



**Position of the Net Users' Rights Protection Association
(NURPA)**

on

the Report from the Commission regarding the application of the Directive
2004/48/EC of the European Parliament

and

the Council of 29 April 2004 on the enforcement of intellectual property rights
(COM (2010) 779 final)

Net Users' Rights Protection Association

Identification number in the register: 80339855034-02

Introduction

The Net Users' Rights Protection Association (NURPA) highly appreciates the opportunity to comment on the European Commission's report.

The NURPA is a Belgian advocacy group which promotes and protects digital rights and the founding principles of the Internet. Since technologies increasingly influence our lives as citizens, consumers, artists and professionals, the NURPA defends fundamental rights and freedoms in the networked world wherever they might come under attack. As a non-profit organization, the NURPA is dedicated to the protection of online freedom of expression, privacy, digital rights and civil liberties.

As such, the NURPA welcomes the efforts of the European Commission to adapt to technological developments in the domain of copyright and to find the fair balance between the various rights at stake.

However, the NURPA has several serious concerns regarding the scope of application of the Directive, the closer involvement of intermediaries, the one-sided approach to policy making in the domain of copyright, the absence of a critical economic analysis and the lack of future-oriented and sustainable cultural policies.

I. What should be the scope of the Application?

The NURPA objects to the European Commission “one size fits all” approach. There is no doubt that infringement of intellectual property concerning physical goods such as medical products pose indeed a danger to consumers’ health and safety.

The NURPA does not agree with the European Commission's approach that non-commercial infringements, such as file sharing, have exactly the same consequences for consumers and the society as profit-motivated willful infringements.

Every day, millions of users engage in legal and illegal file sharing on the Internet. If no clear distinction is being made between non-commercial and commercial infringements, there is a risk of seeing adolescents' actions countered with means suited for fighting organised crime. This should not be an “accidental” byproduct of the Directive.

As a consequence, the NURPA is strongly against enforcements and criminal sanctions for consumers and Internet users not seeking to make a profit in order to combat digital piracy.

Recommendations:

The European Commission should make a distinction between commercial and non-commercial infringements. The motivation and socio-economic impact of infringements have to be taken into account. When it comes to file sharing, the Commission should objectively weigh whether the infringers are reducing the profits of the rights holders and society as a whole. The Directive should hence focus on profit-motivated willful infringements.

II. For an evidence-based approach

The European Commission's report COM (2010) 779 states that

“(...) the 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.”

Despite this, the report also stresses that the “alarming” volume of intellectual property infringements is causing “widespread economic harm” and thus gives the impression of a one-sided approach to a review of the Directive. Nevertheless, many other and equally important interests have to be considered when it comes to a modern approach to intellectual property policy-making: there are users, creators, rights holders and content industries. Neither interest should predominate within the legal framework.

Historically, copyright law is not designed for the sole purpose of providing revenue streams for copyright holders.¹

The Commission confidently cites studies by the industry in order to highlight the effect of “file sharing” on the creative economy. The NURPA feels it is important to stress that a

1. R. Deazley, *The Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)* (Oxford: Hart Publishing, 2004)

misleading character has been given, through the failure to invest in an analysis of independent and rigorous research, to the sharing of knowledge and culture on the Internet often pejoratively labelled “piracy”. This semantic shift has led to a zealous approach to enforcement, to the criminalisation of citizens and the marginalisation of consumer rights.

