

Public consultation on the evaluation and modernisation of the legal framework for the enforcement of intellectual property rights: Consumers, Citizens and Civil Society

Fields marked with * are mandatory.

Objectives and General Information

The views expressed in this public consultation document may not be interpreted as stating an official position of the European Commission.

You are invited to read the privacy statement for information on how your personal data and contribution will be dealt with.

Please complete this section of the public consultation before moving to other sections.

Respondents with disabilities can request the questionnaire in .docx format and send their replies in email to the following address: GROW-IPRCONSULTATION@ec.europa.eu.

If you are an association representing several other organisations and intend to gather the views of your members by circulating the questionnaire to them, please send us a request in email and we will send you the questionnaire in .docx format. However, we ask you to introduce the aggregated answers into EU Survey. In such cases we will not consider answers submitted in other channels than EU Survey.

If you want to submit position papers or other information in addition to the information you share with the Commission in EU Survey, please send them to GROW-IPRCONSULTATION@ec.europa.eu and make reference to the "Case Id" displayed after you have concluded the online questionnaire. This helps the Commission to properly identify your contribution.

Given the volume of this consultation, you may wish to download a PDF version before responding to the survey online.

*** Please enter your name/organisation and contact details (address, e-mail, website, phone)**

COMMUNIA association for the public domain
Troonstraat 55 Rue du Trône
1050 Ixelles

Brussels
info@communia-association.org
http://www.communia-association.org/

*** Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?**

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

If you are a registered organisation, please indicate your Register ID number. Your contribution will then be considered as representing the views of your organisation.

If your organisation is not registered, you have the opportunity to register now. Then return to this page to submit your contribution as a registered organisation.

Submissions from organisations that choose not to register will be treated as 'individual contributions' unless they are recognized as representative stakeholders via relevant Treaty Provisions.

- Yes
 No
 Non-applicable

*** Register ID number**

003277719548-45

*** In the interests of transparency, your contribution will be published on the Commission's website. How do you want it to appear?**

- Under the name supplied? (I consent to the publication of all the information in my contribution, and I declare that none of it is subject to copyright restrictions that would prevent publication.)
 Anonymously? (I consent to the publication of all the information in my contribution except my name/the name of my organisation, and I declare that none of it is subject to copyright restrictions that would prevent publication).
 No publication - your answer will not be published and in principle will not be considered.

"Please note that your answers may be subject to a request for public access to documents under Regulation (EC) No 1049/2001."

A. Identification

*** Who are you?**

- Individual
 National consumer protection organisation
 National civil rights organisation
 Other
 Legal counsellor representing consumer
 European consumer protection organisation
 European civil rights organisation

* Please specify:

500 character(s) maximum

COMMUNIA is an international non governmental organization that advocates for policies that expand the public domain and increase access to and reuse of culture and knowledge. We seek to limit the scope of exclusive copyright to sensible proportions that do not place unnecessary restrictions on access and use.

* Please indicate your country of residence or establishment:

- | | |
|------------------------------------------|--------------------------------------|
| <input type="radio"/> Austria | <input type="radio"/> Italy |
| <input checked="" type="radio"/> Belgium | <input type="radio"/> Latvia |
| <input type="radio"/> Bulgaria | <input type="radio"/> Lithuania |
| <input type="radio"/> Cyprus | <input type="radio"/> Luxembourg |
| <input type="radio"/> Croatia | <input type="radio"/> Malta |
| <input type="radio"/> Czech Republic | <input type="radio"/> Netherlands |
| <input type="radio"/> Denmark | <input type="radio"/> Poland |
| <input type="radio"/> Estonia | <input type="radio"/> Portugal |
| <input type="radio"/> Finland | <input type="radio"/> Romania |
| <input type="radio"/> France | <input type="radio"/> Slovakia |
| <input type="radio"/> Germany | <input type="radio"/> Slovenia |
| <input type="radio"/> Greece | <input type="radio"/> Spain |
| <input type="radio"/> Hungary | <input type="radio"/> Sweden |
| <input type="radio"/> Ireland | <input type="radio"/> United Kingdom |
| <input type="radio"/> Other | |

B. Exposure to IP infringing goods and services

* Do you believe that products (goods and services) are promoted and presented in such a manner that you can easily identify that they are legitimate products respecting IPR?

