

## INTERMEDIARIES

### (1) What kind of intermediary service do you provide?

Other: please specify

EDiMA represents online platforms and innovative technology companies including: comparison sites, social networks, online market places, ecommerce platforms, online payment service providers, search engines, and Internet companies amongst others.

### (9) How did IP infringements develop over last 10 years?

Decreased	Increased
Unchanged	Don't know

Please provide detail (1500 max)

Methods to tackle IP infringing and counterfeit goods have developed significantly over the last 10 years with greater emphasis placed on achieving a balanced approach to better informing and preventing consumers from purchasing IP infringing content/counterfeit goods, which has resulted in a decrease in infringements.

For example, in less than 10 years, legal digital music downloads have increased significantly (iTunes went from 0 to 25 bn songs sold) and streaming services emerged as news source of growth (Spotify has now paid over \$1 billion in royalties to-date and YouTube has now paid over \$1 billion to the music industry). Case law has also demonstrated that progress is being made to protect both businesses and consumers. E.g. the Rolex case, (C-98/13) the Court confirmed that a trademark owner can prevent the import of fake products into the EU regardless of whether these were actively marketed to the EU consumer.

Online services provide revenue and marketing opportunities for artists, publishers and copyright owners. Digital music sales are rising and new products/services are continuously emerging to produce revenues for copyright holders and make great strides against IP infringing content, online piracy and counterfeiting with legal online offers deterring piracy and creating less restrictions on consumers which in turn divert users away from piracy and IP infringing content.

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

This section aims to provide the Commission with stakeholder' views, opinions and information about the functioning of the overall enforcement framework and of key provisions of IPRED.

### (10) Do you think that the existing rules have helped effectively in protecting IP and preventing IP infringements?

Yes	No	No opinion
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Please explain. (1500 max)

Existing rules have helped to develop methods to effectively protect, prevent and tackle IP infringements. For examples, new services are making great strides against IP infringing content, online piracy and counterfeiting with legal online offers deterring piracy and creating less restrictions on consumers which in turn divert users away from piracy and IP infringing content. (See latest Ofcom study on content which highlight that illegal consumption of music and video is falling consistently and is expected to reach 10% by 2018

<http://stakeholders.ofcom.org.uk/binaries/research/internet/online-content/online-content-study-010316.pdf> )

Also, within the existing rules companies have implemented methods and processes that make it easier to notify IP infringements. Such measures taken by companies concerning notice and takedown procedures of IP infringements are most effective if approached constructively by all parties involved.

**A.1. Measures, procedures and remedies provided for by IPRED**

Responses to this section should be based on the overall experience with the measures, procedures and remedies provided for by IPRED as implemented and applied at national level. If appropriate please specify in your response, to the extent possible, particular national issues or practices and the jurisdiction concerned.

**C.2.3. Provisional and precautionary measures and injunctions (Articles 9 and 11)**

**(50) Should the Directive explicitly establish that all types of intermediaries can be enjoined?**

Yes	No	No opinion
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Please specify why or why not. (1500 max)

Existing rules already address the possibility to issue injunctions against intermediaries whose services are used by a third party to infringe IP rights (e.g. Art. 9 Enforcement Directive) with no limitation as to the type of intermediary and we do not see a need to change the current wording, which already potentially covers all types of intermediaries. We would also like to stress that the goal to stop online IPR infringements could often be more successfully achieved through instruments of self and co-regulation (eg. the so called ‘follow the money’ approach) and the use on the part of IP right holders of the measures of notice-and-action made available by most online intermediaries.

