intellectual property. Furthermore, more independent figures, more experience on the ground with the directive, and a solid reasoned justification (in line with Article 18) would be necessary before the directive could be credibly revised. In addition, regarding fundamental rights, the current delicate balance on data protection in the *acquis* should not be touched in this instrument, above all as regards the role of judicial authorities vis-à-vis the release of such data. Meanwhile, Mr Rossoglou wondered, in the context of this being a directive on civil procedural law, whether there would really be much appetite on the part of Member States to see EU rules set on litigation funding, how to calculate damages. More generally, substantive law on copyright (2001/29/EC) should first be reviewed and modernised before enforcement rules are discussed. Mr Rossoglou noted that consumers can either be victims of IPR infringements, or the accused party. In this context, he deplored the lack of redress for consumers who are supplied with (often high-priced) counterfeit goods online. BEUC refused to sign the EU level "Memorandum of Understanding on the sale of counterfeit goods over the internet" in 2011 because its provisions on certain issues, notably redress, were unacceptably weak. Online piracy should not be treated the same as counterfeit medicines, as downloading a song for private use is not dangerous to health and safety. Furthermore, regarding online piracy, individual consumers and criminal entities acting for commercial profit should not be treated by the same instrument, but unfortunately this is the approach followed by the directive. Meanwhile, tackling unfair contract terms - whether those imposed on consumers or creators - should be prioritised. Rather than pushing for voluntary agreements on IPR enforcement on the internet, efforts should rather be devoted to accelerating the digital single market (notably as regards high quality legal offer), where a €63 billion consumer dividend is waiting to be reaped. Finally, it is misguided to think that enforcement alone can address all issues; substantive IPR law itself also needs to be adapted.

General Discussion

Mr Tabaka then opened the floor, and in a wide ranging discussion, the following issues were raised:

AIM stressed that, regarding the identification of possible trade mark counterfeits while goods are being transported, it was a little bit irritating that right holders are singled out for strengthened engagement, given that they have nothing whatsoever to do with the infringements in question. **DPDHL** called for a collaborative approach between all relevant actors, identifying risk analysis, as the optimal approach, rather than attempting to shift liability specifically to transporters.

AIM considered that illegal downloading, while not harmful to health and safety, is not appropriate behaviour, regardless of the age of the downloader.

ETNO saw the directive a useful tool for IPR enforcement, in particular the role it ascribes to judicial authorities, whose role must remain a *sine qua non* for any action by an ISP to block a user's access to the internet.

LQDN stated that most critics of today's copyright regime do not want abolition of copyright, but to reform it (including the over-broad definition of "commercial scale" in recital 14). This is the only provision of the directive that should be reviewed. **LQDN** is opposed catalogue-wide injunctions, as in their opinion they are not possible without introducing general monitoring of the website's content, and recalled that the most frequent purchasers of legal offer are also often involved in file-sharing. Intermediaries should not be further drawn into enforcement activities. Outdated business models must evolve, and rather than shutting down innovative services like cyber logger, they should instead be monetised.

BOF, supporting **LQDN**, noted that the Commission's "Roadmap" on the directive made no mention of fundamental rights. **BOF** asserted that anonymity on the internet is a fundamental right, and should not be seen as just an obstacle in the path to identifying IPR infringements. This view was contested by the **EPC**. Meanwhile, **LQDN** took the view that the right to anonymity to be partly covered by Article 10 of the European Convention of Human Rights.

AK saw an important role for consumer organisations (like **AK**) in raising awareness on intellectual property, since consumers often do not understand that content that is accessible on a site can also be illicit. It also considered that data privacy issues should not be put into the background. To deal with commercial scale criminal actions, it called for credit cards companies to be mobilised. It should be forbidden to criminalise the behaviour of households.

From the online contributors, **ICMP** (International Confederation of Music Publishers) asked whether the Commission intended to focus the review on provisions that were badly implemented by Member States, and whether it intended to launch infringement proceedings in cases of incorrect application. Responding for the **Commission**, Jean Bergevin clarified that the review would look at transposition and best practice in implementation, but would also be taking on board issues such as those being discussed at this conference.

Also from the internet, a **citizen** asked how the Commission intended to apply the proportionality principle in practice and strike a fair balance between the various rights involved. Responding, the **Commission** considered these questions amongst issues that are relevant to judges interpreting the directive. **MPA** remarked that the two recent ECJ cases (Scarlet and Netlog) gave detailed guidance in both respects. **EuroISPA** commented in detail on the two ECJ cases, and considered that as regards filtering there should be a careful balance between the legitimate economic interests of rights holders and the legitimate economic interest of third party intermediaries to conduct a business (and who are being served with injunctions grounded on Article 11 of the directive).