- Yes
 No
 No opinion

C. Functioning of key provisions of Directive 2004/48/EC on the enforcement of intellectual property rights

Directive 2004/48/EC on the enforcement of intellectual property rights introduced different instruments for IP right holders to protect their intellectual property. This section aims to provide the Commission with citizen's and stakeholder' views, opinions and information about the functioning of the overall enforcement framework and of key provisions of IPRED. The different instruments consulted on will be briefly explained before each sub-section.

C.1. Overall functioning of the enforcement framework

*** Do you think that the existing rules have helped effectively in protecting IP and preventing IP infringements?**

- Yes
 No
 No opinion

Please explain:

1500 character(s) maximum

The complexity and overreach of the underlying copyright system is a root cause for many of the issues discussed in this consultation. Existing enforcement mechanisms are based on an incorrect assumption: that each infringement of the copyright monopoly is illegal and should be punishable by law. This has resulted in a number of structural shortcomings of the existing rules such as:

1. Sanctions negatively affect people who use file sharing sites to participate in the culture and create it, by collecting and sharing particularly rare and valuable content.
2. In some member states copyright is abused in order to extort compensation by sending pre-trial requests on a massive scale to casual Internet users (copyright trolling).
3. Unclear law creates the possibility for businesses to offer complex licences for entities who can use the works within the scope of exceptions and limitations to copyright law (e.g. schools, libraries).

So long as there are no or insufficient legal offerings for content, increased enforcement will not be capable of steering internet users away from unauthorized sources. From our perspective, promoting the legal availability of content online is the best way to ensure that internet users do not access unauthorized content. EU legislators should end geo-blocking and ensure that legal content offerings are available for all internet users in the EU, irrespective of their location or nationality.

*** Do you consider that the measures and remedies provided in the Directive are applied in a homogeneous manner across the EU Member States?**

- Yes
 No
 No opinion

C.2. Measures, procedures and remedies provided for by IPRED

Responses to this section should be based on your overall experience with the measures, procedures and remedies provided for by IPRED as implemented and applied in your jurisdiction. If appropriate

please specify in your response, to the extent possible, particular national issues or practices. If your response concerns a jurisdiction other than your jurisdiction of residence or establishment or covers more than one jurisdiction please also add the jurisdiction concerned.

C.2.1. Identification of an alleged infringer

This measure should assist rightholders in identifying an alleged infringer of their IPR. Subject to certain requirements the rightholder can ask the competent judicial authorities to order any person to disclose information on the origin of the goods or services that are thought to infringe intellectual property rights and on the networks for their distribution or provision.

*** Have you been concerned with a procedure for an alleged IPR infringement?**

- Yes
- No

*** Are you aware of any out of court procedure for cease and desist notices for alleged IPR infringements in your country of residence?**

- Yes
- No

*** Did you ever appeal a judicial decision ordering information to be provided or the notice/cease and desist submitted on the basis of the information provided?**

- Yes
- No
- Did not receive such an order

*** Do you have the feeling that your rights including the right to respect for private life and protection of personal data are well respected in Court proceedings for the identification of alleged infringers of IPR?**

- Yes
- No
- No opinion

*** From your experience, do you believe that the proportionality test, balancing the protection of IPR and the protection of procedural and fundamental rights, was appropriately applied in your case?**

- Yes
- No
- No opinion

*** In view of your experience with the implementation and application of the procedure for the identification of alleged infringers of IPR do you see a need to adjust the provisions for the application of that procedure?**

- Yes
- No
- No opinion

Comments on the rules for the identification of an alleged infringer:

3000 character(s) maximum

C.2.2. Legal proceedings for infringing IPR

The Directive set up measures and procedures to ensure the civil enforcement of intellectual property rights. This sub-section should help to get a better understanding of the nature of civil proceedings consumers and citizens are involved in in the area of IPR enforcement. It will furthermore look at the provisions on damages and reimbursement of legal costs. On application of the injured party, the competent judicial authorities may order an infringer to pay the right holder damages to compensate for the actual loss incurred. Furthermore, as a general rule court costs, lawyer's fees and any other expenses incurred by the successful party will normally be borne by the other party.