**(51) Should the Directive explicitly establish that no specific liability or responsibility (violation of any duty of care) of the intermediary is required to issue an injunction?**

Yes	No	No opinion
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Please specify why or why not. (1500 max)

The current liability regime of the e-commerce Directive is the best option to allow businesses and consumers to benefit from further growth and innovation in the digital economy and the realisation of a Digital Single Market for Europe. This holds true regarding whether to revisit the existing categories of intermediary services. The key advantage of the e-commerce Directive is its technological neutrality, making it able to adjust to new developments in an ever evolving market. There is no doubt that technologies have evolved and that some intermediaries have more capacity of action. However this does not change the rationale of the intermediaries' liability regime. In other words, it's not because access providers can stop unsolicited mails that they can become liable for all forms of content they carry. Diverging case law at the national level is due to local legal specificities that arguably aren't compatible with the principles of the e-commerce directive, for example the peculiar duty of care ("Störerhaftung") regime in Germany. As well, rightholders should be required to provide specific URLs for the infringing content and it should not be sufficient to provide generic notifications as online intermediaries should not be subjected to any proactive monitoring obligation, as made clear by Art. 15 of the E-Commerce Directive and clarified by the CJEU in C-70/10 (Scarlet v SABAM) and C-360/10 (SABAM v Netlog).

**(52) Should the Directive explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at bringing to an end infringements already committed against IPR using their services, but also at preventing further infringements?**

Yes	<b>No</b>	No opinion
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Please specify why or why not. (1500 max)

An intermediary should not be subjected to proactive monitoring obligations, as made clear by Art. 15 of the E-Commerce Directive and clarified by the CJEU in C-70/10 (Scarlet v SABAM ) and C-360/10 (SABAM v Netlog). Such general monitoring obligations were both inconsistent with the letter of the E-Commerce Directive and with important underlying rights of users, including the rights of freedom to conduct business, freedom of expression and access to information.

In addition, even if an intermediary had the technical capacity to put in place stay down measures, it would have no effect. The content would quickly be available somewhere else (on a site that does not play by EU rules) and users would still be able to access it. A stay-down requirement would provide significant technical challenges. Even if an automated filter is applied to service, it would need be based on an algorithm with defined parameters. All an infringing party needs to do is change one or two variables to the content for it to go undetected.

The principle that intermediaries have no general obligation to monitor the information that they transmit or store nor a general obligation to seek facts or circumstances indicating illegal activity is vital for information society services to flourish and the Internet to work. Without it, many services that exist today would not be possible (see: [Copenhagen Economics, Online intermediaries impact on EU Economy, commissioned by EDIMA, 2015](#)).

**(53) In that respect should the Directive establish criteria on how preventing further infringements is to be undertaken (without establishing a general monitoring obligation under the E-Commerce Directive)?**

Yes	No	No opinion
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Please specify why or why not. (1500 max)

Innovation and technological evolution requires flexible solutions, which are best realised through either co and self-regulation or industry's best practices, including the voluntary application of measures to prevent certain type of infringements.

**(54) Do you see a need for criteria defining the proportionality of an injunction?**

Yes	No	No opinion
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Please specify why or why not. (1500 max)

IPRED provides for injunctions against intermediaries in art.11 & lays down minimum legal conditions in art.3 that must be adhered to by national courts when formulating injunctive measures.Pursuant to this provision,injunctions must be effective,proportionate & dissuasive & shall be applied in a manner avoiding the creation of barriers to legitimate trade.According to art.3(2) of IPRED art.12-15 of eCommerce Dir. shall not be affected. Art.15 of the e-Commerce Dir. states no general obligation to monitor information may be imposed on intermediaries.These minimum legal conditions mean that injunctions against intermediaries must always relate to specific,clearly defined individual content.E.g. Dutch Court of Appeal dismissed Stokke's claim for injunctive relief against Marktplaats on the ground that the proportionality requirement was not met.Stokke requested an injunction obliging Marktplaats to remove all listings showing IPR infringing children's chairs & where the word Tripp Trapp is mentioned.Marktplaats would have to spend several times the amount potentially saved by Stokke to implement filters & review listings manually.The Court concluded that this injunction would not be proportionate. Therefore, the criteria to define the proportionality would be best developed by the courts ensuring that fundamental rights of the rights owners,intermediaries &users are carefully balanced with a focus on ensuring proportionate, correct & harmonised implementation throughout the EU.