Nonetheless, independent studies on the impact of file sharing exist and often prove its neutral or even positive effects on the creative economy:

- A study by the United States Congress Government Accountability Office (GAO) published in April 2010 indicated that downloading illegal music can have a positive effect on total consumer welfare: “Some experts we interviewed and literature we reviewed identified potential positive economic effects of counterfeiting and piracy. (...) Consumers may use pirated goods to ‘sample’ music, movies, software, or electronic games before purchasing legitimate copies”;²
- In 2010, the Strategic Advisory Board for Intellectual Property (SABIP) published a report which argued that the wider “welfare” benefit of digitisation to citizens and consumers has not received enough attention partly because the data available often relates to industry revenue. The report suggests that “...in order to inform copyright policy, it is not sufficient to establish that so-called ‘piracy’ harms existent rights holders”;³
- A report published in March 2011 by University of Minnesota economist Joel Waldfogel shows that file sharing has led directly to “reduced costs of bringing works to market and a growing role of independent labels”. It proves how illegal as well as legal file sharing has led more artists to create more music;⁴
- “Weaker copyright protection, it seems, has benefited society” write Harvard Professor Felix Oberholzer-Gee and University of Kansas Professor Koleman Strumpf in their study “File sharing and copyright”. They conclude that “Data on the supply of new works are consistent with our argument that file sharing did not discourage authors and publishers”.⁵

These might be contested figures but the studies above are meant to demonstrate that the wide range of academic opinion regarding the effects of file sharing on the economy is not reflected in contemporary policy-making.

This problem is also raised by Loren Yager, Director for International Affairs and Trade, Government Accountability Office (GAO). In his report to the World Intellectual Property Organisation Advisory Council on Enforcement in December 2010, he highlights the lack of data as the “primary challenge for quantifying economic impacts of counterfeiting and piracy”.⁶

2. “Intellectual Property: Observations on efforts to quantify the economic effects of counterfeit and pirated goods”, United States Government Accountability Office, 12 April 2010, (p.14) available at <http://gao.gov/products/GAO-10-423>

3. “The economics of copyright and digitisation: A report on the literature and the need for further research”, Christian Handke, SABIP, 2010, (p.12 and p.65) available at <http://ipo.gov.uk/ipresearch-economics-201005.pdf>

4. “Bye, Bye, Miss American Pie? The Supply of New Recorded Music since Napster”, Joel Waldfogel, The Carlson School and Department of Economics University of Minnesota and NBER, 3 January 2011, available at http://tc.umn.edu/~jwaldfog/pdfs/American_Pie_Waldfogel.pdf

5. “File sharing and copyright”, Felix Oberholzer-Gee and Koleman Strumpf, 12 January 2010, (p.1) available at <http://musicbusinessresearch.files.wordpress.com/2010/06/paper-felix-oberholzer-gee.pdf>

6. Observations on efforts to quantify the economic effects of counterfeit and pirated goods, Loren Yager, World Intellectual Property Organisations, Advisory Council on Enforcement, Sixth Session, December 2010, available at http://wipo.int/meetings/en/doc_details.jsp?doc_id=143312

Recommendations:

The Commission should seek the advice of civil society experts and representatives from all interest groups, not just representatives from rights holders industries.

The NURPA recommends that the European Commission ensures that independent technology experts are involved and undertakes rigorous research.

The NURPA also recommends that findings of independent studies suggesting that creativity, innovation and the society in general may benefit from emerging trends in consumer behaviours - such as file sharing - are taken into account.

III. The concept of intermediaries and the workability of injunctions

The European Commission's report states the following:

“Given intermediaries' favourable position to contribute to the prevention and termination of online infringements, the Commission could explore how to involve them more closely.”

The European Commission seeks to increase intermediary liability and to impose obligations on Internet intermediaries to filter content for potential copyright-infringing material. By doing so, the European Commission circumvents the exemptions provided to technical intermediaries by the Electronic Commerce Directive adopted in 2000.

This however, might encourage Internet intermediaries to take potentially overbroad action, for example monitor and surveil all communications, to reduce their exposure to liability.

Nevertheless, mandating copyright filtering by Internet service providers will be technologically ineffective because it can be defeated by use of encryption⁷. Any effort to introduce network level filtering will most probably involve deep packet inspection of citizens' communications. The NURPA has therefore considerable concerns regarding citizens' civil liberties, privacy rights and the future of Internet innovation. As access providers, Internet service providers should not listen in on calls or read mails in the same way as the Postal services should not read the mail they deliver.