From the internet, a **citizen** asked whether Article 8 relates to the collecting of evidence of an alleged IPR infringement or only to the collecting of materials after the infringement has been established by a court. In response, the **Commission** considered that this was an area that might need to be clarified, due to the general nature of the current text "in the context of proceedings concerning an infringement".

An online contribution, from **EGDF** (European Games Developer Federation) suggested that business models such as in "free to play" games, developed by the games industry to tackle piracy, should not be hindered by telecoms operators abandoning network neutrality and starting to monitor internet traffic. In response, the **Commission** clarified that it had not given any such signal in this regard.

Senator de Vita (Italy) considered that, in the lifecycle of the internet, parts of the directive were outdated. He called for a new generation of regulation on copyright.

ENPA noted the value of the directive for the newspaper publishing sector.

MPA wondered whether some stakeholders who would countenance a review of the directive do so with the aim of weakening it. Legal alternatives to illegality online should be the answer that is privileged rather than enforcement actions.

INTA set out the wider context of the damage caused by massive online trade in trade mark counterfeiting, in which business and consumers are duped. It saw this directive as an important tool to tackle the phenomenon.

Regarding consumer awareness-raising and its proposed green/red traffic light system, **PRS** reported that a Harris consumer research poll found that 91% of consumers said it would be helpful, and 75% indicated they would change behaviour on the basis of this sort of information. **EDRI** considered this proposal interesting, but would need to be developed very carefully, so as to avoid prejudicing the presumption of innocence.

AEPO-ARTIS supported proportional protection of IPR and stressed the importance of ensuring fair remuneration for performers.

SACG reported on the findings of the Observatory legal subgroup¹, where no major problem with the directive was identified, even if more harmonised application of rules on injunctions could be applied by the Member States, and rules covering intermediaries could be clarified.

¹ See http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm.

VPRT did not understand why infringing commercial operators, who do not invest or take any financial risks, should be protected.

APRIL called for a thorough impact assessment before any decision to review the directive is taken.

BREIN considered that a limited number of sites that are either infringing or facilitating infringements should be the main focus of enforcement actions, and this should ideally happen in the jurisdiction of the illegal activities, wherever that jurisdiction might be. BREIN stressed that piracy is mostly about illegal distribution, where websites are operated anonymously. It called for suspension websites facilitating infringement until the operator identifies himself/herself and considered website blocking only as a very last resort.

IFPI recalled that the directive is only about civil measures, and considered that a digital single market for content will also assist with the protection and enforcement of rights.

FIMI reported on the challenges faced by young musical entrepreneurs in Italy, and the necessity to help young European inventors to deliver services providing legal offer.

Following closing remarks by the panellists, **Mr Tabaka** wrapped up the discussion by concluding that there was consensus within the panel that awareness-raising of consumers (and not criminalising them) will be the key success factor to addressing the challenges posed in the online environment. With or without a formal reopening of the directive, this will be achieved above all by the various actors, notably companies and consumers/consumer organisations, working together in real dialogue and partnership both now and into the future.

ROLE OF THE OBSERVATORY

António Campinos (OHIM) spoke about the future role of the European Observatory on Infringements of Intellectual Property Rights. Eagerly looking forward to imminent entry into force of the EU Regulation entrusting the Office with the Observatory and with tasks related to the enforcement of IPR, President Campinos outlined his vision for the initial steps OHIM will undertake. The Observatory will continue to work on the projects launched during the Commission's period of stewardship while also drawing on its own experience in IPR enforcement areas (e.g. in the field of training, notably as regards judges). In parallel, the Office will carry out a consultation exercise with all interested stakeholders on what activities should be undertaken (in the context of the powers entrusted by the Regulation). It will then prepare a work programme for 2013, with the assistance of an advisory board of experts to the President. The draft work programme will be presented to a first Plenary of the public and private stakeholders of the Observatory in Alicante in September. Drawing on feedback from that meeting, the work programme will then be presented for information to the OHIM Administrative Board and Budget Committee in November, and thereafter formally adopted in December 2012. Working groups will then be set up to follow the projects included in the 2013 work programme. Here, the model of the Cooperation Fund will be followed, i.e. public and private stakeholders will be asked to put forward candidates to form part of the 10-person working groups for the projects they are interested in. These projects will kick off in March 2013. Mr Campinos concluded by giving one example of a future Observatory activity: in the field of intellectual property data, he pointed to the recent US study on the

influence and economic value of intellectual property on the US economy ("Intellectual Property and the U.S. Economy: Industries in Focus", USPTO, March 2012) as an example of an exercise that the Observatory should emulate, so as to calculate the value of intellectual property to the EU economy.