*** Have you ever been involved in legal proceedings before courts in your Member State for an alleged infringement of IPR?**

- Yes
 No

*** Did you appeal a judicial decision?**

- Yes
 No

*** In view of your experience with the implementation and application of the rules for setting damages do you think that the existing rules have helped effectively in protecting IP and preventing IP infringements?**

- Yes
 No
 No opinion

Please explain:

1500 character(s) maximum

As mentioned in our answer to the first question, existing enforcement mechanisms are based on an incorrect assumption: that each infringement of the copyright monopoly is illegal and should be punishable by law. This has resulted in a number of structural shortcomings of the existing rules such as:

1. Sanctions negatively affect people who use file sharing sites to participate in the culture and create it, by collecting and sharing particularly rare and valuable content.

2. In some member states copyright is abused in order to to extort compensation by sending pre-trial requests on a massive scale to casual Internet users (copyright trolling).

3. Unclear law creates the possibility for businesses to offer complex licences for entities who can use the works within the scope of exceptions and limitations to copyright law (e.g. schools, libraries).

So long as there are no or insufficient legal offerings for content, increased enforcement will not be capable of steering internet users away from unauthorized sources. From our perspective, promoting the legal availability of content online is the best way to ensure that internet users do not access unauthorized content. EU legislators should end geo-blocking and ensure that legal content offerings are available for all internet users in the EU, irrespective of their location or nationality.

*** In view of your experience with the implementation and application of the rules for setting damages do you see a need to adjust the provisions for the application of that measure?**

- Yes
 No
 No opinion

Please explain:

1500 character(s) maximum

The concept that damages can be measured by equating each infringing copy with a lost sale is deeply flawed. This has been evidenced by studies in different European countries, which have found that large scale downloaders generally spend more than average on digital content. See, for example: <https://www.techdirt.com/articles/20110727/16233815292/another-day-another-study-that-says-pirates-are-best-customers-this-time-hadopi.shtml>
This point is also recognized by rightsholders such as Bill Gates in this interview: <http://articles.latimes.com/2006/apr/09/business/fimicropiracy>. In our view, damages should be based on demonstrable economic harm, and not on flawed assumptions.

*** In view of your experience with the implementation and application of the rules for the reimbursement of legal costs do you think that the existing rules have helped effectively in protecting IP and preventing IP infringements?**

- Yes
 No
 No opinion

*** In view of your experience with the implementation and application of the rules for the reimbursement of legal costs do you see a need to adjust the provisions for the application of that measure?**

- Yes
 No

No opinion

Other comments on legal proceedings for infringing IPR:

3000 character(s) maximum

C.2.3. Procedural safeguards

The measures, procedures and remedies provided for by the Directive shall be fair and equitable and be applied in such a manner as to provide for safeguards against their abuse.

*** Do you have the feeling that procedural and fundamental rights, such as the right of defence, the right to respect for private life or the right to protection of personal data, are (usually) well respected in the application of the measures, procedures and remedies provided for by the current Directive?**

- Yes
- No
- No opinion

*** Please explain:**

1500 character(s) maximum

The protection of IPR need to be balanced with regard to citizens' rights to privacy and to FoE. This balance needs to be maintained both in the case of civil procedure and criminal law. Problems arise during the application of the law, when we encounter situations of violations of privacy, property, or suppression of freedom of speech.

The ex parte evidence seizures provided for in IPRED can be highly intrusive, leading to idisproportionate interventions on users, as demonstrated in the case where police in Finland raided a family home due to a nine-year-old child's unauthorised downloading of copyrighted content:
<http://techcrunch.com/2012/11/22/finnish-police-seize-9-year-olds-winnie-the-poo-h-laptop-for-using-the-pirate-bay/>

Given that relevant information is often stored in digital formats, seizing entire computers and servers can have disproportionately negative impacts on the right to privacy, property, and free expression.