The limitation of intermediary liability is hence essential for the protection of fundamental rights and freedoms, such as freedom of information, freedom of expression, as well as the rights to privacy and the protection of personal data.

Recommendations:

The NURPA recommends that the European Commission preserves limitations on liability for Internet intermediaries and clarifies that they should not be considered to have “actual knowledge” or requiring them to takedown content unless they have received a court order.

7. “MI5 comes out against cutting off internet pirates”; The Times, October 2009, available at <http://timesonline.co.uk/tol/news/uk/crime/article6885923.ece>

The European Commission should uphold Article 15 of the Electronic Commerce Directive which provides that Internet intermediaries do not have to look for evidence of potentially infringing content on their networks to get the benefits of the limitation on liability.

The Commission should also evaluate the impact of takedown notices on citizens' fundamental rights of expression and right to private life and communication.

The Commission should actively not only defend but protect network neutrality as a necessary prerequisite for a healthy digital market.

IV. Criminal sanctions for Copyright Infringements

Trade mark counterfeiting and copyright infringement are already forbidden in European countries. On a world-wide scale, the TRIPS treaty sees to that:

“Art. 61: Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.”

The European Commission states in its report that measures, procedures and remedies “must be effective, proportionate and dissuasive”. However, measures such as “three strikes” in the United Kingdom or the French “HADOPI law” are likely to cause significant collateral harm to consumers.

- Repressive measures are not effective since Internet users turn to alternatives such as streaming or direct downloads. For instance, after the HADOPI law came into force, the number of French users of the direct download site Megaupload.com has increased from 350,000 per month in August 2008 to more than 7,4 millions in November 2010.⁸
- They are disproportionate since an entire family, an independent professional or a company can be penalized for the actions of a single individual at a time when the use of the Internet is becoming more and more indispensable for the search of job opportunities and administrative processes. Such measures will lead to a widening of the digital divide.
- They are not dissuasive since they can be circumvented⁹. Anonymisation tools such as TOR or VPNs (Virtual Private Networks) make file sharing possible without even being identified. Alternately, users can switch to direct download services (Megaupload, Rapidshare,...) thus bypassing peer-to-peer surveillance systems. What is more, repressive measures generate a parallel market driven by commercial interests with financial outcomes that could instead be invested in artists and rights holders remuneration.

8. <http://blog.lefigaro.fr/technotes/2009/10/quand-le-p2p-seffondre-hadopi-devient-inefficace.html>

9. <http://pcinpact.com/actu/news/49616-hadopi-wifi-ufc-huissier-constat.htm>

In this context, the NURPA also wants to recall the European Parliament's reaction to measures such as "three strikes" during the second reading of the Telecoms Package. The Amendment 138 to the Framework Directive laid down that any restriction to "fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementations shall be subject to adequate procedural safeguards in conformity with the ECHR and with general principles of Community law, including effective judicial protection and due process."

In our opinion, we are witnessing today an overreaction that will cause more damage than good. As indicated by the Opinion of Advocate General Kokott in the *Promusicae* case: "It is however not certain that private file sharing, in particular when it takes place without any intention to make a profit, threatens the protection of copyright sufficiently seriously to justify recourse to this exception. To what extent private file sharing causes genuine damage is in fact disputed."¹⁰

A report published in March 2011 by the London School of Economics criticises the copyright section of the Digital Economy Act. One of the key messages in the report demonstrates what NURPA strongly supports:

*"The DEA gets the balance between copyright enforcement and innovation wrong. The use of peer-to-peer technology should be encouraged to promote innovative applications. Focusing on efforts to suppress the use of technological advances and to protect out-of-date business models will stifle innovation in this industry."*¹¹

Recommendations:

We strongly believe that criminal sanctions should be reserved for the most egregious commercial-scale and profit-motivated instances of copyright infringement. To avoid chilling effects on innovation and legitimate and socially beneficial uses of copyrighted works, criminal penalties that are implemented need to be clear, narrowly tailored, and proportionate to the harm in issue.

