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## Public Consultation on the Evaluation and Modernisation of the Legal Framework for the Enforcement of IPRs (IPRED)

Date submitted
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2016-04-11 11:47:47
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### Objectives and General Information

<b>Please enter your name/organisation and contact details (address, e-mail, website, phone)</b>
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<b>Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?</b>
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Yes [v5905]
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<b>Register ID number</b>
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16311905144-06
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<b>In the interests of transparency, your contribution will be published on the Commission's website. How do you want it to appear?</b>
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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.) [v5910]
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### A. Identification

<b>Who are you?</b>
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European civil rights organisation [v5921]
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<b>Please indicate your country of residence or establishment:</b>
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Belgium [v5936]
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### B. Exposure to IP infringing goods and services

**Answering guide:** Since the questionnaire concerns all forms of "intellectual property" and all products and services, it is difficult to answer these questions adequately. Here and in subsequent questions, EDRI's focus is on the enforcement of copyright in the digital environment.

<b>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?</b>
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No [v5967]
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**Please explain:** [1500 character(s) maximum ( characters used)]

The use of this question to cover all potential goods & services offered offline and online (some subject to “intellectual property”, some not), makes it difficult, if not impossible to clearly answer this question. According to Eurobarometer and OHIM studies, counterfeit goods are rarely bought in good faith, in the belief that they are authentic ([http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_363\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf) ; [https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/25-11-2013/european\\_public\\_opinion\\_study\\_web.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf)). These studies cover counterfeit goods that have been bought by consumers and seem to focus mostly on trademark infringing goods. There is no evidence on the good or bad faith in which copyright and/or patent infringing goods are bought.

Regarding copyright, not least due to the chaotic systems of exceptions and limitations in the EU, online users have neither the time or nor the knowledge needed to assess the legal use of copyrighted material - rightsholders themselves tend to be unclear on this. In short, it is not clear what specific problem the Commission believes it is addressing in this question. We are not convinced a problem exists, at least in the online environment. It would have been more useful if the Commission would have differentiated in online, offline, durable and fast moving consumer goods, trademark, copyright and patent infringing counterfeits.

## C. Functioning of key provisions of Directive 2004/48/European Commission on the enforcement of inte

**Note from the European Commission:** Directive 2004/48/European Commission 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?**

No [v5975]

**Please explain:** [1500 character(s) maximum ( characters used)]

It is understandable that a consultation on the IPR Enforcement Directive focuses on enforcement. However, the fact remains that, in the online environment, infringements will continue as long as the market does not deliver. Ultimately, the availability of Spotify and Netflix has done more than IPRED to ensure compliance with IP law in the online environment.

We have seen a long line of invasive measures implemented as a result of the Directive - both as a result of the injunctions provision and undue access to personal data. These frequently led to restrictions of rights provided for by the EU Charter. In the online environment, the measures that have been implemented have been unequivocally ineffective, based on all available international research. As a general rule, there is no review process to test the necessity and proportionality of injunctions, meaning the disproportionality of the measure cannot easily be challenged. We see a similar dynamic with regard to failed approaches in the online environment, such as web blocking. If the EC is going to support the use of injunctions in an ever-changing environment, an obligation for meaningful review is absolutely essential. Furthermore, if the Commission is serious about harmonisation, it should consider a single rule on online injunctions and not three (E-Commerce Directive, Copyright in the Information Society Directive and IPRED). A further problem is the issue of access to personal information.

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

No [v5980]

**Please explain:** [1500 character(s) maximum ( characters used)]

The purpose of a Directive is to produce implementations which eliminate barriers, not homogeneity. Under a Directive, measures do not need to be homogenous, they simply need to respect the obligations in the instrument. Homogenous implementation would require the adoption of a Regulation. In that context, it is important to note that adopting EU-wide injunctions would be a severe limitation of national sovereignty and objectionable on several levels. In summary, further harmonisation is neither necessary nor appropriate at this time.

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

**Note from the European Commission:** 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.

**Answering guide:** While the following sections tend to focus on personal experience, EDRi has also included more general examples taken from the Internet community. You may wish to comment on arbitrary procedures, such as implementation of the DMCA by US companies, blocking or access to personal data in your country. Everyone who uses Google or Facebook has been concerned with a procedure for an alleged IPR infringement, as both companies make content unavailable globally as a result of US copyright law.