**(55) Do you see a need for a definition of the term "intermediary" in the Directive?**

Yes	No	No opinion
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Please specify why or why not. (1500 max)

Although the IPRED directive does not currently define intermediary, 'Internet society services' as defined in Directive 98/34/EC and used within a number of Directive (including e-Commerce Directive, InfoSoc & ePrivacy Directives) provides a solid framework and definition that will avoid diverging interpretations and applications of the rules against intermediaries in the Member States and limit the diverging interpretations across legislation. Keeping in mind that innovation and technological evolution requires flexible solutions, attempting to define 'intermediary' within the context of the current digital landscape would become irrelevant through the evolving pace of innovation and technology.

**(56)Do you see a need for a clarification on how to balance the effective implementation of a measure and the right to freedom of information of users in case of a provisional measure or injunction prohibiting an internet service provider from allowing its customers access to allegedly IPR infringing material without specifying the measures which that service provider must take?**

Yes	No	No opinion
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Please specify why or why not. (1500 max)

An intermediary should not be subjected to proactive monitoring obligations. As confirmed by the recent Court of Justice of the European Union decisions (SABAM v. Scarlet and SABAM v. Netlog), such general monitoring obligations were both inconsistent with the letter of the E-Commerce Directive and with important underlying rights of users, including the rights of freedom of expression and access to information. Requiring online services to monitor every piece of content or imposing harsh liability would be bad for innovation, free expression, and privacy. This is analogous to the offline world; telephone companies are not forced to monitor people's calls to make sure they are not doing something illegal, and they are not held legally responsible for callers who plan a crime over their phone lines. The liability regime of the e-commerce Directive (Art. 12-15) remains fit for purpose and necessary for the functioning and growth of online intermediaries and the EU economy. In addition, if a service were automatically liable for illegal content, it would be much more likely to remove all sorts of controversial (though legitimate) speech, for fear of facing legal penalties. The intermediary liability regime is a standard that can be found in several legislations (US, CA, JP, AU, etc.). It would be a fundamental problem for internet commerce if companies can be subject to a more severe liability regime in Europe, and in particular a burden on European start-ups that could not compete on the same basis as companies abroad.

**(57) Do you see a need for other amendments to the provisions on provisional and precautionary measures and on injunctions?**

Yes	No	No opinion
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If "yes" please specify. (1500 max)

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**C.2.4. Other issues**

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

Yes	No	No opinion
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Please explain. (3000 max)

EDiMA believes that no substantive changes are needed to the IPRED, and notes that the IPRED was adopted at a time when the IPR issues relating to the Internet were well understood. Implementation at Member State level has also been successful and EDiMA urges the Commission to ensure that the IPRED continues to be applied across the EU in a proportionate and efficient manner and in full compliance with the principles of the E-commerce Directive regarding limited intermediary liability, in particular the prohibition on general monitoring obligations.

**B. Issues outside the scope of the current legal framework**

**B.1. Role of intermediaries in IPR enforcement and the prevention of IPR infringements**

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

Yes	No	No opinion
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If "no": Please explain. (1500 max)

ISPs work closely with stakeholders across the value chain towards a highly functional IPR policy, eg by developing systems allowing right owners(RO) to notify infringements of their rights, providing innovative technical solutions to help RO to better ensure the protection of their rights online & providing clear/effective procedures to take down illegal content online. ISPs provide commercial & technical solutions to harness opportunities/address emerging challenges in a fast-changing online environment. ISPs continue to support greater collaboration between all stakeholders to address emerging challenges & are committed to cooperating towards the goal of promoting opportunities offered by the online environment to ensure consumers enjoy the widest choice of legitimate products & services. There is a vital need to rely on a measured liability regime in order to provide online services in an efficient/coherent manner. Therefore, preserving & improving the regulatory framework governing ISPs in the EU will underpin the economic growth generated by online intermediaries. Any adverse changes to the current liability regime including increased legal obligations on intermediaries could have severe impacts on innovation, creativity & economic activity of online intermediaries, putting the added economic value at risk. Any changes to the liability regime must be balanced and future proof to ensure that online intermediaries maintain the flexibility to adapt & develop to future challenges.