Furthermore, the irrational war against peer-to-peer file sharing and criminal sanctions do not solve the problems artists face nowadays.

As stated above, there is a growing number of individuals who regularly engage in file sharing. The NURPA is convinced that it would be more effective to promote new business models focused on alternative licensing models for content exchanged on the Internet (such as Creative Commons or free licenses), rather than creating legal rules that would criminalise millions of individuals.

The NURPA wants to stress that the European Commission should take into account in how far file sharing actually stimulates buying.

10. Case C 275/06:<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006C0275:EN:HTML>

11. Creative Destruction and Copyright Protection - Regulatory Responses to File-sharing, Bart Cammaerts and Bingchun Meng, London School of Economics and Political Science Department of Media and Communications, March 2011, available at <http://scribd.com/doc/51217629/LSE-MPPbrief1-creative-destruction-and-copyright-protection>

V. New business models and modern cultural policies

First of all, we want to underline the importance that artists and copyright holders deserve to be fairly compensated. In this context, the European Commission must adopt an objective position regarding the decline in sales of physical copies of recorded music taking into account the many studies that are often overshadowed by the entertainment industry's ones. For instance, the London School of Economics released a paper on that topic. It found that the

*“decline in the sales of physical copies of recorded music cannot be attributed solely to file-sharing, but should be explained by a combination of factors such as changing patterns in music consumption, decreasing disposable household incomes for leisure products and increasing sales of digital content through online platforms.”*¹¹

The NURPA thinks that a fair remuneration of artists and creators should be guaranteed without hindering the universal access and circulation of knowledge and culture. New business models respecting this idea already exist. There is for example the model of social micro-payments on the Internet, like Flattr¹² or voluntary collective licensing as suggested by the Electronic Frontier Foundation¹³.

Another interesting business model is Freemium. Freemium works by offering basic services or a basic downloadable product for free. However, it is charging a premium for advanced or special features. This model has helped to start many online enterprises and seeks to find an equilibrium between providing access for users and the need to pay for some services or content.

Magnatune, for example, allows users to listen to individual songs on their site. Only when paying a fixed amount users can access the entire archive of the project. Premium accounts work because the client has freely chosen to purchase a service, when he or she values the content or services on offer. The digital journalism industry is currently going the same direction. Magnatune uses content licensed under Creative Commons or free licences and thus allows a greater circulation and increasing profits for the authors and the platform.

But innovative platforms are not the only players when it comes to new business models. Already in 2008, the industrial rock band NIN experimented with innovative ways to sell their work. They decided to release their album “Ghosts I-IV” as a free download directly on the Internet while offering a limited deluxe edition for \$300 to 2,500 fans. The band sold this edition in under two days which meant an income of \$750,000 on that package alone.

The Canadian band Misteur Valaire released their album “Friterday Night” for free on the Internet, under a Creative Commons license, which allows fans to legally exchange these files. This has led to an increase in visibility, popularity and income for the artists thanks to well-attended concerts and merchandising. Their next album was made available as a “pay what you want” download, allowing buyers to name their own price. The “pay what you want model” has already proved to be successful for music bands of all size. The British group Radiohead successfully used this business model for their album “In Rainbows”.¹⁴

12. <http://flattr.com>

13. Voluntary Collective Licensing <http://eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>

14. “Pay what you want” benefits companies, consumers, charities <http://arstechnica.com/science/news/2010/07/pay-what-you-want-benefits-companies-consumers-charities.ars>

In March 2011, the Consumer Electronics Association (CEA) summed up the current difficulties of the content industry and suggested to stop complaining and start innovating:

*“For years, record labels viewed their job as maintaining scarcity. Now, they finally realize their future depends upon promoting access. The labels finally appear committed to creating a vibrant, extensive, post-CD music ecosystem. If they are successful, then the big record labels will also count themselves winners in the digital revolution.”*¹⁵

Recommendations:

The NURPA is convinced that the way forward lies in the adaptation of legislation to the digital age.