### C.2.1. Identification of an alleged infringer

**Note from the European Commission:** 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.

<b>Have you been concerned with a procedure for an alleged IPR infringement?</b>
No [v5989]

<b>Are you aware of any out of court procedure for cease and desist notices for alleged IPR infringements in your country of residence?</b>
Yes [v6070]

<b>Please provide detail:</b> [1500 character(s) maximum ( characters used)]
Although we are based in Brussels we work all across the EU, and we prefer pointing at specific examples in other questions of this questionnaire. In Belgium we witnessed farcical efforts to introduce injunction-based blocking of websites linked to The Pirate Bay, followed by coercion of smaller ISPs to implement blocking "voluntarily" as a result of the injunctions that were implemented. We also, obviously, see examples of legal content being deleted/deindexed on the basis of DMCA complaints also and the removal of content for defensive liability reasons by internet hosting providers and social media companies.

<b>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?</b>
Did not receive such an order [v6076]

<b>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?</b>
No [v6097]

**Please explain:** [1500 character(s) maximum ( characters used)]

There are several examples, Germany and the UK being the most notable, of Member States enforcing measures which run contrary to the fundamental rights safeguards provided under EU law. For example, it follows from the IPR Enforcement Directive and the EU Charter that the identification of alleged infringers must only be granted if a 'fair balance' is struck with the right to privacy and right to the protection of personal data of the alleged infringer.

This lack of safeguards has already lead to widespread abuse of personal data in Germany and the UK. In those member states, law firms would harvest IP addresses in peer-to-peer networks in order to obtain data about individuals (at one stage 300,000 sets of personal data were being obtained per month in Germany - which de facto is generalised access to personal data, which, based on CJEU case law, is prohibited by the Charter) from internet access providers. This information is then used to give the end-user "an offer they can't refuse" – either pay a comparatively low amount of money to be left in peace or seek to defend themselves in court, where the cost of losing would be far greater. This approach undermines freedom of communication, privacy and the presumption of innocence.

The most famous proponent of this activity in the UK is the now defunct law firm ACS: Law, whose only registered solicitor was ultimately suspended by the Solicitors' Regulatory Authority for conduct unbefitting a solicitor.

**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?**

No opinion [v6103]

**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 [v6106]

**Please explain:** [1500 character(s) maximum ( characters used)]

It is essential that alleged infringers' privacy rights are taken into account when assessing the proportionality of an an identification order. This assessment can be made accurately if the alleged infringer is given the opportunity to present a defence - this is the least restrictive alternative. A best practice in this regard is the the recent case of Google v. Brein before the Amsterdam Court of Appeal (ECLI:NL:RBDHA:2015:11408), where, in an interlocutory decision, the intermediary was granted a fixed period to allow the user to anonymously provide reasoned objections to the disclosure of their personal information. However, this course of action is not explicitly prescribed by the Enforcement Directive, nor is it reflected in in most Member State Implementations. We call on the Commission to include an anonymous right of defence for alleged infringers in identification procedures under article 8 IPRED.

**Comments on the rules for the identification of an alleged infringer:** [3000 character(s) maximum ( characters used)]

## C.2.2. Legal proceedings for infringing IPR

**Note from the European Commission:** 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?**

No [v6115]

**Did you appeal a judicial decision?**

No [v6173]

**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?**

No opinion [v6189]

**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 [v6192]

**Please explain:** [1500 character(s) maximum ( characters used)]

The concept of damages that equates the making of infringing digital copies to actual damage to the right holder does not fit in the digital environment or empirical reality in general. Three different studies in three European countries found that large-scale downloaders on average also spend the most 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> These findings show that permissionless filesharing does not reduce demand for paid products and services, but rather stimulates it.

It is deeply flawed to assume that the infringement of copyright necessarily results in damage to the right holder. This point was made very clearly by Bill Gates who, himself, is a major rightsholder (<http://articles.latimes.com/2006/apr/09/business/fi-micropiracy9>).

It is especially flawed to award damages based on a speculative assessments of the fees which would have been due if the infringer had requested authorisation to use the "intellectual property" in question, as implemented under 13(1)(b) IPRED. On the internet, a wealth of free-to-use content is available and there is often no real incentive to pay for protected images, music scores et cetera. The article 13(1)(b) calculation method creates perverse incentives in the context of copyright laws and this rule should be revised so that damage awards do not exceed demonstrable economic harm.