During the course of the conference, various speakers – Presidency, Commission, and stakeholders INTA, MPA, FIA, ETNO, DPDHL - voiced their support for the formal establishment of the Observatory, and looked forward to its future contributions, either as regards data collection or raising public awareness.

CLOSING REMARKS

Jean Bergevin (European Commission) considered that a very valuable debate had taken place over the course of the day, and on behalf of the Commission and the Presidency, thanked all participants – above all the moderators and panelists - for their involvement. He undertook to summarize the comments made during the conference in a report to be published shortly on the DG MARKT website. All comments made or sent in will be taken into account by his unit. The full web stream video of the conference, for which there were a few technical difficulties during the morning session, will remain accessible on the website.

Regarding the next stages in this review process, complementing and building on the conference, he stated that the Commission will *inter alia* issue a targeted questionnaire to which all interested stakeholders are warmly invited to respond. This questionnaire will contain ideas on key themes that have arisen at the conference, and will ask for specific views on options that could be taken. In this way, the exercise will also allow ideas on the scope of the review to be transparently consulted and tested as widely as possible. In addition, data gathered from the questionnaire, and from the Observatory, will be of significant value for ongoing work on the impact assessment for the review. Bearing in mind the objectives of the directive, as set out in both Article 3(1) and 3(2), the impact assessment will assess the extent to which the directive has been fit for purpose. On this basis, a decision can then be taken on whether to undertake, or not, a formal revision of the directive.

Mr Bergevin noted that some 10-11 issues had been raised during the day. These included accessibility to civil redress for SMEs, damages, injunctive relief, the role of non-IP infringing intermediaries, due diligence for all commercial players in the chain (including right holders) and, last but by no means least, judicial review. Given the Union's objective to deliver instruments that promote economic growth and sustainable job creation, the Commission, in the context of this review, would wish to see both the further development of competitive and attractive services in Europe, and more generally to see intellectual property regain the noble ground, so that it comes to be generally seen as an engine of economic growth. By way of illustration, taking measures to tackle Europe's enormous "informal economy" problem – a certain percentage of which is related to IPR infringements - would counter a situation which is currently lose-lose for everyone.

ANNEX

I. CONFERENCE PROGRAMME

09:30 – 10:15

Welcome remarks

Pierre Delsaux, Deputy Director General, DG Internal Market and Services, European Commission

Jesper Kongstad, Director General of the Danish Patent and Trademark Office

Keynote speech

Klaus-Heiner Lehne MEP, Chairman of the Committee on Legal Affairs, European Parliament

10:15 – 12.30

Working Session 1: Enforcement challenges facing SMEs and creators

Moderator: *Professor Robin Jacob*, University of London

Panel:

John Mitchell, Chairman of the SME Innovation Alliance, UK

Dominick Luquer, General Secretary of FIA (International Federation of Actors)

Jesper Kongstad, Director General of the Danish Patent and Trademark Office

Johannes Studinger, Head of UNI Global Union

Open discussion (11.15 – 12.30)

14:00 - 16:15

Working Session 2: Challenges posed in the online environment

Moderator: *Benoît Tabaka*, Secretary General, Conseil National du Numérique, France

Panel:

Kostas Rossoglou, Senior Legal Officer, BEUC

Philippe Lacoste, Vice President, UNIFAB, France

Simon Darlow, Deputy Chairman, Performing Rights Society for Music, UK

Carsten Hess, Vice President, Head of Corporate Representation, Deutsche Post DHL

Open discussion (15.00 – 16.15)

16:20 – 16.40

The role of the European Observatory on Infringements of Intellectual Property Rights

António Campinos, President of the Office for Harmonisation in the Internal Market

16:40 – 17:00

Closing remarks

Jean Bergevin, Head of Unit, Intellectual Property - Fight against Counterfeiting and Piracy, DG Internal Market and Services

2. ATTENDANCE LIST

Conference speakers are in grey.