There are cases where companies that have violated the right to privacy of its users by communicating the users' data in such a way not prescribed by law. For example, there is no mechanism for users to object to revealing their personal data during an IPR enforcement procedure. In the recent case of Google v. Brein before the Amsterdam Court of Appeals the court ruled that the intermediary could grant a fixed period of time to allow their users to

anonymously provide reasoned objections to the disclosure of their personal information.

Comments on procedural safeguards:

3000 character(s) maximum

C.2.4. Other issues

*** Are there any other provisions of the Directive which, in your view, would need to be improved?**

- Yes
- No
- No opinion

*** Please explain:**

1500 character(s) maximum

The existing Directive fails to differentiate between the impact of different forms of copyright infringement. This is particularly worrying in the case of online infringement, where many violations occur due to unconscious actions by internet users who are not familiar with complex copyright rules. To be justly enforced, the rules should be able to recognize that there is a wide spectrum of harmfulness of different types of copyright infringements. The law should be able to take this fact into consideration when deciding on enforcement measures and damages.

Excessive enforcement of copyright against everyday activities must not curb creativity, freedom of expression, and social innovation.

Currently there is no clear evidence that the unauthorized use of content on the web—in particular non-commercial content sharing—directly affects the revenue decline for artists and the entertainment industry. To safeguard creativity, freedom of expression, and social innovation, any update of the enforcement rules should contain provisions that exclude non-commercial sharing and transformative use (remixes) from enforcement actions against private individuals.

*** Do you think that the existing rules have helped effectively in protecting IP and preventing IP infringements?**

- Yes
-

- No
 No opinion

Please explain:

1500 character(s) maximum

The complexity and overreach of the underlying copyright system is a root cause for many of the issues discussed in this consultation. Existing enforcement mechanisms are based on an incorrect assumption: that each infringement of the copyright monopoly is illegal and should be punishable by law. This has resulted in a number of structural shortcomings of the existing rules such as:

1. Sanctions negatively affect people who use file sharing sites to participate in the culture and create it, by collecting and sharing particularly rare and valuable content.
2. In some member states copyright is abused in order to extort compensation by sending pre-trial requests on a massive scale to casual Internet users (copyright trolling).
3. Unclear law creates the possibility for businesses to offer complex licences for entities who can use the works within the scope of exceptions and limitations to copyright law (e.g. schools, libraries).

So long as there are no or insufficient legal offerings for content, increased enforcement will not be capable of steering internet users away from unauthorized sources. From our perspective, promoting the legal availability of content online is the best way to ensure that internet users do not access unauthorized content. EU legislators should end geo-blocking and ensure that legal content offerings are available for all internet users in the EU, irrespective of their location or nationality.

*** Do you consider that the Directive has been implemented by all Member States in a way that a high, equivalent and homogeneous level of IPR protection has been achieved in the Internal Market?**

- Yes
 No
 No opinion

D. Issues outside the scope of the current legal framework

This section will address a number of issues which are currently not dealt with by the directive but might be taken up in any future initiative in order to modernise the enforcement of IPR.

D.1. Intermediaries

This sub-section aims to generate views on the role, responsibility and scope of engagement of intermediaries in IP enforcement. The questions should provide the Commission services with stakeholder experience with the implementation and application of voluntary cooperation initiatives involving intermediaries in the prevention of IP infringements.

*** Do you have experience with the involvement of intermediaries in the prevention of IPR infringements?**

- Yes
- No

*** Do you believe that intermediary service providers should play an important role in enforcing IPR?**

- Yes
- No
- No opinion

Please explain:

1500 character(s) maximum

Intermediaries should not be tasked with a role that exceeds the already problematic position they currently have.

The notice and takedown procedures provided for in the E-commerce Directive already requires intermediary service providers to remove content after receiving reliable information that a particular piece of content is in conflict with the law. In its current form, the procedure is threat to the fundamental rights of internet users. If internet platforms make content decisions only on the basis of notices, users do not have the opportunity to present their point of view in whether the piece of content in question is being shared in a legal fashion. This can lead to a violation of the users' rights. The preferred solution would be to create a space for discussion about the legality of the content covered by the notice. In this regard, we recommend the introduction or strengthening of the counter-notice mechanism.