**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?**

No [v6198]

**Please explain:** [1500 character(s) maximum ( characters used)]

If anything, the rules for the reimbursement of legal costs have had a chilling effect on freedom of expression and innovation and have favoured large copyright holders versus small ones. Especially in cases about exceptions, small defendants such as journalists and SMEs have been given an incentive to back down in the face of a larger litigant since a loss would result in potentially ruinous damages awards because of the legal costs. This has the effect of narrowing the scope of the injunctions permitted by the legislator.

**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 [v6202]

**Please explain:** [1500 character(s) maximum ( characters used)]

In implementing the rules on reimbursement of legal costs from IPRED, certain Member States have introduced full compensation of all legal costs, going further than the compensation of court costs and/or the point-based, maximum compensations which are the generally applied in European civil law. This extreme implementation of the loser pays-principle makes the threat of judicial enforcement even more coercive for those with limited means to mount a defence. This has resulted in widespread, abusive threats of litigation.

**Other comments on legal proceedings for infringing IPR:** [3000 character(s) maximum ( characters used)]

### C.2.3. Procedural safeguards

**Note from the European Commission:** 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?**

No [v6211]

**Please explain:** [1500 character(s) maximum ( characters used)]

The ex parte evidence seizures provided for in IPRED can be highly intrusive with, for example, law enforcement parties arriving unannounced to family homes. This has resulted in absurd and deplorable incidents such as the Finnish police raid on a family home due to a nine-year-old child's unauthorised downloading (<https://torrentfreak.com/police-raid-9-year-old-pirate-bay-girl-confiscate-winnie-the-pooh-laptop-121122/>).

Since relevant information is often stored in digital formats, entire computers and servers are often seized to secure the evidence sought. Thus, evidence seizures for even relatively small amounts of information can affect entire computer infrastructures. As companies increasingly rely on this infrastructure, these evidence seizures could have had a major, disproportionate impact on the freedom to conduct a business<sup>[2]</sup> and can be applied in a coercive manner<sup>[2]</sup>.

As outlined under section C.2.1 of this response, the current implementation of identification requests under article 8 IPRED undermines the right of the defence, the right to privacy and the right to protection of personal data for alleged infringers. It facilitates abusive threats of litigation, especially when combined with full compensation of legal costs.

Finally, as pointed out above, mandatory reviews for injunctions are an essential safeguard.

**Comments on procedural safeguards:** [3000 character(s) maximum ( characters used)]

## C.2.4. Other issues

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

Yes [v6217]

**Please explain:** [1500 character(s) maximum ( characters used)]

Ex-parte injunctions in general have resulted in abusive practices that have been detrimental to both freedom of expression and competition, and by extension innovation. It has been a very blunt instrument against web proxy services, artists and software developers alike. Furthermore, it has been abused to exclude competitors from entering new markets.

We would draw your attention to EDRI's response to previous consultations, . See for example [https://circabc.europa.eu/d/d/workspace/SpacesStore/9e1385e4-02b4-4c76-9ad1-f48ecd22d03b/edri\\_en.pdf](https://circabc.europa.eu/d/d/workspace/SpacesStore/9e1385e4-02b4-4c76-9ad1-f48ecd22d03b/edri_en.pdf), with particular reference to injunctions.

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

No opinion [v6224]

**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?**

No [v6228]

**Please explain:** [1500 character(s) maximum ( characters used)]

IPRED currently provides minimum harmonisation of IP enforcement - as IPRED is a Directive, homogeneity was not the goal. This has led, on one hand, to the CJEU becoming the "legislator" in absence of clear rules for IP enforcement because of the lack of clarity in the Directive. On the other hand, it has led to certain Member States going beyond the Directive's already excessive level of enforcement and introducing even stronger enforcement rights. Germany, the Netherlands and the UK have taken an especially draconian stance. A reform of EU copyright law which takes into consideration the realities of the digital environment, the needs of authors and creators, and the balances of fundamental rights when implementing enforcing mechanisms is needed. Meaningful, credible, independent research on the failures of measures currently imposed - or currently threatened - by injunction would be very helpful in improving harmonised enforcement and protecting fundamental rights. Furthermore, IPRED has worsened the imbalance between the public domain and claimants of IPR. In the current system, it is practically impossible to fight spurious claims of copyright on works that are in the public domain.