The NURPA recommends to support and encourage the good practices of alternative licenses, such as Creative Commons licenses, which help creators retain copyright while allowing others to copy, distribute, and make some uses of their work - at least non-commercially.

The NURPA hence urges the Commission to consider the reality of alternative business models acknowledging the benefits of file sharing, instead of focusing on repressing it. By embracing the economic opportunities they offer, it is possible to reach a balance between the interests of both artists and consumers.

15. Michael Petricone, Senior Vice President, Government and Regulatory Affairs, CEA, available at <http://digitalmusicnews.com/stories/031811cea>

Conclusion

It is high time that legislators and the content industry accept the idea that sharing of knowledge and culture will be beneficial to Europe's economy, creativity and innovation.

Therefore, the efforts of the Commission to adapt legislation in the field of intellectual property to digital technologies should not merely be based on the interests of the content industry and rights-holders. This however seems to be, as Michael Petricone, Senior Vice President of the CEA, puts it:

“manifestations of an approach to copyright that has restricted the adjustment of the creative economy to the digital age, with consequent negative effects on creativity, on the creative economy, on the interests of consumers and on social and economic innovation. It prioritises restriction and punishment, is not supported by robust evidence and works against the interests of citizens and consumers. It characterises a market problem as being predominantly a law enforcement problem.”¹⁵

“And thus it is an extraordinary mistake for policy makers today to be ‘solving’ this problem in light of a technology that will be gone tomorrow. The question should not be how to regulate the Internet to eliminate file sharing (the Net will evolve that problem away). The question instead should be how to assure that artists get paid, during this transition between twentieth-century models for doing business and twenty-first-century technologies.”¹⁶

Thereby :

- The European Commission needs to clarify whether it aims to apply the same intellectual property enforcement rules to digital goods than on the physical world ones, since there is almost no reproduction cost involved regarding data copying unlike manufactured goods industrial reproduction. In doing so, it is necessary to clarify the notion of “commercial scale”;
- We strongly believe that the Commission's approach used to assess the economic consequences of digital piracy needs to be extended. It needs to consider the entire economy and to place copyright enforcement measures in view of future-oriented consideration of the social, cultural and economic effectiveness;
- We thus urge the European Commission not to undertake any revision of the IPRED Directive without a comprehensive and independent analysis of the impact on innovation and the development of the information society;
- The NURPA is opposed to the increase of Internet service provider liability or other “intermediary liability” with regards to intellectual property rights enforcement. We are therefore against proposals that could circumvent exemptions provided to technical intermediaries by the Electronic Commerce Directive, lessen network neutrality or turn telecommunication providers into watchdogs or a “private digital police”;
- The protection of personal data and the right to privacy are very important aspects. For this reason, Internet service providers should not transmit IP (Internet Protocol) addresses to public law enforcement authorities without prior court approval;

16. Lawrence Lessig, Free Culture - How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity, March 2004 available at <http://free-culture.cc/freecontent/>

- We recommend that the European Commission tables proposals for necessary reforms and flexibilities in European copyright law in order to promote new, alternative and sustainable business models and to enhance free and equal access to culture and knowledge;
- It is time for European legislators to rethink copyright law and to foster the emergence of new business models capable of inducing lower prices for cultural goods;
- Furthermore, the NURPA considers free access to knowledge and culture to be an indispensable corner stone for innovation, creativity and economic growth in Europe. As shown above, file sharing networks can actually be used as a way to reach consumers whereas research on the actual harms of the “problem” of file sharing is not conclusive.

As a logic consequence of our above mentioned recommendations, the NURPA urges the European Commission to adopt a Digital Rights Directive for clearly defined rights for Internet users and consumers.

We would welcome the opportunity to discuss the elements of our position on the Commission's report in more detail with the Commission, the European Parliament and Member States.

You can contact us at: contact@nurpa.be

Thank you for your consideration.



This document is available online at
http://nurpa.be/resources/downloads/NURPA_20110331_IPRED-consultation.pdf