

Kluwer Copyright Blog

European Commission: two new IP-roadmaps

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What would be the ingredients of a magic formula for better IPR enforcement on the Internet? Has the time come for a horizontal harmonization for notifying and acting on illegal on line content? In a period where the ratification of ACTA is ranked highly in the political agenda of European governments, the European Commission is willing to pose the first bricks for the construction of a more effective policy for IPR enforcement and regulating illegal content. While the outcome cannot be predicted, it can be easily advanced that the task will not be an easy one.

This policy is briefly explained by two new roadmaps (the “[Proposal for a Revision of the Directive of Intellectual Property Rights](#)” roadmap and the “[Initiative on procedures for notifying and acting on illegal online content](#)” (Notice & Takedown) roadmap“ which give a first description of the planned Commission initiatives and set out the planned impact assessment work.

The main objective of the first initiative is the review of the Directive 2004/48 (the Enforcement Directive) in order to render it more clear and capable of effectively tackling with IPR infringements on the Internet. The second one aims to organize the procedures and the formalities of application of the regime of exoneration of liability of Internet intermediaries set by Directive 2000/31 (the “Ecommerce Directive”) and it has certainly a broader scope since it concerns all types of illegal content and not only IP infringements.

Even if the scope of application of the two initiatives is different, significant points of interrelation between them exist. Indeed, the two initiatives are complementary as regards IPR infringement on the Internet. The revision of the Enforcement Directive is aimed to deal with the perplexing issues of Internet infringement which have not been taken into consideration when the Directive was adopted. As it stated in the roadmap “the relative anonymity of the internet, its cross-border nature and its consumer- and user friendly services accessible from all around the globe have created an online environment where the infringers cannot be easily identified, digital evidence is hard to preserve, damages from internet sales are difficult to quantify and, after having been discovered, infringers quickly “re-appear” under a different name”.

Except for the clarification of conceptual flaws or lacuna of the Enforcement Directive, such as the definition of the concept of IPR infringement in a “commercial scale”, a significant part of the revision process concerns the role of intermediaries in the identification of those infringing intellectual property rights. The ECJ’s rulings in the *Productores de Música de España*

(Promusicae) v Telefónica de España SAU (case 275/06) and LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH (case C-557/07) confirmed the necessity to balance data protection and IPR under the light of the principle of proportionality, but it did not provide any clear guidance as regards the role of intermediaries in the identification of infringers that could serve as a basis for an harmonization on this issue. Another point of intersection is the possibility to act against webpages holding content that violates intellectual property rights. The E-Commerce Directive provides a scheme for the exemption of liability for certain internet intermediaries, on the basis that they act when notified of (alleged) illegal content. Nonetheless, these notice and take down procedures (NTD procedures) for removing or disabling access to illegal content by intermediaries upon notification are not regulated by the Directive as it is the case in the U.S. (Digital Millennium Copyright Act of 1998 (DMCA)).

Compared with the DMCA formalities, the European framework does not provide any specific requirements to rightholders and intermediaries as regards the format, the content and the identification of the provenance of the notice. As it can be deduced from recitals 16 and 40 of the Directive, self-regulation in this field was expressly promoted. Nonetheless, the lack of formalities led to a vast fragmentation of the existing national regimes of notice and take down procedures (see the [public consultation](#) on e-commerce and on the Ecommerce Directive).

Moreover, situations compromising freedom of speech made their appearance, since cases were reported that even works which have fallen in the public domain had been removed by ISPs upon a notification without any further investigation.

In this context, one of the main goals of the initiative is to ensure the transparency, effectiveness, proportionality and fundamental rights compliance of NTD procedures. Specifications of the NTD procedures such as the time for an intermediary to act following a notice, the need to inform or consult the provider of the alleged illegal information, the need for further transparency on NTD procedures, the consequences of submitting wrong notices and the instruments for removing or disabling access to illegal content will be addressed by the impact assessment.

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