## D. Issues outside the scope of the current legal framework

**Note from the European Commission:** 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

**Note from the European Commission:** 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.

<b>Do you have experience with the involvement of intermediaries in the prevention of IPR infringements?</b>
Yes [v6236]

<b>This experience concerned which intermediary? [ Advertising service provider ]</b>

<b>This experience concerned which intermediary? [ Mobile apps marketplace ]</b>

<b>This experience concerned which intermediary? [ Contract manufacturing service provider ]</b>

<b>This experience concerned which intermediary? [ Press and media company ]</b>

<b>This experience concerned which intermediary? [ Business-to-business data storage provider ]</b>

<b>This experience concerned which intermediary? [ Online marketplace ]</b>

<b>This experience concerned which intermediary? [ Business-to-consumer data storage provider ]</b>

<b>This experience concerned which intermediary? [ Payment service provider ]</b>

<b>This experience concerned which intermediary? [ Content hosting platform ]</b>

<b>This experience concerned which intermediary? [ Retailer ]</b>

<b>This experience concerned which intermediary? [ Domain name registrar ]</b>

<b>This experience concerned which intermediary? [ Search engine ]</b>
Yes [Y]

<b>This experience concerned which intermediary? [ Domain name registry ]</b>

<b>This experience concerned which intermediary? [ Social media platform ]</b>
Yes [Y]

<b>This experience concerned which intermediary? [ DNS hosting service provider ]</b>

<b>This experience concerned which intermediary? [ Transport and logistics company ]</b>

**This experience concerned which intermediary?** [ Internet Access Provider ]

**This experience concerned which intermediary?** [ Wholesaler ]

**This experience concerned which intermediary?** [ Don't know ]

**This experience concerned which intermediary?** [ Other ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Copyright ]  
Yes [Y]

**Which IPR were covered by these voluntary cooperation schemes?** [ Rights related to copyright ]  
Yes [Y]

**Which IPR were covered by these voluntary cooperation schemes?** [ Community trademark rights ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Community design rights ]

**Which IPR were covered by these voluntary cooperation schemes?** [ National trademark rights ]

**Which IPR were covered by these voluntary cooperation schemes?** [ National design rights ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Patent rights (including rights derived from supplementary protection certificates) ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Geographical indications ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Rights of the creator of the topographies of a semiconductor product ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Plant variety rights ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Sui generis right of a database maker ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Trade names (in so far as these are protected as exclusive property rights in the national law concerned) ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Utility model rights ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Other ]

**Which IPR were covered by these voluntary cooperation schemes?** [ Don't know ]

**Do you believe that intermediary service providers should play an important role in enforcing IPR?**  
No [v6279]

**Please explain:** [1500 character(s) maximum ( characters used)]

Reliance on intermediary enforcement harms the rule of law by leaving enforcement in the hands of private companies, often based in multiple jurisdictions. In many cases, they do not have a strong incentive to defend the interests of their users; in light of the financial risks deriving from a claim of alleged IPR infringement from a powerful rightsholder, intermediaries often prefer to simply comply with such demands. Furthermore, intermediaries also lack full knowledge of relevant facts needed to assess the merits of such claims. As a result, intermediary enforcement often leads to overcompliance with meritless claims and, in a heavily unharmonised copyright framework in Europe, can lead to jurisdictional and applicable law problems.

This overcompliance can result in infringement of various fundamental rights exercised online. When user content is unnecessarily taken down, this can impact the freedom of expression. Injunctions, particularly for cross-border intermediaries in the online world, raise additional rule of law, proportionality and predictability questions. The chaos, particularly for smaller online entities, of trying to manage the uncertainty of national injunctions, injunctions being deliberately or accidentally applied across borders, actions taken on the basis of domestic or foreign liability risks or ad hoc "voluntary" enforcement measures should not be underestimated. See the Manila Principles on Intermediary Liability (<https://www.manilaprinciples.org>)

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

No opinion [v6310]