If "yes": In your opinion which intermediaries are best placed to prevent infringements of IPR?

Advertising service provider <sup>1</sup>	Mobile apps marketplace
Contract manufacturing service provider <sup>2</sup>	Press and media company <sup>3</sup>
Business-to-business data storage provider <sup>4</sup>	Online marketplace
Business-to-consumer data storage provider <sup>5</sup>	Payment service provider
Content hosting platform <sup>6</sup>	Retailer
Domain name registrar	Search engine
Domain name registry	Social media platform
DNS hosting service provider	Transport and logistics company
Internet Access Provider	Wholesaler
Other: please specify (500 max)	No opinion

We encourage and stress the necessity of the continued cooperation and multi-stakeholder approach across the entire ecosystem to prevent infringements of IPR.

<sup>1</sup> Advertising agencies, advertising broker.

<sup>2</sup> Contract manufacturing is an outsourcing of certain production activities previously performed by the manufacturer to a third-party. This may concern certain components for the product or the assembly of the whole product.

<sup>3</sup> Newspaper, broadcaster.

<sup>4</sup> Data storage space and related management services for commercial user.

<sup>5</sup> File-storing or file-sharing services for personal media files and data.

<sup>6</sup> Platforms providing to the user access to audio and video files, images or text documents.

**(60) Do you cooperate with rightholders or rightholders' association in the protection and enforcement of IPR?**

Yes	No
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If "yes": Which intermediaries do you cooperate with?

- Advertising service provider
- Business-to-business data storage provider
- Business-to-consumer data storage provider
- Content hosting platform
- Contract manufacturing service provider
- DNS hosting service provider
- Domain name registrar
- Domain name registry
- Internet Access Provider
- Mobile apps marketplace
- Online marketplace
- Payment service provider
- Press and media company
- Retailer
- Search engine
- Social media platform
- Transport and logistics company
- Wholesaler
- Other (500 Max)

[YouTube Content ID](#), which enables right holders to fully control their content on YouTube.

[eBay's Verified Rights Owner \(VeRO\) Program](#) allows intellectual property rights owners to ask eBay to remove certain listings that offer items or contain materials that infringe on their IPR.

[Allegro's Rights Protection Cooperation Programme](#) (with over 1500 Polish and Global brand owners registered) eliminates auctions with items and services infringing the law.

**(61) The cooperation covers the following IPR**

Copyright	Trademark rights
Design rights	Geographical indications
Patent rights	Other: please specify (500 max)
All IP rights	Don't know

**(62) In which form do you cooperate with these rightholders**

Bilaterally	Within a multilateral cooperation agreement
Other: please specify (500 max)	

Please explain (provide detail and reference) (1000 max)

At the EU level, right holders and intermediaries continue to cooperate extensively within the context of the European Observatory on Infringements of intellectual property rights as part of the Office for Harmonisation in the Internal Market. As well, through a number of European Commission led initiatives such as stakeholder groups on IPR and MoUs (e.g. MoU on online sales of counterfeit products). EDiMA members also implement a number of voluntary actions to improve the functioning of notice-and-take-down systems (e.g. eBay's Verified Rights Owner (VeRO) Program which allows intellectual property rights owners to ask eBay to remove certain listings that offer items or contain materials that infringe on their intellectual property rights, and Allegro's Rights Protection Cooperation Programme (WOP-Współpraca w Ochronie Praw), which focusses mainly on the protection of trademarks and copyright and YouTube Content ID, which enables right holders to fully control their content on YouTube.)

