



Copyright Enforcement Against File Sharing & ISP Liability

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Privileged and Confidential

Illegal File Sharing – Facts & Figures

- » EU Top 5 Markets : 23% of active internet users visit unlicensed services (Source IFPI)
- » 7,7 million people illegally downloaded music on a regular basis in the UK in 2010 (Source BPI)
- » 1,2 bn tracks downloaded illegally in the UK in 2010 (Source BPI)

Illegal File Sharing – A Moving Target

SUPRNOVA
THE UNIVERSAL BITTORRENT SOURCE



File Sharing and Intermediaries

- » **Indexing & search services** (targeted at helping users to access unlawful material)
- » **Internet access providers** (pure mere conduit)

Indexing & Search

- » UK : Twentieth Century Fox v NewzBin (2010)
- » Sweden : The Pirate Bay (2009/2010)
- » Netherlands :
 - The Pirate Bay (2009)
 - Mininova (2009)
- » Germany : Rapidshare (2009/2010)

Indexing & Search

- » Cases closer to a hosting context
 - ⇒ Notice & take down

- » Conduct not “*merely technical, automatic and passive*” (see Case C-236/08 to C-238/06 Google Adwords)
 - ⇒ Restriction of liability of article 14 E-Commerce Directive does not apply

Internet Access

- » Denmark : Telenor / IFPI (2010)
- » Ireland : EMI/UPC Ireland (2010)
- » Netherlands : Brein/Ziggo (2010)
- » Belgium :
 - Scarlet/Sabam (2007)
 - BAF/ Telenet & Belgacom (2010)
- » Austria : VAP/UPC Austria (2011)

Setting the Stage

No liability for mere conduit

» Article 12,1 of Directive 2000/31 :

*“Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is **not liable** for the information transmitted (...)”*

Setting the Stage

Possibility of injunctions against IAPs

» Article 12,3 of Directive 2000/31 :

*“This article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to **terminate or prevent** an infringement.”*

» Article 8,3° of Directive 2001/29 :

*“Member States shall ensure that rightholders are in a position to apply for an **injunction against intermediaries** whose services are used by a third party to infringe a copyright or related right.”*

Setting the Stage

Possibility of injunctions against IAPs

» Article 11 of Directive 2004/48 :

“Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of Directive 2001/29/EC.”

IAP Intervention – Types of Measures

- » DNS Blocking
- » IP Blocking
- » Filtering
- » 3 strikes

IAP Intervention – Striking the Right Balance

- » Protection of intellectual property
- » Internet freedom, freedom to provide & receive information/ No (private) censorship
- » Protection of privacy
- » Fairness & affordable internet access
- » Net neutrality

IAP Intervention – Striking the Right Balance

» Proportionality :

- Article 8,1° of Directive 2001/29 : sanctions shall be “*effective, proportionate and dissuasive.*”
- Article 3 of Directive 2004/48 :
 - “*procedures and remedies shall be **fair and equitable***”
 - “*procedures and remedies shall be **effective, proportionate and dissuasive***”

IAP Intervention – Striking the Right Balance

- » Type of injunction :
 - Clearly identified obligation
 - Best endeavors v. guaranteed result
 - Periodic evaluation
- » Effectiveness
- » Cost of compliance :
 - Fairness and equity in terms of cost allocation
- » No market distortion
- » Collateral damage/impact on legitimate activities

IAP Intervention – Striking the Right Balance

» Future infringements

- Take down or keep down?
 - Cass. Fr, Google Video (2011)
- AG Jääskinen in Case C-324/09 *L'Oréal/E-Bay* :
 - No general obligation of surveillance (article 15 E-Commerce Directive)
 - Double requirement :
 - Same infringer
 - Same trademark

IAP Intervention – Striking the Right Balance

- » Fundamental freedoms/quality of the law
 - Opinion of AG Cruz Villalon,
 - Case 70/10, *Scarlet/Sabam* : Provisions of national law reflecting the wording of article 8.3 of Directive 2001/29 and/or article 11 of Directive 2004/48 are insufficiently clear and predictable to justify **filtering obligations** or **3 strikes obligations**

3 Strikes Policies

- » France (Hadopi), UK (DEA), Ireland
 - » Internet freedom provision (article 1.3.a of Directive 2002/21/EC)
 - Appropriate, proportionate and necessary
 - Adequate procedural safeguards including effective judicial protection and due process
 - Presumption of innocence & right of privacy
- => Legislative intervention always required

Conclusions

- » No de facto liability for content transmitted in a mere conduit context
- » No unjustified restrictions of fundamental rights and freedoms
- » Effectiveness, but also fairness, equity and proportionality



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