Organisation	Organisation	Representative
Access	Access Global Movement for Digital Freedom	Raegan MacDonald
AEPO-ARTIS	Association of European Performers' Organisations	Nicole Schulze
AFII	Italian Association of Phonographic Producers	Monica Speranza
AIIP	Italian Association of Internet Providers	Innocenzo Genna
AIM	European Brands Association	Marie Pattullo
AK	Austrian Chamber of Labour	Daniela Zimmer
APM	Arbeitskreis Produkt- und Markenpiraterie	Jan Bernd Nordemann
APRAM	Association des Practiciens du Droit des Marques et des Modèles	Emmanuel de Marcellus
April	Free software advocacy association	Jeanne Tadeusz
BDZV	Federation of German Newspaper Publishers	Carolin Wehrhahn
Belgium	Intellectual Property Office	Gunther Aelbrecht
BEUC	European Consumers' Organisation	Kostas Rossoglou
BOF	Bits of Freedom	Janneke Sloetjes
BREIN	Protection Rights Entertainment Industry Netherlands	Tim Kuik
BSA	Business Software Alliance	Thomas Boué
Bulgaria	Permanent Representation	Elena Gencheva
BUSINESSEUROPE	Confederation of European Business	Ilias Konteas
Cable Europe	European Cable Communications Association	Caroline van Weede
CCD	Coalition for Cultural Diversity	Carole Tongue
CCIA	Computer & Communications Industry Association	Jakob Kucharczyk
CECCM	Confederation of European Community Cigarette Manufacturers	Mario Mueller
CEFIC	European Chemical Industry Council	Jean Claude Lahaut
CEPI	Confederation of European Paper Industries	Elena Lai
CEPIC	Centre of the Picture Industry	Sylvie Fodor
CI	Consumers International	David Hammerstein
CNIPA	Committee of National Institutes of Patent Attorneys	Nanno Lenz
CNAC	Consiglio Nazionale Anticontraffazione	Giovanni Casucci
CNNum	Conseil National du Numérique	Benoît Tabaka
Commission	European Commission, DG MARKT	Pierre Delsaux
Commission	European Commission, DG MARKT	Jean Bergevin
Confrontations	Confrontations Europe	Dasha Bespyatova
Cyprus	Permanent Representation	Vicky Christoforou
Czech Republic	Industrial Property Office	Petra Maleckova
Danish EU Presidency	Patent and Trademark Office	Jesper Kongstad
Danish EU Presidency	Patent and Trademark Office	Anne Rejnhold Jørgensen
Denmark	Patent and Trademark Office	Rikke Jessen
DI	Confederation of Danish Industry	Kunal Singla

DPDHL	Deutsche Post DHL	Carsten Hess
EAMSP	European Association of Mail Service Pharmacies	Thomas Diekmann
EBF	European Booksellers Federation	Françoise Dubruille
EBU	European Broadcasting Union	Peter Goethals
ECPA	European Crop Protection Association	Doris Schernhammer
ECSA	European Composer and Songwriter Alliance	Patrick Ager
ECTA	European Competitive Telecommunications Association	Federico Poggi
ECTA	European Community Trademark Association	Marius Schneider
EDiMA	European Digital Media Association	Jeremy Rollison
EDRI	European Digital Rights	Joe McNamee
EFPIA	European Federation of Pharmaceutical Industries and Associations	Ivan Burnside
EFTA	European Free Trade Association	Rán Tryggvadóttir
EGMA	European Generic Medicines Association	Lidia Mallo
EMMA	European Magazine Media Association	Catherine Starkie
ENPA	European Newspaper Publishers' Association	Francine Cunningham
EPC	European Producers Club	Alexandra Lebret
EPC	European Publishers Council	Angela Mills Wade
EPO	European Patent Office	Vytenis Semeta
ESBA	European Small Business Alliance	Léa Dehaut
ETNO	European Telecommunications Network Operators' Association	Caterina Bortolini
EUROKINEMA	Association de Producteurs de Cinéma et de Télévision	Yvon Thiec
EuroISPA	European Association of European Internet Service Providers	Malcolm Hutty
FEP	Federation of European Publishers	Liv Vaisberg
FERA	Federation of European Film Directors	Elisabeth Sjaastad
FESI	Federation of the European Sporting Goods Industry	Lars Vogt
FIA	International Federation of Actors	Dominick Luquer
FIMI	Federazione Industria Musicale Italiana	Enzo Mazza
Finland	Ministry of Employment and the Economy	Liisa Huhtala
France	Secrétariat général des affaires européennes	Jean-Baptiste Laignelot
FSFE	Free Software Foundation Europe	Eszter Bakó
GACG	Global Anti-Counterfeiting Network	John Anderson
Germany	Federal Ministry of Justice	Jan Hildebrandt
GESAC	European Grouping of Societies of Authors and Composers	Burak Özgen
GSMA	GSMA Europe	Alessandro Gropelli
Hadopi	Haute autorité pour la diffusion des œuvres et la protection des droits sur internet	Sarah Jacquier
Hungary	Intellectual Property Office	Zita Tóth
ICC/BASCAP	International Chamber of Commerce/Business Action to Stop Counterfeiting and Piracy	Chris Oldknow
IFPI	International Federation of the Phonographic Industry	Olivia Regnier

