



Europe

**GSMA Europe response to the European Commission
consultation on the Intellectual Property Rights Enforcement
Directive (IPRED)**

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About GSMA Europe

The GSMA represents the interests of the worldwide mobile communications industry. Spanning 219 countries, the GSMA unites nearly 800 of the world's mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, internet companies, and media and entertainment organisations. The GSMA is focused on innovating, incubating and creating new opportunities for its membership, all with the end goal of driving the growth of the mobile communications industry. In the European Union the GSMA represents over 100 operators providing more than 600 million subscriber connections across the region. For more information on GSMA, please visit: Mobile World Live, the new online portal for the mobile communications industry, at www.mobileworldlive.com, GSMA corporate website at www.gsmworld.com, and GSMA Europe at www.gsmeurope.org.

Executive summary

GSMA Europe is pleased to have this opportunity to contribute to the debate on the protection of intellectual property and the potential revision of the Directive on enforcement of intellectual property rights (IPRED). GSMA Europe members support the creative sector in a variety of ways, not least by providing convenient ways for end users to access digital content on their handsets and by encouraging the growth of consumption of legal offers as a result of close cooperation with new and inventive businesses providing digital content.

GSMA Europe believes that further work is needed to scope the real impact of IPRED on prevention of IPR infringement, and would like to underline the following points:

1. A more holistic and positive approach is required

GSMA Europe supports the need to foster creativity, but does not believe that a narrow focus on enforcement of rights holders' claims is the correct approach – regulators should rather focus on how to facilitate access to innovative, attractive offers which provide content to consumers on reasonable terms and conditions, and allow sustainable return on creators' investments. Mobile operators have been at the vanguard of offering attractive ways to use content, and have shown that consumers are keen to access creativity in legal manners.

2. More information on the actual impact of IPRED is needed

The evaluation report does not provide any concrete evidence of the need for the changes proposed in the conclusions, and relies on incomplete and partial information from the Observatory on Counterfeiting and Piracy.

IPRED has only been in place at national level for a short time, and GSMA Europe members have not been informed so far of any considerable problems with the way in which the Directive operates in their markets. Indeed, the report itself points out that the "*first evaluation of the impact of the Directive shows that noteworthy progress has been made since it was adopted and implemented in the Member States.*"¹ The main issues according to the findings of the report rather seem to point to a lack of clear and consistent implementation of the Directive into national law.

3. Counterfeiting and piracy require different solutions

The evaluation report does at least uncover the reality that counterfeiting and piracy are different phenomena, and require different approaches. This does not require a wholesale change in legislation, but improved harmonisation on definitions and more proportionate use. A sustainable and long-term solution is one which encourages legal and attractive legal offers to emerge.

4. Fundamental rights should not be amended for the sake of one sector, and balancing them is a job for the law, not private entities

The tension between rights to information and rights of privacy should not be dealt with in a revision of IPRED – these fundamental questions must be decided upon by judicial authorities, and should not be determined by private actors, particularly those who have to

¹ Executive summary of Commission Evaluation report on IPRED, 2010

balance the claims of rights holders with potentially competing legal obligations placed upon them (e.g. with the Data protection and eCommerce Directives).

The report rightly recognises that there are clear rules set out in the e-commerce Directive (2000/31/EC) limiting the liability of intermediaries in this sphere, and GSMA Europe believes that the current balance has been crucial in fostering the growth of the Internet and related activities, and is why these principles should not be altered.

5. A more holistic and positive approach is required

GSMA Europe supports the need to foster creativity, but a narrow focus on enforcement of rights holders' claims is not the correct approach – regulators should focus on how to facilitate access to innovative, attractive offers which provide content to consumers in ways they want, and allows sustainable return on creators' investments.

The evaluation report on the implementation of IPRED focuses heavily on the alleged problems faced by rights holders in pursuing infringements via the tools contained in the Directive. However, GSMA Europe urges the Commission to examine the issue in a wider context, particularly in the case of online copyright infringement. The only sustainable answer according to GSMA Europe is a solution based on legal content being available to consumers in innovative and attractive ways, which reduces the demand for illegal methods. Mobile operators have led the way in enabling legal offers in the past, and consumers have shown a willingness to pay for content if it is made easy and interesting to buy. We are working to continue that trend, but found that content service providers are hampered by the lack of co-operation from collective rights managers and rights holders in facilitating the creation of new ways to sell and distribute creative content.

