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European Commission
Unit DG3 - Enforcement of Intellectual Property Rights
markt-iprconsultation@ec.europa.eu

Re:
Consultation on the Commission Report on the enforcement of intellectual property rights

Date
Amsterdam, 31 March 2011

Dear sirs,

1. The Dutch digital rights organisation Bits of Freedom ("**Bits of Freedom**") would like to take this opportunity to respond to the public consultation of the European Commission on the Commission report on the enforcement of intellectual property rights (the "**report**"). Bits of Freedom defends privacy and communication freedom on the internet. We will focus our reaction on the relation between fundamental rights and the enforcement of intellectual property rights.

2. The report appears to be based on the assumption that the infringement of intellectual property rights on the internet is a growing problem for society which needs to be addressed by extending the possibilities of enforcement by rightsholders. Bits of Freedom fundamentally disagrees with this assumption:

    - There is no relevant analysis supporting the conclusion that infringement online is a growing problem for society. In fact, there are relevant studies which conclude that the societal effects are positive. We recommend to undertake an independent study on the societal effects of infringement online before developing further policy on this issue.
    - Even if this were a problem for society, the current enforcement practice regarding infringements online is already at odds with EU law and fundamental rights. We recommend to clarify that the "general monitoring"-prohibition in the E-Commerce Directive ("**ECD**") extends to injunctions and that any restriction related to Artt. 12 to 14 ECD would also risk to amount to a general monitoring obligation. We also recommend to study the impact on fundamental rights of the enforcement practice in the EU and where necessary restrict the scope of enforcement possibilities envisaged in IPRED in light of the findings of such a study, especially with regard to individual internet users

exchanging information without a commercial profit motive.

- More fundamentally, Bits of Freedom is convinced that further repressive measures aimed at terminating and preventing non-commercial infringements online will not lead to a sustainable resolution of the tension between the internet and copyrights. We recommend addressing the core of the problem and investigating the extent to which material has been made available online by rightsholders. In addition, we recommend to investigate in what cases and how authors whose works are being used online should be remunerated.

3. We will explain this below.

Assumption that infringement is a problem is not supported by independent analysis

4. Firstly, the assumption implicit in the report that the infringement of intellectual property rights on the internet is a growing problem for society is just that: an assumption. There is a very real possibility that reducing the scope of intellectual property rights and their enforcement can also have a positive effect on society, for example on innovation and the production and distribution of cultural works. A Dutch independent study by the University of Amsterdam's Institute for Information Law (IViR) with TNO, an independent research organisation, concludes that the societal benefits of filesharing may be positive.[1] The Government Accountability Office of the United States furthermore concludes that it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.[2] These notions are completely absent from the Commission's report.

5. In the absence of independent analysis on the effects of the infringement of intellectual property rights online, it is not possible for the Commission to claim credibly that these developments need to be addressed, let alone that the report could be the basis for a sound and sustainable policy which benefits European society. Such an independent analysis is badly needed. This analysis needs to at least distinguish between counterfeiting and online infringements, and needs to distinguish between commercial and non-commercial infringements.

> **Recommendation: The European Commission needs to undertake thorough an independent research on the societal effects – both negative and positive – of the infringement of intellectual property rights on the internet.**

6. As a sidenote, the European Observatory on Counterfeiting and Piracy is not in a position to perform such analysis, as it already operates under the assumption that infringements need to be addressed without seriously analyzing the societal effects thereof (for example, the introductory text on the Commission's website reads: "*the Observatory also functions as a central resource for gathering, monitoring and reporting crucial information that will improve our knowledge about the dangerous phenomenon of counterfeiting and piracy, and will allow us to target our enforcement resources*").[3]

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1 See *Ups and downs. Economische en culturele gevolgen van filesharing voor muziek, film en games*, p. 72.
2 See Government Accountability Office 12 April 2010, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods.*
3 See http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm.

Enforcement practice is already at odds with EU law and fundamental rights

7. Even if one were to conclude that infringements on the internet are a growing problem for society as a whole which needs to be addressed, extending the possibilities of enforcement by rightsholders is by no means a desirable policy to adopt. The existing enforcement practice by rightsholders regarding infringements online in member states is already at odds with the E-commerce Directive and leads to serious infringements on fundamental rights of internet users.

Current enforcement practice is already at odds with the E-Commerce Directive

8. Injunctions awarded by rightsholders already have such a broad scope that they constitute a general obligation on providers to monitor the information which they transmit or store, or a general obligation actively to seek facts or circumstances indicating illegal activity (cf. Art. 15 ECD). Intermediaries are being ordered by courts to block entire websites, as in The Pirate Bay-case in Denmark – regardless of the fact that this website also facilitates the distribution of material with authorisation of the rightsholder and notwithstanding the fact that the compatibility with Art. 10 ECHR of such an order has not been confirmed by the European Court on Human Rights.[4] Intermediaries are also being ordered to prevent further unspecified infringements from occurring, as in the *Stokke/Marktplaats*-case in The Netherlands.[5]

9. The Commission in its report refers to the presumed absence of a link between injunctions and liability of an intermediary (p. 16). Even if this link would not exist, the "general monitoring"-prohibition of Art. 15 ECD would still extend also to the scope of injunctions and would thus not merely be relevant for the interpretation of the liability limitations set out in Artt. 12, 13 and 14 ECD. The "general monitoring"-prohibition was introduced in the ECD for good reason: to prevent self-censoring by intermediaries and maximize European innovation. These considerations are still relevant and these broad injunctions remain inconsistent with the ECD.