ISPs and other hosting services should not be compelled to filter content based on the orders imposed by civil courts enforcing intellectual property rights, contrary to the provisions of E-commerce Directive EC / 21/2000. Private entities should not be responsible for blocking links to websites accused of hosting unauthorized content or sharing of unauthorized content.

*** On the basis of your experience what are the main challenges in establishing a successful cooperation between rightholders and intermediaries?**

- Economic interests (e.g. additional costs)
- Specific regulatory requirements
- Technology
- Other
- No opinion

*** Did you experience any limitation in terms of access to services or products previously provided by intermediary service providers due to their involvement in the prevention of IPR infringements?**

- Yes
 No
 No opinion

Please explain:

1500 character(s) maximum

Content restrictions resulting from misguided IP enforcement efforts are well documented. For example, a video of a Dutch professor advocating for a stronger copyright was taken down for alleged copyright infringement: <https://www.techdirt.com/articles/20140903/06114628400/premier-league-uses-copyright-to-pull-down-youtube-video-professor-advocating-stronger-copyright-premier-league.shtm>. This case perfectly illustrates the problem that enforcement claims regularly ignore the rights users have under exceptions and limitations to copyright.

Another Dutch example is the case of the Blender Foundations, which had made its own Creative Commons-licensed animations films available via YouTube only to have them taken down by Sony, who claimed to own the copyright after having been granted a non-exclusive license to use the film.

With their 'Multatuli' project, the Dutch digital civil rights organisation Bits of Freedom showed that overcompliance with takedown requests is a structural problem: Over 70% of service providers complied with a takedown request based on work which had been out of copyright for over 50 years (<https://www.bof.nl/live/wp-content/uploads/researchpaperSANE.pdf>).

*** In your opinion does the enhanced involvement of intermediary service providers in enforcing IPR has or might have a negative impact on fundamental rights?**

- Yes
 No

*** How could fundamental rights be negatively affected?**

- Limitation of freedom of expression
 Limitation of freedom to conduct business
 Limitation of the right to due process
 Limitation to the dissemination of legal content
 Other

*** Please specify:**

500 character(s) maximum

Limitation of the right to science and culture, as pointed out by UN Special Rapporteur Farida Shaheed's report on copyright policy and the right to science and culture.

D.2. Specialised courts

This sub-section seeks to explore if, following the example of the Community trade mark courts, the designation of specialised national courts for matters of infringement and validity of IPR could help to strengthen the protection of IPR and the efficacy of IPR enforcement.

*** Do you have experience with courts, courts' chamber or judges specialised in IP matters in your country of residence?**

- Yes
 No

*** Does legal action at a court specialised in IPR matters provide an added value compared to legal actions at other courts?**

- Yes
 No
 No opinion

D.3 Other issues

*** Do you identify any other issue outside the scope of the current legal framework that should be considered in view of the intention to modernise the enforcement of IPR?**

- Yes
 No
 No opinion

Please explain:

1500 character(s) maximum

EU law should reaffirm the principle of the presumption of legality of all submitted online content. In particular, in order to strengthen the principle enshrined in Article 15 of the E-Commerce Directive (prohibition of general obligation to monitor), all types of mandatory preventive mechanisms aimed at preventing the publication of certain types of online content should be banned.

Moreover, the transfer of the enforcement of copyright laws to private entities—without a mechanism for effective judicial review—could lead to the abuse of users' rights. Right now there are several examples of the blocking of lawful content due to improper handling of intellectual property rights by intermediaries. For example, there was the takedown of a home video film that captured a small child dancing along to the Prince song "Let's Go Crazy", which happened to be playing in the background. The court in the U.S. eventually ruled that the rights holders must consider whether the use of

material like this on platforms such as YouTube is a fair use before issuing a takedown notice. There was also the blocking by Sony of the film Sintel on YouTube. Sony claimed that it owned copyright in the film, which later turned out to be incorrect.

E. Other comments

* Do you have any other comments?