IMPALA	Independent Music Companies Association	Matthieu Philibert
INTA	International Trademark Association	Christina Sleszynska
Ireland	Department of Jobs, Enterprise and Innovation	James Kelly
ISFE	Interactive Software Federation of Europe	Dara MacGreevy
Italy	Senate of the Italian Republic	Senator Vincenzo Maria Vita
IVF	International Video Federation	Charlotte Lund Thomsen
LQDN	La Quadrature du Net	Felix Treguer
Malta	Permanent Representation	Greta Agius
MARQUES	Association of European Trade Mark Owners	Diana Versteeg
MPA	Motion Picture Association	Ted Shapiro
Netherlands	Ministry of Security and Justice	Willem van den Aardweg
NVF	Dutch Film Distributors' Association	Michael Lambrechtsen
OFCOM	UK Office of Communications	Monica Arino
OHIM	Office for Harmonisation in the Internal Market	António Campinos
OHIM	Office for Harmonisation in the Internal Market	Andrea Di Carlo
OHIM	Office for Harmonisation in the Internal Market	José Izquierdo
Parliament	European Parliament	Klaus-Heiner Lehne MEP
Pearle	Performing Arts Employers Associations League Europe	Caroline Adamczewski
PKPP	Polish Confederation of Private Employers - Lewiatan	Magdalena Piech
Poland	Ministry of Culture and National Heritage	Dariusz Urbanski
Portugal	Permanent Representation	Patrícia Castaheira
PRS	Performing Rights Society for Music	Simon Darlow
PRS	Performing Rights Society for Music	Frances Lowe
REACT	European Anti-Counterfeiting Network	Meena Sayal
Rights Alliance	Antipiratbyrån - Rights Alliance of Swedish movie industry	Sara Lindbäck
Romania	Patent Office	Gratiela Costache
SAA	Society of Audiovisual Authors	Cecile Despringre
SACG	Swedish Anti-Counterfeiting Group	Ann-Charlotte Söderlund
Slovakia	Permanent Representation	Radoslav Repa
SME Alliance	SME Innovation Alliance	John Mitchell
Spain	Patent and Trademark Office	Alberto Casado Cervino
SROC	Sports Rights Owners Coalition	Bill Bush
Sweden	Ministry of Justice, Division for Intellectual Property Law and Transport Law	Linda Kullberg
UEAPME	Union Européenne de l'Artisanat et des Petites et Moyennes Entreprises	Sabine Erkens
UK	Intellectual Property Office	Steve Codd
UL	University of London	Sir Robin Jacob
UNI MEI	UNI Global Union - Media, Entertainment & Arts	Johannes Studinger

UNIC	International Union of Cinemas	Julia Galaski
UNIFAB	Union des Fabricants	Philippe Lacoste
UNIFAB	Union des Fabricants	Delphine Sarfati
VDZ	Association of German Magazine Publishers	Karina Lott
VPRT	Association of Private Broadcasting and Telemedia	Julia Maier-Hauff
WIPO	World Intellectual Property Organisation	Xavier Vermandele
WKÖ	Austrian Economic Chambers	Anja Moosbrugger

Organisation Team:

Danish EU Presidency	Patent and Trademark Office	Thomas Xavier Duholm
Danish EU Presidency	Danish Patent and Trademark Office	Marie Louise Rosendal
Commission	European Commission, DG MARKT	Anne Cools
Commission	European Commission, DG MARKT	Denise O'Hanlon
Commission	European Commission, DG MARKT	Natalia Zebrowska
Commission	European Commission, DG MARKT	Arthur Forbes