GSMA Europe therefore welcomes the forthcoming IP strategy from DG Internal Market, which provides a possibility to take a more holistic and long-term approach, balancing the need for protection of IPR with the imperative of liberalising and re-invigorating the market for legal offers. Mobile operators have been in the vanguard of this market, and have shown that consumers are willing to pay for legal content offers, if they are made attractive and easy to access. The ringtone market at its peak in 2007 was worth over \$7 billion – while this has now declined, the growth of music and applications consumed via handsets is estimated to reach \$54 billion by 2015².

6. More information on the actual impact of IPRED is needed

“[T]he Commission has not been able to conduct a critical economic analysis of the impact that the Directive has had on innovation and on development of the information society, as provided for in Article 18 of the Directive.”³

The basis for the evaluation report leaves much to be desired in terms of impact assessment. The Commission was tasked by article 18 of the Directive to produce a report, based on reports from national authorities. These reports have been submitted by only a portion of Member States, and by the Commission's own admission are of varying quality.

² *Mobile Entertainment Strategies: Markets, Opportunities and Forecasts 2011-2015*, Juniper Research, March 2011

³ Evaluation report, page 5

This is mainly owing to the late transposition of the Directive in some countries, and so indicates that the time is not yet right to carry out an analysis of IPRED's impact.

The lack of concrete evidence from national authorities has been addressed by a consultation of the Observatory on Counterfeiting and Piracy, but GSMA Europe disagrees with the assertion that this is a full consultation of the relevant stakeholders. The legal sub-group is almost entirely made up of rights holders' representatives, and none from the telecommunications and ISP sectors. GSMA Europe has repeatedly requested to join the sub-group, but these requests have been ignored by the Commission. If intermediaries are as important an element in the fight against IPR infringement as is stated in the evaluation report, this does not appear to be reflected in the actions of the Commission in its consultation processes.

Had GSMA Europe and its members been consulted, the picture presented may well have been different. Mobile operators have found few problems with the implementation of IPRED – Indeed, the report itself points out that the *“first evaluation of the impact of the Directive shows that noteworthy progress has been made since it was adopted and implemented in the Member States.”*

However, any reform of the Directive needs to recognise two essential facts:

7. Counterfeiting and piracy require different solutions

Counterfeiting is a serious issue, with potential negative impact on consumers' safety and health. It is often run by organised groups, and is aimed to abuse the intellectual property of others in order to make a profit.

Online copyright infringement is sometimes also run by organised groups for profit, but is mainly carried out by individuals sharing files between them. GSMA Europe does not condone either activity, but recommends that a difference is made between the two phenomena and the solutions thereto. As stated above, the approach which we see as the only long term answer to online copyright infringements is the positive growth of attractive and consumer-friendly content offers. Facilitating the imposition of injunctions or other obligations on intermediaries will not solve the problem: it will create more confusion about the liabilities involved in providing access to the valuable resource of the Internet, and hinder the growth of access as ISPs and intermediaries attempt to protect themselves from misapplications of the injunctions.

8. Fundamental rights should not be amended for the sake of one sector, and balancing them is a job for the law, not private entities

The evaluation report cites rights holders' difficulties in gaining access to information about infringers because of the rights to information are granted “very restrictively” by national legal systems. While this may be an inconvenience to tracking and punishing illegal filesharers, these laws are rooted in EU Directives, particularly in the case of GSMA members' responsibilities. The Directives on Data Protection, Data Retention Directive, ePrivacy and eCommerce have shaped a framework within which ECS providers such as mobile operators must treat their customers' data. Protection of personal data, right to privacy and right to confidential communications are core principles of the information society and they should not be impaired by creating disproportionate measures combating illegal file sharing.

Any measures touching these rights should be clearly defined and should remain a matter of competent judicial authority – not a matter of private entities. Legal clarity is key for GSMA Europe's members in this field. Moreover, the use of any measures need to be proportionate and effective, so measures like a general P2P filter or certain blocking techniques are not only contrary to principles of law, but are also not the right solutions from a technical or practical point of view.

These rights to privacy and protection of personal data are valuable to our customers, and an important element of European identity. If the EU institutions wish to revise the balance between the rights to information and privacy, then in the interests of creating a consistent legal framework this should be carried out within the current discussions on revision of the general Data Protection Directive, and not within IPRED to deal with a sectoral problem. All intermediaries can play a role, including other internet players, websites and social networks. These are mentioned in the report, but then ignored in the sections which consider potential future scenarios. A consistent set of obligations, under the Data Protection Directive, would make for a clearer delineation of roles for each actor, private and public, in rights holders' attempts to access private data.