**(63) Do you consider your cooperation with rightholders successful?**

Yes	No	No opinion
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If "yes": What are the elements for a successful cooperation between rightholders and intermediaries? Please explain. (1000 max)

The elements for successful cooperation between right holders and intermediaries involve mutual trust and a common understanding of respective industries and technology.

If "No": Why do you not cooperate with rightholders?

Not aware of the possibility	Costs
Negative experience	Other: please explain

**(64) 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)	Technology
No opinion	
Specific regulatory requirements	Other: please explain (1500 max)

Ways to overcome some of the challenges faced in establishing successful cooperation between rightholders and intermediaries are to ensure an inclusive approach and the involvement of the entire ecosystem and to outline and identify the issues that need to be tackled to guarantee the correct tools and laws are utilized to their full potential.

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

Yes	No	No opinion
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If 'yes': 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 explain (500 max)	

**(66) Other comments on the role of intermediaries in IPR enforcement and the prevention of IPR infringements:**

3000 character(s) maximum

Online intermediaries already work closely with stakeholders across the value chain towards a highly functional IPR policy, for example, by developing systems allowing rights owners to notify infringements of their rights, providing innovative technological solutions to help rights owners to better protect their rights online and providing clear and effective procedures to take down illegal content online. Intermediaries provide commercially and technologically practical solutions to harness the opportunities and address the challenges that emerge in a fast-changing online environment. We continue to support greater collaboration between all stakeholders to address emerging challenges and is committed to cooperating towards the objective of promoting the opportunities offered by the online environment to ensure online consumers enjoy the widest possible choice of legitimate products and services.

**B.2. Other issues**

**(67) 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
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Please specify (3000 max)

Online intermediaries play a crucial role and an important enabling function in Europe's economy, in both online and offline industries.

Preserving and improving the regulatory framework governing online intermediaries in the EU will underpin the economic growth generated by online intermediaries. Conversely, any adverse changes to the current liability regime – including increased legal obligations on intermediaries – could have adverse impacts on innovation, creativity and the economic activity of online intermediaries, putting the added economic value at risk. Any improvements to the liability regime must be balanced and future proof to ensure that online intermediaries maintain the flexibility to adapt and develop to future challenges.

Today, the current liability regime is enshrined in Art. 12-15 of the EU's Directive 2000/31/EC on electronic commerce (henceforth the e-Commerce Directive). The e-Commerce Directive provides a sensible legislative framework for online intermediaries in Europe, which includes search providers, e-commerce platforms, social networks and cloud computing providers. The current legislative landscape recognises that through ensuring a well-functioning and future-proof legislative environment allows online innovation and new-business models to prosper and flourish within Europe.

This is achieved through ensuring a balanced approach that both protects online intermediaries from liability for the misuse of their services by users and third parties, as costs associated with general monitoring would hinder the generation of new online entrepreneurs and start-ups and stifle competition and future growth in the European online sector, and allows the intermediary to act expeditiously to remove or disable access to illegal information upon receiving actual knowledge of it, as on the other hand unlimited liability for monitoring illegal content and goods online is not a practical or realistic approach in the online world.

The limited liability regime is not only necessary for the functioning and growth of online intermediaries, but it is also beneficial to the European economy as a whole. With an overall growth rate of 10% per year since 2013, online intermediaries continue to facilitate the exchange of goods and services in the online environment, bringing together different types of users in order to enable social and economic interaction. ([Online Intermediaries: Impact on the EU economy, Copenhagen Economics, 2015](#))

If there were to be enforcement changes to IPRED or the limited liability regime provided within the e-commerce Directive this would also hold serious implications on both the law applicable to contractual obligations under Rome I and jurisdictional requirements under Brussels I regulations.

Indeed the current EU's liability regime provides the basis for online intermediaries to run and develop their activities – technically and commercially – and the intermediaries' contribution to the economy would not be possible at the current level without the liability regime as it is currently designed.

### C. Do you have any other comments?

Yes	No
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Please specify (3000 max)

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