- Yes
 No

* Please explain:

3000 character(s) maximum

From the perspective of internet users, there is no need to revise the Directive in order to strengthen its enforcement provisions. If anything is to be changed, it should be only those provisions that support a better balance between the interests of consumers and the protection of the rights of content creators. The following changes should be considered:

1. Withdrawing from both civil and criminal prosecution of citizens for non-commercial filesharing, and withdrawing from prosecuting the creators of derivative works who produce non-commercial remixes. Criminal penalties for violations of intellectual property rights by individuals should be minimized.
2. Introducing mechanisms for safeguarding fair use and the public domain, including a ban on direct contractual restrictions on access and use of these materials, or using digital rights management or other technical mechanism to prevent citizens from exercising their rights under the law.
3. Avoiding the situation where ISPs or hosting services are forced to filter content based on the orders imposed by the civil courts enforcing intellectual property rights, contrary to the provisions of Directive EC / 21/2000 ("e-commerce"). There should not be any involvement of intermediaries other than the notice and takedown rules established by the E-commerce Directive. As highlighted in our answers above, these rules already have a negative impact on the rights of internet users because they do not adequately provide internet users the ability to file counter notices. The ability of users to counter unjustified takedowns needs to be strengthened and rights holders need to be required to take exceptions and limitations into account before filing notice and takedown.

It is crucial that any changes in IPRED do not lead to the implementation of disproportionate filtering technologies that prevent the use of culture for non-commercial purposes. Freedom of speech, privacy, and the right to a fair trial would be weakened by greater involvement of ISPs in intellectual property enforcement.

The debate on copyright should not focus primarily on issues related to enforcement. Instead, it should look to support business models that can accommodate widespread social practices like non-commercial file sharing,

while ensuring adequate financial resources for creative activities.
The desired direction of change in the system of enforcement of intellectual property rights should be about increasing the protection of fundamental rights and freedoms of users online. This is the approach that will best serve the development of a knowledge-based information society.
The copyright law and its enforcement mechanisms need to be understandable and fair to those it will affect. In the case of copyright, this calls for an update of user exceptions and limitations, a full harmonization of exceptions and limitations across the EU, and further harmonization based on a shorter term for copyright protection.

Useful links

Enforcement of intellectual property rights

(http://ec.europa.eu/growth/industry/intellectual-property/enforcement/index_en.htm)

The Single Market Strategy (http://europa.eu/rapid/press-release_MEMO-15-5910_en.htm)

The Digital Single Market Strategy (http://europa.eu/rapid/press-release_MEMO-15-4920_en.htm)

Background Documents

[DE] Datenschutzerklärung (/eusurvey/files/25c5d987-2467-47e8-910c-a4733cd7488b)

[DE] Hintergrund (/eusurvey/files/81667da2-51bf-4f65-b9e8-a978a9498268)

[EN] Background information (/eusurvey/files/2ed412ac-400d-4796-94c9-37d58e724cd4)

[EN] Privacy statement (/eusurvey/files/995adeb9-0ad8-4ed4-b036-d07e70b73b30)

[ES] Antecedentes (/eusurvey/files/5128ccc9-9568-4cde-90cd-0b87b1462cee)

[ES] Declaración de confidencialidad (/eusurvey/files/1b6fc94d-687b-4787-acb0-e59eee9b193d)

[FR] Contexte (/eusurvey/files/9949a17c-9deb-4eeb-8d42-d7405a10b80c)

[FR] Déclaration relative à la protection de la vie privée (/eusurvey/files/52d0153e-0bb3-4809-9074-d3c945daa693)

[IT] Contesto (/eusurvey/files/0397c708-3a93-450b-99f8-d238986f3227)

[IT] Informativa sulla privacy (/eusurvey/files/574a2286-b14a-471a-a803-f94ff5173ba8)

[PL] Kontekst (/eusurvey/files/685910a4-4a2e-481e-8bdd-35739080d305)

[PL] Oświadczenie o ochronie prywatności (/eusurvey/files/72d8d32c-a541-4395-923a-5d3b6688d2e3)

Contact

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