> **Recommendation: We recommend to clarify that (i) the "general monitoring"-prohibition in the ECD extends to injunctions, thus prohibiting injunctions which are not sufficiently specific in scope, and (ii) that any restriction related to Artt. 12 to 14 ECD would also risk to amount to a general monitoring obligation.**

Current enforcement practice is already at odds with fundamental rights

10. Injunctions of a general scope furthermore violate the right to communication freedom, set out in *inter alia* Art. 10 ECHR. Injunctions with a broad scope of a general nature lead to over- and underblocking, while function creep cannot be prevented. In addition, restrictions on the fundamental right to communication freedom imposed on intermediaries require an assessment of injunctions on a case-by-case basis, and a general obligation to monitor or block unspecified content is at the outset inconsistent with this requirement.

11. As regards the provision of data about private internet users, the statement of the European Commission that the relative anonymity on the internet makes it difficult to pursue

4 See EDRi-gram, Danish supreme court upholds injunction to block the Pirate Bay, http://www.edri.org/edrigram/number8.11/piratebay-denmark-supreme-court

5 See the decision of the Supreme Court of Denmark of 27 May 2010 and Hof Leeuwarden 8 June 2010.

infringements is not supported by any evidence in the report whatsoever.[6] Meanwhile, users' data are already being requested in large numbers: the European Data Protection Supervisor (EDPS) has noted that "*[in] Germany […] since 2008, following the transposition of the IPRE Directive, there have been about 3 000 court orders pursuant to which ISPs have disclosed to courts the subscriber information of 300 000 subscribers [...].* "[7] A policy which has the effect of disclosing the identity of potentially millions of European internet users to private parties – in some countries potentially without a court order[8] – clearly is at odds with the fundamental right to privacy.

12. It essential to protect the fundamental right and privacy of European individual internet users when developing policy on the enforcement of intellectual property rights on the internet. And since current enforcement practice in the EU already is at odds with the fundamental rights of millions of Europeans, the enforcement possibilities of rightsholders regarding infringements online need to be restricted, not expanded. It should in particular be ensured that the sharing of information between individual internet users without a commercial profit motive falls outside the scope of IPRED. Unfortunately, the notion that enforcement possibilities, especially in an online environment, may be at odds with fundamental rights is wholly lacking in the report. This is quite remarkable, especially given the Commission's dedication to human rights in other areas.

Recommendation: We recommend to study the impact on fundamental rights of the enforcement practice in the EU and where necessary restrict the scope of enforcement possibilities envisaged in IPRED in light of the findings of such a study, especially with regard to individual internet users exchanging information without a commercial profit motive.

A more fundamental approach is required to resolve tension between IPR and internet

13. More fundamentally, however, Bits of Freedom is convinced that further repressive measures aimed at terminating and preventing infringements online will not lead to a sustainable resolution of the tension between the internet and intellectual property rights. The decentralized nature of the internet by definition facilitates the free exchange of information between users. All attempts to stop this exchange with regard to copyrighted material have not been effective, served to undermine public support for European copyright policy and meanwhile paved the way for an infrastructure of general censorship. The obligations under consideration in the *Scarlet/Sabam*-case – supported by the Commission - are an unfortunate low point in this regard: "*to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services*".[9]

14. A fundamental rethinking of the causes of non-commercial infringements of copyright on the internet is required. An investigation into *why* tens of millions of Europeans regularly exchange copyrighted information online will lead to the conclusion that the current offering

6 See p. 8 and 13 of the report.
7 Opinion of the EDPS of 22 February 2010, par. 48.
8 It is argued, for example, that it follows from the Lycos/Pessers-decision of the Dutch Supreme Court, that providers have a duty to provide subscriber's data without a court order.
9 Reference for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium) lodged on 5 February 2010 — Scarlet Extended SA v Société Belge des auteurs, compositeurs et éditeurs (SABAM) , case C-70/10.

of copyrighted works by rightsholders is lacking, both in scope and in formats. Online music offerings have only very recently been developed – more than 10 years after filesharing service Napster first launched its software. And comparable video offerings online are to date still lacking in all European countries. A study into the steps taken by rightsholders to make their works available online, comparing for example the United States to Europe and comparing the video and music sector, needs to provide further insight into this.

Recommendation: The Commission needs to investigate to what extent rightsholders have been making their material available to the public, comparing regions and types of material, and analyzing to what extent this could be cause for non-commercial infringements on the internet by tens of millions of Europeans.

15. Instead of focusing on how to stop infringements on the internet, the Commission should focus on how to remunerate authors for the use of their work online. There is no simple answer to this. One alternative, more effective approach is to embrace policies facilitating voluntary collective licensing by rightsholders. In that scenario, rightsholders would provide a license for the up- and downloading of copyrighted material against a fee. Users who would be willing to exchange copyrighted material could conclude such a license with rightsholders. Bits of Freedom would support such a scenario.

Recommendation: The Commission needs to investigate in what cases and how authors whose works are being used online should be remunerated.

16. Lastly, Bits of Freedom would like to endorse EDRi's response to this consultation. Please do not hesitate to contact me, should you have any questions.

Sincerely yours,

Ot van Daalen