**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 [v6313]

**Please explain:** [1500 character(s) maximum ( characters used)]

Examples abound of unnecessary content restrictions directly resulting from misguided IP enforcement efforts. One famous example occurred when a video of a professor advocating for a stronger copyright was taken offline for alleged copyright infringement: - illustrating that even IPR experts acting in good faith cannot avoid excessive IP enforcement actions (<https://www.techdirt.com/articles/20140903/06114628400/premier-league-uses-copyright-to-pull-down-youtube-video-professor-advocating-stronger-copyright-premier-league.shtm>). Baseless requests can often achieve content takedown; Bits of Freedom in their 'Multatuli' project, showed that 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>). Even third party takedown requests based on the supposed IP rights of 'aliens from another planet' have been granted by major online intermediaries (<https://www.techdirt.com/articles/20150618/14264131389/tumblr-complies-with-dmca-takedown-requests-self-proclaimed-future-alien-another-planet.shtml>). The negligible degree of scrutiny with which many takedown requests are processed and (contrary to the balance always demanded by the CJEU) disproportionate lack of incentive to leave content online, allows them to be used as tools for censorship. Many examples of baseless and arguably malicious takedown can be found at <https://www.eff.org/takedowns> .

**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 [v6318]

**How could fundamental rights be negatively affected? [ Limitation of freedom of expression ]**

Yes [Y]

**How could fundamental rights be negatively affected? [ Limitation of freedom to conduct business ]**

Yes [Y]

**How could fundamental rights be negatively affected? [ Limitation of the right to due process ]**

Yes [Y]

**How could fundamental rights be negatively affected? [ Limitation to the dissemination of legal content ]**

Yes [Y]

**How could fundamental rights be negatively affected? [ Other ]**

Yes [Y]

**Please specify:** [500 character(s) maximum ( characters used)]

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:

[http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A\\_HRC\\_28\\_57\\_ENG.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_57_ENG.doc)

Lack of liability protections leads to deletion of legal content, "notice and takedown" removes the right to due process, removal of content due to foreign rules leads to all of the above restrictions, cross-border implementation of injunctions leads

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## D.2. Specialised courts

**Note from the European Commission:** 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.

<b>Do you have experience with courts, courts' chamber or judges specialised in IP matters in your country of residence?</b>
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No [v6338]
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<b>Does legal action at a court specialised in IPR matters provide an added value compared to legal actions at other courts?</b>
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No opinion [v6343]
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## D.3 Other issues

<b>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?</b>
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No opinion [v6356]
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## E. Other comments

<b>Do you have any other comments?</b>
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Yes [v6360]
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<b>Please explain:</b> [3000 character(s) maximum ( characters used)]
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The underlying cause of undercompliance with copyright and other IP laws is not a lack of enforcement powers, but the overreaching and unharmonised substantive law. "Ubiquitous" (Commission Communication COM(2010) 779 final) undercompliance reflects that the law is outdated, extreme, and lacks legitimacy in the eyes of the people. Lawmakers have turned ordinary citizens into lawbreakers - the ban on private copying in the UK is a particularly obvious example of this. Therefore, further expanding enforcement powers is a wrongheaded response. Rather than sacrifice fundamental rights in the misguided pursuit of full compliance with outdated laws, the Commission should re-evaluate copyright norms and adapt them to accord with contemporary technologies, practices, and values.<sup>[2]</sup>

Especially in light of the fundamental, substantive shortcomings in current intellectual property law, it is clear that the current enforcement framework is disproportionate. Contrary to the requirements set out by the Court of Justice of the European Union in *Scarlet v SABAM* (ECLI:EU:C:2011:771), the measures provided under IPRED do not strike a fair balance the aims of copyright enforcement and the protection of fundamental rights such as privacy and freedom of speech.

Reliance on enforcement by intermediaries further exacerbates the harm to fundamental rights resulting from the current framework, since they are incentivised to take even more invasive measures than strictly required by law. The CJEU's decision in *UPC Telekabel Wien* (ECLI:EU:C:2014:192) shows that, when implementing enforcement measures, an obligation to observe the 'fair balance'-requirement also rests on privately-owned intermediary services. However, this requirement is not yet adequately reflected in the IPRED framework or in its national implementations. One essential step in addressing the current imbalance and to introduce stronger protection for fundamental rights, is to reduce the reliance on enforcement by intermediaries. More research on effectiveness and proportionality of enforcement measures and mandatory review processes for injunctions are urgently needed.

Overall improvements may require measures falling outside the scope of the IPRED directive, such as strengthening and further harmonising the liability protections of intermediaries under articles 12-15 of the e-Commerce Directives. Furthermore, any proposal to introduce extra-judicial or contractually-regulated enforcement mechanisms should only be considered with the greatest scrutiny and with close involvement of civil society, so as to ensure that the sufficient safeguards for observance of fundamental rights form an integral part of such systems.